

## *Introduction: In Search of EU Standards for Asylum Procedures*

**T**HIS INTRODUCTORY CHAPTER starts by sketching the field of investigation and the nature of the issues to be scrutinised. This will lead to the formulation of a research question and an outline of this book.

### 1.1 ADEQUATE AND FAIR ASYLUM PROCEDURES IN THE EU: STATE OF THE ART

Adequate and fair procedures are a precondition for the effective exercise of rights.<sup>1</sup> In the context of EU law it is generally recognised that the rights granted by EU law to individuals would be worthless if they could not be enforced in national administrative proceedings<sup>2</sup> and in particular before national courts.<sup>3</sup> The importance of procedural rights is acknowledged by the Charter of Fundamental Rights of the European Union (the Charter) as it has accorded fundamental rights status to procedural rights, such as the right to an effective remedy and the right to good administration, on an equal footing with substantive rights.<sup>4</sup>

In asylum cases a lack of procedural guarantees may undermine the EU rights usually claimed by asylum applicants: the right not be expelled or extradited to a country where they face the risk of being subjected to human rights violations (the principle of *non-refoulement*)<sup>5</sup> and the right to asylum. The need for fair

<sup>1</sup> See, eg ECtHR 10 January 2012, *GR v the Netherlands*, no 22251/07, where the ECtHR ruled that the extremely formalistic attitude of the Dutch authorities prevented the applicant from seeking recognition of his arguable claim under Art 8 of the ECHR.

<sup>2</sup> J Ponce, 'Good Administration and Administrative Procedures' (2005) 12 *Indiana Journal of Global Legal Studies* 551, 577; and J Schwartz, 'Judicial Review of European Administrative Procedure' (2004) 68 *Law and Contemporary Problems* 85, 97.

<sup>3</sup> See, eg M Accetto and S Zlepzig, 'The Principle of Effectiveness: Rethinking Its Role in Community Law' (2005) 11 *European Public Law* 375, 380; and K Kańska, 'Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights' (2004) 10 *European Law Journal* 296, 301.

<sup>4</sup> Kańska, 'Towards Administrative Human Rights in the EU', *ibid.*, 302. Procedural rights can also be seen as an end in themselves. They aim to 'protect an individual and to ensure fairness of proceedings'. Ponce, 'Good Administration' (n 2) 552–53. See also Kańska, *ibid.*, 301.

<sup>5</sup> CW Wouters *International Legal Standards for the Protection from Refoulement* (Antwerp, Intersentia, 2009) 1.

## 2 Introduction: In Search of EU Standards

asylum procedures is recognised in the light of both the 'grave consequences of an erroneous determination for the applicant'<sup>6</sup> and the vulnerable situation in which asylum applicants often find themselves.<sup>7</sup>

Making a considered decision on an asylum case is not easy. The task of assessing fear of persecution and future risk of harm poses unique challenges which, as Costello remarks, 'requires both sensitive communicative approaches and objective risk assessment'.<sup>8</sup> This is to a large extent due to the fact that in most asylum cases there is a lack of documentary evidence and, therefore, the asylum applicant's statements may be the only evidence available. Thomas even states that:

There can be little doubt that asylum decision-making, involving an assessment of future risk for the claimant often on the basis of limited information, is amongst the most problematic, difficult and complex forms of decision-making in the modern state. Decision-makers may feel pulled in different directions in light of both the considerable evidential uncertainty and a complex combination of facts pointing both ways in favour of awarding or refusing international protection.<sup>9</sup>

The examination of the credibility of the applicant's asylum account plays a central role in many asylum decisions.<sup>10</sup> As a result, rules regarding judicial review of the evidentiary assessment of asylum claims are crucial for the outcome of the case. Furthermore, factors such as the quality of the personal interview, the speed of the asylum procedure, and the asylum applicants' access (or lack of access) to legal aid and interpretation services may increase or decrease an applicant's chance of success. This book examines which procedural guarantees are required by EU law in asylum cases.

### *Rights Claimed by Asylum Applicants: The Prohibition of Refoulement and the Right to Asylum*

The prohibition of *refoulement*, explicitly laid down in the United Nations Convention relating to the Status of Refugees (Refugee Convention, also often referred to as the 1951 Geneva Convention) and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and recognised under the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political

<sup>6</sup> See EXCOM, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, 20 October 1983, No 30 (XXXIV) 1983, sub (e).

<sup>7</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979, new edition 1992) para 190, available at [www.refworld.org/docid/3ae6b3314.html](http://www.refworld.org/docid/3ae6b3314.html) accessed 25 September 2013.

<sup>8</sup> C Costello, 'The European Asylum Procedures Directive in Legal Context, New Issues in Refugee Research, Research Paper No 134' (Geneva, UNHCR, 2006) 2.

<sup>9</sup> R Thomas 'Assessing the Credibility of Asylum Claims, EU and UK Approaches Examined' (2006) 8 *European Journal of Migration and Law* 79, 84.

<sup>10</sup> G Noll, *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Leiden/Boston, Martinus Nijhoff, 2005) 1–6; TP Spijkerboer and BP Vermeulen, *Vluchtelingenrecht* (Nijmegen, Ars Aequi Libri, 2005) 261.

Rights (ICCPR), is the cornerstone of international refugee and asylum law.<sup>11</sup> The fundamental nature of the prohibition of *refoulement* is stressed by the European Court of Human Rights (ECtHR) in its case law. In the ECtHR's view, the prohibition of torture and inhuman or degrading treatment or punishment guaranteed by Article 3 ECHR enshrines one of the fundamental values of democratic societies. Protection against the treatment prohibited by Article 3 is absolute. As a result, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run a real risk of being subjected to such treatment. According to the ECtHR there can be no derogation from that rule, even if the person concerned acts undesirably or dangerously.<sup>12</sup> The principle of *non-refoulement* requires that a State must assess a person's claim that he is in need of international protection, particularly if this State intends to expel or extradite that person.<sup>13</sup>

The prohibition of *refoulement* is also recognised as an EU fundamental right in Article 19 of the Charter which provides:

No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.<sup>14</sup>

According to the Court of Justice, the assessment of the extent of the risk of *refoulement* relates 'to the integrity of the person and to individual liberties, issues which relate to the fundamental values of the Union'.<sup>15</sup> In *Elgafaji* the Court of Justice considered that the fundamental right guaranteed under Article 3 ECHR forms part of the general principles of EU law, observance of which is ensured by the Court.<sup>16</sup> The Court of Justice recognised in *Schmidberger* that the prohibition of torture and inhuman or degrading treatment or punishment laid down in Article 3 ECHR is absolute. It considered:

[U]nlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of

<sup>11</sup> Art 33 Refugee Convention, Art 3 CAT, Art 3 ECHR and Art 7 ICCPR.

<sup>12</sup> ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, paras 137–38. The prohibitions of *refoulement* guaranteed by the CAT and ICCPR are also absolute, see HRC 15 June 2004, *Ahani v Canada*, no 1051/2002, para 10 and ComAT 20 May 2005, *Agiza v Sweden*, no 233/2003, para 13.8. The Refugee Convention allows for exceptions to the prohibition of *refoulement*, according to Art 33(2).

<sup>13</sup> I Staffans, 'Judicial Protection and the New European Asylum Regime' (2010) 12 *European Journal of Migration and Law* 273, 275; Wouters, *International Legal Standards* (n 5) 164; and E Lauterpacht and D Bethlehem, 'The scope and content of the principle of non-refoulement' in E Feller, V Türk and F Nicholson (eds), *Refugee Protection in International Law*, UNHCR's *Global Consultations on International Protection* (Cambridge, Cambridge University Press, 2003) 118.

<sup>14</sup> The principle of *non-refoulement* is also recognised in Art 21(1) Dir 2011/95/EU.

<sup>15</sup> Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla* [2010] ECR I-1493, para 90.

<sup>16</sup> Case C-465/07 *Elgafaji* [2009] ECR I-921, para 28.

#### 4 Introduction: In Search of EU Standards

assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose.<sup>17</sup>

EU law not only provides for a prohibition of *refoulement* but also for a right to asylum in Article 18 of the Charter. This provision states that the right to asylum shall be guaranteed with due respect for the Refugee Convention and in accordance with the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). The Court of Justice has not yet explained how this right to asylum should be interpreted.<sup>18</sup> It may be argued that it includes the right to asylum status.<sup>19</sup> This right is reflected in Directive 2011/95/EU (the Qualification Directive), which provides that a person who qualifies as a refugee or is eligible for subsidiary protection in accordance with the Directive, should be granted refugee status or subsidiary protection status.<sup>20</sup> In his Opinion in *Puid* AG Jääskinen stated that Article 18 of the Charter does ‘not create for asylum seekers a substantive right to be granted asylum.’ He does recognise, however, that a subjective right to refugee status is provided for in the Qualification Directive.<sup>21</sup> The EU right to asylum status is not absolute. A refugee may be refused refugee status, for example where there are reasons to believe that he has committed a serious crime outside the country of refuge, if there are reasonable grounds to consider him to be a danger to the security of the Member State, or if he constitutes a danger to the community of that Member State.<sup>22</sup> A person who is in need of subsidiary protection may be refused asylum status on similar grounds.<sup>23</sup> Balancing of interests may thus take place in cases in which only the refusal of an asylum status is under dispute. International treaties such as the ECHR do not provide for a right to asylum status.<sup>24</sup>

#### *Lack of Harmonisation of Standards for Asylum Procedures at the International Level*

Although the importance of fair asylum procedures for the effective exercise of the prohibition of *refoulement* is widely recognised, the level of harmonisation of standards for such procedures at the international level is remarkably low.<sup>25</sup>

<sup>17</sup> Case C-112/00 *Schmidberger* [2003] ECR I-5659, para 80.

<sup>18</sup> Questions regarding the interpretation of Art 18 of the Charter have been referred to but were not answered by the Court of Justice in Case C-528/11 *Halaf* [2013].

<sup>19</sup> See also UNHCR, *Statement on the right to asylum, UNHCR’s supervisory responsibility and the duty of States to cooperate with UNHCR in the exercise of its supervisory responsibility* (August 2012) 13, available at [www.refworld.org/docid/5017fc202.html](http://www.refworld.org/docid/5017fc202.html) accessed 29 September 2013.

<sup>20</sup> Dir 2011/95/EU 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] OJ L337/9. See Arts 13 and 18 of the Directive. See also *Elgafaji* (n16) Opinion of AG Maduro, para 21.

<sup>21</sup> Case C-4/11 [2013] *Puid*, Opinion of AG Jääskinen, paras 49–50.

<sup>22</sup> See Arts 12(2) and 14(4) and (5) Dir 2011/95/EU.

<sup>23</sup> Art 17 Dir 2011/95/EU.

<sup>24</sup> See, eg ECtHR 20 July 2010, *A v the Netherlands*, no 4900/06, paras 152–53.

<sup>25</sup> See Costello, ‘The European Asylum Procedures Directive’ (n 8) 3.

Most importantly, the Refugee Convention does not contain any standards for refugee status determination proceedings. The UN High Commissioner for Refugees (UNHCR) and the Executive Committee of the Programme of the High Commissioner (EXCOM) have adopted guidelines regarding asylum procedures.<sup>26</sup> However, these guidelines are not binding and provide only limited guidance, as they assume that States are free to choose their own procedural system.<sup>27</sup> The ECtHR has set important requirements for procedures in which claims based on the prohibition of *refoulement* are assessed in its case law under the right to an effective remedy recognised in Article 13 ECHR. However, it is not possible to derive a comprehensive set of standards from this case law, as it only addresses a limited number of procedural issues and leaves many questions unanswered. In addition, the (non-binding) views of other supervising bodies such as the Human Rights Committee (HRC) and the Committee against Torture (ComAT) only provide very limited guidance.

As a result of the lack of international standards, asylum procedures adopted by States vary considerably.<sup>28</sup> Costello notes that governments have taken advantage of the leeway allowed by international law 'and manipulated asylum procedures in order to pursue manifold objectives, from deterring and deflecting asylum seekers, to ensuring that failed asylum seekers will be deportable'.<sup>29</sup> Indeed, many States have decided to take measures in reaction to, for example, large influxes of asylum applicants or the political demand for the prevention of abuse of the asylum procedure. In 2001 the UNHCR noted within the Member States of the EU

a gradual shift of emphasis away from the identification of persons in need of protection towards the deterrence of real or perceived abuse, if not sheer deterrence of arrivals of asylum applicants. Concern about growing backlogs and the difficulty of agreeing on burden-sharing formulas have resulted in policies of deflection, with less attention paid to key issues of responsibility and international solidarity.<sup>30</sup>

Many of the measures taken by EU Member States lead to diminishing safeguards in the asylum procedure. Arguably, one of the most far-reaching is the introduction of accelerated asylum procedures in many Member States. Procedures in these countries are similar in that applications are dealt with within a very short period of time and are often offered limited procedural safeguards.

<sup>26</sup> See, eg UNHCR, *Handbook* (n 7) and EXCOM Conclusion no 8 (XXVIII) 1977, Determination of Refugee Status.

<sup>27</sup> Noll, *Proof, Evidentiary Assessment and Credibility* (n 10) 5.

<sup>28</sup> See UNHCR, *Handbook* (n 7) paras 191–92, and B Gorlick, 'Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status' (2003) 15 *International Journal of Refugee Law* 357, 357–58.

<sup>29</sup> Costello (n 8) 3.

<sup>30</sup> UNHCR, *Observations on the European Commission's proposal for a Council Directive on minimum standards on procedures for granting and withdrawing refugee status, COM(2000) 578 final 20 September 2000* (July 2001) para 5, available at [www.refworld.org/docid/3f2fd59b4.html](http://www.refworld.org/docid/3f2fd59b4.html) accessed 29 September 2013.

## 6 Introduction: In Search of EU Standards

### *EU Standards for Asylum Procedures*

The lack of harmonisation of procedural standards in asylum cases (and migration cases in general) as well as the tendency to curtail procedural guarantees in national legal systems was noted by Pieter Boeles in 1997.<sup>31</sup> At the time Boeles concluded that there was a lacuna in legal protection of immigrants at the Community level. The only measure then available was the Council Resolution on minimum guarantees for asylum procedures of 1995.<sup>32</sup>

Since the conclusion of Boeles' research on procedural standards in immigration proceedings, some major developments have taken place at the European level. In 1999 the European Council recognised that the issues of asylum and migration call for the development of a common EU policy. In that year the European Council decided during the summit in Tampere to work towards a Common European Asylum System (CEAS). This system should, according to the Presidency Conclusions, include 'standards for a fair and efficient asylum procedure'. It was even decided that EU legislation should in the longer term lead to a common asylum procedure.<sup>33</sup>

### *The First Phase: Directive 2005/85/EC*

After lengthy and difficult negotiations, Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status (Directive 2005/85/EC) was adopted.<sup>34</sup> This directive contains minimum standards for the examination of asylum applications at first instance as well as at appeal. The goal of the approximation of rules on the procedures for granting and withdrawing refugee status was to limit the secondary movements of applicants for asylum between Member States where such movement would be caused by differences in legal frameworks.<sup>35</sup> Nevertheless, the minimum set of standards laid down in Directive 2005/85/EC leaves much discretion to the participating Member States, as it contains a large number of vaguely defined concepts and has failed—due to political differences in opinion—to provide clear-cut answers to a number of core issues in procedural asylum law.<sup>36</sup> It therefore did not succeed in

<sup>31</sup> P Boeles, *Fair Immigration Proceedings in Europe* (The Hague/Boston, Martinus Nijhof Publishers, 1997), ch 19.

<sup>32</sup> Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures [2006] OJ C274/13.

<sup>33</sup> Presidency Conclusions of the Tampere European Council 15–16 October 1999 (SN 200/99) paras 14–15.

<sup>34</sup> Council Dir 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13.

<sup>35</sup> Recital 6 Preamble Dir 2005/85/EC. See also Commission, 'Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum' COM (2000) 755 final.

<sup>36</sup> According to Michelogiannaki, the negotiations 'were proved to be the most intense, lengthy and difficult negotiations compared to any other that had taken place in the past, regarding the asylum agenda'. M Michelogiannaki, 'The Negotiations of Directive 2005/85/EC' in K Zwaan (ed), *The Procedures Directive, Central Themes, Problem Issues and Implementation in Selected Member States*

effectively harmonising procedural standards.<sup>37</sup> According to Vedsted-Hansen, the Member States' unwillingness to achieve a higher level of harmonisation on asylum procedures could be explained by the fact that non-compliance with administrative and procedural matters 'will be readily discovered both by the affected individuals and by those bodies controlling the implementation of EU law'.<sup>38</sup>

Arguably, the common standards on asylum procedures were also meant to serve the general objective of CEAS, namely the full and inclusive application of the Refugee Convention and safeguards maintaining the *non-refoulement* principle.<sup>39</sup> However, according to the UNHCR and various NGOs, the minimum standards contained in the Directive violated international human rights standards and reflected a race to the bottom. Just before political agreement on the proposed directive was reached, 10 NGOs even asked EU Commissioner for Justice and Home Affairs Vitorino to withdraw the proposal.<sup>40</sup>

### *The Second Phase: Directive 2013/32/EU*

The European Council in The Hague Programme of 2004<sup>41</sup> and the Stockholm Programme of 2009<sup>42</sup> committed itself to establishing a common area of protection and solidarity based on a common asylum procedure and a uniform status for those granted international protection. The deadline for the completion of the second phase of the CEAS was initially 2010 but was later extended to 2012.<sup>43</sup>

According to the Stockholm Programme, the CEAS should be based on high standards of protection. At the same time it must give due regard to fair and effective procedures capable of preventing abuse. The second phase of the CEAS also seeks to achieve a higher level of harmonisation. The European Council stated that it is crucial that individuals, regardless of the Member State in which their application for asylum is lodged, are offered an equivalent level of treatment as regards, for example, procedural arrangements and status determination. 'The

(Nijmegen, Wolf Legal Publishers, 2008) 21. For further discussion of the Procedures Directive see ch 2, section 2.2 in this volume.

<sup>37</sup> See also J Vedsted-Hansen, 'Common EU Standards on Asylum—Optional Harmonisation and Exclusive Procedures?' (2005) 7 *European Journal of Migration and Law* 369, 371.

<sup>38</sup> *Ibid*, 374.

<sup>39</sup> *Ibid*, 370.

<sup>40</sup> European Council for Refugees and Exiles, Amnesty International and Human Rights Watch, *Refugee and Human Rights Organisations across Europe Call on EU to Scrap Key Asylum Proposal* (29 March 2004) available at [www.ecre.org/media/news/press-releases.html](http://www.ecre.org/media/news/press-releases.html) accessed 29 September 2013. See also UNHCR, *UNHCR regrets missed opportunity to adopt high EU asylum standards* (30 April 2004) available at [www.unhcr.org/40921f4e4.html](http://www.unhcr.org/40921f4e4.html) accessed 29 September 2013.

<sup>41</sup> Council of the European Union, *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union* [2005] OJ C53/1.

<sup>42</sup> Council of the European Union, *The Stockholm Programme—An open and secure Europe serving and protecting the citizen* [2010] OJ C115/1, para 6.2.1.

<sup>43</sup> See also Council of the European Union, *Council Conclusions on Borders, Migration and Asylum, Stocktaking and the way forward*, 3096th Justice and Home Affairs Council meeting Luxembourg, 9 and 10 June 2011, 4.

## 8 Introduction: In Search of EU Standards

objective should be that similar cases should be treated alike and result in the same outcome.<sup>44</sup>

In order to realise the second phase of the CEAS the Commission issued proposals for recasts of the asylum directives and regulations. The proposal for the recast of Directive 2005/85/EC was introduced by the Commission in 2009.<sup>45</sup> However, as the negotiations in the Council were difficult and did not result in an agreement, the Commission decided to come up with an amended recast proposal in June 2011.<sup>46</sup> The amended proposal aimed to address the concerns of the Member States by recognising the need for flexibility, cost-effectiveness, simplification of rules and the prevention of abuse. The level of protection offered by the recast proposal was lower than that in the original proposal and during the subsequent negotiations some safeguards, in particular for vulnerable groups of asylum applicants, were further decreased. In June 2013 the recast of Directive 2005/85/EC, Directive 2013/32/EU on common procedures for granting and withdrawing international protection status, was finally adopted. The Directive is due to be transposed in the Member States before 20 July 2015. Directive 2005/85/EC is repealed for the Member States bound by this Directive with effect from 21 July 2015. The United Kingdom and Ireland do not take part in Directive 2013/32/EU and remain bound by Directive 2005/85/EC. Where this study uses the term 'Procedures Directive', it refers to the Procedures Directive in general, which includes the texts of both Directive 2005/85/EC and Directive 2013/32/EU.

Directive 2013/32/EU contains a number of improvements in comparison to Directive 2005/85/EC.<sup>47</sup> However, some critics are also disappointed. Peers states that:

Member States still retain a good deal of flexibility to set fairly low standards as regards the special procedures and in a couple of respects (as regards new listings of 'super-safe third countries' and a new exception from the right to legal aid) standards have been lowered.<sup>48</sup>

### *Is the European Harmonisation of Asylum Procedures a Failure?*

It is questionable whether the attempt to develop common standards for asylum procedures at EU level should be considered a failure, or even harmful, both

<sup>44</sup> The Stockholm Programme (n 42) para 6.2.

<sup>45</sup> European Commission, 'Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast)' COM (2009) 554.

<sup>46</sup> European Commission, 'Amended proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast)' COM (2011) 319.

<sup>47</sup> See, eg UNHCR, *Moving further toward a Common European Asylum System*, UNHCR's statement on the EU asylum legislative package (June 2013) available at [www.refworld.org/docid/51de61304.html](http://www.refworld.org/docid/51de61304.html) accessed 26 September 2013.

<sup>48</sup> See, S Peers, 'The second phase of the Common European Asylum System: A brave new world—or lipstick on a pig?' April 2013, [www.statewatch.org](http://www.statewatch.org).

from a human rights perspective and from the perspective of harmonising such procedures. In this book it is argued that it should not. In spite of its shortcomings the Procedures Directive could enhance the position of persons who apply for asylum in one of the Member States and lead to at least some form of harmonisation of standards on asylum procedures within the EU. This is not only because the Procedures Directive provides important safeguards in national asylum procedures. More importantly, the Directive has brought many aspects of national asylum procedures within the scope of EU law. As a result, the Charter of Fundamental Rights of the EU and general principles of EU law, such as the right to an effective remedy and the principle of effectiveness, apply. These rights and principles will be used by the Court of Justice of the European Union (Court of Justice) and national courts to interpret the provisions of the Procedures Directive and to test their legality. On the basis of these rights the courts may limit the discretion of Member States and even require the application of additional procedural safeguards that are not included in the Directive. The Charter and general principles of EU law also come into play because of the clear rights included in the Qualification Directive: the right to refugee status for those who qualify as a refugee; the right to subsidiary protection status for those who are in need of subsidiary protection; and the right to be protected against *refoulement*. The principle of effectiveness abolishes procedural hurdles which render the exercise of these rights practically impossible or excessively difficult.

Through the Charter and principles of EU law, the Procedures Directive may, therefore, provide more procedural safeguards to asylum applicants than many had expected at the time of its adoption. Costello explained in 2006, shortly after the adoption of Directive 2005/85/EC, that this 'new legal context and the general principles it incorporates, as well as the inevitable intervention of another supranational jurisdiction, the European Court of Justice, may well thwart the race to the bottom more than the negotiators anticipated'.<sup>49</sup> Of course, the extent to which the Court will be able to do this largely depends on the national courts' willingness to refer questions regarding the interpretation of the Procedures Directive to the Court for preliminary ruling and to interpret these directives in the light of EU fundamental rights and general principles. It should be noted, however, that EU fundamental rights are not only enforced by the Court of Justice and the national courts but also as a result of their incorporation into EU legislation. Indeed, as will be shown later, some of the safeguards following from the EU right to an effective remedy have already been incorporated in Directive 2013/32/EU. Both the initial and the amended proposal for the recast of Directive 2005/85/EC were 'informed by developing case law of the Court of Justice of the European Union and the European Court of Human Rights, especially concerning the right to an effective remedy'.<sup>50</sup>

<sup>49</sup> Costello (n 8) 6.

<sup>50</sup> Amended proposal (n 46) 4 and Initial proposal (n 45) 6.

## 1.2 IN SEARCH OF EU STANDARDS FOR ASYLUM PROCEDURES

This study focuses on the potential meaning of EU procedural rights, in particular the right to an effective remedy for the asylum procedures of EU Member States. EU Courts have developed an important body of case law on procedural guarantees. Now that national asylum procedures also fall within the scope of EU law, in principle this case law is also applicable to those procedures. It is expected that, when applying EU procedural rights and principles to asylum cases, the Court of Justice will be inspired by relevant international treaties and the judgments and views of the bodies supervising those treaties. This study aspires to derive from EU legislation and (the case law relating to) EU fundamental rights and general principles a set of EU procedural standards for several important issues in national asylum procedures.

### 1.2.1 Protection of Fundamental Rights in the EU Legal Order

Until the entry into force of the Treaty of Lisbon on 1 December 2009, fundamental rights, including the right to an effective remedy, were mainly protected in the EU as general principles of EU law by the Court of Justice.<sup>51</sup> In its case law the Court of Justice has developed an ‘unwritten charter of rights’.<sup>52</sup> Many of the most far-reaching decisions of the Court of Justice in the field of fundamental rights have been the result of preliminary references by national courts.<sup>53</sup>

Murray states that the Member States have so far actively endorsed the approach of the Court of Justice with regard to human rights protection, by including provisions requiring respect for human rights in successive treaties.<sup>54</sup> Article 6(3) TEU states that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of EU law.

Many of the fundamental rights recognised by the Court of Justice were incorporated in the Charter of Fundamental Rights of the EU. The Charter’s Preamble states:

This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional

<sup>51</sup> For the history and development of EU fundamental rights and general principles of EU law, see, eg B de Witte, ‘The Role of the ECJ in Human Rights’ in P Alston, MR Bustelo and J Heenan (eds), *The EU and Human Rights* (Oxford, Oxford University Press, 1999) 859–97; P Craig, *EU Administrative Law* (Oxford, Oxford University Press, 2006) 484–86; and JL Murray, ‘Fundamental Rights in the European Community Legal Order’ (2008) 32 *Fordham International Law Journal* 531–50.

<sup>52</sup> Craig, *ibid*, 484.

<sup>53</sup> Murray, ‘Fundamental Rights in the European Community Legal Order’ (n 51) 535 and K Lenaerts and JA Gutiérrez-Fons, ‘The Constitutional Allocation of Powers and General Principles of EU Law’ (2010) 47 *Common Market Law Review* 1629, 1635.

<sup>54</sup> Murray, ‘Fundamental Rights’ (n 51) 536; see also Lenaerts and Gutiérrez-Fons, ‘The Constitutional Allocation of Powers’, *ibid*, 1633.

traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights.

The Charter thus made EU fundamental rights, including general principles of EU law, more visible.<sup>55</sup> The Procedures Directive states in its preamble that it respects fundamental rights and observes the principles recognised in particular by the Charter.<sup>56</sup>

Although until 1 December 2009 the Charter had no binding force, it did play a role in the EU Courts' case law.<sup>57</sup> The Court referred to the Charter mainly in order to reaffirm the existence of a general principle of EU law.<sup>58</sup> Since the entrance into force of the Treaty of Lisbon, the Charter has become binding.<sup>59</sup> The Court of Justice has in its case law referred to the binding force of the Charter.<sup>60</sup> According to Iglesias Sánchez, this is 'an emphatic sign of acknowledgement, highlighting the relevance of the changes in the legal framework after a long period of uncertainty'.<sup>61</sup> In some cases, however, it still only mentioned the Charter in order to reaffirm an existent general principle of EU law<sup>62</sup> or to support its textual interpretation of a provision of an EU directive.<sup>63</sup> In other cases the Court attached much more weight to the Charter. In *DEB*, for example, the Court of Justice considered that the principle of effective judicial protection is enshrined in Article 47 of the Charter and focused on the interpretation of this provision (instead of that of the principle).<sup>64</sup> In this case even though the referring court asked about the compliance with national rules with the principle of effectiveness, the Court of Justice 'promptly placed the Charter at the core of its reasoning'.<sup>65</sup> Iglesias Sánchez considers the judgment in *DEB* to be 'an example of a discernible trend to resort to the Charter rather than to general principles if possible'.<sup>66</sup> He also notes the value of the Charter in governing and inspiring

<sup>55</sup> According to the preamble to the Charter 'it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter'. See also Lenaerts and Gutiérrez-Fons (n 53) 1656.

<sup>56</sup> Recital 8 Preamble Dir 2005/85/EC.

<sup>57</sup> S Iglesias Sánchez, 'The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights' (2012) 49 *Common Market Law Review* 1565, 1569–73.

<sup>58</sup> See, eg Case C-432/05 *Unibet* [2007] ECR I-2271, para 37, Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, para 46 and Case C-450/06 *Varec* [2008] ECR I-581, para 48.

<sup>59</sup> Art 6(1) TEU.

<sup>60</sup> See, eg Case C-555/07 *Kücüdeveci* [2010] ECR I-365, para 22 and Case C-578/08 *Chakroun* [2010] ECR I-1839, para 44.

<sup>61</sup> S Iglesias Sánchez, 'The Court and the Charter' (n 57) 1565, 1576.

<sup>62</sup> See *Kücüdeveci* (n 60) paras 21–22 and Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08 *Alasini et al* [2010] ECR I-2213, para 61.

<sup>63</sup> Case C-403/09 PPU *Deti ek* [2010] ECR I-12193, paras 53–59.

<sup>64</sup> Case C-279/09 *DEB* [2010] ECR I-13849, para 33 *et seq.*

<sup>65</sup> Iglesias Sánchez, (n 57) 1579.

<sup>66</sup> *Ibid.*, 1580.

the interpretation of EU norms in the field of the Area of Freedom, Security and Justice, including asylum.<sup>67</sup>

#### *General Principles of EU Law Recognised by the Court of Justice*

Various lists can be found in legal literature of the general principles recognised by the Court of Justice.<sup>68</sup> These include: the principle of equality; the principle of proportionality; the *non bis in idem* principle; the principle of legal certainty and legitimate expectations; the right to an effective remedy; and the principle of good administration. Many of these general principles of EU law are relevant in the context of asylum procedures.

#### *Rights Included in the Charter*

The Charter consists of five chapters: Dignity, Freedoms, Equality, Solidarity and Citizen's Rights. Some of the core rights of the ECHR are included in the Charter, such as the right to life, the prohibition of torture and slavery, the right to respect for private life, and the freedom of religion, expression, assembly and association. The Charter also contains economic and social rights, such as the right to education and the right to social security and social assistance.

The Charter lists many rights which may be of particular relevance for asylum cases, such as the right to asylum (Article 18) and the prohibition of *refoulement* and collective expulsions (Article 19). With respect to asylum procedures, Article 47 of the Charter on the right to an effective remedy, and Article 41 on the right to good administration, are particularly relevant.

### **1.2.2 Scope of Application of the Charter and General Principles of EU Law**

For the purpose of this study it is necessary to know when the Member States should abide by the Charter and general principles of EU law. Are they only bound by EU fundamental rights and principles when implementing the Procedures Directive or do these also apply when taking decisions on individual asylum cases which fall within the scope of this directive or other provisions of EU law?

According to Article 51(1) of the Charter, the provisions of the Charter are first of all addressed to the institutions, bodies, offices and agencies of the EU. Furthermore, the Member States are bound by the Charter 'only when they are implementing Union law'. The EU Institutions and the Member States shall

<sup>67</sup> Ibid, 1577.

<sup>68</sup> For a list of procedural guarantees, see CS Kerse, 'General Principles of Community Law: Procedural Guarantees' in U Bernitz and J Nergelius (eds), *General Principles of European Community Law* (The Hague, Kluwer Law International, 2000) 208. For a comprehensive discussion on the most important principles, see T Tridimas, *The General Principles of Community Law* (Oxford, Oxford University Press, 2006) and X Groussot, *General Principles of Community Law* (Groningen, Europa Law Publishing, 2006).

‘respect the rights, observe the principles and promote the application’ of the Charter in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it by the Treaties.

The question arises as to when Member States are ‘implementing Union law’. According to the Court of Justice, ‘the applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter’.<sup>69</sup> This means that these rights apply where national legislation falls within the scope of EU law. The scope of application of the Charter is thus the same as that of general principles of EU law.<sup>70</sup> The following categories of national measures fall within the scope of EU law and may therefore fall to be tested against general principles of EU law as well as the Charter:<sup>71</sup>

- measures implementing EU law;<sup>72</sup>
- measures adopted under an EU derogation in order to justify a measure which restricts one of the fundamental freedoms protected by the Treaty;<sup>73</sup> and
- measures which otherwise fall within the scope of EU law.<sup>74</sup>

The Court of Justice generally seems to be willing to accept that a sufficient EU law context exists.<sup>75</sup> Nevertheless, several examples can be found in the Court of Justice’s case law of cases where the Court considered that the situation fell out of the field of application of EU law.<sup>76</sup> Matters of pure national law are not governed by the Charter and EU general principles.

For the purpose of this study it is important to note that the fact that procedural issues are not governed by EU legislation does not mean that EU fundamental rights do not apply. EU procedural rights and principles, such as the fundamental right to an effective remedy, require that EU rights are effectively protected in national proceedings. If a person claims a right provided for by EU law in national asylum proceedings, those rights and principles may set

<sup>69</sup> Case C-617/10 *Åkerberg* [2013] para 21. This could have been derived from Case C-256/11 *Dereci et al* [2011] para 72.

<sup>70</sup> Explanations relating to the Charter of Fundamental Rights (2007/C 303/02) OJ 14 December 2007, C 303/32. Some authors believe that the Charter’s scope of application is more limited than the scope of application of EU general principles. See Lenaerts and Gutiérrez-Fons (n 53) 1657–59.

<sup>71</sup> HG Schermers and DF Waelbroeck, *Judicial Protection in the European Union* (The Hague, Kluwer, 2001), 36, Tridimas, *The General Principles of Community Law* (n 68) 36–42, S Prechal, ‘Competence Creep and General Principles of Law’ (2010) 3 *Review of European Administrative Law* 8.

<sup>72</sup> See, eg Case 5/88 *Wachauf* [1989] ECR 2609, para 19. ‘Implementation’ should be understood in a broad sense. See Prechal, ‘Competence Creep’, *ibid.*, 8.

<sup>73</sup> See, eg Case C-260/89 *ERT* [1991] ECR I-2925, para 43.

<sup>74</sup> Lenaerts and Gutiérrez-Fons (n 53) 1639, state that general principles are applicable where some specific substantive EU rule is applicable to the situation in question.

<sup>75</sup> See, eg *Åkerberg* (n 69) para 21, Joined Cases C-411/10 and C-493/10 *NS and ME et al* [2011] paras 64–69 and *Küçüdeveci* (n 60) paras 23–26. Tridimas notes that there is ‘a clear and, indeed, remarkable tendency towards the broad application of general principles, in particular fundamental rights’. Tridimas (n 68) 39.

<sup>76</sup> Case C-299/95 *Kremzow* [1997] ECR I-2629, paras 16–18 and Case C-144/95 *Maurin* [1996] ECR I-2909. Further examples are mentioned in Prechal (n 72) 11 and Iglesias Sánchez (n 57) 1588–90.

requirements as to these proceedings.<sup>77</sup> With regard to national procedural rules, the scope of EU law is therefore also determined by the substantive right claimed in the national procedure.

Since the inclusion of Title IV in the EC Treaty and the adoption of the various directives on asylum, national measures in the field of asylum often fall within the field of application of EU law. Asylum issues that the Directives did not aim to harmonise will fall outside the scope of EU law and therefore remain out of the reach of EU fundamental rights.<sup>78</sup> Section 2.4.2 discusses the scope of application of EU fundamental rights with respect to national asylum procedures. The Procedures Directive provides the Member States with wide discretion with respect to many issues. Therefore section 2.4.2 addresses the question of whether Member States are bound by EU fundamental rights when making use of their discretionary power.

### 1.2.3 Function of EU Fundamental Rights and General Principles

EU fundamental rights and general principles have been applied by the national courts and the EU Courts for different purposes. First, these courts use those rights and principles to review the legality of EU legislation. The Court of Justice considered that ‘respect for human rights is a condition of the lawfulness of Community acts ... and that measures incompatible with respect for human rights are not acceptable in the Community’.<sup>79</sup>

EU fundamental rights and general principles can be invoked under Article 263 or Article 267 TFEU to obtain the annulment of an EU measure. An individual may question the legality of an EU measure before a national court on grounds of infringement of EU fundamental rights and general principles. If the national court considers that an EU measure is invalid on this ground, it should refer to the Court of Justice for a preliminary ruling.<sup>80</sup> The Court of Justice has in several cases declared a provision of secondary EU law to be invalid because it infringed a provision of the Charter<sup>81</sup> or a principle of EU law.<sup>82</sup> Section 2.4.1 examines

<sup>77</sup> See Prechal (n 72) 11–13.

<sup>78</sup> Examples may include national rules concerning special protection policies for unaccompanied minors, humanitarian cases and the prohibition of expulsion for medical reasons based on Art 3 ECHR. See H Battjes, *European Asylum Law and International Law* (Leiden/Boston, Martinus Nijhoff, 2006) 88.

<sup>79</sup> Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v Council and Commission* [2008] ECR I-6351, para 284. See also para 285.

<sup>80</sup> Case 314/85 *Foto-Frost* [1987] ECR 4199, paras 17–20. See also Tridimas (n 68) 31 and 35. For more detail see ch 2, section 2.5.1 in this volume.

<sup>81</sup> See, eg Case C-236/09 *Association Belge des Consommateurs Test-Achats et al* [2011] para 32 and Joined Cases C-92/09 and C-93/09 *Volker und Marcus Schecke GbR and Hartmut Eifert* [2010] ECR I-11063.

<sup>82</sup> See, eg Case C-25/02 *Rinke* [2003] ECR I-8349, para 27 and Case C-120/86 *Mulder* [1988] ECR I-2321.

the question of whether the standards included in the Procedures Directive are capable of infringing EU fundamental rights and general principles. This question is relevant because Directive 2005/85/EC and Directive 2013/32/EU both allow Member States to provide a higher level of protection than that offered by the standards of the Directive. Arguably, Member States are never forced by those standards to violate EU fundamental rights, as they are generally allowed to introduce or maintain more favourable provisions.<sup>83</sup>

Secondly, the national courts of the Member States and the Court of Justice use the Charter and general principles of EU law to interpret EU legislation.<sup>84</sup> The Court has held that EU legislation cannot be interpreted in such a way that it disregards a fundamental right included in the Charter.<sup>85</sup> Furthermore, it has considered that where an EU measure must be interpreted, preference must be given as far as possible to the interpretation that renders it compatible with general principles of EU law.<sup>86</sup> National rules and practice will be tested against this interpretation of EU law.<sup>87</sup> Finally, the EU Courts have used general principles of EU law to fill in gaps in EU legislation and to supplement the provisions of written EU law.<sup>88</sup>

In summary, EU fundamental rights and general principles may require that relevant EU legislation is set aside and may set additional standards to those explicitly included in EU legislation. In order to discover which requirements are set by EU law for national asylum procedures, therefore, it is necessary to have regard not only to the Procedures Directive, but also to relevant EU fundamental rights and general principles. This book attempts to define the meaning and content of the EU fundamental right to an effective remedy and related rights and general principles for the legality and interpretation of EU legislation on asylum procedures.

#### **1.2.4 Sources of Inspiration of EU Fundamental Rights and General Principles**

Both the EU Charter and general principles of EU law have several sources of inspiration, in particular the constitutional traditions and international

<sup>83</sup> See, eg Art 5 Dir 2005/85/EC and Art 5 Dir 2013/32/EU.

<sup>84</sup> The Court has interpreted provisions of secondary EU legislation in the light of the Charter. See *Chakroum* (n 60) para 44 and *Salahadin Abdulla* (n 15) para 54.

<sup>85</sup> *Detiček* (n 63) para 55. This case concerned the compatibility of a regulation with the rights of the child set out in Art 24 of the Charter.

<sup>86</sup> *Tridimas* (n 68) 29. He refers to several cases including Case C-314/89 *Rauh* [1991] ECR I-1647.

<sup>87</sup> *Lenaerts and Gutiérrez-Fons* (n 53) 1650.

<sup>88</sup> As to the triple function of general principles of EU law, see *Lenaerts and Gutiérrez-Fons* *ibid*, 1629–31.

obligations common to the Member States.<sup>89</sup> Secondary EU legislation<sup>90</sup> and EU soft law<sup>91</sup> may also serve as a source of inspiration for EU fundamental rights and general principles. However, as secondary legislation and EU soft law play only a minor role in this study they will not be addressed in this section.<sup>92</sup> For the purpose of this study by far the most weight is attached to international law as a source of inspiration.

### *International Law as a Source of Inspiration*

Article 6(2) TEU states that the EU shall accede to the ECHR.<sup>93</sup> The EU could also become a party to other human rights treaties.<sup>94</sup> At the time of writing, however, the EU, unlike its Member States, is not a party to human rights treaties such as the ECHR or the ICCPR.<sup>95</sup> The EU is therefore not directly bound by human rights treaties. Although the wording of the case law sometimes suggests differently, the EU Courts therefore have generally not directly applied these treaties.<sup>96</sup> Instead they use human rights treaties as a source of inspiration for EU fundamental rights and general principles of EU law. The following standard consideration has been used by the Court of Justice:

Fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied

<sup>89</sup> See the Preamble to the Charter and Art 6(3) TEU.

<sup>90</sup> See Case T-228/02 *Organization des Modjahedines du peuple d'Iran v Council* [2006] ECR II-4665, para 149 and Case T-47/03 *Sison v Council* [2007] ECR II-73, para 204. See also B Kunoy and B Mortansson, 'Case C-578/08, *Chakroun* [2010]' (2010) 47 *Common Market Law Review* 1815, 1825.

<sup>91</sup> See Case C-322/88 *Grimaldi* [1989] ECR 4407, paras 18–19, Case C-188/91 *Deutsche Shell* [1993] ECR I-363 and *Alassini et al* (n 62) para 40. Several Advocates General are of the opinion that the *Grimaldi* obligation should also apply to the EU Courts. See Case C-450/93 *Kalanke* [1995] ECR I-3051, Opinion of AG Tesouro, para 20 and Case C-76/97 *Tögel* [1998] ECR I-5357, Opinion of AG Fennelly, para 34. See also L Senden, *Soft Law in Community Law* (Oxford and Portland OR, Hart Publishing, 2004) 399.

<sup>92</sup> The following Resolutions are relevant: Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures [2006] OJ C274/13; Council Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries [1997] OJ C221/23; and Council Resolution of 30 November 1992 on manifestly unfounded applications for asylum (not published in the Official Journal).

<sup>93</sup> In April 2013 the draft accession agreement of the EU to the ECHR was finalised. See [www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting\\_reports\\_en.asp](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports_en.asp) accessed 29 September 2013.

<sup>94</sup> The Stockholm Programme (n 42) para 6.2.1 mentions a possible accession to the Geneva Convention and its 1967 Protocol.

<sup>95</sup> In Opinion 2/94 the Court of Justice held that the European Community had no competence to accede to the ECHR. According to Groussot, Opinion 2/94 marked the start of an extensive use of the ECtHR's jurisprudence and acceleration in the shaping of fundamental rights. Groussot, *General Principles of Community Law* (n 68) 61.

<sup>96</sup> See, eg Case C-199/11 *Europese Gemeenschap v Otis* [2012] para 47 and Case T-112/98 *Mannesmannröhren-Werke v Commission* [2001] ECR II-729, para 59. Cf Case C-60/00 *Carpenter* [2002] ECR I-6279 and Case C-413/99 *Baumbast* [2002] ECR I-7091 where the Court of Justice directly applied Art 8 ECHR. See Groussot, 'UK Immigration Law under Attack and the Direct Application of Article 8 ECHR by the Court of Justice' (2003) 3 *Non state actors and International Law* 199.

by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories.<sup>97</sup>

International law also inspired the drafters of the Charter. The Preamble of the Charter states that the Charter reaffirms rights including those which result from the international obligations common to the Member States and the ECHR as well as from the ECtHR's case law. Many of the rights included in the Charter are clearly based (partly or wholly) on the ECHR. When interpreting the fundamental rights included in the Charter the Court of Justice has relied on the ECtHR's case law.<sup>98</sup>

The Court of Justice has recognised several international treaties as sources of inspiration for EU fundamental rights and general principles of EU law.<sup>99</sup> Among those treaties are the ECtHR, the Refugee Convention,<sup>100</sup> the ICCPR<sup>101</sup> and the UN Convention on the Rights of the Child (CRC)<sup>102</sup> which play a significant role in the context of this study. According to Article 6(3) TEU, the Charter<sup>103</sup> and the Court of Justice's case law, the ECHR has special significance for the development of EU fundamental rights and general principles.<sup>104</sup> Therefore, in many cases in which the Court of Justice applies EU fundamental rights or general principles, it refers to the ECHR and/or the ECtHR's case law. The CAT, which will also be included in this study as a source of inspiration, has so far not been recognised as such by the EU Courts. However, it may be expected that the Court of Justice will recognise it in the future as all Member States are parties to this convention.<sup>105</sup>

Chapter three will further address the Court of Justice's use of international treaties as sources of inspiration for EU fundamental rights and principles. It will in particular explain the (relative) weight which should be given to these sources of inspiration *for the purpose of this study*.

### *The Constitutional Traditions of the Member States*

Although the constitutional traditions of the Member State may be relevant in defining the meaning of the EU right to an effective remedy, they are not included in this study (see section 1.4). The reason for this is that it is very difficult to identify principles which are common to the constitutional traditions of the

<sup>97</sup> Case C-540/03 *Parliament v Council* [2006] ECR I-5769, para 35.

<sup>98</sup> See, eg *DEB* (n 64) where the Court of Justice interpreted Art 47 of the Charter in the light of the ECtHR's case law concerning Art 6 ECHR.

<sup>99</sup> The European Social Charter in Case C-438/05 *Viking Line* [2007] ECR I-10779, para 44 and Case 149/77 *Defrenne* [1978] ECR 1365, para 28 and the ILO Conventions in *Defrenne*, para 28.

<sup>100</sup> *Salahadin Abdulla* (n 15) paras 51–53 and Joined Cases C-57/09 and C-101/09 *B and D* [2010] ECR I-10979, paras 76–78.

<sup>101</sup> Case C-347/87 *Orkem* [1989] ECR I-1083 and *Parliament v Council* (n 97).

<sup>102</sup> *Parliament v Council* (n 97), see also Case C-244/06 *Dynamic Medien* [2008] ECR I-505.

<sup>103</sup> See the Preamble and Art 52(3) of the Charter. Other human rights conventions such as the ICCPR or the CAT are not explicitly mentioned by the Charter.

<sup>104</sup> Case C-222/84 *Johnston* [1986] ECR 1651, see also *Parliament v Council* (n 97) para 35.

<sup>105</sup> See Battjes, *European Asylum Law* (n 76) 85.

Member States. First, in order to discover such principles we would need to assess the legislation of the 27 Member States, which would be complicated and time-consuming. This may also be the reason why, in practice, the Court of Justice does not often enter into a comparative analysis of the constitutions of the Member States.<sup>106</sup> Secondly, the EU Courts have not set out any criteria on the basis of which it should be decided whether a constitutional tradition is common to the EU Member States.<sup>107</sup>

Arguably, an EU general principle is common to the constitutional traditions of the Member States if it is laid down in a treaty of which the Member States are signatories. Groussot states that the most common approach is to let the use of the constitutional traditions come after international law. The reason is that international law is appraised as having a unifying potential. International obligations are also easier to identify than the common constitutional traditions of the Member States. Thus only if the international treaties do not provide any guidance, may the absence of an assessment of the constitutional traditions of the Member States be problematic.<sup>108</sup> In such a situation the Court of Justice could accept a certain interpretation of an EU fundamental right or general principle on the basis of the common constitutional traditions of the Member States alone.<sup>109</sup>

### 1.3 AIM OF THE STUDY

The purpose of this study is generally to examine the potential meaning of EU fundamental rights and general principles for national asylum procedures. In particular, it aims to derive a set of EU procedural standards for several key issues of asylum procedures from EU legislation and/or the EU right to an effective remedy. This study addresses the meaning of the EU right to an effective remedy in its broadest sense and also takes into account requirements following from EU procedural rights and principles which are included in or strongly connected to

<sup>106</sup> See, eg S Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Rights *Aquis*' (2006) 43 *Common Market Law Review* 629, 658; de Witte, 'The Role of the ECJ in Human Rights' (n 51) 878; and Murray (n 51) 537. The Advocates General usually analyse the constitutional traditions of the Member States rather than the Court of Justice.

<sup>107</sup> See AL Young, 'The Charter, Constitution and Human Rights: Is this the Beginning of the End for Human Rights Protections by Community Law' (2005) 11 *European Public Law* 219, 223–24; Groussot (n 68) 50. The Court of Justice's considerations in Joined Cases C-46/87 and C-227/88 Hoechst [1989] ECR I-2859, para 17 seem to point in the direction of an evaluative approach and to exclude the possibility of the minimalist approach. In Case C-144/04 *Mangold* [2005] ECR I-9981, however, the Court of Justice accepted a general principle, which was not obviously (or even obviously not) common to the constitutional traditions of the Member States. D Schiek, 'The ECJ Decision in *Mangold*: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation' 35 *Industrial Law Journal* 329, 329–41. For an overview of other critics, see Lenaerts and Gutiérrez-Fons (n 53) 1654.

<sup>108</sup> See also section 1.4.

<sup>109</sup> The *Mangold* case (n 107) concerning the prohibition of age discrimination, may be an example. See Schiek 'The ECJ Decision in *Mangold*' (n 107) 329–41.

the right to an effective remedy. Examples of such rights and principles include: the right to a fair trial; the principle of effectiveness; and the right to good administration.<sup>110</sup> The study aims to define the meaning of the EU right to an effective remedy for the following procedural topics:

1. the right to remain on the territory during asylum proceedings in first instance and appeal;
2. the asylum applicant's right to be heard in first instance and appeal; and
3. questions relating to evidence in asylum procedures:
  - the standard and burden of proof and evidentiary assessment;
  - judicial review of the establishment and qualification of the facts; and
  - the use of secret evidence.

The book is divided in three parts. Part one addresses several preliminary issues which are necessary to define the meaning of EU right to an effective remedy for national asylum proceedings. Part two then examines the requirements following from the EU right to an effective remedy for the three specific procedural topics mentioned above. In part three conclusions are drawn.

#### *Preliminary Issues (Part I)*

Chapter two introduces the CEAS and, in particular, the Procedures Directive. It also examines the potential impact and the scope of application of EU fundamental rights in asylum cases taking into account the particular characteristics of the Procedures Directive. Chapter three discusses the Court of Justice's use of international treaties as sources of inspiration for EU fundamental rights. In particular, it examines the (relative) weight which should be accorded to the ECHR, the Refugee Convention, the CAT, the ICCPR and the CRC as a source of inspiration for the EU right to an effective remedy when applied in the context of asylum procedures. Chapter four introduces the EU procedural rights, which will be used in this study in order to build a set of EU standards for the themes discussed in later chapters. It shows how EU fundamental rights have limited the procedural autonomy of the Member States. In addition, this chapter explains how EU procedural rights and principles are interlinked and it discusses their general content. It also gives an overview of the specific provisions of international treaties, which may inspire the Court of Justice when defining the meaning and content of the EU right to an effective remedy in the context of asylum. Finally, three basic concepts are introduced which may help to explain the case law of the Court of Justice as well as the case law of the ECtHR and predict how they will rule on procedural issues in the future. Chapter five draws conclusions as to the preliminary issues discussed and explains the methodology applied in the following chapters.

<sup>110</sup> See further ch 4.

*Key Issues of Asylum Procedures (Part II)*

Chapter six addresses the question whether, according to EU law, Member States are required to allow asylum applicants to remain on their territory during first instance proceedings and the appeal procedure. In addition, it examines whether the Member States must grant applicants the opportunity to lodge an appeal against this expulsion before being expelled. Chapter seven addresses the EU standards with regard to the asylum applicant's right to be personally heard on his asylum motives in first instance and appeal proceedings. The statements of the claimant play an essential role in the assessment of whether this person runs a risk of *refoulement* upon return to his country of origin. Chapter eight examines the EU requirements with regard to the standard and burden of proof and the evidentiary assessment in asylum cases. Chapter nine concerns the standard of judicial review in asylum cases. It examines in particular whether the (first instance) courts of some Member States can defer (more or less) to the authorities' decision on the establishment of the facts, or whether they are required to apply a full judicial review to the asylum decision. Chapter ten considers the use of secret information in asylum proceedings. This chapter specifically addresses procedural safeguards applying to asylum cases in which (part of) the establishment of the facts is based on evidence gathered by the authorities, which is not made available to the asylum applicant himself or his legal representative.

*Conclusions (Part III)*

Chapter eleven recapitulates the methodology used in this study. It draws some conclusions as to the achievements of the Procedures Directive up to the time of writing and its potential impact for the future. It also contains a list of procedural standards which were derived from the Procedures Directive and the EU right to an effective remedy described in chapters six to ten.

1.4 SCOPE AND LIMITATIONS OF THE STUDY

The section will set out the scope and limitations of the study and explain some of the choices which have been made in order to clearly define the research topic.

*Focus on EU Law*

As is apparent from the central research question described in section 1.3, this study focuses primarily on EU law. Its purpose is to develop a set of EU procedural standards for several important issues in national asylum procedures. International law (the ECtHR, the Refugee Convention, the ICCPR, the CAT and the CRC) is only included in this study as a source of inspiration for EU fundamental rights. It is, therefore, only in this context that the study assesses the requirements for asylum procedures which follow from those treaties.

*No Assessment of National Law*

This study does not include an assessment of the national law and practices of Member States. It only briefly refers to European Commission evaluations and UNHCR research, which examined the implementation of the Procedures Directive in the Member States, in order to show how certain procedural aspects addressed in this study cause problems or are discussed in practical and not just in theoretical terms. However, a set of EU standards for national asylum procedures has been developed in the abstract on the basis of EU legislation, the EU Courts' case law and relevant sources of inspiration.

*Asylum Procedures Governed by the Procedures Directive*

This study only assesses which EU standards should apply to asylum procedures which fall within the scope of the Procedures Directive. Asylum applications governed by the Procedures Directive (procedural standards) are also governed by the Qualification Directive (substantive standards).<sup>111</sup> The standards laid down by the Qualification Directive are relevant for the purpose of this study for two reasons. First, it defines the content of the substantive EU rights claimed by asylum applicants: the right to asylum and the prohibition of *refoulement*. National procedural rules which render the effective exercise of these rights impossible or excessively difficult are contrary to EU law. Furthermore, it will be argued in section 4.5.3.1 that the nature of the substantive EU rights claimed by a person defines to a certain extent the level of procedural protection which must be offered to that person. Secondly, the Qualification Directive contains standards regarding several evidentiary issues which are addressed in chapter seven. The standard of proof which must be met in asylum cases should be derived from the criteria for qualifying as a refugee or a person eligible for subsidiary protection included in the Directive. Moreover, Article 4 of the Qualification Directive provides for standards concerning the burden of proof and evidentiary assessment. For these reasons the Qualification Directive is included in this study where it is relevant.

This study does not address the procedural guarantees applicable when a person claims that his expulsion, extradition or transfer to another country will violate the prohibition of *refoulement* in a procedure governed by an EU measure other than the Procedures Directive. A claim of a risk of *refoulement* may be made in the context of a refusal of entry to the EU at the border under the Schengen Borders Code,<sup>112</sup> a transfer to another Member State on the basis of the Dublin Regulation or a return procedure governed by the Return Directive.<sup>113</sup> In such procedures,

<sup>111</sup> See Arts 2(b) and 3(1) Dirs 2005/85/EC and 2013/32/EU and Art 1 and 2(g) Dir 2011/95/EU.

<sup>112</sup> Reg (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders [2006] OJ L105/1.

<sup>113</sup> Dir 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 [2008] OJ L348/98.

the risk of a violation of the prohibition of *refoulement* should also be assessed. Arguably, many of the standards which apply to asylum procedures governed by the Procedures Directive should also apply to those procedures. However, border, Dublin or return proceedings have different characteristics to asylum procedures, which may influence the level of procedural protection which should be offered to the individual. In Dublin cases the asylum applicant will be transferred to another EU Member State, which may impact on, for example, the burden of proof. A return procedure may follow an asylum procedure, which could have implications for the procedural safeguards which need to be offered. If a person first claims a violation of the prohibition of *refoulement* when a decision to refuse entry at the border or to return him to his country of origin is taken, the most logical step would be to lodge an asylum claim. From the moment the asylum claim is lodged the Procedures Directive applies.

*Directive 2005/85/EC and Directive 2013/32/EU*

The study will define the meaning of the EU right to an effective remedy for the interpretation and validity of Directive 2005/85/EC and its recast Directive 2013/32/EU. Member States remain bound by Directive 2005/85/EC until they have transposed Directive 2013/32/EU or the time limit for transposing Directive 2013/32/EU has passed on 20 July 2015. After this date the UK and Ireland will remain bound by Directive 2005/85/EC as they are not taking part in the adoption of Directive 2013/32/EU. The conclusions with regard to the interpretation and validity of Directive 2005/85/EC will thus remain relevant after 20 July 2015.

*No Questions Concerning the Exclusion from an Asylum Status and Detention*

This study only concerns the assessment of the question whether a person falls within the scope of the EU prohibition of *refoulement*, according to the criteria laid down in the Qualification Directive. Most persons who have a well-founded fear of persecution or run a real risk of serious harm are not only protected by the prohibition of *refoulement* but will also be granted asylum status on the basis of Article 13 or 18 of the Qualification Directive. However, some persons in need of protection will be excluded from such a status, for example, because they have committed serious crimes in their country of origin or because they constitute a danger to the national security or community of the Member State to which they have moved.<sup>114</sup> EU procedural standards which apply to the decision to refuse a person asylum status or to withdraw asylum status for reasons other than that protection against expulsion is no longer necessary, will not be examined in this study. The reason for this is that the nature of the EU right involved in such a decision (the right to asylum) is different from the EU right to protection against

<sup>114</sup> Arts 12(2) and 14(4) and (5) and 18 Dir 2011/95/EU.

*refoulement*. While the EU right to asylum may be subject to limitations, the EU prohibition of *refoulement* is absolute. Before refusing or withdrawing asylum status for national security reasons, the interests of the person concerned should be balanced against the interests of the State. This has implications for the level of procedural protection which should be offered and specific procedural questions may arise.<sup>115</sup> For example, the burden of proof and the required intensity of judicial review is different in the case of a balancing test in the context of a decision as to whether asylum status may be refused for reasons of national security, to that in the case of a decision regarding the existence of a real risk of *refoulement* upon return to the country of origin. In addition, procedural guarantees applicable to detention cases falling within the scope of Article 18 of Directive 2005/85/EC and Article 26 of Directive 2013/32/EU will not be assessed.

#### *Limited Number of Procedural Topics*

The procedural topics which will be examined in the second part of this book were chosen because the way they are regulated in a Member State arguably determines to a significant extent the fairness of the asylum procedure. Another reason to choose these particular topics was the assumption that they cause problems in practice in at least some Member States. Several important procedural topics, such as the right of access to the asylum procedure, the right to (free) legal assistance and interpretation services, the application of safe country of origin, first country of asylum and safe third-country concepts, and the use of very speedy (accelerated) procedures, will not be discussed in this book. It should be noted that these procedural topics are also governed by the Procedures Directive and, as a result, by the EU right to an effective remedy and related procedural rights. The methodology used in this study to discover the meaning of the EU procedural right to an effective remedy can, therefore, also be applied to these procedural topics.<sup>116</sup>

<sup>115</sup> See also ch 4, section 4.5.3.1 in this volume.

<sup>116</sup> For the right of access to (free) legal assistance in relation to the right of access to court, see AM Reneman, 'Access to an Effective Remedy before a Court or Tribunal in Asylum Cases' in E Guild and P Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Leiden/Boston, Martinus Nijhoff, 2011) 401.

