CHAPTER 12

What Protection for Persons Fleeing Indiscriminate Violence? The Impact of the European Courts on the EU Subsidiary Protection Regime

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Through the Qualification Directive, Member States of the EU sought to harmonise rules pertaining to the qualification for, as well as loss and denial of, international protection and to define the rights that accrue to each category of protected persons, as part of a Common European Asylum System (CEAS). The Qualification Directive established two distinct categories of internationally protected persons: refugees and subsidiary protection beneficiaries. The EU refugee protection system has been developed against the backdrop of the Refugee Convention which plays a central role in the CEAS. According to the EU treaties and the EU Charter of Fundamental Rights (EUCFR), European asylum policy must respect the Refugee Convention.

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1 The author would like to extend her thanks to the organisers and the participants of the conference ‘Refuge from Inhumanity: Enriching Refugee Protection through Recourse to International Humanitarian Law’, which took place in Oxford on the 11th and 12th February 2013, for their valuable comments on an earlier version.


4 Treaty on the Functioning of the European Union (TFEU) OJ. 2010, C 83/47, Art 78; EU Charter of fundamental rights (EUCFR) Art 18. The EU Charter of Fundamental Rights was solemnly proclaimed by the Parliament, the Council and the Commission in Nice, on 7 December 2000, and in Strasbourg on 12 December 2007. Its wording has been adapted and published in OJ. 2010, C 83/389.
reflected in secondary legislation, namely the Qualification Directive, as well as by the Court of Justice of the European Union (CJEU) in its case law.

The CESAS is also developed against the backdrop of the human rights protection system of the Council of Europe. All Member States are party to the European Convention on Human Rights (ECHR). While the Convention does not recognise a right to asylum as such, the substantial body of jurisprudence that has emerged from the European Court of Human Rights (ECtHR) has a bearing on the rights of asylum seekers all across Europe. Of particular relevance is the non-refoulement case law of the ECtHR on the basis of Article 3 ECHR. EU law regulates some aspects of the relationship between the Council of Europe’s human rights protection system and the EU. The EU Charter of Fundamental Rights, which now has the same legal value as the treaties states that the meaning and scope of rights contained in the Charter that correspond to rights guaranteed by the ECHR shall be the same. However, the EU is not prevented from establishing more extensive protection. EU treaties also mandate the accession of the Union to the ECHR.

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6 Joined Cases C-175/08, C176/08, C-178/08 and C-179/08, Salahadin Abdulla and Others [2010] ECR I-01493, at para 52 where the Court characteristically notes ‘[t]he Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the Directive for determining who qualifies for refugee status and the content thereof were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria’.


9 Article 3 ECHR entitled ‘prohibition of torture’ reads as follows: ‘[N]o one shall be subjected to torture or to inhuman or degrading treatment or punishment’.

10 Treaty on the European Union (TEU) OJ. 2010, C 83/13, Art 6(1).

11 EUCFR, Art 52(3).

12 Ibid.

13 TEU, Art 6(2); on the impact of the accession of the EU to the ECHR see for example T. Lock, ‘Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order’ (2011) 48 CML Rev 1025; G. Gaja, ‘Accession to the ECHR’ in A. Biondi, P. Eeckhout and S. Ripley (eds), EU Law after Lisbon (OUP 2012).