Wilfried
Martens Centre
for European Studies

Back to Geneva

Reinterpreting Asylum in the EU

Vladimír Šimoňák and Harald Christian Scheu

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Credits

The Wilfried Martens Centre for European Studies is the political foundation and think tank of the European People's Party (EPP), dedicated to the promotion of Christian Democrat, conservative and like-minded political values.

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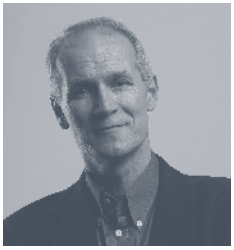

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Executive summary

The European asylum system sometimes comes under criticism for being overly generous with regard to access to asylum and other aspects of international protection. This is often attributed to the provisions of the 1951 Convention Relating to the Status of Refugees (the Geneva Convention).

This paper examines these claims by applying legal methodology to several key concepts which are relevant not only to the legal structure of asylum law but also to its practical application. The focus is on the evolving jurisprudence and legislative action in Europe which have created a peculiar understanding of international protection. Although the legal standards currently in force in the EU have their roots in the Geneva Convention, European asylum law has evolved into its current form through the layering of a legal superstructure onto the Convention. As a result there are considerable differences between what is laid out in the Convention and the implementation carried out by the Common European Asylum System.

To provide an additional perspective, the paper includes a brief overview of how key elements of asylum law are interpreted in other major democratic jurisdictions, including the US, Canada and Australia. The objective is not to provide an exhaustive comparison, but rather a few examples of an alternative approach.

Based on an analysis of relevant case law and international comparisons, the paper asserts that the Geneva Convention itself cannot be linked to certain overly generous interpretations and that such an outcome was not intended by the framers of the Convention. Rather, supplementary judicial and legislative interpretations, which have accumulated over decades, have caused Europe's asylum system to become more permissive in certain aspects, compared to those of other major democratic jurisdictions. In particular, the jurisprudence of the European Court of Human Rights has played a major role in this regard. Furthermore, the EU's legislative ambition, as set out in the treaties, is broader than that of the Geneva Convention. As a separate point, the rulings of the Court of Justice of the European Union have failed to consider the rulings of courts in other democratic jurisdictions which, on issues such as the definition of persecution, have issued rulings just as 'liberal' as the European court.

The paper concludes by offering several alternative views on how one may assess the differences between the EU, on the one hand, and Australia, the US and Canada, on the other. An examination of these differing perspectives allows us to advance operational efficiency of the EU's asylum system by moving

it closer to the original intention of the Geneva Convention. If the major challenges in the field of asylum are to be met successfully, this will have to be within the framework of the Geneva Convention as the only universal legal instrument of refugee law.[1]

Keywords Asylum – Migration – Geneva Convention – Court of Justice of the European Union – European Court of Human Rights – EU treaties

[1] We would like to thank Jonas Nitschke for preparing the reference apparatus.

Introduction

When political debates in Europe turn to asylum, the smiles around the table tend to disappear. International protection offered to third-country nationals or, more concisely, asylum, has acquired a toxic tint in recent years. It regularly carries the connotations of failure, crisis without end, division or, at the very least, serious shortcomings. Particularly since 2015, such habits of thought have become widespread.

Yet, one could argue, important realities routinely go unnoticed. Year after year, Europe extends protection to people genuinely fleeing compelling dangers, with a policy ambition and determination unparalleled anywhere in the world. The sheer number of these people is, on a per capita basis, several orders of magnitude higher than are offered protection anywhere else. The case of Sweden, a nation of 10 million, provides a good illustration. Sweden alone has for several years provided protection to more people than the US and Canada combined.[2]

If we look beyond the numbers, Europe's ambition becomes even more pronounced. The EU has developed the most sophisticated and generous set of norms, processes and institutions dedicated to people arriving at its borders. There is literally no other continent-sized area of the globe where people receive such committed attention solely because they are human beings and claim to have been forced out of their homeland. No other such entity entitles strangers arriving at its borders to such extensive, and extensively safeguarded, rights. Indeed, no other major political entity has ever felt the need to explicitly and publicly justify that it is *not* capable of dealing with the human suffering of the whole globe.[3]

Bearing these facts in mind, to see the EU and its member states regularly being bashed for their failures is often a spectacle difficult to comprehend. Yet, there are shortcomings and insufficiencies and, perhaps even more importantly, there are diverging political narratives on their extent and nature. In numerous member states, asylum and, more generally, immigration have taken a prominent place in political discourse at the expense of other content. At the national and indeed European level, it has become a source of division, which in itself is not a hallmark of a well-functioning public policy. While there are widely diverging narratives on how exactly the asylum and immigration system is failing Europeans, a large majority seems

[2] See e.g. UNHCR, *UNHCR Statistical Yearbook 2016* (2018), 48–51, Table 9.

[3] 'Even Europe, as the richest continent in the world, will not be able to accommodate the distress and pain of the whole globe'; in J.-C. Juncker, *My Five-Point Plan on Immigration,* European People's Party (Valetta, 23 April 2014).

to be discontent with its operation[4] and likely to accept the need for reform. The sense that we are failing ourselves, that our asylum and immigration system is not delivering outcomes that we associate with good functioning, seems to be ever more present in the political discourse.

The present study is an attempt to examine the nature of some of these shortcomings. It provides examples of the discrepancy between expectations and actual outcomes. We approach this from a legal perspective, that is, by referring to judicial rulings and legislation. We believe this to be both useful and unavoidable. Europeans conceptualise their society as an environment of law; the EU itself is a community of law. Our asylum system operates as a process of law; therefore, current shortcomings can only be remedied through legislative or judicial action.

It is perfectly understandable that among EU member states and various political actors on the EU level there are very different views on the sensitive political and social issue of asylum and migration. However, with a view to fragmented interests and diverging ideologies, it is clear that compliance with legal norms is the only force that can hold the Common European Asylum System (CEAS) together. Those who threaten the agreed standard, including the so-called Dublin system, even if by reference to very noble principles, threaten the only mechanism that can ensure the protection of both citizens and refugees.

Comprehensive asylum legislation needs to be based on a lengthy legislative process at the European and national levels. This process needs to reflect the interests and experiences of a wide range of political and expert bodies; it is ultimately the result of political compromises. A lasting solution cannot simply be reached using moral trump cards and one-sided concepts of solidarity. Whatever the European solution to a refugee crisis may be in the end, it will have to respect the specificities of the legislative process and the philosophy of compromise.

In this light, the 1951 Geneva Convention serves as a major point of reference with regard to all acts and decisions of the CEAS. Therefore, it is useful to compare various elements of European asylum law with the individual and material scope of the Convention. The motto ‘Back to Geneva’ certainly does not suggest that current geopolitical and social challenges can be solved by means of legal instruments that were

[4] See, e.g. European Commission, *Standard Eurobarometer 92 – Autumn 2019*, First Results (December 2019), 27. Between 2015 and 2020, ‘immigration’ has been eclipsed only briefly by terrorism as the leading ‘main concern at European level’

drafted 70 years ago. It is our intention to show that the basic humanitarian principles of the Convention as supplemented by European human rights law are interpreted by European courts as a living instrument. With this in mind, we want to provide a critical evaluation of relevant European case law.

Following a brief introduction to the current legal standards and the role of the Geneva Convention within the supranational asylum system, the paper focuses on the interpretation of crucial Convention concepts in European jurisprudence. This section includes a thorough analysis of court cases dealing with the definition of a refugee, the concept of persecution, protection alternatives and border regimes. We also cover elements of EU asylum law which go beyond the Convention and provide a comparison of selected EU standards and international legal practice.

Current legal standards: supranational and national legal regimes on asylum

The Geneva Convention and international refugee law

The 1951 Convention Relating to the Status of Refugees (the Geneva Convention), as amended by the 1967 New York Protocol, is the starting point for both European and national asylum law.

From a historical perspective, the Geneva Convention represents a kind of synthesis of the brief development of international refugee law. Article 1A of the Convention refers to the relevant agreements of the League of Nations of 1926, 1928, 1933 and 1938 and to the constitution of the so-called International Refugee Organization, which operated between 1946 and 1952. In the interwar period, the institutions of the League of Nations provided support to refugees from the Soviet Union and the territory of the former Ottoman Empire, later to those from Nazi Germany and, after 1939, also those from occupied Austria. After the Second World War, the International Refugee Organization took care of returning or finding a new home for more than a million refugees.

Against this background, the Geneva Convention was created as a tool primarily or almost exclusively for refugees from Europe, whose situation in the early 1950s had not yet been satisfactorily resolved. It is true that the signatories of the Convention chose a universal UN framework. However, given the geographical and temporal restrictions that were laid down in the Convention, many non-European, especially African, states saw the Convention as a tool for solving European problems. It was not until the adoption of the New York Protocol of 1967 that the Convention lifted the original restrictions and established the universal nature of refugee protection.

The Geneva Convention does not guarantee an individual the right to asylum. However, it prevents the parties to the Convention from expelling refugees or returning them to countries where their lives or freedom would be threatened. According to the Convention, a refugee is a person who has a well-founded fear of being persecuted for reasons of race, religion, nationality or membership of a particular social group or political opinion. Therefore, the essence of the Convention is to distinguish between refugees on the one hand and other immigrants on the other.

International human rights law also grants protection against expulsion or return to those persons who are not considered refugees under the Geneva Convention. Although the European Convention on Human Rights (ECHR) does not provide for an individual right to asylum either, under the principle of non-refoulement it is prohibited to put an individual at risk of torture or other forms of inhuman or degrading treatment or punishment, or the death penalty. According to the case law of the European Court of Human Rights (ECtHR), such protection applies to refugees who are victims of individual persecution within the meaning of the Geneva Convention as well as to persons fleeing the consequences of armed conflict and natural disaster. According to ECtHR rulings, similar protection from expulsion must be provided if there is a serious risk that the right to respect for private and family life would be violated. Therefore, the personal and material scopes of protection under the ECHR are broader than under the Geneva Convention.

Finally, the Charter of Fundamental Rights of the EU (EUCFR) provides that the right to asylum must be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). This means that the EUCFR does not grant an autonomous right to asylum, but simply gives effect to the guarantees of the Geneva Convention. In other words, the right to asylum under Article 8 of the EUCFR is equivalent to the refugee status given under the Geneva Convention.

All EU asylum directives make explicit reference to the Geneva Convention, the EUCFR and the ECHR.

The EU asylum system

For a long time, the legal regulations on asylum and migration, being very sensitive issues of national policy, were built upon the premise of state sovereignty. The adoption of the Schengen Agreement of 1985, effective as of 1995, was an incentive for EU member states to start closer cooperation in these areas. The Maastricht Treaty of 1992 conceived cooperation between member states as intergovernmental (within the so-called third pillar of the Maastricht Treaty). Following the 1997 Amsterdam Treaty, the process of the

gradual Europeanisation of member states' asylum and migration policies began. Following the Tampere European Council of October 1999, the dynamic development of EU asylum instruments resulted in the creation of the CEAS.[5]

In line with the relevant political programmes of the European Council,[6] during the first phase the asylum law of the member states was harmonised to the level of 'minimum standards'. A set of EU asylum directives, including the Procedural Directive,[7] the Qualification Directive,[8] the Reception Directive[9] and the Directive on Temporary Protection,[10] were adopted in the first half of the 2000s. The Temporary Protection Directive, which, in response to the experience of protecting the victims of the Yugoslav war, was intended to determine the procedure in the event of a mass influx of displaced persons, has never been applied.

Following the so-called Dublin Convention, which was adopted before the start of the first phase of implementation of the CEAS and had already entered into force in 1997 (Dublin I),[11] Council Regulation (EC) no. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the member state responsible for examining applications for asylum lodged in one of the member states by a third-country national (Dublin II)[12] was conceived as a directly effective legal act of EU law. In order to facilitate

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[5] See, e.g. Commission of the European Communities, *Green Paper on the Future Common European Asylum System*, COM (2007) 301 final (6 June 2007).

[6] European Council, *Tampere European Council Presidency Conclusions* (15–16 October 1999); European Council, *The Hague Programme: Ten Priorities for the Next Five Years. The Partnership for European Renewal in the Field of Freedom, Security and Justice,* Communication, COM (2005) 184 final, 10 May; and Council of the European Union, *The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizens* (2 December 2009).

[7] Council Directive 2005/85/EC on minimum standards on procedures in member states for granting and withdrawing refugee status, OJ L326 (1 December 2005), 13.

[8] Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L304 (29 April 2004), 12.

[9] Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers, OJ L31 (27 January 2003), 18.

[10] 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, OJ L212 (20 July 2001), 12.

[11] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities - Dublin Convention, OJ C254 (19 August 1997), 1.

[12] See also Commission Regulation (EC) no. 1560/2003 laying down detailed rules for the application of Council Regulation (EC) no. 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, OJ L222 (2 September 2003), 3.

the application of the Dublin rules, the Council adopted Regulation no. 2725/2000 of 11 December 2000 concerning the establishment of Eurodac[13] for the comparison of fingerprints for the effective application of the Dublin Convention.[14]

The second phase of implementation of the CEAS started after the entry into force of the Lisbon Treaty of 2007. Based upon the new authorisation laid down in Article 78 of the TFEU, the framework of minimum standards was extended in order to achieve a higher common standard of protection. The new legal regime was intended to ensure greater equality in refugee protection across the EU and a higher level of solidarity between member states. The Reception, Qualification and Procedural Directives, the Dublin II Regulation and the Eurodac Regulation were revised. The new versions of both regulations entered into force on 1 January 2014. The transposition deadline for the revised Qualification Directive expired on 21 December 2013 and for the revised Reception and Procedural Directives on 20 July 2015.

The new Qualification Directive[15] was intended to improve the protection of applicants for international protection, for example with regard to persecution related to sexual orientation or gender identity, or the maintenance of family unity. Therefore, issues arising from an applicant's gender should be given due consideration for the purposes of defining a particular social group. According to Article 23 of the Directive, member states should ensure that family unity can be maintained.

For the first time, the revised Procedural Directive[16] introduced specific deadlines for the examination of applications for international protection. The standard procedure should not exceed the limit of six months. Another goal of the new Procedural Directive was to put refugees and beneficiaries of subsidiary protection on an equal footing. The protection of applicants for international protection was further strengthened by

[13] Eurodac (European Dactyloscopy) is an IT system whose purpose is to assist in determining which EU member state is to be responsible for examining an application for international protection lodged in the EU. The system seeks to identify asylum seekers and irregular border-crossers.
[14] See also Council Regulation (EC) no. 407/2002 laying down certain rules to implement Regulation (EC) no. 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, OJ L62 (28 February 2002), 1.
[15] European Parliament and Council Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L337 (13 December 2011), 9.
[16] European Parliament and Council Directive 2013/32/EU on common procedures for granting and withdrawing international protection, OJ L180 (26 June 2013), 60.

new rules on personal interviews and access to information. The new Reception Directive[17] clarified the standards for the reception of applicants for international protection, for example, with regard to their exclusion from the national labour market (a maximum of nine months) and the treatment of particularly vulnerable persons. It also clarified the very sensitive issue of detaining applicants for international protection. Finally, six possible grounds for restricting personal liberty were included in the new Reception Directive.[18] Under certain circumstances, minor applicants for international protection may also be detained.

The revised Dublin III Regulation[19] did not change the principles governing the determination of the member state responsible for the examination of an application for international protection. Similar to the Procedural Directive, the regimes for asylum seekers and applicants for subsidiary protection—previously regulated separately—were merged. Therefore, asylum seekers can no longer avoid being returned to another member state by applying for subsidiary protection in the country where they currently reside. However, the procedural guarantees for applicants for international protection in return proceedings were strengthened, for example with respect to information provided to the applicant and the organisation of a personal interview. The new version of the Eurodac Regulation[20] provided for the wider protection of personal data, for example by setting stricter deadlines for data storage and the automatic erasure of data. At the same time, however, it also introduced a provision allowing the use of the database by law enforcement authorities.

While the Dublin Regulation and the Eurodac Regulation are directly applicable in EU member states, the asylum directives need to be transposed into member states' national law. This means that member states have some space for discretion. Therefore, the asylum laws of the EU's member states do not ensure exactly the same standards of refugee rights and asylum procedures. Although the degree of legal harmonisation is relatively high, practices on the ground may differ significantly.

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[17] European Parliament and Council Directive 2013/33/EU laying down standards for the reception of applicants for international protection, OJ L180 (26 June 2013), 96.

[18] Ibid., art. 8/3.

[19] European Parliament and Council Regulation (EU) no. 604/2013 establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the member states by a third-country national or a stateless person, OJ L180 (26 June 2013), 31.

[20] European Parliament and Council Regulation (EU) no. 603/2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) no. 604/2013 establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the member states by a third-country national or a stateless person and on requests for the comparison with Eurodac data by member states' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) no. 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, OJ L180 (26 June 2013), 1.

Interpretations by European and national courts

Interpretations by the European and national courts have expanded the areas of protection beyond the original scope of the Geneva Convention in the EU. In the landmark 2012 *Hirsi* case, the ECtHR ruled that state jurisdiction extended to the state's flag vessels, thus creating a de facto obligation for EU member states to consider the asylum applications of everyone rescued by their flag vessels on the high seas.

Scope of the Geneva Convention

Three provisions of the Geneva Convention are crucial for this study. First, the Geneva Convention contains the definition of a refugee, including the reasons for excluding persons from the definition. Second, the Convention prohibits the prosecution of refugees for an illegal border crossing or an illegal stay in the territory of a contracting state. Third, the Convention prohibits the expulsion and return of refugees to states where their lives or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion.

As for the interpretation of these legal concepts, the Geneva Convention can either be understood as a living instrument of international refugee law, or one can rely on textualist interpretations. The former means that interpretation of the Convention's provisions has to reflect present-day conditions rather than the original understanding of the various terms in 1951.[21] The latter relies on the original meaning of the obligations intended by the contracting parties.

[21] As early as 1999 the UK Court of Appeal said: 'It is clear that the signatory States intended that the Convention should afford continuing protection for refugees in the changing circumstances of the present and future world. In our view the Convention has to be regarded as a living instrument: just as, by the Strasbourg jurisprudence, the European Convention on Human Rights is so regarded. Looked at in this light, the Geneva Convention is apt unequivocally to offer protect against non-State agent persecution, where for whatever cause the State is unwilling or unable to offer protection itself.' See UK, Court of Appeal (England and Wales), Application no. 1999/6323/4, *Adan, R (on the application of) v Secretary of State for the Home Department* [23 July 1999]. In academic literature we find that 'the 1951 Convention is frequently described as a "human rights treaty", to be approached as a living instrument, evolving to meet the needs and challenges of the day.' See G. S. Goodwin-Gill, 'The International Law of Refugee Protection', in E. Fiddian-Qasmieh et al. (eds.), *The Oxford Handbook of Refugee and Forced Migration Studies* (New York: Oxford University Press, 2014), 43.

Unlike a number of international human rights treaties, the Geneva Convention does not establish any judicial or quasi-judicial body to interpret disputed terms in an authoritative and binding manner. The office of the United Nations High Commissioner for Refugees (UNHCR) has significantly contributed to clarifying the meaning of individual articles of the Geneva Convention. Although the political and moral authority of the organisation's opinions and guidelines cannot be denied, these belong only to the area of non-binding soft law.

Therefore, the interpretation of the Geneva Convention is primarily up to the national courts of the contracting states, which are requested to apply the Convention in national asylum cases. Naturally this fact may cause problems with regard to an international treaty such as the Convention that is applied in different parts of the world and in countries with very different cultural and legal traditions. The inconsistency of interpretation concerns, for example, the notion of persecution, as it is not entirely clear from the wording of the Convention which forms of human rights violations should be considered serious enough to call them 'persecution'. The interpretation of the term 'social group' is inconsistent as to the question of whether the term includes, for example, women, people of different sexual orientations or people with disabilities. There is no international consensus on whether or not the group must be defined by innate and unchangeable characteristics. Moreover, it seems that, outside Europe, there is no general agreement on whether the persecution necessarily has to be attributed to a state body or whether a specific situation may be called persecution within the meaning of the Convention if the human rights violations are committed by a non-state actor.

As early as 1991, the famous Swiss human rights lawyer Walter Kälin highlighted practical problems related to the interpretation of the Geneva Convention. With a view to the diverging practices among the state parties to the Convention, Kälin distinguished both a restrictive and a liberal interpretation and reached the conclusion that the refugee definition of the Convention allows for a liberal interpretation. However, according to Kälin, the decision to choose a restrictive or liberal interpretation is, basically, a political one.[22] This diagnosis also applies, in principle, to the current situation. From a legal perspective, the competent bodies have to take into account the basic guidance on the interpretation of international treaties which is laid down in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Therefore, as well as the text, context and purpose of the treaty, national authorities must also consider any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.[23]

[22] W. Kälin, 'Refugees and Civil Wars: Only a Matter of Interpretation?', *International Journal of Refugee Law* 3/3 (1991), 435–51.
[23] See Vienna Convention of the Law of Treaties (Vienna, 23 May 1969), UNTS 1155, 331, art. 31(3b).

Definition of a refugee

As for the personal scope of EU asylum law, the definition of the following two terms is crucial: 'refugee' and 'person eligible for subsidiary protection'. According to Article 1 of the Geneva Convention, the term 'refugee' applies to any person who is outside the State of origin, has severed relations with that State and has legitimate concerns about persecution on certain grounds (namely racial, religious or national grounds, or due to belonging to certain social groups or even holding certain political views).

This definition of the Geneva Convention has been incorporated into Article 2 of the Qualification Directive. The same provision of the Qualification Directive defines a person eligible for subsidiary protection as 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, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.[24]

To summarise, subsidiary protection under EU law is granted to persons who do not qualify as refugees within the meaning of the Geneva Convention but nevertheless face serious risks in their home countries.

As the concept of subsidiary protection is not based upon the Geneva Convention, we will not expand on this issue in this paper. However, it should be noted that the practical application of this concept varies significantly in the member states. For the sake of completeness, it should also be mentioned that the TFEU establishes a third status of international protection, that of temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin. This status is not based on the Geneva Convention either and is further developed in the Temporary Protection Directive, which, as has already been noted, has never been used.

In EU law, both refugee status and subsidiary protection status are covered by the term 'international protection'. So, in line with this terminology, asylum seekers are called applicants for international protection.

[24] Art. 1(f), Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L304 (29 April 2004), 12.

Persecution

With regard to religion

In 2012, the Court of Justice of the European Union (CJEU) dealt with the case of two Pakistani asylum seekers in Germany. In the *Y and Z* joined cases,[25] the CJEU had to answer a question concerning the definition of the term 'act of persecution'. In the proceedings before the competent German authorities, both asylum seekers claimed that because of their membership of an Islamic reformist movement (the Ahmadiyya community) they had been mistreated in their country of origin. The authorities also found that under Pakistani criminal law members of the Ahmadiyya religious community may face imprisonment of up to three years.

The German asylum authority, referring to the case law in Germany before the transposition of the relevant EU Qualification Directive, found that only interference with the core area of religious freedom was to be considered 'persecution' relevant to the purposes of the right to asylum. Therefore, restrictions on the public practice of faith would not constitute interference with that core area. According to the German authority, if members of the Ahmadiyya religious community refrained from practising their religion in public they would not face any negative consequences in Pakistan.

The German court *(Bundesverwaltungsgericht)* referred the case to the CJEU for a preliminary ruling and asked whether under EU asylum law every interference with religious freedom which infringes Article 9 of the ECHR constitutes an act of persecution or whether a severe violation of religious freedom as a basic human right arises only if the core area of that religious freedom is adversely affected.

The CJEU reiterated that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the Qualification Directive were adopted to guide the competent authorities of the member states in the application of that convention on the basis

[25] CJEU, Case nos. C-71/11 and C-99/11, *Y and Z v Bundesrepublik Deutschland* [5 September 2012].

of common concepts and criteria. According to the CJEU, for that reason, the Qualification Directive must be interpreted in the light of its general scheme and purpose, and in a manner consistent with the Geneva Convention and the other relevant treaties referred to in Article 78(1) of the TFEU.[26]

With a view to the particular case, the CJEU found that acts which undoubtedly infringe the freedom of religion protected under Article 10(1) of the Charter, but whose gravity is not equivalent to that of an infringement of basic human rights are not to be regarded as constituting persecution within the meaning of the Qualification Directive and the Geneva Convention.[27] By so saying, the Court opened the door for the application of a more restrictive interpretation but, in fact, then applied a liberal one. Without any further reference to the Geneva Convention, the CJEU concluded that, when defining the term 'persecution', it is unnecessary to distinguish acts that interfere with the 'core areas' *(forum internum)* of the basic right to freedom of religion, which do not include the performance of religious activities in public *(forum externum)*, from acts which do not affect those purported 'core areas'. According to the CJEU, such a distinction is incompatible with the broad definition of 'religion' given by the Qualification Directive. Acts which may constitute a 'severe violation' within the meaning of the Qualification Directive include serious acts which interfere with the applicant's freedom to practice his faith not only in private but also publicly.[28] In other words, the national authorities in the EU member states cannot expect applicants to limit themselves to private practice in their country of origin. The Court recognises the right to practice one's religion in public. Significant violations of this right are to be understood as persecution within the meaning of the Geneva Convention and protection has to be granted.

We do not intend to say that this interpretation of the term 'persecution' is incorrect in the light of EU law. However, we want to highlight the fact that the CJEU did not consider relevant international practice concerning the interpretation of the relevant Geneva Convention provision. In the judgment we do not find any explanation of how this question is dealt with by other state parties to the Geneva Convention.

[26] Ibid., paras. 47–8.
[27] Ibid., para. 61.
[28] Ibid., paras. 62–3.

With regard to sexual orientation

In the joined cases of *X, Y and Z*,[29] the CJEU dealt with the question of whether people with a homosexual orientation form a social group within the meaning of the Qualification Directive and the Geneva Convention. Three asylum seekers from Sierra Leone, Uganda and Senegal claimed before the competent Dutch authorities that in their countries of origin homosexual acts were punishable under national law. Therefore, they claimed to have reason to fear persecution in their respective countries of origin on account of their homosexuality.

The national authority refused to grant international protection in these cases, arguing that although foreign nationals should not be expected to conceal their sexual orientation in their country of origin, this did not mean that they should be free to publicly express it in the same way as in the Netherlands.

The CJEU recalled, by referring to the above-mentioned case on religious minorities, that it is not necessary to take into account the possibility of avoiding the risk of persecution by abstaining from the religious practice in question. Therefore, it follows that an applicant must be granted refugee status, in accordance with the Qualification Directive, where it is established that on return to his country of origin his homosexuality would expose him to a genuine risk of persecution. According to the CJEU, the fact that he could avoid the risk by exercising greater restraint than a heterosexual in expressing his sexual orientation is not to be taken into account in that respect.[30]

In this judgment again, the CJEU did not consider established practice related to the interpretation of the Geneva Convention as it did not analyse relevant state practices and did not ask how the relevant norm is interpreted and applied by other state parties to the Geneva Convention.

[29] CJEU, Case nos. C-199/12, C-200/12, C-201/12, *X, Y and Z v Minister voor Immigratie en Asiel* [7 November 2013].
[30] Ibid., paras. 74–5.

Privacy protection, including age determination

Given the era of its adoption, it is not really surprising that the Geneva Convention does not provide for any protection of the privacy of the asylum seeker. Perhaps the provisions closest to the modern concept of privacy call for respect for family unity. It might not be a mere coincidence that the EUCFR protects both private and family life under the same Article 7. It is also important to note that Article 1 of the Charter, protecting human dignity, is often invoked at the same time.[31]

Age assessment is an important context in which the asylum procedure collides with privacy protection. The claim of being aged 17 or younger provides the asylum seeker with procedural privileges based on the need to protect children, particularly if that asylum seeker is unaccompanied by an adult relative. Since this creates a clear incentive for misleading claims, the integrity of the asylum process requires options to check the truthfulness of such claims. The medical examination method needs to be both reliable and as minimally invasive as possible. While Article 25(5) of the Asylum Procedures Directive does recognise the right of member states to conduct an age assessment, it should not be assumed that false claims about the status of a minor are successfully examined. In fact, the majority of member states require the consent of the asylum seeker for such an examination. In most member states, the lack of such an examination leads to the assumption that the asylum seeker is a minor.[32]

A less frequent, yet arguably more sensitive situation arises where the asylum claim relies on the risk of persecution based on sexual orientation. No medical method is seemingly accepted as reliable. It is no surprise therefore, that attempts to use medical procedures are routinely criticised as both unreliable and

[31] The Geneva Convention does not mention human dignity at all. It could be argued, on the basis of the travaux preparatoires, that the framers of the Geneva Convention apparently did not distinguish between protection from persecution and the protection of human dignity. It might have been interesting for them to realise that EU member states offering protection are accused of interfering with human dignity on a regular basis.

[32] European Asylum Support Office, *EASO Practical Guide on Age Assessment*, EASO Practical Guide Series (Valletta, 2018).

by definition intrusive.[33] However, circumstantial evidence is also of limited value for assessing the claim. In *F v Bevándorlási és Állampolgársági Hivatal*,[34] the CJEU found that merely the perception by the actor of persecution of a person belonging to a particular social group may constitute a cause for protection. It may therefore be immaterial to the case whether the person is or is not of a specific sexual orientation. It follows quite clearly that it would be legally difficult to justify any degree of privacy intrusion to examine an irrelevant circumstance. The resulting picture is one of the absolute primacy of privacy protection when it comes to examining such asylum claims.

Safety available in another country[35]

Whether EU member states may rely on third countries to ensure the safety of people seeking asylum is a recurring theme in many contexts, particularly in policymaking. However, the Geneva Convention does not deal separately with the possibility of asylum seekers being nationals of a country which is safe for them. On the contrary, the recognition of such a possibility is included in the 'well-founded fear' clause in the definition of the core concept of a refugee. This clause, as the *travaux préparatoires* to the Geneva Convention document quite clearly state, was thought to be enough to address the issue of non-substantiated claims of refugee status. One might well assume that, given the realities of post–Second World War Europe, this could have been thought sufficient.

In practical terms of law, particularly of procedural law, one needs to operationalise the distinction to make it meaningful. Careful examination of each individual claim is naturally the core way of revealing if the stated fear is 'well-founded'. However, assumptions relying on the general situation of a third country are particularly appealing for their promise of administrative efficiency and transparency. Two concepts have gained particular prominence here: the safe country of origin and the safe third country.

[33] See, e.g. UNHCR, *Comments on the Practice of Phallometry in the Czech Republic to Determine the Credibility of Asylum Claims Based on Persecution Due to Sexual Orientation* (April 2011).

[34] CJEU, Case no. C-473/16, *F v Bevándorlási és Állampolgársági Hivatal* [25 January 2018].

[35] The doctrine of the 'safe third country' may be relevant in the context of non-refoulement, but in EU law it is also used as an argument for declaring an application inadmissible or for accelerating the asylum procedure.

The Asylum Procedures Directive provides for the option of not examining the merits of an asylum claim, but holding it inadmissible, if the applicant has the nationality of a safe country or, as a stateless person, was formerly habitually resident in a safe country. According to Annex I to the Directive, such a country may be designated safe if it is one where both law and its practical general application credibly guarantee the observation of fundamental rights and freedoms, as defined with reference to the ECHR and a few other key international standards. Given the special emphasis on the absence of torture and refoulement, one may safely conclude that genuinely available safety is deemed more important than declaratory legal commitments when assessing the third country. Despite this, it is still assumed than such safety might not apply to every individual case, so the applicant must not be deprived of the right to present his own circumstances when he claims asylum. In order to do so, the claim must satisfy a higher standard, by having to state why the country of origin is not, despite its usual characteristics, safe for that particular claimant. It can be concluded that being the national of a safe country of origin does change the procedural situation of the applicant but seeks to safeguard the substance of the right to asylum.[36]

Another possibility of relying on the protection available elsewhere is independent of the nationality of the applicant and relies on a safe third country. The criteria for considering a third country safe are less stringent, as the assumption is that the applicant might receive protection there as a refugee within the meaning of the Geneva Convention, not as a national of that country. It is important to note that in order for the classification to have a real effect, the third country in question must be willing to play its part, both to admit the person and to provide the person with protection under the Convention.

[36] Protocol (no. 24) on asylum for nationals of member states of the European Union, TFEU. A particular example of the safe country of origin is enshrined in Protocol (no. 24) on asylum for the nationals of EU member states, attached to the treaties. Under the Protocol, EU member states are to consider each other to be safe countries of origin, with the express intention of preventing abusive asylum claims. While this logic appears very solid, it should be underlined that it would not apply in the case of a proceeding under Article 7 of the TEU, which is no longer just a theoretical possibility. Also, there is the option for a member state to unilaterally process an asylum claim made by a national of another member state. In such a case, the need to notify the Council would immediately make such a case a political issue, which is quite unique in asylum law. Last, but certainly not least, the Protocol can hardly exclude the actions of national courts or of the ECHR, given the status of asylum as a fundamental right.

Access to territory: detention, border control and pushbacks

Detention and border procedures

In its 2019 judgment in *Ilias and Ahmed v Hungary*, the Grand Chamber of the ECtHR ruled that the accommodation of asylum seekers in a transit zone did not constitute a deprivation of liberty in the light of Article 5 of the ECHR. It is interesting that one of the major arguments of the ECtHR was based on the Geneva Convention. The ECtHR considered that in the present case it was possible for the applicants to walk to the border and cross into Serbia, a country bound by the Geneva Convention. According to the ECtHR, the applicants were therefore not deprived of their liberty within the meaning of Article 5 of the ECHR.[37]

However, in 2020 in the joined cases C-924/19 PPU and C-925/19 PPU, the CJEU did not take into account the arguments of the ECtHR and decided that Hungary had established a system of systematic detention of applicants for international protection in the transit zones of Röszke and Tompa. Unlike the ECtHR, the CJEU did not consider the relevance of the Geneva Convention in its judgment.[38]

Border control

There is nothing in the Geneva Convention that would call into doubt the legitimacy of border control measures as understood, in particular, by the Schengen Borders Code. In fact, the Geneva Convention assumes that refugees have already crossed the relevant borders, as it initially referred to refugee situations

[37] ECtHR, Application no. 47287/15, *Ilias and Ahmed v Hungary* [21 November 2019], paras. 240–2.

[38] CJEU, Case nos. C-924/19 PPU, C-925/19 PPU, *MS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság* [14 May 2020].

arising from events before 1951. Quite tellingly, the Geneva Convention only mentions borders when prohibiting refoulement, which is an intrinsically backwards movement, meaning the expulsion of a refugee at the border to a dangerous territory. This apparent disinterest in the issue of entering the jurisdiction of a contracting state is probably one of the most important legal voids of the Geneva Convention in relation to today's issues.

The current legal framework of the EU has gone a long way towards filling that void following a rights-based logic. Border control measures, such as the refusal of entry to persons not meeting the conditions for entry, simply do not apply to persons applying for asylum. Furthermore, the Asylum Procedures Directive sets out the obligations of member states to provide information to applicants at border crossing points, including by allowing 'persons providing advice and counselling to applicants' to be present, and to train border control officials to work in a protection-sensitive way.

In summary, for a person seeking asylum, the EU's external border is to be a welcoming place, inviting and not discouraging asylum applications. The ultimate purpose is to make the border a place where access to asylum procedures is facilitated, not denied.

Legal and illegal pushbacks

'Pushback' is a term that has come to be used relatively recently and has no settled meaning. In some cases, it seems to denote the physical denial of access to territory of a migrant who would possibly seek asylum if given the chance. In others, its use is very close to the settled meaning of refoulement, emphasising the dangers present in the territory where the migrant is made to remain. It needs to be emphasised that this term applies to both land and maritime borders.

The term came into widespread use after the landmark ECtHR judgment of *Hirsi Jamaa and others v Italy*.[39] A group of African migrants intending to disembark in Italy were intercepted by Italian authorities outside of Italian territorial waters and made to disembark in Libya. Libya was, at that time, under consolidated rule and had an agreement with Italy that was being followed. The ECtHR ruled that by removing the migrants

[39] ECtHR, Case nos. C-924/19 PPU, C-925/19 PPU, *Hirsi Jamaa and Others v Italy* [23 February 2012].

from its jurisdiction and not allowing access to individual assessment of protection needs, Italy had violated the ban on collective expulsion and refoulement. As a critical element of the reasoning, the vessels used for the pushbacks were deemed to be equivalent in jurisdiction to national territory.

The jurisprudence on pushbacks is still far from stable, even outside of the maritime context, which is also a somewhat separate issue. The ECtHR upheld, in the judgment of *N. D. and N. T. v Spain*,[40] the immediate arrest and expulsion of two migrants who had scaled the border fence at the land border with Morocco. The ECtHR considered it relevant that the migrants, instead of seeking to lodge an application at a border crossing point, had used force to irregularly cross the border.

Search and rescue

Given the geography of Europe's external borders, search and rescue operations on the high seas are particularly relevant to irregular entry to EU territory. In addition to the international commitments already mentioned and various national regulations, EU member states are bound by the UN Convention on the Law of the Sea and the International Convention on Maritime Search and Rescue. Both documents not only codify the age-old obligation of all vessels to search for and provide rescue to another vessel in distress, but they also require states to establish through mutual coordination the regions of the high seas where they are responsible for organising search and rescue interventions. The question that has become increasingly relevant in recent decades is how this responsibility has impacted access to the territory.

In the case of interventions by state-operated vessels, be they military or under the command of another state agency, the situation is quite clear. In the judgment of *Hirsi Jamaa and others v Italy*, the ECtHR invoked maritime and national law to deny any difference between the jurisdiction in the territory of the flag state and its ship on the high seas. In particular, the actions of the crew were without any doubt attributable to the flag state. In this particular case, the forced disembarkation of the migrants in Libya, the country of their departure, without enabling them access to the assessment of an asylum claim, was deemed unlawful. As a consequence, state vessels have become something akin to 'floating asylum application centres'. This has acted as a disincentive for the member states to provide government-controlled search and rescue assets in the Mediterranean.

[40] ECtHR, Application nos. 8675/15 and 8697/15, *N. D. and N. T. v Spain* [13 February 2020].

Non-state-owned vessels have partly filled the resulting search and rescue void. Their legal situation, whether operating in the area for search and rescue purposes or not, is quite a bit more complicated. States adjacent to the high seas are supposed to declare their search and rescue zones,[41] which also results in the responsibility to direct vessels to intervene. The persons rescued are then to be disembarked in a place of safety, not necessarily on the territory of the directing state. It remains unclear whether this authority also entails responsibility for the actions of private vessels, particularly if these meet the criteria of refoulement or if the vessel disrespects the directions of the responsible state. Also, there is the controversial issue of to what extent an attempt to disembark such migrants despite negative directions may constitute a criminal offence. Conclusive jurisprudence on these questions is still lacking.

The net result in practice seems to be the active abandonment of search and rescue activities by EU member states and an increased reliance on and incentivising of interventions by external actors, such as the coast guards of North African countries. This has called into being the even less tangible term of 'pull-back', referring to the actions of such external actors that prevent migrants from reaching the EU's jurisdiction. It is impossible to say now whether this very indirect link with the actions of an EU member state will suffice to establish a jurisdictional link. It is, however, likely that the jurisprudence on this issue will emerge shortly, particularly with an outcome of the ECtHR case of *S.S. and others v Italy*.[42]

Family life

The right to family unity is a value stated quite explicitly by the Geneva Convention. Although some related concepts, such as the 'head of the family' might appear outdated, its intention is quite clearly to safeguard the right for family members to join the member who is in a situation of safe refuge. However, the Convention does not make clear how to deal with family units that emerge after the need for protection arises. Given the pronounced preference of migrants for certain countries of asylum, this is a matter of more than conceptual importance. In *Hode and Abdi v the United Kingdom*,[43] the ECtHR found that there must be no differentiation made between the right to family unity in comparable situations of couples that emerged

[41] Significantly, Libya only did so in 2017.
[42] ECtHR, Application no. 21660/18, *S.S. and others v Italy* [11 November 2019].
[43] ECtHR, Application no. 22341/09, *Hode and Abdi v the United Kingdom* [GC], 6 February 2013.

after refugee status was given and others. This is, in itself, an important departure from the original Geneva Convention's concern for family rights as serving the purpose of 'maintaining' the unity of the refugee's family. In this case, the ECtHR did not base its reasoning on the Geneva Convention, but rather on the right to family unity as stipulated in the ECHR. In finding no substantial difference between a 'post-flight' and a 'pre-flight' family unit, the ECtHR found no basis for differing treatment. In so doing, it has clarified that the individual scope of rights under Article 8 ECHR is broader than those rights stemming from the Geneva Convention. In a broader context, this might serve as an example of how courts cause an indirect extension of asylum seekers' rights without referring to the Geneva Convention.

The principle of non-refoulement

The principle of non-refoulement is a cornerstone of both international refugee law[44] and international human rights law. Article 33(1) of the Geneva Convention provides that 'no Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

As for the general human rights law, we can point, for example, to the judgment of the ECtHR in the case of *Soering v the United Kingdom*[45] and the interpretation of Article 7 of the International Covenant on Civil and Political Rights, according to which no one is to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[46] The 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contains an explicit prohibition in its Article 3(1) which stipulates that 'no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.' It is no surprise that the principle of non-refoulement has also been incorporated into EU law in Article 19/2 of the EUCFR.

[44] European Union Agency for Fundamental Rights, *Scope of the Principle of Non-Refoulement in Contemporary Border Management: Evolving Areas of Law* (Luxembourg, 5 December 2016), 12.

[45] ECtHR, Application no. 14038/88, *Soering v the United Kingdom* [7 July 1989].

[46] UN Human Rights Committee, *CCPR General Comment no. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* (Geneva, 10 March 1992).

Unlike the ECtHR, the CJEU has not very often dealt with the application and interpretation of the non-refoulement principle. However, in joined cases C-391/16, C-77/17 and C-78/17,[47] the CJEU was given the chance to define the scope of the principle of non-refoulement in relation to Article 21(2) of the Qualification Directive, which provides member states with the opportunity to *refoule* a refugee in specific situations.

While the principle of non-refoulement, as follows from Article 3 of the ECHR and Articles 4 and 19(2) of the EUCFR, is of an absolute nature and does not allow for exceptions, Article 33(2) of the Geneva Convention allows for the expulsion and return of a refugee when there are reasonable grounds to regard him as a danger to the security of the country in which he is or when he constitutes, having been convicted by a final judgment of a particularly serious crime, a danger to the community of that country.

Therefore, in joined cases C-391/16, C-77/17 and C-78/17, the principle of non-refoulement had to be interpreted in the light of the ambiguous structure of the Qualification Directive[48] and its relationship with the Geneva Convention. On this occasion, the CJEU reiterated that while some rights under the Qualification Directive fully correspond to the rights of a refugee under the Geneva Convention, in some respects the Qualification Directive goes beyond the scope of the Geneva Convention and is more favourable from the perspective of the refugee.[49]

Connecting the interpretation of Article 21(2) of the Qualification Directive to the human rights obligations of Articles 4 and 19(2) of the EUCFR, the CJEU concluded that the prohibition of refoulement under the Qualification Directive must be understood as absolute. Thus the level of protection provided by the EUCFR is higher than the level provided by the Geneva Convention. As a result, EU countries must not *refoule* a person even if such person would not be protected under the Geneva Convention.

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[47] CJEU, Case nos. C-391/16, C-77/17 and C-78/17, *M v Ministerstvo vnitra, X and X v Commissaire général aux réfugiés et aux apatrides* [14 May 2019].

[48] One of the problems is terminology. The Qualification Directive uses terms which, while based on the wording of the Geneva Convention, may have a different meaning. With regard to the concept of 'refugee', art. 2(d) of the Qualification Directive quite precisely repeats the substantive conditions for obtaining refugee status laid down in the Geneva Convention. However, a terminological deviation can be seen in the use of the term 'refugee status', which is not defined in the Geneva Convention, despite the fact that this term appears in the very title of the Geneva Convention and in several of its provisions. According to art. 2(e) of the Qualification Directive, the term 'refugee status' means the recognition of a third-country national or a stateless person as a refugee. However, since the preamble to the Directive stresses the declaratory nature of the recognition of refugee status, the act of recognition has no constitutive consequences.

[49] In the proceedings before the CJEU, the European Parliament referred to arts. 24(1), 28 and 34 of the Qualification Directive, i.e. to the right to be granted a residence permit; the recognition of foreign diplomas, certificates and other evidence of formal qualifications; and access to integration facilities.

What the Geneva Convention does not cover

Determination of the responsible member state

A rather unique set of questions arises from the coordination of the EU member states in examining asylum claims. This issue has become rather sensitive in recent years, often overshadowing most other elements of asylum law. The term 'Dublin' frequently pops up in debates. It is now almost a foregone conclusion that EU member states need to have an algorithm to determine the state responsible for examining an asylum claim. There is, however, no systemic reason for that to be the case, as made evident by the lack of such an algorithm in the Geneva Convention.

The Schengen Convention of 1985 does not mention asylum at all. The Implementing Convention of 1990 does, however, set out the criteria for determining the responsible member state in a way that would, in essence, last for at least three decades. The criteria are essentially meant to attach responsibility for the asylum claim to the member state which 'allowed the person to enter' the common territory, either by issuing a visa or by being the place of physical entry into the common area. The same criteria have been translated through a series of agreements and, after the Schengen acquis, became part of EU law and regulations. However, the most important current document allocating responsibility to a member state to examine an asylum application is the 1990 Dublin Convention. This international treaty completely replaced the relevant provisions of the Implementing Convention.

Interestingly, the material rule determining the responsible member state has become separated from the original context of the Schengen area. In 1998, creating an 'area without internal border checks' became an objective of the EU, as per Article 3 of the TEU. It has since become a cardinal purpose of the Union's existence. At the same time, member states maintained their agreement that there should be a way of determining the member state responsible, as part of the Union's common policy on asylum. The content of

the applicable rules became relegated to secondary legislation, thus opening up the possibility of disputes between the member states. Legally, the member states are obliged to refrain from checks at internal borders whether the Dublin system functions or not. The continued application of such checks has been difficult to legally substantiate. Several members have felt compelled to maintain these internal border checks since 2011, while others have reintroduced them since 2015.

The rules applied to determine the member state responsible are open to legislative debate. The fact that Article 78(2)(e) of the TFEU provides for the establishment of such criteria does not, per se, make it necessary that they exist. The same article also provides for a uniform status of asylum that is valid throughout the EU, something which has not materialised.[50] As a consequence, there is nothing preventing any such criteria from being declared inapplicable by a court. The migration crisis of 2015, in particular, provided situations that allowed for a challenge on the basis of unusual circumstances. In the cases *A.S. v Slovenia*[51] and *Khadija Jafari and Zainab Jafar*,[52] the CJEU found the Dublin Regulation to apply despite all the unusual and extreme circumstances which existed at that time. The refusal of the CJEU to declare the Dublin Regulation inapplicable in view of unusual circumstances does not, however, paint the whole picture. In 2011, the ECtHR judgment of *M. S. S. v Belgium and Greece*[53] established that member states may not automatically rely on the assumption that another member state does, as a matter of course, offer asylum seekers dignified reception conditions. If that is not the case, a Dublin transfer to such a member state might constitute inhumane or degrading treatment under Article 3 of the ECHR. Existing difficult circumstances on the ground should therefore be taken into consideration, in addition to the mere letter of the law. If they amount to a systemic risk of inhumane and degrading treatment under Article 3, they are to be interpreted as preventing the expected operation of the Dublin criteria and the transfer of an asylum seeker to the member state responsible.

The notion that an EU member state may be unable to ensure dignified conditions for asylum seekers was shocking to many initially, yet has become widely accepted as a fact since. In any case, it challenges

[50] Neither mutual recognition of asylum decisions nor many of the practical consequences of a positive decision issued by another member state is exhaustively legislated for. See ECtHR, Application no. 59297/12, *M.G. v Bulgaria* [25 March 2014].

[51] CJEU, Case no. C490/16, *A.S. v Republika Slovenija* [26 July 2017].

[52] CJEU, Case no. C-646/16, *Khadija Jafari and Zainab Jafar* [26 July 2017].

[53] ECtHR, Application no. 30696/09, *M. S. S. v Belgium and Greece* [21 January 2011].

many of the assumptions underlying the edifice of the CEAS. The impact of this judgment, and those following that solidified its jurisprudence,[54] on mutual trust between member states has been devastating. The option to allow a national asylum system to degrade in order to force other member states to take over responsibility is real and undeniable. Yet, the legislator of the EU has not decisively reacted to this new set of incentives. The Dublin Regulation adopted in 2013 has codified once more the logic of its previous iterations.

Humanitarian visas

In theory, a visa is an instrument that should not have too much in common with asylum. A visa is a document usually issued by a consulate in a third country, authorising entry into and a short stay within the territory of the issuing state. Since the access to territory and stay of refugees and asylum seekers are dealt with in a specific manner, there should not be much overlap.

However, under EU law, the issuance of a visa is not an act of executive discretion, as it is in many other jurisdictions. Instead, the Visa Code[55] sets out the criteria which, when satisfied, substantiate an entitlement to a Schengen visa. In most countries of the world, the local consulate of an EU member state is the place where one can gain a legal title to enter the EU. This has led to the question of whether or not the humanitarian responsibility of EU member states to provide refugee protection includes the obligation to issue visas.

In the case of *M. N. and others v Belgium*,[56] a family of Syrian nationals applied for a Belgian visa in Beirut with the explicit purpose of later applying for asylum in Belgium. The ECtHR refused to rule on the substance of the application, declaring it inadmissible. Despite the applicants being clearly within the administrative jurisdiction of Belgium via its consulate, the ECtHR ruled that the jurisdiction did not extend to protection from inhumane and degrading treatment and the obligation to provide an effective remedy.

[54] E.g. CJEU, Case no. C-578/16, *PPU C. K. and Others v Supreme Court of Republic Slovenia* [16 February 2017].
[55] European Parliament and Council Regulation (EC) no. 810/2009 establishing a Community Code on Visas (Visa Code), OJ L243 (13 July 2009), 1.
[56] ECtHR, Application no. 3599/18, *M. N. and others v Belgium* [5 May 2020].

Selected international comparisons

A comparison of asylum law in the EU with that of other major democratic jurisdictions provides a rather complex picture. On the one hand, legislators and courts in the EU and wider Europe have created an understanding of asylum as a legal entitlement. Such a right cannot be found in either North America or Australia. On the other hand, courts in the latter jurisdictions have ruled, even before the CJEU did, that refugees should not have to conceal their sexual orientation or religion in their home country to avoid persecution in order to be able to claim asylum in the host country. What is confusing with regard to these grounds for persecution is that the CJEU tends not to provide analysis of the relevant judicial practices of the contracting states to the Geneva Convention; this creates the incorrect impression that the CJEU has introduced a more liberal standard of refugee protection in this regard.

Legal entitlement versus executive discretion

Before attending to the diverging interpretations of the Geneva Convention in various jurisdictions, one should point out an element almost unique to the EU, which has nonetheless come to permeate the understanding of asylum in Europe. In the EU, asylum is a legal entitlement. In practice, any person who can prove that the elements of his or her situation correspond to the definition of a refugee is legally entitled to obtain the Convention-awarded status. The individual and judicially enforceable right to asylum is enshrined in the EUCFR as well as in the numerous constitutions of the member states. (As already noted, the ECHR does not provide for a right to asylum.)

Such an entitlement is alien to the interpretation of the Geneva Convention in many other jurisdictions. In the US, the process of adjudicating on Convention status is entirely discretional. This means that regardless of how well the substantiated fear of persecution is proven, it is up to an executive authority to recognise a person as a refugee or not. Judicial review is not allowed, specifically to ‘protect the Executive’s discretion’

from undue interference by the courts.[57] It is almost a matter of course to note that the US Constitution does not enshrine the right to asylum in any way.

The situation in Canada is rather similar, with no entitlement to asylum enshrined in national law. The decision is entrusted to an independent body instead of an executive agency. The Canadian example also highlights some ramifications of discretionary systems. In a situation where asylum is not an entitlement, the options are much broader for legislative or executive measures that limit practical access to asylum, in procedural or substantive terms. In a complementary sense, the options for high courts to invalidate such practices are rather limited if there is no individual right on which to rule. From another perspective, it is worth noting that jurisdictions which have no entitlement to asylum tend to maintain resettlement programmes for refugees at a much higher rate than others.

Access to territory

In the Canadian instance, it is particularly striking that asylum requests are, as a general rule, inadmissible if presented at the Canada–US land border. Given the geographical realities of the region, it is difficult to overestimate the practical importance of such a measure. The Canada–US agreement of 2002, known as the Safe Third Country Agreement, recognises the ineligibility of asylum claims at the common land border and also the obligation of the 'country of last presence' to readmit migrants. The practice of not admitting an asylum claim and turning the person over to the authorities of the neighbouring country is known as 'turn-back'. Such an arrangement is a rather efficient deterrent to asylum claims, whether unfounded or not. In fact, the system avoids providing for substantial examination of claims on the explicit basis that mere individual preference is not enough of a reason for jurisdiction where options for receiving asylum are comparable. This is remarkably similar to the underlying logic of the EU's Dublin system as a deterrent to 'secondary movements' and so-called asylum shopping.

[57] US, Supreme Court, Case no. 19–161, *Department of Homeland Security et al. v Thuraissiagiam* [25 June 2020].

The situation is, of course, rather different in jurisdictions where the neighbours are not as cooperative. Australia has become a notorious example of seeking to achieve the deterrent effect by 'almost unilateral' means by mandating that the processing of asylum claims of spontaneous arrivals occurs offshore in places such as Nauru. In fact, the Australian policy's primary aim is to discourage an increase in arrivals by preventing those choosing an irregular route from achieving a more advantageous position than those not choosing it. That migrants are disembarked outside of the Australian territory has been deemed legitimate by the High Court of Australia only if the jurisdiction of disembarkation is also offering asylum, having ratified the Geneva Convention.[58] In this assessment, the High Court of Australia seems to be less concerned about the actual conditions in those receiving jurisdictions than European courts are. Instead, it seems to rely on the general availability of protection as the defining criterion.

It has been frequently stated that Australia, unlike the EU, can rely on its geographical isolation and on the relatively moderate numbers of people arriving to limit the numbers of people claiming asylum. Similar policies have, however, been deployed on other, much more exposed maritime borders. On its southern border, the US has frequently been faced with situations familiar to a European observer. In the 1990s, vessels carrying migrants from Haiti were intercepted by US Coast Guard ships which then returned them to Haiti without admitting asylum requests. The US Supreme Court has adopted an approach quite different from that of the ECtHR by ruling that considerations regarding non-refoulement do not apply to US government vessels on the high seas.[59] When summarily returning migrants to the port of their departure, US authorities were authorised not to consider the consequences of their actions in terms of refoulement in any way. It should be pointed out that in this instance, the differing interpretation of the Geneva Convention goes much further than denying access to procedure or to territorial jurisdiction. Executive action undertaken outside of US territory is considered free of considerations that would apply within, with the deck of a US government vessel not being considered a place of US jurisdiction. The US–Haiti Agreement to Stop Clandestine Migration of Residents of Haiti to the United States of 1981 is an early example of a comprehensive policy framework to counter irregular arrivals which has, remarkably, stood the test of time both in the courtroom and on the high seas.

[58] V. Novotný, *Reducing Irregular Migration Flows Through EU External Action*, Wilfried Martens Centre for European Studies (Brussels, 2019).
[59] US, Supreme Court, Case no. 92-344, *Chris Sale, Acting Commissioner, Immigration and Naturalization Service, et al. v Haitian Centers Council, Inc., et al.* [21 June 1993].

The term ‘persecution’ and the discretion argument

Above we have highlighted the rather progressive approach of the CJEU towards the concept of persecution under the Geneva Convention. The Court found that asylum authorities must not require the members of religious and sexual minorities claiming asylum to have behaved ‘discreetly’ in their countries of origin. According to the Court, the term ‘persecution’ comprises serious acts that interfere with the applicant’s freedom to practice his faith not only in private but also publicly. In a similar manner, the CJEU argued that asylum seekers should not have to abstain from expressing their sexual orientation in public. In this way, the CJEU has indeed contributed to a more liberal approach towards certain categories of asylum seekers.

It is, however, surprising that the CJEU, when firmly opposing the discretion argument, did not make any reference to the legal practices of other state parties to the Geneva Convention. It has already been noted in academic literature that with regard to the interpretation of the Geneva Convention, the CJEU tends to behave as if it were the supreme judicial authority.[60] Such an approach may lead to irritations given the long history of the Geneva Convention and the high number of state parties to it. It may also lead to the impression that the CJEU has autonomously and independently introduced a very liberal standard of refugee protection.

A brief comparison with various arguments invoked by courts in Australia, New Zealand, Canada and the US supports the conclusion that this assumption is not correct. As a matter of fact, non-European courts addressed the ‘discretion argument’ years before the CJEU issued its relevant judgments in 2012 and 2013.

[60] ‘The use of the [Vienna Convention of the Law of Treaties] . . . may tell us something more about how the Court sees itself more generally in the wider international legal order. The Court does not refer to leading case law on the interpretation of international treaties given by the highest courts in other contracting States to the treaty. It feels free to use the [Vienna Convention] in a way that diverges from its use in wider international law without acknowledging how other Courts have interpreted and applied those principles.’ See J. Odermatt, ‘The Use of International Treaty Law by the Court of Justice of the European Union’, *Cambridge Yearbook of European Legal Studies,* vol. 17 (2015),1–24.

As early as 1995, the Immigration and Refugee Board of Canada, in the case of a homosexual asylum seeker from Venezuela, declared that 'to deny refugee status to someone who cannot or will not conceal one of these immutable or fundamental attributes, on the grounds that by such concealment he or she could remove the fear of persecution, would make a mockery of the Convention'.[61]

In 2004, the Canadian Federal Court, in *Sadeghi-Pari v Canada*, reached the conclusion that an individual must not be expected to conceal his or her sexual orientation. According to the Federal Court, 'expecting an individual to live in such a manner could be a serious interference with a basic human right, and therefore persecution.'[62]

Australian legal practice originally argued that members of sexual minorities could evade persecution by avoiding public attention. Even as late as 2002, the Federal Court of Australia, in *SAAF v Minister for Immigration and Multicultural Affairs*,[63] upheld the decision of the Refugee Review Tribunal which had rejected a claim for protection, stating that the Iranian authorities did not actively pursue homosexuals who behaved 'discreetly'. However, in 2003, the Australian High Court, in the case of *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*,[64] decided against the discretion argument. The High Court found that it would undermine the object of the Convention if the signatory countries required people to hide their race, nationality or membership of particular social group.

In a case in 1995[65] the New Zealand Refugee Status Appeals Authority had already reached the same conclusion, arguing that one could not expect an applicant to deny an essential part of their identity. It needs to be added that the courts in Canada and Australia usually perform a thorough analysis of existing case law in common law countries. Going even further, the New Zealand Refugee Status Appeals Authority even provides a thorough comparison of relevant judgments issued by, for example, German, Dutch and Swedish courts.

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61 Canada, Federal Court, Case no. (1995) 89 F.T.R. 94 (TD), *Narvaez v Canada (Minister of Citizenship and Immigration)* [9 February 1995].
62 Canada, Federal Court, Case no. (2004) FC 282, *Sadeghi-Pari v Canada (Minister of Citizenship and Immigration)* [26 February 2004].
63 Australia, Federal Court, Case no. FCA 343, *SAAF v Minister for Immigration and Multicultural Affairs* [28 February 2002].
64 Australia, High Court, Case no. HCA 71, *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [9 December 2003].
65 New Zealand, Refugee Status Appeals Authority, Refugee Appeal no. 1312/93, *Re GJ* [30 August 1995].

In summary, over the years, courts in non-European state parties to the Geneva Convention have developed a clear approach regarding the discretion requirement. Moreover, prior to the adoption of the corresponding case law of the CJEU, the UK Supreme Court, in the case of *HJ and HT v SSHD*,[66] also issued a 2010 landmark decision rejecting the discretion argument in relation to sexual minorities. In a similar manner, Australian and Canadian case law has also preceded the CJEU's judgments on the persecution of members of religious minorities.

These examples show that the interpretation of the Geneva Convention is shaped by court practice in various liberal and democratic state parties to the Convention. It would be incorrect to say that the CJEU claims a specifically privileged status in this respect. Moreover, from our case law analysis it becomes clear that the CJEU approach to the Geneva Convention is not necessarily more liberal than its interpretation in other democratic countries. Rather the major difference seems to be that whereas especially common law courts regularly carry out a thorough analysis of state practices under the Geneva Convention, the CJEU does not seem to be interested in such kinds of comparison. It is doubtful whether the CJEU's approach to the interpretation of the Geneva Convention is fully correct in the light of the interpretation principles laid down in public international law.

[66] UK, Supreme Court, Case no. 2009/0054, *HJ and HT v Secretary of State for the Home Department* [7 July 2010].

Conclusions

In this paper we have explored EU asylum law, taking into account both how it has evolved and elements of comparison with other jurisdictions. A few consistent patterns have emerged with more clarity than others. Perhaps the most consistent pattern is the gradual evolution towards expanding entitlement stemming from the interpretation of the Geneva Convention under EU law. This process is driven by judicial action, and relies on CJEU and ECtHR jurisprudence rather than on legislative bodies at the EU and national levels. With some delay, as a rule, the major changes introduced by case law appear in EU legislation. Some changes, however, are never incorporated into acts of legislation. Rather, they become part of the application of law on a basis just as regular and reliable.

In fact, this pattern seems to have its most general and, one could argue, complete expression in the text of the treaties from which the EU asylum policies arise. According to Article 78(1) TFEU, EU asylum law is not limited to the Geneva Convention. Rather, the EU sets itself a much wider goal of developing policy in the field of not only asylum, but also subsidiary and temporary protection. This policy 'must be in accordance' not only with the Convention, as amended by the 1967 Protocol, but also with 'other relevant treaties'. One should also note that, legally speaking, this is not an exacting criterion for the content of such treaties, if they are merely expected to be 'relevant'.

The legislative ambition is therefore clearly much broader than simply implementing the Geneva Convention. It is worth noting that the additional categories of protection are based not on the Geneva Convention, but rather on the jurisprudence of the ECtHR, which relies on a particularly relevant 'other treaty', and also on EU legislative action. The Geneva Convention is, in this sense, used as a fundament for much more ambitious regulation.

It is essentially a matter of legal philosophy to assess how much the Geneva Convention itself restricts that ambition. On the one hand, there is a rather widespread tendency to regard the Convention, as well as the ECHR and similar human rights documents, as 'living' ones. In other words, the understanding of their provisions and their application in case law is deemed to be subject to evolution without any change to the text. As social acceptance of certain concepts evolves, and moral sensitivities emerge or become less widespread, an unchanging text is deemed to evolve in meaning. This attitude to legal interpretation is well analysed in academic writing, along with a host of reasons both in favour of and against such an interpretation.

On the other hand, one could rely on a 'textualist' interpretation of the Convention. This approach is based on the ordinary meaning of the words used to write the provisions and does not attribute importance

to the more abstract context evolving around them. As the Geneva Convention is an international agreement, this approach relies ultimately on the customary principles codified in the Vienna Convention on the Law of Treaties. This approach to legal interpretation is no less well described, analysed and debated in legal writing than the other. Instead of seeking an evolving meaning, the guiding light of this interpretation is the original meaning of the obligations that the contracting parties established between themselves. As a result, this interpretation is very unlikely to assign innovative meanings to terms used in the text without specific reasons for doing so.

This paper has shown that when it comes to the definition of persecution, the CJEU has created the impression that it has introduced a more liberal standard of refugee protection than that afforded by other democratic jurisdictions. While not based in reality, this impression has been created as a result of the lack of reference in the CJEU's rulings to relevant international judicial practice. With regard to the concept of persecution, Canada, Australia and New Zealand have all interpreted refugee persecution as progressively as the EU.

On the right of asylum and access to territory, the EU stands in contrast to other major democratic jurisdictions. The paper has demonstrated that on these issues, going beyond the textual meaning of the Convention is a widespread practice in EU asylum law. A mere glance at the treaties indicates that this is not an accident as the treaties are explicitly open to that ambition. It is a profoundly political choice whether or not it was wise to go in that direction at all and if so, if and where there was a point beyond which it was unwise to venture. Opinions on that question vary widely, and there are various ways of analysing it, be it based on examining values or the consequences of action.[67]

In a metaphorical way, this more ambitious regulation could be compared to what is, in other contexts, known as gold-plating. The term itself is intrinsically controversy-generating and seldom used as a means of flattery. To make things more complicated, it is used not only in the context of transposing EU directives into national law, but also in the implementation of EU funds and other widely varying contexts. However imprecise, the term is not only of argumentative value. It describes the very real phenomenon of additional regulation beyond the minimum necessary to achieve compliance.

From a legal perspective, one can differentiate between mandatory gold-plating and non-mandatory gold-plating. Speaking in the context of EU law, mandatory gold-plating is the extent to which EU law

[67] See H. Brady, *Openness Versus Helplessness: Europe's 2015–2017 Border Crisis*, Groupe d´études geopolitiques (Vienna, 28 June 2021).

subordinates itself, through the founding treaties, to the limits set by other international treaties. While it is, in general, a remarkable construction, as the EU is known for insisting on its regulatory autonomy in other contexts, it is enshrined in the treaties. Of singular importance in this context is, as demonstrated by this paper, the ECHR and the Court created to interpret it. We have no ambition to delve into the complexities of the intended accession of the EU to the ECHR and the interaction between the CJEU and the ECtHR. We limit ourselves to remarking that asylum policy is a striking example of how much those institutional questions, generally seen as abstract and unrelated to the everyday practicalities of law, are of very immediate and indeed fundamental practical importance. One may also add that while the immediate importance is great, the long-term importance is also difficult to overstate.

What one can call, for lack of a better term, non-mandatory gold-plating is, quite simply, everything else that expands the scope of obligations of member states beyond the Convention. As with any other policy area, it is a matter of free consideration for the legislator as to what entitlements and obligations to create. What one should bear in mind, however, is that such freely created entitlements and obligations may be just as freely modified, replaced or even abolished completely. This freedom exists not only for the Union's legislator, but also, to a considerable extent, for those of the member states.

It is clear from the situation in several major jurisdictions that with regard to asylum as a legal entitlement and access to territory, it is possible to adhere more closely to the Geneva Convention than the EU does. Nor is this choice detrimental to democracy, human dignity or the other values that the EU shares with its partners across the globe. Examples of particular policies and whole policy frameworks of that nature abound, along with the controversies surrounding them, which are natural in a democracy. In fact, it is worth noting that some important policy concepts that the EU has adopted are not widely imitated globally. Whether or not Europe wishes to continue on the path of diverging from the Convention, and if so, in what matters and to what extent, is a matter of political choice rather than of legal necessity.

We feel that by reaching these conclusions we have also reached the outer limit of what legal analysis can contribute. Beyond lies an area of questions no less important, but of a different nature, ones of policy and politics, generating support, forging alliances and resolving disputes. To what extent our observations are a useful contribution to these efforts is left to the opinion of the kind reader.

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The European asylum system sometimes comes under criticism for being overly generous with regard to access to asylum and other aspects of international protection. This is often attributed to the provisions of the 1951 Geneva Convention. Based on an analysis of relevant case law and international comparisons, the paper asserts that the Geneva Convention itself cannot be linked to certain overly generous interpretations and that such an outcome was not intended by the framers of the Convention. Rather, supplementary judicial and legislative interpretations, which have accumulated over decades, have caused Europe's asylum system to become more permissive in certain aspects, compared to those of other major democratic jurisdictions. In particular, the jurisprudence of the European Court of Human Rights has played a major role in this regard. Furthermore, the EU's legislative ambition, as set out in the treaties, is broader than that of the Geneva Convention.

The paper offers several alternative views on how one may assess the differences in interpretations of the Geneva Convention between the EU, on the one hand, and Australia, the US and Canada, on the other. An examination of these differing perspectives allows us to advance operational efficiency of the EU's asylum system by moving it closer to the original intention of the Geneva Convention. If the long-term challenges in asylum are to be met successfully, they need to be tackled on the basis of the Geneva Convention as the only universal legal instrument of refugee law.

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