

**Introduction: European refugee law and transnational emulation**

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## Introduction: European refugee law and transnational emulation

HÉLÈNE LAMBERT

Europe has the most advanced regional protection regime in the world. The regime has taken shape through a series of legal undertakings on asylum, refugee law principles and human rights between Member States of the European Union (EU), aiming at an ever-greater uniformity in the law and practice of its members. The EU sought to codify a common regional system of asylum by 2012, in order to provide a single asylum procedure and a uniform protection status.<sup>1</sup> A regime covering twenty-four countries,<sup>2</sup> including some of the most developed and powerful in the world, is bound to exert considerable influence beyond Europe. The predicted impact of this body of EU norms has been widely identified in the academic literature as one that will have a ‘ripple effect’ beyond the EU, particularly with respect to the evolving content of international refugee law by means of changing customary law and UNHCR practice.<sup>3</sup> However, very few studies have noted the fact that the European protection regime has already influenced the law and practice of States

<sup>1</sup> Art. 78(2), Treaty on the Functioning of the European Union, as amended by the Treaty of Lisbon, which entered into force on 1 December 2009 (OJ 2010 No. C 83/47).

<sup>2</sup> Denmark opted out entirely of the asylum package; both the UK and Ireland opted out of most of the second phase (recast) of EU legislation.

<sup>3</sup> B. S. Chimni, ‘Reforming the International Refugee Regime: A Dialogic Model’ (2001) 14 *Journal of Refugee Studies* 151–68, at 157; Volker Türk and Frances Nicholson, ‘Refugee Protection in International Law: An Overall Perspective’, in Erika Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), p. 6; Catherine Dauvergne, *Making People Illegal* (Cambridge: Cambridge University Press, 2008), pp. 150–3; Guy S. Goodwin-Gill, ‘The Search for the One, True Meaning. . .’, in Guy S. Goodwin-Gill and Hélène Lambert (eds.), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge: Cambridge University Press, 2010), at pp. 238–9.

around the world, for some time.<sup>4</sup> The implications of this are great, in terms of understanding the global reach of regional systems of law, and how this shapes the relationship between international rules and standards, and national law and practice across the world when it comes to refugee protection.

This volume explores the extent to which European (or EU) legal norms of refugee protection have been emulated in other parts of the world, and assesses the implications of these trends. At times, the norms may *not* have had much discernible influence. This, too, is of interest. The aim of this volume is therefore more evaluative than speculative. We believe that now is a good time to take stock and assess the influence of European refugee law beyond the EU. This is because the first phase of the Common European Asylum System (CEAS) legislation (which codifies over twenty years of State practice) has concluded, and it is therefore a useful point in time to look both backwards and forwards. Thus, the volume examines how the European protection regime has (or has not) influenced national refugee law and protection practice in a range of States around the world. This is evaluated in two respects: first, in terms of the *extent* of influence (e.g., partial or total and the content of the norm being emulated), and second, in terms of the *processes* whereby emulation of the European protection regime has occurred (e.g., through transnational network, international or local actors). We examine the extent and processes of emulation in seven case studies: Africa, Australia, Canada, Israel, Latin America, Switzerland and the United States. The chosen cases seek to reflect a range of broad legal characteristics (e.g., diversity of civil/common law traditions) as well as characteristics more specific to refugee law (e.g., States with national refugee determination systems versus those that rely on UNHCR for this function) and EU law (e.g., States which have formal bilateral agreements with the EU versus States which do not, and therefore where diffusion may be said to be more natural). Crucially, we have selected case studies that enable us to explore the degree to which EU refugee law is emulated or eschewed, and whether this is done expressly or 'by stealth'. In this regard, for example, the case study on the United States is important in identifying and explaining the lack of transnational dialogue and emulation, thereby capturing the limits of diffusion of European refugee law. By contrast, the case studies of Switzerland, Israel, Australia, Canada, Africa and to some extent also Latin

<sup>4</sup> One such study to note this to be the case in Africa is Bonaventure Rutinwa, 'The End of Asylum: The Changing Nature of Refugee Policies in Africa' (2002) 21 *Refugee Survey Quarterly* 2–41, at 33.

America provide clear evidence of emulation, albeit in the case of Africa, this evidence is more historical than modern. Overall, the number and range of cases enables us to produce robust generalizations about the global reach of European norms in the area of international protection.

*The Global Reach of European Refugee Law* takes forward the research agenda first laid out by Goodwin-Gill and Lambert in *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union*.<sup>5</sup> Where *The Limits of Transnational Law* explored the extent of transnational judicial dialogue within the EU (and explained why there was less than might be expected), *The Global Reach of European Refugee Law* examines the worldwide emulation of key norms of European refugee protection through transnational processes and actors.

Regarding terminology, the term 'law' in this volume is used in a normative sense, interchangeably with 'norm': that is, as principled beliefs about appropriate action, shared by a community, which are embedded in practice and codified in rules (i.e., law).<sup>6</sup> The word 'European' is used interchangeably with 'European Union (EU)' to capture the influence of the wider Europe of the Council of Europe on the EU, unless specified otherwise. 'Emulation' is understood to mean a process of diffusion. The word 'reach' in the title of the volume is used in its ordinary meaning in order to capture both the scope of the study and the capability of the emulation in terms of distance, length, degree and range. Finally, 'refugee law' in the context of this book is synonymous with the EU concept of 'international protection': it encompasses both the law under the 1951 Refugee Convention/1967 Protocol (that is, the law of 'refugee protection' *stricto sensu*), and other forms of protection under international human rights treaties. In the EU context, international protection generally translates into asylum, understood as 'the right of residence'.<sup>7</sup>

<sup>5</sup> Guy S. Goodwin-Gill and Hélène Lambert (eds.), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge: Cambridge University Press, 2010).

<sup>6</sup> Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999); Martha Finnemore, *National Interests in International Society* (Ithaca, NY: Cornell University Press, 1996); Wayne Sandholtz and Kendall Stiles, *International Norms and Cycles of Change* (Oxford: Oxford University Press, 2009). See also Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1995), pp. 1–16.

<sup>7</sup> Arts. 13 and 18, 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

## A Worldwide emulation of Europe: drivers and facilitators

A core proposition of this volume is that States worldwide have been copying, to varying degrees, European norms of refugee protection for some time. In other words, this pattern of emulation is historical, and the 1951 Refugee Convention may be seen in terms of similar pattern of worldwide adoption of Western norms encoded in an international legal instrument providing rights for refugees (see discussion in Chapter 7 on Africa).

There is a sizeable body of literature on the possible global influence of the EU, both in the socio-legal literature on the diffusion of law<sup>8</sup> and in the area of political science/political sociology of the EU.<sup>9</sup> Up to now, most European legal scholars have taken a 'European integration' approach to 'European asylum law' and have focused on EU institutional development and the effects of EU law on Member States.<sup>10</sup> At the same time, American scholars have for some time highlighted the global promise of European legal institutions.<sup>11</sup> More specifically, recent work by Fullerton highlights the significance of the new EU provisions concerning war refugees on the policy debate on asylum in the United

persons eligible for subsidiary protection, and for the content of the protection granted (recast) (OJ 2011 No. L 337/9).

<sup>8</sup> See, e.g., William Twining, *Globalisation and Legal Theory* (Cambridge: Cambridge University Press, 2000); 'Diffusion of Law: A Global Perspective' (2004) 49 *Journal of Legal Pluralism* 1–45; 'Social Science and Diffusion of Law' (2005) 32 *Journal of Law and Society* 203–40; 'Normative and Legal Pluralism: A Global Perspective' (2010) 20 *Duke Journal of Comparative & International Law* 473–517; Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences' (1998) 61 *Modern Law Review* 11–32.

<sup>9</sup> See, e.g., Eiko Thielemann and Nadine El-Enany, 'Refugee Protection as a Collective Action Problem: Is the EU Shirking Its Responsibilities?' (2010) 19 *European Security* 209–29; Andrew Geddes, *Immigration and European Integration: Beyond Fortress Europe?* (2nd edn, Manchester: Manchester University Press, 2008), pp. 170–85; Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40 *Journal of Common Market Studies* 235–58.

<sup>10</sup> See, e.g., Elspeth Guild and Carol Harlow (eds.), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Oxford: Hart, 2001); Anneliese Baldaccini, Elspeth Guild and Helen Toner (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Oxford: Hart, 2007).

<sup>11</sup> Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 *American Journal of International Law* 1–27; Anne-Marie Burley and Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47 *International Organization* 41–76; Anne-Marie Slaughter and William Burke-White, 'The Future of International Law is Domestic (or, The European Way of Law)' (2006) 47 *Harvard International Law Journal* 327–52.

States.<sup>12</sup> International Relations (IR) scholars too have long been working on diffusion theories in organizational structures.<sup>13</sup> The empirical data reveal from the mid-twentieth century onward, growing similarity in organizational form and function within a range of specific policy areas including public healthcare, education, and managing the natural environment.<sup>14</sup> Such similarity constitutes a puzzle. Why is there such a degree of worldwide homogeneity in how societies organize themselves, given the great difference in local conditions and requirements?

Some sociologists predict that weaker States, often on the periphery of the world system, will emulate the policies and organizations of the post powerful and advanced States.<sup>15</sup> This sociological institutionalism has been criticized for offering an account of 'world culture march[ing] effortlessly and facelessly across the globe'.<sup>16</sup> Local conditions or 'cultural filters'<sup>17</sup> – policy requirements, domestic politics and national legal culture – may reasonably be expected to shape how transnational rules are received and adopted by States. Here constructivism in IR is most useful as it seeks to explain how ideas spread across borders and take effect in national policy communities. Constructivists see a world that is substantially shaped by the identities of actors and the ideas they hold about how they should organize and act (i.e., norms).<sup>18</sup> One such example is the norm of sovereignty, which defines the primary

<sup>12</sup> Maryellen Fullerton, 'A Tale of Two Decades: War Refugees and Asylum Policy in the European Union' (2011) 10 *Washington University Global Studies Law Review* 87–132.

<sup>13</sup> Emily Goldman and Leslie Eliason (eds.), *The Diffusion of Military Technology and Ideas* (Stanford: Stanford University Press, 2003); Alexander Betts (ed.), *Global Migration Governance* (Oxford: Oxford University Press, 2011); Manners, 'Normative Power Europe'.

<sup>14</sup> I am grateful to Theo Farrell for pointing me to this literature. John Meyer, David Frank, Ann Hironaka, Evan Schofer and Nancy Tuma, 'The Structuring of a World Environmental Regime, 1870–1990' (1997) 51 *International Organization* 623–51; Francisco Ramirez and John Meyer, 'Comparative Education: The Social Construction of the Modern World System' (1980) 6 *Annual Review of Sociology* 369–99.

<sup>15</sup> Paul DiMaggio and Walter Powell, 'The Iron Cage Revisited: Institutionalism Isomorphism and Collective Rationality', in P. Powell and W. DiMaggio (eds.), *The New Institutionalism in Organizational Analysis* (Chicago: Chicago University Press, 1991), pp. 41–62.

<sup>16</sup> Martha Finnemore, 'Norms, Culture and World Politics: Insights from Sociology's Institutionalism' (1996) 52 *International Organization* 325–47, at 339.

<sup>17</sup> Manners, 'Normative Power Europe', at 245.

<sup>18</sup> Wendt, *Social Theory of International Politics*. See also David Armstrong, Theo Farrell and Hélène Lambert, *International Law and International Relations* (2nd edn, Cambridge: Cambridge University Press, 2012), pp. 100–10.

unit of political organization in the modern world, and rights and duties of that unit.<sup>19</sup>

Much overlap exists between these bodies of scholarship (particularly, law and IR).<sup>20</sup> Accordingly, this Introduction, which is written from a law perspective, draws on IR (and sociological) theory on policy and social diffusion in the modern world, with the aim of identifying key pointers for chapter authors to consider in their case studies.<sup>21</sup>

According to Twining, ‘diffusion is a pervasive, continuing phenomenon’;<sup>22</sup> it ‘refers to a vast and complex range of phenomena’<sup>23</sup> and raises ‘questions about occasions, motives, agents, recipients, pathways, obstacles, trialability, observability, impact, and so on’.<sup>24</sup> Twining correctly notes that this process of diffusion is ‘typically a reciprocal rather than a one-way process’, hence early influences of ‘Western legal traditions lose their pre-eminence’.<sup>25</sup> Crucially, he explains that ‘processes of diffusion are nearly always mediated through local actors’.<sup>26</sup>

Constructivists in IR have produced numerous accounts of how norms evolve and spread. Most accounts emphasize the role of norm entrepreneurs and advocates in promoting new norms, and the role of transnational networks (professional, scientific, legal or advocacy) in diffusing norms.<sup>27</sup> Norm diffusion usually involves a process of socialization, where States (or policy communities within them) are pressured and/or persuaded to adopt the new norm, and internalization, where the new norm is embedded in the laws, codes and practices of the adopting

<sup>19</sup> Samuel Barkin and Bruce Cronin, ‘The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations’ (1994) 48 *International Organization* 107–30.

<sup>20</sup> See Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004).

<sup>21</sup> In the academic debate relating to the spread of ideas, sociologists and IR scholars have generally referred to the terminology of ‘diffusion’ and ‘socialization’, whereas lawyers have referred to ‘reception’ and ‘transplants’. Some socio-legal scholars do however embrace the term ‘diffusion’; see Twining, ‘Diffusion of Law: A Global Perspective’ and ‘Social Science and Diffusion of Law’.

<sup>22</sup> Twining, ‘Social Science and Diffusion of Law’, 215, referring to the work of Patrick Glenn.

<sup>23</sup> *Ibid.*, 240. <sup>24</sup> *Ibid.*, 228. <sup>25</sup> *Ibid.*, 215–16, referring to the work of Patrick Glenn.

<sup>26</sup> Twining, ‘Diffusion of Law: A Global Perspective’, 26. On the role of electoral mechanisms in shaping patterns of policy diffusion, see Katerina Linos, ‘Diffusion through Democracy’ (2011) 55 *American Journal of Political Science* 678–95.

<sup>27</sup> Peter Haas, ‘Epistemic Communities and International Policy Coordination’ (1992) 41 *International Organization* 1–35; Thomas Risse, ‘Ideas Do Not Float Freely: Transnational Coalitions, Domestic Structures, and the End of the Cold War’ (1994) 48 *International Organization* 165–214; Preslava Stoeva, *New Norms and Knowledge in World Politics* (Abingdon, Oxon.: Routledge, 2010).

community.<sup>28</sup> Crucially, constructivists find that specific norms are often ‘localized’ in the process of selective adoption by States.<sup>29</sup>

We may draw on this scholarship to identify the processes whereby non-EU States emulate European asylum law and protection practice. There are *two main drivers* behind the spread of norms. The first driver for emulation is new challenges and uncertainty. This emulation driver draws on rational processes and the need to succeed.<sup>30</sup> Where States are faced with new challenges and are uncertain about how to tackle them, then they go fishing for ideas. According to this perspective, diffusion offers a solution to a problem.<sup>31</sup> The second driver for emulation is normative and stems from reputation and the growing of transnational professional standards (through association or bilateral agreements with the EU, for instance). This emulation driver draws on social processes and the need to conform.<sup>32</sup> Here, diffusion appears more as an ideology; the underlying motivation of the diffusion is its value.<sup>33</sup> In law, including refugee law, a transnational professional identity, composed of expertise and norms, has developed that is shared by organizational actors the world over.<sup>34</sup> In the context of our study on refugee law and protection practice, the EU, as a major source of new ideas and professional standards, fulfils a leading role in this respect.

State emulation is also a process of norm diffusion. Here constructivist studies point to *three facilitating factors*. The first of these is the degree of fit between the foreign norm and local requirements, politics, laws and culture<sup>35</sup> – in other words, the ‘context’.<sup>36</sup> The second, as noted already, is

<sup>28</sup> Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52 *International Organization* 887–917; Thomas Risse, Steven Ropp and Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).

<sup>29</sup> Amitav Acharya, ‘How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism’ (2004) 58 *International Organization* 239–75.

<sup>30</sup> Paul DiMaggio and Walter Powell, ‘The Iron Cage Revisited: Institutionalism Isomorphism and Collective Rationality’, in Powell and DiMaggio (eds.), *New Institutionalism*, pp. 41–62.

<sup>31</sup> Twining, ‘Diffusion of Law: A Global Perspective’, 30.

<sup>32</sup> DiMaggio and Powell, ‘Iron Cage Revisited’.

<sup>33</sup> Twining, ‘Diffusion of Law: A Global Perspective’, 30.

<sup>34</sup> Betts, *Global Migration Governance*.

<sup>35</sup> Jeffrey Checkel, ‘Norms, Institutions, and National Identity in Contemporary Europe’ (1999) 50 *International Studies Quarterly* 83–111, at 86–7; Andrew Cortell and James Davis, ‘Understanding the Domestic Impact of International Norms: A Research Agenda’ (2000) 2 *International Studies Review* 65–90.

<sup>36</sup> Twining, ‘Social Science and Diffusion of Law’, 211 discussing the work of Otto Kahn-Freund. See also the discussion on ‘fit’ and ‘proximity’, in Katerina Linos, ‘When Do Policy Innovations Spread? Lessons for Advocates of Lesson-Drawing’ (2006) 119 *Harvard Law*



the presence and role of transnational policy, legal or advocacy networks in ‘transmitting’ the foreign norms. The third facilitating factor is the role of advocacy groups and other stakeholders in ‘pushing’ for normative change from within the country in question.<sup>37</sup> This view of diffusion captures the more romantic view that law is embedded holistically in legal culture, and so reception can be problematic.<sup>38</sup>

Aside from the academic issues that result from looking at the spread and effect of European protection law worldwide, there are also important practical imperatives. Policy makers, but also legislators (in the EU and in countries around the world), want to know why the adoption of a legal rule or practice is not working, and when – and under what conditions – it will work. When faced with a choice, they also want to know how to go about choosing a particular rule or practice.<sup>39</sup> Domestic courts and judges want to know when it is appropriate to use foreign law.<sup>40</sup> Others (e.g., activists, UNHCR, human rights NGOs, etc.) want to know how to resist a restrictive rule or practice.

By examining seven case studies in detail, this book aims to remedy the lack of a sustained empirical base – identified by Twining as ‘the Achilles heel of comparative law’<sup>41</sup> – in the area of (diffusion of) refugee law.

## B Key trends in European refugee law

Ever since the Single European Act (1987), issues of asylum and immigration have been part of the debate relating to the creation of an Internal

*Review* 1467–87. For different views on commonalities and distinctiveness between legal cultures, see, for instance, Roger Cotterrell, *Law, Culture and Society* (Aldershot: Ashgate, 2006); David Nelken, ‘Puzzling Out Legal Cultures: A Comment on Blankenburg’, in David Nelken (ed.), *Comparing Legal Cultures* (Aldershot: Ashgate, 1997), pp. 58–88; Pierre Legrand, ‘European Legal Systems Are Not Converging’ (1996) 45 *International and Comparative Law Quarterly* 52–81.

<sup>37</sup> Anne-Marie Clarke, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms* (Princeton: Princeton University Press, 2002); Anne Klotz, *Norms in International Relations* (Ithaca, NY: Cornell University Press, 1995).

<sup>38</sup> Twining, ‘Diffusion of Law: A Global Perspective’, 30.

<sup>39</sup> *Ibid.*, 10; Twining, ‘Social Science and Diffusion of Law’, 217.

<sup>40</sup> Goodwin-Gill and Lambert, *Limits of Transnational Law*. See also Christopher McCrudden, ‘A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights’ (2000) 20 *Oxford Journal of Legal Studies* 499–532; Sir Basil Markesinis and Jörg Fedtke, *Judicial Recourse to Foreign Law: A New Source of Inspiration?* (London: University College London and Austin: University of Texas: 2006); John Bell, ‘The Argumentative Status of Foreign Legal Arguments’ (2012) 8 *Utrecht Law Review* 8–19.

<sup>41</sup> Twining, ‘Social Science and Diffusion of Law’, 240.

Market and the abolition of internal borders by 1992.<sup>42</sup> A special group of senior civil servants (the Ad Hoc Immigration Group) was set up to reinforce external border controls and limit access into Europe. As early as 1987, this Group adopted an agreement to impose penalties on carriers responsible for bringing undocumented aliens into the European Community (EC) (1987). The Ad Hoc Group also adopted two conventions in 1990: the Convention determining the state responsible for examining the applications for asylum lodged in one of the Member States of the EC (Dublin Convention),<sup>43</sup> and the Convention on the gradual abolition of internal borders (Schengen Convention).<sup>44</sup> Both conventions contained almost identical provisions on asylum. Shortly afterwards, and clearly confirming the priorities of the EC in the field of asylum at the time (namely, internal security and external border control), the EC Immigration Ministers agreed on the text of two Resolutions and one Conclusion (1992): the Resolution on manifestly unfounded applications, the Resolution of a harmonized approach to questions concerning host third countries and the problem of readmission agreements, and the Conclusion on countries where there is generally no serious risk of persecution.<sup>45</sup>

The Amsterdam Treaty (1997)<sup>46</sup> was a major milestone in the creation of a European asylum policy through the introduction of EC competence in asylum and immigration issues in a new 'title' dealing with an area of freedom, security and justice. However, this 'title' was kept separate from the traditional provisions relating to the free movement of persons.<sup>47</sup> Equally important, therefore, were the Tampere European Council Conclusions, which promised a new legal objective for the development

<sup>42</sup> Art. 8A(2) Single European Act (now art. 26(2) TFEU) defines the internal market as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty' (OJ 1987 No. L 169).

<sup>43</sup> Convention determining the state responsible for examining applications for asylum lodged in one of the member states of the European Communities (Dublin Convention, OJ 1997 No. C 254/1).

<sup>44</sup> The Schengen *acquis* – Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 No. L 239/19).

<sup>45</sup> See generally Ingrid Boccardi, *Europe and Refugees: Towards an EU Asylum Policy* (Alphen aan den Rijn, the Netherlands: Kluwer Law International, 2002), pp. 27–60.

<sup>46</sup> OJ 1997 No. C 340.

<sup>47</sup> Steve Peers and Nicola Rogers (eds.), *EU Immigration and Asylum Law: Text and Commentary* (Dordrecht: Martinus Nijhoff, 2006), p. 83 (referring to Title IV as the 'ghetto' provision).

of a common asylum and immigration policy, namely, the respect of human rights. For the first time, a commitment was made to freedom based on human rights, democratic institutions and the rule of law.<sup>48</sup> In particular, the right to ‘move freely throughout the Union ... in conditions of security and justice’ was affirmed.<sup>49</sup> This freedom was to be granted to *all*, which meant that the EU had to develop common policies on asylum and immigration.<sup>50</sup> The Tampere summit was a key moment in the development of common asylum and immigration policies as it was then that these policies became founded on respect for human rights, and not in the Internal Market. The Union was acquiring a new human rights dimension, and as pointed out by Boccardi, ‘[i]t was not coincidence that the Tampere Council also instituted the body that was going to draft the EU Charter of Fundamental Rights’.<sup>51</sup> That also marked the moment when it was finally acknowledged that the EU needed a Common European Asylum System (CEAS), a hugely ambitious project, and that this was to be created by 2012.

This project has so far proceeded in two stages. In stage one (1999–2005 – the Tampere Programme), a common legislative framework was adopted on the basis of international and Europe-wide standards. Six key legislative instruments were adopted during this first phase: the Asylum Procedures Directive,<sup>52</sup> the Qualification Directive,<sup>53</sup> the Dublin Regulation,<sup>54</sup> the Reception of Asylum Seekers Directive,<sup>55</sup> the Eurodac Regulation<sup>56</sup> and the Temporary Protection Directive.<sup>57</sup> Stage

<sup>48</sup> Tampere European Council, Presidency Conclusions, point 1. <sup>49</sup> *Ibid.*, point 2.

<sup>50</sup> *Ibid.*, point 3. <sup>51</sup> Boccardi, *Europe and Refugees*, p. 174.

<sup>52</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in member states for granting and withdrawing refugee status (OJ 2005 No. L 326/13).

<sup>53</sup> 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 (OJ 2004 No. L 304/12).

<sup>54</sup> Council Regulation 2003/343/EC 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 (OJ 2003 No. L 50/1).

<sup>55</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ 2003 No. L 31/18).

<sup>56</sup> Council Regulation 2000/2725/EC of 11 December 2000 concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention (OJ 2000 No. L 316/1).

<sup>57</sup> Council Directive 2001/55/EC of 20 July 2001 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 2001 No. L 212/12).

two (2005–12, still ongoing – the Hague and Stockholm Programmes)<sup>58</sup> seeks to harmonize asylum procedures in the EU, increase cooperation between EU States on managing their external borders, and increase the standards of protection in some of the adopted common legislation (through recast instruments currently being adopted).<sup>59</sup>

In summary, over the past two decades, European asylum policy and law have evolved from soft law (namely, resolutions and conclusions) to hard law instruments (namely, treaty, charter, regulations and directives). Despite different legal traditions and systems, the EU has codified a regional legal framework of international protection applicable to Member States. The emerging CEAS contains a number of key, positive substantive and procedural rules, most notably, the recognition of the ‘right to asylum’ in the EU, which goes beyond protection from *refoulement*,<sup>60</sup> but also the recognition of non-State agents of persecution, gender-based persecution and the codification of subsidiary protection and temporary protection, all of which are based on State practice and/or national legislation,<sup>61</sup> and, finally, the recognition of basic standards of

<sup>58</sup> Communication from the Commission to the Council and the European Parliament of 10 May 2005 – The Hague Programme: ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice (COM(2005) 184 final, OJ 2005 No. C 236). Also, European Council, the Stockholm Programme – An open and secure Europe serving and protecting citizens (OJ 2010 No. C 115/1).

<sup>59</sup> E.g., 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 (recast).

<sup>60</sup> Art. 18, Charter of Fundamental Rights of the European Union (OJ 2000 No. C 364/1) and Recast Qualification Directive 2011/95/EU, Recital 16. See Maria-Teresa Gil-Bazo, ‘The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union’s Law’ (2008) 27 *Refugee Survey Quarterly* 33–52; UNHCR’s written observations in CJEU Joined Cases C-411/10 and C-493/10, para. 31.

<sup>61</sup> Subsidiary protection refers to ‘internal mechanisms adopted in order to comply with the 2004 EU Qualification Directive’. It is distinct from complementary protection, which refers to ‘other forms of protection, created by national law, different from refugee status and from subsidiary protection status, conferred on persons whose return is impossible or undesirable’. See ECRE, ‘Complementary Protection in Europe’, July 2009, p. 4. Temporary protection on the other hand refers to ‘a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons . . . immediate and temporary protection’ (art. 2(a), Council Directive 2001/55/EC on temporary protection). See generally Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford: Oxford University Press, 2007).

reception (e.g., detention) for asylum seekers.<sup>62</sup> Yet, significant gaps and shortcomings also characterize the CEAS: a tendency towards more exceptions and derogations to established standards (e.g., limitation of the application of the Refugee Convention definition to third-country nationals,<sup>63</sup> the internal flight alternative concept, the safe third country, first country of asylum and safe country of origin principles, manifestly unfounded applications), restrictive access to international protection through delocalized migration control (e.g., discussions on extraterritorial processing), the Dublin rule (according to which only one Member State is responsible for determining an asylum application and corresponding transfers), increased securitization (e.g., through detention, deportation and denaturalization procedures), and a tendency, in some countries, to resort to granting subsidiary protection rather than refugee status,<sup>64</sup> with the former still providing fewer rights than the latter.<sup>65</sup> These norms and trends are further discussed below.

### 1 Processes of securitization

The literature on asylum in Europe generally points towards a strengthening of border controls as the EU Member States attempt to consolidate their refugee determination procedures, with the result that access to

<sup>62</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers. Note that the Reception Directive does not contain an upper limit on the length of detention, only the Returns Directive does (Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in member states for returning illegally staying third-country nationals (OJ 2008 No. L 348/98), art. 15(5),(6)).

<sup>63</sup> The Qualification Directive limits the scope of international protection to 'third country nationals and stateless persons' only. This led the House of Lords Select Committee on the EU to observe: 'for a major regional grouping of countries such as the Union to adopt a regime apparently limiting the scope of the Geneva Convention among themselves would set a most undesirable precedent in the wider international/global context' (*Defining Refugee Status and Those in Need of International Protection* (London: TSO, 2002), para. 54, cited in McAdam, *Complementary Protection*, p. 60).

<sup>64</sup> This is the case, for instance, of Bulgaria, Italy, Cyprus, Malta, Poland, Slovakia, Finland and Sweden.

<sup>65</sup> 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. This recast Directive is a considerable improvement from the original Directive of 2004, but still today the right to residence permits (art. 24) and the right to social welfare (art. 29) remain unequally protected.

protection systems by those persons entitled to benefit from them is being denied.<sup>66</sup> These norms are being complemented with deteriorating reception standards, increased levels of social control, heightened policing and stricter detention policies, and the growing sophistication of expulsion procedures.<sup>67</sup> Any of these could potentially spread to and be adopted in countries beyond the EU (and has already occurred in some cases, as the case study chapters show).

Guild has long provided a powerful critique of the protection provided by EU Member States to refugees and of their responsibilities towards refugees.<sup>68</sup> She describes the protection of refugees in the EU as a process of 'deterritorialisation of protection obligations' for refugees already in, or seeking to enter, the EU.<sup>69</sup> The geographical EU common territory being no longer the object of sovereign responsibilities, there is now 'space for an opportunistic exclusion of protection responsibilities which are tied to sovereignty'.<sup>70</sup> She finds that this gap has been filled to some extent by human rights law, and the European Convention on Human Rights (ECHR) in particular. Both legal orders, the EU and the ECHR, complement each other, but they are separate. Hence, EU Member States remain accountable to the European Court of Human Rights for their protection obligations under EU law whenever these obligations involve a right or obligation under the ECHR. Recent landmark judgments clearly illustrate this point. The most notable example is *MSS v. Belgium and Greece*,<sup>71</sup> a case involving the transfer of an Afghan asylum seeker from Belgium to Greece in accordance with EU law. The European Court of Human Rights held that a presumption of safety, even where created by EU law (under the Dublin Regulation II),<sup>72</sup> should never be conclusive but rebuttable. Since Belgium 'knew or ought to have known' that MSS had no guarantee that his asylum

<sup>66</sup> E.g., Boccardi, *Europe and Refugees*. Elspeth Guild, *Security and Migration in the 21st Century* (Cambridge: Polity, 2009). Red Cross/EU Office, 'Position paper on the Right to Access to International Protection', Brussels, 17 November 2011.

<sup>67</sup> Laura Barnett, 'Global Governance and the Evolution of the International Refugee Regime' (2002) 14 *International Journal of Refugee Law* 238–62, at 253.

<sup>68</sup> E.g., Elspeth Guild, 'Seeking Asylum: Storm Clouds between International Commitments and EU Legislative Measures' (2004) 29 *European Law Review* 198–218.

<sup>69</sup> Elspeth Guild, 'The Europeanisation of Europe's Asylum Policy' (2006) 18 *International Journal of Refugee Law* 630–51.

<sup>70</sup> *Ibid.*, 631.

<sup>71</sup> *MSS v. Belgium and Greece*, App. No. 30696/09, judgment of 21 January 2011.

<sup>72</sup> 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 (OJ 2003 No. L 50/1) (Dublin II Regulation).

application would be seriously examined in Greece, and the Belgian authorities had the means to refuse to transfer him, article 3 ECHR had been violated.<sup>73</sup> Belgium should have verified how the Greek authorities applied their legislation on asylum in practice, not just assume that MSS would be treated in conformity with the ECHR. Likewise in *Hirsi and Others v. Italy*, a case involving illegal migrants from Somalia and Eritrea and their ‘push-back’ to Libya (from where they came) by the Italian police, the European Court of Human Rights held that the Italian authorities ‘knew or ought to have known’ that irregular migrants would be exposed to treatment contrary to article 3 ECHR if returned to Libya;<sup>74</sup> and that the authorities should have found out about the treatment to which the applicants would be exposed after their return (in practice), and not just assume that Libya’s international commitments under human rights treaties would be respected (in law). Thus, there can be no hiding behind notions of common territory and loss of sovereignty before the European Court of Human Rights, which ‘has pushed in the direction of a “collectivisation” of responsibility’.<sup>75</sup> Gilbert, too, is critical of the EU approach towards refugee protection for having inextricably ‘fused’ refugee protection and immigration control: an immigration control mentality is driving refugee policy.<sup>76</sup> Consequently, EU States will continue to choose who should be protected within the EU, and currently this category of people is decreasing in number.<sup>77</sup> Another forceful critique is provided in Chapter 9 of this volume, with Jean-François Durieux arguing that the EU asylum system, which is based on an internal market’s logic, threatens the specificity of the Refugee Convention and therefore the figure of the refugee.

## 2 *Improved standards of refugee protection?*

Thielemann and El-Enany argue that, until recently, EU asylum laws have ‘reflect[ed] restrictive trends similar to those in other parts of the world’.<sup>78</sup>

<sup>73</sup> *MSS v. Belgium and Greece*, para. 358.

<sup>74</sup> *Hirsi and Others v. Italy*, App. No. 27765/09, judgment of 23 February 2012, para.131.

<sup>75</sup> Guild, ‘Europeanisation’, 630.

<sup>76</sup> Geoff Gilbert, ‘Is Europe Living up to Its Obligations to Refugees?’ (2004) 15 *European Journal of International Law* 963–87, at 987.

<sup>77</sup> *Ibid.* See also Nadine El-Enany, ‘Who Is the New European Refugee?’ (2008) 33 *European Law Review* 313–35.

<sup>78</sup> Eiko Thielemann and Nadine El-Enany, ‘Beyond Fortress Europe? How European Cooperation Has Strengthened Refugee Protection’, paper presented at European Union Studies Association’s 11th Biennial International Conference, Los Angeles, 23–25 April 2009, p. 22.

However, looking specifically at the two most contested EU Directives, the Asylum Procedures Directive and the Returns Directive, they dismiss the claim that European cooperation is driving protection standards down, on the grounds that it is unsubstantiated by the evidence.<sup>79</sup> They argue instead that European cooperation in this area ‘has curtailed regulatory competition and in doing so had largely halted the race to the bottom in protection standards in the EU’.<sup>80</sup> They further argue that these new EU protection standards are not only improved standards in relation to previous standards in the Member States, but also in relation to comparable non-EU countries of equivalent wealth and development, such as Norway, the US, Canada and Australia.<sup>81</sup> For instance, the highly contested concept of the ‘safe third country’, enshrined in the Asylum Procedures Directive and the Returns Directive, also operates in these four countries. Another instance is the use of detention practices in the context of return: restrictive detention practices currently exist in the EU under the Returns Directive, but also in Australia, the US, Canada and Switzerland (Norway being an exception, as it appears to provide better guarantees against arbitrariness).<sup>82</sup>

For the purpose of this volume, the relevant and important argument advanced by Thielemann and El-Enany is that EU refugee policy has not become a uniquely restrictive policy as compared with other non-EU OECD countries. Restrictive practices found in the EU asylum regime are also found in the regimes of non-EU OECD countries.<sup>83</sup> They do not, however, consider the issue whether this is so because of the effect of EU law on these countries (including the practice of individual EU Member States). They predict that the rights-enhancing trends noted in EU policy making are expected to continue (their argument is supported by the new round of recast Directives aimed at improving minimum standards ahead of the anticipated harmonization), while other OECD countries have leaned towards the adoption of new restrictive policies with no (regionally) agreed minimum standards to resist against such actions.<sup>84</sup> Some of the case study findings in this volume in fact confirm this argument (e.g., Australia, Canada, Israel and Latin America), and the implications for this will be examined further in the concluding Chapter 10.

Geddes makes a similar point, namely, that there is not necessarily anything distinct or unique about Europe when comparing responses to

<sup>79</sup> Thielemann and El-Enany, ‘Refugee Protection as a Collective Action Problem’, at 215–17.

<sup>80</sup> *Ibid.*, 216. <sup>81</sup> *Ibid.*, 217–20. <sup>82</sup> *Ibid.* <sup>83</sup> *Ibid.*, 226–7. <sup>84</sup> *Ibid.*, 219 and 226–7.



migration and asylum problems with those in the US and Australia.<sup>85</sup> Geddes considers 'the attempts by the EU and its Member States to influence migration from, and the migration policies of, non-EU States',<sup>86</sup> through various forms of dialogue and cooperation, partnerships with countries of origin and third countries, and bilateral and multilateral forums.<sup>87</sup> He sees value in viewing this as a process of the EU 'impos[ing] its migration and asylum priorities on non-Member States'. He asks 'what incentive is there for non-member states to agree to participate in such processes if the onus is on them to adapt to EU requirements?'<sup>88</sup> Geddes observes clear parallels between the exclusionary practices 'being pursued by EU states and those strategies of similar non-European States'.<sup>89</sup>

At this juncture, it is necessary to clarify that the purpose of this volume is less about mapping the transplantation of some of the EU refugee norms in countries with which it has formal arrangements, such as association or other bilateral agreements, as it is to look at the effects of EU refugee law by way of its more 'natural' or 'cultural' diffusion into the legal systems of non-EU countries. Indeed, even in countries with which the EU has formal arrangements, such as Switzerland and Israel, the success of diffusion is very much dependent on the facilitating factors identified above (namely, the 'fit', the 'transmitter' and the 'push') and local requirements. It may also be recalled that the aim of the book is to explore whether or not restrictive European concepts are being adopted and adapted the world over, based on the evidence found so far; in other words, it is to take stock at this point in time of what has happened, and then use this as a point of comparison for what might follow.

### 3 *Exceptions and derogations to established international standards*

Notwithstanding the arguments made by Thielemann and El-Enany, it cannot be denied that certain standards enshrined in EU asylum legislation are not in compliance with international refugee law and/or international human rights law. As strongly expressed by the European Council on Refugees and Exiles (ECRE): 'The result of the first phase of harmonization has been disappointing; the level of protection granted to asylum seekers

<sup>85</sup> Geddes, *Immigration and European Integration*, pp. 183–4. <sup>86</sup> *Ibid.*, p. 170.

<sup>87</sup> *Ibid.*, p. 176. <sup>88</sup> *Ibid.*, p. 178. <sup>89</sup> *Ibid.*, p. 179.

and refugees in the EU asylum *acquis* is generally low.<sup>90</sup> UNHCR, too, notes that the legislation adopted during the first phase of the creation of the CEAS contains or permits broad exceptions, derogations and ambiguities, which are partly responsible for the existing divergence in recognition rate and quality of asylum decision between EU Member States.<sup>91</sup> For instance, both UNHCR and ECRE are critical of the administrative detention of asylum seekers, which is less regulated than the detention of accused and convicted criminals. ECRE also recently observed that by allowing Member States a wide margin of discretion, the Asylum Procedures Directive fails to ensure common standards across the EU. In some countries, accelerated asylum procedures have become the rule rather than the exception. The 2009 Commission proposal to recast the Asylum Procedures Directive proposes significant improvements in EU standards with regard to some key issues, such as the right to a personal interview, training requirements for staff in asylum authorities, the right to legal assistance and representation and the right to an effective remedy. However, this proposal is meeting with resistance in the Council of the EU.<sup>92</sup> Furthermore, the recast proposal maintains the various safe country concepts. The 'safe country' concept has been presented as 'a new notion of *non-refoulement*', one that States were forced to create in order to deal with the emergence of 'the *potential* refugee or the asylum seeker' and the subsequent burden on asylum administrations.<sup>93</sup> In other words, this concept was invented to send asylum seekers back from where they had come.<sup>94</sup>

In summary, the substantive and procedural rules that currently form the CEAS are impaired by exceptions and derogations to existing international standards.<sup>95</sup> While it is true that some of these rules and practices are still evolving (through recast instruments currently being negotiated as well as through judicial interpretation), the focus of this

<sup>90</sup> ECRE Memorandum on the occasion of the Belgian Presidency of the EU (July–December 2010), p. 1.

<sup>91</sup> UNHCR's recommendations to Belgium for its EU Presidency July–December 2010 (June 2010) [www.unhcr.org/4c2486579.html](http://www.unhcr.org/4c2486579.html) (accessed 1 December 2012).

<sup>92</sup> At its meeting on 5 January 2012, the Asylum Working Party examined the Council of the EU Presidency compromise suggestions on an Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (recast) (Doc. 5168/12 ASILE 4 CODEC 50).

<sup>93</sup> El-Enany, 'Who Is the New European Refugee?', 320.

<sup>94</sup> Madeline Garlick, 'The EU Discussions on Extraterritorial Processing: Solution or Conundrum?' (2006) 18 *International Journal of Refugee Law* 601–29.

<sup>95</sup> See Durieux's arguments on 'normative conflict' between an EU-specific 'genetic material' and the universal regime of refugee protection, in Chapter 9 of this volume.

book is on key norms of European refugee law that originated over twenty years ago in State practice and asylum policies, and which are now squarely codified in the CEAS (e.g., safe third country, safe country of origin, subsidiary protection, accelerated procedures and manifestly unfounded applications). It is notoriously difficult to trace the precise origin of a legislative rule.<sup>96</sup> To overcome this difficulty, this volume is interested in *trends* (e.g., a set of restrictive or liberal rules, practices or ideas), rather than specific rules.<sup>97</sup>

All but one (the United States) of the selected case studies in this volume provide *clear* evidence of these trends or norms having ‘leaked’ beyond Europe and impacted on refugee law worldwide at some point in time.

(a) Europe’s unique double-judicial check

It is further *predicted* that other norms likely to spread worldwide are those which the Court of Justice of the European Union (CJEU) has ruled upon, particularly, where the ruling concerns a provision of EU law that enshrines a provision of the Refugee Convention, such as cessation of refugee status<sup>98</sup> or exclusion from refugee status,<sup>99</sup> or a provision relating to subsidiary protection.<sup>100</sup> Indeed, once the CJEU answers a reference for a preliminary ruling in a judgment, this interpretation carries great weight as EU law – much greater weight than those provisions that have not been interpreted by the CJEU. This pioneering role by the CJEU is further amplified by the fact that while the International Court of Justice is competent, no State has ever requested its involvement and it is unlikely to ever be used in this way. While it is true that rulings of the CJEU are authoritative in respect of EU law only (in the sense of their binding legal force),<sup>101</sup> it is less true of their general authority

<sup>96</sup> Rosemary Byrne and Andrew Shacknove, ‘The Safe Country Notion in European Asylum Law’ (1996) 9 *Harvard Human Rights Journal* 185–228; Rosemary Byrne, Gregor Noll and Jens Vedsted-Hansen, ‘Understanding Refugee Law in an Enlarged European Union’ (2004) 15 *European Journal of International Law* 355–79.

<sup>97</sup> Twining talks about ‘patterns relating to law’ (‘Diffusion of Law: A Global Perspective’, 5).

<sup>98</sup> ECJ, Joined Cases C-175, 176, 178, 179/08, *Salahadin Abdulla and Others v. Germany*, ECR [2009] I-1493.

<sup>99</sup> CJEU, Joined Cases C-57/09 and C-101/09, *Bundesrepublik Deutschland v. B and D*, judgment of 9 November 2010.

<sup>100</sup> ECJ, Case C-465/07, *Mr and Mrs Elgafaji v. the Dutch Secretary of State for Justice*, judgment of 17 February 2009.

<sup>101</sup> As commented by Advocate General Eleanor Sharpston in her Opinion of 4 March 2010 in the Case C-31/09 *Bolbol v. Bevándorlási és Állampolgársági Hivatal* (Hungarian Office for Immigration and Citizenship).

(persuasive or not) as rulings from the first ever supranational court to have interpreted provisions of the Refugee Convention. These rulings will carry enormous weight in generally influencing the interpretation of the Refugee Convention – that is, in promoting an interpretation of what is ‘normal’ interpretation in 26 of the 144 countries signatories to the Refugee Convention/Protocol. The idea behind this ability to shape conceptions as ‘normal’ has been identified as constitutive of Europe’s normative power.<sup>102</sup> In sum, we can *predict* a ‘jurisprudential glow’ of the CJEU’s judgments outside the EU.<sup>103</sup> In the context of this volume, this prediction is based on the suggested influence of the CJEU’s judgment in the landmark case *Mr and Mrs Elgafaji v. the Dutch Secretary of State for Justice*, on the US Board of Immigration Appeals, hence this case is introduced here. *Elgafaji* was the first judgment to be given by the CJEU (which was then called the ECJ). The Court was asked to answer two questions referred by the Raad van State (Dutch Council of State) relating to the scope of subsidiary protection granted by article 15(c) Qualification Directive:<sup>104</sup> Does article 15(c) offers supplementary or merely equivalent protection to article 3 ECHR? If supplementary, what are the criteria for eligibility to protection under article 15(c)? Following the opinion of Advocate General Maduro,<sup>105</sup> the CJEU ruled that article 15(c) Qualification Directive is different in content from article 3 ECHR (enshrined in article 15(b) Qualification Directive), hence the interpretation of these provisions must be carried out independently.<sup>106</sup> While article 15(a) and article 15(b) ‘cover situations in which the applicant for subsidiary protection is specifically exposed to the risk of a particular type of harm’, namely the death penalty, torture, inhuman or degrading treatment or punishment, article 15(c) ‘covers a more general risk of

<sup>102</sup> Manners, ‘Normative Power Europe’, 240. This is discussed further in Chapter 10 of this volume.

<sup>103</sup> Dauvergne, *Making People Illegal*, p. 150.

<sup>104</sup> Chapter V – Qualification for Subsidiary Protection

Article 15 – Serious harm

Serious harm consists of:

- (a) death penalty or execution; or
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
- (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situation of international or internal armed conflict.

<sup>105</sup> Delivered on 9 September 2008. <sup>106</sup> *Elgafaji*, para. 28.

harm', namely a 'threat . . . to a civilian's life or person'.<sup>107</sup> It added that the threat in question 'is inherent in a general situation of "international or internal armed conflict" and the reference to "indiscriminate" violence implies that this term "may extend to people irrespective of their personal circumstances"'.<sup>108</sup>

The Court ruled that the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances; the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place . . . reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence in the territory of that country or region, face a real risk of being subject to that threat.<sup>109</sup>

It further related the 'level of indiscriminate violence' with the 'level of individualization' as regards the standard of proof – they are inversely proportional: 'the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection'.<sup>110</sup>

In sum, the interpretation provided by the CJEU of the word 'individual' in article 15(c) Qualification Directive means that there is no need for the applicant to demonstrate that s/he is individually or 'specifically' targeted in order to enjoy the protection of article 15(c). Rather, the importance of article 15(c) is its ability to provide protection from serious risks that are *situational*, rather than individual. This interpretation, which rejects a high degree of individualization, must be praised for it is in full compliance with both international refugee law<sup>111</sup> and international human rights law,<sup>112</sup> and echoes the views of the UNHCR,

<sup>107</sup> *Ibid.*, paras. 32–4. <sup>108</sup> *Ibid.*, para. 34. <sup>109</sup> *Ibid.*, para. 45; see also para. 35.

<sup>110</sup> *Ibid.*, para. 39.

<sup>111</sup> Although not necessarily state practice, which often requires that the asylum seeker be 'deliberately targeted' (e.g., *R v. SSHD, ex parte Adan and Aitseguer*, House of Lords, judgment of 19 December 2000).

<sup>112</sup> Since its judgment in *Salah Sheek v. the Netherlands*, App. No. 1948/04, judgment of 11 January 2007, the European Court of Human Rights no longer requires an individual to be singled out or targeted. See also *NA v. United Kingdom*, App. No. 25904/07, judgment of 17 July 2008; and *Sufi and Elmi v. United Kingdom*, App. Nos. 8319/07 and 11449/07, judgment of 28 June 2011.

which recommended that the EU legislator delete the term ‘individual’ in article 15(c) Qualification Directive.<sup>113</sup>

This case clearly illustrates the CJEU’s awareness of the conflicting dimensions of EU asylum policy.<sup>114</sup> From a human rights (and refugee protection) perspective, the interpretation given by the CJEU in *Elgafaji* makes absolute sense: subsidiary protection is made effective by interpreting article 15(c) as offering something more than article 15(b) (or 3 ECHR), and international protection is to be granted where a risk of harm to human rights is likely to arise without requiring that an individual be personally targeted. This interpretation is in harmony with the case law of the European Court of Human Rights in Strasbourg. The latter indeed recognized that cases could arise where a general situation of violence in a country of destination is of ‘a sufficient level of intensity’ that removal to it would necessarily breach article 3 ECHR.<sup>115</sup> From a security (or control of the external borders of the EU) viewpoint, this ruling too makes perfect sense: the CJEU ‘entrusted the [national authorities] with a key aspect of article 15(c), namely [the assessment of the level of indiscriminate violence,] the turning point at which indiscriminate violence becomes an exceptional situation’.<sup>116</sup>

The ECHR and the case law of the European Court of Human Rights further influence the interpretation of EU refugee law on the principle of *non-refoulement*.<sup>117</sup> This is the case in particular when provisions of the EU Charter of Fundamental Rights or of CEAS law overlap with provisions of the

<sup>113</sup> UNHCR also recommended that this term be deleted from Recital (26), according to which: ‘Risks to which a population of a country or of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.’ Note that article 15 (as well as Recital 26, now Recital 35) has been left untouched in the Recast Directive 2011/95/EU of 13 December 2011.

<sup>114</sup> Koen Lenaerts, ‘The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice’ (2010) 59 *International and Comparative Law Quarterly* 255–301, at 296.

<sup>115</sup> European Court of Human Rights, *NA v. United Kingdom*, App. No. 25904/07, judgment of 17 July 2008, para.115. And now for an application of this finding to Mogadishu (Somalia), see European Court of Human Rights, *Sufi and Elmi v. United Kingdom*.

<sup>116</sup> Lenaerts, ‘Contribution of the European Court of Justice’, at 297.

<sup>117</sup> This is a two-way process. In *MSS v. Belgium and Greece*, the Grand Chamber of the European Court of Human Rights referred to EU legislation as an express source of law for its judgment; this is novel but not unexpected because the European Court of Human Rights often looks at consensus or near consensus, or for international norms reflecting a high degree of agreement.

ECHR. Regarding the Charter,<sup>118</sup> the CJEU recently granted special significance to article 3 ECHR and its case law (particularly in *MSS v. Belgium and Greece*)<sup>119</sup> when interpreting the corresponding article 4 of the Charter.<sup>120</sup> It regarded article 4 of the Charter as imposing the same level of protection as article 3 ECHR.<sup>121</sup> Regarding CEAS law, particularly the Qualification Directive, it is generally accepted that protection under article 3 ECHR is squarely provided by article 15(b) Qualification Directive,<sup>122</sup> and that the latter should be interpreted with due regard to the ECHR.<sup>123</sup> However, divergence in views between Luxembourg and Strasbourg prevails when comparing article 3 ECHR with article 15(c) Qualification Directive. The view from the CJEU (see discussion above) is that article 15(c) has something more to offer than article 15(b) (which is equivalent to article 3 ECHR) in terms of protection<sup>124</sup> – although what this ‘something more’ is remains unclear. In contrast, the view from the European Court of Human Rights is that article 3 ECHR offers ‘comparable protection’ to that afforded under article 15(c) Qualification Directive, since both courts impose an ‘exceptionality requirement’ when the risk to a person arises in a situation of general violence.<sup>125</sup> Notwithstanding these differences, it is unquestionable that in

<sup>118</sup> The EU Charter of Fundamental Rights was approved in 2000 at the Nice summit; it became binding law following the entry into force of the Lisbon Treaty in 2009 (OJ 2007 No. C 306).

<sup>119</sup> *MSS v. Belgium and Greece*.

<sup>120</sup> *NS v. Secretary of State for the Home Department and ME and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, Joined Cases C-411/10 and C-493/10 [2011] ECR I-0000, paras. 89 and 91. The case involved asylum seekers from Afghanistan, Iran and Algeria who had arrived in Greece prior to travelling in the UK and Ireland, and so raised very similar issues to the case *MSS v. Belgium and Greece*. See Advocate General Trstenjak’s statement that ‘particular significance and high importance are to be attached to the case-law of the European Court of Human Rights in connection with the interpretation of the Charter of Fundamental Rights, with the result that it must be taken into consideration in interpreting the Charter’ (para. 146).

<sup>121</sup> *NS v. Secretary of State for the Home Department and ME and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* (para. 94). Both art. 3 ECHR and art. 4 EU Charter provide: ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’.

<sup>122</sup> Art. 15(b) Qualification Directive defines serious harm as ‘torture or inhuman or degrading treatment or punishment of an applicant in the country of origin’.

<sup>123</sup> ECJ, case C-465/07, *Elgafaji v. Staatssecretaris van Justitie*, 17 February 2009 (OJ 2009, No. C 90/4, para. 28).

<sup>124</sup> *Ibid.* This view is shared by the UK Upper Tribunal: see *AMM and Others (conflict; humanitarian crisis; returnees; FGM) Somalia v. Secretary of State for the Home Department*, CG [2011] UKUT 00445 (IAC).

<sup>125</sup> European Court of Human Rights, *Sufi and Elmi v. United Kingdom*, para. 226, and ECJ, *Elgafaji*, paras. 37–8. To read more on this, see Hélène Lambert, ‘The

Europe, the ECHR offers very real added protection against *refoulement* to victims of armed conflicts who meet neither the requirement of the refugee definition (article 1A(2) Refugee Convention), nor article 15(c) Qualification Directive. This is not necessarily the case in other regions. However, where EU law may be better equipped than ECHR law is on the issue of the right to asylum (and a legal status) following a finding of violation of *refoulement*.<sup>126</sup> Indeed, the European Court of Human Rights has so far failed to recognize any further duties (beyond *non-refoulement*) on the part of Contracting States, such as to allow access to an asylum procedure or to grant a particular protection status to persons protected against *refoulement*. For the European Court of Human Rights, these remain matters for individual Member States.<sup>127</sup> All that the Strasbourg Court has acknowledged is that asylum seekers constitute a category of particularly vulnerable people.<sup>128</sup> Thus, it may be argued that the right to asylum by way of guaranteeing access to the asylum procedure and of granting refugee status is a key element of EU law (as well as the Refugee Convention)<sup>129</sup> but not of ECHR law, which continues to see the right to asylum purely in terms of protection against *refoulement*.<sup>130</sup>

### C Structure of the book

The volume is divided into ten chapters. This chapter (Chapter 1) introduces the conceptual framework for the book and the necessary tools for testing the hypothesis that European refugee law is being emulated in non-EU countries around the world. It identifies two key drivers and

Next Frontier: Expanding Protection in Europe for Victims of Armed Conflict and Indiscriminate Violence', forthcoming in (2013) *International Journal of Refugee Law*.

<sup>126</sup> Note that for persons coming from another EU Member States, the right to asylum is subject to the rules on responsibility sharing, rebuttable presumption and transfer provided in Council Regulation (EC) No. 343/2003 of 18 February 2003. This situation is discussed fully in Chapter 9 of this volume.

<sup>127</sup> In *Hirsi et al. v. Italy*, App. No. 27765/09, judgment of 23 February 2012, paras. 208–11, the European Court of Human Rights, having found that the transfer of the applicants exposed them to the risk of being subjected to ill-treatment in Libya and of being arbitrarily repatriated to Somalia and Eritrea, held that 'the Italian Government must take all possible steps to obtain assurances from the Libyan authorities that the applicants will not be subjected to treatment incompatible with article 3 of the Convention or arbitrarily repatriated'. See Violeta Moreno-Lax, '*Hirsi Jamaa and Others v. Italy* or the Strasbourg Court versus Extraterritorial Migration Control?' (2012) 12 *Human Rights Law Review* 574–98.

<sup>128</sup> *MSS v. Belgium and Greece*.

<sup>129</sup> UNHCR's written observations in CJEU Joined Cases C-411/10 and C-493/10, paras. 12–32, and UNHCR's oral submissions in the same joined cases, para. 12.

<sup>130</sup> This issue is further discussed in Chapter 9 of this volume, Part D2.



three facilitating factors behind the emulation of European protection norms. The two drivers are new challenges and uncertainty, and reputation and growing transnational professional standards. The three facilitating factors are the local context (fit), transnational networks (transmitter) and advocacy groups (push for change). It further examines basic norms or trends in European refugee law – namely, restrictive norms, such as the safe third-country rule and accelerated procedures, and liberal norms, such as subsidiary protection – for the case study chapters to consider, and presents Europe's unique judicial safety mechanisms.

Chapters 2 to 8 cover seven case studies. In each of the chapters, the primary research question was to explore the effect of European refugee law in the selected country. To the extent that evidence of emulation was found to have taken place, the authors were asked to analyse this evidence by paying particular attention to the key drivers and facilitators elaborated in Chapter 1, as well as the 'context' or local requirements. The chapters are ordered based on the strength of the evidence found of emulation, starting with Australia, Latin America and Canada where clear evidence of 'natural' emulation is found. These Chapters are followed by the cases of Israel and Switzerland where strong evidence of 'formal' emulation is found. Africa follows with clear evidence of past (but not of present) emulation, and, finally, the United States where no evidence is found.

Chapter 9 provides a cautionary tale of diffusion of European law by challenging some of our assumptions about EU asylum law (and ECHR law). It warns against a system (the CEAS) that is based on the logic of an internal market (namely, mutual trust and free movement) and a European human rights framework that too often sees protection against *refoulement* as an end in and of itself. Durieux argues that these (the CEAS and the ECHR) must not allow the specificity of refugee protection (and of the refugee) to be dislodged in this region.

Drawing on the findings in each of the case studies, Chapter 10 provides some conclusions about the emulation of European refugee law around the world. Thus, it consolidates and summarizes the analysis of the evidence produced through the various case studies, and it considers the theoretical implications of this evidence, for international, EU and domestic refugee law.

Through this methodology, we believe that an accurate examination and evaluation of the global reach of European law in the area of international protection is possible. It is hoped that through the assessment of the evidence obtained, and the theoretical implications, this volume will make a significant contribution to the debates about the diffusion of law and the role of the EU as a normative power.