

ICMPD Working Paper 12

International Refugee Protection and European Responses

Martin Wagner & Albert Kraler

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Abstract

The purpose of the Vienna Migration Conference (VMC) is to take stock of the developments in the area of migration and migration policy in the previous year and to discuss the most burning issues in the field of migration together with political decision makers; government experts; and representatives of academia, media and civil society. The 2016 VMC was dedicated to two topics: “International Refugee Protection and the European Responses” and “European Migration Policy and International Cooperation”.

The present paper looks into international protection and the European Responses. It reflects on the arrival of around 1.25 million people who applied for asylum in EU Member States in 2015 and on the consequences this had on the Common European Asylum System (CEAS). The paper argues that the so-called “refugee crisis” is not merely the result of the exigencies of 2015, but rather goes back to the very foundation of the international refugee protection framework. While the 1951 Geneva Refugee Convention set the basis for the CEAS, the latter failed at providing European answers to questions that had not been solved globally in 1951. In particular the CEAS missed the opportunity to find a common European understanding on questions such as solidarity, responsibility sharing, effective access to protection or the scope of protection – all questions that already were controversial and could not have been solved in 1951. The paper concludes that new ideas and proposals on how to address the “refugee crisis” are thus likely to fail as long as no joint EU, or indeed international, understanding has been reached on some of those fundamental questions.

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1. Introduction

The arrival of around 1.25 million people applying for asylum in EU Member States in 2015 shook the very core of the Common European Asylum System (CEAS).¹ Within a few months, the initial ‘welcoming culture’, as witnessed in some EU countries, gave way to a feverish search for ways to contain the largely chaotic and uncontrolled entry of non-EU citizens. The majority of these people were from refugee-producing countries, travelling through Greece and the Western Balkans, to Hungary and onwards to Austria, Germany and other countries in Western Europe.

The European Commission responded with an avalanche of legislative proposals and resolutions intended to provide a common European response. For the Member States, these proposals either went too far, developed too slowly, were not far-reaching enough or went in the wrong direction. In a situation of increasing disagreement over the ‘common’ asylum policy and political pressure to find solutions, some Member States went their own ways, introducing internal border controls within the Schengen zone, erecting fences and other physical barriers at the borders, or amending national asylum laws in order to make their own asylum system as unattractive as possible.

‘Intra- EU solidarity’ – one of the core principles of the CEAS – was at best paid lip service to during the crisis and at worst sabotaged through the often overt rejection of bilateral or multilateral solutions. In this context, the CEAS was questioned and criticised for not offering appropriate instruments to deal with the increased influx of asylum applicants. The EU’s legal instrument intended to handle a mass influx of displaced people (the 2002 Temporary Protection Directive) was not activated,² while the system for determining the Member State responsible for examining an application for international protection (the Dublin system) proved not to be up to the task of dealing with higher numbers of people arriving and was *de facto* temporarily suspended to a large extent.

The resulting chaotic situation in 2015 was labelled by the media and policy-makers as a “European refugee crisis”. The CEAS was deemed dysfunctional and new ideas on how to solve the so-called crisis surfaced and were widely circulated. Increasing recognition of the failures of the CEAS then also led to broader criticism of the international refugee law instrument, the 1951 Refugee Convention. Some described the Convention as outdated and inadequate in the face of current challenges.

¹ The Common European Asylum System (CEAS) consists of: (1) the revised Asylum Procedures Directive regulating asylum decisions; (2) the revised Reception Conditions Directive on reception conditions for asylum applicants; (3) the revised Qualification Directive governing grounds for granting international protection; (4) the revised Dublin Regulation regulating responsibility sharing of asylum applications among EU Member States; and (5) the revised EURODAC Regulation on the EU database of the fingerprints of asylum applicants. See: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm, accessed 30.08.2016.

² In fact only a candidate country for the EU, Turkey, introduced temporary protection on 13 October 2014 to deal with the large influx of Syrians to Turkey.

The present paper argues that today's so-called "refugee crisis" or "protection crisis" in Europe is not merely the result of the exigencies of 2015, but rather dates back to the very foundation of the international refugee protection framework. While the Geneva Refugee Convention set the basis for the CEAS, the latter missed the opportunity to provide European answers to questions that were not resolved globally in 1951. In fact the CEAS is a rather conservative regional implementation of the obligations set out in the Refugee Convention, to which all EU Member States are party. The EU has not availed of the opportunity to reach a common European understanding on questions such as solidarity, responsibility sharing, effective access to protection and the scope of protection – all questions that were controversial and could not be resolved in 1951. New ideas and proposals are thus likely to fail or not even be discussed, as long as no joint EU, or indeed international, understanding is reached on some of these fundamental questions.

While acknowledging that none of the top ten refugee-hosting countries in the world are located in the European Union³ and the number of new asylum applications in 2015 remained small as a proportion of the entire EU population (around 0.25%), the increase in arrivals last year was dramatic in relation to previous years. This significant increase put pressure on existing mechanisms and raised questions about their fitness for purpose. On the occasion of the first Vienna Migration Conference, hosted by ICMPD, this paper therefore examines the EU asylum system, contextualising it within the historical and international development of refugee law and practice, and provides suggestions of what the EU can do to improve, particularly in the global context of the recently adopted New York Declaration for Refugees and Migrants.

In what follows, the development of the CEAS will first be briefly presented within the framework of international refugee law, followed by an overview of the core elements of the CEAS and considerations on possible prospects for the future. Key priorities are identified and options considered in the areas of (1) access to international protection; (2) responsibility-sharing; and (3) protection status.

2. The CEAS in the context of international refugee law

The CEAS is a regional legal framework based on the international protection regime, which is firmly established by the Geneva Refugee Convention (the "1951 UN Convention relating to the Status of Refugees", hereafter referred to as GRC) and its Protocol from 1967. A key impetus for increasing cooperation among the Member States of the European Community and later the European Union consisted of finding a regional solution to the tension between the 'open nature' of the universal definition of the term refugee on the one hand and the political 'necessity'⁴ for a stricter definition on the other.⁵

³ The top ten refugee hosting countries globally, in absolute numbers, are: Turkey; Pakistan; Lebanon; Iran; Ethiopia; Jordan; Kenya; Uganda; Democratic Republic of Congo; and Chad.

⁴ Necessity in the sense of a requirement in the democratic competition for votes and power.

The first common measures of European refugee policy, such as the Dublin Convention⁶ and concepts like the safe third country or safe country of origin, were put in place at the end of the 1980s and the beginning of the 1990s. These measures were, however, primarily aimed at restricting access to asylum, influencing the choice of destination country in order to prevent what was termed ‘asylum shopping’, and preventing multiple applications by the same person and the concentration of applications in a few main receiving states.

The foundations of this tension between openness and restrictiveness were already laid by the GRC, which provided for **a temporal restriction, and the possibility of a geographical restriction**. By restricting the scope to people who sought protection ‘as a result of events’ before 1951 and providing for the possibility of restricting protection to people from Europe, the authors of the Convention hoped to avoid signing a ‘blank cheque’ for the reception of a future unknown number of refugees.⁷ It was only in 1967 that the Protocol – which was neither signed nor fully supported by all signatory countries of the GRC – eliminated these restrictions. Significantly, of the three main receiving countries of refugees in 2015 (Turkey, Pakistan and Lebanon), only Turkey has ratified the GRC and its Protocol, although it maintained the geographical restriction.

The GRC also defined the term ‘refugee’ in a narrow way, focusing on individual persecution and thereby omitting being affected by war or indiscriminate violence. The *Travaux Préparatoires* for the GRC clearly show that the drafters intentionally excluded people affected by natural disasters or war, for example, from the definition of a refugee⁸. Although at the final conference the plenipotentiaries signing the Convention expressed their hope that states would extend protection to people “not covered by the terms of the Convention”⁹, the Convention was never amended in this sense. Nevertheless, the drafters of the Convention envisaged refugee protection also for people who were in need of it based on grounds other than those mentioned in the Convention.

Not least because of the sometimes violent experiences of decolonisation and of conflicts in countries on the African continent, the 1969 Convention of the Organization of African Unity Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention) provided for a much broader refugee definition than the GRC, by including “every person who, owing to external aggression, occupation, foreign

⁵ Hollifield *et al.* see this as a fundamental paradox of all liberal democratic migration policy. See Hollifield, J. F., Hunt, V. F., & Tichonor, D.J. (2008): *Immigrants, Markets, and Rights: The United States as an Emerging Migration State*. Washington Journal of Law and Policy, vol 27.

⁶ The Dublin Convention was signed by the then twelve Member States of the EC on 15 June 1990 and entered into force on 1 September 1997.

⁷ Bundeszentrale für politische Bildung: 65 Jahre Genfer Flüchtlingskonvention, Blog citing further literature under footnote 9, available at <http://www.bpb.de/apuz/229819/65-jahre-genfer-fluechtlingskonvention?p=all#footnode9-9>, accessed on 29.09.2016.

⁸ Battjes et al (2016): *The Crisis of European Refugee Law 2016: Lessons from Lake Success* (May 23, 2016). Available at SSRN: <http://ssrn.com/abstract=2783247> or <http://dx.doi.org/10.2139/ssrn.2783247> p 20, footnote 120, accessed on 30.09.2016.

⁹ *Ibid.*

domination or events seriously disturbing public order (...) is compelled to leave his place of habitual residence (...)¹⁰.

In the European context, the European Convention on Human Rights (ECHR) was a major driving force for the expansion of the refugee definition: following extensive jurisprudence by the European Court of Human Rights on the absolute validity of the **prohibition of torture or inhuman or degrading treatment or punishment**, subsidiary protection grounds developed that were in many cases also used for protection from “indiscriminate violence”. In the CEAS, subsidiary protection grounds were then legally standardised and a corresponding protection status was created, which is approximated to the status of GRC refugees in many, though not all, aspects.¹¹ While protection was thus considerably expanded – and harmonised – in the EU context, the procedures for how refugee status is determined are only partly unified. Indeed, the GRC also left open the question of how a state should determine refugee status.

Possibly one of the most decisive weaknesses of the GRC, however, seems to be the lack of provisions for how people seeking protection should access that protection. While this played a key role in the negotiations on the text of the GRC, eventually the position prevailed that ‘asylum law’ and the rules of the GRC needed to be distinct areas; the GRC should, according to the drafters of the Convention, regulate the legal status of refugees who have already been accepted in a receiving state, whereas it should exactly not touch upon the question of ‘admitting refugees’.¹²

It therefore remains a point of contention whether refugees must seek protection in the first country in which they are no longer subjected to persecution, or whether the GRC also allows for a refugee to choose the destination country.¹³ Indeed the need among such a large proportion of today’s asylum applicants to use irregular migration routes to reach EU countries, and the attendant risks of abuse and death, are a result of this inherent tension between the right to apply for asylum, and the lack of a universally recognised right to travel regularly to the country of asylum.

In the European context, the concepts of the safe first country of asylum and the safe third country were developed at the beginning of the 1990s. The purpose of these concepts is primarily to prevent refugees from exercising freedom of choice regarding their destination country. Instead, asylum seekers have to stay in the first EU country or State Party to the GRC that has already or could have provided protection

¹⁰ See Art 1 OAU Convention.

¹¹ Exceptions concern, for instance, access to and amount of social benefits, as well as access to family reunification.

¹² See Davy, U (1996): *Asyl und internationales Flüchtlingsrecht; Völkerrechtliche Bindungen Staatlicher Schutzgewährung, dargestellt am österreichischen Rechte; Band I: Völkerrechtlicher Rahmen*; Verlag Österreich; Österreichische Staatsdruckerei, Wien 1996, p 50 with further references.

¹³ See Hathaway, J.C. (2007): "Why Refugee Law Still Matters." *Melb. J. Int'l L.* 8, no. 1: S 90; at: <http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1296&context=articles>, accessed on 30.09.2016

on their flight route. Within the EU, these concepts emerged as a mechanism for determining responsibility for individual asylum applications - the “Dublin” system, which assigns principal responsibility to the first EU Member State to which the applicant arrives.

Although it constitutes a *de facto* sharing mechanism, the Dublin system is at cross-purposes with the fundamental principle of responsibility-sharing and does not broach the issue of **equitable sharing** in the first place. While the question of how to ensure a more equal distribution of refugees also remained unanswered by the GRC, its authors clearly perceived international cooperation as a means to alleviate unduly heavy burdens on certain countries.¹⁴ The UNHCR has repeated this demand of the GRC in a series of Executive Committee Conclusions¹⁵ and in particular pointed to the possible negative effects on countries and regions of a “large-scale influx” that is disproportionately directed to one or a few countries.¹⁶

It can therefore be concluded that despite some important developments, the CEAS has inherited the crucial weaknesses of the GRC, especially concerning access to international protection and the concrete meaning of ‘solidarity’ or fair sharing of responsibilities for people seeking international protection. The following section will briefly discuss the key elements of the CEAS and its limitations in the context of the recent increase in arrivals – the so-called “European refugee crisis”.

3. Central elements of the CEAS and its performance

The CEAS consists of three main parts: (1) legal provisions on determining the responsibility of a Member State for handling an asylum claim; (2) legal provisions on the procedure and the qualification of applications for international protection; and (3) legal provisions on the reception and care of asylum seekers.¹⁷

Determining the responsibility of a Member State for handling an asylum claim

Responsibility for asylum applications is regulated by the Dublin Regulation. The Eurodac database, established as a technical support for the determination of responsibility, stores the fingerprints of asylum seekers and irregular migrants taken during initial registration in a Member State. It thereby

¹⁴ See Preamble to the GRC: “Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognised the international scope and nature cannot therefore be achieved without international co-operation.”

¹⁵ See for example UNHCR Executive Committee Conclusions No. 15 (XXX) – 1979 para f; No 61 (XLI) – 1990 para g; No 71 (XLIV) – 1993, para h; etc.

¹⁶ See for example UNHCR Executive Committee Conclusions No 22 (XXXII) – 1981; No 100 (LV) – 2004, etc.

¹⁷ For a detailed overview, see, among others: European Parliament, Committee on Civil Liberties, Justice and Home Affairs; Wagner, M. et al. (2016): The implementation of the Common European Asylum System at [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556953/IPOL_STU\(2016\)556953_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556953/IPOL_STU(2016)556953_EN.pdf) , accessed on 30.09.2016.

serves as evidence of whether asylum seekers/irregular migrants have already or should have already lodged an asylum application in another EU country.

As mentioned above, Dublin responsibility is based on the principle that the Member State through which the asylum seeker first entered the EU is responsible for their asylum application. The EU approach to the determination of responsibility is thus strongly orientated around the principle that as soon as an asylum seeker reaches any EU country he or she is supposed to seek and find protection there. Thus, Dublin is in clear contrast to a model that would leave the choice of where to file an application to asylum seekers themselves, and provides clear rules on how the desired legal situation is to be achieved. This comprises a specific procedure to determine responsibility, carrying it out if necessary by compulsory enforcement, and to transport the person in question back to the responsible state. Since its creation, the Dublin system has been strongly criticised. It is said to be ineffective¹⁸ and inhumane, as well as time-consuming and cost-intensive.¹⁹ In addition, national and supranational courts have stopped Dublin returns to certain EU Member States in several cases, in particular because of insufficient conditions in the admission, accommodation and care of refugees.²⁰ At the same time, the EU Commission and most Member States regard the Dublin system as a cornerstone of the CEAS.

During the so-called “refugee crisis” of 2015, the Dublin system was *de facto* suspended. Asylum seekers travelled through several EU countries without having to provide their fingerprints. Disregarding EU law, the border and asylum authorities of some EU Member States let non-EU citizens pass through their country and thereby allowed exactly what Dublin should have prevented: the free choice of destination country by people seeking protection.

The logical consequence of the EU responsibility-determination system is that countries at the external borders of the EU are disproportionately confronted with higher numbers of people arriving and seeking protection. Through Greece alone, more than 800,000 people reached the EU in 2015, mostly coming *via* Turkey. Greece could hardly have been expected to cope with this number of people on its own; however, if the Dublin Regulation had been strictly applied, Greece, as first country of asylum, was indeed responsible for most of these people. Eventually, it also became clear that Dublin, besides the

¹⁸ According to EASO, only 2% of asylum seekers in the period of 2010 to 2014 in the EU including associate states were removed, in accordance with the Dublin system. See EASO Annual Report 2015, page 30, footnote 44; at: https://www.easo.europa.eu/sites/default/files/public/EN_%20Annual%20Report%202015_1.pdf, accessed on 29.09.2016.

¹⁹ Among many other studies on the Dublin Regulation, see: European Parliament (2015): Enhancing the Common European Asylum System and alternatives to Dublin at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL_STU\(2015\)519234_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL_STU(2015)519234_EN.pdf), accessed on 29.09.2016, as well as European Parliament (2016): The Reform of the Dublin III Regulation at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL_STU\(2016\)571360_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL_STU(2016)571360_EN.pdf), (accessed on 29.09.2016); see also the evaluation through the EC: European Commission (2016): Evaluation of the Dublin III Regulation DG Migration and Home Affairs - Final report at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_dublin_iii_regulation_en.pdf, accessed on 29.09.2016.

²⁰ See among others: European Court of Human Rights (ECtHR): *M.S.S. v Belgium & Greece*, January 2011; Court of Justice of the EU (CJEU): *NS vs UK*, C-411/10; ECtHR: *Tarakhel v. Switzerland*, Application no. 29217/12.

other weaknesses already mentioned, is completely unsuitable for determining the equitable sharing of asylum applications throughout the EU.

With unprecedented speed for this policy area, the European Council adopted two decisions in September 2015 that provided for the intra-European relocation of 160,000 asylum seekers, first on a voluntary basis (relocation of 40,000 asylum seekers) and then, in the second decision, based on a mandatory fixed “distribution key”²¹ (relocation of 120,000 asylum seekers). “Hotspots” were created in countries with disproportionately high numbers of arrivals to support them in the registration and initial reception of asylum seekers. With the support of staff from other EU Member States and together with the national authorities in Greece and Italy, EU agencies such as the European Asylum Support Office (EASO), Frontex, Europol und EUROJUST were to organise further distribution among other EU Member States.

The decisions remained largely ineffective. A number of EU countries immediately rejected the decisions, in particular the obligatory fixed distribution key, and some filed a lawsuit against the relocation scheme to the Court of Justice of the European Union. Sweden and Austria requested temporary withdrawal from the decisions because of the already higher numbers within their asylum systems, and the remaining countries showed only a limited willingness to accept asylum seekers from Italy and Greece. Logistical challenges exacerbated the disastrous results and thus, after 12 months, only 6,237 of the intended 160,000 people had been relocated within the EU.²²

In the first months of 2016, the number of people arriving to the EU seeking protection remained high relative to previous years. The relocation measures were not very effective. In parallel, the search for sustainable and complementary solutions was continued, eventually culminating in the EU-Turkey Statement of 18 March 2016²³. In this Statement, the EU and Turkey committed to taking joint measures to curb irregular migration, including the arrivals of asylum applicants in the EU along irregular migration routes. Along with a number of accompanying measures, the Statement provides that Turkey prevents irregular migration to the EU and takes back migrants who have entered the EU irregularly. In return, the EU commits to admitting one Syrian refugee from Turkey through resettlement for each non-EU citizen who entered Greece irregularly and who is taken back by Turkey (“1:1 Deal”).

The Statement was received very critically. Particularly the designation of Turkey as a safe third country or first country of asylum is regarded by many as being in contravention of articles 35 and 38 of the

²¹ The distribution key is based on GDP and population size (40% weighting for each) as the primary determinants, while the unemployment rate and number of asylum applications received in the past are weighted as 10% each (see COM(2015) 451 final at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/proposal_for_council_decision_establishing_provisional_measures_in_the_area_of_international_protection_for_it_gr_and_hu_-_annexe_en.pdf, accessed on 29.09.2016.

²² See: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf, accessed on 29.09.2016.

²³ See: <http://www.consilium.europa.eu/de/press/press-releases/2016/03/18-eu-turkey-statement/>, accessed on 29.09.2016.

Procedures Directive,²⁴ particularly given that Turkey applies the geographic limitation of the GRC and grants Convention refugee status only to Europeans. Similarly, the return element of the Statement is the focus of criticism, as it implies a complete change of the purpose of the “hotspots”, which were previously responsible for admission and relocation. This meant that the hotspots were quickly converted into detention centres for preparation for the return to Turkey of asylum seekers who had arrived in Greece.

It was precisely this latter argument that eventually led the UNHCR, Médecins sans Frontières (MSF) and other humanitarian actors to pull out of the hotspots, and, in the case of MSF, to refuse to receive any further funding from the EU and its Member States.²⁵ In the meantime, a series of judgements by Greek asylum courts also stopped the return of asylum seekers to Turkey, because they did not share the EC’s opinion that Turkey is a safe third country.²⁶ Nevertheless, while not undisputed²⁷, the European Commission and many Member States perceived the EU-Turkey Statement as having reduced the numbers and brought the situation under control. The contention that the EU-Turkey Statement has been a success also leads some states to see the future of EU asylum management in such deals with neighbouring countries of the EU.

The procedures and qualification of applications for international protection

Refugee status is determined through specific procedures, standardised at EU level in the **Procedures Directive** - first through minimum standards and later through common standards. The Procedures Directive is the most complex instrument of the CEAS. This complexity is primarily due to the fact that EU Member States have developed their own asylum procedures to implement international obligations deriving from the GRC over the years, which are embedded in specific national administrative procedural

²⁴ See (for example) the controversial contributions of Peers, S. (2016): ‘The EU, Turkey and the Refugee Crisis: What could possibly go wrong?’, EU Law Analysis, available at: <http://eulawanalysis.blogspot.co.at/2016/02/the-eu-turkey-and-refugee-crisis-what.html>, accessed on 30.09.2016; Hathaway, J. (2016): ‘Three legal requirements for the EU-Turkey deal: An interview with James Hathaway’, Verfassungsblog, 9 March, available at: <http://verfassungsblog.de/three-legal-requirements-for-the-eu-turkey-deal-an-interview-with-james-hathaway/>, accessed on 30.09.2016 ; as well as the reply by Hailbronner, K. (2016): Legal Requirements for the EU-Turkey Refugee Agreement: A Reply to J. Hathaway, Verfassungsblog, 11 March, available at: <http://verfassungsblog.de/legal-requirements-for-the-eu-turkey-refugee-agreement-a-reply-to-j-hathaway/>, accessed on 30.09.2016. See also the contribution of the Dutch Refugee Council and ECRE (2016), The DCR/ECRE desk research on application of a safe third country and a first country of asylum concepts to Turkey, May 2016 at: <http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/turkeynote%20final%20edited%20DCR%20ECRE.pdf>, accessed on 30.09.2016.

²⁵ See UNHCR (2016): UNHCR redefines role in Greece as EU-Turkey deal comes into effect - Briefing Notes, 22 March 2016 at <http://www.unhcr.org/print/56f10d049.html> , <http://www.unhcr.org/print/56f10d049.html> , accessed on 30.09.2016. See also the criticism of the Council of Europe (2016): The situation of refugees and migrants under the EU-Turkey Agreement of 18 March 2016; Doc. 14028, p 5; at <http://semanticpace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbmQvbnNveG1sL1hSZWYvWDJILURXLWV4dHluYXNwP2ZpbGVpZD0yMjYxMiZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YUWYUERGLnhzbA==&xsltparams=ZmlsZWlkPTlyNjEy>, accessed on 30.09.2016.

²⁶ The Guardian on 20 May 2016: “Syrian refugee wins appeal against forced return to Turkey” available at: <https://www.theguardian.com/world/2016/may/20/syrian-refugee-wins-appeal-against-forced-return-to-turkey> accessed on 30.09.2016.

²⁷ See for example <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/09/fact-check-did-eu> accessed on 30.09.2016.

rules and legal traditions. Efforts to develop common standards for asylum procedures generally had to take into account these national differences, since the political will for broad harmonisation was limited. The result is a Directive that gives Member States considerable leeway and thus only partly contributed to harmonisation.

The qualification of asylum applications was harmonised at EU level by the **Qualification Directive**. The standardisation of subsidiary protection as a legally defined protection status was an important innovation of the Qualification Directive. A second protection status valid throughout the EU was thereby created, encompassing the jurisprudence of the ECtHR relating to Article 3 of the ECHR. Other humanitarian protection mechanisms remain unaffected by EU law and can consequently still be regulated by Member States at the national level.

Although both multi-annual programmes for Justice and Home Affairs, the Hague and the Stockholm Programmes, called for a uniform protection status for recognised refugees and beneficiaries of subsidiary protection, which is also repeated in the considerations on the recast of the Qualification Directive²⁸, unequal treatment in the areas of residence status and social benefits still remain.²⁹ The resulting different arrangements in the individual countries were seen by EU Member States as a pull factor, which is why some countries curtailed the rights associated with the respective status during the “refugee crisis”, in order to reduce the attractiveness of their national asylum systems.³⁰ The strongest criticism of the implementation of the Qualification Directive concerns the sometimes stark differences in recognition rates, i.e., the percentage of applicants who are granted international protection. According to EASO, recognition rates vary across the EU between 21% and 98% for applications by Iraqis and between 14% and 96% for Afghans.³¹

The reception and care of asylum seekers

The Reception Directive regulates the reception of asylum seekers in Member States. This Directive similarly only contains minimum standards that the Member States may not fall short of. Evaluations of this CEAS instrument still show a sharp difference between states with regard to standards of accommodation of asylum seekers. As already mentioned, a number of national and supranational courts qualified the conditions in the accommodation facilities in Greece as that insufficient that the

²⁸ See recital No 39 of the Preamble to the Qualification Directive.

²⁹ UNHCR Austria (2015): Subsidiär Schutzberechtigte in Österreich, p. 16; available at http://www.unhcr.at/fileadmin/user_upload/dokumente/07_presse/material/Bericht_subsidiaerer_Schutz.pdf, accessed on 30.09.2016.

³⁰ See for example in Austria § 3 para 4 of the most recent amendment to the Asylum Act, BGBl. I No 24/2016; or Sweden at <http://www.government.se/press-releases/2016/05/proposal-to-temporarily-restrict-the-possibility-of-being-granted-a-residence-permit-in-sweden/>, accessed on 30.09.2016.

³¹ EASO Annual Report 2015: https://www.easo.europa.eu/sites/default/files/public/EN_%20Annual%20Report%202015_1.pdf, accessed on 30.09.2016.

courts regarded removals according to the Dublin Regulation as a grave violation of human rights³². Member States were forced to suspend removals to Greece. The implementation of the Reception Directive thus directly affects other legal acts of the CEAS, such as the Dublin Regulation.

Decision-makers in individual Member States see differing standards as another main reason why some states are considered to attract more asylum seekers than others. As a consequence, the level of reception standards in Member States was increasingly downgraded, with the intention of deterring people from choosing to apply for asylum in a particular country. Member States cut benefits for asylum seekers or declared that they would seize their valuables in order to cover care costs. On the other hand, according to the revised version of the Reception Directive, Member States were also obliged to open up access to the labour market for asylum seekers after six months' residence.

Although reception conditions are often seen as the main motivation for the choice of the asylum destination country, this has rarely been substantiated by research. Research has generally shown that networks of family and friends, employment opportunities and relevant linguistic and vocational skills are much more important factors. Clearly, these factors cannot be 'harmonised away' by the asylum system. This means that the numerous changes and restrictions applied to national asylum systems with the aim of creating equal standards throughout EU MS ultimately have very little influence on the attractiveness of an individual country as a destination for asylum.

4. Future Priorities and Possible Options

A number of different prospects for the future of refugee law are being and will be discussed at several levels. At the global level, a stimulus for more solidarity with those entitled to international protection was given at two summits addressing large movements of refugees and migrants on 19 and 20 September 2016 in New York. The summits and the New York Declaration for Refugees and Migrants have been praised by some commentators and criticised by others.³³ It is as yet too early to predict their actual impact on international protection on the ground. "At the EU level, the EU Commission published new legislative proposals for the Common European Asylum System on 4 June and 13 July 2016. Asylum experts, journalists and representatives of European governments have for a long time been discussing a variety of approaches to solving the "refugee crisis", some of which are outlined below. Hence, there is no lack of proposals; it is the political feasibility and the practicalities that are often problematic. In what follows, three avenues for improvement will be discussed, presenting what could be done to address the challenges set out in this paper.

³² See among others CJEU of 14 November 2013, Puid, (C-4/11).

³³ See for example, Hathaway, J: "A Really, Really Bad Month for Refugees" at <http://verfassungsblog.de/a-really-really-bad-month-for-refugees/>. accessed on 30.09.2016.

4.1. Future priorities and possible options on access to protection

International refugee law and the CEAS provide little guidance on how people in need can access protection. The implicit principle is that people must personally seek protection in another country. There is, however, no regulated procedure for how a person in need of international protection is expected to access protection other than in neighbouring countries, or even in neighbouring countries, should they restrict border crossing. Due to the lack of clear regulations, in practice it mostly falls on neighbouring countries to provide protection, since they are the first destination for people displaced from their country of origin. The responsibility for protection is therefore generally assigned to countries arbitrarily according to their geographical location.

The situation is analogous at the EU level. An application for asylum can only be lodged on the territory of a Member State. Asylum seekers, who usually do not fulfil the necessary entry requirements, depend mostly on irregular migration routes to reach the EU. These routes are usually dangerous, arduous and expensive. Again, the allocation of responsibility is ultimately the result of arbitrary geographical locations and disproportionately affects EU countries at the EU's external borders as the first entry points for people in need of protection.

It is important to scrutinise the question of whether this unregulated access to protection is adequate in terms of current challenges, and whether this ultimately is indeed in accordance with the intentions of the international as well as the European asylum system. The spirit of both legal frameworks centres on the principle of responsibility sharing, which is supposed to avoid a situation where one country or a few countries host a disproportionate number of refugees.

A number of proposals on how access to protection could be better regulated have already been made. From protection and special economic zones³⁴, extraterritorial asylum reception centres, the reintroduction of asylum applications at embassies and expanding family reunification, to the use of humanitarian or Limited Territorial Validity (LTV) visas³⁵, extensive resettlement, private sponsorship³⁶ and human corridors³⁷ – the range of suggestions is very broad and discussed controversially.

At the EU level, there has been a particular focus on extraterritorial processing centres, the hotspots introduced on foot of the “refugee crisis” in 2015, and resettlement programmes in connection with

³⁴ Betts, A. and Collier, P (2016): Jordan's Refugee Experiment; A New Model for Helping the Displaced at <https://www.foreignaffairs.com/articles/middle-east/2016-04-28/jordans-refugee-experiment>, accessed on 24.10.2016.

³⁵ European Parliament (2014): Humanitarian visas – option or obligation? At http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509986/IPOL_STU%282014%29509986_EN.pdf, accessed on 24.09.2016.

³⁶ Kumin, J (2015): Welcoming Engagement: How Private Sponsorship Can Strengthen Refugee Resettlement in the European Union; at: <http://www.migrationpolicy.org/research/welcoming-engagement-how-private-sponsorship-can-strengthen-refugee-resettlement-european>, accessed on 24.09.2016.

³⁷ Squire, V (2016): Humanitarian Corridors: beyond political gesture at <https://www.opendemocracy.net/5050/vicki-squire/humanitarian-corridors-beyond-political-gesture>, accessed on 24.09.2016.

agreements with non-EU countries, following the example of the EU-Turkey Statement. At global level, the recently adopted New York Declaration for Refugees and Migrants particularly mentioned “complementary pathways for admission” as an additional durable solution.³⁸

All these proposals have positive as well as negative aspects. Regardless of the decision on whether and which approach is chosen, we consider three issues essential in the discussion on access to international protection:

- Deliberations and legal innovations on access to international protection should, as a whole, lead to a higher absolute number of people in need of protection actually being granted it, as well as to an increase in the proportion of vulnerable people accessing international protection. Vulnerable groups are currently over-represented among those deprived of durable solutions, as they are usually unable to access solutions in a protracted refugee situation, nor to undertake an irregular migration journey.
- Alternative avenues for access to protection have to be designed in such a way that they provide a real and practical alternative to long, expensive and dangerous journeys in the search for protection.
- Alternative pathways to admission and increased resettlement however should not come at the expense of reducing or blocking independent arrivals, as people must be allowed to continue to exercise their right to seek asylum independently of such programmes.

4.2. Future priorities and possible options on solidarity

Even if the right to asylum (meaning the admittance of refugees) was not covered in the GRC, as mentioned above, an attempt was later made to introduce this right into the Declaration on Territorial Asylum in 1967. The negotiations on this Declaration were, however, strongly characterised by the maintenance of the principle that the state exercises its sovereignty when granting asylum, and that the “right” to asylum should not be a legal, but only a moral right.³⁹ After all, the weakened right to asylum was partly compensated for by repeating a central element of the GRC. Should the granting of asylum result in unduly heavy burdens on individual countries, the principle of solidarity should prevail: “*Where a State finds difficulty in granting or continuing to grant asylum, States individually or jointly or through the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that State.*”⁴⁰

³⁸ Listed as an additional alternative to the classical durable solutions (repatriation, local integration and resettlement). See New York Declaration for Refugees and Migrants on 19 September 2016, Annex I, point 10.

³⁹ See Davy, U (1996), pages 55 et seq. citing further literature.

⁴⁰ Article 2 Declaration on Territorial Asylum. See also the Preamble to the Refugee Convention of 1951.

Solidarity and fair sharing of responsibility among the international community - the so-called “Global Compact on Refugees”⁴¹, to be signed in 2018 - was also one of the main concerns of the UN General Assembly Meeting on refugees and migrants on 19 September 2016 in New York. However, the summit did not produce any more tangible results than acknowledging a shared responsibility to manage large-scale movements of refugees and migrants through international cooperation, while recognising that states have varying capacities and resources to respond to these movements.⁴²

Financial support and resettlement have been part of the international community’s response to refugee movements since the genesis of the modern refugee regime. Solidarity is usually discussed in the context of mass influxes of refugees.⁴³ At the regional EU level, the unprecedented inflow of refugees to Germany in 1994 – 480,000 people sought protection in the country during that year – led to a revival of the solidarity debate. Solidarity and the sharing of responsibility specifically within the EU eventually found their way into the Treaty on the Functioning of the European Union (TFEU). The principle of solidarity and fair sharing of responsibility between Member States, including the financial implications, are covered in the chapter on ‘Policies on border checks, asylum and immigration’ of the TFEU.⁴⁴

Solidarity and responsibility-sharing are, however, not only a question for relations between states, but are also relevant within individual countries. Countries such as Germany, Austria, Finland, Sweden and the United Kingdom also provide for sharing mechanisms at the national level in order to prevent what are considered to be too high concentrations of refugees in only a few regions.⁴⁵

Deliberations on solidarity and equitable sharing often result in quotas that are designed to take into account indicators such as the surface area of a country, the number of inhabitants, unemployment and GDP *per capita*.⁴⁶ Even if such quotas represent an attempt at reaching a fair solution, they are met with little acceptance by Member States and in day-to-day political life. Even an objectively fair distribution seemingly cannot be reconciled with a subjective feeling of limited capacity: “how many refugees can one country deal with?”

⁴¹ See UN (2016): In safety and dignity: addressing large movements of refugees and migrants - Report of the Secretary-General, A/70/59, of 21 April 2016 available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/70/59, accessed on 24.09.2016.

⁴² See New York Declaration for Refugees and Migrants on 19 September 2016, point 11 as well as point 68. See also the recently adopted Conclusion of the Executive Committee No. 112(LXVII) 2016 on international cooperation from a protection and solutions perspective, 6 October 2016, available at: <http://www.refworld.org/docid/57f7b5f74.html>, accessed on 19.10.2016, in response to the New York Declaration.

⁴³ See Wagner, M and Kraler, A (2015): An Effective Asylum Responsibility Sharing Mechanism – Thematic Paper, October 2014 – Updated Version October 2015; ICMPD Asylum Programme for Member States, page 7 et seq., available at: https://www.icmpd.org/fileadmin/ICMPD-Website/Newsletter/October_2015/ICMPD_TP_Responsibility_Sharing_Update2015_1007.pdf, accessed on 24.09.2016.

⁴⁴ Article 80 Treaty on the Functioning of the European Union.

⁴⁵ See Wagner, M and Kraler, A (2015), page 12, available at: https://www.icmpd.org/fileadmin/ICMPD-Website/Newsletter/October_2015/ICMPD_TP_Responsibility_Sharing_Update2015_1007.pdf, accessed on 19.09.2016.

⁴⁶ For a summary and comparison of different distribution mechanisms see Wagner, M. & Kraler, A. (2015).

There are also a number of examples of financial burden-sharing. At the international level, the UN Refugee Emergency Fund of 1952 represented an important milestone in financial support for disproportionately affected host countries.⁴⁷ At the EU level, three funds (the Refugee Fund, the Integration Fund and the Return Fund) comprised a move towards financial burden-sharing. These three funds were combined and replaced with the Asylum, Migration and Integration Fund⁴⁸ in 2014.

Although financial balancing concepts and the physical redistribution of asylum seekers and refugees (such as through resettlement or, within the EU, through relocation) are at the centre of deliberations, other concepts have also been developed and proposed in the past. These include, for example, proposals to liberalise the territorial protection principle, in opposition to forceful relocation, and favouring freedom of choice concerning the country of asylum.⁴⁹ A more theoretical model of “tradable refugee-admission quotas” was proposed by Fernández-Huertas Moraga und Rapoport.⁵⁰ It is based on the approaches of Hathaway & Neve⁵¹ and Schuck,⁵² proponents of a system of bilateral negotiation of refugee quotas. As well as a series of additional suggestions, Hathaway’s proposal to include “common but differentiated state responsibilities” is worthy of mention. This proposal moves away from non-negotiable obligatory quotas towards a more flexible system, in which states can take responsibility at different levels.⁵³

Finally, because it is based on Hathaway’s contribution, Finch’s proposal is also notable, introducing the concept of “managed protection” into the discussion. Although the latter cannot strictly be regarded as a form of solidarity, it still represents a key component of a more ordered refugee system that, according to Finch, should be organised in stages. People should first seek protection in the neighbouring country, where resettlement is then to be planned and organised.⁵⁴

⁴⁷ See Loescher, G (2001): *The UNHCR and World Politics. A Perilous Path*. Oxford.

⁴⁸ Regulation (EU) No 516/2014 of the European Parliaments and the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC.

⁴⁹ Free choice is called for in particular by representatives of the civil society, see for example Pro Asyl et al. (2015): Memorandum - For a free choice of host country in the EU Respecting refugees’ interests; available at: https://www.proasyl.de/wp-content/uploads/2015/12/PRO_ASYL_Memorandum_free_choice_english_June_2015.pdf, accessed on 30.09.2016, see also the combined solution of Dublin und free choice suggested by the Expert Council of German Foundations for Integration and Migration; Sachverständigenrat deutscher Stiftungen für Integration und Migration (2015): *Unter Einwanderungsländern: Deutschland im internationalen Vergleich – Jahresgutachten 2015*, page 74 et seq.; available at: http://www.svr-migration.de/wp-content/uploads/2015/07/SVR_JG_2015_WEB.pdf, accessed on 29.09.2016.

⁵⁰ See Moraga, F. and Rapoport, H (2015): *Tradable Refugee-Admission Quotas (TRAQs), the Syrian Crisis and the New European Agenda on Migration*; at: <http://ftp.iza.org/dp9418.pdf>, accessed on 29.09.2016.

⁵¹ Hathaway, J. C. and R. A. Neve (1997): *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, *Harvard Human Rights Journal*, 10: 115-211.

⁵² Schuck, P. H. (1997): *Refugee Burden-Sharing: A Modest Proposal*, *Yale Journal of International Law*, 22: 243-297.

⁵³ Hathaway, J (2016): *A global solution to a global refugee crisis* at: <https://www.opendemocracy.net/openglobalrights/james-c-hathaway/global-solution-to-global-refugee-crisis>, accessed on 29.09.2016.

⁵⁴ Finch, T (2016): *Improve refugee protection by managing it better*; at: <https://www.opendemocracy.net/openglobalrights/tim-finch/improve-refugee-protection-by-managing-it-better>, accessed on 29.09.2016.

While the list of proposals can be extended the following central issues in relation to the debate should be considered when searching for a common basis on solidarity:

- We must do more than simply pay lip service to solidarity.
- The willingness of the international community to demonstrate solidarity concretely must be timely, comprehensive and substantial.
- Solidarity can be applied at various levels and should not be reduced to financial support or resettlement.
- Solidarity and fair sharing concepts are more likely to be accepted by states if there are clear rules, and if protection is designed and managed in a more transparent way.
- Solidarity and responsibility sharing concepts should always aim to grant protection to an increased number of people in need, thus improving access to protection quantitatively as well as qualitatively.

4.3. Future priorities and possible options on protection status

As already indicated, subsidiary protection complements refugee protection at the EU level according to the GRC. Both are summarised as “international protection” in the Qualification Directive. Although the Hague and the Stockholm Programmes provided for a unified protection status, refugee protection and subsidiary protection were kept separate. Refugee status comprises far-reaching rights based on the GRC and is intended for a longer period of time. In contrast, subsidiary protection is understood as short-term and therefore equipped with fewer rights.

However, the different rights that result from these two protection statuses are neither theoretically nor practically understandable. It is evident that subsidiary protection grounds within the meaning of article 15 of the Qualification Directive are rarely short-term in nature and there are no factual distinguishing characteristics that would justify unequal treatment of the two protection statuses. In practice, EU MS indeed grant subsidiary and humanitarian protection approximately as often as refugee status.⁵⁵ In addition, the extra administrative effort is considerable, since people granted subsidiary protection often take legal action in order to obtain the better refugee status, and because the need for subsidiary protection has to be re-assessed at relatively short intervals.

While the Qualification Directive leaves it to the Member States to adopt more favourable provisions, the experiences during the “refugee crisis” led to a race to the bottom. This was the case even for countries such as Sweden, which had the same rights for beneficiaries of refugee and subsidiary protection status, but recently amended its asylum law and shortened the duration of both refugee protection (from

⁵⁵ On average between 2008 and 2015, 51% of positive asylum decisions led to the granting of refugee status, while 49% led to other subsidiary and humanitarian protection statuses.

permanent to three years) and subsidiary protection (from permanent to one year).⁵⁶ Also, the recently adopted Communication of the EC on the reform of the CEAS still seems to tend towards a separation of the two statuses, contrary to previous approaches.⁵⁷

In the context of the EU-wide organisation of international protection status, the lack of mutual recognition of positive decisions is also striking. Mutual recognition could potentially strengthen a common European protection status and could have positive effects on the prevention of secondary migratory movements during the asylum procedure. Unfortunately, however, the Commission only regards this as an option in the future, and not in the current context.⁵⁸

In connection with the design of international protection the following seems necessary:

- A unified international protection status, providing the same rights and duration of stay for refugees and beneficiaries of subsidiary protection, would better adapt international refugee law to existing refugee problems.
- In order to prevent differing standards among Member States, it would be necessary to harmonise the duration of protection and the associated rights throughout the EU.
- While negative decisions are mutually recognised within the EU, this does not apply to positive asylum decisions. Mutual recognition of positive asylum decisions, however, would send a clear signal of trust in the functioning of the CEAS and would better take into account freedom of movement within the EU.

5. Conclusions

The significant increase in the number of asylum applications lodged in EU countries during 2015, and the response of the EU and its Member States to this increase, led many to question Europe's asylum system, and indeed the foundation of international refugee law – the Geneva Refugee Convention (GRC). As a set of rules valid throughout the EU, the Common European Asylum System (CEAS) has adapted international refugee law to European circumstances, with the GRC providing the basic structure upon which EU asylum policies are built. In general, the CEAS reproduced the main features of the GRC, developed some of them further and contributed to a high regional standard of protection. Nevertheless, the CEAS has to date not provided fully satisfying answers to some of the key issues inherent in the international protection regime, namely:

⁵⁶ Cf. a summary by ECRE (2016): *Asylum on the Clock? Duration and review of international protection status in Europe*, page 5, available at: http://www.asylumineurope.org/sites/default/files/resources/aida_brief_permits.pdf, accessed on 29.09.2016.

⁵⁷ See Communication from the Commission to the European Parliament and the Council towards a reform of the Common European Asylum System and enhancing the legal avenues to Europe of 6.4.2016; COM(2016) 197 final; page 10, "The Commission also intends to better clarify the difference between the refugee and subsidiary protection status and differentiate further the respective rights attached to them."

⁵⁸ Moreover, in the long run further initiatives with regard to the mutual recognition of protection status granted in one Member State – as well as requirements for a possible transferability – could be taken.

- A joint response among states on how to facilitate access to protection in a more orderly manner;
- A common understanding of what solidarity/responsibility sharing should mean and how it should be implemented in practical terms;
- A coherent approach towards the concept of international protection, combining refugee and subsidiary protection status as one single protection status.

Political debates in the EU tend to focus on fighting “asylum abuse” and “irregular migration”. This reactive approach often takes precedence over other more pro-active approaches that would aim to provide more targeted protection to those in need. Over the past 65 years, the GRC has shown a certain level of flexibility to deal with contemporary challenges. The basic consensus of the GRC, as well as of the CEAS, is that the international community and the EU, respectively, should provide protection to asylum seekers and refugees. This should provide the necessary legal basis for appropriate measures for international protection. It was simply the lack of a political agreement on the above-mentioned key questions at EU level that so far prevented the development of EU-specific policies to respond to the questions left open in 1951.

As has frequently been argued, the so-called “refugee crisis” in 2015 was less a crisis of numbers than a failure to reach a workable agreement on what solidarity and responsibility sharing should mean in concrete terms, especially in the context of a larger influx of refugees. The “crisis” witnessed in 2015 should, however, present an opportunity for the EU to further advance the European regional protection regime and to emerge stronger out of the crisis.

Collectively, the EU should be in a position to receive and adequately process the applications of those 1.25 million people (0.25% of the total EU population of 500 million) who sought asylum in the EU during 2015. A new revision of the – only recently revised - CEAS instruments will only yield sustainable results if consensus on the above-mentioned key questions is reached. At the global level, the impetus to develop such a consensus was given by the proposed adoption of a global compact on refugees by 2018, as envisaged in the New York Declaration for Refugees and Migrants. In parallel with these international efforts, the EU, however, needs to agree on what “access to protection” and “solidarity and responsibility sharing” means for a community of 28 Member States.