

# EU Immigration and Asylum Law

A Commentary

edited by

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# PART D ASYLUM

## I.

### Legal Framework for EU Asylum Policy

**Selected Bibliography:** Battjes, *European Asylum Law and International Law* (Martinus Nijhoff, 2006); Battjes, 'Subsidiary Protection and Other Alternative Forms of Protection', in: Chetail/Baulez (eds), *Research Handbook on International Law and Migration* (Elgar, 2014), p. 541 561; Boeles/den Heijer/Lodder/Wouters, *European Migration Law*, 2<sup>nd</sup> edn (Intersentia, 2014); Boccardi, *Europe and Refugees* (Kluwer, 2002); Costello, 'Administrative Governance and the Europeanisation of Asylum and Immigration Policy', in: Hofmann/Türk (eds), *EU Administrative Governance* (Elgar, 2006), p. 287 340; Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP, 2015); Drywood, 'Who's in and Who's Out? The Court's Emerging Case Law on the Definition of a Refugee', CML Rev. 51 (2014), p. 1093 1124; Fröhlich, *Das Asylrecht im Rahmen des Unionsrechts* (Mohr Siebeck, 2011); Goodwin Gill/McAdam, *The Refugee in International Law*, 3<sup>rd</sup> edn (OUP, 2007); Goudappel/Raulus (eds), *The Future of Asylum in the European Union* (Springer, 2011); Hailbronner, *Immigration and Asylum Law and Policy of the European Union* (Kluwer, 2000); Hailbronner, 'Asylum Law in the Context of a European Migration Policy', in: Walker (ed), *Europe's Area of Freedom, Security and Justice* (OUP, 2004), p. 41 88; Hathaway, *The Rights of Refugees under International Law* (CUP, 2005); Muzak, 'Articles 77 80 TFEU', in: Mayer/Stöger (eds), *Kommentar zu EUV und AEUV* (Maunz, looseleaf: 141<sup>th</sup> edn, 2012); Rossi, 'Articles 77 80 TFEU', in: Calliess/Ruffert (eds), *EUV/AEUV Kommentar*, 4<sup>th</sup> edn (C.H. Beck, 2011); Schieber, *Komplexentwässerter Schutz* (Nomos, 2013); Storey, 'Briefing Note for Participants', IJRL 25 (2013), p. 328 348; Peers, *EU Justice and Home Affairs Law*, 3<sup>rd</sup> edn (OUP, 2011); Stern/Tohidipur, 'Migration von Drittstaatsangehörigen', in: von Arnould (ed), *Enzyklopädie Europarecht*, Vol. X (Nomos, 2014), § 14; Teitgen Colly, 'The European Union and Asylum', CML Rev. 43 (2006), p. 1503 1566; ter Steeg, *Das Einwanderungskonzept der EU* (Nomos, 2006); Weiß, 'Articles 77 80 TFEU', in: Streinz (ed): *EUV/AEUV. Kommentar*, 2<sup>nd</sup> edn (C.H. Beck, 2011).

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## I. General Remarks

### 1. Evolution of EU Asylum Policy

- 1 Cooperation on asylum began as a so called flanking measure which compensated states for their loss of control options following the abolition of border controls within the Schengen area (see Thym, *Legal Framework for Entry and Border Controls*, MN 1 3). The **Schengen Implementing Convention of 1990** contained a first set of rules on the responsibility for processing applications for asylum.<sup>1</sup> In parallel, all Member States, including those who did not join the Schengen area initially, agreed upon the **Dublin Convention of 1990** concerning asylum jurisdiction,<sup>2</sup> which eventually entered into force in September 1997 after a drawn out ratification process.<sup>3</sup> The arrangements pursued a double objective. Firstly, they were meant to prevent ‘forum shopping’<sup>4</sup>, a term used to describe situations where asylum seekers leave for countries with generous reception conditions or recognition quota. Secondly, the coordination of asylum jurisdiction was destined to counter the phenomenon of ‘refugees in orbit’ where applicants are ‘referred successively from one Member State to another without any of these States acknowledging itself to be competent to examine the application’<sup>5</sup> as a result of domestic safe third country rules. In practice, the Dublin Convention did not function particularly well: 95 % of all asylum applications were processed outside the Dublin system in the 1998/1999 period, while actual transfers took place in no more than 1.7 % of cases.<sup>6</sup>
- 2 While the original Schengen and Dublin Conventions moved towards the demarcation of asylum jurisdiction without a substantive harmonisation of rules on asylum procedure, reception conditions or recognition criteria, the Treaty of Maastricht declared the whole field of asylum policy an area of common interest that was to be realised through intergovernmental decision making.<sup>7</sup> Thus, the EU institutions started coordinating divergent national practices.<sup>8</sup> The **Treaty of Amsterdam** was a decisive next step, since it first created a supranational competence within the framework of today’s TFEU,<sup>9</sup> although fully fledged supranationalisation was achieved only by the Treaty of Lisbon (see Hailbronner/Thym, *Constitutional Framework*, MN 3 4). In 1999, the European Council in Tampere advanced the idea of a Common European Asylum System (CEAS), which later found its way into the EU Treaties as a legally binding objective (see below MN 13). A number of legislative acts were adopted to realise the

<sup>1</sup> See Articles 28–38 Convention Implementing the Schengen Agreement of 14 June 1985 of 19 June 1990 (OJ 2000 L 293/19), which covered the Benelux countries, France and Germany at the start.

<sup>2</sup> See the Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities (Dublin Convention) of 15 June 1990 (OJ 1997 C 254/1), which comprised the 12 EEC Member States at the time.

<sup>3</sup> The Dublin Convention entered into force on 1 September 1997, thereby replacing the arrangements under the Schengen Implementing Convention in accordance with the latter’s Article 142(1); for further detail on the rules on asylum in the Schengen and Dublin Conventions, see Hailbronner/Thiery, ‘Schengen II and Dublin’, *CML Rev.* 34 (1997), p. 957–989; and Fröhlich, *Asylrecht*, p. 135–144.

<sup>4</sup> AG Cruz Villalón, *MA et al.*, C 648/11, EU:C:2013:93, para 76 on the former Dublin II Regulation (EC) No 343/2003.

<sup>5</sup> Recital 4 of the Dublin Convention, *ibid.*

<sup>6</sup> See the Commission doc. SEC(2001) 756 of 13 June 2001; and Hailbronner, *Immigration and Asylum Law*, p. 397–401.

<sup>7</sup> See Article K.1(1) EU Treaty as amended by the Treaty of Maastricht (OJ 1992 C 191/1).

<sup>8</sup> On the Maastricht Treaty and the early practice, see Hailbronner, *Immigration and Asylum Law*, p. 355–466; Boccardi, *Europe and Refugees*, p. 61–120; and Fröhlich, *Asylrecht*, p. 145–154.

<sup>9</sup> See Article 63 EC Treaty as amended by the Treaty of Amsterdam (OJ 1997 C 340/173); on the negotiation history, see Guild, *Immigration Law in the European Community* (Kluwer, 2001), p. 295–335; and Boccardi, *Europe and Refugees*, p. 121–154.

**first phase of the CEAS**, which remained limited to minimum standards, in line with restrictive EU competences at the time.<sup>10</sup> It focused on vertical policy transfers with the EU legislature emulating practices at national level and spreading them across Europe.<sup>11</sup> Many decisions made at the time have shaped the contours of Europe's asylum policy ever since.<sup>12</sup> The former Asylum Reception Conditions Directive 2003/9/EC, the former Asylum Qualification Directive 2004/83/EC, the former Asylum Procedure Directive 2005/85/EC and the former Dublin II Regulation (EC) No 343/2003 together with the former Eurodac Regulation (EC) No 2725/2000 are the bedrock of many achievements and problems of EU asylum policy to this date.<sup>13</sup>

The move towards a common asylum policy had always been meant to be a gradual one. 3 The Commission proposed, therefore, to replace existing minimum standards by a common set of rules<sup>14</sup> in a **second phase of legislative harmonisation** that was meant to reduce disparities among Member States both in terms of legislative design and administrative practice on the basis of the more robust Treaty base established by the Treaty of Lisbon, which entered into force in December 2009.<sup>15</sup> To recast existing legislation the Commission submitted a number of proposals which were adopted after up to four years of occasionally heated debates.<sup>16</sup> Disputes among the EU institutions and problems with practical implementation (see below MN 6) resulted in detailed prescriptions on some questions, which leave little leeway to Member States and which can make it hard to keep an overview of the various facets of Europe's asylum policy acquis. Different chapters of this commentary will focus on the interpretation of the new Asylum Qualification Directive 2011/95/EU, the new Asylum Procedure Directive 2013/32/EU, the new Asylum Reception Conditions Directive 2013/33/EU and the new Dublin III Regulation (EU) No 604/2013.<sup>17</sup>

It is in the nature of asylum policy that the European Union cannot control many 4 events in countries of origin and transit which have an impact on cross border movement. This leaves the CEAS with a potentially open flank, since the instruments adopted concentrate on legislative harmonisation among the Member States. Their regulatory leverage can influence events beyond the EU's borders only indirectly. The move towards a continental asylum system entailed that the situation of the external borders became the subject of debate following the **death of thousands of migrants trying to cross the Mediterranean**, often on boats not fit for travel on the high seas.<sup>18</sup> Later that year, the **migratory routes in the Eastern Mediterranean**, from Turkey to Greece and,

<sup>10</sup> Cf. Article 63(2)(a) EC Treaty, *ibid*.

<sup>11</sup> See Costello, *Administrative Governance*, p. 313–314; national practices concerned, for instance, the definition of refugee status, accelerated procedures at the border or safe third countries rules.

<sup>12</sup> For the underlying policy design, see the Commission Communication, COM(2000) 755; and the Commission Communication, COM(2003) 152.

<sup>13</sup> On the legislation of the first phase, see the first edition of this Commentary published in 2010, as well as Teitgen Colly, *Asylum*, p. 1503–1566; de Zwaan, 'EU Asylum and Immigration Law and Policy', in: *ibid.* (ed), *Freedom, Security and Justice in the European Union* (T.M.C. Asser Press, 2006), p. 91–150; or Sidorenko, *The Common European Asylum System* (CUP, 2007).

<sup>14</sup> It should be borne in mind that in EU terminology a 'common' policy does *not* designate the most intensive form of supranational action, i.e. a common policy regularly contains room for a certain degree of diversity among the Member States, see below MN 13.

<sup>15</sup> Cf. the Commission Green Paper, COM(2007) 301; and the policy plan on asylum in accordance with the Commission Communication, COM(2008) 360.

<sup>16</sup> For an overview, see Boeles et al., *European Migration Law*, ch. 6; Peers, *EU Justice*, ch. 5; and Stern/Tohidipur, *Migration*, § 14 paras 63–121.

<sup>17</sup> Moreover, legislation on the second phase comprises the new Eurodac Regulation (EU) No 603/2013 (OJ 2013 L 180/1), which is not discussed in this commentary.

<sup>18</sup> While the situation between Spain (incl. the Canary Islands) and Northern Africa received much attention in the 2000s, the journey between Libya and Italy or Malta has been a focal point for years, while the so called Eastern route via Turkey and Greece or the Western Balkans gained relevance after 2010.

via the Western Balkans, to Central Europe were the focus of attention with almost one million people entering the EU. The response of the EU institutions has been a mix of measures ranging from Frontex operations and the adoption of relation and resettlement schemes (see below MN 26, 28, 36) to enhanced cooperation with countries of origin or transit, in particular Turkey.<sup>19</sup> Corresponding legal debates concern the extraterritorial scope of human rights and statutory instruments (see Thym, Legal Framework for Entry and Border Controls, MN 38 41) the Sea Borders Regulation (see Ryan, Regulation (EU) No. 656/2014) the reform of the Dublin III Regulation (see Hruschka/Maiani, Regulation (EU) No 604/2013 and the effective implementation of the Asylum Reception Conditions Directive (see Peek/Tsourdi, Directive 2013/33/EU). The reform debate was ongoing at the time of publication.

- 5 EU asylum policy is often criticised for an alleged focus on restrictive measures, trying to prevent migrants from reaching Europe,<sup>20</sup> mirroring the original concept of flanking measures to compensate states for the loss of control over internal borders in a move that **critics regularly refer to as ‘fortress Europe’**.<sup>21</sup> Yet the overall picture is more nuanced. The criticism of entry and border control policies contrasts with a rather generous definition of the criteria for refugee status and subsidiary protection in the Asylum Qualification Directive 2011/95/EU and corresponding procedural rules and reception conditions, which comprise extensive guarantees for vulnerable groups. As a result of the second phase of legislative harmonisation, during which the European Parliament and ECJ judgments played a prominent role, the common legislative **standards for international protection are laudable**,<sup>22</sup> although generous recognition criteria and reception conditions do respond directly to the continued criticism of the allegedly restrictive entry and border control policies. Notwithstanding practical problems in some Member States (see below MN 6) and the asymmetric distribution of asylum applications within Europe (see below MN 29), the Common European Asylum System was instrumental in **establishing refugee protection systems in all EU Member States**, some of which had not previously contribute substantially to international activities in support of refugees.<sup>23</sup>
- 6 In the field of asylum, the approximation of national laws by the EU institutions does not always result in effective implementation.<sup>24</sup> The most pronounced expression of

<sup>19</sup> Cf. the ‘strategic response’ by Council doc. 8714/1/12 of 23 April 2012; the European Council, EUCO doc. 18/15 of 23 April 2015; and the Commission’s Agenda on Migration, COM(2015) 240; and, on the Eastern Mediterranean Council doc. 12002/15 of 14 September 2015; the Commission Communications, COM(2015) 490, and COM(2015) 510; the Commission MEMO IP/15/5904 of 26 October 2015; and the EU Turkey Summit of 29 November 2015.

<sup>20</sup> See, by way of example, Goodwin Gill, ‘The Right to Seek Asylum: Interception at Sea and the Principle of Non Refoulement’, IJRL 23 (2011), p. 443 457.

<sup>21</sup> See El Enany, ‘Who is the New European Refugee?’, EL Rev. 33 (2008), p. 313 335; Guild, ‘The Europeanisation of Europe’s Asylum System’, IJRL 18 (2006), p. 630, 638 640; or Moreno Lax, ‘Life after Lisbon: EU Asylum Policy as a Factor of Migration Control’, in: Acosta Arcarazo/Murphy (eds), *EU Security and Justice Law* (Hart, 2014), p. 146, 148 157.

<sup>22</sup> Contrast the criticism at the recognition criteria and reception conditions after the first phase by, among others, Juss, ‘The Decline and Decay of European Refugee Policy’, OJLS 25 (2005), p. 749 792; and Guiraudon, ‘European Integration and Migration Policy: Vertical Policy Making as Venue Shopping’, JCMSt. 38 (2000), p. 251 271 to the more positive outlook for those having reached EU territory by Guiraudon, ‘The Constitution of a European Immigration Policy Domain’, *Journal of European Public Policy* 10 (2003), p. 263 282; and Acosta Arcarazo/Geddes, ‘The Development, Application and Implications of an EU Rule of Law in the Area of Migration Policy’, JCMSt. 51 (2013), p. 179 193.

<sup>23</sup> Cf. Byrne/Noll/Vedsted Hansen, *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union* (Kluwer, 2002); and Geddes, *The Politics of Migration and Immigration in Europe* (Sage, 2003), chs 7 8.

<sup>24</sup> Cf. Thielemann, ‘How Effective are National and EU Policies in the Area of Forced Migration?’, *Refugee Survey Quarterly* 31 (2012), p. 21, 28 34.

practical deficits is the failure of the Greek asylum system, which both the ECtHR and the ECJ found not to be in compliance with human rights standards and corresponding EU legislation (see below MN 29). It is convincing, therefore, that EU asylum policy has emphasised **strengthened practical cooperation** in recent years.<sup>25</sup> The establishment of the European Asylum Support Office (EASO) in Malta seeks more coherence in the interpretation and application of EU legislation on asylum in the same way as the Eurodac database was meant to render the Dublin Regulation more effective.<sup>26</sup> EASO is tasked with sharing information about countries of origin, spreading knowledge about EU asylum law and supporting Member States faced with difficulties, including through emergency support teams.<sup>27</sup> The supranational activities of EASO complement the primary responsibility of national institutions to apply the EU asylum *acquis* effectively (see below MN 27). Administrative bodies alone, however, cannot achieve the desired convergence of national practices; national and European courts retain the responsibility to develop coherent standards for specific scenarios (see below MN 46).

**2. Territorial Scope (Member State Participation)**

Measures on border controls and visas are subject to country specific opt outs for the United Kingdom, Ireland and Denmark. The abstract rules guiding these arrangements are described in the introductory chapter to this commentary (see Hailbronner/Thym, Constitutional Framework, MN 38 45). It was demonstrated that the overall picture is rather complex and can be difficult to discern in specific scenarios, since the **country specific opt outs for the United Kingdom, Ireland and Denmark** do not follow a uniform pattern; there are differences between the rules for Denmark on the one hand and for the United Kingdom and Ireland on the other. Moreover, we are faced with two sets of rules for the aforementioned countries: measures building upon the Schengen *acquis* and other instruments. In practice, the last recitals of most instruments indicate whether the United Kingdom, Ireland and/or Denmark are bound. In order to facilitate orientation, the list of the measures below indicates whether the instruments commented upon in this volume are binding for the United Kingdom, Ireland and/or Denmark and whether they are considered to be building upon the Schengen *acquis*.

Instrument	United Kingdom	Ireland	Denmark	Schengen? <sup>28</sup>
Temporary Protection Directive 2001/55/EC	yes	no	no	no
Asylum Qualification Directive 2011/95/EU	no (yes) <sup>29</sup>	no (yes) <sup>30</sup>	no	no

<sup>25</sup> See Goudappel/Raulus, ‘Introduction’, in: *ibid.* (eds), *The Future of Asylum*, p. 1, 8 10; as well as the Commission Communications, COM(2006) 67 and COM(2008) 360, p. 8.

<sup>26</sup> See Costello, *Administrative Governance*, p. 314 318.

<sup>27</sup> See the EASO Regulation (EU) No 439/2010 (OJ 2010 L 132/11); Stern/Tohidipur, § 14 paras 117 121; and the annual reports, available on the EASO website <http://easo.europa.eu> [last accessed 1 November 2015].

<sup>28</sup> Does the measure build upon the Schengen *acquis*? If yes, it is subject to the opt out arrangements in the Schengen Protocol described by Hailbronner/Thym, *Constitutional Framework*, MN 41, 44.

<sup>29</sup> The United Kingdom is not bound by Directive 2011/95/EU, but continues to apply the former Asylum Qualification Directive 2004/83/EC.

<sup>30</sup> Ireland similarly continues to apply the former Asylum Qualification Directive 2004/83/EC.



Asylum Procedures Directive 2013/32/EU	no (yes) <sup>31</sup>	no (yes) <sup>32</sup>	no	no
Asylum Reception Conditions Directive 2013/32/EU	no (yes) <sup>33</sup>	no	no	no
Dublin III Regulation (EU) No 604/2013	yes	yes	no (yes) <sup>34</sup>	no

Participation in asylum law instruments commented upon in this volume.

## II. Treaty Guidance under Article 78 TFEU

### Article 78 TFEU

1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third country national requiring international protection and ensuring compliance with the principle of non refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:

- (a) a uniform status of asylum for nationals of third countries, valid throughout the Union;
- (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;
- (c) a common system of temporary protection for displaced persons in the event of a massive inflow;
- (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;
- (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;
- (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;
- (g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.

3. In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

<sup>31</sup> The United Kingdom is not bound by Directive 2013/32/EU, but continues to apply the former Asylum Procedure Directive 2005/85/EC.

<sup>32</sup> Ireland similarly continues to apply the former Asylum Procedure Directive 2005/85/EC.

<sup>33</sup> The United Kingdom is not bound by Directive 2013/32/EU, but continues to apply the former Asylum Reception Conditions Directive 2003/9/EC.

<sup>34</sup> Denmark signed an agreement with the EU (then still the EC) associating itself with the contents of the former Dublin II Regulation (EC) No 343/2003 (a similar agreement for the Dublin III Regulation has not been signed yet); see Hailbronner/Thym, *Constitutional Framework*, MN 41.

## 1. Compliance with International Law (Article 78(1) TFEU)

As opposed to individual Member States, the European Union is not a state party to the Geneva Convention and, therefore, the EU itself is not bound by it as a matter of public international law; the eventuality of formal accession by the EU to the Convention or other forms of international subordination have not been realised so far (see below MN 47). Against this background, the doctrinal significance of Article 78(1) TFEU stands out: the EU asylum **acquis must comply with the Geneva Convention** and the 1966 Protocol. Non compliance with the Geneva Convention constitutes an infringement of Article 78(1) TFEU that can result in the annulment of secondary legislation or at least require its **interpretation in conformity with the Geneva Convention**.<sup>35</sup> This position has been reaffirmed in welcome clarity by the ECJ in a number of judgments on today's Asylum Qualification Directive 2011/95/EU.<sup>36</sup> The subordination of the CEAS to the Geneva Convention in Article 78(1) TFEU does not alter its international legal characteristics. As an integral part of EU law, the Geneva Convention continues to be subject to the interpretative principles of public international law (see below MN 49) and Article 78(1) TFEU does not bring about an individual right to asylum transcending the contents of the Geneva Convention,<sup>37</sup> although such an individual guarantee could flow from Article 18 of the EU Charter (see below MN 63).

The obligation to comply with the Geneva Convention contained in the Treaty of Lisbon is not new; Article 63(1) EU Treaty as amended by the Treaty of Amsterdam and Article K.2(1) EU Treaty as amended by the Treaty of Maastricht contained similar instructions. In contrast to these earlier provisions, Article 78(1) TFEU clarifies, however, that the necessary respect for the Geneva Convention and corresponding human rights guarantees (see below MN 11) applies to all instruments building the EU asylum *acquis*, including rules on **subsidiary and temporary protection** (see below MN 19 23).<sup>38</sup> In contrast to those governing refugee protection, however, the rules on subsidiary or temporary protection do not implement established doctrinal categories of international law.<sup>39</sup> This entails that the EU legislature retains discretion to define or alter the contours of the EU's subsidiary and temporary protection regimes as long as corresponding rules comply with international refugee and human rights law (see below MN 19 23).

Compliance with the Geneva Convention is a matter of course from a political perspective. Doctrinally, however, Article 78(1) TFEU sets out a constitutive obligation, since multilateral conventions to which the EU has not formally acceded can only be relied on within the EU legal order if they have been ratified by all EU Member States *and* are directly applicable (see Hailbronner/Thym, Constitutional Framework, MN 54 57). To require EU legislation to comply with the Convention ensures compliance in all circumstances and **prevents diverging obligations from being imposed on Member States by EU law and the Geneva Convention**. Such discrepancies would have to be

<sup>35</sup> Similarly, see Hailbronner, *Immigration and Asylum*, p. 40; Battjes, *European Asylum*, p. 101; Muzak, *Article 78 TFEU*, para 5; and Weiß, *Article 78 TFEU*, para 5.

<sup>36</sup> Cf. ECJ, *Abdulla*, C 175/08, C 176/08, C 178/08 & C 179/08, EU:C:2010:105, paras 51 53; ECJ, *Bolbol*, C 31/09, EU:C:2010:351, paras 36 38; ECJ, *B.*, C 57/09 & 101/09, EU:C:2010:661, paras 76 78; and Drywood, *Who's in*, p. 1113 1118.

<sup>37</sup> Similarly, see Rossi, *Article 78 TFEU*, para 3; Weiß, *Article 78 TFEU*, para 6; and Muzak, *Article 78 TFEU*, para 7.

<sup>38</sup> By contrast, Article 63(1) EC Treaty as amended by the Treaty of Amsterdam (OJ 1997 C 340/173) applied to refugee protection *sensu stricto* only, although it was generally assumed that other rules had to comply with these standards; see Hailbronner, *Immigration and Asylum*, p. 81; and Battjes, *European Asylum*, p. 103.

<sup>39</sup> Cf. Battjes, *Subsidiary Protection*, p. 541 561.

resolved to the benefit of the former given the supremacy of Union law. In accordance with settled ECJ case law, the EU Treaties establish an autonomous legal order (distinct from public international law) in relation to which the rules of conflict concerning the application of successive international treaties relating to the same subject do not apply.<sup>40</sup> National courts are obliged to refer alleged infringements of the Geneva Convention to the ECJ by means of a preliminary reference under Article 267 TFEU. Judges in Luxembourg hold the ultimate judicial authority to adjudicate on compliance with international refugee law within the EU legal order and existing case law shows that the ECJ takes this obligation seriously.<sup>41</sup> Article 78(1) TFEU ensures that the CEAS is firmly embedded into international refugee law.

- 11 Article 78(1) TFEU mandates, moreover, that the Common European Asylum System must be in compliance with ‘other relevant treaties.’ Both the wording and the systemic position of this obligation indicate that other treaties should be considered ‘relevant’ whenever their contents relates to the realisation of EU asylum policy.<sup>42</sup> Aside from the Geneva Convention this concerns, in particular, international human rights agreements such as the Convention on the Rights of the Child (see Hailbronner/Thym, Constitutional Framework, MN 54) or other potential treaties that may be concluded in the future.<sup>43</sup> In line with the general principles of EU law, this obligation should be applied to conventions ratified by all Member States (see Hailbronner/Thym, *ibid.*, MN 55). Other treaties with less ratifications cannot be considered ‘relevant’ in the eyes of the Member States drafting Article 78(1) TFEU.<sup>44</sup> This implies, for instance, that the European Agreement on the Abolition of Visas for Refugees of 10 April 1959 cannot be considered binding on the EU legislature under Article 78(1) TFEU, since it has not been ratified by various EU Member States.<sup>45</sup>

## 2. Scope of EU Competences (Article 78(2) TFEU)

- 12 As a shared competence, legislation on asylum must comply with the principles of subsidiarity and proportionality that oblige the EU legislature to limit their action to initiatives that cannot be sufficiently achieved at national level and remain limited, in terms of regulatory intensity, to what is necessary to achieve legitimate policy objectives.<sup>46</sup> However, when assessing specific proposals, it should be acknowledged that the far reaching Treaty objective of a Common European Asylum System (see below MN 13) requires a certain amount of generosity in the application of the principles of subsidiarity and proportionality in support of EU action.<sup>47</sup> The term ‘measure’ in the introductory part

<sup>40</sup> Cf. Article 30 Vienna Convention on the Law of Treaties; for a seemingly different position, read Battjes, *European Asylum*, p. 59–61, 167–168; see also Goodwin Gill/McAdam, *Refugee*, p. 62–63.

<sup>41</sup> See Drywood, *Who’s in*, p. 1113–1118, who also highlights, rightly in our view (see Thym, *Legal Framework for EU Immigration Policy*, MN 28–36), that the ECJ accepts the Geneva Convention as a legal limit for EU legislation without positioning it like Union citizenship as a lone star guiding interpretation in areas where no distinct doctrinal limitations exist.

<sup>42</sup> Similarly, see Battjes, *European Asylum*, p. 97; and Muzak, Article 78 TFEU, para 6.

<sup>43</sup> Cf. Rossi, Article 78 TFEU, para 8; see also Peers, ‘Human Rights, Asylum and European Community Law’, *Refugee Survey Quarterly* 24 (2005), p. 24, 28–30.

<sup>44</sup> Cf. Battjes, *European Asylum*, p. 98; this interpretation corresponds to the basic idea of the international law of treaties that states cannot be bound without their consent.

<sup>45</sup> See CETS No. 31; in practice, recognised refugees living in the EU Member States benefit from visa free travel within the Schengen area under Article 21 Schengen Implementing Convention as amended by Regulation No 265/2010 (OJ 2010 L 85/1).

<sup>46</sup> Cf. Article 5(3), (4) TEU; more generally, on the importance of maintaining the coherence of ‘single’ or ‘common’ EU policies, see ECJ, *Gauweiler et al.*, C 62/14, EU:C:2015:400, para 48.

<sup>47</sup> See Peers, *EU Justice*, p. 393; Rossi, Article 78 TFEU, para 11; and Labayle, ‘L’espace de liberté, sécurité et justice dans la Constitution pour l’Europe’, *Revue trimestrielle de droit européen* 41 (2005), p. 437, 463.

of Article 79(2) TFEU indicates that directives, regulations and decisions can be adopted and that operative and financial support, which usually has its legal basis in a decision, are also permissible (see Thym, Legal Framework for Entry and Border Controls, MN 7).

The Treaty of Lisbon attributes the rank of primary law to the objective of establishing a **Common European Asylum System** (French: *système européen commun d'asile*; German: *gemeinsames europäisches Asylsystem*),<sup>48</sup> which was first introduced by the European Council in Tampere and was later taken up by the Commission.<sup>49</sup> The objective generally calls for more commonality and can influence both the application of the principles of subsidiarity and proportionality (see above MN 12) and the interpretation of secondary legislation, in relation to which it supports a restrictive reading of vaguely formulated provisions on more favourable national treatment (see Hailbronner/Thym, Constitutional Framework, MN 28 33). It also resonates with the ECJ's position that horizontal cooperation among Member States, for instance under the Dublin system,<sup>50</sup> is governed by the principle of mutual trust (see below MN 29). In cases of doubt, the Treaty objective of the Common European Asylum System **argues for more harmonisation**, although the EU institutions retain—as in the case of other Treaty objectives—a principled discretion regarding the necessity and course of EU action. Moreover, the concept of a *Common European Asylum System* **does not command quasi federal uniformity**, since the adjective 'common' (French: *commun*; German: *gemeinsam*) is usually employed, in the EU context at least, to designate an intermediate degree of harmonisation, in contrast to the designation of a 'single' (French: *unique*; German: *einheitlich*) policy.<sup>51</sup> The common policy on asylum transcends the minimum measures foreseen by the Treaty of Amsterdam (see above MN 2), but stays short of quasi federal uniformity.

a) **Uniform Status of Asylum.** Whereas Article 63 EC Treaty was limited to the adoption of 'minimum measures', Article 78(2)(a) TFEU allows for the agreement on a 'uniform status of asylum' (French: *statut uniforme d'asile*; German: *einheitlicher Asylstatus*), thereby designating the **option of enhanced uniformity** in contrast to the lesser degree of harmonisation in relation to 'common' rules (French: *commun*; German: *gemeinsam*) concerning temporary protection and asylum procedures under Article 78(2)(c), (d) TFEU. The objective of a uniform status implies that the principle of subsidiarity does not prevent EU action in regular circumstances (see above MN 12) and that EU legislation may contain, moreover, mandatory rules not allowing more favourable national treatment (see Hailbronner/Thym, Constitutional Framework, MN 28 31). By contrast, the concept of minimum harmonisation in the Treaty of Amsterdam had been interpreted by some authors as permitting Member States to deviate from EU legislation.<sup>52</sup> That conclusion cannot be upheld in the light of the more robust Treaty language and the objective of a CEAS.

Article 78(2)(a) TFEU refers to a uniform 'status of asylum' instead of the previous orientation towards the 'qualification of nationals of third countries as refugees.'<sup>53</sup> This

<sup>48</sup> In contrast to the EU institutions and the ECJ, the Treaty does not use capital letters.

<sup>49</sup> See European Council, Presidency Conclusions of the Meeting on 15/16 October 1999 in Tampere, paras 13 17; and above MN 2 3.

<sup>50</sup> See ECJ, *N.S. et al.*, C 411/10 & C 493/10, EU:C:2011:865, para 83 using capital letters when describing the Common European Asylum System.

<sup>51</sup> Think of the *common* market (established in 1968) and the later move towards the *single* market (realised in 1992); similarly, the EU had had a *common* monetary policy before the *single* currency was introduced and the Common Foreign, Security and Defence Policies under the EU Treaty are, both structurally and in terms of policy substance, much less integrated than the CEAS.

<sup>52</sup> See ter Steeg, *Einwanderungskonzept*, p. 228 232.

<sup>53</sup> Article 63(1)(a) EC Treaty as amended by the Treaty of Amsterdam (OJ 1997 C 340/173).

change should not be construed, however, as a permission for a distinct status for asylum under EU law that does not coincide with refugee status under the Geneva Convention. Both the drafting history and the general scheme of the EU Treaties argue in support of substantive **congruence of the EU asylum status and refugee status**; the move towards the Common European Asylum System was always meant to be founded upon the Convention.<sup>54</sup> This is confirmed by the explicit references to the Convention in both Article 78(1) TFEU and Article 18 of the EU Charter.<sup>55</sup> Legislation on the basis of Article 78(2)(a) TFEU is thus bound to specify the meaning of the Geneva Convention and secondary legislation must be interpreted in light of the latter (see above MN 8). Indeed, the Asylum Qualification Directive is meant to 'guide the competent national bodies of Member States in the application of the Geneva Convention.'<sup>56</sup> **Distinct national protection schemes**, such as the autonomous concept of asylum under the German Constitution, can be applied in parallel under the condition that they cannot be confused with the EU asylum status.<sup>57</sup>

- 16 Besides the criteria governing refugee status, Article 78(2)(a) TFEU allows for the harmonisation of a **bundle of rights after recognition**, in line with the international practice on the juridical status of refugees under the Geneva Convention.<sup>58</sup> The content of international protection under Articles 20–35 Asylum Qualification Directive 2011/95/EU is therefore based on Article 78(2)(a) TFEU,<sup>59</sup> while reception conditions for those whose application is still being considered are covered by Part F as *lex specialis* (see below MN 31). Other legal bases must be distinguished, in line with settled ECJ case law, on the basis of the contents and objectives of the instrument in question. Permanent residence status for refugees is thus covered by Article 79(2)(a) TFEU in the same way as reunification with family members not applying for protection for themselves,<sup>60</sup> while the transnational coordination of social security schemes continues to be covered by Article 48 TFEU as *lex specialis*.<sup>61</sup>
- 17 In contrast to Union citizens, refugees and other third country nationals **do not benefit from an individual right to free movement within the single market**; it remains the decision of the legislature to decide whether and, if so, under which conditions free movement within the EU shall be allowed (see Thym, Legal Framework for EU Immigration Policy, MN 28–36). Along similar lines, the option of a uniform **asylum status 'valid throughout the Union'** in Article 78(2)(a) TFEU indicates that the conditions for mobility within Europe are to be determined in the ordinary legislative procedure.<sup>62</sup> At present, refugees benefit from intra European mobility once they have obtained permanent residence status or qualify for residence in accordance with national

<sup>54</sup> See the references to the Geneva Convention in European Council, Presidency Conclusions of the Meeting on 15/16 October 1999 in Tampere, para 13 and the deliberations of the European Convention expressed in the Final Report of the Working Group X, doc. CONV 426/02 of 2 December 2002, p. 3–4 paving the way for Article III 266 of the Treaty establishing a Constitution for Europe of 24 October 2004 (OJ 2004 C 310/1), which never entered into force but was resurrected later as today's Article 78 TFEU.

<sup>55</sup> Article 18 of the EU Charter designates a 'right to asylum' whose substance and contents is to be defined, according to the EU Charter, by the Geneva Convention.

<sup>56</sup> Recital 23 Directive 2011/95/EU.

<sup>57</sup> See ECJ, *B.*, C 57/09 & 101/09, EU:C:2010:661, paras 113–121; and Hailbronner, 'Das Grundrecht aus Asyl unverzichtbarer Bestandteil der grundgesetzlichen Wertordnung, historisches Relikt oder gemeinschaftsrechtswidrig?', *Zeitschrift für Ausländerrecht* 2009, p. 369, 372–375.

<sup>58</sup> Cf. Chapter II of the Geneva Convention on 'juridical status'; and Hathaway, *Rights*, p. 370 et seq.

<sup>59</sup> See Schieber, *Komplementärer Schutz*, p. 310–313.

<sup>60</sup> See see Thym, Legal Framework for EU Immigration Policy, MN 12–18; in practice, the differentiation has little impact, since the ordinary legislative procedure applies to both Articles 78 and 79 TFEU.

<sup>61</sup> Cf. ECJ, *Khalil*, C 95/99–98/99 & C 180/99, EU:C:2001:532, paras 39 et seq.

<sup>62</sup> The legislature may opt, for instance, to make free movement conditional upon economic self-sufficiency, language skills and/or a job offer in compliance with domestic labour market tests.

immigration laws.<sup>63</sup> Calls for more favourable free movement rights are political in nature and do not reflect a legal obligation on the EU legislature under Article 78 TFEU. This conclusion is reaffirmed, moreover, by the terminological openness of Article 78(2)(a) TFEU in relation to the uniform asylum status ‘valid throughout the Union’, whose transnational validity can alternatively be interpreted as a reference to the mutual recognition of positive asylum decisions as a result of which Member States would be allowed, in cases of secondary movements, to return asylum seekers to the Member State that had issued the recognition.<sup>64</sup>

It is beyond doubt, given its unequivocal wording, that the **personal scope** of Article 78(2)(a) TFEU relates to third country nationals, including stateless persons (Article 67(2) TFEU).<sup>65</sup> The EU therefore has no competence for intra European asylum claims. This exclusion for asylum applications by Union citizens reflects the character of the European Union as a community founded upon the rule of law, democracy and respect for human rights.<sup>66</sup> In line with **Protocol (No 24) on Asylum for Nationals of Member States of the European Union** the Member States ‘shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters.’<sup>67</sup> This **designation of all Member States as safe countries of origin** has the rank of primary law in accordance with Article 51 TEU and benefits from supremacy over conflicting national legislation.<sup>68</sup> As a result, applications in accordance with national legislation can be processed only in compliance with the criteria set out in Protocol (No 24), which focus on an abstract assessment of the situation in the country concerned ‘on the basis of the presumption that [the application] is manifestly unfounded.’<sup>69</sup>

**b) Subsidiary Protection.** Rules in the Geneva Convention are based on experience of state sponsored persecution on the European continent in the first half of the 20<sup>th</sup> century, while today’s mixed migration flows are often characterised by convulsion. In practice, many asylum seekers are fleeing indiscriminate violence, in particular civil wars or resort to the asylum system for economic reasons. Moreover, we are witnessing a **growing complexity of push factors** that are not always covered by the Geneva Convention.<sup>70</sup> The EU Treaties react to this challenge, in line with earlier national practices,<sup>71</sup> by providing for ‘a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international

<sup>63</sup> The provisions of the Long Term Residents Directive 2003/109/EC were extended to refugees in accordance with Regulation 2011/95/EU (OJ 2011 L 337/9). Moreover, refugees can be allowed, for instance, to work in other Member States on the basis of national immigration laws, while the Blue Card Directive 2009/50/EC and the Seasonal Workers Directive 2014/36/EU do not apply according to their Article 3(2)(b) Directive 2009/50/EC and Articles 2(1), 3(b) Directive 2014/36/EU.

<sup>64</sup> See Peers, EU Justice, p. 310–311; at present, the Asylum Qualification Directive 2011/95/EU does not comprise an obligation of mutual recognition, while it is unclear whether Article 12(1) Dublin III Regulation (EU) No 604/2013 applies to those who had received international protection in another EU Member State already (it applies primarily to those not having been recognised as refugees yet).

<sup>65</sup> Previous formulations under the Treaties of Amsterdam and Nice had been less clear.

<sup>66</sup> See Articles 2, 7 and 49 TEU and the EU Charter of Fundamental Rights.

<sup>67</sup> Sole operative Article of the said Protocol (OJ 2008 C 115/305).

<sup>68</sup> The Protocol also applies to the United Kingdom, Ireland and Denmark, since it is not covered by their corresponding opt out protocols (see above MN 7).

<sup>69</sup> Part D of the sole operative Article, *ibid.*; for further reflection, see Fröhlich, *Asylrecht*, p. 280–298, Zimmermann, ‘Der Vertrag von Amsterdam und das deutsche Asylrecht’, *Neue Zeitschrift für Verwaltungsrecht* 1998, p. 450, 453–454; and Muzak, Article 78 TFEU, paras 10–13.

<sup>70</sup> See Feller, ‘Asylum, Migration and Refugee Protection’, *IJRL* 18 (2006), p. 509–536 und Zetter, ‘More Labels, Fewer Refugees’, *Journal of Refugee Studies* 20 (2007), p. 172–192.

<sup>71</sup> See the comparative survey by Boutellet Paquet (ed), *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention* (Bruylant, 2002).

protection' (Article 78(2)(b) TFEU).<sup>72</sup> Like in the case of refugee status, the reference to a 'uniform status of subsidiary protection' allows for the adoption of recognition criteria and a bundle of rights after recognition, including the option (not: obligation) of mobility rights within the European Union (see above MN 16 17). On the other hand, the adjective 'uniform' (French: *uniforme*; German: *einheitlich*) implies an enhanced degree of harmonisation (see above MN 14). Distinct legal bases for refugee status (part A) and subsidiary protection (part B) indicate that the legislature is not obliged to treat refugees and those with subsidiary protection equally.<sup>73</sup>

- 20 It remains the prerogative of the EU legislature to define the contours of the subsidiary protection status, including grounds for recognition, since the concept of subsidiary protection does not correspond, in contrast to refugee status, to a clearly defined concept under international law (see above MN 15). Nor is the EU legislature obliged, under EU primary law, to limit itself to the criteria enshrined in the present Article 15 Asylum Qualification Directive 2011/95/EU.<sup>74</sup> **The criteria for subsidiary protection could thus be altered or amended** in accordance with the ordinary legislative procedure in response to practical demands and/or political priorities.<sup>75</sup> It could also be decided to replace the individual right to subsidiary protection by quantitative protection quotas whose exhaustion would prevent successful applications. Outer limits to legislative discretion can be deduced from the underlying idea of 'international protection' which designates factors with a cross border dimension and relates, in particular, to the situation in countries of origin or transit.<sup>76</sup> Article 78(2)(b) TFEU concerns scenarios of forced migration, while 'voluntary' migration, in particular for economic purposes, is covered by Article 79 TFEU (see Thym, Legal Framework for EU Immigration Policy, MN 13).<sup>77</sup> In the delineation of corresponding instruments, the legislature benefits from a certain discretion on the basis of which it could modify, to a certain extent at least, the 'rationale of international protection' identified by the ECJ to exclude residence 'on compassionate or humanitarian grounds' in reaction to general shortcomings in the economic and social system of a home state, since Directive 2011/95/EU requires persecution by an actor in line with the Geneva Convention.<sup>78</sup>

<sup>72</sup> Article 63(2)(a) EC Treaty as amended by the Treaty of Amsterdam (OJ 1997 C 340/173) had remained ambiguous in this respect, since it was unclear whether the reference to persons who 'otherwise' (i. e. in addition to temporary protection) need international protection was a sufficient basis for a distinct subsidiary protection regime; see Hailbronner, Immigration and Asylum, p. 81.

<sup>73</sup> For a critique, see Teitgen Colly, Asylum, p. 1528 1544 contra Battjes, Subsidiary Protection, p. 547.

<sup>74</sup> See Muzak, Article 78 TFEU, paras 23 24.

<sup>75</sup> Bast, *Aufenthaltsrecht und Migrationssteuerung* (Mohr Siebeck, 2011), p. 155 156 rightly indicates that EU legislature could establish various distinct subsidiary protection standards, possibly in different legal instruments with separate bundles of rights after recognition; the wording 'a' does nothing to present, contra Schieber, *Komplementärer Schutz*, p. 303, an unsurmountable hurdle in this respect.

<sup>76</sup> Cf. Hailbronner, Asylum Law, p. 59, Goodwin Gill/McAdam, *Refugee*, p. 421 et seq.; Battjes, Subsidiary Protection, p. 541 542; and UNHCR ExCom, Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection, Conclusion No. 103 (LVI), 7 October 2005.

<sup>77</sup> The legal distinction between forced migration (Article 78 TFEU) and voluntary migration (Article 79 TFEU) applies irrespective of the *factual* pertinence of mixed flows; in line with settled ECJ case law, the identification of the correct legal basis follows the contents and objective of the instrument in question; for further comments, see Schieber, *Komplementärer Schutz*, p. 303 310; and Battjes, Subsidiary Protection, p. 544 547.

<sup>78</sup> See ECJ, *M'Badj*, C 542/13, EU:C:2014:2452, paras 35 37, 44 on the basis of Directive 2011/95/EU, although the additional reference to the Geneva Convention indicates that some elements of this description transcend the statutory contents of the Directive and reflect a generic definition of the concept of international protection; see also J. Y. Carlier/L. Lebeuf, 'Droit européen des migrations', *Journal de droit européen* (2015), p. 111, 116.

It is possible to base the criteria for subsidiary protection on **non refoulement obligations under international human rights law** which can reach further than 21  
 refugee protection under the Geneva Convention (see below MN 55–61), although the  
 EU legislature is not obliged to do so.<sup>79</sup> When similar terminology is used, it has to be  
 ascertained, by means of interpretation, whether statutory provisions of EU secondary  
 law are to be interpreted in line with international human rights law. In the case of the  
 Asylum Qualification Directive, the ECJ decided that this was not the case (see Storey,  
 Directive 2011/95/EU, Article 15 MN 12–14). This **autonomy of subsidiary protection**  
**under EU law** has a twofold implication: it indicates, firstly, that EU legislation can  
 provide for international protection in situations below the threshold of human rights  
 obligation. Secondly, the opposite scenario could also arise, in theory at least,<sup>80</sup> if EU  
 legislation does not extend the concept of subsidiary protection to situations covered  
 by human rights law. Mandatory respect for human rights can be ensured, in the  
 second scenario, on the basis of humanitarian protection rules in domestic immigra-  
 tion and asylum laws beyond the confines of EU legislation.<sup>81</sup>

c) **Temporary Protection.** During the civil wars in the former Yugoslavia, many 22  
 Member States were confronted with a ‘massive inflow’ of people seeking protection. At  
 the time, the idea became popular to establish specific rules for such scenarios, which  
 would allow states to act on the basis of abstract criteria without necessarily analysing,  
 in contrast to asylum applications, the need for international protection on an indivi-  
 dual basis.<sup>82</sup> The objective of **reacting swiftly to situations of massive inflows** resulted  
 in the adoption of the Temporary Protection Directive 2001/55/EC, which was the first  
 legally binding instrument ever to be agreed upon by the EU institutions in the field of  
 asylum, and explains why Article 78(2)(c) TFEU provides for an express legal basis for  
 temporary protection. In practice, the Temporary Protection Directive has not been  
 activated so far despite various instances in which this could have been done. The idea  
 to react to scenarios of massive inflows with specific instruments has lost its relevance  
 (see Skordas, Directive 2001/55/EC Article 1 MN 15).

Given that temporary protection does not build on a pre-existing concept under 23  
 international law (see above MN 15, 20), the EU **legislature has wide discretion** when  
 defining the contours of temporary protection. As an integral part of the Common  
 European Asylum System, rules on temporary protection can potentially be applied to  
 various forms of forced migration (see above MN 20), while temporary residence  
 permits for economic purposes, such as those for seasonal workers, are covered by  
 Article 79 TFEU (see Thym, Legal Framework for EU Immigration Policy, MN 12–13).  
 In a similar vein, the term ‘displaced persons’ in Article 78(2)(c) TFEU indicates that  
 the provision concerns cross-border movements of people in reacting to various forms  
 of hazards in countries of origin, such as civil wars or natural disasters. EU legislation  
 could potentially embrace all these scenarios.

d) **Procedural Rules.** Procedural rules are **essential components of the Common** 24  
**European Asylum System**, since they support the identification of those in need of  
 international protection and are crucial for efforts to streamline the asylum process to

<sup>79</sup> See Schieber, *Komplementärer Schutz*, p. 302.

<sup>80</sup> ECJ, *Elgafaji*, C 465/07, EU:C:2009:94, para 44 can be interpreted to imply that the present Article 15  
 Asylum Qualification Directive 2011/95/EU should be interpreted in line with Article 3 ECHR in cases of  
 doubt; for further comments, see Storey, Directive 2011/95/EU Article 15 MN 13.

<sup>81</sup> See ECJ, *M'Bodj*, C 542/13, EU:C:2014:2452, paras 39–46.

<sup>82</sup> See Battjes, *Subsidiary Protection*, p. 543–544; and Hailbronner, *Asylum Law*, p. 64–65.



respond to increasing numbers of claims, many of which are unfounded.<sup>83</sup> Nevertheless, the semantic differentiation between a ‘uniform’ (French: *uniforme*; German: *einheitlich*) status of asylum and subsidiary protection (Article 78(2)(a), (b) TFEU) and ‘common’ (French: *commun*; German: *gemeinsam*) procedural rules (Article 78(2)(d) TFEU) indicates that the EU Treaty aims for a lesser degree of harmonisation in the field of procedure.<sup>84</sup> This hesitation reflects the diversity of national administrative and judicial practices that cannot be approximated as easily as the substantive grounds for granting refugee status. Rather, the EU legislature has to **balance the need for commonalities against the respect for national specificities**, in line with the principle of subsidiarity (see above MN 12) and the concept of national procedural autonomy (see Hailbronner/Thym, Constitutional Framework, MN 35–36). A truly federal EU asylum agency would require Treaty change (see below MN 27).

- 25 Article 78(2)(d) TFEU covers provisions on various aspects of the asylum procedure, such as the personal interview, the **evaluation by administrative authorities** or special rules for vulnerable persons together with **guarantees for judicial protection** that can be found in the Asylum Procedures Directive 2013/32/EU. In cases of conflict, EU legislation and national administrative practices have to be interpreted in light of the procedural guarantees in the Charter of Fundamental Rights (see Hailbronner/Thym, Constitutional Framework, MN 37). Article 78(2)(d) TFEU covers both applications for asylum and subsidiary protection without necessarily requiring the EU legislature to lay down identical standards for both categories; the term ‘common’ refers to the approximation of differences among the Member States,<sup>85</sup> not the equal treatment of asylum and subsidiary protection. Article 78(2)(d) TFEU also covers statutory provisions on **safe countries of origin or transit**,<sup>86</sup> which exist in various Member States and are subject to the caveats laid down in the Asylum Procedure Directive (see Vedsted Hansen, Directive 2013/32/EU Articles 36–38).<sup>87</sup>
- 26 The EU Treaty is silent on the **geographical scope** of the provision on asylum procedures and does not specify, in particular, whether common ‘procedures for the granting and withdrawing of uniform asylum or subsidiary protection status’ should necessarily apply within the territory of the Member States. This textual ambivalence contrasts with restrictive earlier formulations<sup>88</sup> and was deliberate, since today’s Article 78 TFEU was discussed by the European Convention drafting the erstwhile Constitutional Treaty<sup>89</sup> in parallel political debates in the early 2000s about the desirability

<sup>83</sup> For early reforms in reaction to increasing numbers of asylum applicants in the 1980s, see Hailbronner, ‘Vom Asylrecht zum Asylbewerberrecht’, in: Fürst et al. (eds), *Festschrift für Wolfgang Zeidler*, Vol. 1 (de Gruyter, 1987), p. 919–937.

<sup>84</sup> See also Battjes, *European Asylum*, p. 180.

<sup>85</sup> On prevailing differences at the time of the European Convention, which discussed the wording of today’s Article 78 TFEU, see Hailbronner/Higgins, ‘General Rapporteur Report’, in: *ibid.* (eds), *Migration and Asylum Law and Policy in the European Union. FIDE 2004 Reports* (CUP, 2004), p. 455, 469–470.

<sup>86</sup> If one contests the procedural nature of these provisions (see Battjes, *European Asylum*, p. 151; and Kugelmann, ‘Einwanderungs und Asylrecht’, in: Schulze/Zuleeg/Kadelbach (eds), *Europarecht. Handbuch für die deutsche Rechtspraxis*, 3<sup>rd</sup> edn (Nomos, 2015), § 41 para 178), one has to activate Article 78(2)(a), (b) TFEU as an additional or alternative legal basis (the ordinary legislative procedure applies to both provisions).

<sup>87</sup> See Engelmann, ‘Convergence against the Odds: The Development of Safe Country of Origin Policies in EU Member States (1990–2013)’, *EJML* 16 (2014), p. 277–302.

<sup>88</sup> Article 63(1)(d) EC Treaty as amended by the Treaty of Amsterdam (OJ 1997 C 340/173) referred to ‘procedures in Member States’ (emphasis added).

<sup>89</sup> Cf. the critique of the open formulation chosen by the European Convention for today’s Article 78 TFEU by the Joint Comments of Non Governmental Organisations for the IGC, *Towards a Constitution for Europe: Justice and Home Affairs*, 1 October 2003, p. 4.

of external asylum reception centres<sup>90</sup> an idea taken up 10 years later in response to the ongoing asylum crisis during the year 2015.<sup>91</sup> In light of the drafting history, it should therefore be assumed that **Article 78(2)(d) TFEU covers extraterritorial processing of asylum applications.**<sup>92</sup> Such scenarios may include, but are not limited to, a **European resettlement scheme** put forward by the Commission in early June 2015.<sup>93</sup> Of course, it would have to be ensured that potential future processing centres comply with international **refugee law and human rights** requirements (see below MN 52, 54, 60).<sup>94</sup> The EU institutions cannot bypass these constitutional guarantees by relocating beyond the EU's borders.

In accordance with the EU's constitutional structure, the supranational level concentrates on legislative harmonisation and administrative support, while decisions affecting individuals are usually taken at national level. The move towards a federal administration applying EU law directly towards individuals requires a foundation in the EU Treaties (see Thym, *Legal Framework for Entry and Border Controls*, MN 7). At present, Article 78 TFEU does not provide sufficient legal basis for a **federal asylum agency examining asylum application instead of national authorities.**<sup>95</sup> Its establishment would require Treaty change in accordance with Article 48 TEU. This does not imply, however, that the Union cannot sponsor the effective application of the EU asylum acquis, with regard to which many deficiencies persist (see above MN 6). Within the context of Article 78(2)(d) TFEU the EU can support transnational cooperation among the Member States (see Thym, *ibid.*, MN 17) and establish the **European Asylum Support Office (EASO)**, which started its work in 2010.<sup>96</sup> If EASO sends emergency support teams comprised of national officials to another Member State, there is only a gradual practical difference between enhanced transnational cooperation and the move towards a federal asylum office, although this distinction remains relevant for constitutional reasons. While enhanced transnational and vertical cooperation can be achieved within the existing Treaty framework, a federal EU asylum bureaucracy replacing the Member States would require Treaty change.

e) **Determining which Member State is Responsible.** Rules determining the Member State responsible for examining asylum applications are the historic foundation of the Common European Asylum System in order to prevent both forum shopping and the phenomenon of refugees in orbit (see above MN 1). Corresponding rules are nowadays laid down in the **Dublin III Regulation** (EU) No 604/2013, which comprises, in line with Article 78(2)(e) TFEU, both 'criteria' and procedural 'mechanisms' (French:

<sup>90</sup> On the debate, see Garlick, 'The EU Discussions on Extraterritorial Processing: Solution or Conundrum?', *IJRL* 18 (2006), p. 601-629; and Bröcker, *Die externen Dimensionen des EU Asyl und Flüchtlingsrechts im Lichte der Menschenrechte und des Völkerrechts* (Dr. Kovac, 2010).

<sup>91</sup> See above MN 5 and, more specifically, the Commission Communication, COM(2014) 154, p. 8.

<sup>92</sup> See Battjes, *European Asylum*, p. 173; ter Steeg, *Einwanderungskonzept*, p. 463-464; and den Heijer, *Europe and Extraterritorial Asylum* (Hart, 2012), p. 205.

<sup>93</sup> Cf. the Commission Recommendation, COM(2015) 3560.

<sup>94</sup> It would have to be assessed carefully whether the Member States and/or the EU hold jurisdiction in asylum processing centres, without which the ECHR cannot be applied extraterritorially (see Thym, *Legal Framework for Entry and Border Controls*, MN 38-39), while corresponding jurisdictional standards under the EU Charter remain unclear at this juncture (see *ibid.*, MN 41).

<sup>95</sup> Article 78(2)(d) TFEU presumes the existence of national asylum systems, for which 'common' standards are to be established, in the same way as Article 78(2)(e) TFEU assumes that a specific Member State shall be responsible for considering an application for international protection.

<sup>96</sup> See Regulation (EU) No 439/2010 (OJ 2010 L 132/11); legal bases for EU action need not authorise explicitly, in accordance with ECJ, *United Kingdom vs Council & European Parliament*, C 217/04, EU:C:2006:279, para 42 et seq., that agencies can be established on their basis (in the case of EASO, Article 74 TFEU can be activated in conjunction with Article 78(2)(d) TFEU).

*mécanismes*; German: *Verfahren*).<sup>97</sup> It is the prerogative of the legislature to decide upon relevant criteria in the legislative procedure; the **legislature can modify existing rules or opt for an alternative mechanism, such as a quota system** allocating asylum seekers among Member States on the basis of a redistribution key set out in EU legislation.<sup>98</sup> The open terms ‘criteria’ and ‘mechanisms’, which define the EU competence under Article 78(2)(e) TFEU, are not confined to the former or present Dublin Regulations. New or additional distribution or **relocation mechanisms** can be introduced in accordance with the ordinary legislative procedure<sup>99</sup> or established by means of agreements among representatives of the Member States.<sup>100</sup> However, the Treaty covers asylum seekers only and does not establish a competence for the relocation of recognised refugees. In order to support the application of EU legislation (see Thym, Legal Framework for Entry and Border Controls, MN 10),<sup>101</sup> Article 78(2)(e) TFEU also covers instruments rendering the Dublin Regulation more effective, such as the Eurodac database of finger prints and other data.<sup>102</sup>

29 It is well known that the former and present Dublin Regulations have resulted in a considerable **asymmetry in the number of asylum applications across Europe**. In this respect, Article 80 TFEU lays down a general obligation to support Member States that assume more responsibilities than others for the functioning of the Common European Asylum System. This obligation can be implemented in various ways, including by means of financial and/or operative support, and does not necessarily require a recast of the Dublin III Regulation (EU) No 604/2013 (see below MN 43–44). Moreover, **human rights can oblige Member States not to transfer asylum seekers** to another Member State in exceptional scenarios whenever there are systemic flaws in the asylum procedure and in the reception conditions (see below MN 58). The ECJ has emphasised, in this context, that the principle of mutual trust mandates a careful assessment in order not to jeopardise the functioning of the CEAS, while the ECtHR seems to insist on stricter standards. In cases of conflict, the ECJ is the ultimate authority on the interpretation of the EU asylum acquis (see below MN 56).

30 **Norway, Iceland and Switzerland** (and Liechtenstein), which participate in the Schengen area on the basis of public international law (see Thym, Legal Framework for Entry and Border Controls, MN 29), have concluded international agreements with the European Union providing for their participation in the Dublin system on the basis of a dynamic institutional framework covering amendments to or recasts of previous legislation, such as the new Dublin III Regulation (EU) No 604/2013.<sup>103</sup> Moreover,

<sup>97</sup> In contrast to Article 63(1)(a) EC Treaty as amended by the Treaty of Amsterdam (OJ 1997 C 340/173), Article 78(2)(e) TFEU applies to both asylum and subsidiary protection.

<sup>98</sup> Germany’s quota system and its potential implications for the EU, see Thym/Beverungen/Gies, Germany’s Domestic “Königstein Quota System” and EU Asylum Policy, *Verfassungsblog.de* on 11 October 2013.

<sup>99</sup> It is compatible with primary law to establish parallel mechanisms such as the partial quota for intra European relocation and/or voluntary resettlement schemes in parallel to the Dublin III Regulation suggested by the Commission Proposal, COM(2015) 450.

<sup>100</sup> Legally speaking, agreements of Member States do not constitute secondary EU law, even if they are adopted by national representatives ‘meeting within the Council’; such practice was common in the 1960s and 1970s and they were reactivated for the first relocation and resettlement schemes adopted in July 2015 according to Council doc 11097/15 for intergovernmental quotas accompanying Council Decision 2015/1523 (OJ 2015 L 239/143) and Council doc 11130/15; as a result, the ECJ would not be competent for interpretation and the EU Charter would not apply.

<sup>101</sup> Similarly, see Weiß, Article 78 TFEU, para 38.

<sup>102</sup> Cf. the new Eurodac Regulation (EU) No 603/2013 (ABL. 2013 L 180/1) as well as implementing legislation.

<sup>103</sup> For Norway and Iceland, see the Agreement of 19 January 2001 (ABL. 2001 L 93/40), which entered into force on 1 April 2001 (OJ 2006 L 112/16); for Switzerland, see the Agreement of 26 October 2004 (OJ

Denmark concluded an agreement on its association with the former Dublin II Regulation (EC) No 343/2003,<sup>104</sup> since the Danish opt out does not allow, like in the case of the United Kingdom's and Ireland's, for its participation in EU legislation building the area of freedom, security and justice (see above MN 7). The agreement has not been updated to cover the new Dublin III Regulation (EU) No 604/2013 and it would be preferable, for reasons of legal clarity, if Denmark were to amend its opt out instead of concluding cumbersome intra EU agreements.

f) **Reception Conditions.** Article 78(2)(f) TFEU allows for the adoption of 'standards concerning the conditions for the reception of applicants for asylum or subsidiary protection.' The reference to 'applicants' makes clear that the provision concerns the status *during the asylum procedure*, while the bundle of rights of those having been granted international protection is covered by Article 78(2)(a), (b) TFEU (see above MN 14, 19). Once an application has been rejected, the former applicant for asylum must regularly be characterised as an illegally staying third country national within the meaning of the Return Directive 2008/115/EC, whose return to the country of origin or transit is covered by Article 79(2)(c) TFEU (see Thym, Legal Framework for EU Immigration Policy, MN 19 20). Like in the case of recognised refugees, the EU legislature holds the power to define the bundle of rights, such as the conditions governing access to the labour market, education or social assistance,<sup>105</sup> which can be found in the **Asylum Reception Conditions Directive 2013/33/EU**. Whenever secondary EU legislation lays down social policy standards, the rights and principles enshrined in the chapter on 'solidarity' of the Charter of Fundamental Rights can influence the interpretation (see Hailbronner/Thym, Constitutional Framework, MN 49).

The reference in Article 78(2)(f) TFEU to 'standards' (French: *normes*; German: *Normen*) should not be interpreted strictly as covering rules on legislative harmonisation only. Rather, the provision should be interpreted in the light of Article 80 TFEU on solidarity, which does not in itself provide a legal basis for support instruments but can influence the interpretation of other Treaty provisions (see below MN 43). This implies that Article 78(2)(f) TFEU covers **financial or operative support**, including through the Asylum, Migration and Integration Fund that supports projects concerning the accommodation of asylum seekers.<sup>106</sup>

g) **Cooperation with Third States.** Although asylum has, by definition, a cross border dimension, most national asylum systems and international refugee law until recently focused on the situation *after* asylum seekers had reached the state territory. The Europeanisation of asylum policy encourages a gradual paradigm change if states on the European continent collaborate in order to ensure the effective application of the Geneva Convention (see above MN 5), thereby mirroring a **general thrust of EU migration policy to support enhanced international cooperation**.<sup>107</sup> The European Council has repeatedly called upon the EU institutions to extend international collaboration beyond Europe and to support a global approach.<sup>108</sup> Against this background,

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2008 L 53/5), which entered into force on 1 March 2008 (OJ 2008 L 53/18) and provides for the accession of Liechtenstein.

<sup>104</sup> See the Agreement (OJ 2006 L 66/40), which entered into force on 1 April 2006 (OJ 2006 L 96/9).

<sup>105</sup> Similarly, see Peers, 'The EU Institutions and Title IV', in: *ibid./Rogers (eds), EU Immigration and Asylum Law* (Martinus Nijhoff, 2006), p. 47, 56; and Battjes, *European Asylum*, p. 149

<sup>106</sup> See the Regulation (EU) No 516/2014 (ABl. 2014 L 150/168).

<sup>107</sup> See Thym, 'Towards International Migration Governance?', in: Van Vooren et al. (ed), *The Legal Dimension of Global Governance: What Role for the EU?* (OUP, 2013), p. 289 305.

<sup>108</sup> See the European Council, Presidency Conclusions of the Meeting on 15/16 October 1999 in Tampere, paras 11 12; the Hague Programme (OJ 2005 C 53/1), p. 5; the Stockholm Programme (OJ

the European Convention, when drafting the erstwhile Constitutional Treaty, the provisions of which later found their way into the Treaty of Lisbon, established an explicit legal basis for ‘partnership and cooperation with third countries’ in today’s Article 78(2)(g) TFEU.<sup>109</sup> This express provision on international cooperation reaffirms that the EU can cooperate with third states also in situations in which the adoption of secondary legislation does not result in an exclusive external treaty making competence (cf. Thym, Legal Framework for Entry and Border Controls, MN 28), including through **financial and operative support**.<sup>110</sup>

- 34 Although Article 78(2)(g) TFEU constitutes an integral part of the Common European Asylum System and refers to cooperation with third states ‘for the purpose of managing *inflows* of people applying for asylum or subsidiary or temporary protection’,<sup>111</sup> the provision **should not be confined to movements with an immediate impact on the functioning of the CEAS**, since the factors defining migration flows are inherently blurred.<sup>112</sup> Moreover, a broad reading supports the effective realisation of other EU policies, including on external action and development cooperation.<sup>113</sup> Other legal bases must be distinguished, in line with settled ECJ case law, on the basis of the content and objective of the instrument in question; if the latter concerns primarily the functioning of the CEAS, Article 78(2)(g) TFEU should be used, while other instruments can be based on other policies, such as the instruments for financial support in the context of development and neighbourhood policies.<sup>114</sup> Corollary rules on asylum in **association and neighbourhood agreements** are covered by these legal bases, while Article 78(2)(g) TFEU applies to sectoral treaties (see Thym, Legal Framework for Entry and Border Controls, MN 15).
- 35 Support for third states in the field of asylum can help establish a favourable political and practical context for the realisation of the **controversial proposal to establish asylum reception centres in North Africa**.<sup>115</sup> Article 78(2)(g) TFEU does not, in itself at least, provide a sufficient legal basis for the initiation of such centres, since cooperation with third states on the basis of this provision must be distinguished from protection by national personnel with EU support abroad. It has been explained above, however, that the Treaty of Lisbon deliberately discontinued the previous limitation of the Common European Asylum System to the territory of the Member States. **Article 78(2)(d) TFEU** in particular is formulated in such an open manner that it could justify future legislation providing for external asylum processing centres that would

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2010 C 115/1), p. 33–34; and European Council, Conclusions of the Meeting on 26/27 June 2014 in Ypres, doc. EUCO 79/14, para 8.

<sup>109</sup> Cf. Article III 266(2)(g) of the Treaty establishing a Constitution for Europe of 24 October 2004 (OJ 2004 C 310/1), which never entered into force but corresponds to today’s Article 78(2)(g) TFEU.

<sup>110</sup> An example are Regional Protection Programmes (RPPs); cf. de Vries, ‘An Assessment of “Protection in Regions of Origin” in Relation to European Asylum Law’, EJML 9 (2007), p. 83–103.

<sup>111</sup> Emphasis added.

<sup>112</sup> A regional protection programmes in the African Great Lakes region, for instance, can have at least some impact on the number of asylum seekers in Europe.

<sup>113</sup> Cf. Articles 21–22 TEU and Articles 208–214 TFEU on development cooperation, economic, financial and technical assistance as well as humanitarian aid.

<sup>114</sup> On support for migration related projects, see Article 5(2)(i) Regulation (EC) No 1905/2006 (OJ 2006 L 378/41) on the financing instrument for development cooperation and, in the context of the neighbourhood policy, Article 2(2)(r) Regulation (EC) No 1638/2006 (OJ 2006 L 310/1).

<sup>115</sup> On the debate in the early 2000s, in parallel to discussion in the European Convention drafting today’s Article 78(2)(g) TFEU, see ter Steeg, *Einwanderungskonzept*, p. 305 et seq.; Roig Granjon, ‘Des tentatives d’externalisation de la protection des réfugiés au développement de la dimension extérieure de la politique d’asile européenne’, in: Millet Devalle (ed), *L’Union européenne et la protection des migrants et des réfugiés* (Pedone, 2010), p. 77–90; and the Joint Comments of Non Governmental Organisations for the IGC, 1 October 2003, p. 4; the debate was taken up during 2015 by various interior ministers.

have to be run by the Member States, possibly in cooperation with EASO (see above MN 26 27). In order to render such external processing centres effective, Article 78(2)(g) TFEU could be activated to guarantee a favourable political and administrative context, for instance through support to third states to apply their international legal obligations effectively.

### 3. Emergency Situations (Article 78(3) TFEU)

Legislation on temporary protection in the event of a massive inflow is covered by Article 78(2)(c) TFEU and need not be confined to the statutory status quo under the present Temporary Protection Directive 2011/55/EC (see above MN 22 23). By contrast, Article 78(3) TFEU concerns, in line with the previous Article 64(2) EC Treaty,<sup>116</sup> other measures for the benefit of certain Member States in emergency situations, although this support must be confined, according to the wording, to ‘provisional measures.’ It corresponds to the desire of swift decision making in emergency situations that the Council decides by qualified majority after consulting the European Parliament.<sup>117</sup> When deciding the time period during which provisional measures should apply, the EU institutions benefit from a certain discretion,<sup>118</sup> which also extends to the definition of what constitutes an ‘emergency situation’ justifying recourse to Article 78(3) TFEU.<sup>119</sup> Similarly, the institutions have a margin of appreciation when deciding upon the substance of support measures.<sup>120</sup> They may, in particular, include financial or operative support, among others by EASO, the activation of which does not necessarily require recourse to Article 78(3) TFEU (see above MN 27, 32). By contrast, any permanent amendment of secondary legislation outside the confines of the ordinary legislative procedure cannot be decided on the basis of Article 78(3) TFEU;<sup>121</sup> neither can visa requirements be imposed on that basis.<sup>122</sup> This conclusion rests on the rather vague language that does not contain any clear indication that ‘provisional measures’ can justify non compliance with secondary EU legislation. However, it appears possible to lay down *leges speciales* which apply for a temporary period like in the case of the relocation schemes established in 2015 which implied a temporary derogation from the Dublin III Regulation.<sup>123</sup>

## III. Overarching Principles

### 1. Mixed Migration Flows and Legal Status Change

It is explained elsewhere that rules on immigration and asylum in the EU Treaties do not conceive cross border movements of people as simple one step settlements that instantly result in either full membership or illegal residence. Instead, the careful

<sup>116</sup> Article 64(2) EC Treaty as amended by the Treaty of Amsterdam (OJ 1997 C 340/173).

<sup>117</sup> Given the absence of any indication to the contrary, qualified majority voting in the Council applies in accordance with Article 16(3) TEU.

<sup>118</sup> The Treaty of Lisbon discontinued the previous limitation to a six month period; the 24 month period of the EU relocation scheme mentioned below arguably stretches the discretion to its limits.

<sup>119</sup> COM(2015) 286, p. 2 3 had extensive recourse to statistical data to justify the proposal of a relocation scheme, which need not be done in all scenarios; political institutions have to assess the situation politically and need not embark upon a quasi academic justification.

<sup>120</sup> See Hailbronner, *Immigration and Asylum*, p. 83.

<sup>121</sup> Similarly, see Weiß, Article 78 TFEU, para 79; contra ter Steeg, *Einwanderungskonzept*, p. 158; and Muzak, Article 78 TFEU, para 45.

<sup>122</sup> Contra Rossi, Article 78 TFEU, paras 31, 33.

<sup>123</sup> See Council Decision 2005/1523 (OJ 2015 L 239/146) and Council Decision 2015/1601 (OJ 2015 L 248/80).

distinction of different statuses in the wording of the EU Treaties implies that the legal dimension of regular migrants' biographies can be described as a **process of legal status change** with distinct sets of rules applying in different scenarios (see Thym, Legal Framework for EU Immigration Policy, MN 7). This conclusion extends to the varying facets of the existing EU asylum acquis. In accordance with secondary law, asylum seekers entering Europe may encounter 'mechanisms for determining which Member State is responsible' (Article 78(2)(e) TFEU) and are accommodated under harmonised reception conditions (Article 78(2)(f) TFEU). Their asylum application will be decided on the basis of common procedures (Article 78(2)(d) TFEU) and single recognition criteria (Article 78(2)(a), (b) TFEU). The decision on the application for asylum will not usually be the end of the migrants' encounter with EU immigration and asylum law. Depending on the circumstances of the individual case, each migrant will continue being confronted with different scenarios.

38 Following a positive asylum decision, **migrants in need of international protection** obtain the right to stay in the Member State that took the decision. The option of an asylum status valid throughout the Union does not necessarily entail that free movement across Member States should be granted from day one, since the legislature remains free to choose among different options of a pan European status (see above MN 17). *De lege lata*, statutory free movement for recognised refugees is guaranteed **after five years of legal residence** under the conditions laid down in the Long Term Residents Directive (see Thym, Directive 2003/109/EC Article 3 MN 6). Moreover, those in need of international protection can qualify for unconditional free movement after naturalisation in a Member States as a result of which rules for Union citizens apply.<sup>124</sup> Existing directives on legal migration for other purposes usually exclude asylum seekers and recognised refugees *ratione personae*.<sup>125</sup> However, **Member States can allow access to their territory** to refugees living in another Member State in accordance with more favourable national rules adopted beyond the confines of the said EU directives on legal migration.<sup>126</sup> The EU legislature remains free, moreover, to amend legislation and to extend, for instance, existing rules under the Blue Card Directive to those in need of international protection.

39 After an asylum application has been rejected, the directives on asylum no longer apply. Article 9(1) Asylum Procedure Directive 2013/32/EU explicitly states that the right to remain in the Member States pending the examination of the application exists 'for the sole purpose of the procedure until to the determining authority has made a decision' and that '[t]hat right to remain shall not constitute an entitlement to a residence permit.' This implies that **unsuccessful asylum seekers** must usually be qualified as people who no longer fulfil the conditions for entry, stay or residence in the Member States, i. e. as **illegal residents for the purposes of the Return Directive 2008/115/EC**.<sup>127</sup> They should therefore be returned to countries of origin or transit in

<sup>124</sup> Naturalisation in accordance with national laws is, as the ultimate legal expression of local integration, one of the three durable solutions promoted by UNHCR; cf. Article 34 Geneva Convention and UNHCR, Framework for Durable Solutions for Refugees and Persons of Concern, May 2003.

<sup>125</sup> See Article 3(2)(b) Blue Card Directive 2009/50/EC; Article 2(1) ICT Directive 2014/66/EU; and Article 2(3) Seasonal Workers Directive 2014/36/EU require residence abroad and therefore do not cover those living in a Member State already; the wording of Article 3(2)(a) Researcher Directive 2005/71/EC and Article 3(2)(a) Student Directive 2004/114/EC remains ambiguous and should be interpreted as covering applicants for international protection only; cf. Hailbronner/Gies, Researcher Directive, Article 3 MN 3.

<sup>126</sup> See, generally, on the admissibility of more favourable national rules Hailbronner/Thym, Constitutional Framework, MN 28 33; this may, in particular, concern rules on labour migration.

<sup>127</sup> See Vedsted Hansen, Asylum Procedure Directive 2013/32/EU, Article 9 MN 2 4; as well as Article 3(2) Return Directive 2008/115/EC.

accordance with human rights law and statutory requirements set out at national and European level, including the Return Directive 2008/115/EC. In practice, Member States do not return all those who could be returned in accordance with Union law and instead often grant various degrees of **complementary protection for humanitarian or other purposes**, either on the occasion of a rejection of an asylum application or at a later stage.<sup>128</sup> These various forms of complementary protection remain intact besides EU legislation (see above MN 20). Moreover, many Member States regularly pursue regularisation campaigns by granting residence permits to illegal residents in accordance with national laws which have not so far been harmonised by the EU (see Thym, Legal Framework for EU Immigration Policy, MN 13).

The prevalence of so called ‘mixed flows’ designates the underlying reason for the ambivalence of asylum law after the recognition or rejection of the initial application. People applying for asylum leave their home countries for various reasons that cannot always be considered an expression of ‘forced migration.’<sup>129</sup> This entails that **political reactions to the pertinence of mixed migration flows** often embrace a multi pronged approach as the Commission’s ‘Agenda on Migration’ in response to the recent refugee crisis (see above MN 5) illustrates: it included various policy initiatives and tried to combine different instruments ranging from enhanced protection for those in need to reinforced return policies.<sup>130</sup> Generally speaking, political responses to mixed flows will often include, on the one hand, measures for people in need of international protection, such as resettlement, the fight against the root causes of involuntary movements or protection in countries of origin or transit. On the other hand, instruments focusing on the prevention of illegal entry and more effective procedures for the identification of people (not) in need of protection, such as safe country of origin or transit concepts, will often be considered together with initiatives rendering return policies more effective.

## 2. Solidarity (Article 80 TFEU)

### Article 80 TFEU

The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.

Calls for more solidarity and a fair sharing of responsibilities have accompanied the Europeanisation of asylum policy from the beginning. In the 1990s, Germany was unsuccessful with its demand to complement the Dublin Convention with a quota system on the relocation of asylum seekers among Member States.<sup>131</sup> During the 2000s and 2010s, the states at the external Schengen borders in Southern and South Eastern Europe complained about the conceptual asymmetry of the Dublin system that allocates

<sup>128</sup> For a comparative survey, see Schieber, *Komplementärer Schutz*, ch 3.

<sup>129</sup> Cf. Feller, ‘Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come’, *IJRL* 18 (2006), p. 509, 515–518; and Hailbronner, ‘Die Genfer Flüchtlingskonvention vor den Herausforderungen des 21. Jahrhunderts’, in: *ibid./Klein* (eds), *Flüchtlinge Menschenrechte Staatsan gehörigkeit. Menschenrechte und Migration* (C.F. Müller, 2002), p. 51–70.

<sup>130</sup> See COM(2015) 286.

<sup>131</sup> See Hailbronner, *Immigration and Asylum*, p. 417–425; and Noll, *Negotiating Asylum. The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff, 2000), p. 285–296.



more responsibilities to the states of first entry (even if some Central and Northern European countries, such as Sweden, Belgium, Austria and Germany, account for the majority of applications in practice, also because many of those who are registered first in Italy or Greece more on to Northern Europe).<sup>132</sup> Against this background, the European Convention drafting the erstwhile Constitutional Treaty agreed upon a specific Treaty provision on solidarity,<sup>133</sup> and the European Council appealed for more solidarity before the formal entry into force of the provision,<sup>134</sup> thereby influencing the adoption of numerous policy initiatives concerning various forms of financial, logistical and operative support (see below MN 44).

- 42 In a European Union aspiring to be some sort of political union, solidarity among its federated states should be considered a **means to its own end** in order to ensure a sustainable basis for the European integration process. Similar attempts to reinforce solidarity within the EU were established, in parallel to Article 80 TFEU, with regard to other policy areas, such as economic policy, energy and in relation to potential terrorist attacks or natural disasters.<sup>135</sup> At the same time, political science shows that solidarity can be an important **precondition for effective cooperation among states** to the benefit of a better asylum policy implemented in practice (see above MN 6). Thus, the willingness to participate in the construction of the CEAS is enhanced by mechanisms embedding inter state cooperation in a framework promoting mutual trust in the common interest.<sup>136</sup> Such convergence can be pursued through a give and take approach in various policy areas or within the domain of migration and asylum policy *sensu stricto*. The same applies to attempts to foster cooperation with third states in the field of asylum (see above MN 33–35).
- 43 In contrast to an earlier Treaty provision,<sup>137</sup> Article 80 TFEU establishes **no free standing competence for the adoption of measures** promoting solidarity and responsibility sharing among Member States.<sup>138</sup> Rather, other ‘Union acts adopted pursuant to this Chapter’ shall contain instruments putting Article 80 TFEU into effect, which as a result must be legally construed as a **horizontal provision that may influence the interpretation of other Treaty competences** on border controls, asylum and immigration.<sup>139</sup> This means, more specifically, that the interpretation of Articles 77–79 TFEU in light of the general scheme of the EU Treaties, including Article 80 TFEU, may allow for the promotion of solidarity and burden sharing among Member States. The level of generality in the wording of Article 80 TFEU and the necessary combination with other Treaty provisions entail that the EU institutions have broad political discretion in deciding which measures are ‘appropriate’ to promote solidarity and responsibility

<sup>132</sup> For regularly updated data, see the Eurostat statistics available online at [http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr\\_asyappctza&lang=en](http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_asyappctza&lang=en) [last accessed 1 November 2015].

<sup>133</sup> The initial proposal for Article III 268 Treaty establishing a Constitution for Europe of 24 October 2004 (OJ 2004 C 310/1), which never entered into force, was resurrected later as today’s Article 80 TFEU; it can be traced back to a proposal by the former Italian Foreign Minister Fini according to the draft formulations by the Convention Presidium, Doc. CONV 614/03 of 14 March 2003, p. 25.

<sup>134</sup> Cf. the Hague Programme (OJ 2005 C 53/1), p. 3; and the Stockholm Programme (OJ 2010 C 115/1), p. 32–33.

<sup>135</sup> See Article 122(1) TFEU, Article 194(1) TFEU, and Article 222 TFEU.

<sup>136</sup> See Hansen, ‘Making Cooperation Work’, in: *ibid./Koehler/Money* (eds), *Migration, Nation States, and International Cooperation* (Routledge, 2011), p. 14–30; and Warner, ‘Dublin Regulation and Boat Arrivals’, in: Snyder/Thym (Hrsg.), *Europe – A Continent of Immigration?* (Bruylant, 2011), p. 165–196.

<sup>137</sup> See Article 63(2)(b) EC Treaty as amended by the Treaty of Amsterdam (OJ 1997 C 340/173).

<sup>138</sup> See also Peers, *EU Justice*, p. 311; and Weiß, Article 80 TFEU, para 3.

<sup>139</sup> In contrast to the previous Treaty provision, *ibid.*, Article 80 TFEU is not confined to asylum policy thus embracing Article 77 and 79 TFEU as well; see also Monar, ‘Die Vertragsreformen von Lissabon in den Bereichen Inneres und Justiz’, *Integration* 2008, p. 379, 386–387.

sharing.<sup>140</sup> There is, in regular circumstances at least, no precise judicable standards obliging the EU institutions to opt for a specific solution, although they are bound by the abstract legal obligation to promote solidarity and burden sharing in the realisation of the area of freedom, security and justice.

In practice, EU institutions may opt for and have established **various forms of financial, logistical, operative or legislative support**. While some of these instruments concern general questions, since they are meant, for instance, to enhance the ability of the Member States to apply the EU asylum *acquis* effectively (e.g. training tools for judges and civil servants established by EASO), others relate to specific scenarios of support for one or several Member States with difficulties (e.g. Rapid Border Intervention Teams in the context of FRONTEX). Legislative support may include, by way of example, a relocation scheme for asylum seekers (see above MN 28, 36) or the introduction of visa requirements when one or several Member States are faced with an increase of illegal entries from certain third state (see Thym, *Legal Framework for EU Immigration Policy*, MN 10). Finally, the wording of Article 80 TFEU emphasises that the EU institutions can have recourse to **financial assistance** in order to enhance solidarity within the CEAS, and a considerable amount of money is distributed among Member States by the Commission for external border controls and visas as well as asylum, migration and integration purposes.<sup>141</sup>

#### IV. International Law and Human Rights

EU immigration and asylum law is firmly embedded in the constitutional framework of the EU Treaties, including human rights. From a doctrinal perspective, the rights and principles enshrined in the **Charter of Fundamental Rights** serve as the primary yardstick for the judicial review of EU legislation, both in situations where its validity is at stake or where it is interpreted in conformity with human rights. While the EU institutions must respect the Charter in all their activities, the Member States are bound only when implementing Union law (see Hailbronner/Thym, *Constitutional Framework*, MN 47–48). In specific scenarios, the interpretation of the EU Charter by the ECJ typically follows the **case law of the ECtHR on the ECHR**, although the ECJ is not formally obliged to follow the Strasbourg court (see *ibid.*, MN 51). In contrast to international human rights law and the Geneva Convention, **international agreements of the Member States** to which the EU has not formally acceded do not form part of the EU legal order as a matter of principle (see *ibid.*, MN 58–59). On the basis of these general principles, this section concentrates on the human rights dimension of EU instruments on asylum discussed in this chapter.

In practice, the adjudication of international legal standards in the field of asylum, both under the Geneva Convention and international human rights law, regularly concerns not only abstract legal principles but also the **assessment of the factual situation in diverse countries of origin or transit**. If we want the rules building the CEAS to be applied coherently across the EU (see above MN 6), uniform standards across Europe should be strived for. Unfortunately, however, there seems to exist a **structural deficit of the European court architecture in asylum matters**. Firstly, the ECJ is bound to limit itself, in the preliminary reference procedure at least, to questions of abstract legal interpretation and does not regularly evaluate the situation in specific

<sup>140</sup> Similarly, see Rossi, ‘Article 80 TFEU paras 1 and 4; and Geiger/Kahn/Kotzur, *European Union Treaties* (C.H. Beck/Hart, 2014), Article 80 TFEU paras 1, 4.

<sup>141</sup> See, for border controls and visas, Regulation (EU) No 515/2014 (OJ 2014 L 150/143), and, for the Asylum, Migration and Integration Fund, Regulation (EU) No 516/2014 (OJ 2014 L 150/168).

countries of origin or transit.<sup>142</sup> Secondly, the ECtHR can also consider the facts, but does so only after the exhaustion of local remedies,<sup>143</sup> and is limited, moreover, to the interpretation of the ECHR which cannot automatically be extended to statutory EU rules on asylum (see above MN 21). Thirdly, while national authorities may share information on countries of origin with the active support of EASO, this cannot bind the judges who are independent. This implies that national courts of last instance retain a principled responsibility to apply the EU asylum *acquis* coherently to specific scenarios, among others by means of horizontal cross fertilisation by taking note of the position of other national courts.<sup>144</sup>

### 1. Geneva Convention

47 The Geneva Convention, together with the 1967 Protocol, constitutes the centrepiece of international refugee law and serves as a central point of reference for the EU asylum *acquis*. That being said, it should be noted that the European Union has not – unlike the Member States – formally acceded to the Geneva Convention. EU primary law may encompass an (exclusive) external Union competence for most matters covered by the Convention today,<sup>145</sup> but the **Geneva Convention** to this date **does not allow for the accession of the EU**.<sup>146</sup> The option of a unilateral declaration by the EU to commit itself formally on the international plane to adhere to the Geneva Convention has not so far been realised;<sup>147</sup> neither has the EU assumed the responsibilities of the Member States as state parties by way of functional succession, following the earlier example of the GATT.<sup>148</sup> This implies that as a matter of public international law the EU is bound, in line with settled ECJ case law, only by those provisions of the Geneva Convention that correspond to obligations under customary international law (see Hailbronner/Thym, Constitutional Framework, MN 58). Although the EU has not acceded to the Geneva Convention, Member States are under an obligation to represent the EU's position in treaty bodies.<sup>149</sup> What is more, the EU **could adopt formal decisions under Arti**

<sup>142</sup> See ECJ, *Dumon & Froment*, C 235/95, EU:C:1998:365, para 25, although the ECJ often hints at how it would resolve the individual case; arguably, the ECJ lacks the procedural devices necessary to gather information on specific countries of origin or transit; see also Costello, Human Rights (forthcoming).

<sup>143</sup> See Storey, Briefing Note, p. 329–337; in practice, the ECtHR tends towards a mixed approach combining its own assessment with a referral to domestic courts; for more comments, see Storey, Briefing Note, p. 344–346; Blake, 'Luxembourg, Strasbourg and the National Court', IJRL 25 (2013), p. 349 (363–368); and Costello, Human Rights (forthcoming); Protocol No. 16 to the ECHR, which has not yet entered into force, will not change the setting, since the reference procedure for domestic courts of last instance will, like in the case of the ECJ, concern questions of abstract legal interpretation only, not the assessment of individual scenarios.

<sup>144</sup> The EU Asylum Law Database may support horizontal cross fertilisation; see online at <http://www.asylumlawdatabase.eu/en> [last accessed 1 November 2015].

<sup>145</sup> In accordance with settled ECJ case law, codified in Article 3(2) TFEU, the EU obtained an exclusive external treaty making competence for most aspects of *future* agreements (or amendments of existing agreements) on asylum after the adoption of the former Asylum Qualification Directive 2004/83/EC.

<sup>146</sup> Only states may accede in accordance with Article 39(2) GC; the Stockholm Programme (OJ 2010 C 115/1), p. 32 had called on the EU institutions to seek accession to the Convention and the 1967 Protocol, but no step seems to have been taken in this direction.

<sup>147</sup> Similar questions have been discussed in relation to international humanitarian law in the context of military and civil CSDP operations; cf. Tsagourias, 'EU Peacekeeping Operations: Legal and Theoretical Issues', in: Trybus/White (eds), *European Security Law* (OUP, 2007), p. 102–133; the *internal* commitment to abide by the Geneva Convention in Article 78(1) TFEU must be distinguished from a commitment at *international* level.

<sup>148</sup> This was explicitly confirmed by ECJ, *Qurbani*, C 481/13, EU:C:2014:2101, para 23; see also Battjes, *European Asylum*, p. 79–80.

<sup>149</sup> Cf ECJ, *Commission vs. Greece*, C 45/07, EU:C:2009:81, paras 30–31 with regard to the International Maritime Organisation IMO.

cle 218(9) TFEU determining the position of the Member States in international treaty bodies or the UNHCR Executive Committee.<sup>150</sup>

Notwithstanding the absence of an international obligation to abide by the Geneva Convention and the 1967 Protocol, the EU has committed itself unequivocally in Article 78(1) TFEU to respect its provisions as a matter of Union law when establishing the Common European Asylum System (see above MN 8). This internal commitment prevents a mismatch between the obligations of the Member States under supranational Union law and public international law, since the ECJ is bound to respect the Geneva Convention in the interpretation of the EU asylum acquis (see above MN 10). Given that the EU has not signed up the Geneva Convention under public international law, the ECJ has no comprehensive jurisdiction to interpret the Geneva Convention in situations not pertaining directly to rules in EU legislation, including in situations of Member State discretion.<sup>151</sup> In such (rare) scenarios, national courts remain free to interpret the Geneva Convention autonomously without a preliminary reference to the ECJ, and the legal effects of the Geneva Convention will follow the rules of the domestic law order in question.

Like in the case of other international agreements, the ECJ and national courts should recognise that the Geneva Convention must be interpreted in line with the established principles of public international law as reaffirmed by the Vienna Convention on the Law of Treaties (see Hailbronner/Thym, Constitutional Framework, MN 57). Distinct principles for the interpretation of Union law (see *ibid.*, MN 10 27) do not extend to the Geneva Convention. This implies that, in accordance with Article 31(3) Vienna Convention, state practice constitutes one point of reference for the interpretation of the Geneva Convention, together with other interpretative principles such as the effective achievement of the Convention's purposes.<sup>152</sup> The same applies to the position of the UNHCR, in particular its handbooks and commentaries (see below MN 53), although they cannot be qualified as being legally binding in themselves, since UNHCR does not hold the power to interpret the Geneva Convention authoritatively.<sup>153</sup> In the absence of an institution that may provide for the authoritative interpretation of the Geneva Convention as a matter of international law, academic contributions should discuss the suitability of different interpretative standards and the legitimacy of diverging positions openly instead of assuming single handedly that there is only one convincing interpretation available.

For the interpretation of the Geneva Convention, a transnational dialogue among courts can be an important instrument, both within and beyond the European Union.<sup>154</sup> The ECJ plays a central role in this respect, since its position on the interpretation of the Geneva Convention has obtained great visibility across the world in recent years,<sup>155</sup>

<sup>150</sup> Cf ECJ, *Germany vs. Council*, C 399/12, EU:C:2014:2258, paras 48 68; the situation applies to any international organisation, treaty body or other forum dealing with areas covered by exclusive external EU competences, also with regard to decisions that are, like in the case cited, not legally binding.

<sup>151</sup> See ECJ, *Qurbani*, C 481/13, EU:C:2014:2101, para 20 28.

<sup>152</sup> For a progressive position, which partly suggests to exempt the Geneva Convention from the established principles for international treaty interpretation, see Hathaway, *Rights of Refugees*, p. 48 74.

<sup>153</sup> See Hathaway, *Rights of Refugees*, p. 54; and Recital 22 Asylum Qualification Directive 2011/95/EU, whose wording remains noticeably open ended; an example of divergent interpretation between UNHCR and the ECJ is the definition of 'memberships of a particular social group' in Article 1A(1)(2) GC and Article 10(1)(d) Directive 2011/95/EU; see Dörig, *Asylum Qualification Directive*, Article 10 MN 13 16.

<sup>154</sup> See the contributions to Goodwin Gill/Lambert (eds), *The Limits of Transnational Law. Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (CUP, 2010).

<sup>155</sup> See Drywood, *Who's in*, p. 1115 1123; and Lambert, 'Transnational Law and Refugee Identity: The Worldwide Effect of European Norms', in: Kneebone/Stevens/Baldassar (eds), *Refugee Protection and the Role of Law* (Routledge, 2014), p. 203 214.

thereby complementing the existing dialogue among courts from Commonwealth countries and the US, which had dominated transnational debates until recently. This newly found prominence of ECJ judgments on the Geneva Convention does not mean that national courts have no role to play. On the contrary, the abstract character of many ECJ judgments and the significance of country specific assessments (see above MN 46) implies that the **position of domestic courts** which unlike the ECJ often have a specialisation in asylum law, can be an important factor for the interpretation of the Geneva Convention.<sup>156</sup> National courts should actively reflect the position of their peers in other Member States, thereby enhancing the coherence of the CEAS and contributing to the transnational visibility of the European position on the interpretation of the Geneva Convention.

- 51 Many provisions in the **Geneva Convention contain vaguely formulated rules** or expressly provide for discretion on the side of the contracting parties. In such scenarios, abstract obligations under the Geneva Convention can be complemented with more detailed statutory rules in EU legislation, such as the Asylum Qualification Directive 2011/95/EU (see above MN 15). In this respect, EU legislation contributes to a pan European understanding of the Geneva Convention which is binding on the Member States as a matter of Union law and which may, particularly through ECJ judgments, have an impact on judicial practices worldwide (see above MN 50). It is discussed elsewhere whether and, if so, to what extent the Geneva Convention embraces, from today's perspective, an individual right of asylum seekers not to be rejected at the border (see Thym, *Legal Framework for Entry and Border Controls*, MN 40) and commands for **extraterritorial effects**, in particular with regard to border controls on the high seas (see Thym, *ibid.* 36).
- 52 The Geneva Convention does not contain rules on procedures. Nonetheless, **general principles on a fair asylum procedure** have been developed in the application of the Convention. They require state parties, in line with the principle of good faith,<sup>157</sup> to institute 'fair and effective' procedures in order to determine who is entitled to the guarantees of the Convention.<sup>158</sup> This position has found general acceptance, in particular with regard to the principle of non refoulement, but it can be **difficult to determine the precise scope** of corresponding obligations at the international level in specific scenarios (see below MN 54). State practice, including court judgments, are the main source to determine whether such general principles have evolved,<sup>159</sup> although other interpretative standards must also be considered (see above MN 49). Moreover, many international and non governmental agencies have in recent years formulated general principles on asylum procedures, which often make an effort to promote the progressive evolution of the law.
- 53 Prominent among them is the **UNHCR Handbook** on Procedures and Criteria for Determining Refugee Status of 1979 and a series of **Executive Committee Recommendations** on the determination of refugee status, including problems arising from manifestly unfounded or abusive applications.<sup>160</sup> In 2002, the **International Law Association** passed a declaration on international minimum standards based on a report by its Committee on Refugee Procedures, which distinguishes between general

<sup>156</sup> See, by way of example, Dörig, 'German Courts and their Understanding of the Common European Asylum System', *IJRL* 25 (2013), p. 768-778.

<sup>157</sup> Cf Article 26 Vienne Convention on the Law of Treaties.

<sup>158</sup> See *Vedsted Hansen*, in: Chetail/Baulez (eds), *Research Handbook*, p. 439-458.

<sup>159</sup> In practice, however, there is usually not clearly identifiable and consistent state practice.

<sup>160</sup> See the informal UNHCR Manual on Refugee Protection and the European Convention of Human Rights, April 2003, available online at <http://www.unhcr.org/3ead2a814.pdf> [last accessed 1 November 2015].

procedural standards, rules for the hearing and the determination of claims as well as standards on appeals and reviews in situations of a real risk of persecution or harm.<sup>161</sup> It should be noted that none of these recommendations, resolutions, conclusions or decisions constitutes an authoritative source of interpretation (see above MN 49). Their **non binding character** frequently follows from the title or wording, the lack of a competence of the respective body to adopt binding rules or the circumstances of their elaboration. The House of Lords explicitly noted, in a judgment of 2003, that the opinion of non governmental or international bodies or a consensus of the academic literature cannot constitute customary international law unless it was accepted by the states as binding under international law.<sup>162</sup>

In the application of international procedural standards, **fairness** generally mandates 54 a procedure providing for a reasonable chance to enforce a claim to protection. Applicants must be given an opportunity to present their claim by means of an application to asylum and to pursue it throughout the procedure. **Efficiency** has different connotations. From the point of view of the applicant, it means that the procedural rights and the legal status should allow them to enforce their claim within a reasonable period of time. At the same time, however, efficiency also relates to the public interest if asylum procedures are required to be swift in order to save scarce public resources and to prevent asylum procedures from becoming a back door to illegal immigration. In sum, the concept of 'fair and efficient' procedures embraces a large discretion on the side of states within the (rather broad) international normative limits described above.<sup>163</sup> This background explains the great practical relevance of the Asylum Procedure Directive 2013/32/EU, which lays down detailed prescriptions for Member States and, moreover, must be interpreted in the line with the procedural human rights standards in the EU Charter of Fundamental Rights (see Hailbronner/Thym, Constitutional Framework, MN 34 47).

## 2. European Convention on Human Rights

On the basis of the general principles guiding compliance of EU legislation with 55 human rights (see above MN 45), three provisions of the ECHR are particularly relevant for immigration and asylum policy. While Article 8 ECHR is activated by migrants against European countries they are living in to protect their private or family life (see Thym, Legal Framework for EU Immigration Law, MN 53 55), **Article 3 ECHR serves as a central guarantee against mistreatment in countries of origin or transit** from which European states are asked to provide shelter (see below MN 57 58), and Article 13 ECHR guides procedural and judicial decision making (see below MN 60). On this basis, the ECtHR effectively turned the European Convention into an instrument of refugee protection, although the state parties had originally deliberately decided not to integrate a right to asylum in the ECHR.<sup>164</sup> In the early 1990s, the ECtHR nonetheless started to activate Article 3 ECHR as an additional instrument of refugee

<sup>161</sup> The report was elaborated by the Committee on Refugee Procedures chaired by Kay Hailbronner and had been drafted by Guy Goodwin Gill; it is available online at <http://www.ila-hq.org/en/committees/index.cfm/cid/27> [last accessed 1 November 2015].

<sup>162</sup> Lord Bingham of Cornhill per House of Lords, judgment of 9 December 2004, *R v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)* [2004] UKHL 55, para 27.

<sup>163</sup> See also Hailbronner, *Immigration and Asylum*, p. 44; and Battjes, *European Asylum*, p. 102.

<sup>164</sup> They considered the Geneva Convention to be the appropriate benchmark in this respect; see Uibopou, 'Der Schutz des Flüchtlings im Rahmen des Europarats', *Archiv des Völkerrechts* 21 (1983), p. 60, 61 64; and European Commission of Human Rights, Decision of 26 March 1963, No. 1802/62, *X. vs. Germany*, Yearbook of the European Convention on Human Rights 6 (1963), p. 462, 478.

protection and extended it beyond the reach of the Geneva Convention.<sup>165</sup> The ECHR not only protects individuals against persecution, but may cover other threats to life resulting from indiscriminate violence or, in exceptional circumstances, socioeconomic living conditions in countries of origin (see below MN 57–58). In short, Article 3 ECHR has been turned into an instrument for refugee protection also in situations not covered by the Geneva Convention *ratione materiae*.

56 In contrast to the Geneva Convention, the ECHR establishes an obligatory **judicial system** providing for authoritative interpretation and enabling anyone to seek redress against the alleged violation of Convention rights before the ECtHR in Strasbourg. Indeed, a great number of applicants have seized the ECtHR in asylum matters in recent years, thereby stretching the institutional resources of the Court system<sup>166</sup> and motivating the latter to gradually move towards an informal lead case system (see above MN 46) which exemplarily analyses the situation in specific countries of origin or transit instead of focusing on the individual case.<sup>167</sup> Although the EU has not yet formally acceded to the European Convention, the **parallel interpretation of the EU Charter in regular circumstances** guarantees a level playing field of human rights protection in Europe even if the position of the ECJ prevails over the interpretation of the ECtHR for all matters relating to EU law in a (rare) case of conflict between the two courts (see Hailbronner/Thym, *Constitutional Framework*, MN 51). Notwithstanding the widespread overlap of the European Convention with the Geneva Convention and the EU asylum *acquis*, the different sources must be distinguished doctrinally not least because the procedural means of administrative and judicial enforcement can differ. The **Asylum Procedure Directive 2011/32/EU** in particular covers applications for international protection only and therefore does not encompass asylum claims based on the ECHR whenever the latter extends beyond the Geneva Convention or EU style subsidiary protection (see above MN 21).<sup>168</sup>

57 Over the past 25 years, the ECtHR has developed extensive criteria for limiting state discretion regarding extradition or expulsion whenever the transferee faces a real risk of torture or inhuman or degrading treatment abroad. Since the Court considers Article 3 to enshrine one of the most fundamental values of democratic society, it construes the provision as an **absolute guarantee from which no derogation is possible** and which can therefore also cover those who are excluded from refugee status under the exclusion provisions in the Geneva Convention.<sup>169</sup> The ECtHR accepts, however, that the ECHR does not stand in the way of return whenever the country of destination provides for **diplomatic assurances** that must include, besides abstract obligations, assurances and

<sup>165</sup> For an overview, see Bossuyt, *Strasbourg et les demandeurs d'asile* (Bruylant, 2010), p. 7–48; Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia, 2009), p. 187–358; and Zimmermann, 'Ausweisungsschutz', in: Dörr/Grote/Marauhn (eds.), *Konkordanzkommentar EMRK/GG*, 2<sup>nd</sup> edn (Mohr Siebeck, 2013), ch. 27.

<sup>166</sup> See the former President Wildhaber, 'Ein Überdenken des Zustands und der Zukunft des Europäischen Gerichtshofs für Menschenrechte', *Europäische Grundrechte Zeitschrift* 2009, p. 541–553; and, more generally, Greer, *The European Convention on Human Rights* (CUP, 2006), chs 2–3.

<sup>167</sup> In asylum matters, such a system has not been formalised and it can be difficult, therefore, to discern a clear pattern in the case law, which often shifts between abstract considerations and the individual case; in practice, judgments of the Grand Chamber are particularly relevant; see Thym, 'Respect for Private and Family Life under Art. 8 ECHR in Immigration Cases', *ICLQ* 57 (2008), p. 87, 102–111.

<sup>168</sup> Member States may decide voluntarily, however, to apply the Directive to other claims to protection in accordance with Article 3(3) Asylum Procedure Directive 2013/32/EU.

<sup>169</sup> See ECtHR, judgment of 15 November 1996 (GC), No. 22414/93, *Chahal v. the United Kingdom*, paras 79–80; ECtHR, judgment of 17 December 1996, No. 25964/94, *Ahmed vs. Austria*, para 41 explicitly confirming that the ECHR is wider than the GC; and ECtHR, judgment of 28 February 2008 (GC), No. 37201/06, *Saadi v. Italy*, paras 124–127 in contrast, in particular, to Article 1F GC.

procedures guaranteeing for their actual implementation.<sup>170</sup> In contrast to EU legislation and the Geneva Convention, the ECHR is concerned primarily with the prevention of refoulement and does **not encompass a set of guarantees regulating the legal status of asylum seekers during the asylum procedure or after recognition.**

The ECtHR assumes, controversially, that living conditions abroad after expulsion may amount, even in the absence of persecution, to a violation of Article 3 ECHR if the transferee had to live in extreme poverty or will be subject to excessive cases of **indiscriminate violence** which is not directed against a specific social group but defines the situation in the country concerned more generally. After a series of far reaching judgments in the late 1990s, the ECtHR has adopted a more careful position in recent years by stressing that ‘a general situation of violence will not normally in itself entail a violation of Article 3’, since such an approach is warranted ‘only in the most extreme cases.’<sup>171</sup> In a number of follow up rulings, it has carefully applied these standards to different countries of origin.<sup>172</sup> Along similar lines, the ECtHR has found that **socio economic living conditions**, in particular the lack of medical care, can be covered by Article 3 ECHR in ‘very exceptional circumstances,’ for instance if the applicant effectively faces imminent death upon return.<sup>173</sup> The Grand Chamber confirmed this position in a judgment of principle, because applicants ‘cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services’ even if the standard of living in the country of origin is much lower.<sup>174</sup> Against this background, it is problematic that the ECtHR has applied stricter standards to European countries regarding Dublin transfers (see above MN 29).<sup>175</sup> In relation to third states, the EU legislature and the ECJ adopted a somewhat critical perspective when they designed Article 15 Asylum Qualification Directive 2011/95/EU to be narrower than Article 3 ECHR (see above MN 21).

Besides Article 3 ECHR, the ECtHR assumes that the violation of other human rights in countries of origin can also stand in the way of deportation or extradition. However, in such scenarios, it insists on a particularly strict assessment, thereby effectively

<sup>170</sup> For a list of relevant factors, see ECtHR, judgment of 17 January 2012, No. 8139/09, *Othman (Abu Qatada) v. the United Kingdom*, para 189; note that the guarantees Member States may have to provide in relation to Dublin transfers (see above MN 29) are less strict, mirroring the availability of supervision and redress mechanisms in all European states, including before the ECtHR.

<sup>171</sup> ECtHR, judgment of 17 July 2008, No. 25904/07, *NA v. the United Kingdom*, paras 114–115; more open formulations of earlier rulings include ECtHR, judgment of 17 December 1996, No. 25964/94, *Ahmed vs. Austria*; for a critique of the case law, see Hailbronner, ‘Artikel 3 EMRK – ein neues europäisches Konzept der Schutzgewährung?’, *Die Öffentliche Verwaltung* 1999, p. 617–624.

<sup>172</sup> Cf. the rejection of a real risk of a violation with regard to some part of Somalia in ECtHR, judgment of 28 June 2011, Nos. 8319/07 & 11449/07, *Sufi & Elmi v. the United Kingdom*, paras 212 et seq.; and for Iraq by ECtHR, judgment of 27 June 2013, No. 71680/10, *A.G.A. M. v. Sweden*, paras 29 et seq. (the Grand Chamber accepted the outcome by rejecting a review).

<sup>173</sup> See, for an AIDS patient in ‘advanced stages of a terminal and incurable illness’ (para 51), ECtHR, judgment of 2 May 1997, No. 30240/96, *D. v. the United Kingdom*, para 52.

<sup>174</sup> ECtHR, judgment of 27 May 2008 (GC), No. 26565/05, *N. v. the United Kingdom*, para 42; for the irrelevance of disparities of living standards, see para 44; for an overview of the case law, see Hailbronner, ‘Aufnahme von Flüchtlingen aus Ländern mit prekären Lebensbedingungen und Bürgerkrieg’, *Zeitschrift für Ausländerrecht* 2014, p. 306–312.

<sup>175</sup> Cf. ECtHR, judgment of 21 January 2011 (GC), No. 30696/09, *M.S.S. v. Belgium & Greece*, paras 235–264; and ECtHR, judgment of 4 November 2014 (GC), No. 29217/12, *Tarakhel v. Switzerland*, paras 93–99; it seems to us that the ECtHR wrongly confuses the interpretation of human rights with statutory obligations under the Asylum Reception Conditions Directive 2013/33/EU, see Thym, ‘Menschenrechtliche Feinjustierung des Dublin Systems zur Asylzuständigkeitsabgrenzung’, *Zeitschrift für Ausländerrecht* 2011, p. 368, 369–371.



establishing distinctive standards for internal and removal cases.<sup>176</sup> Instead of applying its case law on the human right in question to the situation in the country of origin, an approach which would result in a problematic application of the intra European human rights standards to the situation abroad, the ECtHR inquires whether we are faced with a ‘**flagrant denial**’ of other human rights – a threshold which is higher than the intra European benchmark and will be met in exceptional circumstances only. In practice, it has found that extreme scenarios of unfair judicial procedures or detention can give rise to an issue under **Articles 5 and 6 ECHR**,<sup>177</sup> although these rules will usually be more relevant in extradition than in expulsion cases. For asylum matters, Article 3 ECHR remains the central yardstick. In line with more recent ECtHR case law, the ECHR can be applied extraterritorially whenever the contracting parties exercise jurisdiction over a person, in particular once he has been transferred to a European border guard vessel on the High Seas (see Thym, Legal Framework for Entry and Border Controls, MN 38–39).

60 The ECHR has gained particular relevance in procedural issues, thereby complementing the rather general standards at international level (see above MN 52–54) with a more specific continental benchmark. Since **Article 6 ECHR does not apply to immigration and asylum cases** due to their non civil and non criminal character,<sup>178</sup> Article 13 ECHR on the right to an effective remedy has become the central yardstick. Any application of the provision requires, in contrast to Article 47 of the EU Charter (see Hailbronner/Thym, Constitutional Framework, MN 37), a prima facie case under Article 3 ECHR, i.e. applicants have to show a real risk of torture, inhuman or degrading treatment in order to avail themselves of the procedural guarantees under the Convention: **Article 13 ECHR does not apply without an arguable complaint**.<sup>179</sup> Once this condition is met, states must establish an effective remedy in relation to which the contracting parties are afforded some discretion.<sup>180</sup> More specifically, the ECtHR has held that the remedy must be available in practice and provide for a prompt response as well as an independent and rigorous scrutiny.<sup>181</sup> It also requires complaints in relation to Article 3 ECHR to have automatic **suspensive effect**, which effectively requires the option of a court oversight before a foreigner is returned to a third state.<sup>182</sup>

### 3. Other International Agreements

61 Other international human rights treaties can influence the interpretation of the EU Charter and may as a result be applicable to the EU asylum acquis (see Hailbronner/Thym, Constitutional Framework, MN 54). In practice, the **Convention on the Rights of the Child** and the **UN and the European conventions against torture** have gained some relevance in asylum matters in the EU context (see *ibid.*), since they complement the guarantees under the ECHR with sector specific non refoulement obligations<sup>183</sup> or,

<sup>176</sup> See also Costello/Mouzourakis, ‘Reflections on Reading *Tarakhel*’, *Asiel & Migrantenrecht* 2014, p. 404, 406–407.

<sup>177</sup> For a summary of the Court’s position, see ECtHR, judgment of 17 January 2012, No. 8139/09, *Othman (Abu Qatada) v. the United Kingdom*, paras 231–235, 258–262.

<sup>178</sup> ECtHR, judgment of 5 Oct. 2000 (GC), No. 39652/98, *Maaouia v. France*, paras 32–41.

<sup>179</sup> Settled case law, see, by way of example, ECtHR, judgment of 21 January 2011 (GC), No. 30696/09, *M.S.S. v. Belgium & Greece*, para 288.

<sup>180</sup> See ECtHR, judgment of 28 October 1999, No. 40035/98, *Jabari v. Turkey*, para 48.

<sup>181</sup> See the summary of the case law in ECtHR, judgment of 21 January 2011 (GC), No. 30696/09, *M.S.S. v. Belgium & Greece*, paras 283–293.

<sup>182</sup> See ECtHR, judgment of 23 Feb 2012 (GC), No. 27765/09, *Hirsi Jamaa et al. v. Italy*, paras 199–200; and ECtHR, judgment of 26 April 2007, No. 25389/05, *Gebremedhin v. France*, para 58; it is sufficient if one court has the option to decide before removal; a final decision of a court of last instance is not required.

<sup>183</sup> See Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia, 2009), ch. 5.

in the case of the rights of the child, may influence the asylum procedure.<sup>184</sup> Whenever these issues are relevant, they are discussed in the chapter commenting on a specific legal instrument.

#### 4. Charter of Fundamental Rights

In accordance with Article 52(3) of the Charter, Articles 4, 7 and 19 EU Charter must be interpreted in line with established ECtHR case law (see above MN 56). This entails that Article 4 of the Charter should be interpreted in line with Article 3 ECHR<sup>185</sup> and that the limitations in Article 52(1) of the Charter cannot be applied to a human right that the ECHR considers to be absolute, such as Article 3 ECHR (see above MN 57). Guarantees for administrative and judicial proceedings under Articles 41, 42, 47 of the Charter extend to asylum law and can be particularly relevant, since they reach further than the ECHR (Hailbronner/Thym, Constitutional Framework, MN 37).

Moreover, Article 18 of the Charter may have a bearing on EU asylum policy, since it guarantees '[t]he right to asylum ... with due regard for the rules of the Geneva Convention ... and in accordance with the [TFEU].' The precise bearing of that provision is not immediately clear given that the wording deliberately evades the designation of an individual right by referring to the guarantees under the Geneva Convention and the EU Treaties in an abstract manner.<sup>186</sup> In particular, Article 18 of the Charter does not state, in contrast to the Universal Declaration of Human Rights, that '[e]veryone has the right to seek asylum.'<sup>187</sup> Moreover, the drafting history shows that the abstract wording was a deliberate choice reflecting a concern among the members of the Convention drafting the Charter about the implications of an individual right to asylum beyond the confines of the Geneva Convention.<sup>188</sup> Notwithstanding these arguments, various authors sustain an individualised interpretation of the provision.<sup>189</sup> In practice, however, these differences have little bearing, since the Asylum Qualification Directive 2011/95/EU establishes an individual right to have asylum claims considered with regard to refugee status *and* subsidiary protection (while Article 18 of the Charter relates to the former only).

<sup>184</sup> See Smyth, *European Asylum Law and the Rights of the Child* (Routledge, 2014).

<sup>185</sup> As confirmed, at least in principle, by ECJ, *N.S. et al.*, C 411/10 & C 493/10, EU:C:2011:865, paras 86, 88 and 109, 114 when judges rejected a higher level of protection under the EU Charter.

<sup>186</sup> The reference to the TFEU supports the argument that the provision may constitute a 'principle' which, in line with Article 52(5) of the Charter, cannot be directly applied but may influence the interpretation of secondary legislation; such interpretation could go beyond a codification of the Geneva Convention due to its impact upon the interpretation of secondary legislation, see Fröhlich, *Asylrecht*, p. 184 et seq., 328, 331; ECJ, *N.S. et al.*, C 411/10 & C 493/10, EU:C:2011:865, para 75 can be read to confirm this interpretation, thereby rejecting an individualised interpretation.

<sup>187</sup> Article 4(1) UDHR.

<sup>188</sup> See Jochum, 'Artikel 18 GRC Asylrecht', in: Tettinger/Stern (eds), *Europäische Grundrechte Charta – Kölner Gemeinschafts Kommentar* (C.H. Beck, 2006), p. 453, 458; and Galetta, 'The European Asylum Policy: Myth and Reality', in: Birkinshaw/Varney (eds), *The European Union Legal Order after Lisbon* (Kluwer, 2010), p. 213, 219.

<sup>189</sup> See Gil Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum', *Refugee Survey Quarterly* 27 (2008), p. 33, 34, 45; den Heijer, 'Article 18', in: Peers et al. (eds), *The EU Charter of Fundamental Rights. A Commentary* (C.H. Beck/Hart, 2014), p. 519, 542; and Groß, 'Migrationsrelevante Freiheitsrechte der EU Grundrechtecharta', *Zeitschrift für Ausländer recht* 2013, p. 106, 110.