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2015

Introducing the Second Phase of the Common European Asylum System

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C Bauloz, M Ineli-Ciger, S Singer and V Stoyanova, 'Introducing the Second Phase of the Common European Asylum System' in C Bauloz, M Ineli-Ciger, S Singer and V Stoyanova (eds), *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common European Asylum System* (Martinus Nijhoff Publishers, 2015) 1-19.

CHAPTER 1

Introducing the Second Phase of the Common European Asylum System

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If the roads to reach the European Union (EU) are often dangerous for asylum-seekers,¹ they only constitute preliminary steps on the tortuous journey of seeking protection within the Union. Being granted asylum in EU Member States is indeed a sinuous process, reflecting the complexity of the communitarian protection regime established at the EU level, the so-called 'Common European Asylum System' (CEAS). The complexity surrounding the CEAS is in turn inherent to its very rationale, scope and evolution.

First, it would be misleading to conceive of the CEAS as a purely protection-oriented system built on the basis of Member States' obligations under international refugee law and international human rights law. Its rationale is more complex, as it is also a product of Member States' *policy* interests in the field of migration and asylum.² Hence, this communitarian regime was not only established with the view to enhance asylum protection in the EU, but also with the objective of combating the so-called phenomenon of 'asylum shopping'.³ With the abolition of internal borders within the then European Community,⁴ concerns were indeed raised that asylum-seekers would begin moving from

¹ This is sadly illustrated by the dramatic number of boat people who perish every day in the Mediterranean Sea. According to the United Nations High Commissioner for Refugees (UNHCR, 'High Seas Tragedies Leave More than 300 Dead on the Mediterranean in Past Week' *UNHCR News Stories* (26 August 2014) <<http://www.unhcr.org/53fc58969.html>> accessed 6 December 2014). These figures nonetheless only account for the deaths that have been identified and reported so that the scale of these high seas tragedies might be even greater.

² As noted by Pirjola, '[t]he objective of the EU's asylum policy is then reconciling the universal interest of asylum-seekers as stated in EU policy documents with the particular interest of the EU or its Member States.' J. Pirjola, 'European Asylum Policy – Inclusions and Exclusions under the Surface of Universal Human Rights Language' (2009) 11 EJML 347, 349.

³ As further detailed below, combating asylum shopping has been the main driving force behind the creation of the CEAS. Nonetheless, the system can be more broadly seen as relying on four main strategic pillars which, in addition to the fight against asylum shopping, include preventing access of asylum-seekers to the EU territory, criminalizing those not entitled to international protection and enforcing their return, and promoting the integration of genuine refugees (V. Chetail and C. Bauloz, *The European Union and the Challenges of Forced Migration: From Economic Crisis to Protection Crisis?* (European University Institute 2011) 4).

⁴ The abolition of internal borders between Member States was necessary to establish the 'free movement of goods, persons, services and capital' in the European Community (see Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders (Schengen Agreement), 30 ILM 68, 14 June 1985 (entry

one State to the other with the view to 'shop' for the country with the most generous asylum policies.⁵ Each individual Member State thus feared becoming the destination country in Europe.

To counter such secondary movements, the Community has relied on a two-step strategy. Firstly, with the 1990 Dublin Convention it established a system allocating responsibility among Member States for the examination of asylum claims.⁶ The effect of this Dublin mechanism has been to return asylum-seekers to the Member State through which they first entered the European Community's territory, thereby countering subsequent movement to other Member States. Secondly, because the Dublin mechanism presupposed similar treatment of refugees in all Member States, and with the view to further decrease incentives for secondary movements of such persons, the Community worked towards harmonizing asylum policies at the European level.⁷ This second strategy however took more time to implement as it entailed extracting asylum from the sole competence of Member States.⁸ This was thus done progressively by first acknowledging asylum as a matter of inter-governmental cooperation under the 1992 Maastricht Treaty⁹ and then instituting it as an area of communitarian competence under the 1997 Amsterdam Treaty.¹⁰ Hence, the Amsterdam Treaty opened the door to the genuine harmonization of asylum policies among EU Member States.

When the CEAS was created in 1999 by the Tampere Presidency conclusions, the overall strategy of countering asylum shopping was integrated as a constituent element of the system.¹¹ Thus, although not explicitly mentioned in the Tampere conclusions, the goal of combating asylum shopping constitutes both the foundation upon which the CEAS was built and its main driving force. Against this background, it therefore comes as no surprise that the CEAS is not as generous as one might expect a regional system of refugee protection to be.

into force: 1 September 1993) and Article 8(a) of the Single European Act of 28 February 1986, OJ L 169/1, 29 June 1987 (entry into force: 1 July 1987)). However, refugees were from the inception of the common area excluded from this 'free movement equation' (E. Guild, 'The Europeanisation of Europe's Asylum Policy' (2006) 18 IJRL 630, 634).

⁵ EU Commission, Completing the Internal Market, White Paper from the Commission to the European Council, COM(85) 310 final, 14 June 1985, 15–16, para 55.

⁶ Dublin Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, OJ C 254/1, 15 June 1990 (entry into force: 1 September 1997).

⁷ As highlighted by Barbou Des Places and Oger, '[...] it is the generalised suspicion vis-à-vis forum shopping that fuels harmonization of the national legislation regulating asylum-seekers' access to the status of refugee, the procedure for the application examination and the reception conditions.' S. Barbou Des Places and H. Oger, 'Making the European Migration Regime: Decoding Member States' Legal Strategies' (2005) 6 EJML 353, 371.

⁸ In 1989, the Presidency already envisioned the long-term objective of harmonizing asylum policies among Member States: '[...] an inventory will be made of national policies on asylum with a view to achieving harmonization.' EU Council, Conclusions of the Presidency, European Council, Strasbourg, 8 and 9 December 1989, EU Doc SN 441/2/89, 1989, 5.

⁹ See Title VI on cooperation in the field of Justice and Home Affairs, OJ C 191/1, 2 July 1992 (entry into force: 11 November 1993).

¹⁰ See Article 63, OJ C 340/115, 10 November 1997 (entry into force: 1 May 1999).

¹¹ See EU Council, *Presidency Conclusions, Tampere European Council, 15 and 16 October 1999*, EU Doc 200/1/99, 16 October 1999, paras 14 and 15.

Second, although the CEAS was conceived as a comprehensive system, it is in fact comprised of an aggregation of various and dispersed rules. This contrasts with other regional refugee protection systems which have been comparatively less ambitious in their scope.¹² While the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration of Refugees have focused on extending the refugee definition to broader categories of asylum-seekers,¹³ the CEAS has rather sought to establish common standards regulating all facets of asylum in the EU.¹⁴ But what is referred to as the CEAS is in fact scattered among multiple directives and regulations aimed at determining the Member State responsible for considering an asylum claim (Dublin Regulation, replacing the 1990 Dublin Convention, and supported by the Eurodac Regulation)¹⁵ and detailing the reception conditions provided to asylum-seekers (Reception Directive),¹⁶ the asylum procedure (Procedures Directive),¹⁷ as well as the type of protection conferred and the rights and benefits granted to those eligible for protection (Temporary Protection Directive and Qualification Directive).¹⁸ As a result, understanding

¹² As Vincent Chetail underscores, although more recent than its regional counterparts the CEAS is much more ambitious in its scope. V. Chetail, 'The Common European Asylum System: Bric-à-Brac or System?', in V. Chetail, P. de Bruycker and F. Maiani (eds.), *Towards a Common European Asylum System: The Added Value of the Legislative Package of Second Generation* (Martinus Nijhoff, forthcoming) (on file with the authors).

¹³ These two instruments have complemented the Convention relating to the Status of Refugees and its 1967 Protocol by extending its refugee definition to additional categories of refugees (see respectively 189 UNTS 150, 28 July 1951 (entry into force: 22 April 1954) and 606 UNTS 267, 31 January 1967 (entry into force: 4 October 1967)). While its Article 1(1) takes up the conventional refugee definition, Article 1(2) of the 1969 Convention further considers a refugee to be 'every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality' (Convention Governing the Specific Aspects of Refugee Problems in Africa adopted by the then Organization of the African Unity (1001 UNTS 45, 10 September 1969 (entry into force: 20 June 1974)). Similarly, the Cartagena Declaration on Refugees provides that '[...] the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees 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 which have seriously disturbed public order' (Recommendation No. 3 of the Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena (Colombia) on 19–22 November 1984). Although the Declaration is not legally binding, it remains authoritative for its extended refugee definition has been incorporated within the asylum legislation of 15 States in Central and South America. See UNHCR, *Definición ampliada de refugiado en América Latina* [Extended Definition of the Refugee in Latin America] (UNHCR America updated as of June 2011) <<http://www.acnur.org/biblioteca/pdf/2541.pdf?view=1>> accessed 6 December 2014.

¹⁴ See Tampere Conclusions (n 11) paras 14–15.

¹⁵ Council Regulation (EC) No 353/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50/1, 25 February 2003; and Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, OJ L 316/1, 15 December 2000.

¹⁶ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers, OJ L 31/18, 6 February 2003.

¹⁷ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13, 13 December 2005.

¹⁸ See respectively Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance

the CEAS is like deciphering a musical score: although each individual note makes a particular sound, it is only taken together that the greater composition can be played. Borrowing the words of Vincent Chetail, 'the CEAS is halfway between a *bric-à-brac* and a true system. The key challenge will be to transform the existing collection of eclectic instruments into a comprehensive and coherent regime of refugee protection.'¹⁹

Third, and finally, the complexity of the CEAS flows not only from its rationale and scope but also from its constant evolution. The EU-wide harmonization of asylum policies has indeed been approached as a step-by-step construction. Since its creation in 1999, the CEAS has undergone two main phases of harmonization. The first phase was conceived by the 1997 Amsterdam Treaty and the 1999 Tampere Conclusions as a preliminary stage with the view to establishing common *minimum* standards in the field of asylum within a five-year period. This mandate led the EU to adopt, in a relatively short time span, the various regulations and directives mentioned above. In 2008, the EU Commission however recognized that this first phase had not been entirely successful in achieving the complete harmonization of asylum policies:

[...] the differences in decisions to recognise or reject asylum requests from applicants from the same countries of origin point to a critical flaw in the current CEAS: even after some legislative harmonisation at EU level has taken place, a lack of common practice, different traditions and diverse country of origin information sources are, among other reasons, producing divergent results. This is creating secondary movements and goes against the principle of providing equal access to protection across the EU.²⁰

The consequent need for more effective harmonization has led the CEAS to enter a second phase of development. As laid down by the EU Council in its 2004 Hague Programme, 'the aim of the [CEAS] in its second phase will be the establishment of a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection'.²¹ This objective was further explicitly recognized by the Council in its 2009 Stockholm Programme as a way to 'prevent or reduce secondary movements within the EU'²² and was ultimately integrated within the 2009 Lisbon Treaty.²³ To be achieved, the

of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212/12, 7 August 2001; and Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304/12, 30 September 2004.

¹⁹ Chetail, 'The Common European Asylum System' (n 12).

²⁰ EU Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Policy Plan on Asylum: An Integrated Approach to Protection Across the EU*, COM(2008) 360 final, 17 June 2008, 3.

²¹ EU Council, *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, OJ C 53/1, 3 March 2005, 3.

²² EU Council, *The Stockholm Programme: An Open and Secure Europe Serving and Protecting the Citizens*, EU Doc 17024/09, 2 December 2009, 69.

²³ Article 78(1) of the consolidated version of the Treaty on the Functioning of the European Union (TFEU), as amended by the Treaty of Lisbon (OJ C 306/1, 17 December 2007 (entry into force: 1 December 2009)), indeed provides that: 'The Union shall develop a common policy on asylum, subsidiary protection and temporary protection [...]. The second paragraph details the necessary measures to be adopted and which comprise: '(a) a uniform status 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

minimum standards developed during the first phase of the CEAS had to be replaced with common standards.²⁴ As a result, most of the regulations and directives that had been adopted in the first phase of the CEAS had to be recast in what is now commonly referred to as the second generation of CEAS instruments. A Recast Qualification Directive was thus adopted in 2011,²⁵ followed in mid-2013 by Recast of the Reception Conditions Directive,²⁶ Asylum Procedures Directive,²⁷ Dublin Regulation,²⁸ and Eurodac Regulation.²⁹

In light of the above, the level of complexity in the CEAS equals its wide-ranging ambitions of being a multifaceted, policy-oriented and harmonized asylum system in the EU. Coupled with the diverse EU measures put in place to prevent asylum-seekers' access to the Union,³⁰ the CEAS takes the form of a labyrinth; obscuring the path to protection, if not the ramparts of 'fortress Europe'.

in need of international protection; (c) a common system of temporary protection for displaced persons in the event of 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.' It is noteworthy that the Lisbon Treaty is the first instrument of EU primary law to expressly refer to the CEAS.

²⁴ Such common standards had to initially be adopted by 2010 according to the 2004 Hague Programme (n 21). The 2008 Policy Plan on Asylum (n 20) and the 2009 Stockholm Programme (n 22) extended this deadline to 2012, while, in fact, the second phase of the CEAS harmonization was achieved mid-2013.

²⁵ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337/9, 20 December 2011.

²⁶ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180/96, 29 June 2013.

²⁷ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180/160, 29 June 2013.

²⁸ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180/31, 29 June 2013.

²⁹ Regulation EU No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast), OJ L 180/1, 29 June 2013.

³⁰ These most notably encompass visa requirements for nationals – including potential refugees – of certain third countries (Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), OJ L 243/1, 15 September 2009; and Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ L 81/1, 21 March 2001 which were both subject to subsequent amendments); interception of migrants trying to reach the European shores (Frontex Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349/1, 25 November 2004 further amended and most

Refugee protection has, however, always been heralded by the EU as a key component of the CEAS. Laying down the foundations of the CEAS, the 1997 Treaty of Amsterdam expressly grounded the asylum measures to be adopted on the protective regime established by the 1951 Refugee Convention, its 1967 Protocol and 'other relevant treaties'.³¹ The 1999 Tampere Conclusions further clarified that the CEAS was to be based on the 'absolute respect of the right to seek asylum', that is, 'on the full and inclusive application of the Geneva Convention [1951 Refugee Convention], thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement'.³² This commitment to refugee protection was integrated in all the CEAS instruments subsequently adopted and was reaffirmed in the second phase of CEAS development.³³ In keeping with the Amsterdam Treaty, the Lisbon Treaty has more recently reiterated the need for the CEAS to respect international refugee instruments and other treaties relevant to international protection.³⁴

Against such laudable pronouncements, one may thus wonder why seeking asylum in the EU still seems to be such a tortuous process. The first phase of the CEAS revealed gaps between the 'protection' rhetoric and actual practice: some CEAS standards adopted under the various regulations and directives either fell short of States' international legal obligations or gave Member States too broad discretion in their implementation.³⁵ Widely criticised by scholars,³⁶ these shortcomings came to the attention of EU institutions. As a

recently by Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 189/93, 27 June 2014); and the externalization of asylum processing through Regional Protection Programmes (see for instance EU Commission, *Communication from the Commission to the Council and the European Parliament on Regional Protection Programmes*, COM(2005) 388 final, 1 September 2005). On these preventive measures against asylum, see Chetail and Bauloz, *The European Union and the Challenges of Forced Migration* (n 3) 5-10.

³¹ Article 63(1) of the 1997 Amsterdam Treaty (n 10).

³² Tampere Conclusions (n 11), para 13. See also, EU Council, *Presidency Conclusions, Seville European Council, 21 and 22 June 2002*, EU Doc 13463/02 POLGEN 52, 24 October 2002, para 29.

³³ See most notably, the 2004 Hague Programme (n 21), 3; and the 2009 Stockholm Programme (n 22), 69. All regulations and directives of the CEAS in its first and second phase made direct reference to international refugee law and human rights law. For the Dublin Regulation, see most notably Recitals 2 and 15 of Dublin II Regulation (n 15) and Recitals 3, 19, 20, 21 and 39 of Dublin III Regulation (n 28); for the Temporary Protection Directive (n 18), see Recitals 10, 16 and 18; for the Qualification Directive, see Recitals 2, 3, 10, 11 and 12 of the 2004 Directive (n 18) and Recitals 3, 4, 16, 17, 18 and 34 of the 2011 Recast Directive (n 25); for the Reception Directive, see Recitals 2, 5 and 6 of the 2003 Directive (n 16) and Recitals 3, 9, 10, 18 and 22 of the 2013 Recast Directive (n 26); for the Procedures Directive, see Recitals 2, 8 and 14 of the 2005 Directive (n 17) and Recitals 3, 15 and 33 of the 2013 Recast Directive (n 27).

³⁴ Article 78(1) of the TFEU, as amended by the Lisbon Treaty (n 23), provides that the CEAS shall be developed 'with a view to offering 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.'

³⁵ The leeway given to Member States was due to the vague wording of certain provisions, as well as to explicit references to Member States' national legislation. See in this sense, C. Teitgen-Colly, 'The European Union and Asylum: An Illusion of Protection' (2006) 43 *Common Mkt L Rev* 1503, 1512-1513; and Chetail, 'The Common European Asylum System' (n 12).

³⁶ Among the vast literature on the CEAS, see most notably: E. Guild and P. Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Martinus Nijhoff Publishers 2011); F.A.N.J. Goudappel and H.S.R. Raulus (eds), *The Future of Asylum in the European Union: Problems, Proposals and Human Rights* (TMC

result, and although prompted by the need for further harmonization, the second phase of the CEAS was also an opportunity to redress these flaws by adopting higher protection standards.³⁷

Whether the second generation instruments have succeeded in enhancing protection is, however, a question that cannot be answered in a straightforward manner. On the one hand, in some instances the instruments have improved the treatment of asylum-seekers in the EU. For instance, important safeguards were introduced with regard to detention in the Recast Reception Directive³⁸ and concerning legal counselling and

Asser Press 2011); P. de Bruyker *et al*, *Setting up a Common European Asylum System: Report on the Application of Existing Instruments and Proposals for the New System*, Study (European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, EU Doc PE 425.622, 2010); E. Guild, S. Carrera and A. Eggenschwiler (eds), *The Area of Freedom, Security and Justice Ten Years On: Successes and Future Challenges under the Stockholm Programme* (Centre for European Policy Studies 2010); S.W. Allard, 'Casualties of Disharmony: The Exclusion of Asylum-seekers under the Auspices of the Common European Asylum System' (2010) 24 *Emory Int'l L Rev* 295; H. Lambert, 'Transnational Judicial Dialogue, Harmonization and the Common European Asylum System' (2009) 58 *ICLQ* 519; O. Ferguson Sidorenko, *The Common European Asylum System: Background, Current State of Affairs, Future Directions* (TMC Asser Press 2007); A. Baldaccini, E. Guild and H. Toner (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Hart Publishing 2007); E. Guild, 'The Europeanisation of Europe's Asylum Policy' (2006) 18 *IJRL* 630; H. Battjes, *European Asylum Law and International Law* (Martinus Nijhoff Publishers 2006); J. Huysmans, *The Politics of Insecurity: Fear, Migration and Asylum in the EU* (Routledge 2006); M. Garlick, 'Asylum Legislation in the European Community and the 1951 Convention: Key Concerns regarding Asylum Instruments Adopted in the "First Phase" of Harmonization', in T. Balzacq and S. Carrera (eds), *Security Versus Liberty? A Challenge for Europe's Future* (Ashgate 2006) 45; Teitgen-Colly, 'The European Union and Asylum' (n 35); J.-Y. Carlier and P. de Bruycker (eds), *Immigration and Asylum Law of the EU: Current Debates* (Bruylant 2005); F. Julien-Laferrrière, H. Labayle and Ö. Edström (eds), *The European Immigration and Asylum Policy: Critical Assessment Five Years after the Amsterdam Treaty* (Bruylant 2005); J. van Selm, 'European Refugee Policy: Is There Such a Thing?' (2005) 115 *UNHCR New Issues in Refugee Research Series*; J. Vedsted-Hansen, 'Common EU Standards on Asylum – Optional Harmonization and Exclusive Procedures?' (2005) 7 *EJML* 369; T.J. Hatton and J.G. Williamson, 'Refugees, Asylum-seekers and Policy in Europe' (2005) 5058 *CEPR Discussion Paper*; S. Da Lomba, *The Right to Seek Refugee Status in the European Union* (Intersentia 2004); C. Harvey, 'The Right to Seek Asylum in the European Union' (2004) 1 *EHRLR* 17; M. Fullerton, 'Asylum on the Eve of Accession: European Developments and Perspectives' in *Proceeding of the Ninety-Eight Annual Meeting of the American Society of International Law (ASIL), Protection Control: Regulating the Movement of People in a Globalized World* (ASIL 2004) 255; A. Klug, 'Harmonization of Asylum in the European Union – Emergence of an EU Refugee System?' (2004) 47 *GYIL* 594; C. Dias Urbano de Sousa and P. de Bruycker (eds), *The Emergence of a European Asylum Policy* (Bruylant 2004); I. Boccardi, *Europe and Refugees – Towards an EU Asylum Policy* (Kluwer Law International 2002); S. Lavenex, *The Europeanisation of Refugee Policies: Between Human Rights and Internal Security* (Ashgate 2002).

³⁷ See in this sense, albeit not so explicitly couched, the 2009 Stockholm Programme (n 22) 69 underlining that the CEAS 'should be based on high protection standards'. The adoption of higher protection standards is more expressly affirmed by the recitals of the recast directives. For instance, the 2011 Recast Qualification Directive provides that: 'In light of the evaluations undertaken, it is appropriate, at this stage, to confirm the principles underlying Directive 2004/83/EC as well as to seek to achieve a higher level of approximation of the rules on the recognition and content of international protection *on the basis of higher standards*' (n 25, Recital 10, emphasis added). See as well Recital 7 of the 2013 Recast Reception Directive (n 26). See also the role of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) in the recast process for setting higher protection standards: F. Ippolito, 'The Contribution of the European Courts to the Common European Asylum System and its Ongoing Recast Process' (2013) 20(2) *Maastricht J Eur & Comp L* 261.

³⁸ For the provisions on detention, refer to Articles 8–11 of the Recast Reception Directive (n 26).

interviews in the Recast Procedures Directive,³⁹ which also now applies to subsidiary protection claims. The Recast Qualification Directive also introduced some positive modifications, including more circumscribed definitions of actors of protection and internal protection,⁴⁰ as well as a quasi-total uniformization of the rights and benefits granted to subsidiary protection beneficiaries and refugees.⁴¹ On the other hand, the extent of these changes appears to be insufficient to fully ensure the effective protection of refugees in the EU. This is particularly striking with respect to the Dublin III Regulation which, despite the systemic deficiencies of the Dublin mechanism, has remained loyal to the wording of its predecessor.⁴²

Against such a mixed background, the CEAS in its second phase does not fully live up to one's expectations in terms of refugee protection. As incisively noted by Steve Peers:

Taken as a whole, the second-phase legislation provides for very limited improvements as regards reception conditions, modest improvements as regards procedures and qualification, no real improvement as regards the Dublin rules and a significant reduction in standards as regards Eurodac. On balance the overall scoreboard is modestly positive, but as regards the Dublin rules in particular there have only been cosmetic changes to the previous objectionable legislation. This legislation in particular deserves the description of being merely 'lipstick on a pig'.⁴³

Albeit recently adopted, the second generation of CEAS instruments has thus already attracted scholarly attention and criticism.⁴⁴ Publications on the subject, highlighting the

³⁹ Concerning legal assistance, see Articles 12 and 19–23, and for safeguards relating to interviews, refer most notably to Articles 14–17 of the Recast Procedures Directive (n 27). For a more detailed account of the Recast Procedures Directive, see S. Peers, *The Revised Asylum Procedures Directive: Keeping Standards Law* (Statewatch 2012).

⁴⁰ See, respectively, Articles 7 and 8 of the Recast Qualification Directive (n 25). On the changes brought about by the Recast Qualification Directive, see: J. Eaton, 'The Internal Protection Alternative under European Union Law: Examining the Recast Qualification Directive' (2012) 24(4) IJRL 765; S. Peers, *The Revised Directive on Refugee and Subsidiary Protection Status* (Statewatch 2011).

⁴¹ See Chapter VII of the Recast Qualification Directive which details the rights and benefits granted to refugees and subsidiary protection beneficiaries. While the granting of such benefits between the two types of protection beneficiaries differed under 2004 Qualification Directive, the only differences remaining between them under the Recast concern residence permits and social assistance. For a more insights on these modifications and their consequences, see: C. Bauloz and G. Ruiz, 'Refugee Status and Subsidiary Protection: Towards a Uniform Content of International Protection?' in V. Chetail, P. de Bruycker and F. Maiani (eds), *Towards a Common European Asylum System: The Added Value of the Legislative Package of Second Generation* (Martinus Nijhoff forthcoming).

⁴² See in this sense, S. Peers, *The Second Phase of the Common European Asylum System: A Brave New World – Or Lipstick on a Pig?* (Statewatch 2013) 6. The *MSS* case ruled by the ECtHR and the *NS* case judged by the CJEU have both highlighted the limits of the Dublin mechanism (see respectively *MSS v Belgium and Greece*, Appl no 30696/09 (ECtHR, 21 January 2011); and Joint Cases C-411/10 and C-493/10 *NS et al v Secretary of State for the Home Department* [2011] ECR I-13905). Contrary to the initial assumption, it is now acknowledged that Member States cannot be automatically considered as safe countries in case of Dublin transfers.

⁴³ Peers, *The Second Phase of the Common European Asylum System* (n 42) 16.

⁴⁴ See most notably: V. Chetail, P. de Bruycker and F. Maiani (eds.), *Towards a Common European Asylum System: The Added Value of the Legislative Package of Second Generation* (Martinus Nijhoff, forthcoming); S. Velluti, *Reforming the Common European Asylum System – Legislative Developments and Judicial Activism of the European Courts* (Springer 2014); H. O'Nions, *Asylum – A Right Denied: A Critical Analysis of European Asylum Policy* (Ashgate 2014); F. Toscano, 'The Second Phase of the Common European Asylum System: A Step Forward in the Protection of Asylum-seekers?' (2013) 7 Institute for European Studies Working Papers;

merits and flaws of these recast regulations and directives, are beginning to emerge. These studies are valuable in enabling one to grasp the contours and content of the CEAS in its second phase as well as identify the challenges still to be overcome.

The present volume aims to complement these recent doctrinal comments. The objective here is not to undertake a comprehensive assessment of the changes introduced by the recast CEAS instruments. Rather, the purpose of this volume is to concentrate on specific protection issues raised by the second phase of the CEAS which are not addressed in studies of a broader nature. The aim of this volume is thus to provide further insight and critical analysis of selected problems that scholars and policy-makers will have to face and address in this second phase of the CEAS. In so doing, specific protection issues are identified and analysed in the present volume. These issues are clustered into three groups: procedural guarantees and reception conditions (Part 1), qualification as persons in need of protection (Part 2) and missed opportunities and problematic developments (Part 3).

Part 1 of this volume focuses on two specific issues concerning the procedure for the assessment of international protection needs and the reception conditions afforded to asylum applicants during the assessment procedure: (i) the possibility of obtaining free legal assistance and (ii) the protection of vulnerable persons in terms of procedural guarantees and reception conditions. In Chapter 2, 'Fair Enough? The UK's Reluctance to Find Article 6 ECHR Engaged in Asylum Disputes and the Transformative Potential of EU Law', Emma Borland addresses the absence of guarantees in the protection assessment procedure. More specifically, she discusses the limited opportunities for asylum-seekers to benefit from legal aid. Since it can be assumed that a significant number of asylum claims involve complex issues in terms of substance and procedure, she asks to what extent cuts in legal aid are compatible with the right to an effective remedy. As background to her analysis, Borland first draws attention to the incremental cuts to legal aid that have taken place in the United Kingdom (UK) in recent years and the corresponding rise in unrepresented asylum claimants. The latter can easily become 'failed asylum-seekers' who are exposed to the danger of being subjected to removal proceedings. She questions the extent to which these asylum applicants, who should rather be named 'asylum-seekers failed by the asylum system', could invoke the standards of EU law and the European Convention of Human Rights (ECHR) for the purpose of enhancing the availability of procedural guarantees in these cases. The EU Procedures Directive, adopted as part of the first generation of the CEAS to which the UK has opted in, leaves Member States wide discretion to decide not to grant legal aid in particular circumstances. As noted by the Commission, this wide discretion permitted a 'proliferation of disparate procedural guarantees at the national level.'⁴⁵ Borland investigates the extent to which this problem has been remedied with the Recast Asylum Procedures Directive. It is commendable that the directive stipulates that at first instance applicants shall be 'provided with legal and procedural information free of charge.'⁴⁶ However, this does not cover the attendance of a representative at the personal interview. In addition, the directive reintroduced the 'merits

and F. Ippolito and S. Velluti, 'The Recast Process of the EU Asylum System: A Balancing Act between Efficiency and Fairness' (2011) 30(3) RSQ 24.

⁴⁵ EU Commission, *Proposal for a Directive of the European Parliament and of the Council on Minimum Standards on Procedures in Member States for Granting and Withdrawing International Protection (Recast)*, COM(2009) 554 final, 21 October 2009 (Proposal for a Recast Procedures Directive).

⁴⁶ Article 19(1) of the Recast Asylum Procedures Directive (n 27).

test' exception to free legal representation.⁴⁷ As a consequence, if the application has 'no tangible prospect of successes', the Member State may refuse free legal assistance and representation. Borland asks whether the ECHR and EU Charter of Fundamental Rights impose higher standards than those incorporated in the Recast Procedures Directive. She reminds us of the unfortunate effects of the *Maaouis v France* Judgment of the European Court of Human Rights (ECtHR) and argues it should be revisited. At the same time, she also sees the transformative potential of EU law in at least two respects. First, EU law confers certain rights which can be framed as civil rights; as a consequence, the operation of Article 6 of the ECHR could be triggered. Second, Borland points out the effects of Article 47 of the EU Charter, which importantly are not restricted to the determination of civil and criminal law cases.

In Chapter 3, 'Victims of Human Trafficking: A Legal Analysis of the Guarantees for 'Vulnerable Persons' under the Second Phase of the EU Asylum Legislation', Vladislava Stoyanova argues that the provisions in the second phase of EU asylum legislation which address the needs of vulnerable persons are so vague that there is a real risk that they could be rendered meaningless in practice. She focuses on victims of human trafficking, who have been designated as vulnerable persons in second phase CEAS instruments. This inclusion raises challenging questions about the interaction between the human trafficking legal framework, which requires a procedure for the identification of victims of trafficking and the provision of certain levels of assistance, on the one hand, and the CEAS, on the other hand. Having closely examined the interaction between the two frameworks, Stoyanova continues to explore the conceptual problems raised by the categories of vulnerable persons, victims of human trafficking, applicants with special reception needs and applicants in need of special procedural guarantees, as introduced by the second phase of the CEAS. She reviews how the EU Recast Reception Conditions Directive and the EU Recast Procedures Directive have structured the assessment of whether applicants for international protection belong to these special categories. She also critically examines the meaningfulness of the benefits attached to these categories. Finally, Stoyanova addresses the perplexing questions that the application of the Dublin mechanism, as regulated by the Recast Dublin Regulation, raise in relation to victims of human trafficking, and argues that in certain circumstances Dublin transfers will have to be suspended.

Part 2 of this volume, entitled 'Qualification as Persons in Need of Protection', concentrates on specific questions raised in relation to the qualification of asylum-seekers as beneficiaries of international protection under the second phase CEAS instruments. With the creation of the CEAS in 1999, qualification for international protection gave rise to the adoption of a specific directive devoted to eligibility standards: the 2004 Qualification Directive. In addition to detailing the rights and benefits granted to beneficiaries of international protection, the purpose of the Directive has been 'to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection'.⁴⁸ This objective has been sought through 'the approximation of

⁴⁷ Ibid, Article 10(3).

⁴⁸ Recital 6 of the Qualification Directive (n 18).

rules on the recognition of refugees' as established by the 1951 Refugee Convention⁴⁹ and with the creation of a subsidiary protection status, complementing refugee status and primarily building on the *non-refoulement* case law of the ECtHR.⁵⁰ Hence, two forms of international protection are regulated at the EU-level: refugee status and subsidiary protection.⁵¹

The adoption of the Recast Qualification Directive in 2011 did not alter this protection scheme.⁵² In structural terms, international protection is still conceived by the EU on the basis of these two protection statuses.⁵³ From a substantive point of view, the Recast Directive did not substantially modify the eligibility standards of both forms of protection. Except for a handful of modifications,⁵⁴ qualification for refugee status and subsidiary protection remains on the whole governed by the same criteria as previously.

The partial maintenance of the status quo raises concerns as to the criteria for qualification for international protection and, more specifically, the actual impact of the modifications introduced by the Recast Directive. While some of these modifications incontestably enhance the prospects for asylum-seekers to receive international

⁴⁹ Ibid, Recital 4. In this regard, the refugee definition provided by the Directive is expressly grounded on the 1951 Refugee Convention. According to its Recital 17: 'It is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the Geneva Convention.'

⁵⁰ See Recital 5 of the Qualification Directive (n 18): 'The Tampere conclusions also provide that rules regarding refugee status should be complemented by measures on subsidiary forms of protection, offering an appropriate status to any person in need of such protection.' As to the relationship of subsidiary protection with the *non-refoulement* jurisprudence of the ECtHR, see most notably: EU Council, *Note from the Presidency to the Asylum Working Party, Discussion Paper on Subsidiary Protection*, EU Doc 13167/99 ASILE 41, 19 November 1999, 2; and EU Council, *Note from the Presidency to Asylum/Migration Working Group, Implications of Article 3 of the European Convention on Human Rights for the Expulsion of Illegally Resident Third Country Nationals*, EU Doc 7778/97 ASIM 89, 28 April 1997. See also the following judgments of the CJEU and ECtHR: CJEU, Case C-465/07 *Meki Elgafaji & Noor Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-00921 para 28 and ECtHR, *Sufi and Elmi v the United Kingdom*, Appl nos 8319/07 and 11449/07 (ECtHR, 28 June 2011) para 226.

⁵¹ Within the EU, temporary protection is not per se conceived as a form of international protection and will thus be dealt with separately in Part 3 of the present volume. Moreover, the fact that the Qualification Directive regulates the granting of refugee status and subsidiary protection is without prejudice to the existence of other forms of protection prescribed at the national level. As Recital 9 of the 2004 Qualification Directive reminds us: 'Those third country nationals or stateless persons, who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds, fall outside the scope of this Directive.'

⁵² At least when it comes to qualification for international protection. The most important changes brought about by the 2011 Recast Qualification Directive rather concern the content of international protection as the majority of benefits granted to subsidiary protection beneficiaries were aligned with those of refugees (see above n 41).

⁵³ See Recitals 5 and 6 of the 2011 Recast Qualification Directive (n 25), which restate verbatim Recitals 4 and 5 of the 2004 Directive.

⁵⁴ For a list of the modifications introduced by the Recast Qualification Directive, see S. Peers, *The Revised Directive on Refugee and Subsidiary Protection Status* (n 40) 3-6. Among these modifications, those concerning the eligibility criteria for international protection include: 1) a more generous definition of family member (Article 2(j)); 2) clarifications as to the notion of protection by the actors of protection (Article 7); 3) a more detailed definition of the internal protection alternative (Article 8); 4) a direct reference to the absence of protection in the definition of persecution (Article 9(3)); 5) a more gender-sensitive definition of membership of a particular social group (Article 10); and 6) a more circumscribed ground of cessation of protection in case of ceased circumstances in the country of origin (Article 11).

protection,⁵⁵ others appear of modest impact.⁵⁶ For instance, this is the case with the changes made to Article 7 of the Directive on actors of protection, critically analysed by Julian M. Lehmann in Chapter 4 entitled 'Availability of Protection in the Country of Origin: An Analysis under the EU Qualification Directive'. By examining the implementation of Article 7 of the 2004 Qualification Directive in Germany, the United Kingdom and the Netherlands, the author highlights significant differences in the interpretation of the provision. These differences include how much emphasis courts place on the analysis of the existence of actors of protection in the country of origin, where they locate such analysis and whether they link it to the nexus requirement of the refugee definition, whether they expect individuals to appeal to authorities of the host country, which elements are considered relevant when considering protection against persecution and serious harm, and whether decision makers substantiate their conclusions. According to Lehmann, these divergences are not likely to be overcome by the modifications of Article 7 introduced by the Recast Qualification Directive. Indeed, the latter still gives Member States considerable leeway in its interpretation.

Moreover, other provisions governing qualification for international protection contained in the Qualification Directive have not been subject to any modifications despite the pressing need for clarification. The most striking illustration often given is that of Article 15(c) concerning subsidiary protection⁵⁷ which, although highly debated, was ultimately left untouched during the recast process.⁵⁸ Chapters 5 and 6 of the present volume also shed light on other – so far less examined – protection issues that deserved to be addressed by the Recast Qualification Directive.

In this regard, Chapter 5 entitled 'The Persecution of Disabled Persons and the Duty of Reasonable Accommodation: An Analysis under International Refugee Law, the EU Qualification Directive and the ECHR' written by Stephanie A. Motz, provides valuable insight into the specific case of disabled persons seeking asylum. In light of the refugee definition provided by the Qualification Directive, it is indeed not clear whether violations

⁵⁵ This is notably the case concerning refugee applications based on gender related aspects which now have to be duly taken into account by Member States when determining membership of a particular social group. Contrary to the 2004 Directive which gives Member States the possibility to consider gender related aspects for determining membership of a particular social group, Article 10(1)(d) of the 2011 Recast Qualification Directive now provides an obligation to do so. The latter indeed prescribes that: 'Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group'. By contrast, Article 10(1)(d) of the 2004 Directive provides that: 'Gender related aspects might be considered, without by themselves creating a presumption for the applicability of this Article'. Underlying the importance of this modification, see Peers, *The Revised Directive on Refugee and Subsidiary Protection Status* (n 40) 4 and 6.

⁵⁶ See Peers, *The Revised Directive on Refugee and Subsidiary Protection Status* (n 40) 6 especially with regard to the modifications to the definition of family members further detailed in *ibid*, 3.

⁵⁷ Article 15(c) provides that subsidiary protection can be granted in case of 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.'

⁵⁸ When presenting its recast proposal of the Qualification Directive, the EU Commission considered that the interpretive hurdles raised by Article 15(c) had been clarified by the CJEU in its *Elgafaji* Judgment (n 50). For the Commission, there was thus no need any longer to modify the paragraph. EU Commission, *Proposal for a Directive of the European Parliament and of the Council on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection and the Content of the Protection Granted (Recast)*, COM(2009) 551 final/2, 23 October 2009.

of the duty of reasonable accommodation, as established under the United Nations Convention on the Rights of Persons with Disabilities,⁵⁹ could constitute a form of persecution and thus entitle disabled persons to refugee status. Following an incisive analysis of the human rights and international refugee law framework in this area, the author demonstrates that a disability-sensitive reading of persecution might be adopted under the Recast Qualification Directive. She further questions whether such a reading might even be required by the Convention on the Rights of Persons with Disabilities, to which the EU is a contracting party, and by the EU Charter of Fundamental Rights.⁶⁰

In Chapter 6 entitled 'Refuge from Climate Change-Related Harm: Evaluating the Scope of International Protection within the Common European Asylum System', Matthew Scott analyses one of the most controversial and contemporary issues in today's refugee protection regime, namely international protection in cases of disaster-related harm. Despite the magnitude of forced migration caused by disaster-related harm at present, and its expected increase in years to come, no form of international protection is per se designed to protect this specific category of displaced persons in the EU. Nevertheless, building upon the case law of Australia and New Zealand, the author investigates the potential for individuals affected by climate change-related harm to be protected under existing CEAS instruments. After having examined the Temporary Protection Directive and qualification for refugee status under the Recast Qualification Directive, Scott analyses the potential for such individuals to be granted subsidiary protection and the protection of the *non-refoulement* principle as developed by the ECtHR. This leads him to explore a new avenue for extending the scope of subsidiary protection, by focusing on scenarios where a State affected by a natural disaster would have 'culpably exacerbated' the impact of the disaster. Beyond the potential offered by this interpretation, however, the author points to a protection gap that will only be properly addressed through norm-building at the inter-state level.

The volume concludes with the final Part 'Missed Opportunities and Problematic Developments', which focuses on the missed opportunity to develop a more comprehensive and operational temporary protection regime within the second phase of the CEAS and the changes brought about by the Recast Eurodac Directive.

In Chapter 7, 'Has the Temporary Protection Directive Become Obsolete? An Examination of the Directive and its Lack of Implementation in view of the Recent Asylum Crisis in the Mediterranean', Meltem Ineli-Ciger discusses the long-standing problem of the EU Temporary Protection Directive: namely, the non-implementation of the Directive since its adoption in 2001. Ineli-Ciger explores the reasons for the lack of implementation of this directive in the last 13 years, challenging the assumptions that underpin this situation and suggesting ways to counter such approaches. Finally, the Chapter reviews the much debated issue of how European States and the EU handled the protection of mass flows of persons that fled North African States in 2011 and arrived at the Italian island of Lampedusa, and changes in the Dublin Regulations and introduction of the European Asylum Support Office. By examining these developments, Ineli-Ciger seeks to answer the question of whether the Temporary Protection Directive will be ever implemented. The missed opportunity to develop this aspect of the CEAS is starkly exposed, as is the unlikely

⁵⁹ 2515 UNTS 3, 13 December 2006 (entry into force: 3 May 2008).

⁶⁰ OJ C 364/01, 18 December 2000 (entry into force: 1 December 2009).

prospect that the Directive will ever be effectively used as a means of protecting those fleeing armed conflict, violence and other humanitarian emergencies.

The volume concludes with Chapter 8 written by Niovi Vavoula and entitled ‘The Recast Eurodac Regulation: Are Asylum-Seekers Treated as Suspected Criminals?’ which provides a critical analysis of the crucially important but under-researched instrument: the EU Recast Eurodac Regulation. Vavoula discusses how law enforcement access to Eurodac data affects the fundamental rights of asylum-seekers and to what extent this means that asylum-seekers are treated as a group of criminal suspects. In particular, Vavoula examines the main provisions of the Recast Regulation concerning the use of the database for criminal law objectives. She assesses the new functionality introduced in the Recast instrument by exploring concerns relating to fundamental rights and how the Regulation attempts to address these concerns. Vavoula concludes by assessing the necessity of the law enforcement access to the database and whether this necessity justifies the problematic aspects of the Eurodac Regulation with regard to its interference with the rights of asylum-seekers. As such, Vavoula reveals an area in which the recast of European instruments has led to a situation in which the rights of asylum-seekers are undermined. She also draws attention to the problematic consequences that may arise from the implementation of the Recast Eurodac Regulation.