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Does the EU Need a European Migration and Protection Agency?

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ABSTRACT

This article considers the ongoing legitimacy of the Common European Asylum System (CEAS), 17 years after its creation. Its organizing principle is that anyone seeking international protection will have only one opportunity to have their application assessed, by one of the 28 Member States of the European Union. The CEAS therefore implements a common system of reception, definition, procedures, and responsibility for asylum seekers. Yet, the recognition rates for individual asylum seekers from the same countries of origin vary dramatically in different Member States. This article therefore takes seriously the proposal by Professor Guy S Goodwin-Gill that, for the CEAS to be fair to asylum seekers, there is a need for common institutions, charged with the faithful implementation of States' international protection obligations to determine claims in the pursuit of fair and consistent outcomes and treatment.

1. INTRODUCTION

In 2015, Guy S Goodwin-Gill began to promote the idea that Europe, and more particularly the European Union (EU), needs a new institution: a European Migration and Protection Agency.[1] This article will examine the state of the EU regarding asylum and will analyse the options available for either a new competence to an existing institution, or the viability of a new one. It is in this context that Goodwin-Gill argued that, since the EU is based on common values and shares international obligations, it is disingenuous to suggest that refugees in EU Member States are the responsibility, exclusively, of those States individually. The intensification in 2015 of the regional war in Syria and Iraq resulted in millions of Syrian and Iraqi refugees seeking asylum in Europe. The neighbouring countries, in which many of them have been living for over four years, have already become less hospitable. For instance, Lebanon, which has hosted more

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1 Guy S Goodwin-Gill, 'Regulating "Irregular" Migration: International Obligations and International Responsibilities', Notes for a Presentation, University of Naples 'L'Orientale', 11 May 2015; and Keynote Address to the International Workshop, National and Kapodistrian University of Athens, Faculty of Law, 20 Mar 2015.

than 3.2 million Syrian refugees,[2] introduced visa requirements for Syrians in early 2015.[3] The pressure on Turkey increased as a result. From the summer of 2015, the Aegean Sea border between Turkey and Greece became the new flash point for the arrival of people seeking international protection. The response of EU States, and candidate States[4] in the Western Balkans, in 2015, has been heavily criticised as insufficient, and UNHCR has called for a more coordinated response.[5]

There was a wide range of proposals from the EU institutions for reforms in 2015. Two EU policy commitments were put into question: the Dublin system of allocation of responsibility for asylum seekers, made primarily on the basis of the first country through which they entered the EU; and the Schengen area – an area in Europe without internal border controls. As refugees travelled across the EU searching for a hospitable place to seek refuge, the Dublin system became irrelevant, and the option of border controls became increasingly attractive to some countries as a way to deter refugees.[6]

Goodwin-Gill identified the need for an institution with specific responsibility to collectively fulfil Member States' individual obligations to refugees and migrants. He noted that there are already a number of EU agencies – the European Asylum Support Office (EASO) and the Fundamental Rights Agency (FRA), in particular – that are charged with issues concerning refugee protection and migration. However, in his view, while they can play a role in monitoring the various 'solutions' proposed by the EU and its Member States, a more international approach is needed.

The main focus of this article is not the coordinated international approach that Goodwin-Gill maintains is needed to address the current crisis in the Middle East. It is, rather, the issues surrounding the creation of a new EU agency, which would be charged with ensuring solidarity among Member States and the protection of refugees and migrants.

2. THE HISTORY AND INSTITUTIONAL STRUCTURE OF THE EU REGARDING REFUGEES AND MIGRANTS

2.1 Free movement of persons, the abolition of border controls, and asylum

The EU's Common European Asylum System (CEAS) grew out of the EU's project to abolish border controls between the Member States and to apply compensatory measures regarding common external border controls.[7] An inherent component of this

[2] UNHCR, 'Syria Regional Refugee Response' (2016) <http://data.unhcr.org/syrianrefugees/country.php?id=122> accessed 25 Apr 2016.

[3] Hugh Naylor and Suzan Haidamous, 'Syrian refugees become less welcome in Lebanon, as new entry rules take effect' *Washington Post* (5 Jan 2015).

[4] The countries of the Western Balkans have applied for membership of the EU and currently enjoy the formal status of 'candidate countries'.

[5] UNHCR 'Over one million sea arrivals reach Europe in 2015' (30 Dec 2015) <http://www.unhcr.org/5683d0b56.html> accessed 5 Jan 2016.

[6] Elspeth Guild *et al*, 'What is happening to the Schengen borders?' CEPS Liberty and Security in Europe Papers, No 86 (2015).

[7] Elspeth Guild, 'The Europeanisation of Europe's Asylum Policy' (2006) 18 IJRL 630.

system was considered to be the development of the CEAS. It started as a fairly simple idea that Member States are entitled to determine in which Member State an individual is permitted to make his or her asylum application, and it developed from there, but has become, in 2016, a system in crisis. This section addresses the framework within which the CEAS came into existence.

The four freedoms – free movement of goods, persons, services, and capital – are the foundation of the EU. From its inception in the early 1950s, these freedoms have driven and provided the basis for the consolidation of EU law. For the purposes of the CEAS, it is the freedom of movement of persons that provides the starting point. The first transitional period for the achievement of free movement of persons (in the form of workers and the self-employed) ended in 1968, and resulted in the development of the right through the interpretation of the treaty provisions, regulations, and directives to give it effect in the national courts and the Court of Justice of the EU (CJEU).[8]

Three events in the 1980s had profound effects on the issue of scope.[9] The first was the initial Schengen Agreement 1985,[10] in which five Member States[11] agreed to abolish all border controls on movement of persons as between themselves. Implicit in this was the inclusion of third country nationals, including refugees and asylum seekers, as beneficiaries of the abolition of border controls on persons. This was rapidly followed by the Single European Act 1987, which included, as an EU measure, the abolition of intra-Member State border controls on the movement of goods, persons, services, and capital by, at the latest, 31 December 1992. Once again, the inclusion of third country nationals was implicit, and the UK delegation raised questions about the continued legality of passport controls for persons entering the UK after 31 December 1992.[12] It is worth remembering that the second and third enlargements of the EU had taken place by this time to include Greece (1981), and Portugal and Spain (1986). The third significant event was, of course, the fall of the Berlin Wall on 9 November 1989 and the end of the era of bipolarity. Movement of persons had played its part in this event, as East German nationals travelled in increasing numbers in August 1989 through Hungary to Austria to collect their West German passports to enjoy free movement in the EU (although, primarily, they were interested in moving to the 'other' Germany).[13] The fall of the Berlin Wall was preceded and followed by substantial increases in the numbers of asylum seekers arriving in EU Member States seeking international protection. These

8 Paul Minderhoud and Nicos Trimikliniotis, *Rethinking the free movement of workers: the European challenges ahead* (Wolf Legal Publishers 2009).

9 This question was resolved in favour of EU citizens only in Case *C-22/08 Vatsouras & Koupatantze* [2009] ECR I-4585.

10 European Union (EU), Agreement 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, Schengen Agreement, 14 June 1985, Official Journal [2000] L 239, 13–18.

11 Belgium, Germany, France, Luxembourg, and the Netherlands.

12 Andrew Moravcsik, 'Negotiating the Single European Act: national interests and conventional statecraft in the European Community' (1991) 45 IO 19.

13 Michael Meyer, *The Year that Changed the World: The Untold Story Behind the Fall of the Berlin Wall* (Simon & Schuster 2009).

numbers spiked in the 1990s during the Balkan Wars, which followed the dissolution of Yugoslavia and the dismemberment of the Soviet Union.[14]

2.2 Asylum and intergovernmentalism

The first European (but not EU) treaty that brought together the issue of refugees and the abolition of border controls was the Schengen Implementing Agreement 1990 (CISA),[15] which was already well progressed before the Berlin Wall fell. In this treaty, the nuts and bolts of the Schengen system were set out, including the abolition of intra-Schengen State border controls and a specific system for the allocation of asylum seekers to Member States. This approach to State responsibility towards people seeking international protection in an area without internal border controls on persons was based on the principle that borders were still effective vis à vis asylum seekers, and that States had an entitlement to pool responsibility for them as those States themselves determined. These basics were transposed into the Dublin Agreement 1990.[16] EU Member States began to sign up to the Schengen system and, by the end of the decade, all of them were parties except Ireland and the UK, who insisted on their island particularity to justify the continuation of border controls for persons coming to their territory from other Member States. However, both countries did participate in the Dublin Agreement, which was more or less a carbon copy of the asylum section of CISA. This decade also included the fourth enlargement of the EU to include Austria, Finland, and Sweden (1995). CISA was absorbed into EU law in 1999, which gave competence and obligation to the EU to adopt the CEAS.

Two regional and/or civil wars framed the development of the CEAS. First, the disintegration of the former Yugoslavia, 1992–95, resulted in hundreds of thousands of refugees fleeing the region, often to Europe and, particularly, to Germany.[17] The sense that Germany had been left to cope with the consequences of refugee flight from the Western Balkan region was an important factor in the inclusion of asylum in the Amsterdam Treaty of 1999. Secondly, the regional war in Syria and Iraq, from 2011, tested the CEAS, built as it was on the basis of the Yugoslavia experience, and in many cases it was found wanting. The 2016 reconsideration of EU solidarity among the Member States and towards refugees is resulting in substantial changes, including, as suggested by Goodwin-Gill, the need for 'more Europe' to compensate for the shortcomings of the system.

[14] Elspeth Guild *et al*, 'New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection', CEPS Liberty and Security in Europe, No 77 (2015).

[15] EU, 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 ('Schengen Implementation Agreement'), 19 June 1990.

[16] EU, Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities ('Dublin Convention'), 15 June 1990, OJ [1997] C 254/1.

[17] Nadje Al-Ali, Richard Black, and Khalid Koser, 'Refugees and Transnationalism: The Experience of Bosnians and Eritreans in Europe' (2001) 27 Journal of Ethnic and Migration Studies 615.

It is important to remember this larger picture, since the institutionalization of the CEAS has tended to blur the issues. The EU's engagement with refugees did not start with an overwhelming obligation to ensure that the international protection obligations of the Member States were incorporated into the EU project, but rather as a side issue to the abolition of intra-Member State border controls on the movement of persons. Refugees were a minor irritant, a problem difficult to resolve because of the scale of antagonism to the reception of refugees from the interior ministries of some Member States. The big issue for the Schengen area was ensuring the confidence of all the participating States in the propriety of external border controls on persons – with over 320 million third country nationals entering the EU every year, according to the EU's border agency, FRONTEX.[18] Refugees and asylum seekers have rarely exceeded 1 million a year, although State responsibilities towards them are of an entirely different nature to those for the 320 million plus third country national visitors.

2.3 Why fingerprints?

The integrity of the CEAS was challenged by its very basis, the Dublin system of allocation of responsibility for asylum seekers.[19] This first element took shape initially in the CISA and then in the Dublin Agreement, and is still referred to, in 2016, as a 'cornerstone' of the CEAS by institutional actors. But as an allocation system, the main criterion for responsibility to receive, care for, and determine asylum applications is territorial: the State in which the asylum seeker first arrives in the EU. The consequences of the system for border States were particularly noticeable in 2014–15. An integral part of the Dublin system is the principle that the asylum seeker only has one chance to make his or her asylum claim. That claim is only admissible in accordance with the Dublin rules of State responsibility (not the choice of the asylum seeker). The creation of a fingerprint database, for all asylum seekers and persons apprehended irregularly crossing the external borders of the EU (EURODAC), has helped to identify where a specific individual should be sent. That the CEAS was based on the capacity of Member States to keep asylum seekers within their borders, when border controls among the Schengen States had been abolished, never worried the policy makers. In theory, asylum seekers would be sent back to where they 'ought' to be, no matter how many times they went somewhere else. Asylum seekers themselves developed a profound distrust of the Dublin system and many refused to be fingerprinted, sought to avoid fingerprinting, and feared coercive fingerprinting because of what they feared the outcome might be.[20] The fact that, according to the EASO, only 3 per cent of asylum seekers are ever actually sent from one Member State to another under the Dublin system, is irrelevant to the terror that the system seems to inspire.[21]

[18] On 26 Oct 2004, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) was established by Council Regulation (EC) 2007/2004.

[19] Violeta Moreno-Lax, 'Dismantling the Dublin System: MSS v Belgium and Greece' (2012) 14 EJML 1.

[20] Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP 2016).

[21] EASO, 'Annual Report on the Situation of Asylum in the European Union 2014' (2015) 87.

This fear is not necessarily ill-founded. As an individual only gets one chance to make an asylum application, he or she is desperate to make it in the country where he or she wants to live. This may be determined by the presence of family members, close or distant, fellow countrymen (or their absence, where political divisions are intense, and where new arrivals fear resident fellow countrymen may include informers, interpreters, and so on), reputation, language, colonial links, and so on.

2.4 Fairness and outcomes

At the heart of the legitimacy problem of the CEAS has always been the differential outcomes for refugees in different EU Member States. This is the issue to which Goodwin-Gill addressed his proposal for a new agency or institution competent to make asylum decisions for all Member States. In order to examine this further, two points of comparison will be used: UNHCR statistics published in 1999, the year of the commencement of EU competence for asylum; and those published in 2014, by when the second phase of the CEAS had been adopted. If the CEAS was successfully providing a fair and equitable consideration of all asylum applications in the EU, there should be similar outcomes for asylum seekers from the same countries. Further, it is worth noting that over that 15-year period, asylum seekers from three countries of origin (Afghanistan, Iran, and Iraq) have continued to arrive in the EU in high numbers. While media attention in 2015–16 is focused on Syrian refugees (who are a fairly new category), the numbers of Afghans, Iraqis, and Iranians have been fairly consistent. The overall picture in 1998, according to the UNHCR statistics, is illustrated in the tables below.[22]

Refugee Recognition Rates by Selected Member State and Country of Origin: 1998[23]

Afghanistan

Member State	% of applications[24]	% given protection
Germany	18.8	34
UK	18.1	95
Netherlands	17.6	57
Austria	14.6	16
Denmark	4.4	60

[22] The statistics provided have a time gap: the application rates are for 2000, the recognition rates are for 1998. This is the result of a lack of more precise data on recognition rates by UNHCR. Nonetheless, the consistency of the sending countries, and the lack of substantial positive developments in them during this period, may mean that when the applications made in 2000 were considered they would likely enjoy about the same rate of recognition.

[23] Source: UNHCR, 'Statistical Yearbook 1999'.

[24] Made in the EU in 2000.

Iran

Member State	% of applications[25]	% given protection
UK	19.1	77
Germany	18.1	21
Belgium	11.8	n/a
Austria	9.5	10
Netherlands	9.4	24

Iraq

Member State	% of applications[26]	% given protection
Germany	33.8	37
UK	20.4	92
Sweden	10.1	75
Netherlands	8.0	50
Austria	6.8	3

The variations in recognition rates among Member States are astonishing. Taking the example of Iraq – the second most common source of refugees in Europe: the UK had a recognition rate of 92 per cent, compared to Austria's 3 per cent, although both countries were in the top five EU States receiving asylum seekers from Iraq.

Ninety-five per cent of Afghans whose applications were determined in the UK received protection, with the UK accounting for 18.1 per cent of the overall EU applications. Austria, on the other hand, provided protection to 16 per cent of Afghans applying for asylum, being responsible for 14.6 per cent of all EU applications. Turning to Iran, the UK and Austria again represent the widest divergence on protection: 77 per cent of Iranians receiving protection in the former, and 10 per cent in the latter. Yet, in 2000, 19.1 per cent of Iranians seeking protection in the EU did so in the UK, while 9.5 per cent did so in Austria. Another odd aspect of these figures is that the 1998 recognition rate does not seem to have had any substantial effect on the choice made by asylum seekers of which EU Member State in which to apply.

[25] Made in the EU in 2000.

[26] Made in the EU in 2000.

2.5 The institutional framework and the challenges

The institutional framework of the CEAS has been built around the sensitivities of the Member States in respect of their sovereign entitlement to determine who should receive protection on their territory, consistent with their duty of *non-refoulement*. Notwithstanding the common framework of the Refugee Convention, the Member States have clung to their different understandings of their international commitments, as demonstrated in the 1999 UK House of Lords decision in *Adan*,[27] where the issue boiled down to a profound difference of interpretation, by France, Germany, and the UK (with UNHCR intervening), of Refugee Convention obligations regarding agents of persecution (State or non-State actors). The solution adopted by the House of Lords was national – UK law interprets the Convention in one way, the others in another, so the UK will follow its own route (and leave the others to do as they wish).[28] The issue shifted to the EU level with the new CEAS competence, and was resolved in the Qualification Directive.[29] Yet, as Goodwin-Gill stresses,[30] the legislative framework is not enough to result in common outcomes. A strong institutional framework is needed to prevent unjust variations.

The response of the EU institutions, once given competence to design the CEAS, was to focus on minimum standards – setting a base line that all Member States were obliged to respect as regards, in particular, reception conditions, qualification as a refugee or beneficiary of international protection, and procedures. These were set out in the first phase of the CEAS, and in 2013 the second phase moved to common standards. The first phase measures were adopted by 2005 and had to be transposed into national law within a two-year deadline. One of the key measures, an accompaniment to the Dublin allocation system, was the minimum (and now common) standards on reception conditions. All Member States were obliged, first, to provide minimum reception conditions for asylum seekers (including those subject to a Dublin decision) and, secondly, common minimum

[27] *R v Secretary of State for the Home Department, ex parte Adan*, [1998] UKHL 15 (EWCA).

[28] 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* (CUP 2010) 204.

[29] EU, Council of the European Union, 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] L 304/12–304/23; and re-cast EU: Council of the European Union, 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) 20 December 2011, OJ [2011] L 337/9. The Directive definition of 'refugee' includes persons who fear persecution by a non-State actor, which accords with best practice and the interpretation promoted by UNHCR.

[30] Goodwin-Gill (n 1).

reception conditions. This has proved to be the Achilles heel of the system, with many Member States failing to live up to their obligations.[31] Greece fell out of the Dublin system in 2012 because of its flagrant failure to provide adequate reception conditions for asylum seekers. From January 2012, when the European Court of Human Rights handed down its judgment in *MSS v Belgium and Greece*, Dublin transfers back to Greece were stopped.[32] The CJEU followed later that year with a similar judgment, on account of the appalling conditions in which asylum seekers were forced to live in Greece. Neither of these judgments, nor the efforts of EASO to assist the Greek authorities to enhance its reception capacity, has managed to resolve the intransigence of the Greek authorities regarding the provision of adequate reception conditions for asylum seekers. The movement of Syrian and Iraqi refugees through Greece and the Western Balkans has highlighted the obvious problem – neither Greece nor any country in the Western Balkans wants the refugees to stop in their countries. It took intense pressure from other EU States to close the Balkan route in January 2016, by which time many people had been stranded along the way.[33]

2.6 Did 15 years of the CEAS resolve the fairness question?

What are the outcomes? Taking the same three countries of origin of asylum seekers in the EU as those examined for 1998 (above): Afghanistan, Iran, and Iraq, the outcomes 15 years after the establishment of the CEAS, in 2013, are examined below, to determine whether the common single asylum system has proved fair and equitable.

Refugee Recognition Rates by Selected Member State and Country of Origin: 2013/2014[34]

Afghanistan

Member State	% of [EU] applications[35]	% given protection
Germany	7	67
UK	8	14
Netherlands	2	50
Austria	25	98
Denmark	6	37

[31] If Member States do not provide the agreed standards of reception, refugees will move to another Member State where they can access adequate reception conditions.

[32] *MSS v Belgium and Greece* [2011] ECtHR 108.

[33] Patrick Kingsley, 'Balkan countries shut borders as attention turns to new refugee routes' *The Guardian* (London, 9 Mar 2016).

[34] Source: UNHCR, 'Statistical Yearbook 2014'.

[35] EUROSTAT, Asylum Quarterly, report 9 (Dec 2015).

Iran

Member State	% of applications[36]	% given protection
UK	8	57
Germany	No longer in the top 5	73
Belgium	No longer in the top 5	61
Austria	3	97
Netherlands	No longer in the top 5	45

Iraq

Member State	% of applications [2014]	% given protection
Germany	6	87
UK	No longer in the top 6	37
Sweden	10	52
Netherlands	4	42
Austria	19	97

After 15 years of designing and implementing the CEAS, the variations in protection rates are almost as shocking as in 1998. For Iraqis, only 37 per cent receive protection in the UK, while 97 per cent of those who seek asylum in Austria receive protection. For Afghans, the UK and Austria again form the two extremes – protection rates of 14 per cent in the UK and 98 per cent in Austria. Iranians fare poorly in the Netherlands, with a 45 per cent recognition rate, but well in Austria, with a 97 per cent recognition rate.[37]

EASO also recognises the issue of differential recognition rates for nationals from the same countries, in particular, ones with ongoing civil or regional wars within their borders. In its 'Annual Report on the Situation of Asylum in the European Union 2014',[38] it states:

> The ... chart [Wide disparity in recognition rates among EU+ countries for some citizenships] shows that the recognition rates of Iraqi and Afghan applicants varied prominently and ranged from 13% to 94% for the first and 20% to 95% for the latter group of applicants.

[36] ibid.

[37] All of the figures are for new applications or first instance decisions.

[38] EASO Annual Report 2014 (n 21) s 2.4.2.

However, it sought to excuse this variation stating:

> It should be noted that the scattering does not necessarily point towards a lack of harmonisation across the EU+ countries in terms of decision-making practice, but may rather indicate different profiles of applicants who have the same citizenship (e.g. such as states favoured as destination countries by specific ethnic minorities such as Chechen or Kurds). Only a case-by-case analysis of decisions would determine real differences in practice or policy among states on similar types of claims.

Yet, in the same report, in EASO's analysis of the situation in Afghanistan, it states:

> These developments culminated in 2014 being the most deadly year for civilians in the recent conflict so far: UNAMA (United Nationals Assistance Mission to Afghanistan) documented 3,699 civilian deaths and 6,849 injuries, a 22% rise compared to the previous year. (Section 2.7.)

The CEAS procedures directive[39] requires that asylum seekers whose applications are rejected have the right to appeal to a judicial or administrative authority. Yet, according to EASO in its '2014 Annual Report', in some Member States success at the appeal stage was 50 per cent (Bulgaria, Italy, and Finland) – an indication of serious problems at the first instance decision making stage – but close to zero in five (unspecified) Member States. Syrians had the best success rate on appeal at 71 per cent, according to EASO, but Afghans had only a 42 per cent success rate. The rate dropped again for Iranians to 41 per cent. Goodwin-Gill's proposed new operational competence for asylum determination will need a consistent and fair appeal structure to fulfil its objectives.

2.7 Fairness to whom?

The Dublin system of allocation of responsibility for asylum seekers does not resolve the fairness issues either. According to EASO, in 2014, 65 per cent of Dublin cases (where one Member State sought to send an asylum seeker to another Member State) were 'take back' cases – that is, where an asylum seeker has made an asylum application elsewhere in the EU and 35 per cent were 'take charge' cases – where the person has not applied for asylum elsewhere but the Member State has reason to believe that he or she is the responsibility of another Member State under the Dublin criteria. Interestingly, according to EASO, the majority of the 'take charge' requests (60 per cent) were on the basis that the asylum seeker had documentation indicating legal entry in another Member State; the second largest category was family reunion (22 per cent). This leaves only 12 per cent of the 'take charge' cases being based on irregular entry into the EU via the requested State. This means that a successful strategy, for

[39] EU, Council of the European Union, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 29 June 2013, OJ [2013] L 180/60.

88 per cent of asylum seekers, is to arrive irregularly in the EU and travel as quickly as possible to the country where they want to make their asylum application, without applying in the country of entry. Their applications will be considered in the State where they apply for asylum. One could call this successful 'self re-location'. Thus, Goodwin-Gill's determination system will also need a system whereby beneficiaries of international protection are entitled to go to the Member State where they have links. Further, mutual recognition by all Member States of the status of beneficiary of international protection, coupled with a right to move from one Member State to another, will be key to ensuring that all secondary movement of refugees takes place within a coherent, legal system.

2.8 Country of origin information and the CEAS

Country of origin information (COI) of excellent and reliable quality is critical to fair CEAS decision making for asylum seekers. Some argue that if all the Member States used the same COI as a starting place the determination of asylum applications might be more coherent. In addition, an asylum applicant, or their counsel, would need the opportunity to present further information, or information that contradicts the standard 'pack'. This may seem obvious and easily achieved, but this has not proved to be the case.

EASO states in its 'Annual Report 2014' that:

> Availability and an appropriate use of country of origin information (COI) are crucial for well-informed, fair, and well-reasoned asylum decisions. In 2014, Member States and EASO continued to aim at improving the quality, efficiency and accessibility of COI by developing new methodologies and products and further developing databases.[40]

This highlights the source of the problem: 'Member States and EASO'. A number of Member States have well-developed bureaux producing COI, and are unwilling to dismantle them in favour of an EASO-centralised system. Further, while all Member States' COI units are willing to share some information with EASO, it is far from clear that they share all or, indeed, the most sensitive information, which may have been provided by their intelligence units and be confidential. Such information could even be dangerous if shared, as it may not always be reliable enough for judicial decision making. As a consequence, the range of information used by national COI units is not always consistent as regards sources and the value placed on those sources. In light of the countries chosen for networks, and the continuing disparities in recognition rates, it would appear that this approach has not yet been successful.

2.9 Extended competence

Goodwin-Gill called for a new agency to include competence, not only to implement Member States' obligations on asylum, but also on immigration, 'precisely because the arrival of those in an irregular situation, whether directly or following interception or

[40] EASO Annual Report 2014 (n 21) s 4.10.

rescue at sea, presents Member States with legal and practical challenges' that require an EU-wide response.[41] The Dublin data of EASO indicate that the majority of people in need of international protection seek to avoid applying for asylum in the country of entry in order to apply in the country in which they wish to settle. While some Member States (at the time of writing, Germany and Sweden in particular) claim that all asylum seekers want to make their applications in their countries, the EUROSTAT asylum statistics indicate otherwise. The EUROSTAT asylum report on the third quarter of 2015, issued on 9 December 2015, calculated, based on information provided by Member States, that 26 per cent of all first asylum applications presented in the EU were made in both Germany and Hungary, followed by 10 per cent in Sweden. Of course, the size of the countries is not comparable, Germany having a population of 80 million, and Hungary and Sweden both having populations of around 9.6 million.

However one looks at these figures, it is evident that asylum seekers mainly arrive by land and sea; flights are generally not possible for asylum seekers as carrier sanctions on airlines effectively prevent the arrival of persons without passports and valid Schengen visas by air. This means that the point of entry is not primarily Germany, Hungary (except perhaps for asylum seekers from the Western Balkans, who do not require Schengen visas), or Sweden.

The FRA has published weekly data on the situation of persons in need of international protection, at the request of the Commission, since the start of the 2015 so-called refugee crisis. For the week of 16–20 November 2015, at the height of arrivals from Turkey to the EU, the report describes the situation of eight countries: Austria, Bulgaria, Croatia, Germany, Greece, Hungary, Italy, and Slovenia. Austria, Germany, and Hungary consider themselves to be destination countries, although there is considerable movement from Austria towards Germany and Sweden. The situation in Hungary is fairly mixed – it is not entirely clear just how many people actually pursue their asylum applications there. Italy is also a country of asylum and transit for many asylum seekers. The other countries are primarily countries of transit. The FRA report covers new arrivals, focusing on where and why people become stranded in one country or another. This weekly report clarifies the practices of Macedonia and Greece at their common border – in particular, at the main crossing point, Idomeni – and how those wishing to move onwards and northwards through Europe become stranded in Greece.

2.10 Member States' efforts to avoid entry of asylum seekers

The Greek-Macedonian border is not the only crossing point that the report singles out as problematic. It notes that Croatia, Italy, and Slovenia are known to have refused entry to people arriving from countries that they have designated as 'not affected by war'. The FRA sources indicate that there have been push backs of new arrivals by Croatian border guards where people could not prove that they were from Syria, Afghanistan, or Iraq. On the other hand, according to the report, transit through Croatia has become faster. Croatian authorities appear to acquiesce to the perceived interests of people in transit to ensure that they get to where they are trying to go, rather than staying in Croatia and applying for asylum there.[42]

[41] Goodwin-Gill, Keynote Address (n 1).

[42] EU Fundamental Rights Agency, 'Fundamental rights at land borders: findings from selected European Union border crossing points' (2015).

The FRA reports also focuses on reception conditions (by and large inadequate almost everywhere); child protection (limited and overstretched); and the legal, social, and policy response. In this third category, the FRA reports pay particular attention to anti-foreigner backlash after the terrorist attacks in Paris on 13 November 2015, and any impact this seems to be having in the countries under consideration (surprisingly little, according to the sources in all the countries). Germany has been particularly strong in its support of EU action for common accelerated procedures for use, in particular, against nationals of the Western Balkans and North African countries.[43] The report reveals the degree of consensus, at least at the national level, that people on the move are better off moving than being blocked. Blocking actions seem to be the exception, rather than the rule, and sporadic and fairly *ad hoc*. The only country that was reported as regularly using criminal sanctions was Hungary, which has made it a criminal offence to carry out an unauthorised border crossing (mainly, ducking under or climbing over the border fence between Hungary and Serbia). In the one-week period covered by the report, 21 criminal trials were held and 17 people were convicted of this offence, which resulted in penalties of expulsion from Hungary and re-entry bans of between one and three years. Hungary was also the only country reported as illegally facilitating irregular entry or stay. According to FRONTEX, however, in the third quarter 2015, border guard reports identified 3,166 facilitators of irregular entry, a 13 per cent increase over the previous year.[44]

2.11 Irregular border crossings into the EU and asylum

Finally, if one takes into account the information produced by FRONTEX, the third quarter 2015 was a busy time. According to the FRA report on the situation at EU external borders, there were 617,412 irregular border crossings in that quarter.[45] This compares with 170,155 in the second quarter 2015, and 80,109 a year earlier in the third quarter 2014.[46] According to FRONTEX, there are high levels of unregulated border crossing into (and possibly out of) the EU – a fact that is supported by media reports of people entering, exiting, and re-entering the EU through the sea and land borders of the Western Balkan States. Yet, as the FRA report reveals, most people in need of international protection, crossing into and out of the EU, do so at the designated crossing point, for instance, at the Greek-Macedonian border, at Idomeni (there are no reports of people in need of international protection wandering through the Greek Albanian mountains). That the people crossing irregularly at these regular crossing points are in need of international protection is indicated by the FRONTEX figures: in the third quarter 2015, only 32,868 persons were refused admission to the EU; so, of the 617,412 irregular border crossings, only a tiny proportion were subject to a refusal of entry decision. Further, the figures show that border guards reported 283,353 instances of irregular stay in the third quarter 2015.[47] There is no indication

[43] EASO, 'Asylum Applicants from the Western Balkans: Comparative Analysis of Trends, Push–Pull Factors and Responses – Update' (May 2015).

[44] FRONTEX, 'Third Quarter 2015 Risk Analysis' (2015).

[45] FRONTEX, 'Annual Risk Analysis' (2015).

[46] FRONTEX, 'Third Quarter 2015 Risk Analysis' (2015).

[47] ibid.

of how many of these people subsequently applied for asylum – perhaps having been identified as irregularly present while en route to the country where they planned to seek asylum. The implication of these figures is that people are being double or triple counted, depending on the purpose of the statistics being compiled. Consequently, the figures become increasingly inflated and thus are more easily used by the media as evidence of a 'problem'.

Before leaving this subject, it is worth recalling that FRONTEX figures show that, in 2014, 320 million third country nationals subject to immigration controls turned up at the EU's external borders. FRONTEX calculates that, due to the pressure of numbers, a border guard has 12 seconds in which to make a decision to admit, or to refuse admission (or refer to secondary examination).[48] On 16 December 2015, European Tourism Day, Slawomir Tokarski, European Commission,[49] made a speech in support of the travel industry, stating that tourism contributes up to 10 per cent of EU GDP, and calling for more third country nationals to be welcomed in the EU (as tourists). The figures are sufficiently astonishing as to merit no further comment at this time. Instead, this article now returns to the need for a new European Migration and Protection Agency.

3. CONCLUDING OBSERVATIONS

EU border controls must be carried out with full respect for the Member States' international protection obligations, not only as a duty in international and regional human rights and refugee law, but also as part of EU law.[50] It seems, from the events of 2015–16, that the EU is having great difficulty in actually delivering on its obligations. As this article has discussed, 15 years of the CEAS has not resulted in a fair chance of international protection for asylum seekers in the EU. Variations between countries remain significant and have shown little improvement during this time, despite attempts to harmonize the system. This could be seen to justify the right to allocate where asylum seekers can make their claims according to the Member States' own criteria, and to mutual recognition of all negative decisions. The statistics set out in the preceding section are a stark reminder of the injustice of determination of refugee claims by 28 different asylum authorities, which are under no obligation to follow the determination of similar claims made in other Member States.

Notwithstanding the creation of an ever-increasing number of EU agencies with responsibilities towards asylum seekers, such as EASO, the FRA, and others, little progress seems to have been made. The Syria/Iraq/Afghanistan 'crises', that rose to the top of the political agenda in 2015, have only highlighted the current inadequacies of the system and the impotence of the existing agencies to deal with the issues of burning importance to refugees arriving in Europe.

There are many options open to the EU at this juncture. The most unattractive is to change nothing, continuing to claim the legal, moral, and ethical legitimacy of the Dublin system (to allocate asylum seekers to States according to their own

[48] FRONTEX, 'Twelve Seconds to Decide. In search of excellence: FRONTEX and the principle of best practice' (2015).

[49] Director of Innovation and Advanced Manufacturing, DG GROW, Opening Remarks, European Tourism Day, Charlemagne Building, Brussels, 16 Dec 2015.

[50] Arts 3 and 3A, Schengen Borders Code; and arts 18 and 19, EU Charter of Fundamental Rights.

preferences), which has brought such misery to so many people. Another option would be to strengthen the powers of some of the existing institutions, such as the FRA and/or EASO, providing them with real operational powers to ensure that people who need international protection receive it, in dignified conditions, and in accordance with their preferences. It is possible that, institutionally, these agencies are too far committed to intergovernmental approaches to their work. This may hamper their capacity even to enter into real dialogue from a position of power with national authorities, and to insist on the correct application of the EU acquis (minus Dublin, and enhanced to improve protection capacities on the ground). If this is the case, the Goodwin-Gill proposal of a new agency may be the best viable route to achieving a real and effective CEAS, which is fair to asylum seekers and refugees.

There are many questions and issues that would need resolution. Most importantly, the system would have to be truly dedicated to international protection. Any agency that became a mechanism to reduce the rates at which asylum seekers are recognised as refugees and beneficiaries of international protection to the lowest standard of any Member State would have no legitimacy and would be contrary to Goodwin-Gill's objective. One can imagine an interest in some administrative quarters for just such an outcome – an increase in refusal rates which a single institution could deliver across the EU. This must be resisted. Instead, international protection would have to be the core value and driving objective of the agency, and it would have to be guaranteed freedom from Member State interference. A residual competence for Member States to recognise beneficiaries of international protection, under national law, would need to be recognised. This would also help to ensure that any new agency would not start a race to the bottom, as regards recognising applications, as such an approach would trigger concern at the national level and would flag up the issue of national statuses contrary to the objective of the agency.

Other issues that would need to be resolved include the duty of the State to provide reception conditions for asylum seekers for the duration of the consideration of the application. Once the application has been determined and refugee status recognised, or subsidiary protection granted, the Member States would need to be required to recognise this status as an obligatory ground for the issue of a residence permit. All Member States would need to be equally bound by a favourable decision, to permit the beneficiary to move to the Member State of their choice. This would ensure that unregulated secondary movements of asylum seekers would be less likely to occur.

The Goodwin-Gill institutional proposal merits serious consideration, despite the practical issues that would need to be resolved. Most importantly, the independence of any new agency would need to be ensured, the coherence of decisions, appeal rights, and so on. Its sole duty would need to be the determination of international protection claims in the spirit of the Refugee Convention and the Member States' other international obligations.