CHATHAM HOUSE

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The UN Refugee Convention at 60: The Challenge for Europe

Louise Arimatsu and Marika Giles Samson

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Summary points

- The protection of asylum-seekers in Europe is dealt with under three principal bodies of law: the UN Convention Relating to the Status of Refugees of 1951, the law of the European Union and the soft law developed by the Council of Europe.
- Member states of the Council of Europe are also bound by the judgments of the European Convention on Human Rights; although the convention makes no reference to refugee protection, its provisions and the judgments of its court in Strasbourg impose important obligations on states in respect of asylum.
- The entry into force of the Amsterdam Treaty in 1999 initiated the first phase of the creation of the Common European Asylum System (CEAS), which aimed to harmonize refugee protection among member states while enabling them to meet their international obligations in that respect.
- The harmonizing measures adopted by the EU have been subject to severe criticism and the practices of member states reveal a systemic failure to comply with international refugee protection obligations.
- While there have been improvements in European refugee policy, significant challenges must be addressed before Europe can regain its reputation as a champion of the rights of the refugee. This is given particular urgency by recent events in North Africa, which may lead to large numbers of persons fleeing violence and disorder.

Introduction

In early 2008 an Afghan national fled Kabul, fearing that he would be murdered by the Taliban for having worked as an interpreter for the foreign forces. Travelling via Iran and Turkey, he entered the European Union through Greece and finally arrived in Belgium, where he applied for asylum. Belgium sent him back to Greece, requesting that the Greek authorities process the asylum claim in accordance with the EU 'Dublin II' Regulation establishing which member state is responsible for examining an application. On arrival in Athens, the applicant was detained temporarily and then released. He was forced to live on the streets with no means of subsistence. Denied access to the protections owed to asylum-seekers in accordance with international and European standards, and fearing that he would be returned to Afghanistan because the Greek asylum procedures did not satisfy even the minimum EU standards for processing claims, the applicant brought a claim under the European Convention on Human Rights. At issue was whether EU law and state practice in relation to the implementation of international refugee law were in breach of the applicant's human rights. In January 2011, the European Court of Human Rights (ECtHR) found for the applicant and held that Greece and Belgium had violated Article 3 (prohibition of inhuman or degrading treatment or punishment) and Article 13 (right to an effective remedy).[1] Simply put, EU law was incompatible with the fundamental obligations that the member states owed to those seeking protection under international law.

The Office of the United Nations High Commissioner for Refugees (UNHCR) has described the asylum system in Greece as having collapsed, causing a 'humanitarian emergency' for those affected. According to UNHCR, 48,000 cases remain to be decided in Greece while human rights groups have estimated that more than 500,000 migrants currently live in Greece without any legal status. Prior to the ruling the United Kingdom, Iceland, Sweden and Germany announced that they would suspend the return of asylum-seekers to Greece. Since then, other EU states including Denmark, Finland, Switzerland, Norway and Belgium have followed suit.

> 'Inadequate structures and processes in many European states have left refugees homeless, destitute and relying on charitable hand-outs or, alternatively, incarcerated for prolonged periods in detention centres'

Recent events in North Africa, particularly political unrest in Tunisia and violence in Libya, have the potential to confront EU countries with an even greater refugee and humanitarian emergency. Owing to its proximity to Libya and Tunisia, Italy is likely to be the most immediately affected EU country. At least 6,000 people are reported to have fled Tunisia for the Italian island of Lampedusa since the beginning of the unrest in the country in December 2009, and there are EU concerns that the situation in Libya could lead to many more attempting to reach EU territory.[2] In February 2010, the Italian authorities requested EU assistance to cope with actual and potential movement of refugees across the Mediterranean. As a result, Italy and the EU border control agency Frontex began a joint operation (Hermes 2011), with technical assets provided by several other member states.[3]

1 *M.S.S. v Belgium and Greece*, Application No. 30696/09, Judgment of 21 January 2011 of the Grand Chamber of the European Court of Human Rights. The compatibility with EU law and the EU Charter of Fundamental Rights of returning asylum seekers to Greece under the Dublin system is also being addressed by the Court of Justice of the European Union (CJEU) in *R(NS) v SSHD* (the Saeedi case) C-411/10. This case is being considered jointly with an Irish referral: *M.E., A.S.M., M.T., K.P. and E.H. v Refugee Applications Commissioner and Minister for Justice and Law Reform*, C-493/10.

2 Stacy Meichtry, 'Refugee crisis builds at Tunisia border', *Wall Street Journal*, 2 March 2011. http://online.wsj.com/article/SB10001424052748703409904576174913959221254.html.

3 Council of the European Union, 'Developments in Libya: an overview of the EU's response', 3 March 2011. http://www.consilium.europa.eu/showFocus.aspx?id=1&focusid=568&lang=en.

On the 60th anniversary of the United Nations Convention Relating to the Status of Refugees of 1951 (the Refugee Convention) this paper asks whether Europe – which played a pivotal role in the creation of this humanitarian protection regime – is able to meet its treaty obligations effectively. The paper begins with a snapshot of the convention and a brief history of its evolution over the last six decades within the broader international landscape. In doing so, it examines the gaps in the treaty regime and considers how states have sometimes sought to use the ambiguities inherent in the text to justify contentious policy choices.

The paper next considers the relationship between the Refugee Convention and the evolution of refugee protection within the European Union.[4] In a bid to harmonize the asylum system in the region, EU states have spent the last decade introducing measures to construct a region-specific legal framework for handling refugee claims. Such efforts have the potential to strengthen refugee protection, but whether Europe can live up to the challenge of ensuring consistency with the terms of the Refugee Convention, let alone its spirit, is yet to be seen. Inadequate structures and processes in many European states have left refugees homeless, destitute and relying on charitable hand-outs or, alternatively, incarcerated for prolonged periods in detention centres, with little concern for their physical and mental welfare. Coupled with the apparent increase in xenophobic and intolerant attitudes towards foreigners that has been exacerbated by the rise in irregular migration and a culture of heightened security in the wake of 9/11, is Europe's recent record a cause for concern?

The origins of the Refugee Convention

International refugee law had its genesis in Europe in the wake of the First World War, taking the form of a number of separate inter-state agreements.[5] Drafted in a piecemeal fashion in response to specific migrant flows, these agreements were pragmatic attempts to reconcile the humanitarian aspirations shared by many in Europe with the need on the part of the states to retain control over the entry of non-nationals into their respective territories. This tension between humanitarian principles deriving from general international law and the principle of state sovereignty has continued to be the defining conceptual dichotomy of the international refugee protection system.

The displacement of an estimated one million persons in Europe as a consequence of the Second World War once again highlighted the pressing need for a system of protection and resettlement. Various short-term projects were launched by the newly created United Nations, culminating in the drafting of the 1951 Convention Relating to the Status of Refugees and the establishment of UNHCR with the mandate to 'lead and safeguard the rights and well-being of refugees'.

Unlike its predecessors, the convention did not simply address the needs of a specific group but extended protection to a wider class of persons that included:

> any person who … owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[6]

Expansive in scope and rooted in the broader human rights movement, the Refugee Convention reaffirmed the fundamental norms encapsulated in the Universal Declaration of Human Rights, which had been adopted by the UN General Assembly three years earlier. While international refugee law has continued to shape and be shaped by the developments in human rights law,

4 The scope of this paper is relatively narrow in that it engages primarily with measures adopted by the European Union to harmonize refugee protection among the member states. As such, the contribution of the Council of Europe towards the evolution of refugee protection in Europe, while significant, is not considered in detail.

5 Including the 1933 Convention Relating to the International Status of Refugees and the 1938 Convention Concerning the Status of Refugees Coming from Germany.

6 Refugee Convention, Article I.A(2).

Box 1: Four elements that characterize convention refugees

1. They are outside their country of origin;
2. They are unable or unwilling to seek or take advantage of the protection of that country, or to return there;
3. Such inability or unwillingness is attributable to a well-founded fear of being persecuted; and
4. The persecution feared is based on reasons of race, religion, nationality, membership of a particular social group, or political opinion.

Source: Guy Goodwin-Gill and Jane McAdam (2007), *The Refugee in International Law* (Oxford: OUP), p. 37.

the substantial body of caselaw that has been generated by domestic courts engaging with the provisions of the convention has contributed to the evolution and strengthening of the protection of refugees in international law. The adoption of the New York Protocol in 1967 eliminated the temporal[7] and geographic[8] limitations of the Refugee Convention and it became truly universal in scope. The breadth of its language has been matched by the extent of its adoption: UNHCR lists 147 states, including all EU member states, as having ratified either the convention or its protocol, or both.

Over the decades, the convention has successfully provided a legal framework for the protection of refugees fleeing from persecution by repressive regimes or from situations of armed conflict.

Rights, limitations and gaps under the Refugee Convention

What is a refugee?

In order to fall within the Refugee Convention, a claimant must be situated 'outside' his or her country of origin since an intrinsic element of the refugee definition is the fact that an international border has been crossed. The convention does not require that persecution should have actually occurred but merely that the claimant has a well-founded fear of persecution based on at least one of the five grounds of persecution (point 4 in Box 1). Each of these grounds has been developed by courts in different jurisdictions in the field of non-discrimination. The criterion 'membership of a particular social group' has enabled courts to progressively extend protection to groups unrecognized at the time of the drafting of the convention, such as gays and lesbians. Nevertheless, although non-discrimination on the grounds of sex is well-established in international law, there has been a general reluctance to add gender to the list of convention reasons for persecution.

What are the rights of a refugee?

The determination by a state that a claimant or group satisfies the definition of refugee status entitles such persons to remain on the territory of the receiving state and receive the benefit of certain civil, political, social and economic rights. These include the right to engage in wage-earning employment and to practise a profession; freedom of association; access to housing, education and welfare; entitlement to benefit from labour and social security legislation; and entitlement to receive travel documentation.

In addition to this bundle of rights, the convention also accords the refugee basic protections by imposing certain limitations on the host state. For example, the state is prohibited from penalizing a refugee who has entered the territory illegally provided the refugee applies for asylum without delay and shows good cause for his or her illegal entry or presence (Article 31). The convention also limits the bases upon which a state may expel a refugee to circumstances where the refugee constitutes a danger to national security or, having been convicted of a serious crime, to the community (Articles 32 and 33). More broadly, in applying the provisions of the Refugee

7 Events prior to 1 January 1951 (Article I.A(2)).

8 With 'events' being further defined as either (a) events in Europe; or (b) events in Europe and elsewhere (Article I.B(1)), with individual states parties opting to limit or extend their obligations.

Convention, the state is prohibited from discriminating on the basis of race, religion or country of origin (Article 3).

The principle of *non-refoulement*, encapsulated in Article 33(1) of the Refugee Convention, forms the bedrock of refugee protection. Under the provision, states are prohibited from expelling or returning a refugee or asylum-seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion. Derogation to Article 33(1) is permitted only where there are overriding reasons of national security or public safety (Article 33(2)) – that is, only in such circumstances may a state declare that it will not apply that provision. By contrast, where a person faces a risk of torture or cruel, inhuman or degrading treatment or punishment, there is an absolute prohibition on *refoulement*. While this rule is found in human rights law, Article 33(1) is now interpreted so as to encompass it. Thus, there are no permissible exceptions to the prohibition on *refoulement* where the individual asylum-seeker faces the risk of torture.[9]

Gaps in the convention?

There are nevertheless serious gaps in the Refugee Convention that states have exploited. Most notably, it does not guarantee a person (even one meeting the definition) the *right* to be granted asylum. The convention is also silent on the procedures by which refugee status is determined; nor indeed does it guarantee access to the receiving state's territory or any refugee claims process. Moreover, there is no body endowed with the authority to clarify or define the somewhat vague language of the convention. While the Executive Committee of the UNHCR may, and frequently does, provide advice on interpretation in its *Conclusions*, this advice is non-binding. The ambiguity of the language of the convention has enabled states to interpret many of the provisions to suit domestic political agendas, often leaving refugees vulnerable. Significant variations between states have arisen, leading to wide discrepancies in refugee acceptance rates, as well as differences in the rights accorded to recognized refugees. And because the convention does not provide an enforcement mechanism, there are no apparent consequences even for blatant breaches. While similar weaknesses have been identified in other major human rights instruments, most have oversight committees to which states parties must report. They are thus endowed with a soft enforcement mechanism of the 'name and shame' sort. There is no such committee for the Refugee Convention.

The evolution of refugee protection in Europe

The early years

During the early years of the Refugee Convention, migrant flows into Europe were relatively small and stable. Both refugees and economic migrants were welcomed since they were able to fill the gap in the labour market in the continent's expanding economies. But as recession and high rates of unemployment confronted European states after the 1973 oil crisis, reluctance to admit new migrants grew. A radical shift in attitude towards refugee protection followed the collapse of Communist regimes in Eastern Europe and the break-up the Soviet Union. The conflict in the Balkans created a refugee problem not witnessed in Europe since the Second World War, while the escalation in civil wars across the world triggered an unparalleled movement of people fleeing violence. Although most fled to neighbouring states, wider access to air travel enabled a proportion of refugees to seek protection further afield, including in Europe. As numbers rose, compounded by the rise in economic migrants fleeing poverty, European states began to adopt ever more restrictive legislation and entry policies.

The European Union

The evolution of refugee protection in Europe cannot be fully understood without taking account of the broader context of the development of the European Union framework. From a loose web of trade relationships, the EU has evolved into a more robust regional system concerned with matters that go beyond economic union. With the

9 *Chahal v. United Kingdom*, Application No. 70/1995/576/662, Judgment of 15 November 1996 of the Grand Chamber of the European Court of Human Rights.

adoption of the first Schengen Agreement on freedom of movement in 1985 came the imperative for cooperation on immigration and asylum matters and the genesis of the idea that refugee protection or asylum policy should be managed on a Europe-wide basis. Over the following years member states at the intergovernmental level adopted a series of measures that were primarily concerned with limiting the flow of immigration. Measures dealing with 'asylum-shopping', the introduction of expedited procedures for 'manifestly unfounded' asylum claims and agreed interpretations of international commitments all suggested that refugee issues had become part of a larger immigration agenda, dominated by economic priorities.

Many of the measures adopted by European states during this period came under harsh criticism for being incompatible with the Refugee Convention. The 1990 Dublin Convention, which identified which state was responsible for assessing asylum applications lodged in the region, and the Schengen Convention, which was concerned with internal security and restrictions on the entry of third-country nationals, were two such examples. In effect, the Dublin system functioned to defer the responsibilities of individual states under the Refugee Convention, while the Schengen system assumed that there was a uniform, or at least uniformly compliant, application of the convention throughout the European Community. Two decades after the adoption of these systems, the concerns originally raised by the critics were vindicated by the 2011 judgment of the ECtHR mentioned at the start of this paper.

As the European Union moved towards greater integration during the 1990s, proposals were advanced to move asylum from being a matter of intergovernmental cooperation to Community jurisdiction, initially without much success. Throughout this period the EU continued to adopt a series of restrictive measures that were intended to disqualify asylum applications in a summary fashion, and these were supplemented by cooperative measures to facilitate expulsion of failed asylum-seekers and illegal immigrants. The 1997 Treaty of Amsterdam finally transferred asylum matters to Community competence. With this move, the Council of Ministers was given the authority to adopt legally binding instruments of harmonization while the European Court of Justice was extended a measure of judicial oversight in respect of asylum matters.

A regional framework

In May 1999 the entry into force of the Amsterdam Treaty, which requires that EU legislation comply with the Refugee Convention and its protocol as well as other relevant treaties, initiated the first phase of the creation of the Common European Asylum System (CEAS). Its aim was to harmonize the legal frameworks of member states on the basis of common minimum standards.

While the focus of this paper is on the development of refugee protection within the EU, the activities of the Council of Europe (CoE) in the sphere of refugee protection must also be acknowledged, since EU member states are also states parties to the CoE and are bound by the decisions of the ECtHR. Since the late 1950s, the CoE has adopted numerous treaties on refugee protection that have indirectly contributed towards development of the law within Europe. Since taking office in 2005, the Commissioner for Human Rights has announced that the protection of the human rights of asylum-seekers and refugees has been designated a priority area. But perhaps the most progressive development in recent years has been the completion of the draft convention on preventing and combating violence against women and domestic violence, transmitted to the Council of Ministers in December 2010. If adopted as proposed, this will represent the first treaty which expressly recognizes gender-based violence as amounting to persecution within the meaning of the Refugee Convention.

A regional approach to refugee protection is not unique to Europe. Latin America has a long asylum tradition while Africa has also developed a number of regional and sub-regional protection instruments. In both regions a very expansive definition of 'refugee' has been adopted. The 1969 Organization of African Unity Convention on Refugee Problems in Africa, for example, extends protection to those forced to leave their country of origin on account of external aggres-

sion, occupation, foreign domination or events seriously disturbing public order. The 1984 Cartagena Declaration, endorsed by the Organization of American States, similarly broadens the definition of refugee to persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances seriously disturbing public order. In addition, the African Union has introduced an extraordinarily progressive approach to burden-sharing among member states.

> 'Common procedures can enhance efficiency, speed, quality and fairness of decision-making, while uniform and transparent standards of treatment can promote accountability'

Regional paradigms thus have the potential to raise standards and address issues that are specific to the region. The development of a coherent and comprehensive system across a region can improve and ensure access for those in need of protection. Common procedures can enhance efficiency, speed, quality and fairness of decision-making, while uniform and transparent standards of treatment can promote accountability. New substantive law can also be adopted, addressing additional matters such as gender considerations and the special needs of certain groups. On a practical level, harmonization can facilitate cooperation in the areas of training and expert knowledge, promoting greater resource management and ensuring coherence with other policies including border control and fighting transnational criminal activity. But there are also potential dangers and drawbacks associated with harmonization, as illustrated by the European experience.

The Common European Asylum System

Over the last decade the EU has adopted significant legislation as part of the CEAS, under the umbrella of three consecutive five-year programmes – or roadmaps – comprising the Tampere (1999–2004), Hague (2004–09) and Stockholm (2009–12) Programmes. The Tampere conclusions emphasized absolute respect for the right to seek asylum under the Refugee Convention, but concerns have been voiced that the practical effect of this EU legislation has been to lower the standards of refugee protection rather than raise them, and a review ('recast') is currently under way. Some of that legislation is considered below.

Dignified standards of living

The *Reception Conditions Directive* (2003) requires that states provide claimants with a 'dignified standard of living' and purports to limit the use of detention for asylum-seekers to situations where it is necessary to verify identity. States must provide a certain minimum level of shelter, food and clothing, a financial allowance, medical care and access to education. Bars on employment should be lifted after no more than six months unless a final negative decision has been taken on the applicant's claim. Regrettably, rather than raising standards in less generous countries, there is evidence to indicate that these minimum standards have served to lower standards across the region in the interest of uniformity. But perhaps the most troubling feature of the directive is that it permits states, for legal reasons or reasons of public order, to confine an applicant to a particular place in accordance with national law. In other words it authorizes the detention of an asylum-seeker in a closed facility at the state's discretion. This has meant that the detention of asylum-seekers remains endemic among some states.

Effective processing of applications

The *Procedures Directive* (2005) concerns the processing of asylum applications. Although the purpose of the directive is to establish minimum standards in the region to best ensure that all claimants are accorded effective access

to asylum procedures, experts in the field and human rights organizations have voiced concerns that the standards encapsulated in the directive do just the reverse. The repeated reference throughout the directive to the need for speedy determinations has the potential to address one of the most emotionally arduous aspects of the asylum process for the refugee – delay. But the downside to accelerated procedures is the risk of poor decision-making, which has regrettably become a common feature in many European states. Given that a negative decision in one EU state effectively bars an asylum-seeker from the protection of all member states, the consequences of summary justice can be grave.

> 'The appalling living conditions that face asylum-seekers in many of the gateway states, compounded by the lack of state support … have meant that European states are routinely evading their convention obligations'

The most controversial aspect of the Procedures Directive concerns the incorporation of two concepts: the 'safe third country' and the 'safe country of origin'. Where the claimant is deemed to have come from a 'safe third country' or a 'safe country of origin', the directive permits a member state to dismiss the application as manifestly unfounded. Designating which countries are considered 'safe' is left to the discretion of the individual member state. As Erika Feller, UN Assistant High Commissioner for Refugees (Protection), has observed,

> Notions such as 'effective protection elsewhere' are increasingly entering asylum systems […] if the notion is to have any currency, its applicability should be determined on an individual basis, not on a country basis, and certainly not in the case of persons who have passed through countries of 'mere transit'. Any decision to return an asylum-seeker to a 'safe third country' should be accompanied by assurances that the person will be readmitted to that country, will enjoy there effective protection against refoulement, will have the possibility to seek and enjoy asylum and will be treated in accordance with accepted international standards.
>
> Similar concerns exist with the notion of 'safe country of origin', which is also coming to serve as an automatic bar to access to asylum procedures. It is impossible to exclude, as a matter of law, the possibility that an individual could have a well-founded fear of persecution in any particular country, however great its attachment to human rights and the rule of law.[10]

Which EU country assesses an asylum claim?

The objective of the *Dublin II Regulation* was to establish the criteria and mechanisms for determining which member state is responsible for assessing an asylum claim. It was predicated on the presumption that all member states would respect the rights of asylum-seekers, examine claims in a fair and effective manner and grant protection in line with international and European law. Created purportedly to promote solidarity among European states, in practice the system has imposed untenable pressure on those states situated along Europe's borders: 'gateway' countries such as Poland, Spain, Italy and Greece. The failure of these states to cope with the additional refugee numbers has been well documented and has resulted in largely dysfunctional claims-processing systems and human rights abuses. At the time of its adoption, NGOs and UNHCR expressed concerns that external-border member states – some of which are among the poorest countries in the EU – would be overwhelmed by the burden of assessing the vast majority of applications into the region. Warnings that the system would create further problems, including the risk that the border states would adopt more restrictive policies undermining the

10 Erika Feller (2001), 10 *Forced Migration Review* 6, p. 7.

EU harmonization project, or that their decision-making capacity would be seriously impaired, leading to violations of the Refugee Convention particularly in respect of *non-refoulement*, went unheeded.

The Dublin system has had the effect of not only insulating countries such as France, Germany, Austria and Holland but also facilitating the abdication of individual state responsibility under the Refugee Convention since the asylum-seeker is, as a matter of procedure, returned to the original EU state of entry for assessment. The appalling living conditions that face asylum-seekers in many of the gateway states, compounded by the lack of state support, limited access to application processes, poor decision-making and summary deportations, have meant that European states are routinely evading their convention obligations. Defenders of the Dublin system have long maintained that for genuine refugees it should not matter which European state processes the claim. Critics point out that this logic is predicated on a 'one status, one procedure' level of pan-European harmonization that has simply not yet been realized.

Subsidiary protection for those who are not refugees

The *Qualification Directive* (2004) opened the debate as to *who* was entitled to protection. European states have traditionally allowed persons needing protection, despite not technically falling into the definition of refugee, to remain in their territories. But because such persons fell outside the scope of the Refugee Convention, state practice differed significantly. Although the adoption of human rights treaties as well as the evolution of customary international law have reduced the discrepancies, wide disparities between the practice of EU states as to the scope of 'subsidiary protection' continued to dominate. For example, during the first quarter of 2007, Sweden granted subsidiary protection to 73% of Iraqi nationals in its territory while the recognition rate in both Greece and the Slovak Republic was 0%.

The Qualification Directive endeavours to address these disparities by laying down 'minimum standards for the qualification of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted'.[11] The introduction of a uniform level of protection, it was reasoned, would reduce secondary

Box 2: The Elgafaji case

Elgafaji v. Staatssecretaris van Justitie (The Netherlands)

The applicant, an Iraqi national, fled Iraq for the Netherlands, following the murder of his uncle by a local militia group, and under threat of death for having worked for a British security firm. In its ruling under the Qualification Directive the ECJ held that by contrast to the specific harms defined in sub-sections (a) and (b), the harm in sub-section (c) was broader and covered a more general risk of harm. The court affirmed that 'indiscriminate violence' may extend to people irrespective of their personal circumstance and the existence of a serious and individual threat to the life and person of an applicant is not subject to the condition that he adduces evidence that he is specifically targeted by reason of factors particular to his personal circumstances. (C-465/07, Ruling of 17 January 2009 of the Grand Chamber of the European Court of Justice)

Six months later, in the UK case of *QD & AH i*nvolving two Iraqi nationals who had sought protection in the United Kingdom, the Court of Appeal relied on the ECJ's ruling and found that the immigration tribunal had erred in law in giving a restrictive interpretation of the provision. The critical question, in the light of the Directive and of the ECJ's jurisprudence, was: 'Is there in Iraq or a material part of it such a high level of indiscriminate violence that substantial grounds exist for believing that an applicant such as QD or AH would, solely by being present there, face a real risk which threatens his life or person?' (*QD (Iraq) v Secretary of State for the Home Department*, [2009] EWCA Civ 620 (24 June 2009), para. 40)

11 Article 1.

movements within the region based on differing rights and benefits. While conceding that the directive is to be welcomed for having established a *legal* basis for subsidiary protection, critics have also cautioned that the directive is based on restrictive entrance policies that have lowered standards of protection.

Under the directive, persons who are eligible for subsidiary protection include third-country nationals or stateless persons who do not qualify as refugees but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to their country of origin, would face a real risk of suffering serious harm.

'Serious harm' is further defined as

(a) death penalty or execution;
(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

The wording in sub-section (c) has been subject to controversially narrow interpretations by courts. This has too often meant that despite the continued violence in places like Iraq, Afghanistan and Somalia, persons seeking protection from the indiscriminate effects of generalized violence in such armed-conflict situations have been returned to their country of origin.

A decision of the European Court of Justice in 2009 may ameliorate the situation (see Box 2), but without specific criteria to assess the exceptional circumstances under which a situation of indiscriminate violence warrants the grant of subsidiary protection, member states may continue to adopt differing approaches.

The directive has introduced progressive developments. It clarified that persecution based on sexual orientation is to be regarded as persecution as a member of a social group. In addition, the directive allows for claims by women on the grounds of abuse or denial of rights on sexual grounds (including female genital mutilation, forced marriage and state-sanctioned marital abuse). It allows for limited family reunion for those who have been granted subsidiary protection.

But as national courts dissect the precise meaning of the words and phrases to determine who is entitled to subsidiary protection, the risk is that the Refugee Convention and refugee status will become increasingly sidelined as the appropriate framework for securing international protection. As Volker Türk, Director of International Protection at UNHCR, has forcefully argued,

> there are those who, in UNHCR's view, meet the Convention criteria but who, because of varying interpretations, are not recognized by states as refugees under the 1951 Convention. For instance, those who fear gender-related persecution or persecution by non-state agents or … those who flee persecution in areas of on-going conflict or general violence may not, in some states, be determined to be refugees. It is our view that a proper application of the 1951 Convention and the 1967 Protocol is itself key in securing international protection to these categories of persons. Limiting such persons to complementary forms of protection is, in UNHCR's view, not appropriate.[12]

Conclusions: The future of refugee protection in Europe

A substantial body of public opinion considers that Europe has to bear far more than its fair share of asylum-seekers. The statistics, however, tell another story. Latest figures indicate that 80% of the world's refugees are located in the developing world. For example, there are 260,000 Somali refugees in just one camp in Kenya while Pakistan hosts a staggering 1.7 million registered refugees, most of whom are from neighbouring Afghanistan. According to EUROSTAT figures, during 2009 there were approximately 263,000 asylum claims in the EU as a whole compared with 220,000 in South Africa alone. Moreover, there has been a significant decline in the number of asylum applications to the EU since its peak in 1992 when

12 Volker Türk, 'Protection Gaps in Europe? Person fleeing the indiscriminate effects of generalized violence', Statements by the Assistant High Commissioner for Protection and Director of the Division of International Protection, 18 January 2011. http://www.unhcr.org/.

an estimated 670,000 claims were recorded in what was then a union of 15 member states. During 2009, protection was granted to 78,800 asylum-seekers by the 27 EU member states. Malaysia alone granted almost half as many applications: 35,524. Ecuador granted protection to over 26,000 people. Ethiopia took in 19,141 asylum-seekers. In the face of these global figures, it is clear that the EU is not shouldering a disproportionate load.

> "The development of a fair, efficient and transparent asylum system would help to alleviate public anxiety and misconceptions about the nature of asylum as well as assisting the refugee in need of protection"

Despite the historically low number of applicants seeking protection within the EU, some states have began to adopt a variety of policies designed to prevent refugees from even reaching the point of being able to lodge an asylum claim. For example, under the 2009 Treaty of Friendship between Italy and Libya an agreement was reached to cooperate in fighting 'illegal immigration', allowing Italy's coastguard to return boatloads of migrants to Libya. Such measures have been condemned by the human rights community as a violation of the principle of *non-refoulement* on the part of Italy since Libya does not have a functioning asylum system, nor is it a signatory to the Refugee Convention.

The development of a fair, efficient and transparent asylum system would help to alleviate public anxiety and misconceptions about the nature of asylum as well as assisting the refugee in need of protection. Public debate has too often confused the issue of asylum with immigration and irregular migration. Abuse of the asylum system by some, which has been overblown in unhelpful rhetoric by certain quarters of the media and those in public life, has too often led to counter-productive measures being implemented by governments. This in turn has served to reinforce public misconceptions and led to poor decision-making by state officials, resulting in prolonged appeal processes and rising costs. The development of a robust and fair asylum system has the potential to break this damaging cycle.

What conclusions can be drawn in respect of the standard of refugee protection in the EU? There are some states within Europe that have a long tradition of offering asylum and resettlement to refugees. These states generally uphold protection standards that are compliant with human rights law. Nevertheless, on the 60th anniversary of the Refugee Convention, far too many states within the EU continue to fail those in need of protection. Some states appear unable to address the huge backlog of asylum applications while bad practice remains endemic in others. States frequently defer deciding on a claim in the expectation that the situation in a country of origin will change. Delaying the registration of asylum-seekers to avoid offering reception facilities is a practice that is also well documented. Despite endeavours to harmonize standards, huge disparities continue to exist between EU member states in respect of the provision of legal advice, the quality of decision-making and the appeal process, and assessments regarding the country of origin. Positive asylum adjudication rates continue to differ widely between member states and there is no mechanism to address this problem. During 2009, the rate of recognition of Somali applicants in EU member states varied between 4% and 93% while the recognition rate for Afghan asylum-seekers in the two EU countries receiving the largest number of applications was 44% and 1% respectively. These figures challenge the idea of a *common* European system.

The measures adopted under the CEAS have been criticized for lowering standards rather than reducing the disparities between EU member states. What is more, the absence of an enforcement mechanism has resulted in widespread non-compliance, even with the minimum standards encapsulated in the directives. Some critics have concluded that many of Europe's

asylum systems have not appeared to progress much since the start of the harmonization process in 1999, with international protection often being subordinated to the interests of managing migration.

It would be wrong, however, to convey the impression that there is no good news. The harmonization process mandated by Tampere has produced some very positive outcomes. The Qualification Directive, for example, requires states to give protection to those persecuted by persons not acting on behalf of a state. Not all EU states had previously done so. It has also added substantially to the required grounds for protection, including for persecution based on sexual grounds, and it has introduced protection for those fleeing generalized violence, as discussed above. The announcement in 2009 that a Europe Asylum Support Office would be established to assist in improving the way Community rules on asylum are implemented and applied throughout the region also offers some optimism. Moreover, the entry into force of the Lisbon Treaty and the Charter of Fundamental Rights in 2009 is at least symbolically significant: Article 18 of the charter guarantees the right to asylum by reference to the Refugee Convention. And the decision by the European Parliament in December 2010 to allow refugees and beneficiaries of international protection to apply for long-term resident status is certainly indicative of a humane approach.

Asylum practices in many European states go beyond the strict requirements of the Refugee Convention, and the developing caselaw of the ECtHR has provided a measure of human rights protection for those whose removal might lead to the violation of European Convention rights. The development of an EU asylum system offers an opportunity to raise the standard of protection throughout the region and for Europe to live up to the aspirations upon which the Refugee Convention was originally founded. The CEAS, as it currently exists, falls short of that promise but if the EU is committed to safeguarding its reputation as the protector of human rights, the structures are in place for it to do better.

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Louise Arimatsu is an Associate Fellow in International Law at Chatham House, and a visiting lecturer at University College London.

Marika Giles Samson is an Associate Fellow in International Law at Chatham House.

Chatham House
10 St James's Square
London SW1Y 4LE
www.chathamhouse.org.uk

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