

# EU ASYLUM POLICY: RECEPTION CONDITIONS FOR ASYLUM SEEKERS

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## A. INTRODUCTION: THE EU ASYLUM ACQUIS

The development of a system of reception for asylum seekers emerged from the development of a common European asylum system.<sup>1</sup> Within the European Union as a whole, the numbers claiming protection, have increased in the last number of years, with almost 435,000 individuals claiming protection in the European Union in 2013.<sup>2</sup> From the establishment of an Ad Hoc Group on Immigration in 1986,<sup>3</sup> to the obligation on states to discuss issues relating to asylum and immigration matters in the *Maastricht Treaty*,<sup>4</sup> to the current situation<sup>5</sup> where Parliament and the Council are

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<sup>1</sup> See generally, Ferguson Sidorenko, O. *The Common European Asylum System: Background, Current State of Affairs, Future Direction* (The Hague: TMC Asser Press, 2007) and Battjes, H. *European Asylum Law and International Law* (The Hague: Martinus Nijhoff Publishers, 2006).

<sup>2</sup> Euro Stat, *Asylum applicants and first instance decisions on asylum applications: 2013* - Issue number 3/2014 (March 2014).

<sup>3</sup> For background, see Walker, N. "Current Developments-Justice and Home Affairs" [1998] *International and Comparative Law Quarterly* pp. 231-238.

<sup>4</sup> See, Article K.1TEU and Article K.2TEU, Treaty on European Union [Maastricht] [1992] *Official Journal* C-191 (29 July 1992) and European Commission, *Communication on Asylum and*

co-legislators on asylum matters.<sup>6</sup> Over an almost 30 year period, issues relating to asylum have moved from the periphery to the centre of EU law and policy. Throughout this time, with some exceptions,<sup>7</sup> there has been a constant reaffirmation of the legal values relating to the protection of those seeking asylum in the European Union from the European Commission.<sup>8</sup> In its first stage, the Common European Asylum System (CEAS) simply aimed to set down minimum standards. However, in the last few years the European Commission has been leading the drive to create common standards in areas such as the member state responsible for determining the asylum claim,<sup>9</sup> definition of those seeking asylum and protection,<sup>10</sup> the

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*Immigration Policies* COM94(23/1994), 23 February 1994. See also, European Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures, Annex I.4 [1996] O.J. C.247/01.

<sup>5</sup> See, Van Selm-Thorburn, J. "Asylum in the Amsterdam Treaty: A Harmonious Future" (1998) 24(4) *Journal of Ethnic and Migration Studies* pp. 627-638 ; European Council, *Tampere Presidency Conclusions*, 15<sup>th</sup> and 16<sup>th</sup> October 1999 and Boccardi, I. *Europe and Refugees: Towards an EU Asylum Policy* (London: Kluwer Law International, 2000).

<sup>6</sup> See, Article 78, Council of the European Union, *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights of the European Union*, (REV 7), 6655/7/8 (12 November 2012).

<sup>7</sup> In 2003, the European Commission stated that the protection system was 'in crisis' which posed "a real threat to the institution of asylum and more generally for Europe's humanitarian tradition...". However, the Commission went on to confirm its commitment to international law and standards on asylum, see EU Commission, *Towards a more accessible, equitable and managed asylum systems* COM (2003) 315, final, p. 11 and pp. 19-22.

<sup>8</sup> See generally, European Council, *Tampere Presidency Conclusions*, 15<sup>th</sup> and 16<sup>th</sup> October 1999; EU Commission, *Towards a more accessible, equitable and managed asylum systems* COM (2003) 315, final; Communication from the EU Commission to the Council and the Parliament, *The Hague Programme, Ten priorities for the next five years A Common Asylum Area*, COM/2005/0184 final (2005); European Council, *The Stockholm Programme-An Open and Secure Europe Serving and Protecting Citizens* (2010) *Official Journal* C.115/1 (4 May 2010).

<sup>9</sup> Council Regulation (EC) No 407/2002 of 28 February 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 [2003] O.J. L.62/1; Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] O.J. L.50/1 (Dublin II) and Regulation (EU) No. 604/2013 of the European Parliament and the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] O.J. L.180/31 (Dublin III)

<sup>10</sup> See, Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] *Official Journal* L.304/12 and the Recast Directive: Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, [2011] O.J. L.337/9.

procedures to carry out assessment of asylum and protection claims<sup>11</sup> and common standards for reception across the majority of member states.<sup>12</sup> As well as the treaties providing a legal base for EU action, the European Union Charter of Fundamental Rights (EUCFR) also recognises the rights of asylum seekers specifically. For asylum seekers, article 18 EUCFR and article 19 EUCFR are of fundamental importance. These articles recognise the right to request asylum protection, along with the protection from *refoulement*.<sup>13</sup> Asylum seekers also enjoy many of the other rights recognised under the EUCFR.

## **B. FOCUS: RECEPTION CONDITIONS FOR ASYLUM SEEKERS**

In exploring the approach of institutions to measures adopted under the CEAS, this section will focus on the directives relating to reception conditions for asylum seekers. While still developing, international law does recognise that States have duties under international and European human rights law to protect the social, economic and cultural rights of asylum seekers.<sup>14</sup> The approach of various institutional actors at the European Union level is the focus of this section. The

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<sup>11</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] O.J. L.326/13; and the Recast Directive: Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, [2013] O.J. L. 180/60.

<sup>12</sup> In this regard, Ireland and the United Kingdom may opt-out from CEAS measures. Denmark is not bound by measures adopted under the Treaties. See, Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] O.J. L.31/18 and the Recast Directive, Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants of international protection [2013] *Official Journal of the European Union* L.180/96.

<sup>13</sup> Article 18 and article 19 EUCFR.

<sup>14</sup> While this issue is somewhat complex and transitory issue, a full overview is provided in Thornton, L. "Law, Dignity & Socio-Economic Rights: The Case of Asylum Seekers in Europe", FRAME Working Paper No. 6, January 2014, available at <http://www.fp7-frame.eu/working-papers/> [last accessed, 10 July 2014].

Reception Conditions Directive (RCD)<sup>15</sup> and the successor Recast Reception Directive (RRD)<sup>16</sup> are unique, in that a very basic standard of living has been set down from those considered outside the European polity. It has been estimated that the total cost across 25 member states (excluding Ireland and Denmark) for providing reception conditions to asylum seekers (and in some cases those seeking subsidiary protection as well as third country non asylum applicants) is €1.5 billion.<sup>17</sup>

Some of the obligations under the Reception Directives include:

- Recognition of a dignified standard of living;<sup>18</sup>
- Highly circumscribed freedom of movement rights;<sup>19</sup>
- The right to be provided with some form of shelter,<sup>20</sup>
- Material reception conditions,<sup>21</sup>
- A circumscribed right to education for children under 18;<sup>22</sup>
- Protection of particularly vulnerable asylum seekers.<sup>23</sup>
- A limited right to work.<sup>24</sup>

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<sup>15</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] O.J. L.31/18 (this will be referred to as the Reception Conditions Directive or RCD).

<sup>16</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants of international protection [2013] *Official Journal of the European Union* L. 180/96 (hereinafter Recast Reception Directive or RRD).

<sup>17</sup> EU Commission Staff Working Document accompanying the Proposal for a Directive of the European Parliament and Council laying down minimum standards for reception of asylum seekers (Recast), SEC(2008) 2944 (3 December 2008) at p. 45.

<sup>18</sup> Preamble recital 7 RCD and Preamble recital 9 and 10 RRD.

<sup>19</sup> Article 7 RCD/Article 7 RRD.

<sup>20</sup> Article 14 RCD/ Article 18 RRD.

<sup>21</sup> Article 13 RCD/Article 17 & 18 RRD.

<sup>22</sup> Article 10 RCD/Article 14 RRD. In relation to the possibility of separate education for children of asylees (or possibly asylum seekers themselves), Chalmers comments that educational provision “is only on terms of 1950s Mississippi”, Chalmers, D. (editorial) “Constitutional treaties and human dignity” (2003) 28(2) *European Law Review* 147.

<sup>23</sup> See Article 16-19 RCD and Article 21-25 RRD.

<sup>24</sup> Under the RCD, a right to work was granted (Article 11(2) RCD) if an asylum applicant’s first instance decision was not rendered within one year. This is to be reduced to 9 months under Article 15 RRD. Priority can still be given to EU citizens, EEA nationals and ‘legally resident’ third country nationals.

The socio-economic rights highlighted above, should not be seen as a wholly rights based approach towards the socio-economic rights of asylum seekers<sup>25</sup> or without practical problems of implementation.<sup>26</sup> In the drafting of the Recast Reception Directive (as with the Reception Conditions Directive (2003)<sup>27</sup> previously), there was institutional push back to adopting a more rights orientated system of reception for asylum seekers.<sup>28</sup> As is evidenced from the progression of the proposals from 2008 to 2011, concerns about abuse of the asylum and protection system led to significant downgrading of core elements of socio-economic rights protection within the RRD. In this regard, the European Parliament and Council of the European Union,<sup>29</sup> were central in arguing for a less rights orientated and more punitive approach to material reception conditions for asylum seekers. The European Parliament, as co-legislator along with the Council of the European Union, adopted a legislative resolution under

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<sup>25</sup> See generally, Nuala Mole, "The complex and evolving relationship between the European Union and the European Convention on Human Rights" (2012) 4 EHRLR 1 and European Commission, *Report from the Commission to the European Council and the European Parliament on the application of Directive 2003/9/EC Laying Down Minimum Standards for the Reception of Asylum Seekers* (2007, Brussels)

<sup>26</sup> See, Peers, S. "The EU Reception Conditions Directive: A Weak Compromise" (Brussels: Statewatch, 2011); ECRE, *Comments and Analysis on the Recast Reception Directive* (September 2011). See also, e, Guild, E. "Seeking Asylum: Storm clouds between international commitments and EU legislative measures" (2004) 29(2) *European Law Review* 198.

<sup>27</sup> Compare the approach of the various institutions to the Commission's initial draft of the RCD (2003), see: Proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States [2001] O.J. C.213/E/286 and contrast the consultations between European Parliament, Committee on Foreign Affairs Common Security and Defence Policy, Employment and Social Affairs Committee and Foreign Affairs Committee, "Report on the proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States" A5-0112/2002, [2001] O.J. C.213/E/286 and Opinion of the Committee of the Regions on the 'Proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States' [2002] O.J. C.107/85 and Opinion of the Economic and Social Committee on the 'Proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States' [2002] O.J. C.48/63.

<sup>28</sup> See, European Parliament legislative resolution of 07 May 2009 on the proposal for a directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (recast), [2010] O.J. C-212E/348 (05 August 2010); European Economic and Social Council, *Opinion of the European Economic and Social Committee on the RRD*, SOC/332 (16 July 2009) and Committee of the Regions, *Opinion of the Committee of the Regions on the RRD*, CONST-IV-021 (5-7 October 2009).

<sup>29</sup> See above.

the first reading of the co-decision procedure in May 2009.<sup>30</sup> (The ‘co-decision’ procedure is now known as the ‘ordinary legislative procedure’).<sup>31</sup> The Parliament modified the Commission’s proposal in a number of respects, including *inter alia* some attempt to strengthen guarantees for detained asylum seekers while permitting states to detain those claiming asylum and/or protection for reasons of public policy,<sup>32</sup> insisting that legal assistance be granted to those seeking asylum or protection free of charge, regardless of whether costs can be covered from their own resources,<sup>33</sup> and for the schooling of minors to take place once the application for international protection had been made.<sup>34</sup> Parliament considered that removing draft Article 13(5) RRD, which stated that material reception conditions in kind, through financial allowances or vouchers, would be a “significant pull factor, which would be likely to cause additional illegal immigration”.<sup>35</sup> Members of the European Parliament (MEPs) also deleted the method proposed by the Commission, which sought to calculate the level of material reception conditions with reference to social assistance available to nationals of the host state.<sup>36</sup> The Commission accepted many of the amendments proposed by Parliament. The UNHCR and the European Council on Refugees and Exiles (ECRE) welcomed the lessening of discretion and the linking of reception conditions with social benefits of nationals within member states.<sup>37</sup>

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<sup>30</sup> European Parliament legislative resolution of 07 May 2009 on the proposal for a directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (recast), [2010] O.J. C-212E/348 (05 August 2010).

<sup>31</sup> Article 294, Treaty on the Functioning of the European Union (TFEU) [2008] O.J. C115/77

<sup>32</sup> Amendments 12, 13, 14, 15, [2010] O.J. C-212E/348 (05 August 2010).

<sup>33</sup> Amendment 16 [2010] O.J. C-212E/348 (05 August 2010).

<sup>34</sup> Amendment 22 [2010] O.J. C-212E/348 (05 August 2010).

<sup>35</sup> European Parliament, *1<sup>st</sup> reading of the co-decision procedure, RRD* (07 May 2009), para. 6. Available at <http://www.europarl.europa.eu/oeil/file.jsp?id=5723652> (last accessed, 10 July 2014).

<sup>36</sup> *Ibid.* Amendment 1, Recital 11; Amendment 23 and Amendment 24 [2010] O.J. C-212E/348 (05 August 2010).

<sup>37</sup> UNHCR, *Comments on the European Commission's Proposal for a recast of the Directive laying down minimum standards for the reception of asylum-seekers* (Geneva: UNHCR: March 2009) at p. 10 and European Council on Refugees and Exiles, *Comments on the Re-cast Reception Conditions Directive*, (Brussels: ECRE: March 2009) at pp. 10-12.



However, the Commission, aware that Parliamentary approval will be needed to adopt the RRD, removed this provision.

However, as has been documented by human rights organisations, and as seen in a number of cases coming before European courts, the minimum requirements as regards the Reception Conditions Directive are not being upheld in a number of EU member states.<sup>38</sup> The approach of the Court of Justice of the European Union (CJEU) towards substantive socio-economic rights of asylum seekers, shows the court willing to conform its findings and jurisprudence to that of the European Court of Human Rights i.e. willing to prevent removal to another EU member state who will not meet the minimum standards as set down in the RCD.<sup>39</sup> The recent decision of the Court of Justice of the European Union in *Saciri*<sup>40</sup> as regards the level of financial allowances for asylum seekers adds a further dimension to issues of coherencies and incoherencies. The CJEU make a number of interesting comments as regards reception conditions for asylum seekers. Human dignity is equated with the RCD (para 35); however at para. 40, it is made clear that

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<sup>38</sup> For an non-exhaustive list of current concerns relating to (amongst other things) the socio-economic rights of asylum seekers in European Union (EU) member states, see: United Nations High Commission for Refugees, *UNHCR Observations on the Current Situation of Asylum in Bulgaria* (UNHCR, 3 January 2014); ECRE, *Asylum Information Database: Country Report for Italy*, (ECRE, May 2013), however the European Court of Human Rights has found that the transfer of asylum seekers to Italy, does not constitute inhuman and degrading treatment, see Application no. 27725/10, *Mohammed Hussein et al. v the Netherlands and Italy*, unreported judgment of the ECtHR, 03 April 2013. The treatment of asylum seekers in Greece is discussed below, but more generally see, Amnesty International, *The End of the Road for Refugees, Asylum Seekers and Migrants* (December 2012).

<sup>39</sup> See in particular, Joined cases C-411/10 and C-493/10, *N.S. v Secretary of State for the Home Department, M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2012] 2 *Common Market Law Reports* 9.

<sup>40</sup> Case C-79/13, *Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and others*, decision of the CJEU, 27 February 2014.

“financial aid granted must be sufficient to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence.”

### **C. ANALYSING THE EU INSTITUTIONAL RESPONSE ON RECEPTION CONDITIONS**

International and European human rights law have attempted (albeit, in my view unsuccessfully) to protect the socio-economic rights of asylum seekers in Europe. The key method and efforts for seeking protection of the dignity, inherent worth and socio-economic rights for asylum seekers should be focused on domestic rights regime, with international rights mechanisms supplementing socio-economic rights protection for asylum seekers. However, this also carries risks. Bigo argues that the approach of EU institutions (supported by member states) reinforces the view of immigration as a threat, and those the perception of those who seeking asylum or protection as being fraudulent.<sup>41</sup> The effect of differentiating between the needs of asylum seekers and of European citizens creates an overarching EU institutional discourse of fear and mistrust of those outside the European polity.<sup>42</sup> This feeds into national concerns on asylum and legitimises the controlling nature of reception conditions within individual member states. The large degree of discretion that exists in relation to the socio-economic rights of asylum seekers suggests human rights law and standards of dignity and respect for the individual, which some institutions of the European Union seek to embrace, is lacking when one speaks of the rights of the outsider. The punitive elements of the CEAS are further compounded with the placement of issues of asylum alongside other actual threats to the EU such as

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<sup>41</sup> Bigo, D. “Liberty, whose liberty? The Hague Programme and the Conception of Freedom” in Balzacq, T. & Carrera, S. *Security versus Freedom: A Challenge for Europe’s Future* (Aldershot: Ashgate, 2006), at p. 36.

<sup>42</sup> *Ibid.*, p. 37.



terrorism, drug trafficking, people trafficking and international criminal enterprise. In relation to asylum matters, Harvey surmises the position currently taken by EU Member States wherein the:

“...humanitarian institution of asylum is now discussed as a threat and/or a security problem.”<sup>43</sup>

Along with this, Hepple argues that the

“...rhetoric of ‘Fortress Europe’...undermines the civil and social rights which belong to all human beings.”<sup>44</sup>

The desire to strictly control who enters Europe has led to the securitization of the issue of asylum and limitations on protections of social and economic rights for asylum seekers. Tsoukala has opined that the problemisation of immigration is fermented by arguments arising from socio-economic degradation of the host society due to immigration, the need for extra security due to ‘problem’ communities and these two factors threatening a constructed and imagined ‘European’ identity.<sup>45</sup> Within EU law, the language of ‘reception’ of asylum seekers masks the reality of asylum seeker exclusion from human rights protections. The limitations on freedom of movement, right to work, the ability to suspend entitlement to material reception conditions and the denial of education to children on par with nationals trump the

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<sup>43</sup> Harvey, C. “The Right to Seek Asylum in the European Union” (2004) 1 *European Human Rights Law Review* 17 at p. 17.

<sup>44</sup> Hepple, B. “Race and Law in Fortress Europe” (2004) 67(1) *Modern Law Review* 1 at p. 7.

<sup>45</sup> Tsoukala, A. “Looking at Migrants as Enemies” in Bigo, D. & Guild, E. *Controlling Frontiers: Free Movement Into and Within Europe* (Aldershot: Ashgate, 2005), p. 163.

ideals of tolerance, equality, non-discrimination and dignity, which the EU supposedly holds as core values.

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