

## The implementation of the rights of refugees and asylum seekers in Europe and Germany

### I. Introduction

- reception of refugees and asylum seekers a long humanitarian tradition and obligation
  - seeking for asylum not illegal immigration (→ cf. art. 14 UDHR)
- however, high influx and abuse for economic migration may cause social tensions
  - the recent example of Europe after 2015 (7.4 Mio. refugees and asylum seekers in EU in 2018)
- a well-conceived and -implemented asylum and refugee law can provide for effective protection, prevent abuse and promote acceptance in the population

### II. The rights

1. Under global human rights law
  - no right to asylum (→ art. 14 UDHR not legally binding) but *principle of non-refoulement* of refugees (art. 33 Geneva Refugee Convention) and in case of risk of torture or forced disappearance (art. 3 CAT, 16 CPED)
2. Under the European Convention of Human Rights
  - no right to asylum but principle of non-refoulement in case of risk of torture or inhuman/degrading treatment/punishment (art. 3 ECHR), and general rights of foreigners (art. 2, 4 Prot. 4, art. 1 Prot. 7)
3. Under the Charter of Fundamental Rights of the European Union
  - member states only bound when implementing EU law (art. 51 ChFR)
    - a) *Right to asylum* (art. 18 ChFR)
      - only guarantees compliance with Geneva Refugee Convention and art. 78 FEU Treaty
      - quality of subjective (enforceable) right DISPUTED
    - b) *Principle of non-refoulement* (art. 19(2) ChFR)
      - prohibition of removal, expulsion or extradition in case of risk of death penalty, torture or inhuman/degrading treatment/punishment
4. In the member states of the European Union
  - a) In Germany
    - aa) *Fundamental right of asylum* (art. 16a Basic Law)
      - an individual constitutional right, restricted and bureaucratically reformulated in 1993
      - grants right of entry and longterm residence and also to public support (DISPUTED)
      - only in case of *political persecution* (intense violation or imminent threat of intense violation of basic fundamental rights by public authorities in the individual case on grounds of political or religious convictions, race, sexual orientation, language, ethnical or social background)
        - not in case of war, civil war, terrorism, natural disaster and climate change, hunger, inhuman treatment, prosecution for objection to military service or if there are domestic flight alternatives
      - not in case of entry from a *safe third country* specified by law (art. 16a(2))
      - rebuttable presumption of non-persecution in a *safe country of origin* specified by law (art. 16a(3))
    - bb) Protection of refugees by the fundamental right of *human dignity* (art. 1(1) Basic Law)
      - in case of imminent serious threats to life, physical integrity or freedom not falling under the right of asylum
  - b) In other member states
    - usually no constitutional guarantee of protection
    - institutional guarantees of asylum e.g. in Poland (art. 56), Slovenia (art. 48) and Spain (art. 13(4))
    - heterogeneous fundamental rights to asylum in France (preambles 1946/1958), Italy (art. 10(3)), Portugal (art. 33(8)) and Slovakia (art. 53)

### III. The implementation

1. The European Union asylum and refugee law (→ *Common European Asylum System - CEAS*)
  - a) The extensive EU competence in asylum and refugee matters (art. 78 FEU Treaty)
    - for a common policy on asylum, subsidiary protection and temporary protection (art. 78(1))
      - to define *European uniform statuses of asylum and of subsidiary protection* (important in practice)
      - to set common rules on the procedure and for temporary protection in case of massive influx
      - to regulate criteria and mechanisms for determining the responsible member state
      - to set standards for the conditions for the reception of applicants
    - allows all kind of legal acts ("to adopt measures", art. 78(2)), in particular
      - directives (need to be implemented in the law of each member state)
      - regulations (directly applicable in the member states)

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- b) The current secondary law on asylum and refugees
- **Qualification Directive** (Directive 2011/95 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)
    - orientated towards Geneva Refugee Convention
    - provides also for protection against persecution by non-State actors, if it can be demonstrated that the state and international actors are unable or unwilling to protect (art. 6 lit. c)
    - provides for *subsidiary protection* in case of threat of death penalty, torture etc. in the country of origin or to a civilian's life or person *in case of armed conflict* (cf. art. 15)
    - regulates in detail the content of protection (non-refoulement, residence, maintaining family unity, free movement, employment, education, healthcare, social welfare, access to integration programs etc., art. 20 ff.)
  - **Asylum Procedures Directive** (Directive 2013/32 on common procedures for granting and withdrawing international protection)
    - standards for access to the procedure, information, counselling, personal interview, legal assistance, border procedures, the application of the safe third country and country of origin concepts etc.
    - requires *right to an effective remedy before a court* or tribunal (art. 46)
  - **Reception Conditions Directive** (Directive 2013/33 laying down standards for the reception of applicants for international protection)
    - standards concerning information, documentation, residence and free movement, (non-) detention, family unity, schooling, access to labour market, vocational training, living standard, health care etc.
    - member states free to introduce more favourable provisions
  - **Return Directive** (Directive 2008/115 on common standards and procedures in Member States for returning illegally staying third-country nationals)
    - in particular for detention for the purpose of removal (art. 16 ff.)
  - **Dublin III Regulation** (Regulation 604/2013 establishing the criteria and mechanisms for *determining the Member State responsible* for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person)
  - **Eurodac Regulation** (Regulation 603/2013 on the establishment of Eurodac, a European database for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013)
  - **Mass Influx Directive** (Directive 2001/55 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof)

## 2. The German asylum and refugee law

- nowadays basically an advanced implementation of the European standards
  - most matters regulated in the very detail; in practice often the details are decisive
- a) The **Asylum Act** [Asylgesetz]
- clear distinction between asylum status (§ 2), refugee status (§ 3) and subsidiary protection (§ 4)
    - granted also to family members (§ 26)
    - asylum/refugee status entails residence permit for 3 years, subsid. prot. for 1 year (§ 26 Residence Act)
  - special authority *Federal Office for Migration and Refugees* [Bundesamt für Migration und Flüchtlinge] with numerous local branch offices
  - detailed regulation of the **asylum procedure**
    - border authorities refer asylum seeker immediately to a *reception center* where he files his application personally at the local Federal Office branch office; those entering from safe third countries are refused entry (§§ 18, 14)
    - *identification measures* shall prevent abuse (§ 16)
    - applicant must *cooperate personally* in the establishment of the facts of his case and present himself all relevant facts and necessary details (§§ 15, 25(1-3))
    - application deemed withdrawn if applicant fails to pursue it, e.g. goes underground (§33)
    - self-created post-flight reasons usually irrelevant (§ 28)
    - *personal hearing* (§§ 24, 25(4-7)), if necessary with interpreter or translator (17)
    - *reasoned decision* of the Federal Office with explanations about consequences and remedies (§ 31)
    - usually no new procedure in case of follow-up applications or secondary applications after rejection in other member states (§§ 71, 71a)
  - during the asylum procedure
    - compulsory residence in reception centres (§ 71)
    - restriction of free movement to the district of the immigration authority (§ 56 et seq.)
    - restriction of employment (§ 61)
  - *measures for termination of residence* if no status is granted and there are no obstacles to deportation under the Residence Act (§ 34 et seq.)
  - special rules for manifestly unfounded applications (for economic reasons, with forged evidence, deception on identity or citizenship etc.)
  - legal remedies: legal action before administrative court; exceptionally appeal before higher admin. court (§§ 74, 78)
- b) The **Asylum Seeker's Benefits Act** [Asylbewerberleistungsgesetz]
- complemented by special clauses in other laws on social benefits
  - **80 different constellations** (under 5 different kinds of residence permits)
  - during residence in reception centres predominantly benefits in kind, after that cash benefits

#### IV. Problems

1. Strong deficits in the implementation of the EU asylum and refugee law in practice
2. The lack of solidarity among the EU member states in the distribution of refugees
  - the (so far) unsanctioned refusal of Poland, Hungary and other member states to accept refugees
  - the need to reform the Dublin III Regulation which imposes most of the burden on the state of first entry into the EU
3. The high number of refugees
  - and the permanent threat of the Turkish president Erdoğan to send some millions more...
4. Problems of border protection
  - widespread illegal immigration into the EU and illegal transit to the desired host state
  - EU's external borders secured with the support of the European Border and Coastguard Agency FRONTEX
  - a humanitarian problem: organised illegal immigration by the sea in non-seaworthy boats provoking rescue missions
5. Difficulties to enforce the obligation of rejected applicants to leave
  - in particular: difficulties to prove their identity to their countries of origin
  - proposal: EU agreements with third countries on the accomodation of rejected refugees with similar cultural background

#### V. Conclusions for the development of an Indonesian asylum and refugee law

- prepare a *separate law* that is well-coordinated with the Law on Immigration and other laws
- orientate towards the terminology and concepts in international law, in order to avoid complications
- introduce two or three *different statuses of protection* depending on the situation of the refugees
- *ensure effective removal of applicants in case of rejection* of their applications
- try to *keep the new law simple* - the legal implications will anyway be complicated soon!

#### Further Reading

*Cherubini, Francesco*: Asylum Law in the European Union, 2016

*Comisión Española de Ayuda al Refugiado*: The challenges faced by the German asylum system today, 2019, [www.cear.es/wp-content/uploads/2019/04/GERMANY-REPORT\\_-CEAR.pdf](http://www.cear.es/wp-content/uploads/2019/04/GERMANY-REPORT_-CEAR.pdf)

*Federal Office for Migration and Refugees (editor)*: The stages of the German asylum procedure. An overview of the individual procedural steps and the legal basis, 2<sup>nd</sup> edition 2019, [www.bamf.de/SharedDocs/Anlagen/EN/AsylFluechtlingsschutz/Asylverfahren/das-deutsche-asylverfahren.pdf?\\_\\_blob=publicationFile&v=12](http://www.bamf.de/SharedDocs/Anlagen/EN/AsylFluechtlingsschutz/Asylverfahren/das-deutsche-asylverfahren.pdf?__blob=publicationFile&v=12)

*Hailbronner, Kay; Thym, Daniel (editors)*: EU Immigration and Asylum Law. A Commentary, 2<sup>nd</sup> edition 2016

*Smyth, Ciara*: European Asylum Law and the Rights of the Child, 2016

*Sokolska, Ina*: European Parliament Fact Sheets on the European Union: Asylum Policy, 2019, [www.europarl.europa.eu/factsheets/en/sheet/151/asylum-policy](http://www.europarl.europa.eu/factsheets/en/sheet/151/asylum-policy)

*Yabasun, Dersim*: The Common European Asylum System. Vulnerable Asylum Applicants, 2019

See also the publication series Immigration and Asylum Law and Policy in Europe (by the editors *Brill* and *Nijhoff*; since 2001).

## **The implementation of the rights of refugees and asylum seekers in Europe and Germany**

### **Legal provisions**

#### **Excerpt from the Charter of Fundamental Rights of the European Union (ChFR)**

##### Art. 18

##### Right to asylum

The *right to asylum* shall be guaranteed *with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967* relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as ‘the Treaties’).

##### Art. 19

##### Protection in the event of removal, expulsion or extradition

...

2. 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.

#### **Excerpt from the Treaty on the Functioning of the European Union (FEU Treaty)**

##### Art. 78

##### [Asylum policy]

1. The Union shall develop a *common policy on asylum, subsidiary protection and temporary protection* with a view to offering appropriate status to any third-country national requiring international protection and ensuring *compliance with the principle of non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a *common European asylum system* comprising:

- (a) a uniform status of asylum for nationals of third countries, valid throughout the Union;
- (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;
- (c) a common system of temporary protection for displaced persons in the event of a massive inflow;
- (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;
- (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;
- (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;
- (g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.

3. In the event of one or more Member States being confronted by an *emergency situation* characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

#### **Excerpt from the Basic Law for the Federal Republic of Germany (Basic Law)**

##### Art. 16a

##### [Right to asylum]

(1) *Persons persecuted on political grounds* shall have the *right of asylum*.

(2) Paragraph (1) of this Article may *not* be invoked by a *person who enters* the federal territory from a member state of the European Communities or *from another third state in which application of the Convention Relating to the Status of Refugees and of the Convention for the Protection of Human Rights and Fundamental Freedoms is assured*. The states outside the European Communities to which the conditions referred to in the first sentence of this paragraph apply shall *be specified by a law* requiring the consent of the Bundesrat. In the cases specified in the first sentence of this paragraph, measures to terminate an applicant’s stay may be implemented without regard to any legal challenge that may have been instituted against them.

(3) By a law requiring the consent of the Bundesrat, *states* may be *specified in which*, on the basis of their laws, enforcement practices and general political conditions, it can be safely concluded that *neither political persecution nor inhuman or degrading punishment or*

*treatment exists*. It shall be presumed that a foreigner from such a state is not persecuted, unless he presents evidence justifying the conclusion that, contrary to this presumption, he is persecuted on political grounds.

(4) In the cases specified by paragraph (3) of this Article and in other cases that are plainly unfounded or considered to be plainly unfounded, the implementation of measures to terminate an applicant's stay may be suspended by a court only if serious doubts exist as to their legality; the scope of review may be limited, and tardy objections may be disregarded. Details shall be determined by a law.

(5) Paragraphs (1) to (4) of this Article shall not preclude the conclusion of international agreements of member states of the European Communities with each other or with those third states which, with due regard for the obligations arising from the Convention Relating to the Status of Refugees and the Convention for the Protection of Human Rights and Fundamental Freedoms, whose enforcement must be assured in the contracting states, adopt rules conferring jurisdiction to decide on applications for asylum, including the reciprocal recognition of asylum decisions.

### **List of European Union secondary law on asylum and refugees**

1. Qualification Directive (Directive 2011/95 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)
2. Asylum Procedures Directive (Directive 2013/32 of 26 June 2013 on common procedures for granting and withdrawing international protection)
3. Reception Conditions Directive (Directive 2013/33 of 26 June 2013 laying down standards for the reception of applicants for international protection)
4. Return Directive (Directive 2008/115 of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals)
5. Dublin III Regulation (Regulation 604/2013 of 26 June 2013 establishing the criteria and mechanisms for *determining the Member State responsible* for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person)
6. Eurodac Regulation (Regulation 603/2013 of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice)
7. Mass Influx Directive (Directive 2001/55 of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof)

### **German legislation on asylum and refugees**

1. Asylum Act [Asylgesetz]
2. Asylum Seeker's Benefits Act [Asylbewerberleistungsgesetz]
3. See also Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory (Residence Act) [Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Aufenthaltsgesetz)]