A TALE OF TWO DECADES: WAR REFUGEES AND ASYLUM POLICY IN THE EUROPEAN UNION

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"Death to Collaborators!" When he found this note on the front door of his Baghdad home in late 2006, Meki Elgafaji did not waste any time. An employee of a British firm that provided security for travel between the Baghdad airport and the "green zone,"[1] he and his wife fled Iraq. His was a "mixed marriage," his wife a Sunni Muslim. His uncle, an employee for the same firm, had been killed.[2] Three years after the war in Iraq began, the future seemed to be closing in on the Elgafaji family.

After escaping, Mr. and Mrs. Elgafaji made their way to the Netherlands, where they applied for a temporary residence permit based on the danger they faced from indiscriminate violence in Iraq. The Dutch authorities rejected their application, and a series of appeals brought the Elgafaji case to the Dutch Council of State, which stayed the proceedings while it sought an interpretation of the new European Union (EU) law on asylum from the European Court of Justice of the European Communities (ECJ). For more than a year the ECJ considered the case. On February 17, 2009, the court issued its first decision concerning the right of war refugees to obtain asylum in the EU. The ECJ ruled, as the Elgafajis had argued, that proof of indiscriminate violence can warrant asylum under EU law.

Using the *Elgafaji* opinion as a vantage point, this Article provides refugee law scholars and advocates in the United States with a window into the profound changes in asylum policy in Europe during the past two decades. These years have seen the European Union evolve from a collection of nations that jealously guarded sovereign prerogatives over migration to a supranational institution that is devising a regional approach

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1. The International Zone in central Baghdad, commonly referred to as the Green Zone, was the headquarters of the Coalition Provisional Authority starting in 2003. This ten square kilometer area was surrounded by high walls and entry was limited to checkpoints controlled by coalition forces. Iraqi government forces assumed full control of this area in January 2009.

2. The facts are taken from Case C-465/07, Elgafaji v. Staatssecretaris van Justitie, 2009 E.C.R. I-00921, *available at* http://www.unhcr.org/refworld/docid/499aaee52.html, *reprinted in* 21 INT'L J. REFUGEE L. 297 (2009).

to asylum, the Common European Asylum System (CEAS). Imagine the United States, Canada, and Mexico agreeing to implement a common procedure for all asylum seekers who arrive in North America!

The significance of the CEAS has largely been overlooked in the debate over asylum and forced migration in the United States, even though it has been the subject of serious and sustained debate by scholars in the EU.[3] This is testimony to the reality that, despite easy electronic access to scholarship written on any continent, refugee law—like politics—is local. International law, supplemented by transnational and supranational norms, supplies the source and content of the legal rights of refugees, but asylum seekers file their claims for protection in national legal systems. As a consequence, the experts who assist asylum seekers and advocates who attempt to win support for legislative change focus on the nuances of the national laws that affect their clients.

This Article aims to broaden the policy debates in the United States to include a discussion of the CEAS. In crafting a common asylum law, EU policymakers have wrestled with numerous thorny issues familiar to policymakers, scholars, and advocates in the United States. Do individuals fleeing from widespread and indiscriminate violence in war zones have a right to asylum? Should there be deadlines for filing asylum applications? When, if ever, are expedited proceedings permissible? What is the significance of traveling through countries with functioning asylum systems prior to reaching the State in which the asylum application is filed? Frequently, the EU solutions to these and other legal questions differ from those adopted by the United States. In addition, the EU approach to resolving vigorous debates over highly charged asylum issues differs from that taken on this side of the Atlantic. There is much to learn from both the debates and the resulting legislative choices.

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3. *See, e.g.*, Michael John-Hopkins, *The Emperor's New Safe Country Concepts: A UK Perspective on Sacrificing Fairness on the Altar of Efficiency*, 21 INT'L J. REFUGEE L. 218 (2009); OLGA FERGUSON SIDORENKO, THE COMMON EUROPEAN ASYLUM SYSTEM: BACKGROUND, CURRENT STATE OF AFFAIRS, FUTURE DIRECTION (2007); Maria Panezi, *The 2005 Asylum Procedures Directive: Developing the European Asylum Law*, 13 COLUM. J. EUR. L. 501 (2007); Jane McAdam, *The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime*, 17 INT'L J. REFUGEE L. 461 (2005); DIAS URBANO DE SOUSA & PHILIPPE DE BRUYCKER, THE EMERGENCE OF A EUROPEAN ASYLUM POLICY (2004); Ryszard Piotrowicz & Carina van Eck, *Subsidiary Protection and Primary Rights*, 53 INTL. & COMP. L.Q. 107 (2004); Elspeth Guild, *Seeking Asylum: Storm Clouds Between International Commitments and EU Legislative Measures*, 29 EUR. L. REV. 198 (2004); D. BOUTEILLET-PAQUET, SUBSIDIARY PROTECTION OF REFUGEES IN THE EUROPEAN UNION: COMPLEMENTING THE GENEVA CONVENTION?, *in* COLLECTION DE LA FACULTE DE DENT DE L'UNIVERSITÉ LIBRE DE BRUXELLES (2002).

The ECJ judgment in *Elgafaji* highlights the major structural developments that have led to the new regional approach adopted in Europe. A substantial shift in power from the national governments to the central EU institutions was the predicate for a common asylum policy. I note the multilateral treaty negotiations that gave rise to the CEAS and the burst of legislative activity that followed. The arc of the new legislation covers many topics, from temporary legal status to complementary protection to procedural safeguards. Several of the laws recently promulgated in the EU have legislative analogs in the United States, and I will briefly note some salient comparisons.

I then turn to the CEAS's guarantee of protection for victims of indiscriminate violence. The notion that states should supplement the protection they provide to those who flee persecution by providing similar safeguards to those who face serious harm if they return to armed conflict in their homelands, "subsidiary protection" in EU parlance, is not a new one. Many states, European and others, have authorized non-citizens in refugee-like situations to remain until the danger is abated. But which ones, and how many? The CEAS creates an enforceable right of asylum for civilians at risk due to indiscriminate violence from armed conflict, while it cautions that risks experienced by the general population are usually insufficient to warrant this protection. The tensions in this prescription are obvious. The ECJ's *Elgafaji* judgment is the first judicial attempt to forge a coherent interpretation of this guarantee of the CEAS.

I. BOOKENDS OF AN ERA: THE EUROPEAN COURT OF JUSTICE JUDGMENTS OF 1987 AND 2009

To appreciate the institutional import of the ECJ's 2009 *Elgafaji* judgment, it is necessary to look back two decades to an earlier dispute concerning European migration law. In 1985, the European Commission (the Commission), the administrative arm of what was then called the European Economic Community (EEC),[4] established a communication

4. The process of European integration began in 1951 with the European Coal and Steel Community (ECSC), which first implemented a supranational structure for a "community" of member states, which included France, Germany, Italy, Belgium, the Netherlands, and Luxembourg. The 1957 Rome Treaty brought these six countries together in order to achieve economic integration through a common market. Simultaneously, the European Atomic Energy Community (EURATOM) was created. The European Communities were institutionally structured with a Council and Commission for each respective community and a single Court of Justice and Assembly. In 1967, that structure was changed to a single council and single commission to represent all three communities. The Commission functioned as the executive organ of the communities, and the Council functioned as the primary decision-making body. Through further treaties over the decades, the primary institutional

and consultation procedure on migration policies.[5] In essence, the Commission required Member States to inform the Commission and the other Member States of data about workers entering from non-Member States and of any draft measures or policies applicable to these individuals. The Commission or a Member State could initiate a consultation procedure to exchange information, identify common problems, and suggest common measures to harmonize national legislation concerning these workers.

Five of the ten States that comprised the European Community filed suit against the Commission, arguing that it had exceeded the scope of its authority and intruded into matters reserved to the national authority of the Member States.[6] The state parties conceded that article 117 of the EEC Treaty required Member States to improve working and living conditions for workers in order to establish and maintain a common market, and that article 118 authorized the Commission to promote cooperation between Member States to improve particular social conditions such as employment and working conditions.[7] They argued, however, that these

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structure was retained, although the legal foundation for their existence has been amended and the communities renamed the EU. *See* P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN UNION LAW 12–25 (London Sweet & Maxwell, 9th ed. 2007).

5. Commission Decision EC 85/38/EEC of 8 July 1985, Setting Up a Prior Communication and Consultation Procedure on Migration Policies, 1985 O.J. (L 217) 25.

6. Denmark, France, Germany, the Netherlands, and the United Kingdom brought an action under article 173 of the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3 (as in effect 1985) [hereinafter EEC Treaty] (repealed by Consolidated Versions of the European Union and the Treaty on the Functions of the European Union, Mar. 30, 2010 O.J. (C 8311)), seeking a declaration that the communication and consultation procedure on migration policies was void. 1985 O.J. (L 217) 25. In 1985, ten States were members of the EEC: Germany, France, Italy, the Netherlands, Belgium, Luxembourg, Denmark, Ireland, the United Kingdom, and Greece. *The History of the European Union: 1980–1989*, OFFICIAL SITE OF THE EUROPEAN UNION: EUROPA, http://europa.eu/abc/history/1980-1989/index_en.htm (last visited Feb. 4, 2011). They included the six founding members, Belgium, France, Germany, Italy, Luxembourg, and the Netherlands, plus Denmark, Ireland, and the United Kingdom, which had all joined in 1973, and Greece, which had become a member in 1981. *The History of the European Union: 1970–1979*, OFFICIAL SITE OF THE EUROPEAN UNION: EUROPA, http://europa.eu/abc/history/1970-1979/index_en.htm (last visited Feb. 4, 2011); *The History of the European Union: 1980–1989*, OFFICIAL SITE OF THE EUROPEAN UNION: EUROPA, http://europa.eu/abc/history/1980-1989/index_en.htm (last visited Feb. 4, 2011). Portugal and Spain became members in 1986, between the time this suit was brought and the time the ECJ issued its judgment. *Id.*

7. Article 117 provides in pertinent part:

> Member States hereby agree upon the necessity to promote improvement of the living and working conditions of labour so as to permit the equalisation of such conditions in an upward direction. They consider that such a development will result not only from the functioning of the Common Market which will favour the harmonisation of social systems, but also from the procedures provided for under this Treaty and from the approximation of legislative and administrative provisions.

EEC Treaty, *supra* note 6, at 48. Article 118 provides in pertinent part:

legal provisions only concerned European Community workers who moved from one Member State to another. They accused the Commission of overreaching and encroaching upon powers left to the Member States because the Commission sought information about policy initiatives concerning the migration of individuals from non-Member States.

To this American observer, the Commission's decision was minimal and non-intrusive. In essence, the Commission wanted information: who was entering the EEC, how were they treated, and what policies were proposed. Even during the decades of state pre-eminence in immigration processing in the United States, federal legislation required states to provide information on arriving passengers in order to record the numbers and origins of immigrants.[8] Admittedly, it would be foolish to infer support for twentieth century European Community policies from nineteenth century United States legislation. Nonetheless, the new efforts to build an effective common market in Europe necessarily meant that both the national governments of the Member States and the central government institutions in Brussels would need to focus on the movement of workers, including immigrant labor, in and out of Member States. It was hard to see how sharing information impinged on national prerogatives. The American perspective was not shared by the ECJ, however.

> Without prejudice to the other provisions of this Treaty and in conformity with its general objectives, it shall be the aim of the Commission to promote close collaboration between Member States in the social field, particularly in matters relating to: employment; labour legislation and working conditions; occupational and continuation training; social security; protection against occupational accidents and diseases; industrial hygiene; the law as to trade unions, and collective bargaining between employers and workers. For this purpose, the Commission shall act in close contact with Member States by means of studies, the issuing of opinions and the organising of consultations both on problems arising at the national level and on those of concern to international organisations. Before issuing the opinions provided for under this Article, the Commission shall consult the Economic and Social Committee.

Id. art. 118.

8. The State of New York alone processed approximately eight million immigrants through the Castle Garden Emigrant Landing Depot before the federal government took control of migration and opened Ellis Island in 1892. *Castle Clinton National Monument, History & Culture*, U.S. DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, http://www.nps.gov/cacl/historyculture/index.htm (last visited Oct. 3, 2010). In 1819, federal legislation required ship captains to supply to the Collector of Customs a list of all passengers arriving in the United States, including their sex, occupation, age, and country of origin. U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, STAFF REPORT OF SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, 97th CONG., 169 (Apr. 30, 1981), *available at* http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/2f/b7/81.pdf (accessed through the U.S. Dep't of Educ., Educ. Res. Info. Ctr.). Information was collected at Atlantic and Gulf Ports first; after 1850, immigration through Pacific ports was added; and after 1900, information about immigration via Hawaii, Alaska, Puerto Rico, Mexico, and Canada was collected. *Id.*

The ECJ judgment of July 9, 1987 ruled that the Commission's decision requiring information concerning immigrants from non-Member States exceeded the Commission's authority.[9] The judgment upheld the power of the Commission to collect limited kinds of information directly relating to the workforce,[10] but the ECJ agreed with the Member States that migration of individuals from outside the Member States—including information gathering about this phenomenon—was beyond the authority of the Commission and other EC institutions. This power resided in the Member States.

The contrast between this 1987 ECJ judgment and the 2009 *Elgafaji* judgment could hardly be greater. The Elgafajis, Iraqi nationals, claimed a right to reside in an EU Member State. The Member State in question did not challenge the competence of the EU to create asylum law nor the applicability of this EU legislation to Member States. Rather, a Member State institution, the Dutch Council of State, affirmatively reached out to the ECJ for a definitive interpretation of the substantive law Dutch government officials apply to temporary migrants from outside the EU. Moreover, the European law in question involves much more than exchanges of information; it imposes obligations on Member States to accept and give shelter to individuals from non-Member States, despite the fact that their entry is not premised on their employment skills or their impact on the EU workforce.

The road from the 1987 judgment to the 2009 *Elgafaji* judgment was paved by treaty amendments and legislation. Together they transformed EU competence concerning migrants and, in particular, asylum seekers. They have produced an enormous shift in power from the Member States to the EU, and this has generated an astounding burst of EU lawmaking regarding asylum policy.

In hindsight, the 1987 ECJ ruling marked the end of an era. When the ECJ ruled on the Commission's information gathering and sharing procedures in 1987, the law in effect was the EEC Treaty, also called the Treaty of Rome, the 1957 Treaty establishing the EEC.[11] Since 1987 there

9. Case 281/85, Fed. Republic of Ger. and Others v. Comm'n of the European Cmtys., 1987 E.C.R. 3203. Specifically, the court held that the European Commission had violated the terms of the Treaty of Rome when it tried to collect this information. *Id.* ¶ 24. Furthermore, the court held that the Commission's communication and consultation procedures had interfered with the Member States' power to the extent the procedures attempted to ensure that national agreements conform to community policies, such as the policy on development aid. *Id.* ¶ 33.

10. The Commission had success on only one issue: collecting information concerning the integration of immigrants from non-Member States into the workforce of the Member States was permissible because it related to the functioning of the common market. *Id.* ¶ 21.

11. EEC Treaty, *supra* note 6.

has been a whirlwind of treaty negotiations and ratifications in Europe, accompanied by many vigorous disagreements about the extent of powers the Member States were willing to assign to EU institutions. Ultimately, there were compromises and changes, which led to multiple treaties that re-worked institutional power arrangements: the Single European Act in 1986,[12] the Treaty on European Union in 1992,[13] the Amsterdam Treaty in 1997,[14] and the Nice Treaty in 2001.[15] The 2007 Treaty of Lisbon reforming EU institutions, initially derailed by Irish voters in 2008,[16] met a happier fate when Ireland held a second referendum the next year.[17] When the Treaty of Lisbon took effect in December 2009, it incorporated the European Charter of Fundamental Rights into EU law, reorganized the EU courts, created two new positions, EU President and EU Foreign Affairs Minister, and made substantial other changes in EU institutions.[18]

Coincident with the changes in the EU power structure has been an expansion of the EU's geographic reach. When the Commission published its 1985 decision seeking information and consultation regarding immigrants from non-Member States, the Brussels commissioners wanted to obtain information from ten Member States.[19] By the time the ECJ

12. 1987 O.J. (L 169) 1.

13. Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1 (entered into force Nov. 1, 1993) [hereinafter Maastricht Treaty].

14. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1 [hereinafter Treaty of Amsterdam].

15. Treaty of Nice, Mar. 10, 2001, 2001 O.J. (C 80) 1 [hereinafter Treaty of Nice].

16. For the text of the treaty, see Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon]. Ireland rejected the Treaty of Lisbon in June 2008, but the Irish government decided to present it again in a referendum in October 2009. Steven Castle, *With a Nod to Ireland, European Union Lifts Hopes for a Treaty to Strengthen Itself*, N.Y. TIMES, June 19, 2009, at A12. By the time of the second referendum, twenty-three of the twenty-seven Member States had ratified the Treaty of Lisbon and deposited their ratification instruments in Rome. The parliaments of Germany, Poland, and the Czech Republic had approved the treaty, but their presidents had not yet signed the instruments of ratification. *Treaty of Lisbon Taking Europe into the 21st Century, In Your Country*, OFFICIAL WEBSITE OF THE EUROPEAN UNION: EUROPA, http://europa.eu/lisbon_treaty/countries/index_en.htm (last visited Oct. 3, 2010).

17. Eric Pfanner & Sarah Lyall, *Irish Vote for Treaty Centralizing Power in the European Union*, N.Y. TIMES, Oct. 4, 2009, at A6.

18. For example, article 1 of the Treaty of Lisbon amended article 6 of the Maastricht Treaty to recognize the principles set forth in the Charter of Fundamental Rights, added a new article 9F outlining the EU judicial bodies, specified in article 9E the role of the High Representative of the Union for Foreign Affairs and Security Policy, and detailed in article 9B the duties of the president of the European Council. Treaty of Lisbon, *supra* note 16, art. 1 (as in effect 2007).

19. In 1985, the Member States included Germany, France, Italy, the Netherlands, Belgium, Luxembourg, Denmark, Ireland, the United Kingdom, and Greece. *See The History of the European Union: 1980–1989*, *supra* note 6.

issued its 1987 judgment, Spain and Portugal had joined, bringing the number to twelve.[20] In 1995, Austria, Finland, and Sweden joined.[21] Ten more States, Estonia, Latvia, Lithuania, Poland, Hungary, the Czech Republic, Slovakia, Slovenia, Malta, and Cyprus, joined in 2004, followed by Bulgaria and Romania in 2007.[22] Thus, in two decades the EU expanded from ten to twenty-seven nations. The area covered by the EU grew from less than two million to more than four million square kilometers.[23] In population terms, the reach of EU institutions in Brussels expanded almost 100%: from 266 million to approximately 500 million people.[24] As the scope of the lawmaking authority of the EU has increased, the EU's geographic and demographic reach has multiplied.

II. THE DEVELOPMENT OF EU ASYLUM LAW

Two treaties embodied momentous changes for asylum seekers in the EU. Five years after the 1987 ECJ consultation decision, the Treaty on European Union, known as the Maastricht Treaty, stated for the first time that Member States regard immigration and asylum policy as matters of common interest. The Maastricht Treaty's approach envisioned an EU framework supported by three pillars, and specified that asylum policy fell within the third pillar which concerned matters of "justice and home affairs."[25] The 1997 Amsterdam Treaty, signed ten years after the ECJ

20. Spain and Portugal entered the European Union on Jan. 1, 1986. *Id.*

21. *The History of the European Union: 1990–1999*, OFFICIAL SITE OF THE EUROPEAN UNION: EUROPA, http://europa.eu/abc/history/1990-1999/index_en.htm (last visited Feb. 4, 2011).

22. *Id.* at *The History of the European Union: 2000–Today*, http://europa.eu/abc/history/2000_today/index_en.htm (last visited Feb. 4, 2011).

23. The combined geographical size of the ten EU Member States in 1985 totaled 1,748,800 square kilometers. *See How Big is the EU?*, OFFICIAL SITE OF THE EUROPEAN UNION: EUROPA, http://europa.eu/abc/keyfigures/sizeandpopulation/howbig/index_en.htm#chart1 (last visited Feb. 4, 2011).

24. According to Eurostat, the official statistics institution of the European Union, as of early 2009 the EU population stood at 499,794,855. For current statistics, see EUROPEAN COMMISSION EUROSTAT, *Total Population Chart*, http://epp.eurostat.ec.europa.eu/portal/page/portal/eurostat/home/ (click "Total Population") (last visited Oct. 3, 2010). For geographical statistics, see *How Big Is the EU?*, *supra* note 23.

25. The Maastricht Treaty, *supra* note 13, introduced the notion that the EU framework consisted of three pillars. SIDORENKO, *supra* note 3, at 19. The first pillar included the matters that had been regulated by the European Economic Community, the European Coal and Steel Community, and the EURATOM; the EU institutions had competence to regulate matters within the first pillar. *Id.* The second pillar focused on foreign and security policy, while the third pillar concerned policies affecting justice and home affairs ("JHA"). *Id.* Both the second and third pillars were mainly intergovernmental in nature; policy was largely made by the Member States, not by the EU institutions. *Id.* at 19–20. Within the third pillar, article K.1 listed the following areas as matters of common interest that relate to the free movement of persons:

consultation decision, specified that freedom of movement within the EU necessarily requires harmonization of asylum, immigration, and visa policies, in order to make the EU an "area of freedom, security, and justice."[26] Thus, the Amsterdam Treaty was the first to contemplate that the movement of asylum seekers would fall directly within the jurisdiction of EU institutions.[27]

Two years after Member States signed the Amsterdam Treaty, the European Council (EC or the Council) met in Tampere, Finland to articulate guidelines concerning the free movement of persons throughout the EU. The Tampere Conclusions acknowledged that the free movement of individuals implicated the rights of those who seek access to and protection in the EU, and explicitly called for the development of EU law on asylum. The Tampere Conclusions specified:

> This System should include, in the short term, a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status. It should also be completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection. . . .[28]

> asylum policy; crossing by persons of external borders and the exercise of controls thereon; immigration policy and policy regarding nationals of third countries; combating drug addiction; combating fraud on an international scale; judicial cooperation in civil matters; judicial cooperation in criminal matters; customs cooperation; and police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking, and other serious forms of international crime.

Maastricht Treaty, *supra* note 13, art. K.1. Article K.2 required Member States to adhere to the 1951 Refugee Convention and the European Human Rights Convention in addressing the policies listed in article K.1. *Id.* art. K.2.

26. The Treaty of Amsterdam transferred the policies concerning the free movement of persons from the third pillar (intergovernmental matters) to the first pillar (EU matters). SIDORENKO, *supra* note 3, at 20. Article 73 refers to measures on immigration and asylum Treaty of Amsterdam, *supra* note 14, art. 73. Articles 1 and 2 introduce the concept of the EU as an area of "freedom, security and justice," but do not define these terms, which reappear two years later in the guidelines for free movement of persons adopted at the European Council meeting in Tampere, Finland. *See infra* note 28 and accompanying text.

27. Treaty of Amsterdam, *supra* note 14, art. 73k, tit. III.

28. *Presidency Conclusions*, Tampere European Council ¶ 14 (Oct. 15–16, 1999), *available at* http://www.europarl.europa.eu/summits/tam_en.htm [hereinafter Tampere Conclusions].

> In the longer term, Community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union.[29]

The Maastricht and Amsterdam Treaties and the Tampere European Council meeting did not occur in a political vacuum. The EU had been established to create an internal market with free movement of people as well as goods, services, and capital, and there were continuing efforts to make a more effective common market. To this end, several of the original EU Member States agreed at Schengen, Luxembourg to enhance the security of their common external borders and remove all internal border controls.[30] In 1995, the internal border checkpoints were removed between France, Germany, Belgium, the Netherlands, Luxembourg, Spain, and Portugal.[31] The economic benefits of passport-free travel encouraged other States to join the Schengen Area,[32] and by 2007, it was possible to travel from the Iberian Peninsula to the Baltic Sea without stopping for internal border controls.[33]

The steady reduction in passport controls exacerbated concerns about asylum and illegal migration. While citizens of EU Member States have broad rights to migrate to other Member States,[34] this is not true for citizens from non-Member States. Indeed, many Member States lack laws that permit immigration from beyond the EU.[35] Because they do not

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29. *Id.* ¶ 15.

30. France, Germany, Belgium, the Netherlands, and Luxembourg signed the Schengen Agreement in 1985. This was followed by the Schengen Convention to implement the border control changes in 1990. In 1997, the Treaty of Amsterdam incorporated the suppression of internal border controls into the law of the EU. Other countries applied to join the Schengen area, including two non-EU states, Norway and Iceland. By late 2007, the Schengen area included twenty-four countries. *Summaries of EU Legislation: The Schengen Area and Cooperation*, OFFICIAL WEBSITE OF THE EUROPEAN UNION, http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33020_en.htm.

31. *Id.*

32. Countries believed that joining the Schengen zone would increase business and tourism. *Open Borders Extended Within European Union*, N.Y. TIMES, Dec. 21, 2007, at A15, *available at* http://www.nytimes.com/2007/12/21/world/europe/21border.html.

33. Italy joined the Schengen area in 1990, Greece in 1992, Austria in 1995, Denmark, Finland, Iceland, Norway, and Sweden in 1996, and in December 2007, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia became part of the Schengen zone. *Id.*

34. The free movement of persons is one of the core principles of European Union law. European Parliament and Council Directive 2004/38/EC of 9 April 2004 on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States, 2004 O.J. (L 158) 78–80.

35. For example, Germany, with the largest national economy in the EU, introduced its first immigration law in 2002. Veysel Oezcan, *German Immigration Law Clears Final Hurdle*, MIGRATION POLICY INSTITUTE (Sept. 2002), http://www.migrationinformation.org/Feature/display.cfm?ID=51. Similarly, Spain did not enact an immigration law until 1985, and its provisions focused on temporary

perceive themselves as countries of immigration, they do not have legislation and policies to attract non-citizens to become permanent residents and perhaps, ultimately, citizens.[36] They do have asylum laws, however, and, as a consequence, asylum is often the only avenue for noncitizens to obtain legal residence. This puts substantial pressure on the asylum systems.

As the Soviet Union collapsed, the EU worried that it would be engulfed with asylum seekers. Similarly, when Yugoslavia imploded, hundreds of thousands of refugees fled into EU Member States.[37] The Austrian government estimated that four million asylum seekers had entered the EU in the early 1990s, and called for joint action.[38] Meanwhile, negative public opinion about refugee camps and asylum seekers who did not present bona fide claims intensified government concerns that trafficking organizations had grown more sophisticated in their delivery of asylum seekers and other migrants to Europe.[39] These pressures convinced Member States of the desirability of a common asylum policy for the EU.

These and other developments generated the political will to forge the CEAS. In turn, this new regional approach to asylum has led to the creation of multiple new EU institutions and to the preparation of a multitude of statutes, a veritable New Deal of law-making. The legislation comprising the CEAS has adopted a minimum standards approach: Member States are free to assume greater obligations, but they must comply at least with the standards set forth in the EU Directives.[40] The minimum standards approach sacrifices uniformity for flexibility. In

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migration. Nieves Ortega Perez, *Spain: Forging an Immigration Policy*, MIGRATION POLICY INSTITUTE (Feb. 2003), http://www.migrationinformation.org/Profiles/display.cfm?ID=97. Many European countries allowed non-citizens to become lawful residents based on marriage to a citizen, but these provisions were not envisioned as a national immigration policy.

36. Many European countries had programs to encourage temporary migrants, often known as guest workers, but the intention behind these programs was that the "guests" would return home. *See, e.g.*, Veysel Oezcan, *Germany: Immigration in Transition*, MIGRATION POLICY INSTITUTE (July 2004), http://www.migrationinformation.org/Profiles/display.cfm?ID=235.

37. According to UNHCR statistics, EU countries sheltered 584,017 Bosnians in 1997. JOANNE VAN SELM, KOSOVO'S REFUGEES IN THE EUROPEAN UNION 229 tbl.5 (2000).

38. AUSTRIAN EU PRESIDENCY, STRATEGY PAPER ON IMMIGRATION AND ASYLUM (July 1, 1998); *see* Claude Moraes, *The Politics of European Union Migration Policy*, 2003 POL. Q. 116, 118.

39. Moraes, *supra* note 38, at 118–19.

40. EU Directives often set minimum standards for all the Member States, and a few words about EU legislation will illustrate how this approach works. The EU institutions can issue Directives or Regulations. Directives, which impose an obligation upon the Member States to conform their laws to the requirements established by the terms of the Directive, generally become effective via national legislation enacted by the Member States. In contrast, EU Regulations require no implementing legislation in order to be effective in Member States. MATHIJSEN, *supra* note 4, chs. 3–4; ALINA KACZOROWSKA, EUROPEAN UNION LAW ch. 10 (Routledge-Cavendish 2009).

addition, there is always a concern that each of the Member States will adopt the lowest acceptable standard. This threat raised fears that the minimum standards established by the CEAS would encourage the Member States to reduce the more robust protection of asylum seekers, which their national laws may have previously provided.[41] The negotiations concerning the acceptable minimum standards may also have exacerbated minor disagreements on some issues, as Member States engaged in strategic posturing on one point to gain leverage elsewhere.[42] In short, negotiating the minimum standards for the CEAS was a deeply political process because, ultimately, the consent of all Member States was necessary and each had reasons to prefer its own status quo. Nonetheless, the perspective from 2009—a decade after Tampere—reveals significant accomplishments. At first, the EU efforts were halting and fitful, and critics referred to these efforts as the "so-called Tampere process."[43] By 2009, however, five major EU asylum laws had come into effect.[44]

A. Temporary Protection

The first EU asylum legislation was the Temporary Protection Directive of 2001,[45] a law that in large part was a response to European fratricide in the 1990s. The refugees escaping the Bosnia and Kosovo wars often fled hastily and in great numbers, with disproportionate impacts on EU Member States. For example, Germany received 340,000 Bosnians in comparison to 15,000 who arrived in France, and 6,000 who reached the United Kingdom.[46] The 1999 fighting in Kosovo generated even larger forced migrations, with 900,000 Kosovars crossing borders within a matter of weeks.[47] The largest numbers of war refugees went to non-EU countries, such as Albania and Montenegro, but the distribution of those

41. Piotrowicz & van Eck, *supra* note 3, at 114.

42. *See, e.g.*, McAdam, *supra* note 3, at 497–514.

43. *E.g.*, Migration Policy Group, *Asylum/Refugees*, MIGRATION NEWS SHEET, Nov. 2001, at 10–19.

44. *See infra* Part II.A–E.

45. Council Directive 2001/55/EC on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing the Consequences Thereof, 2001 O.J. (L 212) 12–23, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:212:0012:0023:EN:PDF [hereinafter Temporary Protection Directive].

46. According to UNHCR statistics, in 1997 Germany sheltered 342,500 of the 584,000 Bosnians in the EU. Thus, Germany received 60% of the total. Other EU countries that received sizeable numbers of Bosnian refugees included Austria (88,609), Sweden (60,671), the Netherlands (25,000), and Denmark (21,458). VAN SELM, *supra* note 37, at 229 tbl.5.

47. *Id.* at 225 tbl.1.

seeking protection within the EU was again uneven. Germany received 14,689, which was the largest share of those evacuated to EU countries, 6,339 arrived in France, 4,346 reached the United Kingdom, 1,426 went to Spain, and 1,033 to Ireland.[48]

Enacted two years after the Kosovo conflict, the Temporary Protection Directive provides a mechanism for EU-wide response to dire situations. Specifically, mass arrivals of individuals fleeing armed conflict, endemic violence, and systematic violations of their human rights may lead to short-term protection programs in the EU.[49] If the European Council declares that the preconditions to trigger EU-wide temporary protection have been established, all Member States must grant lawful residence to members of the designated group for one year, which may be extended by six-month periods for a maximum of one more year.[50] During that time, persons granted temporary protection will be provided with residence permits,[51] as well as basic welfare, medical care, and housing.[52] They will not be able to move freely within the EU,[53] and the Council may vote to end the period of protection at any time.[54]

The terms of the Temporary Protection Directive place considerable limits on its actual availability. First, the Temporary Protection Directive does not apply unless a mass influx of people seek protection.[55] Discrete, small-scale disasters do not trigger its protections, which are premised on large-scale emergency situations in which the number of forced migrants makes it impracticable to hold individual hearings on their qualifications for asylum.[56] Second, and more significantly, the Temporary Protection Directive places all relevant decision-making authority in a political body,

48. *Id.* at 224 tbl.1. Of the 900,000 Kosovars who fled Kosovo in the spring of 1999, roughly 800,000 remained in neighboring states, including Albania and Macedonia. Of the 90,000-100,000 who were evacuated from the neighboring states, approximately 55,000 went to EU countries. *Id.* at 225.

49. The Temporary Protection Directive states that its purpose is to provide temporary protection to mass influxes of displaced persons. Temporary Protection Directive, *supra* note 45, pmbl. The Directive defines displaced persons, referring specifically to (i) persons who have fled areas of armed conflict or endemic violence, and (ii) persons at serious risk of systematic or generalized human rights violations. *Id.* art. 2(c).

50. In exceptional circumstances, temporary protection can be extended for a third and final year. *Id.* art. 4.

51. *Id.* art. 8.

52. *Id.* art. 13 (suitable accommodations, basic medical care, and social assistance). Additionally, article 14 calls for education for individuals under 18. *Id.* art. 14.

53. *Id.* art. 11 (Member States must take back those to whom it granted temporary residence permits if they seek to enter another Member State).

54. Temporary Protection Directive, *supra* note 45, art. 6 (procedure to terminate protection).

55. *Id.* art. 2.

56. *Id.*

the European Council.[57] The European Council, composed of the heads of government of all the Member States,[58] must decide that a situation warrants the provision of temporary refuge by EU countries. Moreover, a Council decision to invoke the Temporary Protection Directive must pass by a qualified majority, which requires more than a fifty percent vote.[59] The choice to entrust this power to the Council rather than the Commission guarantees that it will be rarely used. The reality is that mass disasters, ethnic cleansing, and other events that force large groups of people to flee their homes have a disproportionate impact on nearby countries. The past has proved that EU States reeling from the localized impacts of refugee flows find it difficult to convince the geographically distant Member States that joint action is warranted. The future is not likely to be different.

In recent years, Malta, the smallest EU Member State, has repeatedly faced mass influxes of asylum seekers and has contended that other EU Member States should assist Malta in responding to the crisis.[60] Malta's location in the Mediterranean Sea, 200 kilometers north of Libya and 100 kilometers south of Sicily, has made it a landing point for thousands of asylum seekers departing from North Africa by boat.[61] It appears likely that armed conflict, endemic violence, or systematic human rights

57. *Id.* art. 5 (implementation of temporary protection by Council Decision).

58. The Treaty of Lisbon established the European Council as an EU policy making body, separate from the Council of Ministers, a legislative body. Each EU Member State sends either the head of state or a high-ranking minister to these Council meetings. The newly elected President of the European Council heads the Council, and the President of the EU Commission attends as a non-voting member. *See* Treaty of Lisbon, *supra* note 16 and accompanying text.

59. Under the Treaty of Nice, a qualified majority consists of the backing of more than 50% of the EU Member States, plus approximately 74% of the weighted votes assigned to the Member States (74% represents the required number of votes after enlargement of the Union in 2007, which resulted in a requirement for 255 out of 345 weighted votes). Furthermore, a Member State may request that the "Member States constituting the qualified majority represent at least 62% of the total population of the Union," which would then be required in order to adopt the resolution. Treaty of Nice, *supra* note 15, protocols, art. 3. The Treaty of Lisbon expanded the use of qualified majority voting; new definitions of qualified majority voting will come into effect in 2014. Maastricht Treaty, *supra* note 13, art. 16 (as amended by the Treaty of Lisbon, *supra* note 18, art. 6).

60. *See, e.g.*, Migration Policy Group, *Migration Policies/Law*, MIGRATION NEWS SHEET, Sept. 2006, at 1–12 (covering African migration to southern EU Member States, and efforts by those Member States to obtain assistance from other EU countries); Dan Bilefsky, *European Union Split on Solution to African and Iraqi Refugee Influx*, N.Y. TIMES, June 13, 2007, at A4, *available at* http://www.nytimes.com/2007/06/13/world/europe/13eu.html.

61. More than 5,000 boat people have arrived in Malta since 2000. Almost 2,000 arrived in 2005. More than 1,000 arrived in the first six months of 2009. Many appear to have left North Africa for Italy, but have been blown off course to Malta. Others have been shipwrecked in the seas surrounding Malta, rescued, and brought to Malta. By mid-summer 2006, more than 1,500 were in detention in Malta. Vanya Walker-Leigh, *Refugees: Tiny Malta Is Finally Heard*, INTER PRESS SERV. NEWS AGENCY, July 20, 2009, http://ipsnews.net/africa/nota.asp?idnews=34036.

violations may have impelled many of these individuals to flee. Nonetheless, there was no realistic possibility that a majority of EU States would invoke the Temporary Protection Directive in response to these surges of displaced persons. Several EU countries have entered into small ad hoc arrangements to accept asylum seekers from Malta,[62] but EU-wide responses have been lacking.[63]

In early 2011 similar tensions again surfaced, this time in Italy. The protests and conflicts of the "Arab spring" contributed to boatloads of refugees and migrants leaving North Africa for Italian shores. When more than 22,000 individuals landed in Italy in three months, the Italian government vociferously criticized the absence of an EU-wide response to this mass influx.[64] The Temporary Protection Directive played no role.

American readers may note similarities between the Temporary Protection Directive and the Temporary Protected Status ("TPS") approach adopted by the U.S. Congress in 1990.[65] They both envision a non-permanent safe haven.[66] They both require a political decision to set them in motion.[67] Once triggered, they both provide for short-term residence permits and employment authorization. It will not surprise many

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62. In July 2006, Malta refused to accept fifty-one Africans rescued from a sinking ship in nearby waters, which finally convinced the EU to schedule sea patrols nearby in order to intercept unauthorized vessels heading for Malta. Spain agreed to accept forty-five of the rescued individuals, and the EU repatriated the rest to Morocco. *Id.* France also agreed to resettle ninety-two refugees from Malta in 2009. Migration Policy Group, *"Burden-Sharing": France Will Take More Refugees From Malta*, MIGRATION NEWS SHEET, Aug. 2009, at 9.

63. The scale of the arrivals of displaced persons in Malta is smaller than that experienced in the Kosovo and Bosnia conflicts, but Malta's population of 400,000 is also much smaller than that of Germany (82 million), France (64 million), and other EU Member States that provided temporary protection in the earlier crises.

64. Rachel Donadio, *Italy lashes Out at European Union Over Immigrants*, N.Y. TIMES, Apr. 12, 2011, at A9, *available at* http://www.nytimes.com/2011/04/12/world/europe/12italy.html.

65. Section 302 of the Immigration Act of 1990 created a mechanism for awarding temporary protection in a variety of circumstances. Immigration Act of 1990, Pub. L. 101-649, § 302, 104 Stat. 4678, 5030 (codified at 8 U.S.C. § 1254) (2006) (repealed by Pub. L. 104-208, D.U.C, title III, § 308(6)–(7)). The details of temporary protected status are codified in the Immigration and Nationality Act, § 244. Pub. L. 101-649, § 244 (codified at 8 U.S.C. § 1254(a)) (2006) [hereinafter INA].

66. Under TPS, the initial period of protection must be not less than 6 months and not more than 18 months. INA § 244(b)(2), 8 U.S.C. § 1254a(b)(2) (2006). Article 4 of the EU Temporary Protection Directive contemplates a one-year duration that can be extended for an additional year. *See supra* note 50 and accompanying text.

67. The Attorney General, after consultation with appropriate government agencies, has the sole power to designate groups eligible for TPS. INA § 244(b)(1), 8 U.S.C. § 1254a(b)(1) (2006). The Temporary Protection Directive requires the European Council to make all relevant decisions. Temporary Protection Directive, *supra* note 45, art. 5.

to learn that access to the labor market is more robust in the United States,[68] while access to social assistance is more secure in the EU.[69]

Several important differences bear mention. TPS is not limited to mass influx situations as it applies to a broad range of humanitarian crises, from armed conflict to natural and environmental disasters.[70] Furthermore, TPS has been invoked in response to many separate crises since 1990, ranging from civil war victims in Liberia, to Kosovars fleeing Serbian armed forces, to Hondurans reeling from hurricane damage, and, most recently, to Haitians displaced by the catastrophic earthquake on January 12, 2010.[71] All told, more than 400,000 have benefited from TPS in the past two decades.[72] The TPS approach is no panacea and it has generated serious criticisms,[73] but it is much easier to trigger than the EU Temporary Protection mechanism because the U.S. government can make the decision to extend temporary protection on its own, while the European Council has to muster a majority of votes from twenty-seven Member States. The

68. Those granted TPS have unlimited authorization to work throughout the TPS period, INA §§ 244(a)(1)(B), (2), whereas EU Member States can limit access to the labor market for those granted temporary protection. Temporary Protection Directive, *supra* note 45, art. 12.

69. The INA is silent concerning social benefits, whereas EU Member States must provide access to welfare and social benefits. *Id.* art. 13(2).

70. INA § 244(b)(1) outlines three categories of potential eligibility: section (A) refers to armed conflict; section (B) refers to "earthquake, flood, drought, epidemic, or other environmental disaster resulting in a substantial, but temporary, disruption of living conditions in the area affected" and the foreign state officially requests assistance; section (C) refers to other "extraordinary and temporary conditions in the foreign state." INA § 244(b)(1)(A)–(C), 8 U.S.C. § 1254a(b)(1)(A)–(C) (2006). The second category, covering natural and environmental disasters, can only come into effect if the affected state requests TPS designation. INA § 244(b)(1)(B)(iii), 8 U.S.C. § 1254a(b)(1)(B)(iii) (2006). This is not a prerequisite for situations of armed conflict. INA § 244(b)(1)(A), 8 U.S.C. § 1254a(b)(1)(A) (2006).

71. The countries or territories designated under the TPS program have included Angola, Bosnia-Herzegovina, Burundi, El Salvador, Guinea-Bissau, Honduras, Kosovo, Kuwait, Lebanon, Liberia, Montserrat, Nicaragua, Rwanda, Sierra Leone, Somalia, and Sudan. Ruth Ellen Wasem & Karma Ester, CONG. RESEARCH SERV., RS20844, TEMPORARY PROTECTED STATUS: CURRENT IMMIGRATION POLICY AND ISSUES 4 (2008). On January 21, 2010, DHS designated Haiti for temporary protected status for eighteen months, with registration running from January 21 through July 20, 2010. Designation of Haiti for Temporary Protected Status, 75 Fed. Reg. 3476 (Jan. 21, 2010).

72. *See* Wasem & Ester, *supra* note 71, at 5; Susan Martin, Andy Schoenholtz & Deborah Waller Myers, *Temporary Protection: Towards a New Regional and Domestic Framework*, 12 GEO. IMMIGR. L.J. 543, 549–50 (1998). Mark Krikorian, *Here to Stay: There's Nothing as Permanent as a Temporary Refugee*, Center for Immigration Studies (Aug. 1999), http://www.cis.org/articles/1999/back899.html.

73. For analyses and criticisms of this program, see Linton Joaquin, Mark Silverman & Lisa Klapal, *Temporary Protected Status* (Mar. 21, 2010), http://www.law.berkeley.edu/php-programs/jsp/fileDL.php?fID=1123; Joan Fitzpatrick, *The End of Protection: Legal Standards for Cessation of Refugee Status and Withdrawal of Temporary Protection*, 13 GEO. IMMIGR. L.J. 343 (1999); Martin, Schoenholtz & Myers, *supra* note 72, at 543.

challenge is to make Temporary Protection in the EU more than a theoretical response to forced migration.

B. Reception of Asylum Seekers

In 2003, two years after the adoption of the Temporary Protection Directive, the EU adopted legislation imposing minimum standards concerning the conditions in which asylum seekers live while they present their applications for asylum.[74] Known as the Reception Directive, this law requires Member States to provide asylum seekers documents attesting to their status during the asylum process,[75] and to inform them of individuals and organizations that can assist them.[76] Member States must ensure that asylum seekers have access to adequate accommodations,[77] and they must try to keep families together.[78] Member States may confine asylum seekers to a particular location, but asylum seekers should be able to move freely within the area or district where they reside.[79] Staff members of reception centers must be adequately trained,[80] and lawyers, United Nations High Commissioner for Refugees (UNHCR) representatives, and members of nongovernmental organizations (NGOs) must have access to facilities housing asylum seekers in order to assist them in their claims.[81]

Medical screening may be required,[82] but basic health care must be provided.[83] Special services must be offered to victims of torture or violence,[84] to children who may have been abused or exploited,[85] and to unaccompanied minors.[86] In general, minor children of asylum seekers must be guaranteed the same access to education as children from the

74. Council Directive 2003/9/EC Laying Down Minimum Standards for the Reception of Asylum Seekers, 2003 O.J. (L 31) 18–25, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:031:0018:0025:EN:PDF [hereinafter Reception Directive].

75. Within three days of filing the asylum application, applicants must receive a document authorizing their residence during the asylum process. *Id.* art. 6.

76. Within fifteen days of filing the asylum application, they must receive information on their rights and obligations and on organizations that can provide assistance. *Id.* art. 5.

77. The reception conditions must ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence. *Id.* art. 13(2).

78. *Id.* art. 8.

79. *Id.* art. 7(1)–(2).

80. Reception Directive, *supra* note 74, art. 14(5).

81. *Id.* art. 14(7).

82. *Id.* art. 9.

83. Necessary health care "shall include, at least, emergency care and essential treatment for illness." *Id.* art. 15(1).

84. *Id.* art. 20.

85. *Id.* art. 18.

86. Reception Directive, *supra* note 74, art. 19.

Member State, but the education may be provided at reception centers rather than at public schools.[87]

With regard to employment authorization, Member States may preclude asylum applicants' access to the job market for up to one year.[88] After this time, if the authorities have not yet ruled on the asylum application, the applicant can have conditional access to the labor market, provided the delay was not caused by the asylum seeker.[89] Employment priority can be accorded to EU nationals and certain other legal residents.[90]

The impetus for the Reception Directive was to eliminate incentives for forum-shopping among Member States and its goal is to harmonize standards throughout the EU so as to avoid creating "magnet" locations for filing asylum claims.[91] No empirical work has assessed whether this goal has been achieved, but it appears unlikely that the Reception Directive has had much impact on asylum seekers' decisions about where to apply for asylum. First, the harmonization achieved is probably small. The minimum standards are not stringent, which means that many of the national asylum systems already complied with the new law. Inertia would likely keep the prior reception arrangements in place.[92]

Second, to the extent that asylum seekers have choices about where to file asylum claims, factors other than reception conditions are more powerful determinants. For example, the presence of individuals from their homeland or their region of origin is often a major draw,[93] and the

87. *Id.* art. 10.

88. *Id.* art. 11(1)–(2).

89. *Id.* art. 11(2).

90. *Id.* art. 11(4).

91. The preamble of the Directive provides: "The harmonisation of conditions for the reception of asylum seekers should help to limit the secondary movements of asylum seekers influenced by the variety of conditions for their reception." *Id.* pmbl., ¶ 8. *See also The Common European Asylum System: A Summary*, MIGRATION WATCH UK, at 4 (Mar. 9, 2005), http://www.migrationwatchuk.org/pdfs/4_5_common_euro_asylum_system.pdf (official site of Migration Watch UK).

92. It is possible, of course, that states whose asylum systems offer higher quality conditions of reception may, post-Reception Directive, reduce the care they provide. The European Council on Refugees and Exiles noted that one of its principle concerns regarding the Reception Directive was that "many of the Articles fall short of the current standard of reception in many Member States [creating] . . . a risk that in those countries with a higher standard than that of the Directive, . . . [the] text could provide the rationale for reduction of reception standards." *See* ECRE Information Notes on the Council Directive 2003/9/EC of Jan. 27, 2003, Laying down Minimum Standards for the Reception of Asylum Seekers, IN1/06/2003/EXT/HM, 3, *available at* http://www.ecre.org/resources/ECRE_actions/291. If inertia does not inhibit the Member States from reducing the quality of their asylum reception systems, it seems likely that local NGOs and refugee advocates will actively protest a race to the bottom.

93. Several European studies note that the pre-existence of a community of co-nationals, or social networks, in a particular country can heavily influence an asylum seeker's destination. *See* Michael Collyer, *The Dublin Regulation, Influences on Asylum Destinations and the Exception of*

language spoken in the asylum country can be essential. The success rate of asylum applications is another positive factor. The opportunities for regularization outside the asylum process is yet another factor.[94] The ability to obtain work, authorized or not, plays a role.[95] Thus, the reception conditions alone are unlikely to be a decisive factor in attracting asylum seekers to a country.

C. State Responsibility for Asylum

The third element of the CEAS, also adopted in 2003, sets forth elaborate criteria for determining which Member State is responsible for deciding an individual's asylum application. Familiarly known as the Dublin II Regulation,[96] it replaces the Dublin Convention,[97] a 1990 treaty signed by twelve States in an effort to prevent asylum seekers from filing asylum claims in more than one country.[98] The Dublin Convention, which

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Algerians, 17 J. REFUGEE STUD. 375, 383–85 (2004) (citing various studies which analyzed this issue, including T. Havinga & A. Bocker, *Country of Asylum by Choice or by Chance: Asylum Seekers in Belgium, the Netherlands and the UK*, 25 J. ETHNIC & MIGRATION STUD. 43 (1999); V. Robinson & J. Segrott, *Understanding the Decision Making of Asylum Seekers*, HOME OFFICE RESEARCH STUDY 243, *in* LONDON: HOME OFFICE RESEARCH, DEVELOPMENT AND STATISTICS DIRECTORATE (2002); K. Koser & C. Pinkerton, *The Social Networks of Asylum Seekers and the Dissemination of Information about Countries of Asylum*, MIGRATION RESEARCH UNIT AT UNIVERSITY COLLEGE LONDON, *available at* http://www.homeoffice.gov.uk/rds/pdfs2/socialnetwork.pdf (2002)).

94. *See* Stephen H. Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, 15 INT'L J. REFUGEE LAW 567, 571 (2003) (discussing various reasons why asylum seekers might choose a particular destination country, and mentioning "favorable integration conditions" as one such factor).

95. *See id.* (noting that employment opportunities may push asylum seekers to choose a particular destination); Michael Collyer, *supra* note 93, at 384 (citing Thielemann's study).

96. Council Regulation 343/2003, Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third Country National, 2008 O.J. (L 50) 1 (EC) [hereinafter Dublin II Regulation].

97. Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, Dublin Convention, 1997 O.J. (C 254) 1–12 (current version at Dublin II Regulation) [hereinafter Dublin Convention]. The Dublin Convention went into effect in September 1997 for the original twelve state parties, followed shortly thereafter by three more state parties.

98. The Dublin Convention provided that an asylum seeker's application was to be examined by a single Member State. *Id.* art. 3. Another objective was to reduce refugees in orbit, bouncing from State to State to see which one will finally review the merits of the claim. The preamble of the Convention stated that the signatories were:

> aware of the need, in pursuit of this objective, to take measures to avoid any situations arising, with the result that applicants for asylum are left in doubt for too long as regards the likely outcome of their applications and concerned to provide all applicants for asylum with a guarantee that their applications will be examined by one of the Member States and to ensure that applicants for asylum are not referred successively from one Member State to another without any of these States acknowledging itself to be competent to examine the application for asylum . . .

went into effect in 1997, was not part of the EU legal framework although all parties to it were EU Member States; this rendered the ECJ without competence to interpret Dublin Convention provisions. In contrast, the Dublin II Regulation is an integral part of the CEAS which places it squarely within the purview of the ECJ. Indeed, the European Council issued this law as a regulation, which made it effective immediately.[99]

In essence, the Dublin II Regulation is a complex venue statute. Its default principle is that the Member State in which the application is first lodged is responsible for deciding the claim,[100] but many additional factors may come into play.[101] If the asylum seeker previously received a residence permit, visa, or permission to enter without a visa from a Member State, the issuing State would be responsible for examining the claim.[102] Similarly, if family members of the asylum seeker have received residence permits from a Member State, the State where the family resides would assume responsibility for the claim.[103]

There are special rules for unaccompanied minors. If a family member is legally present in a Member State, that State would be responsible, so long as it is in the best interest of the minor.[104] Otherwise, the State where the minor filed his or her asylum application is responsible,[105] but efforts should be made to reunite the minor with family members in any other State that would be able to care for the minor.[106]

Some of the most difficult situations arise when asylum seekers enter the EU without legal authority. In these circumstances, the first Member State entered, irrespective of where the claim is lodged, is responsible.[107] This responsibility lapses twelve months after the illegal entry, at which point the Member State in which the asylum seeker has resided for at least

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Id. pmbl.

99. Pursuant to article 29, the Dublin II Regulation became effective on March 17, 2003, the twentieth day after publication in the Official Journal of the EU. *See supra* note 96, art. 29. *See generally supra* note 40 (concerning the legal effect of regulations and directives under EU law).

100. Dublin Convention, *supra* note 97 art. 13 (if no other provisions of the Regulation apply, the first Member State where an asylum application is filed is responsible).

101. The Dublin II Regulation specifies a hierarchy of criteria to be weighed in each case. *Id.* arts. 5–14. And, of course, if any State volunteers to decide an asylum claim even though not required to do so, that is permissible. *Id.* art. 3(4).

102. *Id.* art. 9 (prescribing the sequence of responsibility if more than one State has issued residence permits or visa, and so on).

103. *Id.* art. 7.

104. *Id.* art. 6(1).

105. *Id.* art. 6(2).

106. Dublin Convention art. 15(3).

107. *Id.* art. 10.

five continuous months becomes responsible.[108] There are further provisions if the claimant has lived in several Member States for more than five months.[109] Determining when and where asylum seekers entered Member States can be extremely challenging, and the Dublin II Regulation specifies the criteria and procedures for evaluating circumstantial evidence and other proof that may be relevant.[110]

The Dublin II Regulation is complicated, and asylum seekers caught up in the so-called Dublin procedures can spend a significant amount of time in limbo.[111] In these situations, they are waiting solely for the answer to a threshold question: which forum is appropriate? Dublin II decisions may take months, and they never address the need for protection. A decision is merely a prelude to an examination of the substance of the application in question.[112]

D. Defining Those in Need of Protection

In the spring of 2004, just before ten new States joined the European Union, the Qualification Directive articulated the fourth element of the new asylum framework, defining those who qualify for protection in the EU.[113] It also prescribes the minimum legal protections that Member

108. *Id.* art. 10(2).

109. *Id.*

110. *Id.* art. 18(2)–(3).

111. Limitation periods apply to the procedures for determining state responsibility for asylum. Member States have three months in which to request another Member State to take custody of the asylum seeker and assume responsibility for deciding his or her case. *Id.* art. 17(1). Failure to respond within two months to a request to take charge of an asylum claim is deemed consent. *Id.* art. 18(7). There are detailed provisions concerning Member States taking charge of and taking back asylum seekers who have lodged asylum claims elsewhere. *Id.* arts. 17–19. "Taking charge" involves the assumption of legal responsibility to process an asylum application. This entails a situation where a Member State is responsible for the application of an asylum seeker according to the provisions of EU regulations, but the asylum seeker has lodged an application in another Member State. In essence, the responsible State must "take charge" of its duties to handle the claim of that asylum seeker. "Taking back," on the other hand, deals with the relocation of the actual asylum seeker and requires the Member State responsible for the individual's application to "take back" such a person into the territory of the responsible Member State under various conditions described in article 20.

112. In December 2008, the European Commission issued a proposal to amend the Dublin Regulation to increase its efficiency and to take into account the pressures on the reception capacities of particular Member States. The proposal includes an individual's right to appeal a transfer decision made pursuant to the Dublin Regulation and a corresponding right to consult legal advisors. *Proposal for a Regulation of the European Parliament and of the Council 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*, COM (2008) 820 final (Dec. 3, 2008).

113. Council Directive 8043/04, of the Council of the European Union on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons

States must afford to refugees and those in refugee-like situations. The Qualification Directive relies on the familiar international definition for those entitled to refugee status:

> [A] third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside of the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country. . . .[114]

The innovation of the Qualification Directive, and the focus of the ECJ *Elgafaji* case, is the new legal category known as subsidiary protection.[115] It is available for individuals "who [do] not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin . . . would face a real risk of suffering serious harm. . . ."[116]

The Qualification Directive requires Member States to grant three-year renewable residence permits to those determined to be refugees[117] and one-year renewable residence permits to those with subsidiary protection status.[118] Refugees must receive employment authorization,[119] social welfare,[120] education,[121] and have access to travel documents.[122] In contrast, those granted subsidiary protection status have the right to work, but the State may limit employment opportunities based on the national

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Who Otherwise Need International Protection and the Content of the Protection Granted, Apr. 27, 2004, *available at* http://register.consilium.eu.int/pdf/en/04/st08/st08043.en04.pdf [hereinafter Qualification Directive].

114. *Id.* art. 2(c). Note the congruence with article 1(A)(2) of the Convention Relating to the Status of Refugees, July 28 1951, 19 U.S.T. 6260 [hereinafter 1951 Refugee Convention], which defines as refugees those individuals who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion" are unable to seek the protection of their country.

115. An analysis of the subsidiary protection status and its legislative history can be found in McAdam, *supra* note 3.

116. Qualification Directive, *supra* note 113, art. 2(e).

117. *Id.* art. 24(1). Although the Qualification Directive goes beyond the mandate of the 1951 Refugee Convention, by requiring three-year renewable residence permits for refugees, it does not break new ground; the EU Member States all offer stable residence rights to those recognized as refugees.

118. *Id.* art. 24(2).

119. *Id.* art. 26(1).

120. *Id.* art. 28(1).

121. *Id.* art. 27.

122. *Id.* art. 25(1). They must also receive the same treatment as nationals with regard to the recognition of foreign diplomas, certificates, and formal qualifications. *Id.* art. 27(3).

labor situation.[123] Subsidiary protection includes the right to social welfare and education,[124] but States may reduce welfare to "core benefits."[125] Subsidiary protection entitles individuals to receive travel documents only "when serious humanitarian reasons arise that require their presence in another State."[126]

Many have criticized the hierarchy created by the Qualification Directive and the differences in the scope of protection afforded refugees and those granted subsidiary protection status. The European Parliament, the House of Lords Select Committee, Amnesty International, UNHCR, and others argued that the distinctions are arbitrary because they are not tied to differences in need, are likely to result in fragmentation of international protection, and will probably increase the numbers of appeals by those refused refugee status yet granted subsidiary protection.[127] Moreover, the assumption that those entitled to subsidiary protection are likely to need protection on a more temporary basis than refugees was strongly disputed.[128] The political compromises that produced the Qualification Directive, however, resulted in the two-tier approach.[129]

Other compromises embodied in the Qualification Directive result in greater protection for asylum seekers. Member States had strong and divergent views about what constitutes persecution and whether asylum could be granted based on the actions of non-state actors.[130] The Qualification Directive firmly acknowledges that those persecuted by non-state actors are entitled to protection, so long as the State or parties controlling the State are unable or unwilling to prevent the persecution.[131] The Qualification Directive also defines acts of persecution broadly to cover acts of physical or mental violence, including sexual violence;[132] disproportionate or discriminatory legal, administrative, police, judicial, or penal measures;[133] gender-specific or child-specific acts;[134] and

123. *Id.* art. 26(3).
124. *Id.* art. 28(1).
125. *Id.* art. 28(2).
126. *Id.* art. 25(2).
127. McAdam, *supra* note 3, at 498–99.
128. *Id.* at 499.
129. *See id.* at 497–99.
130. Germany's agreement to the provision recognizing persecution by non-State actors hinged on the agreement that subsidiary protection status did not guarantee equivalent rights with refugee status. *Id.* at 497–98.
131. Qualification Directive, *supra* note 113, art. 6.
132. *Id.* art. 9(2)(a).
133. *Id.* art. 9(2)(b)–(d).
134. *Id.* art. 9(2)(f).

prosecution for refusing to perform military service in certain circumstances.[135]

In addition, the Qualification Directive takes an expansive view of some of the reasons for persecution. Religion, for example, includes: "theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief. . . ."[136]

Political opinion includes opinions held, but not acted upon, and opinions the persecutor imputes to the applicant.[137] Nationality includes cultural, ethnic, or linguistic identity, common geographical origin, as well as citizenship or lack of citizenship.[138] Race includes color, descent, and ethnic background.[139]

With regard to the definition of a particular social group, the Qualification Directive adopts a two-part approach: the traditional *Acosta*[140] formulation and the social perception test. Under this test, members of a particular social group are those (1) who share innate traits, immutable backgrounds or characteristics so fundamental to identity or conscience that they should not be forced to change them, and (2) who society perceives as a distinct group.[141] As the two elements are not phrased in the alternative, this may make it more difficult for some victims of persecution to qualify as members of a particular social group. The Qualification Directive adds that gender alone does not create a particular social group, but that gender-related aspects might be relevant to defining such a group.[142] It also specifies that sexual orientation can form the basis

135. *Id.* art. 9(2)(e).
136. *Id.* art. 10(1)(b).
137. Qualification Directive, *supra* note 112, art. 10(1)(e), 10(2) (imputed opinion).
138. *Id.* art. 10(1)(c).
139. *Id.* art. 10(1)(a).
140. Matter of Acosta, 19 I&N Dec. 211 (B.I.A. 1985).
141. Qualification Directive, *supra* note 113, art. 10(1)(d). This two-tier approach, adopted by the Board of Appeals in Matter of S-E-G-, 24 I&N Dec. 579 (B.I.A. 2008), *available at* http://www.justice.gov/eoir/vll/intdec/vol24/3617.pdf, is currently a matter of vigorous litigation in the United States. In *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009) and *Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009), the Seventh Circuit has rejected adding a social visibility requirement to the particular social group analysis. In contrast, the First Circuit held in *Scatambuli v. Holder*, 558 F.3d 53 (1st Cir. 2009), that the asylum seekers had the burden of proving the social visibility of the group to which they belonged. Other circuits have addressed the issue in non-precedential opinions. *See, e.g.*, Contreras-Martinez v. Holder, 346 F. App'x 956 (4th Cir. 2009) (unpublished per curiam opinion).
142. Qualification Directive, *supra* note 113, art. 10(1)(d).

of a particular social group, so long as it does not include acts criminalized by the national law of the EU Member States.[143]

E. Asylum Procedures

The fifth component of the CEAS, the Asylum Procedures Directive, took the longest to develop and consensus was difficult to reach.[144] The law setting minimum standards for the procedures used to decide asylum claims was finally approved in the last days of 2005, a year and a half after the deadline for adoption, with Member States allowed two additional years in which to transpose its provisions into national law.[145] The Procedures Directive addresses many different aspects of asylum proceedings: basic procedural guarantees,[146] initial decision-making,[147] detention,[148] border and transit zones,[149] withdrawal of refugee status,[150] and appeal procedures.[151]

The fundamental guarantees ensure that asylum seekers have access to an asylum procedure[152] and the ability to remain in the Member State during the procedure,[153] the right to be informed of the procedures and the resulting decision in a language the asylum seeker can reasonably be thought to understand,[154] the right to consult with the UNHCR,[155] the right to a personal interview,[156] and the right to an interpreter when submitting an asylum claim to the authorities.[157] Free legal assistance is not mandated, but asylum seekers who do not have legal counsel must be informed about

143. *Id.*

144. *See generally* Panezi, *supra* note 3*;* SIDORENKO, *supra* note 3, at 79–81.

145. Council Directive 2005/85, on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 2005 O.J. (L 326) 13 [hereinafter Procedures Directive]. The Procedures Directive was adopted on December 1, 2005, entered into force on January 2, 2006, and established a transposition deadline of December 1, 2007.

146. *Id.* ch. II, arts. 6–22.

147. *Id*. ch. III, arts. 23–36.

148. *Id.* ch. II, arts. 18–19 (states may not detain individuals for the sole reason that they are asylum seekers).

149. *Id.* ch. III, § V.

150. *Id.* ch. IV.

151. Procedures Directive, *supra* note 145, ch. V.

152. *Id.* art. 6.

153. *Id.* art. 7 (right to remain in the Member State during the first-instance proceedings).

154. *Id.* art. 10(1)(a),(e).

155. *Id.* art. 10(1)(c).

156. *Id.* art. 12. States can omit a personal interview in certain circumstances, such as when the authorities have already had a meeting with the applicant, *id.* art. 10(2)(b), or when it is "not reasonably practicable to hold an interview," *id.* art. 10(3).

157. Procedures Directive, *supra* note 145, art. 10(1)(b).

the reason for the decision in their cases and the means available to challenge negative decisions.[158]

The Procedures Directive specifies that asylum seekers cannot be detained solely because they apply for asylum.[159] The Directive is silent as to acceptable grounds for detention, though it implicitly acknowledges that detention is appropriate in some circumstances.[160] The Directive explicitly requires access to speedy judicial review for detained asylum seekers.[161] With regard to appeals in general, asylum applicants have the right to seek judicial or administrative review of negative decisions.[162] However, States are not required to stay orders during appeals.[163]

The Procedures Directive outlines a robust role for the UNHCR. Member States must provide UNHCR access to asylum seekers, including those in detention, transit areas, at airports, and in other reception facilities.[164] UNHCR must also have access to information concerning individual applications, procedures, and decisions, provided the asylum seeker consents.[165] In addition, UNHCR has a right to present its views to government authorities on any individual claimant at any stage of the proceedings.[166]

Two of the most contentious points involve expedited procedures and the notion of safe countries, concepts familiar to American observers.

1. Accelerated Procedures

Many Member States have established accelerated asylum procedures at airports and other ports of entry, and the Procedures Directive allows special border procedures to continue, so long as certain safeguards exist.[167] Individuals stopped at the border or in transit zones[168] must be

158. *Id.* art. 10(1)(e).

159. *Id.* art. 18(1).

160. A compilation of EU measures permitting administrative detention of asylum seekers, as well as reports and analyses, can be found at *European Union*, DETENTION IN EUROPE, http://www.detention-in-europe.org/index.php?option=com_content&task=view&id=92&Itemid=213 (last visited Feb. 5, 2011).

161. Procedures Directive, *supra* note 145, art. 18(2).

162. *Id.* art. 39(1) (listing decisions that can be appealed).

163. *Id.* art. 39(3).

164. *Id.* art. 21(1)(a).

165. *Id.* art. 21(1)(b).

166. *Id.* art. 21(1)(c).

167. Procedures Directive, *supra* note 145, art. 35(2) (Member States may continue to use special border procedures already in effect when the Procedures Directive was adopted, so long as they meet certain prerequisites).

168. *Id.* art. 35(5) (Member States may utilize the specialized border procedures elsewhere, such as in facilities located near borders or transit zones, when there is an overflow of applicants at the

immediately informed of their rights and obligations; supplied an interpreter if necessary; allowed to consult with legal counsel; and provided an interview with an official trained in asylum and refugee law.[169] Asylum claimants must be guaranteed the right to remain in the border or transit zone while their requests are processed[170] and the right to appeal a negative decision.[171] If a decision is not made within four weeks, asylum applicants must be allowed to enter the country to submit their applications via the normal asylum procedure.[172]

In addition to special border procedures, the Procedures Directive permits Member States to establish expedited proceedings within their territory in a variety of circumstances. The Procedures Directive lists fifteen situations in which Member States can resort to accelerated procedures.[173] This list is not only long, but the circumstances that can justify accelerated procedures are extremely broad. For example, Member States may accelerate proceedings for applications that "clearly" do not satisfy the refugee criteria,[174] applications containing "inconsistent, contradictory, improbable or insufficient representations that [make the] claim[s] clearly unconvincing,"[175] applications filed late without reasonable cause,[176] applications that mislead the authorities by withholding relevant information concerning identity and nationality,[177] applications that include false information or fraudulent documents,[178] applications from individuals who entered unlawfully and did not file an asylum application as soon as possible,[179] and applications deemed unfounded because the asylum seekers come from a safe country of origin or a safe third country.[180] In each of these circumstances, the Member States can adopt short deadlines for preparing cases and filing appeals. Short deadlines make it hard to locate legal assistance and undercut the ability to prepare a thorough case; indeed, they increase the likelihood of negative results.

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border or "in the event of particular types of arrivals . . . which makes it practically impossible" to process the claims at the borders or in transit zones.).

169. *Id.* art. 35(3).
170. *Id.* art. 35(3)(a).
171. *Id.* art. 39(1)(a)(ii).
172. *Id.* art. 35(4).
173. Procedures Directive, *supra* note 145, art. 23(4).
174. *Id.* art. 23(4)(g).
175. *Id.*
176. *Id.* art. 23(4)(i).
177. *Id.* art. 23(4)(d).
178. *Id.*
179. Procedures Directive, *supra* note 145, art. 23(4)(l).
180. *Id.* art. 23(4)(c). *See infra* notes 196–212 for a discussion of safe country concepts.

The difficulties of short deadlines and accelerated procedures are familiar to asylum seekers, advocates, and scholars in the United States. In 1996, the U.S. Congress enacted expedited removal procedures,[181] which authorize border control officials to turn away those who arrive without proper documents[182] or with fraudulent documents without an opportunity for hearing or appellate review.[183] Those who state that they fear persecution or want to apply for asylum must be allowed to remain temporarily in order to be interviewed by an asylum officer.[184] The asylum officer assesses whether the individual has a "credible fear of persecution," an easier standard to satisfy than the "well-founded fear" required for eligibility for asylum.[185] Those found to have a credible fear of persecution are scheduled for a full hearing on the merits of their asylum claim.[186] Those determined not to have a credible fear may seek review in a special procedure before an immigration judge.[187] The immigration judge must complete this expedited review within seven days, and the asylum seeker remains detained throughout the accelerated proceeding.[188]

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181. The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 422, 110 Stat. 1213 (1996) (AEDPA) adopted expedited removal procedures which were promptly revised by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 302(a), 110 Stat. 3009-546 (1996) (IIRIRA), and are now found in INA § 235(b)(1), 8 U.S.C. § 1225(b)(1) (2008). Expedited removal procedures generally apply at the border. They also apply in the interior of the United States in two instances: (1) noncitizens who entered without inspection and are stopped within 100 miles of the U.S.-Mexico border or the U.S.-Canada border, unless they can show they have been present in the United States more than fourteen days, Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877 (Aug. 11, 2004); and (2) noncitizens who entered by sea, evaded inspection, and have been present in the United States, unless they can show they have been present in the United States more than two years, Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68924 (2002). INA § 235(b)(1)(A)(iii). *See generally* T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 685–86 (6th ed. 2008) [hereinafter AMMF].

182. INA § 235(b)(1)(A)(i) refers to INA § 212(a)(7), which states that noncitizens who lack valid travel documents cannot be admitted to the United States.

183. INA § 235(b)(1)(A)(i) refers to INA § 212(a)(6)(C), which states that noncitizens who have fraudulently or willfully misrepresented facts in seeking or procuring travel documents are not admissible to the United States.

184. INA § 235(b)(1)(A)(ii); INA § 235(b)(1)(B)(i).

185. The statute defines a credible fear of persecution to include "a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under [U.S. legislation.]" INA § 235(b)(1)(B)(v).

186. *Id.* § 235(b)(1)(B)(ii).

187. *Id.* § 235(b)(1)(B)(iii)(III).

188. *Id.* § 235(b)(1)(B)(iii)(III)–(IV).

As in Europe, many have criticized the short deadlines and truncated proceedings, emphasizing the difficulties of ensuring accurate determinations and evenhanded application of the law when there is little time to prepare an effective application much less to obtain legal assistance.[189] A 2005 report by a bipartisan commission muted some of the criticism. The commission found that asylum officers determined that a credible fear existed in more than 90% of the proceedings and decided the fear was not credible in only 1% of the cases.[190] These results surprised many observers and provided reassurance that individuals who fear persecution will receive a hearing on the merits of their claim.

An earlier point in the procedure has been the focus of new concerns, however. The report indicated that a significant number, perhaps as high as 15%, of those who told the border guards that they feared returning to their homelands were not provided a credible fear hearing.[191] This gap is worrisome, and it compounds concerns that accelerated procedures furnish asylum seekers with too little time to prepare their cases and too little opportunity to seek review of erroneous decisions. Nonetheless, the American experience with expedited removal during the past decade may provide guidance in amending the current EU Procedures Directive to add additional safeguards, such as adopting a "credible fear" standard in preliminary screening of asylum seekers facing accelerated procedures at the border.

More drastic than the Procedures Directive's imprimatur on expedited proceedings is the Directive's perspective on inadmissible claims. Claims deemed inadmissible can be refused without any examination—not even an expedited one—of the merits.[192] The Procedures Directive specifies seven types of asylum applications that can be rejected as inadmissible. Some of the grounds are likely to have wide support: claims by individuals

189. For critical analyses, see generally Karen Musalo et al., *The Expedited Removal Study Report on the First Three Years of Implementation of Expedited Removal*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1 (2001); Philip Schrag & Michelle Pistone, *The New Asylum Rule: Not Yet a Model of Fair Procedure*, 11 GEO. IMMIGR. L.J. 267 (1997); Juan Osuna & Patricia Mariani, *Expedited Removal: Authorities, Implementation, and Ongoing Policy and Practice Issues*, 97–11 IMMIGR. BRIEFINGS 1 (1997).

190. U.S. Commission on International Religious Freedom (CIRF), established by the International Religious Freedom Act of 1998, Pub. L. No. 105-292, 112 Stat. 2787 (1998), issued its Report on Asylum Seekers in Expedited Removal in February of 2005. U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL (2005) [hereinafter CIRF REPORT]. The report indicated that the asylum officers determined that a credible fear of persecution existed in more than 90% of the cases, rejected 1% of the cases, and resolved the case in some other way in the remaining instances. AMMF, *supra* note 181, at 682.

191. CIRF REPORT, *supra* note 190, at 54; AMMF, *supra* note 181, at 681.

192. Procedures Directive, *supra* note 145, art. 25 (inadmissibility grounds).

previously granted refugee status in a Member State[193] and applications filed by individuals who already have the right to remain in a Member State with protections equivalent to refugee status.[194] Other grounds have released torrents of criticism, particularly the provision that deems inadmissible applications filed by asylum seekers the authorities believe have a safe country to which they can go.[195] It is to this concept that I now turn.

2. Safe Countries

Different versions of the "safe country" concept appear in the Procedures Directive.[196] A "safe country of origin" refers to the asylum seeker's homeland and the view that the asylum seeker is unlikely to face serious threats of persecution or other harm at home that would warrant international protection.[197] A "safe country of asylum" or a "country of first asylum" refers to a country, other than the homeland, in which the asylum seeker has already received protection.[198] A "safe third country" is

193. *Id.* art. 25(2)(a).

194. *Id.* art. 25(2)(d). In addition, applications identical to claims already rejected by a final decision are inadmissible. *Id.* art. 25(2)(f).

195. *Id.* art. 25(2)(b)–(c).

196. In general, the idea of a "safe country" in asylum law relates to a country which is "thought to be 'safe' in some generic sense" as determined by the norms and standards of a particular asylum regime. Legomsky, *supra* note 94, at 575. In practice, a determination that a particular country is safe will amount to restrictions in the asylum process for the individual seeking protection. For example, if a refugee is seeking asylum in country X and the laws and regulations in that jurisdiction have a procedural mechanism for determining that there is another safe country, the asylum adjudicator might be instructed to restrict such a person from having his or her claim assessed in country X. The concept of which countries are safe may be "announced unilaterally by the destination country, or it might be part of a readmission agreement or an agreement to allocate responsibility for deciding asylum claims." *Id.* Although the safe country concept was historically most popular in Western Europe, it has proliferated to other regions, including 1996 reforms to asylum law in the United States. *Id.* at 575–76. Advocates of the concept explain that it serves various purposes based in administrative efficiency, such as the avoidance of forum shopping, harmonization and regional solutions to forced migration, and burden sharing among various countries. *See* Rosemary Byrne & Andrew Shacknove, *The Safe Country Notion in Asylum European Law*, 9 HARV. HUM. RTS. J. 185, 208–15 (1996). Despite these justifications, the concept has generated significant controversy. One of the most common criticisms is that "safe country" is simply a procedural device that results in avoiding "consideration of the actual merits of the asylum seeker's case." John-Hopkins, *supra* note 3, at 220.

197. The Procedures Directive contains three alternative approaches to designating safe countries of origin. Procedures Directive, *supra* note 145, arts. 29–31. Creation of a common list of safe countries generated substantial controversy and led to litigation. In 2008, the ECJ annulled arts. 29(1) and (2) and 36(3) regarding the procedures for creating a common list of safe countries. Case C-133106, Parliament v. Council, 2008 EUR-Lex CELEX LEXIS 2429 (May 6, 2008). For a general explanation and critique of the "safe country of origin" concept, see Byrne & Shacknove, *supra* note 196.

198. Procedures Directive, *supra* note 145, art. 26 (first country of asylum).

a country other than the homeland and the Member State reviewing the application for asylum.[199] The asylum applicant may or may not have already been in the third country; whether this third country will accept the asylum seeker and afford him or her safety are often hotly contested points.

All of the safe country variations appear in the Procedures Directive, but the safe third country concept generates the greatest concern. The safe third country concept is very expansive; an individual typically has only one country of origin and one country in which an asylum application has been filed, but the asylum seeker may have passed through or had prior dealings with many "third" countries. As a consequence, the role of the safe third country concept in the Procedures Directive warrants special attention.

Under the Procedures Directive, the Member States can shunt an asylum applicant into accelerated proceedings based on the notion that the application is unfounded because there is a safe country to which the applicant can go.[200] Even more drastically, Member States can declare a case inadmissible and refuse to examine it at all.[201] These measures create major risks for asylum seekers. When a Member State sends an asylum seeker to a third state for adjudication of the claim, the third state might fail to examine the merits of the claim. The third state could ship the asylum seeker to a "fourth" country that allegedly has responsibility to decide the request for asylum.[202] Alternatively, the third state might review the claim, but examine the application pursuant to inadequate asylum procedures.[203] Or the third state might be poor, unstable, and unable to provide adequate protection.

In recognition of these potential harms, the Procedures Directive limits the countries that can be viewed as "safe." The country must be free from threats to the asylum seeker's life or liberty on account of race, religion,

199. *Id.* art. 27 (safe third country).

200. *Id.* art. 23(4)(c). *See supra* note 180 and accompanying text.

201. *Id.* art. 25. *See supra* notes 192–95 and accompanying text.

202. Attempts to allocate responsibility of asylum claims amongst various countries can result in a problem defined as "orbits and chains," whereby the asylum seeker will "be subjected either to a sequence of cumulatively lengthy involuntary exiles to various other countries before his or her refugee status claim is eventually determined or, worse, to indirect chain *refoulement* to the country of origin." Legomsky, *supra* note 94, at 583–88.

203. The safe third country principle can have devastating consequences in the realm of human rights. As a refugee is referred from one country to another, the possibility of facing human rights violations, such as greater procedural deficiencies, increases. *See* Byrne & Shacknove, *supra* note 196, at 219–27 (1996); Legomsky, *supra* note 94, at 583–88.

nationality, political opinion, or membership in a social group.[204] The asylum applicant must have the possibility to seek refugee status in the third country.[205] The third country must live up to the *non-refoulement* obligations imposed by the 1951 Refugee Convention[206] as well as the international law prohibiting torture and cruel, inhuman or degrading treatment.[207]

In addition, a Member State can only send an asylum seeker to a safe third country if the Member State has national legislation containing rules requiring a reasonable connection between the applicant and the destination third country.[208] Individual asylum seekers must be able to challenge the decision that the third country is safe.[209] Asylum applicants whose applications are ruled inadmissible on safe third country grounds must have the right to seek judicial or administrative review.[210]

To lessen the chances of chain *refoulement*, with successive third countries diverting asylum seekers to yet another country, the Procedures Directive requires the Member State to furnish the asylum seeker with a notice in the language of the third country that explains that the merits of the asylum claim have not been reviewed.[211] If the third country does not admit the asylum seeker to its territory, the Member State must accept the asylum seeker back and decide the asylum claim.[212] The Directive does not, however, require the Member State to secure in advance the third country's agreement to accept the asylum seeker and adjudicate the claim.

As the Procedures Directive is the most recently enacted element of the CEAS, experience concerning the safe third country provision is sparse.

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204. Procedures Directive, *supra* note 145, art. 27(1)(a).

205. *Id.* art. 27(1)(d).

206. *Id.* art. 27(1)(b) (express reference to the Geneva Convention, as the 1951 Refugee Convention, is popularly known; article 33 of the 1951 Refugee Convention prohibits returning refugees to territories where their lives or freedom are threatened).

207. *Id.* art. 27(1)(c) (express reference to international law prohibitions of torture, cruel, inhuman, and degrading treatment). Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, *adopted and opened for signature* Dec. 10, 1984, S. Treaty Doc. No. 100-20, at 19 (1988), 1465 U.N.T.S. 112, and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) art. 3, Nov. 4, 1950, 213 U.N.T.S. 222, both prohibit returning individuals to states where they will face torture or inhuman and degrading treatment. This *non-refoulement* obligation is also considered a principle of customary international law. GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 345–54 (3d ed. 2007).

208. Procedures Directive, *supra* note 145, art. 27(2)(a).

209. *Id.* art. 27(2)(c) (third county, at a minimum, must not expose the asylum seeker to risks of torture, or cruel, inhuman or degrading treatment or punishment).

210. *Id.* art. 39(1)(a)(i).

211. *Id.* art. 27(3)(b).

212. *Id.* art. 27(4).

The lack of empirical data is compounded by the notorious difficulty in ascertaining what happens to asylum seekers after they have been transferred to airports in distant lands. Prior to the enactment of the Procedures Directive, the few studies that attempted to track asylum seekers refused admission on safe third country grounds in European Union countries indicated that chain *refoulement* was a serious problem.[213] This provision of the Procedures Directive bears close watching.

It is noteworthy for an American audience that U.S. law contains an analogous safe third country provision. The statute precludes asylum applications from asylum seekers who can be removed "pursuant to a bilateral or multilateral agreement" to a country where they have access to a full and fair asylum procedure and where they will not face threats to their lives or freedom.[214] To date, Canada is the only country that falls within this provision. After years of negotiations, the United States and Canada entered into a formal agreement providing that asylum claims filed at land entries will be adjudicated by the nation in which the applicant was physically present immediately before filing for asylum.[215] Those traveling to Canada from the United States and filing applications in Canada will have their claims decided by the United States, and vice versa.[216] The agreement provides that neither Canada nor the United States can deflect the responsibility to evaluate the asylum application by sending the asylum seeker to a different country.[217] From the U.S. perspective, at this point the only safe third country is Canada.[218]

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213. *See, e.g.*, EUROPEAN COUNCIL ON REFUGEES AND EXILES, "SAFE THIRD COUNTRIES": MYTHS AND REALITIES (1995), *available at* http://www.ecre.org/resources/policy_papers/227; STEVEN EDMINSTER, AT FORTRESS EUROPE'S MOAT: THE "SAFE THIRD COUNTRY CONCEPT" (1997).

214. INA § 208(a)(2), 8 U.S.C. § 1158(a)(2)(A)).

215. Joint Memorandum between Canada and the United States [hereinafter United States-Canada Safe Third Country Agreement], 79 INTERPRETER RELEASES 1431 (2002), implementing regulations found at 69 Fed. Reg. 69, 479 (2004). Negotiations to craft a bilateral agreement acceptable to both Canada and the United States took years and agreement occurred in late 2002. It applies to those who apply for asylum at land ports of entry.

216. United States-Canada Safe Third Country Agreement, *supra* note 215, art. 4.

217. *Id.* art. 3.

218. In 2007, the Federal Court of Canada concluded that the United States-Canada Safe Third Country Agreement violated the 1951 Refugee Convention and Canadian law. Canadian Council for Refugees v. Respondent, [2007] F.C. 1262 (Can.). The Court of Appeals of Canada reversed the Federal Court. Canadian Council for Refugees v. Respondent, 2008 Carswell Nat. 1995 (Can. F.C.A.). The Supreme Court of Canada declined to hear an appeal. Canadian Council for Refugees v. Respondent, Canada Supreme Court, 2009 Carswell Nat. 5170 (Can. S.C.). The UNHCR monitors the operation of the agreement and its legality under standards of international law. A review of the first year of the operation of the agreement found that the total number of U.S. asylum applicants subject to the agreement was sixty-two. UNHCR, UNHCR MONITORING REPORT: CANADA-UNITED STATES "SAFE THIRD COUNTRY" AGREEMENT, 29 December 2004–28 December 2005, at 112 (2006). A recent UNHCR Country Operation Plan for Canada indicated: "[i]n "monitoring the Agreement,

F. Other Measures

In addition to the five major legislative acts that comprise the CEAS, the European Union has created several new entities. European Dactyloscopy ("EURODAC"), a central database for comparing fingerprints of asylum seekers and other third-country nationals, as noncitizens of EU Member States are called, is now in place.[219] Frontex, a new agency to coordinate external border enforcement and management, has come into existence.[220] In 2006 and 2007 Frontex mounted Operation Hera[221] to intercept boats with migrants headed toward the Canary Islands and Operation Nautilus[222] to intercept migrants in the Mediterranean heading to Malta and Italy. In addition, the EU has promulgated multiple migration measures that may substantially deter asylum seekers. For example, the EU has adopted a common visa policy[223] and has adopted laws placing duties, enforced by monetary fines, on public carrier companies that bring unauthorized passengers to the EU.[224]

UNHCR's findings were that it has been implemented according to the terms of the agreement and international refugee law." UNHCR, UNHCR COUNTRY OPERATIONS PLAN: CANADA, 2008–2009 (2007), *available at* http://www.unhcr.org/4706097f2.html.

219. The first law, 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, 2000 O.J. (L 316), was followed two years later by Council Regulation (EC) No. 407/2002, 2002 O.J. (L 62) prescribing implementation rules.

220. 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, 2004 O.J. (L 349) 1.

221. Frontex carried out Operation Hera with two primary activities. First, experts from various Member States were deployed to support Spanish authorities on the Canary Islands in their efforts to interview migrants and obtain information regarding their countries of origin and other knowledge relevant to the flow of migration. Second, joint sea patrols were put in place along the coast of West Africa, involving Member States and third countries who have agreements with Spain to participate in such patrols. Hera I (July 17, 2006–Oct. 31, 2006) involved expert deployment, Hera II (Aug. 11, 2006–Dec. 15, 2006) focused on joint surveillance and patrol, and Hera III (Feb. 12, 2007–Apr. 12, 2007) involved both expert deployment and patrol. *See Examples of Accomplished Operations: Canary Islands—Hera*, OFFICIAL SITE OF FRONTEX, http://www.frontex.europa.eu/examples_of_accomplished_operati/art5.html (last visited Mar. 5, 2011).

222. Operation Nautilus entailed a joint sea operation with the objective of stemming the migration flow in the Central Mediterranean, targeting Malta and Italy. Five Member States participated in the operation which took place from October 5–15, 2006. *See Examples of Accomplished Operations: Central Mediterranean-Nautilus*, OFFICIAL SITE OF FRONTEX, http://www.frontex.europa.eu/examples_of_accomplished_operati/art6.html (last visited Mar. 5, 2011).

223. Council Regulation 539/2001, amended by Council Regulation 851/2005, lists countries whose nationals must have a visa to enter the Schengen area and the countries for which the visa requirement is waived. For further details regarding the common visa policy, see http://ec.europa.eu/home-affairs/policies/borders/borders_visa_en.htm (last visited Mar. 5, 2011) and corresponding legislation.

224. Council Directive 2004/82 on the Obligation of Carriers to Communicate Passenger Data, 2004 O.J. (L 261) 24 (EC).

III. ASYLUM FOR VICTIMS OF INDISCRIMINATE VIOLENCE

For many years war refugees have faced major obstacles in obtaining asylum. The centerpiece of international refugee law, the 1951 Refugee Convention, privileges those uprooted due to persecution based on race, religion, nationality, political opinion, or membership in a particular social group.[225] Many who flee civil wars or insurrections can convincingly demonstrate that they are likely to risk persecution if they return to their country of origin. Others, though possessing evidence that their lives might be in serious danger if sent back to a homeland consumed by armed conflict, lack proof that they will be persecuted.

In the post-World War II era, government authorities have typically linked asylum to refugee status, which is available only to those with well-founded fears of persecution. For those fleeing war zones, governments have crafted different temporary arrangements, known variously as "humanitarian asylum," "temporary protection," "exceptional leave to remain," "tolerated status," war refugees, and de facto refugees.[226] These ad hoc programs frequently are country-specific, based on government assessments of the levels of violence in the asylum seekers' homelands.[227] Administrative discretion has been the hallmark of these measures. Governments weigh pragmatic considerations—the numbers displaced by warfare around the world, the magnet effect of asylum and resettlement, the domestic implications of receiving refugees—against humanitarian impulses. The result has been a patchwork of legal arrangements; flexibility has trumped coherence.

A. Subsidiary Protection in the European Union

Prior to the development of a common asylum law for the European Union, all Member States extended some form of protection to refugees from war-torn zones.[228] Indeed, some Member States granted protection pursuant to ad hoc measures much more frequently than they granted

225. By its terms, the 1951 Refugee Convention does not require that parties grant asylum to refugees, but many legislatures have used this definition as the criterion for granting individuals asylum. GOODWIN-GILL & MCADAM, *supra* note 207, at 46.

226. *See, e.g.*, JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 21–24 (1991).

227. For example, Germany prohibited the deportation of Croats during the early 1990s while war was raging in Croatia but lifted the ban and provided for phased repatriation once the armed hostilities ended. Kay Hailbronner, *Temporary and Local Responses to Forced Migration: A Comment*, 35 VA. J. INT'L. L. 81, 88–89 (1994).

228. McAdam, *supra* note 3, at 463–64.

refugee status.[229] Against this backdrop, the European Council directed that the CEAS include both refugee status and additional "measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection."[230] The Qualification Directive took up the challenge. It requires Member States to grant legal status to those non-EU citizens who satisfy the subsidiary protection definition:

> A third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin . . . would face a real risk of suffering serious harm as defined in Article 15 . . . .[231]

The meaning of "serious harm" is the crux of the definition, and article 15 of the Qualification Directive sets forth three circumstances that constitute serious harm:

> (a) death penalty or execution; or
>
> (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.[232]

The first two provisions reiterate legal obligations already ensconced in European law.[233] Article 15(a) refers to the death penalty, which all Member States prohibit under current law.[234] In addition, the jurisprudence

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229. *Id.* at 464.

230. Tampere Conclusions, *supra* note 28, ¶ 14.

231. Qualification Directive, *supra* note 113, art. 2(e). Article 18 specifies "Member States shall grant subsidiary protection status to a third country national or a stateless person eligible for subsidiary protection in accordance with [this Directive]." *Id.* art. 18.

232. *Id.* art. 15.

233. As described below, these legal obligations stem from the European Human Rights Convention, not from the EU. *See infra* notes 234–36 and accompanying text. All EU Member States are parties to the ECHR, which is interpreted by the European Court of Human Rights, not by the European Court of Justice.

234. As all Member States are parties to the ECHR, *supra* note 207, they are bound by Protocol 6 of this Convention which prohibits the death penalty in peacetime, and Protocol 13, which prohibits the death penalty in all circumstances. In addition, all Member States are parties to the Second Optional Protocol to the International Covenant on Civil and Political Rights, which also outlaws the death penalty. *See* United Nations Treaty Collection, Status of the Second Optional Protocol to the International Covenant on Civil and Political Rights (as of Jan. 2009), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-12&chapter=4&lang=en (last visited Mar. 5, 2011). Furthermore, when the Treaty of Lisbon, *supra* note 18, came into force on Dec. 1, 2009, and

of the European Court of Human Rights (ECHR) prohibits extradition to states that will impose the death penalty.[235] Article 15(b) is virtually identical to article 3 of the European Human Rights Convention, to which all EU Member States are parties.[236] Accordingly, even prior to the Qualification Directive the law prohibited Member States from returning individuals to countries where they would face torture or inhuman or degrading treatment. For individuals who satisfy article 15(a) or (b), the Qualification Directive brings only a small improvement by mandating a legal status rather than merely forbidding *refoulement*.

Article 15(c), in contrast, constitutes a major change in the scope of protection. It brings threats from indiscriminate violence within the ambit of "serious harm." Prior to the Qualification Directive, no European treaty or legislation prohibited *refoulement* of victims of indiscriminate violence or required Member States to grant them legal status. Thus, article 15(c) expands the right of asylum in the EU to civilians facing serious and individual threats from armed conflict. The ECJ's first encounter with the new European asylum law considered which civilians belong in the newly protected group of war refugees.

B. Individual Threat and Indiscriminate Violence

The Elgafajis arrived in the Netherlands in 2006, two years after the adoption of the Qualification Directive.[237] They had left a country experiencing military invasion and sectarian violence. Mr. Elgafaji, a Shiite Muslim, and his wife, a Sunni Muslim, lived in Baghdad where forced evictions, physical assaults, and murder were used to create wholly Shiite and wholly Sunni neighborhoods.[238] Political violence threatened

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incorporated the Charter of Fundamental Rights into EU law, it expressly prohibited the death penalty. Charter of Fundamental Rights of the European Union art. 2, 2000 O.J. (C 364) 1.

235. The *Soering* decision by the European Court of Human Rights prohibited extradition to states in which the accused would suffer the "death row phenomenon." Soering v. UK, 161 Eur. Ct. H.R. (Ser. A) (1989). In addition, the European Convention on Extradition, art. 11, E.T.S. No. 24, bans the extradition of an individual to a state where the death penalty will be imposed and/or requires written assurance from the receiving country that the death penalty will not be pursued.

236. European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 207, art. 3, states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." This text has been adopted verbatim by the Charter of Fundamental Rights of the European Union, *supra* note 234, art. 4, which entered into force Dec. 1, 2009.

237. Article 39 of the Qualification Directive provided that it would enter into force on the twentieth day following publication in the Official Journal, which was Sept. 30, 2004. Article 38 provided that the Member States shall transpose the Directive's standards into national law by October 10, 2006. The Dutch Minister for Immigration and Integration rejected the application for temporary residence permits on December 20, 2006. *Elgafaji*, *supra* note 2, ¶ 19.

238. Sabrina Tavernese, *Quiet Killings Split Neighborhood Where Sunnis and Shiites Once Lived*

many, whether they were bystanders or, like Mr. Elgafaji, employees of companies providing support to the coalition forces.[239]

The Dutch authorities rejected the Elgafajis' claim on the ground that they had not established a real risk of serious and individual threat in their home country.[240] The Elgafajis then challenged the government's decision in the District Court in The Hague. The court concluded that applications for protection filed pursuant to article 15(c) of the Qualification Directive do not require a "high degree of individualization" of threats and annulled the order denying residence permits to the Elgafajis.[241] The government appealed the District Court's ruling to the Dutch Council of State, the highest court in the Netherlands in matters challenging government action.

The parties emphasized different portions of the text of article 15(c) in analyzing whether the Elgafajis had demonstrated the "serious harm" required for subsidiary protection. The Dutch government focused on the language specifying an *individual* threat by reason of indiscriminate violence. The government contended that this language requires evidence that applicants for subsidiary protection have been specifically targeted, and unless singled out, victims of indiscriminate violence are not entitled to subsidiary protection.[242]

The Dutch drew support for their interpretation of article 15(c) from the other provisions in article 15, arguing that article 15(a)'s reference to death penalty or execution implies a punishment imposed on a particular individual. They emphasized article 15(b)'s incorporation of the language of article 3 of the European Human Rights Convention, which has been limited to circumstances in which an individual has been singled out or targeted.[243] Accordingly, they argued that article 15(c) should be understood to require such individualized threats.

Side by Side, N.Y. TIMES, July 4, 2005, at A7; Sabrina Tavernese, *Sects' Strife Takes a Toll on Baghdad's Daily Bread*, N.Y. TIMES, July 21, 2006, at A1.

239. *Elgafaji*, 2009 E.C.R. I-00921, ¶ 18.

240. *Id.* ¶ 19.

241. *Id.* ¶¶ 21–23. The Rechtbank te's-Gravenhage is the trial court for the district of the Hague. It is one of nineteen trial courts (rechtbanken) in the Netherlands. The Staatssecretaris van Justitie, the respondent in the case, is the "Under-Minister of Justice," a role comparable to that of Deputy Attorney General in the U.S. system. *See generally* OFFICIAL SITE OF THE DUTCH JUDICIAL SYSTEM (English version), http://www.rechtspraak.nl/ (last visited Oct. 3, 2010).

242. *Elgafaji*,2009 E.C.R. I-00921.

243. The European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 207, art. 3, states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Note the similarity to the Qualification Directive, *supra* note 113, art. 15(b): "[Serious harm consists of] torture or inhuman or degrading treatment or punishment of an applicant in the country of origin."

The Elgafaji family asserted that the Dutch interpretation of article 15(c) was too narrow. They contended that they *themselves* were *individually* threatened by the *indiscriminate violence* in Iraq. The Elgafajis also declared that the structure of article 15 supported their interpretation: article 15(c) would be redundant if interpreted to reach only the circumstances covered by 15(a) and (b).

The Council of State decided to stay the proceedings and to refer the matter to the ECJ for a preliminary ruling. No other appellate court had yet interpreted eligibility for subsidiary protection under the terms of article 15(c). The terms of article 15(c) were susceptible to different interpretations, and the practical impact of the interpretation could be enormous. The ECJ would be the first to address the scope of the new subsidiary protection status.[244]

1. The Reference to the European Court of Justice

Understanding the procedural posture of the litigation is critical to assessing the significance of the ECJ's Judgment of February 17, 2009. The principles of EU law require the courts of Member States to interpret and rely on EU legislation when it is applicable.[245] If the courts of Member States are unsure about the applicability or the meaning of an EU legal provision, they can temporarily halt the litigation before them while they seek clarification of the disputed provision from the ECJ.[246] This approach is known as a reference for a preliminary ruling.

References for a preliminary ruling are somewhat akin to the certification procedure in the United States that allows federal courts faced with difficult state law questions to seek a definitive interpretation from

244. *Elgafaji*, 2009 E.C.R. I-00921, ¶¶ 25–26.

245. Case 26/62, NV Algemene Transporten Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Admin., 1963 E.C.R. 1, established that EU law has direct effect in Member States and can be enforced in the Member States' courts.

246. EEC Treaty, *supra* note 11, art. 177, provides:

> The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

the highest court of the state.[247] References for preliminary rulings allow the ECJ to provide authoritative interpretations of EU law, after which the Member State's judiciary can then apply the correct interpretation of EU law in the ongoing litigation in the Member State.

In the *Elgafaji* case, the Dutch Council of State sought a preliminary ruling from the ECJ on two specific questions:

> (1) Is the protection offered by Article 15(c) congruent with that offered by Article 3 of the European Human Rights Convention, which requires a showing that the applicant has been specifically targeted?
>
> (2) If Article 15(c) provides broader protection than Article 3, what are the criteria that determine eligibility under Article 15(c)?[248]

A common law lawyer will immediately note several points about the *Elgafaji* preliminary ruling procedure. The Dutch Council of State posed two abstract legal questions, and it avoided framing the statutory interpretation issue in terms of the facts of the underlying litigation. Indeed, the questions did not even mention the facts. This emphasizes the abstract ruling that the preliminary ruling procedure envisions. The national court poses a question. The ECJ considers the question and provides its interpretation of the law, but it does not attempt to apply this interpretation of the law to the specific facts involved in the case. Applying the law to the facts is left to the national court.

Further, in a reference for a preliminary ruling, the ECJ responds only to the questions posed by the referring court. The ECJ does not address other potential grounds for resolving the particular dispute. This can seem

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247. In certain circumstances where a particular issue of state law could be best resolved by a state court, federal courts can take advantage of the certification process. In such a situation, the federal court retains jurisdiction over all federal and state claims that may be involved, but has discretion to submit a novel question of state law to the appropriate jurisdiction. Most state statutes have provisions which allow for certification and describe the process by which federal courts can refer a question to the highest court in the state. CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE Vol. 17A, § 4248 (3d ed. 2007).

248. *Elgafaji*, 2009 E.C.R. I-00921, ¶ 26 reprints the two questions:

> 1. Is Article 15(c) of [the Directive] to be interpreted as offering protection only in a situation in which Article 3 of the [ECHR], as interpreted in the case-law of the European Court of Human Rights, also has a bearing, or does Article 15(c), in comparison with Article 3 of the [ECHR], offer supplementary or other protection?
>
> 2. If Article 15(c) of the Directive, in comparison with Article 3 of the [ECHR], offers supplementary or other protection, what are the criteria in that case for determining whether a person who claims to be eligible for subsidiary protection status runs a real risk of serious and individual threat by reason of indiscriminate violence within the terms of Article 15(c) of the Directive, read in conjunction with Article 2(e) thereof?

distracting and even inefficient to those trained in the common law system. The *Elgafaji* case, for example, contained facts—a death threat posted on the door—that appear to meet a *specifically targeted* standard,[249] but the question posed by the Dutch Council of State was whether article 15(c) *always* requires evidence that the applicant has been specifically targeted.[250]

2. The Judgment of February 17, 2009

At first reading, the ECJ judgment appears to constitute a robust endorsement of the position advanced by the applicants for subsidiary protection. The ECJ adopted textual and structural analyses of article 15(c) that favored the Elgafajis, and the court adopted a critical tone, chastising the Dutch Council of State for confusing the European Human Rights Convention with the Qualification Directive. The court also sternly reminded the Dutch authorities of their obligation to interpret national law in light of EU law, even if the transposition of the EU Directive into Dutch law had not occurred until after the Elgafajis filed their claims for subsidiary protection.[251]

Closer attention to the judgment and its reasoning, though, reveals that the court offers a tempered interpretation of article 15(c). The ECJ began its analysis by rejecting the Dutch Council of State's formulation of the preliminary ruling questions in the context of article 3 of the European Human Rights Convention.[252] Emphasizing that the Qualification Directive stems from EU law, an independent source of law, the ECJ refused to limit the scope of EU subsidiary protection to that outlined in the European Human Rights Convention.[253] The court then examined the

249. A note fixed to one's door threatening "Death to Collaborators" would appear to constitute evidence of a well-founded fear of persecution for reasons of political opinion, thus meeting the qualification for refugee status under the Qualification Directive, art. 2(c), and under the 1951 Refugee Convention. It would also appear to satisfy the "specifically targeted" threat requirement imposed by the jurisprudence interpreting ECHR, *supra* note 207, art. 3 and accompanying text.

250. *Elgafaji*, 2009 E.C.R. I-00921, ¶ 26(1). The Council of State also posed a second question: if evidence of individual targeting is not required, what evidence is relevant to assessing whether the applicant for subsidiary protection runs a real risk of serious and individual threat? *Id*. ¶ 26(2).

251. *Elgafaji*, 2009 E.C.R. I-00921, ¶¶ 41–42.

252. *Id.* ¶ 28.

253. The ECJ stressed that, although the fundamental human rights framework established by the European Convention for the Protection of Human Rights and Fundamental Freedom undergirds EU law, the substantive provisions of EU law have independent content. *Id.* ¶ 28. Ten months after the *Elgafaji* decision, the Treaty of Lisbon entered into force, incorporating into EU law a Charter of Fundamental Freedoms that includes many provisions similar or identical to the terms of the ECHR, *supra* notes 18, 234, 236.

structure of article 15 of the Qualification Directive in order to give content to the term "serious harm." It deduced from the three alternative formulations of serious harm that each sub-section must cover different types of injury,[254] and accordingly, it concluded that article 15(c) should address matters not encompassed by article 15(a)–(b).[255] As article 15(b) mirrors the protection available under European human rights law, the ECJ concluded that article 15(c) should be interpreted to address situations other than those that would fall within the European Human Rights Convention's ban on torture or inhuman or degrading treatment specifically targeting an individual.[256]

The court next turned to the text of article 15(c): "[s]erious harm consists 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."[257] Focusing first on the type of harm contemplated in article 15(c), the court contrasted article 15(c)'s reference to a "threat to . . . life or person" with article 15(a)'s reference to death penalty or execution, and article 15(b)'s reference to torture, inhuman treatment or punishment, and degrading treatment or punishment. In the court's view, all of the harms enumerated in articles 15(a) and 15(b)—execution, torture, inhuman treatment—embody a specific type of harm that a particular individual faces,[258] whereas the broader "threat to life or person" encompasses many unspecified forms of violence and harm.[259] As a consequence, the court concluded that article 15(c) covers a more general risk of harm than the other subsections.[260] Moreover, the court found support for reading article 15(c) broadly from its references to armed conflict and threats of indiscriminate violence. The ECJ reasoned that both of these phrases imply general situations where many people, independent of their particular circumstances, are threatened.[261]

In analyzing article 15(c)'s reference to individual threat, the ECJ stressed that article 15(c) links "individual threat" to "indiscriminate violence" resulting from armed *conflict*.[262] The court reasoned that in this context—situations characterized by high levels of indiscriminate violence

254. *Elgafaji*, 2009 E.C.R. I-00921, ¶ 36.
255. *Id.* ¶ 38.
256. *Id.* ¶ 28.
257. Qualification Directive, *supra* note 113, art. 15(c).
258. *Elgafaji*, 2009 E.C.R. I-00921, ¶ 32.
259. *Id.* ¶¶ 33, 34.
260. *Id.* ¶ 33.
261. *Id.* ¶ 34.
262. *Id.* ¶¶ 34, 35, 38.

due to international or internal armed conflict—all individual civilians will be at risk. As a result, in these circumstances the term "individual threat" would encompass the grave risk that an individual would face solely on account of his or her presence.[263] In the court's view, the danger from such indiscriminate violence would be arbitrary and haphazard rather than linked to an individual's politics, race, religion, or other attributes.[264] Therefore, it would be illogical to require applicants for subsidiary protection under article 15(c) to show they had been individually targeted.

The court acknowledged that the warning contained in the Qualification Directive's preamble could be seen to undermine the text's reference to violence of a wholesale nature. The preambular clause cautions: "Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm."[265]

The ECJ, though, discounted this limiting clause by highlighting the word "normally." The court reasoned that if general risks do not normally constitute individual threats, this acknowledges that they can do so in exceptional situations.[266] Thus, the ECJ imparted a broad interpretation of article 15(c); at least in exceptional circumstances subsidiary protection applicants can satisfy the individual threat requirement by producing evidence of a high level of general risk from indiscriminate violence. In these circumstances, the only thing individual about the threat is that the claimant for subsidiary protection will face the threat, as will all of his or her neighbors. To put it another way, any individual in these circumstances can show that he or she faces a real risk of suffering serious harm.

Having prescribed the outer limits of article 15(c), the ECJ began to circumscribe its general applicability. The court said that in normal circumstances, applicants for subsidiary protection pursuant to article 15(c) must show more than a mere risk they will be threatened by armed conflict in their home region. In most situations, the court suggested, threats directed at the subsidiary protection applicant would be relevant to determining whether or not the applicant faces a risk of serious harm.[267] Elaborating on this point, the ECJ set forth a sliding scale for evaluating

263. *Elgafaji*, 2009 E.C.R. I-00921, ¶ 35.
264. *Id.* ¶¶ 34, 35.
265. Qualification Directive, pmbl., ¶ 26.
266. *Elgafaji*, 2009 E.C.R. I-00921, ¶ 37.
267. The ECJ bolstered this reasoning by noting that the existence of threats directed at the applicant is relevant under Articles 15(a) and 15(b). *Id.* ¶ 38.

claims relying on article 15(c): "[T]he more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection."[268]

Further, the court emphasized that it is up to the national authorities to assess the evidence to determine the level of indiscriminate violence.[269] With these two pronouncements, the court significantly limited the availability of subsidiary protection. Deference to the Member State's evaluation of the level of violence in the applicant's home region, coupled with a flexible inverse correlation between the extent of indiscriminate violence and the need to produce evidence of individually targeted threats, will enable Member States to restrict the award of subsidiary protection.

In sum, the ECJ ruled that those who seek subsidiary protection due to danger from armed conflict should generally support their claims with evidence that their personal circumstances put them at special risk. Nonetheless, if the level of indiscriminate violence is sufficiently high, subsidiary protection is available without any showing that the applicant has been targeted. The ECJ therefore informed the Dutch Council of State that article 15(c) does not require that subsidiary protection applicants produce evidence that they are specifically targeted due to their personal attributes or circumstances.[270]

Although the *Elgafaji* judgment adopted an open-ended interpretation of the "serious harm" requirement, the court accorded government authorities substantial power to apply this broad reading in a restrictive fashion. In practice, government officials will be able to ration the grant of subsidiary protection to war refugees.[271] Nonetheless, the CEAS has taken a major step forward in refugee protection. By requiring Member States to grant asylum, in the form of subsidiary protection, based on serious threats of indiscriminate war-time violence, the Qualification Directive has begun to close the protection gap that has until now existed beyond the contours of the 1951 Refugee Convention.[272]

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268. *Id.* ¶ 39.

269. *Id.* ¶ 35.

270. *Id.* ¶ 43.

271. Indeed, after the ECJ issued the *Elgafaji* judgment, the Dutch Council of State reviewed the evidence concerning the security situation in Baghdad and concluded that the level of indiscriminate violence was not sufficiently high to support the conclusion that Mr. and Mrs. Elgafaji were, by their mere presence, at risk of serious individual threats to their lives or physical safety. Conseil d'État [CE] [Council of State] May 25, 2009, Vreemdelingen, No. 200702174/2/V2, http://www.conseildetat.be (Belg.), *available at* http://www.rechtspraak.nl (search for "BI4791").

272. In the wake of the ECJ's 2009 *Elgafaji* opinion, courts in Bulgaria, the Czech Republic, France, Germany, the Netherlands, and the United Kingdom have wrestled with article 15(c) of the

Of paramount importance, EU law makes subsidiary protection an enforceable right. The burden on individual applicants for subsidiary protection may be high and the courts may exhibit substantial deference to national authorities, but protection for refugees fleeing armed warfare is no longer solely a matter of executive discretion.[273] Iraqis and others forced from their homes by indiscriminate violence have the right, once they reach the EU, to go to court to demand legal protection. Relatively few may gain access to Europe to claim protection from armed conflict that has engulfed their homelands. The initial applicants may find success infrequently. But a new norm, responsive to the real world experience of people forced by war to flee their homelands, is developing. Rather than compelling asylum applicants to mold their claims to fit a persecution model, the EU has created a new protection paradigm that is aligned to the reality of refugees in the twenty-first century.

IV. CONCLUSION

The past two decades have witnessed the growth of a regional approach to asylum policy in the EU, a substantial advance for a polity that in 1987 rejected European Commission requests for information on migration as infringements of the national sovereignty of the Member States. Within twenty years the EU agreed to develop a common asylum law and put into place the first elements of the CEAS. Though this common policy is a product of many political compromises that limit the reach and content of protection available to asylum seekers, it has significantly expanded the substantive protection guaranteed to people forced from their homes by war.

Furthermore, the ECJ judgment of February 17, 2009 interpreted the new subsidiary protection mandate broadly to include those who face high levels of indiscriminate violence in their country of origin but have not been individually targeted themselves. At the same time, the court

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Qualification Directive. Roger Errera, *The CJEU and Subsidiary Protection: Reflections on* Elgafaji–*and After*, 23 INT'L J. REFUGEE L. 93 (2011). The differing interpretations adopted by French and English courts to subsidiary protection under article 15(c) of the Qualification Directive indicate that substantial protection gaps still exist in EU states. Helene Lambert & Theo Farrell, *The Changing Character of Armed Conflict and the Implications for Refugee Protection Jurisprudence*, 22 INT'L J. REFUGEE L. 237 (2010).

273. This is a key difference between subsidiary protection in the EU and Temporary Protected Status in the United States. *See supra* notes 65–73 and accompanying text. Thousands of war refugees have received protection in the United States via the TPS program. The decision to grant TPS to refugees fleeing a war zone (or other types of non-persecutory harm) rests solely in the unreviewable discretion of the Secretary of Homeland Security. INA §§ 244(b)(1), 244(b)(5)(A).

construed the subsidiary protection provisions to accord substantial deference to government authorities' assessments of the levels of indiscriminate violence relevant to individual cases, and much remains to be seen about the contours of subsidiary protection in practice. Nonetheless, by establishing an enforceable right to subsidiary protection for those fleeing extremely violent armed conflicts, the EU has begun to close the yawning protection gap that faces war refugees.