Protect

The Right to International Protection

Institutional architecture historical analysis
in selected EU countries
(Part II, until 2018)

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The Right to International Protection: Institutional architecture historical analysis in selected EU countries (Part 2, until 2018)

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List of Abbreviations

AIND: Archives Immigratie en Naturalisatiedienst
AIO Brussels: Archives Immigration Office Brussels
AN: Archives nationales Paris
APD: Asylum Procedures Directive
AOFPRA: Archives Office français de protection des réfugiés et apatrides
AT: Administrative tribunal
AUNHCR: Archives United Nations High Commissioner for Refugees Geneva
AO: Asylum office
BO: Branch Office
CAHAR: Committee ad hoc of Experts on the Legal Aspects of Refugees
CEAS: Common European Asylum System
CJEU: Court of Justice of the European Union
CIREA: Clearing House on Migration or Centre d'Information de Réflexion et d'Echange en Matière d'Asile
ECHR: European Convention of Human Rights
ECtHR: European Court of Human Rights
EP: European Parliament
EU: European Union
EURODAC: European Asylum Dactyloscopy Database
FSM: forum Suisse pour l'étude des migrations
IGC: Inter-governmental Consultations on Asylum, Refugee, and Migration Policies in Europe, North America, and Australia.
IO: Immigration office
KADOC: Katholiek Documentatiecentrum Leuven
MUC: Manifestly Unfounded Claims
NAB: National Archives Brussels
NATH: National Archives The Hague
PO: Protection Officer
QD: Qualification Directive
RAPD: Recast Asylum Procedures Directive
RQD: Recast Qualification Directive
RSD: Refugee Status Determination
SCO: Safe Country of Origin
STC: Safe Third Country

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Introduction

This report offers the historical material to analyze how different institutional architectures have affected the quality of asylum determination and to identify the institutional architectures that have performed best in the past. While prescribing common goals and specific methods for the protection of refugees, the Global Compact on Refugees (GRC) proposes few procedures or institutional arrangements for governance. The EU's reforms on asylum procedures, on the other hand, give a more detailed description of the asylum determination procedure that the Member States are expected to deploy. Neither the GRC nor the European Union's Asylum Procedures Directive, however, give any prescription on the nature of the institutional architecture in which asylum decisions are to be made. Through this historical analysis we assess which institutional architectures of asylum determination may be instrumental in achieving high international standards in asylum policy implementation.

Both this document (Part 2) and the previous one (Part 1) are working documents. Our objective with both documents is to provide strong foundations for a comparative analysis. In this working document we analyze the position of the asylum offices from the 1990s onward. Part 1 gave an overview of asylum policy and the position of the AO between 1951 and 1993, at a time when nation states in Western Europe still decided sovereign about their protection policy. This report analyses asylum policy from 1993 onward when the ten national states of our sample[1] still decided largely themselves, with little interference of the European Community[2] on their immigration and asylum policy. However, some coordination started with the Schengen and Dublin agreements.

The first chapter analyses how the asylum institutions, in particular the AO either as independent institutions or submerged in the immigration office (IO) strengthened their position in the institutional landscape of the West European states. The chapter gives also an overview of recognition policy. The rise of new protection statuses to cover so-called lacunae in the coverage of protection needs by the Convention of Geneva is central to this chapter. Lacunae which the ECHR exposed; however, it turns out that the authorities in West European states had also other reasons to develop new protection statuses. While most states of our sample had by 2000 strong institutions for handling asylum requests in Greece and to a lesser extent in Italy the AOs were only created in the early 1990s and had less experience in handling asylum requests. These young institutions were not so successful in managing their asylum caseload, partly due to several spectacular rises in asylum requests they had to process. Only in the second decade of the 21st century they acquired a firm position in the institutional architecture of asylum. Therefore, the institution building will be analyzed for both countries until 2018. Chapter 2 starts in 2006, two years after the qualification directive 2004//83/EC which is the moment the European Union acquired considerable impact on the functioning of the AOs in Europe. The qualification directive 2004//83/EC addressed with subsidiary protection the lacunae in protection which the ECHR had exposed but tried to harmonize the recognition policy within the European Union. Chapter 3 starts in 2011 when the Common European Asylum System was plunged into a crisis from which it has not recovered yet.

For this overview we used extensively archives which shed light on how immigration and asylum policy evolved throughout time. In particular the archives of UNHCR and OFPRA gave us insight on how Asylum Offices (AO) functioned. The archives of OFPRA provided us material beyond France as they included the files on CIREA -the platform used for exchange between EC asylum offices- which we could consult until 1996. The period after 2004 when

[1] For the reason why we chose this sample (Austria, Benelux, Denmark, France, Germany, Greece, Italy and Switzerland) see Part 1.

[2] The Maastricht Treaty of 1992 removed the word "economic" from the Treaty of Rome's official title *Treaty establishing the European Economic Community (1957).*

the European Union had important influence on immigration and asylum policy in the member states is only treated in a concise manner. Chapter 2 covering the period 2004 to 2011 is thus largely based on literature and some interviews. The traditional tools of historical research, the archives of UNHCR, of Asylum Offices (AO) and Immigration Offices (IO) are thus not available for his period. We also limited the number of countries we focused upon. Switzerland is not discussed in chapter 2 as we focus on the developments within the European Union. Denmark opted-out from the EU immigration domain, which meant it could choose freely to adopt some EU-decisions, but Danish policy was not inside the scope of CJEU jurisdiction. Before 2000 both countries had exercised considerable influence on the development of asylum policy in Western Europe, this is much less the case, at least directly in the first two decades of the 21st century. For institutional, legislative and political changes we mainly focused on European developments and only when asylum institutions in the EU-states of our sample underwent important changes did we provide an overview of these changes. Chapter 3 is rather an epilogue for this historical research project as we only focus on the recast asylum directives and the asylum institutions in Italy and Greece, elsewhere the asylum institutions were firmly established and no important changes, at least to our knowledge occurred. The challenge which the Mediterranean countries, Italy and Greece, posed in this time period for the asylum policy of the European Union was broader. First of all because asylum seekers increasingly gained access to the EU-territory by travelling over the Mediterranean Sea and either applied for asylum in Italy and Greece or travelled through these countries on their way to apply for asylum in another EU-state. Secondly because the performance of the Italian and in particular Greek asylum institutions was heavily criticized by NGO's, UNHCR and even the ECtHR. This criticism led to a thorough reorganization of these AOs which is central to chapter 3.

In this working document we bring together the vast material relevant to answer our research question. Two historically different, but interrelated processes had to be brought together. We outline in this report first the historical evolution of immigration policy, mainly how West-European states developed, concomitant with a restructuration of their post-industrial economies a seemingly more elaborated migration control system than before. Secondly, we focus on how this affected refugee policy. Within refugee policy we see how migration control conflicted in the last decades of the 20th century with the Geneva Convention (1951), and even more so with the codification of proper state behavior in the European Convention of Human Rights. An enlarged human rights' regime that challenged states and their existing asylum institutions and transformed them.

Covid delayed our research trips to the archives of UNHCR in Geneva and therefore in this working document most of the material relevant for our research in this rich archive has been integrated. Part 1, which covers the period until 1992, is already accessible since May 2022, but an update for that period in which more archival material is integrated, mainly from the UNHCR archive is still forthcoming. However also this working document is not a final version as material from a second trip to Geneva has still to be integrated in our analysis, as well as material from the archives of German asylum institutions. Most importantly the analysis has to be pursued further. We structured the historical material in a meaningful way around our research questions. This report enables us to reflect on the role of the first instance asylum institutions in the protection of refugees in Europe in the last three decades. When the research within the Protect project will be finalized, we will be able to conclude if throughout this nearly three quarters of a century those at the frontline of refugee protection fulfilled their duty to protect and whether the institutional position of these protection officers mattered.

Frank Caestecker & Eva Ecker, 10.2022
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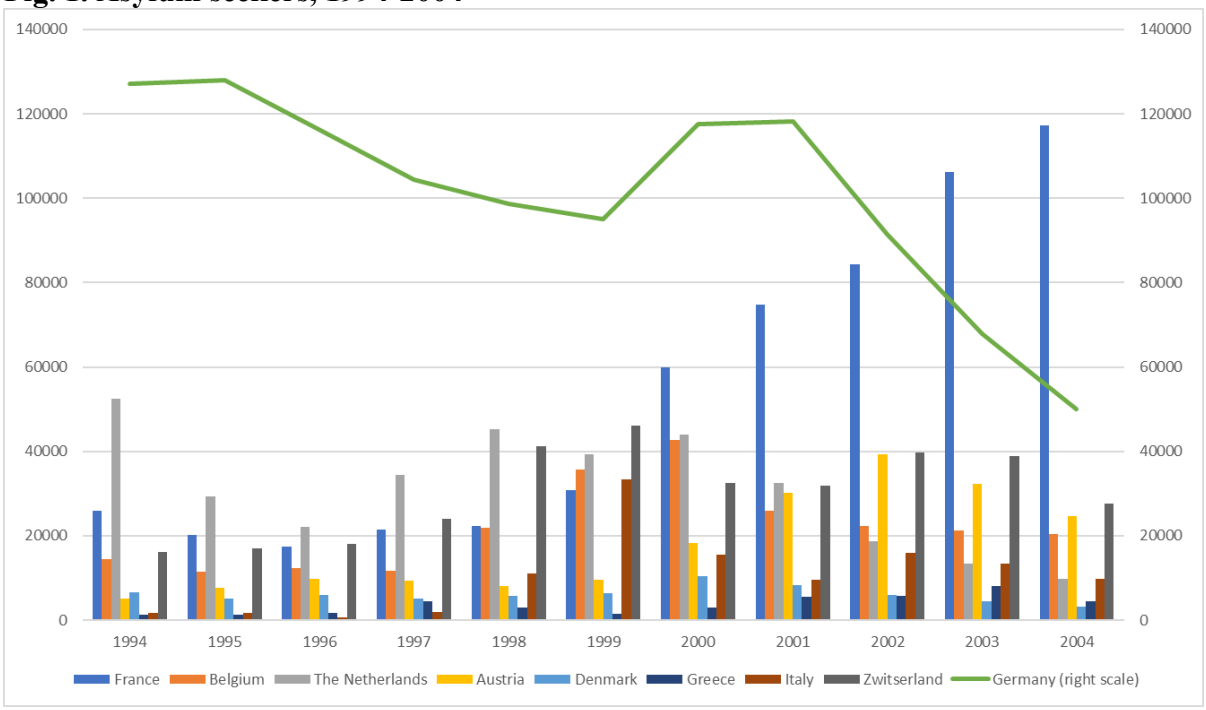
1. A new asylum regime adapted to the deportation turn in immigration policy, 1994-2006

In the second half of the 1990s, in comparison with the early 1990s, the annual number of asylum applications in continental West Europe dropped by a third. At the same time the asylum flows to Europe also changed directions. While in 1991 83% of all asylum requests in Europe were registered in our ten countries, by 1999 their share had declined to 69%.[3] In particular the United Kingdom and Ireland's share had risen (from 8% in 1991 to 18% in 1999) but also Eastern Europe[4] took a large share (from 1 to 6%), while the Scandinavia countries (without Denmark) and the Iberian Peninsula oscillated in the 1990s around respectively 5 and 2% of the asylum flows to Europe. Also, within our sample of countries there was a redistribution. The German share shrank to a third of all asylum seekers arriving in continental West Europe by 1999, which coincided as Fig. 1. illustrates with a rise in the share of other countries, in particular the Netherlands and Switzerland, while France's share hardly rose. However, during these first years of the 21st century France became an ever more important destination, even outrunning Germany in 2003 and 2004.

In the second half of the 1990s Europe experienced a stabilization in the annual number of asylum applications as no major crisis generated large numbers of refugees. No individual country of origin was producing more than 10% of all asylum applications.

Fig. 1. Asylum seekers, 1994-2004[5]



The drop in asylum applications was the result of a deliberate policy. Pre-entry measures were used to stem the flow of asylum seekers at the source, transit or at entry point and turned out to be very effective to keep asylum seekers travelling by air out. Visa requirements were used for

[3] For (the percentages in) this paragraph we include Portugal, Spain, Ireland, the United Kingdom, Belgium, the Netherlands, Switzerland, Italy, Malta, Greece, Austria, Denmark, Norway, Finland, Sweden, Czech Republic, Poland, Slovakia, Hungary, Romania, Bulgaria.

[4] Czech Republic, Poland, Slovakia, Hungary, Romania, Bulgaria

[5] As discussed in part I, 1.3.3., some figures might include subsequent or other types of applications (UNHCR 2021).

a country specific approach.[6] The experience in the 1990s showed that this pre-entry measure of an individual country redirected the asylum seekers to neighboring countries. Little distinction was made in this pre-entry measures between immigrants and refugees. The Schengen group considered that for the EC visa requirements would be only effective if there would be a common concerted effort about which nationalities were subject to visa requirements.

The effectiveness of carrier sanctions had been proven and the Schengen treaty made carrier sanctions mandatory for all countries. Carrier sanctions were introduced in all our European continental countries that sanctioned the companies if they transported passengers when they were not properly documented. The transport companies obtained liability waivers, partly through negotiation, partly through court cases. The authorities could waive the fines if that transport company showed willingness to prevent insufficiently documented immigrants from arriving at the border. Training courses were offered to the airlines. Instituting documentation checks in the source countries was also much appreciated, certainly if they listened to the so-called non-binding advice of the immigration officers stationed in those countries. The authorities also stimulated the airlines to copy the identity documents of their passengers at the time of embarkation so that destroying these documents en route was less effective (Rodenhäuser 2014; Baird 2017; Scholten & Minderhoud 2008). Carrier sanctions had been and were still effective when dealing with air transport, but it was much more difficult to implement fines on transport companies who moved people across land borders. Certainly, when border controls were abolished within the Schengen area this instrument became largely ineffective.

As a result of carrier sanctions, visa procedures and the introduction of pre-screening procedures at the airports the share of asylum applications made in the airport dropped while those filed within the country increased. This trend meant that asylum procedures within the country gained significance in the management of the asylum flows. Admissibility and accelerated procedures were applied to all applications irrespective of where the application was filed. The criteria applied for these specific procedures were common to all countries in our sample, respectively first country of asylum and manifestly unfounded applications. Since the early 1980s the protection officers had to filter out manifestly unfounded cases, but asylum seekers with any ground to refugee status should be allocated to a regular procedure.[7] As outlined already before by 1986 Denmark started to experiment very effectively with the concept safe third countries, followed by Austria, Switzerland and Germany in the early 1990s and, as Costello (2016: 605) argues, '[i]nformal horizontal policy dynamics ensured the quick spread of these practices'. By the end of the decade virtually every Western European state implemented a safe third country policy (Byrne, Nell & Vedsted-Hansen 2004). The fora for such a spreading of practices were the Schengen group and the Intergovernmental Consultations

[6] For example, as mentioned before (see 3.2) France and Switzerland had imposed airport transit visa on some nationalities. By 1997 Switzerland required still airport transit visa only for the nationals of Iraq and Libya. For nationals of Afghanistan, Angola, Bangladesh, Bosnia Herzegovina, Croatia, Ethiopia, Federal Republic of Yugoslavia, Ghana, India, Iran, Lebanon, Macedonia, Nigeria, Pakistan, Somalia. Sri Lanka, Turkey and Zaire only if they did not hold a visa or residence permit for an EFTA, EC or North American country (IGC 1997: 325). According to Amnesty International & France Terre d'Asile (1997: 147) France demanded a transit visa in 1997 for nationals of Afghanistan, Eritrea, Iran, Irak, Liberia, Nigeria, Libye, Pakistan, Sierra Leone and Sri Lanka. In 2007 the French required transit visa for nationals of Albania, Angola, Bangladesh, Ethiopia, Ghana, Haiti, Somalia and Zaire. IGC 2007: 169.

[7] In most countries the interviewer and the decision-maker were the same person, but in some countries (for ex. Denmark and Greece) they were distinct, but the decision-maker could invite the applicant for a second interview if any clarification was required.

on Migration, Asylum and Refugees (IGC).[8] These countries dismissed applications of asylum seekers who came from a safe third country. The admissibility and accelerated procedures mostly excluded in-depth interviews. Post-entry measures were also introduced. As well regular social assistance as the authorization to work were increasingly denied. Benefits were only provided in kind, rather than in cash form. Authorizing asylum seekers to work would make them less of a burden on national resources, but it was considered to work as a pull factor.

The application of the concept safe third countries was one of the reasons for the rise in for-profit smuggling, necessary for refugees to get the opportunity to apply for asylum. Although by 1995 free travel existed within the Schengen zone the external border control had intensified and in order to be able to enter Schengen territory a thriving market for professional smugglers had been created. Also, the greater importance attached to deportation of rejected asylum seekers must have created tensions. Heavy handed deportation practices made victims: Semira Adamu in 1998 and Markus Omofuma the next year were during their deportation suffocated at the hands of respectively the Belgian and the Austrian police. Already in 1992, the Dutch police had inflicted severe brain damage on Constatin Rudaru during his deportation. At the same time the role of the asylum offices became more important as they had to assure that when unwanted immigrants were interned and deported no refugees would fall victim of this policy.

1.1. European policy making from Schengen to Amsterdam

From 1991 onward national parliaments started to ratify the Schengen Convention. The removal of border controls did not begin until the Schengen Agreement entered into force on March 26, 1995, five years after its signature. By 1995, all EU member states, except for UK and Ireland, had joined the initiative. The UK and Ireland as well as Denmark had not been so interested in a borderless European region. They were adamant about exercising their full national sovereignty and therefore preferred to retain their national borders. In the end Denmark, probably due to its less favorable geographical position for an isolated strategy joined Schengen. The high level of requirement for efficient external border control delayed the implementation of the Schengen Agreement in Italy (until October 1, 1997) and Austria (until October 1, 1998).

The Schengen Border Code allows member states to retain considerable competences in the imposition of internal borders. They can temporarily and unilaterally re-introduce controls at internal borders. The European Commission has only marginal control of the use of these competences. Since its launch in 1995, the majority of personal data held in the Schengen Information System (SIS) concerns third-country nationals who have been refused entry into the Schengen territory. The Germans wanted to register in SIS not only third country nationals

[8] The forum has been, when it existed thirty years the subject of a commemoration book by Wall (2018). Wall (2018:48) quotes Mike Bisi, deputy coordinator of IGC (2000-2009) who evokes that in the beginning of IGC "there was often a feeling of tension in the air, especially between the participating states and UNHCR", but the author does hardly elaborate on these tensions. This intergovernmental forum extended beyond Europe, as also Australia, Canada (both from 1987 onwards), and the US (from 1990) joined the organization. This secretive organization still does not allow independent researchers access to its archives of the 1980s. Wall used a "wealth of material from the IGC archives that—owing to the privacy that this publication describes as one of IGC's 'core operating principles'—is not in the public domain" (Wall 2018: 6). We contacted IGC to have access to their archives for the period before 1992 as the states, member of the IGC have at most a 30 year period for access to their archival holdings. We received the following response " We are sorry to let you know that the archives cannot be consulted due to the fact that the IGC operates in confidence, and external parties cannot have access to IGC archives. Moreover, as most early IGC meetings were informal, we have limited paper archives dating back to the mid 1980's, and we have no capacity to properly organise paper archives for consultation. Even if permission was provided by all present and former IGC States, due to our limited resources and staffing, it would be prohibitively resource intensive to retrieve/vet the information for you" Matias Gonzales, senior administrative officer to the authors, 9.9.2022.

on public order offenses but also rejected asylum seekers. The Dutch successfully opposed this proposal. However, once SIS became operational, the German authorities registered also rejected asylum seekers. The practice was only terminated in 1999 after the French *Conseil d'Etat* repeatedly held that this was in violation of the Schengen Implementing Agreement (Oelgemöller e.a. 2020; Brouwer 2008). The lifting of border controls within the Schengen area went along with the imposition of an obligation to carry an ID, which was no problem for Germany and Belgium as they had required such an obligation since the beginning of the 20th century but for the other countries this requirement was something radically new (Oelgemöller e.a. 2020).

The Schengen agreement required signatory states also to establish carrier sanctions and to adopt a common visa policy (Paoli 2015 and 2020). The Schengen states had agreed to a list of 133 states whose citizens needed a visa to enter the Schengen territory. In 1999 this became a regulation. In addition, the EU member states retained the right to require a visa from countries others than those on the common list (Lavenex 2001: 167f). These measures made it much more difficult for refugees to reach the territory of continental European states to apply for asylum.

1.1.1. The Dublin Convention and EURODAC

The ratification of the Dublin Convention signed in 1990 took much longer than the ratification of the Schengen agreement. On September 1,1997 the Convention entered into force. The ratification took seven years (Lavenex 2001: 116). Contemporaneous with the Dublin agreement, a computerized fingerprint identification system for asylum seekers (EURODAC) was developed in order to prevent multiple asylum applications in the European member states and thus serve as a tool to assure the single responsibility rule of the Dublin Convention. This project would also take years to be implemented. In 1989 fingerprinting of asylum seekers was introduced in Belgium and France. A national fingerprint database to prevent multiple applications was fully working by 1993 in both countries. In the meantime, Austria, the Netherlands, Switzerland, and Germany had embarked on setting up a national database. In France, an asylum seeker's refusal to be fingerprinted constituted grounds for dismissing the asylum request. In Denmark prior to 1995, only an asylum seeker whose identity was in doubt could be fingerprinted, but in 1995 Denmark also decided to fingerprint all asylum applicants (IGC 1994: 13; IGCC 1997: 120). These databases were limited to the national space; exchange of information between states was still rare. The informal exchange of fingerprints between Switzerland and Austria in the early 1990s yielded 10% of the cases having applied for asylum in both countries (IGC 1994). The Northern EU-countries wanted the database to also include fingerprints of irregular immigrants, be they apprehended at the border or within the territory of a member state, while the Southern states-- traditional transit states--wanted the database to include only those who applied for asylum in their country. Irregular immigrants found on their territory on the way to Northern Europe should not be their responsibility. In 2000 the Northern countries won the day, although only the fingerprints of asylum seekers were determinant for deciding which state would be responsible for an asylum claim (Lavenex 2001: 117). It was not until January 2003 that the fingerprint control system started operating Europa wide.

1.1.2. The London Resolutions

The Maastricht treaty in 1992 identified a series of policy areas as "matters of common interest": these included asylum, crossing of external borders, and immigration. By the end of 1992 the ministers of Justice and Interiors of the EU member states agreed upon some objectives for asylum policy, the so-called 'London Resolutions'. These intentions were related to aspects that would later become the key concepts of the European Asylum System: the notion of "manifestly unfounded claims" and accelerated procedures that arose from the concepts of

Safe Third Country (STC)[9] and the Safe Countries of Origin (SCO). The London resolutions, although not legally binding, 'urged' all member states to adopt an accelerated asylum procedure. They were indirectly influential as some member states actually changed their national policy to align with the London Resolutions. In the long term, the London Resolutions determined the policy agenda of European Asylum policy development (Guild 2006, 638; Costello 2005).

The first discussions regarding the establishment of a Common European Asylum System (CEAS) go back to 1996 when talks about complementary protection on European level started. At first this status was supposed to entail both existing national *de facto* refugee statuses and humanitarian statuses, as many member states did not distinguish between those two grounds. In a 1988 study of the European Council, medical conditions were the main motive for humanitarian protection, followed by 'a state of war' in the home country or a risk of facing inhuman treatment or punishment. The Council distinguished between different categories of the existing practice. While one category contained 'refugee-like situations', including situations in which the state in the country of origin was unable or unwilling to protect against persecution, a second category of national *de facto* statuses referred to 'humanitarian cases', which included medical reasons, age and family circumstances. A third category referred to 'general circumstances', including war situations, civil war or '*national or ethnic disturbance, political instability, random violence or a poor human rights situation and famine or natural or environmental disasters, the unwillingness of the country of origin to re-admit asylum seekers and difficulties in obtaining reliable information about the situation in the country of origin'* (Feijen 2021: 75, 82). The discussion evolved towards an understanding that complementary protection would be meaningful in light of article 3 of the ECHR, at least that was what the Dutch proposed during their presidency of the European Council in the first half of 1997.[10]

CIREA and the High-Level Working Group on Asylum on recognition of refugees

In 1998 the High-level Working Group on Asylum and Migration was established within the European Council. This Working Group was composed of high-level officials representing the Commission and also the ministries of Foreign Affairs, Justice, and/or Interiors of the member-states. Representatives from NGO's[11] and UNHCR were also invited to the meetings, which were chaired by Born, a representative of the German ministry of Foreign Affairs. The German presidency did not think it was efficient for each member of the High Level Working Group to cover the entire scope of the Working group, which is why subdivisions were created, one of them the Asylum Working Party.[12] The purpose of this working group was *'to establish a common, integrated, cross-pillar approach targeted at the situation in the most important countries of origin of asylum-seekers and migrants'.*[13] The following major countries of origin of asylum seekers would be scrutinized: Afghanistan/Pakistan, Albania (Kosovo), Morocco, Somalia, and Sri Lanka.[14] The Asylum Working Party of the High Level Working Group had no formal relationship with CIREA

[9] Another resolution of the ministers of Justice and Interiors of the EU member states followed in 1995, allowing derogations from basic procedural guarantees in STC cases as, for example, the principle of a suspensive appeal.
[10] 6246/99 LIMITE ASILE 7
[11] Migration Policy Group, Amnesty International, ECRE, UNHCR…
[12] 5337/99 LIMITE CK4 4 ASIM 3
[13] 5264/99 LIMITE JAI 1 AG 1
[14] 52641/2/99 REV 2 UMITE JAI 1 AG 1, see the preliminary discussion in (5264/2/99 REV 2 LIMITE JAI 1 AG 1, 5264/1/99 REV 1 LIMITE JAI 1 AG 1, 5264/99 LIMITE JAI 1 AG 1). At the start, each member state would be responsible for gathering country of origin information (COI) of one country of origin. Germany for Iraq, Italy for Albania, the Netherlands for Afghanistan, Austria for Kosovo, Spain for Morocco, the UK for Sri Lanka and Sweden for Somalia. A5-0304/2001. We have no information on the results of this program.

(Centre for Information, Discussion and Exchange on Asylum), which by then had nearly eight years of experience of European cooperation in the domain of asylum, which obviously led to overlapping activities.

In 1990 CIREA had been created by the European Council of Ministers charged with immigration as an information platform on asylum in the wake of the Schengen agreement.[15] CIREA had to collect statistical data on asylum requests as well as on recognition rates, which entailed a process of data harmonization. By 1996 CIREA had outsourced this task to Eurostat. CIREA concentrated its focus on the analysis of the recognition rates, which was accompanied by joint reports providing comparative information on the recognition policy of the AOs in different EU countries. CIREA as a meeting platform of the AOs had to contribute to the debate on how the different AOs of the member-states were applying the refugee definition of the Convention of Geneva. The main exercise CIREA was charged with was to identify the reasons for differing recognition practices. CIREA constituted a bottom-up approach to obtaining an eventually harmonized recognition policy. The objective of harmonizing asylum policy by a rapprochement of the recognition practices was considered possible only if an intensive exchange of experience was carried out by the national experts who put asylum law into practice. CIREA had to provide information on how -in a very concrete manner- the different national asylum offices dealt with specific asylum applications in order to get insight into the diversity of practices in EU asylum offices. At the same time, the AOs sought to profit from the European exchange of information for the case work of their protection officers, hoping this work would lead to convergence.[16]

The start was very slow. One difficulty was that several AOs insisted on the confidential nature of the information they put at the disposal of CIREA. Even the recognition rates for specific nationalities were provided by some countries only under the condition that they would not be disclosed to the public. COI reports, including fact seeking missions of AOs to countries of origin were shared, but the protection officers were not authorized to refer to these (confidential) reports in their decisions on individual cases. The mission reports were definitely not to be used in court cases.[17] The representatives of countries like Denmark and Germany, where the AOs had a more transparent policy and had a mandatory responsibility to explicitly justify their decisions, strongly disapproved of keeping these reports confidential. By contrast, in Denmark the country-of-origin reports were generally available to the public. UNHCR was largely excluded from the workings of CIREA even though in 1991 the Council of Ministers had stated that UNHCR should be a privileged partner. From 1995 onward CIREA asked UNHCR to provide information on the situation in countries of origin, but the UN agency was still denied any information on the pertinent discussions within CIREA and the national or international missions. Only by the late 1990s do we notice a more open attitude towards UNHCR, but the reports on recognition policy remained confidential.[18]

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[15] CIREA referred to *Centre d'Information de Réflexion et d'Echange en Matière d'Asile* or the *Clearing House on Migration.* There was also a Working group on Asylum, which started to operate in 1993 and until 2010 it was probably a subunit of the group Ad Hoc Immigration.

[16] Earmarking a CIREA meeting for dealing with a single country of origin, 391991; Permanent Representatives Committee to Council (Justice and Home Affairs), 3.6.1994 (Second activity report CIREA); Permanent Representatives Committee to Council (Justice and Home Affairs), 3.6.1994 (Guidelines for Joint reports on third countries). AOFPRA, Dir.5/42.

[17] Compte-rendu de la réunion du CIREA 19-20.2.1997. AOFPRA, dir.5/47.

[18] Most member-states considered these reports on recognition policy of specific groups of asylum seekers as confidential, but they could be used by the administrative bodies dealing with asylum applications. The AOs of a minority of member states (among others Germany and France) were in favor of increasing transparency, primarily since they were unable to use confidential information in their asylum procedure as they had to disclose that information to their courts in case they were using it in decisions. It was decided that UNHCR got access to the country reports albeit for internal use only, These reports were censored as there was no longer explicit mentioning

During the first five years of its existence, national recognition policies of several groups of refugees were discussed within CIREA. Early on, even organizing joint fact seeking missions had been discussed, but only in 1996 was a first mission (to Pakistan) organized with the representatives of four member-states. CIREA also discussed the creation of a European COI database-- bearing in mind the need for rapid access to information—as well as using UNHCR's database of the Centre for Documentation on Refugees. Nothing came out of these discussions as national solutions were still preferred.

By 1996 the AOs felt disenchanted. CIREA had mainly become a place where each member-state, including the new member-states Austria and Sweden provided an overview of the changes in their asylum and immigration legislation. CIREA became increasingly a documentation center where the changing national policies were being presented by general immigration experts and less a meeting platform on the jurisprudence of AOs. The IOs had succeeded in broadening the agenda to immigration policy overall, including putting the return of rejected asylum seekers on the agenda. This shift toward the politics of immigration rather than protection policy was probably due to countries in which immigration and protection policies were executed by similar agencies and the power these countries could wield when they became in charge of CIREA as its presidency, similar to the European Council, changed each semester. During the French presidency in June 1995, a meeting of AO executives was called, as the French tried to save CIREA solely for protection policies. The Italians called a second such meeting in July 1996. In the latter meeting, the feeling of malaise about the turn of events was strongly articulated and it was decided to make CIREA return to its original mission.[19] CIREA decided to distance itself from political developments and would no longer have a rotating presidency following EU politics. Not the rhythm of (EU) politics but how the AOs within the different member states developed a longer-term vision of the interpretation of the Convention of Geneva would become their central focus. The annual meeting of the heads of the AO would steer the process.[20]There were also discrepancies on the degree of institutionalization of CIREA: the French, Austrian, and Dutch representatives opposed a strong European secretariat who would coordinate the meetings instead, they preferred that CIREA become a rather loose informal meeting opportunity for the AOs.[21] It seems the latter option prevailed: in 1997 there were several informal (and confidential) meetings between country experts of the AOs, while at the same time a few more formal meeting were organized in which recognition policies toward a few groups of asylum seekers were discussed.[22] At the end of the 1990s, given the experience of CIREA, it would have been more efficient for the Asylum Working Party of the High Level Working Group to embark on country analyses in cooperation with CIREA.

The 1996 Joint Position of the Council of the EU on a refugee definition

At the level of the EU a substantive approach to refugee recognition had started with a survey in 1991 (see 3.1.1), but this strategy of harmonization was not pursued until the summer of 1994 when the German Presidency put it on the agenda. It led in 1996 to a joint position, which reflected the lowest common denominator between member states.[23] The definition was aligned to the German concept of refugee, as it limited the application to persons who were persecuted by the state. The (private) persecution of an asylum seeker only qualified for refugee

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of the views expressed by individual member states. Meeting CIREA 2-3.4.1997. AOFPRA, Dir 5/48; Publicatieblad van de Europese Gemeenschap, C191/29-36 (23.6.1997).

[19] Publicatieblad van de Europese Gemeenschap, C191/29-36 (23.6.1997).

[20] Compte-rendu de la réunion du CIREA 7.1996. AOFPRA, dir.5/45.

[21] AOFPRA, dir.5/45 and 47.

[22] We have no information on CIREA after 1997. CIREA was dissolved in 2002 when Eurasil was created with a similar objective.

[23] PB, 13.3.1996, 63, 2.

status if that private persecution was at least tolerated by the state. The 1996 Joint Position of the Council of the EU also deemed that conduct by a State's armed forces was not considered persecution if it complied with International Humanitarian Law.[24] International Humanitarian Law is the branch of international law specifically designed for situations of armed conflict. International refugee law and International Humanitarian Law are distinct but interrelated bodies of international law: the latter regulates the conduct of hostilities, striking a balance between military necessity and humanitarian considerations. The use of violence during conflict is subject to clear delimitations under international human rights law. Holzer (2012) argues that references to potential justifications for conduct during a war do not necessarily remove such conduct from the scope of persecution. State measures are not always legitimate attempts to maintain law and order if they are disproportionate or affect persons who do not or no longer take part in the violence.

The Joint Position of the Council of the EU of 1996 was a compromise that left the member states free to follow a more open refugee definition (Lavenex 2001). This joint position was the swan song of the German refugee definition. The Federal Administrative Court in Germany referred to it but elsewhere, at least in case law, it was totally ignored. The only exception is the Netherlands where the Joint Position created some temporary uproar. The Dutch Council of State invoked it in March 1997 to justify its position. The Council of State pointed out that refugees who merely claimed a fear of persecution in the absence of a functioning government (see 1.2.5) failed to meet the Joint Position definition of persecution.

1.2. National Case studies

The pressure to increase the productivity of protection officers of the asylum office caused the quality of the decisions deteriorated. The appeal authorities recalled increasingly more negative decisions. Overall, the asylum offices became bureaucratized as they re-organized themselves following bureaucratic ideals of routinized and standardized decision-making, quantitative targets, hierarchical organization and internal control (Akoka 2020; Kreienbrink 2013; Probst 2011; Dahlvik 2018).

Seen the developments elsewhere in Europe the French authorities remained for several years wary about a possible explosion in asylum requests (Lavenex 2001: 165). Belgium and the Netherlands saw this happening and by 1993 Belgium had as many asylum seekers as France while the Dutch had that year even considerably more asylum requests than France. The French number of asylum requests which had exploded in 1989 knew a linear decline until 1996.

1.2.1. Germany in the midst of reform

In January 1993 UNHCR did a last tentative to influence the German decisions on its renewed asylum policy by sending out a high-profile delegation for three days to Germany to meet with several German authorities. UNHCR was worried about the potential European and universal implications a drastic change of the German policy towards refugees may have. Although safe countries were an important issue in these meetings UNHCR insisted also on discussing the refugee definition with the German authorities. In these meetings UNHCR insisted strongly on the importance to reintroduce the refugee definition of article 1 of the Geneva Convention as a material basis for the granting of asylum in Germany, while the German authorities denied the existence of discrepancies between art. 16 Basic Law and art.1 of the Geneva Convention. This discrepancy had been a topic during the formulation of the

[24] '[T]he use of the armed forces does not constitute persecution where it is in accordance with international rules of war' Council of the European Union, note 7, para. 6 which said also 'Reference to a civil war or internal or generalized armed conflict and the dangers which it entails is not in itself sufficient to warrant the grant of refugee status.'

party compromise, with the Bavarian Christian Social Union opposing the suggestion to reaffirm German commitment to the Geneva Convention and the Social Democrats supporting it. The Social Democrats dropped finally this demand during the interparty discussions. UNHCR still continued in its negotiations with the German authorities to insist on this point and referred time and again to refugees from Bosnia and Somalia who, according to UNHCR could be covered, in their large majority by the definition of the Geneva Convention while art. 16 Basic Law did not provide them protection. UNHCR even went several times in more detail on cases of raped women of Bosnian and Somalian origin who would qualify for refugee status if Germany agreed to fully adhere to the universal definition of refugee of the Convention of Geneva. The German authorities refused to enter in this discussion and referred to the special status for refugees from civil war areas as their solution to the latter issue. The *Staatssekretär* of the Ministry of Justice, Ingo Kober stated that "civil war refugees are not rejected, but accepted as such, but they cannot apply for asylum as long as they have the civil war status. There is, however, a need to allow access to the procedure when the civil war status is revoked." Kober also clarified that the question whether a person from such a war-stricken area was allowed to choose between the civil war status and the asylum procedure, when arriving, was not decided yet. UNHCR stated that they will not demand that such refugees have access to the asylum procedure if and as long as they receive an adequate status. [25]

The difficulties to stop asylum seekers from coming to Germany

The German authorities had invested heavily in border control and had acquired the legal means to keep many asylum seekers out of the country. Germany was surrounded by a belt of safe countries for asylum seekers, either EU or non-EU countries (Finland, Austria, Norway, Poland, Czech Republic, Switzerland).[26] Theoretically only asylum seekers arriving by plane were still eligible to claim asylum. In the vision of the architects of the German reform ports were quasi the only border posts where asylum seekers could enter Germany in a legal manner and lodge an asylum request. For them an accelerated procedure had been introduced to get rid quickly of unjustified requests. Border officials receive adequate training to deal with these applicants who throughout the procedure were provided with legal assistance and were authorized to contact NGOs and UNHCR. Already in July 1993 the reformers were confronted with the discrepancy between their plans and reality. Out of 234 asylum seekers rejected through the accelerated procedure at the Frankfurt airport 14 made use of their right under the Constitution to appeal to the Federal Constitutional Court. In five cases the Federal Court quashed the negative decision as the AO and the administrative court had not been sufficiently careful in their judgement. That two of these five came from Ghana, a safe country of origin caused some political circles to cry havoc. Two devices to be able to process asylum requests in an accelerated manner -the airport and the safe country of origin procedure- were boycotted by the Constitutional Court. The safe country of origin was indeed another device the reformers had designed to get rid quickly of asylum seekers who the authorities considered not to be refugees. The plan of the architects of the reform of Germany's asylum policy was to deny the

[25] Note for the file regarding the meetings with German Government officials during the mission of Messrs. Leonardo Franco, Ulrich von Blumenthal and Michael Petersen to Bonn, 13-15.1.1993. AUNHCR, 600.GFR - Vol 9 (part2.) – 1991.

[26] IGC 1994: 12. Safe third countries were all EC states and other states in which the application of the Geneva Convention (1951) and the ECHR is guaranteed. Statute law named the following safe third countries: Norway, Poland, Sweden, Switzerland and the Czech Republic. Finland, Austria and Sweden had joined the EU on 1 January 1995 and were thus considered safe as other EC states. When the Convention applying the Schengen agreement, including the asylum law provisions took effect on March 26 1995 the countries part of the Schengen area applied the Schengen responsibility procedure (as of March 1997 this applied to Belgium, France, Luxemburg, Portugal and Spain). Since September first, 1997 the date the Dublin Convention entered into force it replaced the Schengen provisions on asylum.

requests for asylum from safe countries of origin en masse with a standardized motivation and without a hearing. However, the Federal Constitutional Court ruled that the examination of the request from a safe country of origin required both a hearing of the applicant as well as a detailed statement of why the individual request was rejected. The rebuttal of the presumption of a safe country of origin had to be examined with the required care. The Constitutional Court required an extensive judicial review as to the facts and the law in every particular case. These five asylum seekers, including the two Ghanaians were allowed to enter Germany and to pursue their case in the regular procedure.[27] Refusal at the airport had to be selective and for example in 1996 80% of the asylum applications in the airport of Frankfurt were considered admissible (N: 5 737).[28]

Although this was not according to the plans of the reformers either, other asylum seekers who had crossed into Germany by the green border succeeded also to request asylum in Germany. In 1992 the border control had been beefed up and this yielded some results. The Border Control Police (BGS) had detected in 1992 30.000 foreigners who tried to entry the country illegally, during the first seven months of 1993 nearly 47,000 foreigners had been stopped from entering. The Border Control Police had estimated in 1992 that they effectively detected at most 25% of all illegal border crossings, but it was difficult to say whether they succeeded to stop a larger share of these movements.[29] For all asylum seekers who had still succeeded in entering German territory by land, mostly illegally the German authorities wanted them to be returned to the safe third country through which they had come to Germany. UNHCR insisted strongly that the German authorities had to inform the authorities of the safe third country that these persons were deported on formal grounds and that their asylum application had not been materially examined yet. Asylum seekers who had succeeded to enter German territory were not eager to cooperate and concealed their itinerary. For the neighboring countries to agree to receive these third country nationals the German authorities had to provide proof that they had passed through these countries. Most of the persons who requested asylum in Germany destroyed their papers so that they could not be send back to a safe third country, but for those who had still a passport the return to the neighboring country they had stayed before they came to Germany was not so easy. Schengen as the border free internal zone meant that passports of third country nationals were no longer marked when they entered or left a neighboring country. So even for those asylum seekers with a passport it became more difficult for the German authorities to convince neighboring countries to take back their third country nationals except for those apprehended in the immediate border regions. For those travelling from Poland, the Czech Republic and Switzerland the administrative border routine was upheld and the asylum seekers who had travelled from these countries to Germany could still be returned (Renner 2002). Still for Rumanian asylum seekers the German authorities decided it would be better for those who were considered not eligible for asylum –Rumania was considered a safe country of origin- that the return should not be to Poland, but straight to Rumania.[30]

[27] Branch office UNHCR Bonn to UNHCR Headquarters, 13.8.1993, pp.2-3. AUNHCR, 600.GFR - Vol.10 – 1993.
[28] Gross, a MP of the Council of Europe visited the airport in January 1997: The decision on admissibility is taken within a maximum of 19 days. During this time applicants stay in a special building within the airport area. The conditions are very bad. The building is run by a private company. It is very poorly equipped, with toilets and showers in very bad condition. An average stay lasts 8 days, although it can be as long as 30 days. By times the building is overcrowded the asylum seekers have to sleep on the floor. There are usually many children but there are no facilities for them. Twice a week a social worker specialised in contacts with children comes to the place. Gross 2020.
[29] Branch office UNHCR Bonn to UNHCR Headquarters, 13.8.1993, p.2. AUNHCR, 600.GFR - Vol 10 – 1993.
[30] Branch office UNHCR Bonn to UNHCR Headquarters, 13.8.1993,p. 2. AUNHCR, 600.GFR - Vol 10 – 1993.

The reform of asylum policy in July 1993 quickly resulted in a spectacular drop in the number of asylum seekers in Germany (see Part 1, Chapter 3 and Fig. 1).[31] Still Germany remained the country with most asylum applications as asylum seekers increasingly resorted to the assistance of smugglers to enter the country.

The AO and an (unexperienced) staff to tackle the backlog

The AO knew a dramatic expansion.[32] A not very selective recruitment campaign succeeded in having the staff expand to 3,947 employees by January 1994 and 4,650 by the end of the year.[33] A part of this staff was employed in six Asylum Decision Centers who were set up to overcome the backlog of 460.000 cases. First they concentrated on the 80,000 Romanian and Bulgarian asylum seekers, but soon asylum seekers from other countries (Liberia, Albania, Zaire…) were also processed in these centers. Although the same legal provisions as in the normal procedure were applied, the decision-making process was different. Elsewhere, asylum seekers were interviewed by the same officer who later on decided on the case, in these Asylum Decision Centers the asylum seekers were first interviewed by a screening officer and subsequently the decision on the case was made by the deciding officer, on the basis if the interview notes of the screening officer. In this way the deciding officers could produce more decisions. By law the deciding officers had to have the rank of at least 'semi-superior' officer (*gehobener Dienst*) that was not required for the screening officers, most of the latter were former army or postal services employees and to prepare them for this task they had received one week of training.[34]

In the 46 sub-offices the vast majority of deciding officers were new and inexperienced. Often also the head of sub-offices were new, many of them being high-ranking civil servants from other sectors of the administration. These new officers obtained a one-week training course in the headquarters of the AO to prepare them for their task. The deciding officers no longer had an interview of the local aliens' authorities in the file; consequently, they had to start their interviews with a questionnaire dealing with personal data, travel route etc. and only after half an hour could they tackle the claims for protection of the asylum seeker. Each sub-office screened about 30 countries of origin. This implied that each deciding officer had to be able to interview asylum seekers from the most diverse countries. At the start of the reform the sub-offices were not connected yet with the extensive country of origin material available at Headquarters.[35] The impression of two UNHCR officers who had been investigating the new procedure by visiting the new offices of the AO all over Germany during the first half of 1993 was that emphasis was laid on the quantitative output rather than on the quality of the decisions.[36] UNHCR spoke of the frequently appalling quality of the decisions of the AO.[37] The Federal Representative of Asylum Affairs who had the power to appeal against any decision of the protection officers does not seem to have assured a quality control. This Federal Representative appealed exclusively against (positive) recognition decisions in line with the

[31] The drop in asylum applications was to a certain extent also cosmetic as subsequent asylum applications and applications by *réfugiés sur place* were no longer calculated for these figures. They only counted first applications of newly arriving immigrants.

[32] Hans-Georg Dusch was the director of the AO from 1996 to December 1999, he had been already director of the AO from 1979 to 1982.

[33] The staff of 4,650 consisted of 950 protection officers and 3,700 persons to handle administrative tasks (IGC 1994: 12)

[34] Leiss and Gregoritisch, report on activities and experiences of UNHCR's revolving officers in Germany (11.1992-7.1993) p.7. AUNHCR, 600.GFR - Vol.10 - 1993

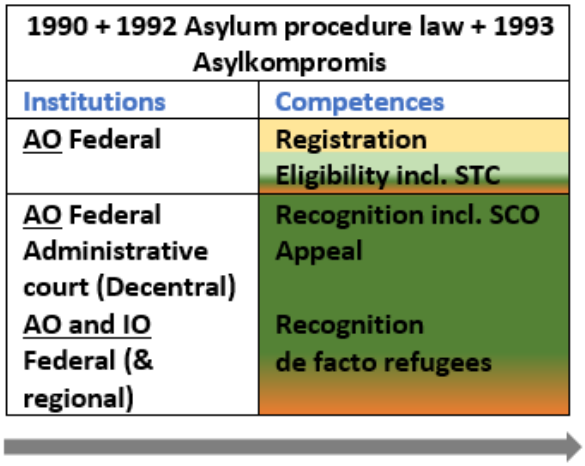
[35] Leiss and Gregoritisch, report on activities and experiences of UNHCR's revolving officers in Germany (11.1992-7.1993) p.4-8. AUNHCR, 600.GFR - Vol.10 - 1993

[36] Leiss and Gregoritisch, report on activities and experiences of UNHCR's revolving officers in Germany (11.1992-7.1993) p.5. AUNHCR, 600.GFR - Vol.10 – 1993.

[37] Branch office UNHCR Bonn to UNHCR Headquarters, 13.8.1993, p.3. AUNHCR, 600.GFR - Vol.10 – 1993.

historical mission of this institution and the instructions which he had received from the Ministers of Interior (see 1.2.1).[38] Due to the decrease of asylum applications the number of field offices was reduced to 36 as of December 31, 1996, and the total staff counted 2,600 of which 560 protection officers (IGC 2007: 209). The AO claimed in 1996 that a new asylum application could be processed in 4 to 6 weeks.[39] The number of field offices was reduced further to 21 in 2008 (IGC 2007: 209).

Fig. 2. Institutional timeline asylum determination Germany, 1991/1993



1994: The Federal Administrative Court confirms the German refugee definition

In 1994 the Federal Administrative Court gave its verdict on civil war refugees. Finally, a case of a Tamil from Sri Lanka who had claimed persecution by the Sri Lankan army in the early 1980s was concluded. In 1985 the AO had rejected the asylum claim, the administrative court had decided to grant protection, but the Federal Representative for Asylum Affairs had opposed this judgement. On November 16, 1991, the Bavarian High Administrative Court had agreed with the Federal Commission for Asylum Affairs and in 1994 the Federal Administrative Court agreed too. The Federal Administrative Court repeated the Tamil decision of the Federal Constitutional Court of July 10, 1989, but extended this decision not only to art. 16 (2) Basic Law (by then art.16 (b)), but also to art.33 of the Convention of Geneva. Only persecution emanating from the State or persecution emanating from a state-like organization (*quasi-staatliche Verfolgung*) could lead to persecution for which protection was offered by the German refugee law. There could be no persecution within the meaning of the German refugee law in countries in which there is no government, or the government is not effectively in control of the country. In Germany the notion of a person threatened by political persecution

[38] There has been no research yet on the influence of the Federal Representative of Asylum Affairs on recognition decisions, the only information we dispose of is an article on Klaus Blumentritt (°1941) who was nominated Federal Representative in 1994 (until 2004). In 2001 the Federal Representative had 30 members of staff. In the summer of 2000 he had been instructed by the Minister of Interior Otto Schily (SPD) to assure a quality control of the asylum decisions and thus also control the quality of rejections. In the second half of 2000 Blumentritt had appealed, in favor of asylum seekers 16 decisions, while he had intervened during that same time period to the disadvantage of asylum seekers in 2300 cases. In 2001 he was criticized by the Constitutional Court for only appealing positive decisions and not to scrutinize rejections by the AO. Lukas Wallraff, Beamte pro Asyl: Noch die Ausnahme**.** Taz, die tageszeitung 9.1.2001. https://taz.de/!1193283/ accessed 5.9.2022; Knipping & Saumweber-Mayer 1995: 273. Jurgen Bast explains that "the "public interest" the Federal Representative of Asylum Affairs was meant to serve was to prevent the AO (and the administrative courts) from taking too lenient decisions on asylum recognition. Jürgen Bast to the authors, 3.5.2022.

[39] Overview of May 1996 in the migration reports of the migration centre of Bamberg. http///www.efms.uni-bamberg.de (accessed 2.9.2022).

presupposes that there was effective State authority over the territory. In the event of civil war such State authority is lacking and thus persecution qualifying a refugee for protection was non-existent. In the case of the bombardments of the Tamil population by the Sri Lanka army or general attacks on uninvolved civilians this could not be considered political persecution (i.e., persecution relating to the 1951 Convention), since those acts were only expression and result of a civil war in which the State was no longer able to exercise its territorial sovereignty over the area. There could be no imputability of persecutory acts to the State if the Government had lost its control over the parts of the country where those acts occurred. The court insisted strongly that the German legislator had transformed the Convention of Geneva into German law and thus any progress made in the interpretation of the Convention of Geneva in other States would not affect the interpretation of the treaty in German law. Judith Kumin, representative of UNHCR in Germany criticized the German court for not adhering to the view that the Convention of Geneva as an international treaty should aim to come to an agreement between States as to who is to be considered as a refugee under international standards. UNHCR was worried that Germany now bound by decisions of its highest courts would try to convince other states to adopt its restrictive interpretation of the Convention of Geneva.[40] However there was later a minor domestic criticism as the Federal Constitutional Court had in 2000 a critical note on the opinion of the Administrative Court that all actions of the state to retain sovereignty over its territory were legitimate actions. The German Constitutional Court acknowledged that measures allegedly maintaining law and order may even constitute persecution, holding that military measures that would normally be legitimate can constitute persecution if their intensity is not justified by the legitimate purpose or if their impact goes beyond the persons who may be legitimately targeted.[41]

Different kinds of protection

Of the cases decided by the AO in 1994 19% were considered manifestly unfounded (N= 352,572), in 1995 26% (N= 127,937) and in 1996 13% (N= 116,367) (IGC 2007: 204). The AO handled also the asylum applications from the safe countries of origin in an accelerated manner with the burden of proof on the asylum seeker.[42] Still about 1/5 of the asylum seekers qualified for some kind of protection. As mentioned before art. 16 Basic Law was the point of reference for German recognition policy. This meant a stricter refugee definition than article 1 of the Geneva Convention as a material basis for the granting of asylum. In the 1990s the German authorities still tried to convince the other European states to adopt their refugee definition.

As mentioned before art. 16 (2) Basic Law was since the 1980s the point of reference for German recognition policy. This meant a stricter refugee definition than article 1 of the Geneva Convention as a material basis for the granting of asylum. The Aliens Law of 1990 had already added to the *de jure* refugees those recognized on the basis of article 33 to the Convention of Geneva. However civil war refugees in Germany had a difficult time to be recognized as refugees. Only if non state agents gained effective control over a defined territory persecution emanating from those agents could be qualified as 'state-like' as had been successfully advocated in cases of refugees from Bosnia-Herzegovina and from Afghanistan,

[40] Judith Kumin, representative UNHCR in West Germany to HQ, 25.3.1994. AUNHCR, protection and General Legal Matters - General - Protection - Germany Federal Republic - Vol. 12. See also Bosswick 1997: 57, Vermeulen and others 1998: 49-53.

[41] Markard 2012: 167-168 in which she refers to BVerfG, 2 BvR 752/97 (15 February 2000).

[42] By 1995 the list of safe countries of origin was Bulgaria, the Czech Republic, Ghana, Hungary, Poland, Romania, Senegal and Slovakia. From 3.9.1995 onwards Senegal was no longer considered a safe country of origin, but in 2009 seen that most of the safe countries of origin had become part of the EU only (again) Senegal and Ghana were on the list (IGC 2009: 170).

but for refugees where the internal situation had to be qualified as close to anarchy as in Somalia, Liberia and Angola in 1994 these asylum seekers were virtually excluded from the German refugee status.[43] UNHCR tried to counter the restrictive interpretation of the agents of persecution issue by the AO by explaining that legitimate distinctions could be made, by instance by pointing out some groups considered more at risk than the overall population in Somalia, Liberia and Angola due to their ethnic or geographical origin, but it seems their lobby work was to little or no avail.[44] Every year there were also a share of about 2% of the decisions referred to *de facto* refugees.

Tab. 1. Germany's decisions on two statuses, 1995-2003 (IGC 2009: 188)

	De jure refugees	*De facto* refugees[45]
1995 (N= 141.407)	17%	3%
1996 (N= 150.652)	16%	1%
1997 (N= 120.108)	15%	2%
1998 (N= 103.020)	11%	3%
1999 (N= 92.592)	11%	2%
2000 (N= 74.883)	15%	2%
2001 (N= 81.504)	28%	4%
2002 (N= 86.952)	8%	2%
2003 (N= 67.705)	5%	2%

Those refugees who did not qualify on the basis of (the German interpretation of) the Convention of Geneva could be tolerated as non-deportable aliens, or they could be granted temporary protection. The latter provision in the 1992 compromise was applied for the first time in 1999 for 13,000 refugees from Kosovo. It took such a long time to be implemented as the financing of this special status could not be sorted out. There was no political will to find a compromise between the federal government and the federal states. Only in 1999 when Germany succeeded to limit the number of war refugees from Kosovo on its territory an arrangement was found (Bosswick 1995; Hailbronner 2002: 494; van Selm 2000).

Another solution for refugees who did not qualify for Convention status in Germany was that the AO or the local authorities ordered them to be tolerated because of being non deportable. Although not only the Convention of Geneva, but also the ECtHR based on article 3 ECHR put the persecution or violence central for raising a collective obstacle to deportation, the German jurisprudence focused on the author of this violence/persecution. Since 1991 the AO had to investigate obstacles to deportation. This became more important as the authorities of the regions who were still in charge of these deportations got much more resources to deport foreigners. The asylum compromise had provided for more grounds to detain irregular immigrants for longer terms (up to 18 months) in order to be able to deport them. The law

[43] Respectively on 1370 rejections for Somalia there were 5 recognitions, 3 Liberian refugees on 4805 rejections and 8 refugees from Angola on 865 negative decisions (time period not mentioned). Judith Kumin, representative UNHCR in West Germany to HQ, 16.2.1994. AUNHCR, protection and General Legal Matters - General - Protection - Germany Federal Republic - Vol. 12

[44] Meeting of Government Eligibility Officers, 30.11.1994 and 1.12.1994 on civil war refugees. AUNHCR, Protection and General Legal Matters - General - Protection - Germany Federal Republic - Vol. 12.

[45] *De facto* refugee status is referred in IGC 2009: 188 as complementary protection and other authorizations to remain, while the *de jure* refugee status refers to refugee and asylum status. We ignored other decisions defined as withdrawing claims, abandoned claims or claims otherwise resolved, so the total of decisions (n) is referring to the two protection statuses and the rejected asylum seekers. We ignore whether the 13,000 refugees from Kosovo temporarily protection were included in these figure as they did not apply for asylum, if they were included we ignore whether they are under the *de facto* refugees or the claims otherwise resolved.

distinguished in its provisions for impediments to deportation between the local aliens' authorities, closer to the individual case, which had to decide whether there were barriers which might prevent deportation in an individual case, while it was up to the AO to decide about more general raisons like the situation in the home country which prevented deportation. Although as well the Convention of Geneva as the ECtHR based on article 3 ECHR put the persecution or violence central for raising a collective obstacle to deportation, the German jurisprudence focused strongly on the author of this violence/persecution. Only state or quasi state actors could by their action raise collective obstacles to deportation and in situations of general violence without any state protection the individual threat to life or liberty could only be evoked in cases of extreme danger involving a very probability of imminent death or severest injury upon return. No *de facto* protection was granted if the danger to which the asylum seekers were exposed to rose out of a situation to which the entire population or a segment of the population was exposed (Renner 2002; Bank 2007: 116 & 121). The AO was bound by instructions on obstacles to deportation. The instructions were issued by the Federal Ministry of the Interior. The Representative for Asylum Affairs had no competence to disqualify these decisions (Knipping & Saumweber-Mayer 1995, 273; Renner 2002). The regions still had the competence to suspend the deportation of specifically defined groups of foreigners. They could decide for a deportation stop for at most six months, for extending it they needed the consent of the Federal Minister of the Interior. Only the Federal Ministry of the Interior could decide about such a prolongation. There was centralization of policy in the case of longer toleration, shorter toleration could still differ from state to state (Marx 1993). In 1992 there was a federal deportation ban for Afghanistan and also a *de facto* ban for refugees from Somalia and Kurds from Iraq due to the technical impossibility to repatriate them. In 1994 the region Rheinland–Pfalz had a deportation ban for Angola and asked for a federal deportation ban, probably without success.[46] In 1995 there was a federal deportation ban for Kurdish asylum seekers from Turkey until June 12, 1995 and the regional government of Hessen prolonged it for another six months but this decision was called illegal by the Administrative Court.[47] According to Henning (2001) the AO and the administrative courts, depending on the region made different decisions on impediments to deportation. To overcome this heterogeneity in 1996 the federal authorities and the regions decided on a common procedure for collective obstacles to deportation. It was agreed that a region would only make use of this possibility in exceptional cases, and this was always in consultation with the other regions and the federal authorities. A federal decision on non-deportation had to be prolonged if eleven of the sixteen regions made the request. This decision hardly changed the very heterogeneous practice throughout Germany (Böcker & Vogel 1997; Henning 2001). In 1997 a regional proposal for a deportation ban for Algerians and in 1998 for Albanians from Kosovo was defeated.[48]

The nature of the obstacles to deportation were contentious, but also the division of labor between the local aliens' authority and the AO, regional and federal institutions in assessing obstacles to deportation caused numerous disputes between policy makers at different levels of

[46] AUNHCR, Folder 600.GFR Protection and General Legal Matters Germany (1993-1994). In November 1996 the Federal Administrative Court cautioned in a verdict against the return to war striken Angola. The decision to return to Angola in war should be scrutinized more carefully the court said in order to prevent that the returnee's life or freedom would be in danger. See the overview of decisions in het migration report of November 1995 of the migration centre of Bamberg. http///www.efms.uni-bamberg.de (accessed 2.9.2022).

[47] See the monthly overview of decisions in the migration report of 1995 of the migration centre of Bamberg. http///www.efms.uni-bamberg.de (accessed 2.9.2022)

[48] Very few asylum seekers from Algeria qualified for protection in Germany. The Ministry of Foreign Affairs considered the terror by the Islamitic Salvation Front not as persecution and pointed out that there was always an internal flight alternative. See the monthly overview of decisions in the migration report of the migration centre of Bamberg, respectively from November 1997 to January 1998 and in March 1998. http///www.efms.uni-bamberg.de (accessed 2.9.2022)

government (Hailbronner 2002: 514f.). When the AO did not raise obstacles to deportation the local aliens' police (and administrative courts) still could do so.

The tolerance of a rejected asylum seeker who turned out to be non-deportable usually had to be renewed every three months and did not grant access to the labor market and limited the freedom of movement to the local district. The tolerated alien did not have a right of family reunion and received only, similar to asylum seekers, limited social benefits. Toleration was not a legal residence status but a mere suspension of deportation. According to the law, toleration was limited as a rule to a maximum of one year, but in practice the toleration has frequently been renewed for many years. By the end of October 2000 265,525 persons were tolerated, among them 44% rejected asylum seekers. Thirty-one percent of these 265,525 persons had been tolerated for more than 4 years, contrary to the spirit of the legislation (Hailbronner 2002: 515ff.; Henning 2001: 29). Several attempts to find an agreement to issue legal residence status to these tolerated foreigners who had been living a long time in Germany failed, mainly due to the opposition of the conservative CDU/CSU Ministers of Interior of the regions Bavaria, Saxony, and Lower Saxony (Bosswick & Borkert 2007).

Certainly, by the end of the 1990s the impact of the Geneva Convention on German recognition policy became stronger. The German parties began to realize that only the universal refugee definition of the Convention of Geneva was able to provide the basis for a European harmonization of asylum law. In October 1998 a red-green government succeeded the Christian-democratic governments. The coalition agreement advocated a common European asylum policy based on the Geneva Convention and a more generous processing of gender-specific asylum claims. A strong lobby advocated to designate gender-based persecution as persecution for reasons of membership in a particular social group (Brabandt 2011). After long political negotiations the Immigration act of 2004 put the Geneva Convention central in the German process of recognizing a refugee (Bank 2007: 124). Due to technical problems the act became only law in 2005, by then under Merkel's first Grand Coalition.[49]

Persecution by non-state actors had also found stronger support among the judiciary. In August 2000 the Constitutional Court decided, referring to Afghanistan that (political) persecution could emanate from non-state actors when they controlled effectively part of the territory. These private actors could be defined as a quasi-state. The AO froze the processing of about 2500 Afghani asylum request pending a decision of the Federal Administrative Court. Shortly afterwards the latter agreed that being persecuted by a quasi-state could qualify as (political) persecution. This was not only relevant for Afghani, for example also more Iraqi who had fled the civil war in their country could qualify as refugees. The immigration Act of 2004 put the Geneva Convention central in the German process of recognizing a refugee and abolished discrimination of refugees who did not meet the narrow criteria for German political asylum. The important difference since the early 1980s between constitutional refugee recognition and refugee recognition based on the Convention of Geneva in terms of a stronger residency status of the former was abolished. Upon recognition both had the same (strong) residency status (Bast 2007: 294-295).

In 2002 the AO was reorganized, and the protection officers lost their independence as they were incorporated into the hierarchy of the AO. The recognition decision was not considered quasi-judicial anymore, but administrative in nature. There was no more need for the Federal Representative for Asylum Affairs. The agency was abolished. Protection officers became henceforth fully responsible to, and centrally steered by the head of this institution and

[49] The Immigration Act 2004 consists of the Residence Act, the Act on the General Freedom of Movement for EU Citizens, and amendments to additional other legislation, Federal Law Gazette 2004 I, page 1950. The Residence Act (30 July 2004) was amended by the Act Amending the Residence Act and other acts of 14 March 2005. Federal Law Gazette 2005 I, page 721.

the Ministry of Interior. In 2002, the AO was assigned to the administration and implementation of the immigration law of 2004 and had, among others, to cooperate with labor offices and the federal labor administration. It is in charge of issuing regulations for integration courses and implementing integration measures at the federal level in cooperation with local institutions. It was also attributed competences in the program of voluntary return, the coordination of Jewish immigration from Russia, the steering of labor migration and it had to run the centrally information database on foreigners (Kreienbrink 2013: 12).[50]

1.2.2. Austria, no longer playing rough

Austria used the concept of safe third countries extensively to dismiss asylum requests. All countries bordering Austria were considered safe third countries and even transit through these countries was enough to return the asylum seekers to this neighboring country (Stacher 2001: 225). In 1997 the asylum law was revised with an extension of protection, but the appeal against a first instance decision for being manifestly unfounded or coming from a safe third country provided for a very short time limit for appeal against a negative decision. The 1998 amendments prolonged the time in which a decision could be appealed.[51] Using the safe third country was from October first, 1998, when Austria applied the Dublin Convention based on EU procedures. While in 1995 the Schengen Agreement entered into force for Austria, which had become member of the EC in that year, this was postponed to October 1998. It was considered that Austria did not yet meet the high standards for external border control. From 1999 onward this implied that within the Schengen zone Austria's internal land borders could no longer be controlled. The 1998 amendments of the asylum legislation introduced a procedure that gave the Federal Ministry of the Interior the possibility of designating, by ministerial order, safe countries of origin (Brandl 2002: 109). It seems that later on Parliament had to approve the list.

A stronger AO with authority to grant different kinds of protection

In 1995 the new Minister of Interior Caspar Einem, also a SPÖ politician but more liberal than his predecessor Franz Löschnak neutralized the conflict between UNHCR and the Austrian authorities.[52] The promise to amend the asylum legislation was kept. An accelerated procedure was introduced, but more important was the strengthening of the position of the AO in immigration policy.[53] Since 1990 the AO had not only the decision power for recognizing refugees, but the AO also had ex officio to give advice on whether the return of an asylum seeker they had rejected to his/her country of origin was legally inadmissible or (technically) possible. The 1997 asylum law stipulated that if the AO qualified the enforcement of the expulsion decision unacceptable the expulsion order of these refugees was suspended. The IO had no more say in this decision. These *de facto* refugees had, however, few, if any rights. In

[50] The Federal Office for the Recognition of Foreign Refugees (BAFl) was renamed the Federal Office for Migration and Refugees (BAMF).

[51] The Federal Constitutional Court had considered these provisions to violate Constitutional Law, which led to amendments of the Asylum Act.

[52] Caspar Einem was a left social democrat who advocated a more liberal immigration policy,. Der Standard, 26.10.2007: https://www.derstandard.at/story/3089476/und-dann-bin-ich-heimgegangen, accessed 28.8.2022. In 1997 Einem was replaced by Karl Schlögl.

[53] The MP of the Council of Europe Gross visited the airport in Vienna on February 27, 1997 and reported on the border procedure: All applicants in the transit area had to wait in one of the twelve rooms, in a special building at the outskirts of the airport. First there was an interview by the police whose report is transferred to the Federal Immigration Authority. Access to interpreters, legal advice and a UNHCR representative was provided. The decision on admissibility was taken by the Federal Immigration Authority within 1-2 days. Appeals, which have a suspensive effect, could be submitted to the Ministry of the Interior: it took another week before the final decision is issued. Gross 2000.

the legislation it was not clearly stipulated whether those the AO considered *de facto* refugees had to be issued with a residence permit. They were merely officially tolerated. In 2001 the Constitutional Court decided that these refugees should be granted a residence permit. In the period between 1998 and 2002 1782 rejected asylum seekers received a *de facto* refugee status (Brandl & Feik 2002).

In 1996 the Minister of Interior Einem had nominated Wolfgang Taucher (°1963) as director of the AO to replace Ulrike Mayerhofer.[54] Taucher, a knowledgeable jurist improved the recognition policy of the AO, but the AO still stuck largely to the German definition of refugee. The AO kept a strict attitude towards non-state persecution, together with an extensive use, even in the case of Somalia of the internal flight alternative (see 1.3.3). From 1998 onwards negative decisions could be appealed to the Asylum Court.[55] This deciding body not bound by ministerial instructions was also competent in the domain of the *de facto* refugee status. The appeal border contested the practice of the AO at times as too restrictive. The asylum court by taking its distance from the German definition of refugee strengthened the protection of refugees (Brandl & Feik 2002).

1.2.3. Belgium: without *de facto* refugees more open to Geneva Convention

Similar to other countries Belgium started to look for a means to decide quicker on asylum requests. The Aliens Law of 1991 introduced an accelerated procedure. Swiss which had pioneered with such a procedure in 1990 was cited as example. If an asylum seeker came from a country of origin of which at least five per cent of the asylum applications came from in the previous calendar year and less than 5% of these applications were recognized, this accelerated procedure had to be applied.[56] An accelerated procedure in which the merit of the case was still investigated, but the burden of proof was on the asylum seeker.[57] In 1992 the IO did apply this provision, but not in a blind manner as they accepted for further investigation 8% of the applicants.[58] Some NGO's requested an annulment of the relevant legal provisions of this arrangement in 1992 at the Constitutional Court.[59] Indeed, the Constitutional Court annulled in March 1993 the legal provisions as they judged that the increased burden of proof

[54] Between 1988 and 1996 this jurist of training had worked as a legal adviser for Caritas

[55] The second instance court was called the *Unabhaengiger Bundesasylsenat* (UBAS)/Independent Federal Asylum Review Board. An appeal against UBAS could be made to the Administrative Court (*Verwaltungsgerichtshof).* We presume the members of the UBAS were appointed for life, therefor we could it an asylum court.

[56] Called the '*dubbele 5% regel'*, or '*double critère des 5%*'. It was the secretary of state Miet Smet who was in charge of the reception of asylum seekers (1985-1992) who had proposed this innovation. It was not to the liking of the Ministry of Justice Melchior Wathelet who called it an useless rule. "Cette notion est très contestable du point de vue juridique et elle est quasiment inutillisable dans la pratique…. L'établissement d'une liste quelconque est … inutile". PDS, 1990-1991, 1076-2, p.19. https://www.senate.be/lexdocs/S0521/S05211167.pdf, accessed 12.9.2022.

[57] At the end of 1991 the IO used this rule for asylum applications from Ghana, India, Pakistan, and Poland. On 3 February 1992 the head of the AO let the minister of Justice know that the provision could be invoked for Romania, Ghana, India, Yugoslavia, Pakistan, and Nigeria. Yet as the situation in Yugoslavia had changed by then, the AO advised the minister not to apply the mechanism for Yugoslavian applications. However in 1992 the IO still applied it to Yugoslavia. CGVS. 1991. 'Vierde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen werkingsjaar 1991'. p.19-20; CGVS. 1993. 'Zesde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen werkingsjaar 1993'. p.11; Bossuyt 2022: 309.

[58] The IO only considered 211 of the 1623 requests from Yugoslavian citizens admissible, 13% was a slightly higher recognition rate than the other countries on the list. For Romania, Ghana, India, Pakistan, and Nigeria it was in 1992 respectively 10%, 2%,2%, 5% and 4%. (N for all 6 countries 6766 and rate 8%). 'Vijfde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen werkingsjaar 1992'. p.14 en bijlage 2.

[59] Called *Arbitragehof/Court d'arbitrage* and from 2007 onwards *Grondwettelijk Hof/Court Constitutionel*

for only one category of aliens went beyond what was necessary to achieve the intended purpose.[60]

In September 1991 a new government was installed and although the Minister of Justice, in charge of immigration policy was the same minister it was decided that the aliens' police would be transferred to the Minister of Interiors but to make that reality it took almost a year. On July 15, 1992, the Minister of Interior was handed over authority on immigration policy from the Minister of Justice.[61] The Minister of Interior wanted to centralize all matters related to immigration policy within this ministry. This centralization in his hands would improve the control over immigration to Belgium. "I can combine refugee policy with my control of the federal police. This, together with a good link with Foreign Affairs is a big advantage".[62]

The Minister of Interior Louis Tobback of the Flemish Socialist Party hoped to reconquer the blue-collar workers who had voted en masse for this populist right party by a more effective and efficient immigration policy. The extreme right party Vlaams Blok demanded absolute control of immigration and gained an important following in Flanders with the demand for zero immigration. In the elections of November 24, 1991, the party had suddenly erupted as 10,4% of the Flemish voters voted for Vlaams Blok, in June 1999 already 15,5%. The government decided for a more effective deportation policy, which became the litmus test for the capacity of the state to impose its will on international migration. A more decisive action against the rejected asylum seekers stood high on the political agenda. The first closed centers were opened where detained irregular immigrants could be detained. In May 1993 the Aliens Law was changed again. A national computerized system of fingerprints of asylum seekers was introduced to prevent multiple applications. Asylum requests were dealt with much more quickly by a considerable increase in staff at the IO and the AO. As elsewhere, most attention went to repatriating rejected asylum seekers and other irregular immigrants. The law of May 1993 introduced the possibility of interning asylum seekers who were already on Belgian territory and had appealed the negative decision of the AO. While waiting for the processing of their appeal they would be detained in a closed center, and upon a negative conclusion of the appeal the authorities could immediately process their removal (Caestecker & Vanheule 2010).[63] The border procedure still enabled the authorities to detain those requesting asylum at the airport.[64]

In September 1998 the political agenda regarding deportation changed suddenly. On 20 September 1998 the recourse to heavy handed deportation practices had a casualty: during her deportation the Nigerian rejected asylum seeker Semira Adamu was suffocated in an airplane in the Belgian airport Zaventem at the hands of the Belgian police. The architect of the deportation policy, Minister of Interior Louis Tobback, resigned.[65]It led to some soul searching, and the humanitarian dimension of immigration policy gained more attention.

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[60] CGVS. 1992. 'Vijfde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen werkingsjaar 1992'; Arbitragehof nr. 20/93, 4 maart 1993. Accessed on 22/03/2022 at https://www.const-court.be/public/n/1993/1993-020n.pdf. p.20.

[61] CGVS. 1992. 'Vijfde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen'; Caestecker & Vanheule 2010.

[62] De Morgen, 20.7.1992, p.3

[63] Also asylum seekers who had manifestly unfounded claims or who filed an asylum claim to avoid a deportation measure could be interned.

[64] The MP of the Council of Europe Gross visited the airport in Brussels on January 11, 1999 and reported on the border procedure: When an asylum seeker submits an application he is transferred within 1-2 hours to Centre 127 which is not considered as Belgian territory. At the centre an interview is conducted by the IO. If the case is considered inadmissible, an appeal with suspensive effect is possible and will entail an interview by the AO. More than 50 % of applicants are admitted to the procedure. All asylum seekers are provided with interpretation and legal assistance. Gross 2000.

[65] Several police officers received suspended sentences for involuntary murder in December 2003. Statewatch. 2012. 'Five Police Officers on Trial over the Death of Semira Adamu in 1998'. 28 March 2012.

Strengthening the institutional position of the AO

In 1993, the revised Aliens Law stipulated that the Minister could no longer bypass the decisions of the AO in the eligibility phase. From purely advisory, the AO's power became that of a decision-maker (Vanheule 2007: 144). The position of the AO had been strengthened: also in the border process, the AO could reverse a decision of the IO not to accept an asylum claim. Concomitant with the stronger institutional position of the AO and the backlog of cases to be decided due to the increasing number of asylum seekers, the staff of the AO increased considerably from 30 in 1990 to 200 in 1993. Protection officers were recruited almost exclusively among the staff with university degrees. In 1988 when the AO was founded, only 22 civil servants with tenure track were attached to this service; in 1993 the tenure track positions were doubled among whom 18 were at the university level. Most staff increase, however, was with personnel with a temporary contract. In 1990 the AO had 14 employees with a temporary contract, but the Ministry of Defense provided 16 university graduates, conscripts to the AO. The number of conscripts put each year at the disposition of the AO increased to 36 from 1991 onwards. In 1994 there were 319 staff members with a temporary contract and the Minister of Defense no longer provided personnel as conscription had been abolished.[66] Anyhow, the AO had not used the quota of conscript to its full extent as it had turned out that the investment in training and the high turnover among these conscripts (military service lasted only 8 months) was less advantageous than hiring contract labor. Also, among the contract labor turnover was high. Due to problems of replacement the allocated quota was not always used to its full extent. In 1995 the quota of contract labor was reduced to 217, and it went slowly down to 190 contract workers in 1998. Among the civil servants at the AO, half were university graduates, while among the contract workers this was even higher at 60%.[67]

In 1997 Luc de Smet, a former UNHCR employee at the Brussels branch of UNHCR and until then adjunct Commissioner General became Commissioner General as the first Commissioner General, Marc Bossuyt, left for the Constitutional Court. From 1998 onwards the number of asylum applications went up and the backlog increased. No new personnel were put at the disposal of the AO, because the productivity of the existing staff declined. Luc de Smet insisted on having more personnel, but no re-enforcement was granted. Finally, with the exploding number of asylum seekers in 2000, Luc De Smet threw in the towel. In September 2001 Pascal Smet who had been adjunct Commissioner General since 1998 took over.[68] When Pascal Smet became Secretary of State in the government of the Brussels-Capital Region Dirk van den Bulck became the new Commissioner General (2003-2022).[69]

https://www.statewatch.org/news/2003/december/statewatch-news-online-five-police-officers-on-trial-over-the-death-of-semira-adamu-in-1998/.

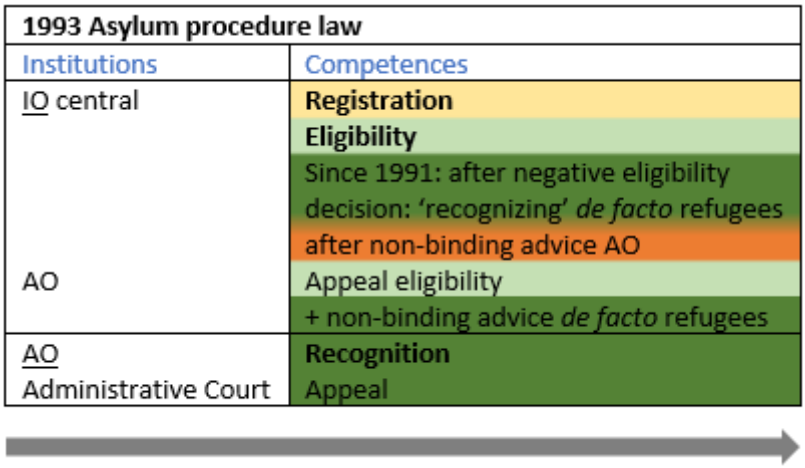
[66] On 28/05/1993 the Council of Ministers decided to expand the staff of the AO with 186 people, all of them with a temporary contract.

[67] Caestecker 2001 and the annual reports of the AO. By the end of 1995 only 21 of the 40 anticipated tenure track vacancies were effectively taken, by the end of 1996 30, and by the end of 1998, 33. CGVS. 1995. 'Achtste jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen werkingsjaar 1995'. p.47; CGVS. 1996. 'Negende jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen werkingsjaar 1996'. p.58.

[68] Pascal Smet had been protection officer at the AO and later became adviser on asylum matters of several ministers of Interior.

[69] Dirk van den Bulck had been an adviser to the Ministers of Interior (1992-1998) and then a judge at the asylum court. In 2003 he became adjunct Commissioner General.

Fig. 3. Institutional timeline asylum determination Belgium, 1993



Tab. 2. Decisions of the Belgian AO to grant Convention status, 1989-2007

	***De jure* refugee status**		***De jure* refugee status**
1988 (N= 660)	46%	1997 (N= 9.160)	20%
1989 (N= 1.250)	42%	1998 (N= 5.190)	33%
1990 (N= 12.310)	4%	1999 (N= 5.050)	29%
1991 (N= 17.840)	3%	2000 (N= 5.088)	24%
1992 (N= 22.100)	4%	2001 (N= 3.373)	26%
1993 (N= 15.330)	7%	2002 (N= 4.582)	25%
1994 (N= 9.930)	16%	2003 (N= 5.170)	23%
1995 (N= 8.040)	18%	2004 (N= 7.486)	30%
1996 (N= 9.710)	17%	2005 (N= 9.947)	31%

AO's recognition policy: article 3 of ECHR and *de facto* refugees

As mentioned before early 1991 the AO had obtained the authority to advice the IO not to deport a foreigner whose asylum application was considered manifestly unfounded both by IO and AO, but whose life or freedom would be in danger when returned to his/her country of origin. Making abstraction of the Yugoslavian case (see 3.2.3), there was definitely a hesitation on the part of the AO to use its new authority to advise the IO not to deport a foreigner whose asylum claim had been declared manifestly unfounded both by the IO and AO but whose "life or freedom would be in danger" in their country of origin. In its detailed annual reports of 1992 and 1993, the AO did not mention how many ineligible asylum seekers they had asked protection for and whether this was decided collectively for certain nationals. Very few decisions of ineligibility confirmed by the AO were accompanied by a non-return advice. In 1992 and 1993 17 Liberian cases and three Somalian cases are documented, but in those years the AO mostly advised the IO to return ineligible asylum seekers from Liberia not to Liberia but to its neighboring countries, while in 1994 the AO did not oppose the return but rather asked the Minister of Interior to judge whether a return was acceptable.[70] The expansion of the

[70] The AO confirmed the ineligibility of 449 Liberian and 37 Somalian cases in 1992 and 1993 and in respectively 64 and 88 cases the AO contested the ineligibility decision of the IO. In only 4% and 8 % of the ineligible decisions of the AO the institution opposed the return to Liberia and Somalia respectively. The decision of the AO to confirm the ineligibility decision could also be motivated by the fact that these ineligible asylum applicants were not truly from Liberia or Somalia or by them not showing up for the interview, but we have no information on the different reasons why the AO denied them access to the asylum procedure. Pascal Smet, de terugleidingsclausule, CGVS

authority of the AO was not to the liking of the then Commissioner General.[71] He disliked the jurisprudence of the ECtHR, which condemned European states for expelling undocumented aliens-- among them rejected asylum seekers-- as their state would potentially treat them in a unhumanitarian and degrading manner. He opposed the indirect and virtual character of the rulings of this 'activist' court (Bossuyt 2003, 2010).

Still from 1994 onward the AO used more often the authority granted by the law to advise to not return ineligible cases. The AO at the same time reformulated the legal mandate into a respect for article 3 ECHR. The AO informed the IO as to the reasons precluding deportation because of a threat of torture, death penalty, or other grounds provided in the ECHR. From September until December 1994 the AO advised the Minister not to return 50 ineligible asylum seekers from war-torn Angola. From 1994 onward it was also used systematically for ineligible asylum seekers from Soudan, Somalia, and Liberia. In the first half of 1996, in the case of 97 older Armenian males who had been drafted in a brutal manner for the conflict in Nagorna Karabach and whose asylum request was declared ineligible, the IO was also given a recommendation not to return them.[72] From January 1998 onward this recommendation was used for ineligible asylum seekers from Algeria, and in 1999 the AO was opposed to the return to Angola, Sierra Leone, Sudan, and Colombia.[73] In 2001 the AO opposed the return to the North and Centre of Irak as well as to Sierra Leone. Also, some people from Sri Lanka and Roma from Kosovo were, according to the AO not to be returned. By the end of 2005 when the AO declared an asylum request ineligible, the Roma, but also other minorities from Kosovo were not to be returned according to their advice to the IO, but also persons from Darfur, Palestina, Irak, Liberia, Eritrea and depending on the profile persons from Myanmar, Tibet, Angola and by the beginning of 2006 persons from Ivory Coast were not to be returned.[74]

During this time there seems to have been a shift in the decision making at the AO. Initially, the AO only focused on the Convention of Geneva, but due to its advisory role in preventing returns of ineligible asylum seekers when that endangered their life and freedom, the protection mandate of the AO expanded. This broader mandate which was reformulated in light of article 3 ECHR 'contaminated' the decisions of the AO on eligibility. It seems the AO declared more asylum seekers, who the IO had considered ineligible, eligible not because of the Convention of Geneva, but because of article 3 ECHR. When the Belgian recognition policy was questioned in the wake of the death of Semira Adamu the then Commissioner General Luc De Smet retorted that he evaluated all asylum requests in the light of the Convention of Geneva as well as article 3 of the ECHR.[75]

7.1995. Private archives Frank Caestecker. We want to thank Laïs De Rynck who in her master thesis for UGent, Global Studies in 2021 provided us with these data on ineligibility decisions. The AO also opposed the return to Algeria of the president of the FIS. Bossuyt 2022: 170 and 305.

[71] Interview Marc Bossuyt, 14.10.2011, Brussels.

[72] For 1994, 1995, first half of 1996 and first nine months of 1997 this was used for respectively 12, 79, 11 and 3 persons from Sudan, 27, 100, unknown and 16 from Liberia and from Somalia 3 in 1994 and 1 in 1997. The first nine months of 1997 the AO advised not to return in total 53 ineligible asylum seekers of which 9 and 16 were from Sierra Leone and Liberia respectively. All other rejected asylum seekers, which according to the AO should not be returned in 1997 were individuals from a total of 10 countries. All except four of the 53 were tolerated in Belgium; the four were deported because of danger for public order. Pascal Smet, de terugleidingsclausule, CGVS 7.1995 together with a counting operation at the end of June 1996 by Frank Caestecker, then CGVS-employee on the use of this protection instrument by the IO in the first half of 1996. For 1997 figures in Rapport to Parliament, 18.11.1997. Private archives Frank Caestecker. See also De Gryse (2001: 140).

[73] For the period after 1997 we have no quantitative data except for an overall number in Sarolea and Carlier, 2002, 314.

[74] Information given by François Bienfait (AO) at the meeting of the Belgian committee for Help to the Refugees, 14.2.2006. https://www.myria.be/nl/contactvergaderingen-internationale-bescherming/archief

[75] CGVS, Communiqué de presse, 26.9.1998. Private archives Frank Caestecker.

From 2002 onward the new Commissioner General, Pascal Smet, decided pro-actively to advise the Minister of Interior on the return decision not only in the eligibility stage, but also in the recognition stage. This seemed logical to him in particular for those asylum seekers whom the AO had declared eligible because of article 3 ECHR but had finally decided not to recognize as Convention refugees. The Council of State had clearly stipulated in its ruling of 27 February 2001 that the asylum court, in contrast to the AO, was not authorized to take into account article 3 ECHR.[76] Therefore, he decided that the negative decisions concerning recognition had to be supplemented with advice not to return the person if that was contrary to article 3 ECHR. The Commissioner General decided to judge each decision not to recognize an asylum seeker also in light of article 3 ECHR. He argued that the law did not prohibit him from adding a humanitarian clause to his decisions. The law mandated him to give his advice on nonreturn together with his decision on ineligibility, but he had no legal mandate to give such advice in the recognition phase. He could always add to his decisions what he called a humanitarian clause. For persons fleeing war-like situations, but also for others who would qualify for protection based on article 3 ECHR but whom the AO did not consider to be Convention refugees, the decision rejecting their asylum claim had to be supplemented with a humanitarian clause pleading for not returning those persons.[77] The AO decided in 2002 pro-actively to point to a protection lacuna in Belgian refugee policy, but the legal implication of this decision was void. By 2005 the AO changed the wording of its advice to the IO in cases of rejecting an asylum claim: the humanitarian clause was added in cases of sickness, pregnancy, advanced age, relatives in Belgium and minor aged asylum seekers and *de facto* refugees were given a non-return advice. The wording of the (informal) non-return advice in this stage of the procedure was similar to the advice given by the AO, as the law prescribed, to *de facto* refugees who were declared ineligible.[78] This administrative renaming was part of a strategy to prepare the ground for the status of subsidiary protection which the EU legislation had introduced with its qualification directive of 2004/83/EU. This directive was transposed in Belgian legislation with the law of 15.9.2006. Three weeks later, on October 6, 2006, the Minister of Interior wrote to the Mayors all over the country that Belgium had a legal status that was similar to subsidiary protection and that it was necessary to transfer these people to the status of subsidiary protection. The Mayors had to inform the ineligible asylum seekers who had a non-return advice as foreseen in the asylum law of 1991 that they had the opportunity to apply at the IO for the status of subsidiary protection. This opportunity was also available for rejected asylum seekers who had received a similar advice when their asylum request had been rejected in the recognition procedure.[79] The European subsidiary protection provided finally a legal status for the *de facto* refugees in Belgium. It had taken Belgium 15 years.

The lack of a status for de facto refugees 1991-2006.

Since 1991 most of the *de facto* refugees were merely tolerated. Their order to leave the territory was not suspended: these *de facto* refugees were tolerated in an extremely precarious manner. The Bosnian war refugees were the first *de facto* refugees who were granted temporary protection which included a short-term residency status with social rights and the right to work (see 3.2.3). The then Minister of Interior was opposed to making temporary protection an

[76] Council of State, 93.573 quoted by Pascal Smet, Horizontale Richtlijn 10 artikel 3 EVRM, 14.3.2002. Archive Belgian Committee for Help for Refugees.

[77] Pascal Smet, Horizontale Richtlijn 10 artikel 3 EVRM, 14.3.2002. Archive Belgian Committee for Help for Refugees. An asylum seeker who was rejected with a humanitarian clause could be rejected again after his/her appeal at the asylum court but the asylum court could not repeat such a humanitarian clause due to the decision of the Council of State of February 27, 2001.

[78] Information given by François Bienfait (AO) at the meeting of the Belgian committee for Help to the Refugees, 14.2.2006. https://www.myria.be/nl/contactvergaderingen-internationale-bescherming/archief

[79] *Circular letter of the Ministry of Interior to the Mayors, 5.10.2006*.

intrinsic part of the alien legislation. He preferred, if need would arise an ad hoc decision by the government.[80] According to the authorities there was little need for such a status. In the spring of 1994, another ad hoc program was set up for a limited category of citizens from Ruanda. They also obtained (renewable) residence permits of 6 months.[81] For all other *de facto* refugees there was no legal status. At supranational fora Belgium was criticized for the lack of a solution for their *de facto* refugees. In 1996, the AO attended the Intergovernmental Consultations on Asylum, Refugee and Migration Matters in Berlin and the Meeting of European Government Experts on Current Refugees Issues in Zürich, during which temporary protection was highlighted.[82] UNHCR also insisted that the Belgian authorities should do better for those refugees. In Belgium itself the precarious stay of *de facto* refugees was strongly criticized. In 1997 the NGOs in refugee assistance launched a campaign for asylum for war refugees, but it received little political response.[83]

The change of Minister of Interior after the death of Semira Adamu meant that some modest initiatives were taken for a more humanitarian policy. In the fall of 1998 two circular letters on "foreigners who, as a result of exceptional circumstances and regardless of their will, temporarily cannot comply with an order to leave the territory" provided them with a temporary stay, each time with three months, under strict conditions. The regularization was open to a larger group of persons: not only refugees but also people who because of technical or medical reasons could not return as well as asylum seekers who were waiting unreasonably long for a decision in their asylum request could apply. If these asylum seekers and tolerated undocumented immigrants were regularized, they would qualify for welfare and after three years a more secure stay would be possible. These circular letters mentioned the group of *de facto* refugees, but it was emphasized that the AO's advice that they should not be returned did not imply an automatic acceptance for regularization; a case-by-case approach was necessary, but it eased the burden of proof on the persons concerned.[84] Parliament evaluated immigration policy between October 1997 and June 1998 and one of its recommendations was to provide a better legal status to these *de facto* refugees.[85] In 1999 the individual requests for regularization proceeded apace, but in the published figures no specification was given as to the number of *de facto* refugees regularized. In 2000 a collective regularization campaign was launched that mentioned *de facto* refugees as an explicitly primordial target group.[86] Twenty thousand undocumented aliens were regularized by 2003. In the meantime, calls for a truly additional protection scheme were refuted by the Belgian authorities. They referred to the Treaty of Amsterdam. The Treaty called for a status at the EU level on temporary protection for mass influx within five years.[87] Still in July 2002 the Minister of Interior decided to grant the *de facto*

[80] Minister of Interior Tobback to UNHCR branch office Brussels, 27.7.1994. AIO,
[81] EU ooucil, 13667/97 ASIM 26.
[82] CGVS. 1998. 'Elfde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen'. pp.139, 145
[83] Discussienamiddag OCIV. 5.06.1997. Personal archive Frank Caestecker. In 2001 the senators Jean Cornil and Marie-José Laloy (PS), two MPs of the government coalition handed in a draft law to introduce a status of subsidiary protection for these *de facto* refugees, but their proposal was never discussed. See https://www.senate.be/www/?MIval=dossier&LEG=2&NR=916&LANG=nl (accessed 15.5.2022).
[84] Circular letters of 10/10/1997 and 15/12/1998. CGVS. 1998. 'Elfde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen werkingsjaar 1998'. pp.83, 136-143; Belgian Gazette 14.11.1997, pp.30348-9 (see also 19.12.1997, p.40492).
[85] Van den Bossche, Luc & Jan Peeters. 1998. 'Nota Aan de Ministerraad: Evaluatie van Het Asielbeleid in België'. Personal archives Frank Caestecker.
[86] CGVS. 2000. 'Dertiende jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen werkingsjaar 2000'. https://www.cgvs.be/sites/default/files/jaaverslagen/jaarverslag_2000_nl.pdf.
[87] CGVS. 1998. 'Elfde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen'. p.93 and 141-143. In 1997, the AO had already called upon the Minister of Interior to give more attention to the *de facto* refugees. Although the Minister had provided opportunities for regularization, the AO asked for highlighting the

refugees, those for whom the AO had opposed their return, a monthly renewable suspension of their expulsion order until the AO agreed to their return. A proposal to grant them first a temporary stay of 6 months and then a yearly residence permit had been refuted.[88] As mentioned before the *de facto* refugees had to wait for a truly temporary protection until the end of 2006.

An aborted radical reform of the asylum institutions, 1999-2003

In the meantime, following the Kosovo crisis the Belgian asylum institutions had been heavily criticized. After the end of the war in Kosovo asylum seekers from Kosovo continued to arrive. In 1999, 12,330 of the 48,108 total asylum applications were from Kosovo. Many of them had come from Germany when the temporary protection program was stopped there. The rather late reaction in Belgium to the end of the war and the lifting of protection elsewhere in Europe created in Belgium a peak in asylum applications.[89] This crisis caused the government to question the institutional setup of asylum policy. The autonomy of the AO was considered detrimental to an efficient immigration policy. The bad communication between the IO and AO was blamed for the exceptional peak in asylum applications. Fully integrating the AO in the IO would make for a more efficient decision-making process in the asylum procedure. In this manner the minister of Interior would formulate general guidelines that the AO had to implement, without the minister intervening in individual decisions. The AO would decentralize in three regional branches, one in Flanders, one in Wallonia and one in Brussels, all bound by ministerial instructions.[90] The discussions on reform of the institutional setup in asylum policy lasted for four years at the top political level, but in the end nothing happened. The appointment of a new government in 2003 with a new Minister of Interior and a drop in asylum applications in the following years did away with the need for reform.[91]

The transformation of the asylum tribunal into an asylum court

In 1993 the law was changed so that an appeal at the asylum court was automatically suspensive. UNHCR resigned voluntarily from the AT. However, the new Aliens Law stipulated explicitly that UNHCR could at any moment advise on individual cases. The advice of UNHCR was not binding, but the AO or the asylum court had, however, if they did not heed this advice motivate their different position in their final decision.[92] The departure of UNHCR from the AT was used to reform the AT into an asylum court with professional judges. The 16 judges got a first mandate of 5 years after which they would be appointed for life.[93] The asylum court had full jurisdiction, meaning they gained authority both to investigate the case on its

specific situation of the *de facto* refugee group more explicitly. CGVS. 1997. 'Tiende jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen werkingsjaar 1997'. p.10

[88] Correspondance between AO, IO and Minister of Interior, 7.2002. Personal archives Frank Caestecker.

[89] Duquesne, A. 'Omzendbrief van 02/09/1999 betreffende de opheffing van het bijzonder statuut van tijdelijke bescherming voor kosovaren'. Belgisch Staatsblad. 2 September 1999. https://etaamb.openjustice.be/nl/omzendbrief-van-02-september-1999_n1999000714.html.

[90] 'Nota Ministerraad. Nieuwe Asielprocedure'. 2000. Box 37, CAHAR. AIO Brussels; CGVS. 'Jaarverslag 2000'. pp.21-22.

[91] CGVS. 2003. 'Jaarverslag 2003'. p.7.

[92] Belgische Senaat. 1993. 'Wetsontwerp tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen'. Wetsontwerp 903/1. Kamer van Volksvertegenwoordigers. https://www.dekamer.be/FLWB/PDF/48/0903/48K0903001.pdf; CGVS. 1992. 'Vijfde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen'.

[93] The appointment of the members of the asylum court happened by the minister of Interior after consulting the Council of Ministers. CGVS. 1991. 'Vierde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen'. p.18.; CGVS. 1992. 'Vijfde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen'; Strubbe 2011. In 1995 and 1996 some side chairs of AT quit and had to be replaced. The Minister of Interiors established a non-binding advisory committee (through a ministerial decree) to start a selection procedure. Candidates were selected, after a written and oral exam after which the minister made his final decision.

merits and to grant the refugee status themselves (Carlier & Vanheule 2010). In 1993, as part of the centralization of immigration policy, the asylum court (together with the AO) was transferred from the Ministry of Justice to the Ministry of Interior. The decision of the AO and the asylum court could be further appealed, on legal grounds rather than on its merits, to the Council of State. The Council of State had an annulment and suspension competence. At the beginning of the 21st century the appeals at the Council of State of rejected asylum seekers exploded. According to the AO this spectacular rise could be attributed to a Constitutional Court ruling in 1998 which stated that rejected asylum seekers had the right to social assistance as long as any appeal was not being decided yet.[94] Tab. 3. gives an overview of the recognition policy of the appeal body between 1989 and 1998. Seven percent of the decisions of the AO were overturned, but we have yet no information to which extent the two institutions had conflicting views on protection and whether the appeal authority influenced the AO recognition policy.

Tab. 3. Share of recognition decisions of asylum tribunal (1989-1992) and asylum court (1993-1998)[95]

1989 (N= 95)	9,5%	1994 (N= 1641)	5,9%
1990 (N= 194)	13,4%	1995 (N= 1537)	7,6%
1991 (N= 371)	6%	1996 (N= 1547)	7,6%
1992 (N= 1938)	7,4%	1997 (N= 3438)	4,1%
1993 (N= 1377)	6,8%	1998 (N= 2982)	8,1%

1.2.4. Switzerland: the asylum office decides about four statuses

By 1994 the centralization of the registration of asylum request was successful as the filling of applications in the country was done in eight registration centers. Many asylum seekers were dismissed from the asylum procedure as they came from a safe third country. Other asylum seekers whose request was registered went through an accelerated procedure. In the first half of the 1990s probably about 60% of the asylum cases were handled in an accelerated procedure, which meant that 40% of the asylum seekers were not interviewed by protection officers (IGC 1994: 6-7; 1997: 332). From 1999 onward lack of identity papers without an acceptable explanation became also a reason for dismissing an asylum application (IGC 2007).[96]

The AO becomes the IO

With a staff of 250 in 1989, the AO was expected to deal with about 12,000 cases per year. Following substantial staff increases up to 350 in 1989-1990 and 500 in 1992, the Office was expected to be able to deal with an annual number of 20,000 cases in 1990 and about 37,000 in 1992. As the number of arrivals in 1989 was more than 24.000 the backlog increased.

[94] CGVS. 2005. 'Jaarverslag 2005'. p. 12.

[95] CGVS. 1990. 'Derde Jaarverslag van de Commissaris-Generaal Voor de Vluchtelingen En de Staatlozen-Werkingsjaar 1990'. p.23; CGVS. 1992. 'Vijfde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen werkingsjaar 1992'. p.37; CGVS. 1993. 'Zesde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen werkingsjaar 1993'. p.22; CGVS. 1995. 'Achtste jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen werkingsjaar 1995'. p.27; CGVS. 1996. 'Negende jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen werkingsjaar 1996'. p.35; CGVS. 1998. 'Elfde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen werkingsjaar 1998'. p.29; Strubbe 2011. The asylum court also got appeal requests from UNHCR recognition decisions, which they refused to process as they declared themselves lacking this authority.

[96] Until May 1995 no social support had been available for these undocumented asylum seekers for a certain time period (IGC 1997: 326).

However, from 1991 to 1993 it was possible to considerably increase the number of expedited cases so that it virtually corresponded to the number of new arrivals and since 1992 the number of expedited cases has been higher than the number of new arrivals resulting in a decrease of the backlog. By 1997 although the backlog totaled 16,380 cases, the staff was reduced to 450 (IGC 1997). The AO increasingly dominated asylum policy.[97] From 1988 onward the cantonal authority for registration was in competition with the centrally managed registration centers. By 2006 only 35% of the asylum applications were still registered by the cantons, and in 2008 the cantonal registration of asylum applications was abolished (Mainz 2017; Parak 2019). By that time the AO had been merged with the Department of Immigration, Integration, and Emigration and had become the Federal Department of Migration.[98] A full circle had passed as the AO, created as a specific institution within the Ministry of Justice and Police in 1979 to distinguish Swiss immigration policy managed by the foreigners' policy from refugee policy, merged with the IO.

In 1995 and 1996 respectively 1531 and 2399 asylum applications were dismissed (IGC 1997: 334). The asylum seeker whose request was dismissed at the airport could only be sent back to their country of origin if UNHCR agreed to this return. The advice was asked for 34% of the airport applications in 1994 (N= 293), 58% in 1995 (N= 473) and 50% in 1996 (N=702) (ICG 2007: 332).[99]

In 1990 an AT had been created.[100] The government never resorted to the provision in the law instituting the AT that the government in extraordinary circumstances could interfere in its functioning. In 1993 55% of the rejected asylum seekers appealed the decision of the AO and 1,5% were repealed (IGC 1994: 7; 1997:332). In 1995 38% of the rejected asylum seekers appealed this decision at the AT of which 9% were repealed, in 2006 resp. 47% and 10% (IGC 2007: 332). The decision of the AT could be challenged before the Highest Administrative Court. In 2007 the AT became a court

Not only Convention refugees

As mentioned before, the "provisionally admitted persons" were *de facto* refugees covered by either an explicit (*de facto* refugee status) or an implicit toleration (humanitarian status). The humanitarian status went beyond refugees as the AO and the cantonal aliens' police could also grant a humanitarian permit on other grounds than the need for protection, such as medical reasons, not being repatriable due to reasons beyond the will of the individual[101] or asylum seekers whose request was not decided upon after three years. The authorities had granted mostly humanitarian status since the 1980s. This continued until 1992 although more *de facto* and *de jure* refugee statuses were granted. The fact that more asylum seekers were granted the *de facto* refugee status was probably due to the promotion by UNHCR of temporary protection as a solution for the war refugees from Yugoslavia. Article 14 of the Asylum Law of 1991 provided for temporary protection. It was first activated for the Yugoslavian war refugees, but it was quickly applied to other groups as well. In 1992 the Temporary protection status was granted to 4622 Yugoslavians, in 1993 to 4220 Bosnians and in 1994 to 3604

[97] Peter Arbenz was the director of the AO until 1993 when he was replaced by Urs Scheidegger who was the director until January 1997. See https://www.admin.ch/cp/d/1997Jan8.145036.7006@idz.bfi.admin.ch.html, and https://sokultur.ch/html/kulturschaffende/detail.html?q=&qs=2&qs2=2&artist_id=1274, accessed July 15, 2022.

[98] The *Schweizerisches Bundesamt für Auswanderung, Integration and Auswanderung* was a department of the Ministry of Justice and Police. Already by the end of the 1990s a merger had been considered but it took until 2005 to be consolidated. Portner 2021, 110. Federal Department of Migration was called *Office federal des migrations/ Bundesamt für Migration.*

[99] We have no information to which extent UNHCR agreed to the return of these rejected asylum seekers.

[100] The AT was called the *Asylrekurskommission/ Commission suisse de recours en matière d'asile*

[101] Refers to asylum seekers who were stateless or without any identity documents and to whom the authorities of his/her country of origin refused to issue such papers.

Bosnians. Citizens from Somalia, Turkey and Angola were also temporarily protected, in 1992 the latter received 11 of all TP statues, in 1993 56% and 62% in 1994. In 1995 more than half of the decisions of the AO was granting temporary protection, in 1996 1/3.[102] In 1999 20,000 war refugees from Kosovo were temporarily protected in Switzerland, but only for a few months. In the first half of the 1990s the recognition rate for Convention refugee status was low in comparison with the temporarily protected. The main explanation for the low recognition rate of the AO in relation to the Convention of Geneva is the restrictive definition of refugee that the AO and AT adhered to, following the German doctrine of state persecution (Kälin 2001).

Tab. 4. Switzerland decisions on four statuses, 1992-2002[103]

	De jure refugee status	*De facto* refugee status (including temporary protection for war refugees from Yugoslavia)	Humanitarian status
1991 (N= 43.500)	2%	0,4%	32%
1992 (N= 24.583)	6%	21% (89%)	6%
1993 (N= 23.048)	17%	42% (44%)	4%
1994 (N= 22.290)	13%	52% (38%)	4%
1995 (N= 16.885)	15%	56%	4%
1996 (N= 17.678)	13%	32%	4%
1997 (N= 17.375)	15%		
1998 (N= 15.319)	13%		
1999 (N= 30.399)	7%		
2000 (N= 28.439)	7%		
2001 (N= 15.799)	14%		
2002 (N= 16.026)	11%		

Temporary protection was a status only available to certain groups, but the AO had to grant provisional admission to any rejected asylum seeker in cases where expulsion or deportation was technically impossible, unlawful, or unreasonable. The latter referred to refugees fleeing indiscriminate violence, who were therefore not directly persecuted as individuals but who were victims of a general situation of violence, usually a civil war. As Tab. 5. illustrates, during the 1990s the status was mostly granted to Tamils from Sri Lanka, some of those who had fled the

[102] IGC 1997: 200-215; Mission to Bern 3.12.1991. AUNHCR, 600.SWI, Protection and General Legal Matters - General - Protection - Switzerland - Vol. 9 (1991-93).Those groups temporarily protected and individuals with de facto refugee status or granted a stay based on compassionate groups are not always easy to distinguish.

[103] The fourth decision was rejecting. For the period 1992-2002 we refer to IGC 2009: 359, where it was explicitly stated that the figures refer to first instance decisions and that the dismissed asylum applications were not incalculated in the rejections. The n refers to decisions taken either (*de jure* or *de facto*) protection, tolerance because of compassionate grounds or rejections. In IGC 1994: 14 the *de facto* status is called a status of temporary protection and the figures are similar to IGC 2005: 200-215 on temporary protection (which also gives the number of Yugoslavian war refugees among them). It seems these figures refer to new cases, without the decisions to prolong the residence permits of older cases. In 1992 there were 1730 Convention refugees according to IGC 1994, but only 1132 according to IGC 1997: 334 and 1395 according to IGC 2009: 359. The fluctuation in the numbers of Convention refugees the next years went all kind of directions. For this table we used the numbers of IGC 2009: 359. In IGC 2009: 359 the rejections included the temporary Admissions, so we deducted those for the years we knew the number of *de facto* refugees and humanitarian status (1992-1996) to calculate the share of decisions for protection and compassionate grounds. We also took the ones of IGC 1997 which were hardly different from those of IGC 1994.

Yugoslavian civil war, and the violence in Angola and Somalia.[104] Those who were considered *de facto* refugees were usually allowed to stay for a first period of 12 months.[105] They received welfare as asylum seekers and needed an authorization for working. Family reunification was mostly not possible. The canton of residence had authority to renew this residence permit as long as protection was needed. The residence permit could be withdrawn at any time depending on the situation in the country of origin, but also if one committed a crime or an offence in Switzerland.[106]

Tab. 5. Countries most represented among *de facto* refugees and those with humanitarian status in Switzerland (not including temporarily protected)[107]

	1994-2000	2001-2007
Sri Lanka	21.000	3.000
Serbia/Kosovo	7.000	10.000
Iraq		4.000
Somalia	5.000	3.000
Bosnia-Herzegovina	2.000	3.000
Angola	2.000	2.000

By the end of 1992, 14,800 refugees and other foreigners resided in Switzerland with a humanitarian status and about 5000 with a *de facto* refugee status.[108] The numbers living with these precarious statuses increased to a total of 30,000 in 1995 (Ruedin & Efionayi-Mäder 2014). As the *de facto* refugee status was extensively used by the Swiss authorities, parliament demanded a legal imbedding of the status. This procedure was very time-consuming and costly although it was obvious that many of these refugees could not return home. Moreover, the Swiss wanted to be prepared for similar situations in the future. The Swiss parliament eventually requested the government to prepare a legal provision for *de facto* refugees. The latter installed a Commission of Experts to prepare such a law, but we ignore the results of this campaign (IGC 1995: 200-215).

By early 1999 the number of *de facto* refugees had dropped to 16,000. All immigrants, mostly asylum seekers who had arrived before 1993 and were still in Switzerland in 2000, could apply for a regularization and 16,700 foreigners, among them many refugees could legalize their stay. The cantonal authorities could turn these temporary permits into permanent residence permits depending on financial self-sufficiency and integration into Swiss society. Many elderlies as well as single women and families had a hard time qualifying for permanent residence permits. A reform in 2007-8 granted *de facto* refugees access to the labor market and the opportunity to reunite with their family. As mentioned before about 18.000 had been authorized to stay temporarily in Switzerland between 1992 and 1996 by a decision of the Federal Council to grant temporary protection to war refugees from Bosnia-Herzegovina and in 1999 20,000 war refugees from Kosovo were also temporarily protected in Switzerland. Most of these 38,000 refugees from ex-Yugoslavia returned home; some qualified for the

[104] Documentation-Réfugiés, Supplement to No. 213, 30 March-12 April 1993 quoted by Lambert 1995: 136-140. IGC 2005: 200-215 refers also to cases from Turkey.
[105] We do not know whether until 1991 the period of stay agreed to for a provisionally admitted persons was one year or shorter, but by 1992 it was one year.
[106] Between 1994 and 2014 133,000 persons had been provisionally admitted. By 2014 15% of them had left the country voluntarily and 0.4% were deported. Ruedin & Efionayi-Mäder 2014: 4. See also Lambert 1995: 136-140; IGC 1994: 15.
[107] Ruedin and Efionayi-Mäder: 2014: 18.
[108] Figures from the AO, February 1993 quoted in Lambert 1995: 140.

regularization for long stayers. The number of *de facto* refugees nearly doubled in 2000 to 28,000 persons and their number oscillated around 25,000 in the next decade (Ruedin & Efionayi-Mäder 2014).

1.2.5. The Netherlands devalues the Convention refugee status

After Germany started to dismiss a large part of the asylum requests, the flows of asylum seekers changed direction, and the Netherlands became one of the preferred destinations of those who came to Europe (Fig. 1.). The Netherlands embarked on a strategy of concentration, speeding up of decision making and dissuasion.

In 1994 a border procedure was introduced.[109] The Dutch authorities decided that the processing of more asylum claims had to be done in accelerated procedures. The accelerated procedure had no second interview, no internal review possibility, and appeal was not automatically suspensive. Such a procedure had been introduced in 1974 with the concept of manifestly unfounded applications but it was only legally embedded in 1993. Inspired by Germany, two additional grounds were added in 1995 by which an application could be treated in an accelerated manner: asylum seekers from Safe Countries of Origin and those who came from a Safe Third Country. Parliament organized a debate on February 7, 1995, on the concept of safe country of origin and it was decided that Parliament had always to give its agreement on the list. From then onward two times a year the Dutch Parliament was given the opportunity to discuss the use of the concept safe country of origin. Asylum requests of asylum seekers coming from a Safe Third Country could be dismissed, but in practice this concept was not often applied. The Dublin Agreement which was being implemented by 1995 made the use of the Safe Third Country less powerful. In line with developments elsewhere at that time, the mere transit through a third country was not sufficient for the return to that country. For the safe country of origin the Dutch approach was very cautious.[110] Being from a Safe Country of origin was not considered as a 'manifestly unfounded' criteria, but could be used as an ineligibility ground (Doomernik, Penninx, & Amersfoort 1996: 29; Grütters 2003: 60; Spijkerboer & Vermeulen 2005: 17). In 2000 a new Aliens Act was codified, and the most important change was that from then onward all applications could be treated in the fast-track procedure, as opposed to only decisions based on the safe countries or the claims considered manifestly unfounded. The fast-track procedure was used in at least 60% of all the cases by mid-2002, which almost always ended in rejection. The fast-track procedure only had a non-suspensive marginal appeal possibility with the Council of State. The Minister in charge expressed the ambition to raise the share of fast-track procedures to 80%.[111] This had not been the intention of the legislature, yet the frequent use of the fast-track procedure did hold up in court (Grütters 2003).

[109] The MP of the Council of Europe Gross visited Schiphol on February 27, 1997 and reported: On their arrival in Schiphol, asylum seekers are registered by the Border Control Police which transfer them to the registration centre, where they are interviewed by the staff of AO. The interview is held in the presence of a lawyer (there is a list of about 100 lawyers available for consultation by asylum seekers), interpreter, staff member of a refugee aid organization and a representative of UNHCR. Gross 2000.

[110] The list of Safe Countries of Origin was prepared by the Minister of Justice. We ignore whether the AO had any say in the establishment of this list, nor to what extent this concept was used in practice. In 1995 Poland, Switzerland, and the Czech republic were considered Safe Third Countries (Grütters 2003: 296). In 1996 this list consisted of all EU and EER countries and in addition Bulgaria, Hungary, Poland, Romania, Slovakia, Czech Republic, Ghana, and Senegal. Doomernik, Penninx, and Amersfoort 1996, 29.

[111] Human Rights watch. 2003. 'Fleeting Refuge: The Triumph of Efficiency over Protection in Dutch Asylum Policy'. Vol. 15, No. 3 (D). https://www.hrw.org/sites/default/files/reports/nether0403.pdf ; Bakker 2002: 149.

Reorganization of IO and AO into internally autonomous agencies

In 1994, similar to Switzerland and Denmark in 1986 and Germany in 1993, the Dutch authorities decided that the registration of asylum applications, including the first interview, should no longer take place all over the country in the different local IOs. They concentrated (the registration of) asylum seekers in a few centers. Registration was done by the AO in first two centers, later, by 2001 in four centers.[112]

This reorganization was part of a general administrative reform movement in the Netherlands and the IO/AO was strongly affected. Whereas previously the IO/AO had been an integral part of the Ministry of Justice, it became an internally autonomous agency.[113] The purpose of this reform was to separate policy development, which was to stay at the Ministry of Justice, and policy implementation, which would be done at the IO/AO.[114] The new IO/AO director Hilbrand Nawijn said about the establishment of the IND: 'You have to separate policy from implementation'.[115] The IO/AO decentralized its organization by having branch offices in the different regions of the Netherlands; each branch office carried out both IO and AO tasks. Within the AO there was a distinction between the protection officer who conducted the asylum interview and the one who took the decision. The former had no specific legal training and did all kinds of cases as for them there was no geographical specialization.[116] Due to the unexpectedly large increase in the number of asylum seekers the staff of IO and AO together expanded from 856 FTE in 1993 to 2,823 FTE by the end of 1999. A lot of the staff was hired on a temporary basis.[117] The IO/AO did not provide data on each division's staff but according to Grütters (2003: 143,171) about half of the staff was allocated to the AO. The IO/AO used a distinctly more businesslike style than before. In their yearly reports they describe themselves as a company to be managed. Moreover, production standards became central in its operational management.[118]

[112] Grütters 2003, 51–61. For a detailed description of the Dutch asylum procedure in 1994 see: IGC 1994.

[113] The IO/AO was called in Dutch *Immigratie and Naturalisatie Dienst* (IND)

[114] IND. 1995. 'Jaarverslag IND 1994'. The reception of asylum seekers, which before 1994 was under the authority of the Ministry of Welfare, became a jurisdiction of an internally autonomous agency within the Ministry of Justice.

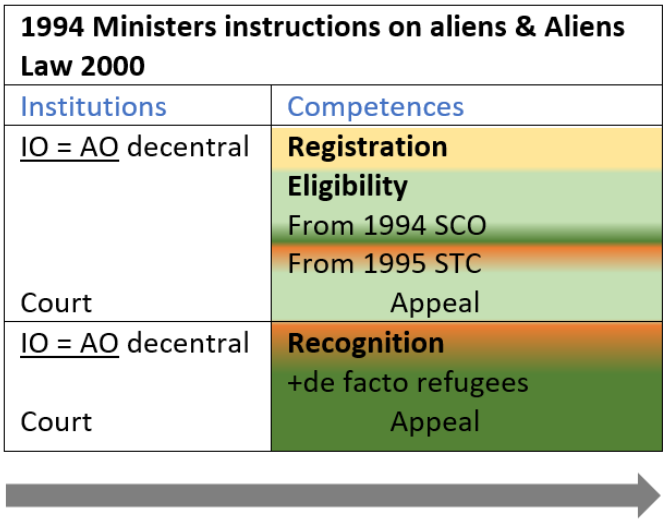
[115] Hilbrand Nawijn was head of the AO between 1982 and 1984, head of the IO between 1984 and 1988, and head of the IO/AO between 1988 and 1994. Nawijn added: 'Politics must be able to keep an eye on things, but there must be room for your own business operations... The aliens policy has a great involvement factor in society and I therefore don't mind being accountable to politics. I also send a lot of information to my political superiors, which leads to mutual understanding.' Nawijn, Hilbrand. n.d. 'Document Reis Door de Tijd: Van DVZ Naar IND: Bijdrage Hilbrand Nawijn'. AIND. Z-336. A93/3448/369703, Bakker 2002.

[116] IGC 1994

[117] In 1996, 1997, and 1998 the IO/AO had employed respectively 32%, 22%, and 12% of its staff on a temporary appointment. Grütters 2003, 95.

[118] IND. 1995. 'Jaarverslag IND 1994'; IND. 1999. 'Jaarverslag IND 1998'; IND. 2000. 'Jaarverslag IND 1999'.

Fig. 4. Institutional timeline asylum determination the Netherlands, 1994/2000



The reorganized IO/AO had a rough start because of the total reorganization and an initially largely inexperienced staff confronted with ever increasing asylum claims. For the regular procedure there was an internal review possibility that had existed since 1965, meaning that when the AO made a negative decision the minister (who delegated to the central IO in practice) could still decide otherwise. The impact of this corrective mechanism in favor of refugees was modest in practice in the 1970s and 1980s.[119] From 1994 onward however the IO corrected almost one third of the AO's decisions.[120]

The Aliens Law of 1994 had changed the institutional set-up of refugee appeal as well. Appeals were no longer handled by the Council of State but by separate Aliens Chambers at regular courts.[121] Since these courts were spread all over the country, a separate chamber was set up to monitor the unity of justice. This reform was not implemented with the deliberate intention of sidelining the Council of State (administrative courts), which had exercised in the 1980s an expansive influence on refugee recognition, but for the sake of a general reform of the administrative law courts. For efficiency reasons the authorities did not want two different appeal bodies as the asylum procedures were considered to last too long. Thus, the administrative court's appeal instance was 'sacrificed'.[122] Between 1994 and 1998 the Aliens Chambers at regular courts corrected about 20% of the AO/IO rejections. In 1995 a new unit within the IO/AO was created to defend their decisions in the regular court. Before, the Ministry of Justice was defended by the general 'country lawyer' (*Landsadvocaat*) to represent them before the court. A lawyer unit within the IO/AO was supposed to increase the quality of decisions as the distance separating protection officers from the lawyers was shortened. According to Grütters (2003: 63) the new unit 'lost' more cases in appeal than the 'country lawyer' did before. The high percentage of quashed decisions was probably also partly due to

[119] Interview Jaap Hoeksma, 6.07.2021. Amsterdam; for the 1970s and 1980s: Swart 1978; Fernhout 1990.
[120] It is not entirely clear whether this number concerns only asylum decisions of the AO or is referring to all IO decisions concerning migration. Van Ess, Henk, and John Oomkes. 1998. 'Portier van het asielbeleid is doodziek'. Leidsch Dagblad, 5 December 1998, p.41.
[121] The new 1994 Aliens Law excluded the Council of State in the entire asylum procedure. Only cases submitted to the Council of State before 1 March 1994 were still dealt with by the Council of State (Bem, 2007: 17; Vermeulen et al, 1998: 10). Thus there was a period when both the Council of State and the district courts dealt with appeals in asylum matters.
[122] The supervision of the detention of asylum seekers had always been handled by the regular courts, similar to several other European courts, but this was used in the Netherlands as an argument to give the regular courts authority in many matters of alien law, including asylum. Grütters 2003; Interview Groenendijk, Kees. 10.09.2021. Ghent.

the inexperienced staff of the new unit, rather than only the shabby work of the IO/AO. The malaise caused the head of the IO/AO to resign in 1996, but his successor only stayed on for 2 years.[123] In 1997 the Minister of Justice admitted that there was a large gap between the intended policy and policy implementation. The IO/AO allegedly appropriated too much policy freedom-- a practice that could tacitly go on for a long time because of the lack of a control mechanism over the organization. The minister lost her grip on the organization as a consequence of the enormous growth of the IO/AO in a relatively short time span.[124] By 1998, however, the IO/AO claimed to perform better as more protection officers acquired experience and more on-the-job training was provided. As the years passed, more protection officers got tenure track.[125] Also, the AO increasingly became more separated from the IO within the agency.[126]

In 2000 a new Aliens Act was codified in which the criteria for regular residence permits were not clearly defined. There also remained a lot of unsettled issues in refugee matters to be arranged through royal decrees and circular letters. Administrative discretion had large leeway (Böcker et al 2012). This Aliens Law of 2000 abolished the internal review possibility, which since 1994 had had an important positive impact on the recognition rates. The AO acquired the final say on recognition decision in first instance. The Aliens Law of 2000 gave the appeal always a suspensive effect.[127] From 1994 onward when an asylum claim had been rejected by the AO/IO an appeal was possible, but these appeals did not always suspend the deportation order. This changed in 2000.

In 2002 the internal autonomous agency IO/AO was transferred from the Ministry of Justice to the newly created Ministry of Aliens Affairs and Integration with Minister Hilbrand Nawijn, former head of the IO/AO (Grütters 2003: 50). The AO within this agency got a stronger autonomous position and was managed by its own director. The division of tasks between the two bodies -IO and AO- became more clearly defined. The decentralized IO/AO structure was no longer based on regions but on processes: Asylum being one process (AO) and other migration related tasks being another process (IO). Some branch offices only handled IO tasks, while others solely handled AO tasks. The AO and IO had their own separate 'middle management teams' although they were still supervised by the head of the IO/AO who had the final responsibility over the whole organization. According to Groenendijk and Strik, an optimal recognition of refugees was not the goal of this strict division between the AO and IO. On the contrary, the division between the IO and AO created possibilities to be stricter in the recognition of refugees.[128]

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[123] Van Ess, Henk, and John Oomkes. 1998. 'Portier van het asielbeleid is doodziek'. Leidsch Dagblad, 5 December 1998, p.41; IND. n.d. 'IND 25 jaar: Interview Peter Veld'. Overzichtspagina. Accessed 2 March 2022. http://ind.nl:80/over-ind/verhalen/Paginas/IND-25-jaar-Interview-Peter-Veld.aspx.

[124] Van Ess, Henk, and John Oomkes. 1998. 'Portier van het asielbeleid is doodziek'. Leidsch Dagblad, 5 December 1998, p.4.1.; Van Ess, Henk, and John Oomkes. 1998. 'Wanbeleid bij immigratiedienst'. Leidsch Dagblad, 5 December 1998, p.1.

[125] IND. 1995. 'Jaarverslag IND 1994'; IND. 1999. 'Jaarverslag IND 1998'; IND. 2000. 'Jaarverslag IND 1999'; Grütters, 2003.

[126] In 1998 a new separate regional branch that only conducted AO tasks was created. This separate AO branch was specialized in processing the growing number of asylum seekers from Irak and Afghanistan. The AO wanted to treat these requests more collectively. IND. 1999. 'Jaarverslag IND 1998'; Leidsch Dagblad. 1988. 'Nieuwe afdeling IND', 21 July 1988, p.3.

[127] Except in the fast-track procedure and in the marginal appeals before the Council of State Appeal before the Council of State was the only appeal possibility in the fast-track procedure and the second appeal in regular procedure. Grütters 2003: 53, 57.

[128] Strik, M. H. A. 2011. Besluitvorming over Asiel- En Migratierichtlijnen. De Wisselwerking Tussen Nationaal En Europees Niveau. Den Haag : Boom Juridische uitgevers. https://repository.ubn.ru.nl/handle/2066/92850; Interview Groenendijk, Kees. 10.09.2021. Ghent.

The 2000 Aliens law also had consequences for appeal as it reintroduced the Council of State in the asylum procedure, but this time only as second appeal instance. The Aliens Chambers from the regular courts were still in charge of the first appeal, however, the separate chamber within the regular court that monitored the unity of justice ceased to exist, as the Council of State took over this task (Grütters 2003: 44). The legislature did not originally intend a fully-fledged additional appeal possibility with this reintroduction of the Council of State. The intention was that the Council of State would in fact only be able to act if a large number of cases received a negative decision without further justification (Ficq 2001: 61–69). While the Council of State had a liberal reputation between about 1976 and 1994, this was not the case for at least the first 10 years after its reintroduction in the asylum procedure in 2000. Many of the old Council of State members had retired by that time and had been replaced by new judges. The Council of State often only tested marginally, claiming 'the IO/AO was the expert in this field that we should trust'.[129]

Refugees shelved in different kinds of protection statuses

Initially the position of the Council of state towards the Convention of Geneva was rather open, focusing on '*the availability of protection against persecutory acts. Whether or not there was a central government was not decisive.'* Following this reasoning for example several asylum seekers who asked asylum after the downfall of Siad Barre in 1991in Somalia were recognized as Convention refugees. Yet from November 1995 onwards the position of the Council of State shifted as they persistently judged there could never be persecution if there was no (factual) state authority present, regardless of the persecuting actor. The Council of State motivated this shift by stating they followed German and French case-law. Some district courts (Zwolle and The Hague) questioned this policy shift refusing to follow the Council of States' reasoning that, in events of civil war, there could not be persecution if there was no (*de* facto) state. In decisions of March 19 and 21, 1997, regarding the recognition of a Somalian asylum seeker, the Council of State emphasized its position relating to the consequences of the lack of a controlling state authority on the applicability of the Geneva convention. Following the German refugee definition, the Dutch Council of State stated that persecution could only take place if it can be attributed to the state. [130] The Council of State acknowledged the possible presence of *de facto* authorities (for example in some parts of Somalia form July 1993 onwards), but these were not quasi states (Vermeulen et al. 1998, 11, 17, 60, 61). Later the Council of State eased up its policy, admitting that in some cases the presence of a *de facto* state might lead to persecution in the sense of the Geneva Convention. Yet the District Court of Zwolle still submitted the disagreement to the Chamber of Legal Uniformity (*rechtseenheidskamer, REK)*. (Vermeulen et al. 1998, 10, 25, 58–61, Bem 2007:206). However the conflict resolved itself as from the new 2000 Aliens law onwards the Council of State was reinstalled as Cassation instance, resulting in the Council of State to prevail.[131] As Tab. 6 shows, the IO/AO was most of the time more prone to deliver *de facto* and second rate *de jure* refugee statuses than *de jure* Geneva Convention status.

The Netherlands had since the immediate post war period experimented with ad hoc refugee statuses. As was the case with the *de facto* status granted in the 1970s and 1980s it remains not entirely clear whether the IO or the AO was responsible for the granting of most *de facto* statuses between 1990 and 2008.[132] As Tab. 6 shows, most of the time the Ministry of

[129] Interview Groenendijk, Kees. 10.09.2021. Ghent.
[130] ABRvS 19 March 199, and ABRvS 21 March 1997
[131] The reinstallation of the Council of State was already proposed by the government on December, 22 1997 (TK 1997-1998, 25 829, nrs. 1-2, https://zoek.officielebekendmakingen.nl/kst-25829-1.pdf f)
[132] Only for the *de facto* (C) status we know for sure that the IO was responsible. Asylum Branch of the ministry of Justice. 1983. 'Asiel in Nederland'. Afdeling Asielzaken. IND 1956-1985 (2305). NATH. Most of the time both

Justice seemingly preferred *de facto* statuses as a solution. With this status the Ministry retained more control over the stay of these (war) refugees. The *de jure* refugee status was only granted to a minority of the refugees. By 1990 the Netherlands applied two refugee statuses: the *de jure* status and the *de facto* (C) status. The *de facto* (C) status was initially a status granted as part of the regular aliens' policy.[133] It became a 'catch all' status over which the Minister of Justice (in practice the central IO) enjoyed large discretion. In the context of asylum, it was granted to asylum seekers who the IO considered unrepatriable based on the 'general living conditions' and in particular on the security situation in the country of origin.

Early 1990 the IO/AO started to relieve the courts which got jammed due to the high number of appealed AO's decisions by granting a collective suspension of expulsion order to all those persons who had been rejected by the AO but whose country of origin was considered unsafe for a forced return. Rejected asylum seekers who were considered to be non-repatriable, due to the situation 'home' were to be explicitly tolerated. The head of the IO/AO said about these asylum seekers: '*They are here and they may not stay. Yet we do not dare to send them back'*. It was decided to temporarily tolerate all rejected asylum seekers from Afghanistan, Iran, Iraq, Ethiopia, Somalia, Liberia, Lebanon, and Sri Lanka.[134] The Dutch authorities were wary that this decision would have a 'pull-effect' and therefore it was decided not to make this list of countries public. Yet, already in March 1990 the head of the IO/AO, Nawijn, blabbed in an interview with the press, admitting the existence of such a list. From then onward the parliament insisted that the Minister of Justice would report on this list and periodically the list was discussed, albeit confidentially in parliament. In 1990 a suspension of expulsion order only meant that the rejected asylum seekers would not be expulsed on 'short term'. By tolerating the war refugees, the authorities hoped they would refrain from further proceedings and relieve the courts. These tolerated refugees often had no other choice than to remain in the (overcrowded) asylum centers and were denied access to educational institutions and the labor market.

In the summer of 1990, the IO/AO suggested that the *ad hoc* arrangement should be transformed into a program integrated more structurally in their policy. The IO/AO suggested granting the non-repatriable war refugees a one-year (renewable) residence permit and after 5 years a permanent residence permit. The ministry of Wellbeing and Culture considered that 3 years temporary protection was long enough for granting a permanent residence permit. The IO/AO also proposed authorizing the tolerated refugees to leave the asylum reception centers and move to a municipality that would be in charge of their upkeep. The Ministry of Social Affairs and Labor opposed this for fear of a pull effect and insisted on having these asylum

literature and circular letters refer to 'the minister/ministry of justice' (before 1994) or IND (after 1994) as deciding actor, so it could be that in practice this task was delegated to the IO or the AO. If we are not sure whether the IO or the AO was responsible for the granting of the *de facto* status; we write 'IO/AO' as deciding institution, although it is almost certain that it was only one or the other.

133 The *de facto* (C) status, being part of the regular migration, could be revoked under the same conditions as other aliens: a) if he/she provided false information, b) if he/she has not enough means of subsistence, c) if he/she has violated the public peace or order, d) if the permit is granted under restrictions that are no longer applicable or violated. Scholten, Y. Wet van 13 januari 1965, houdende nieuwe regelen betreffende de toelating en uitzetting van vreemdelingen, het toezicht op vreemdelingen die in Nederland verblijf houden, en de grensbewaking. Staatsblad van het Koninkrijk der Nederlanden. 2 februari 1965. https://cmr.jur.ru.nl/cmr/Vw/Vw65/Stb.1965.40.pdf

134 The initial list of countries has never been published, but the countries were published by a newspaper, de Telegraaf, who referred to inside information. Six of these countries were among the top ten asylum countries in the Netherlands. During the political discussion 'the Ministry of Justice' was considered to be the author of this list, but the countries were called 'Nawijn-landen' (Nawijn-countries) referring to the head of the IO/AO Hilbrand Nawijn so probably he had considerable input in the making of this list. We ignore whether the Ministry of Foreign Affairs had any say in the drafting of this list. However, indirectly they must have had an impact as they provided the Country of Origin Information. The criteria for adding or removing a country to the list were not clear. Aarts, Milco, and Angelo Vergeer. 1990. 'Recht Op Een Uitkeuring? Nooit van Gehoord!' De Telegraaf, 3 March 1990; Franssen 2011: 11, 38; Van Eijl 2012.

seekers removed. The Ministry of Interior approved the proposal and retorted that these people should be able to work as they should not constitute a burden on the municipalities (Franssen 2011: 38-41; Van Eijl 2011: 143).

Tab. 6. Decision making in asylum cases in the Netherlands, 1990-2004.[135]

	Recognition rate *de jure* (AO)	Recognition rate *de facto* (C) (IO)	Recognition rate second rate *de jure* (IO)	Temporary residence permits	Permanent residence permits
1990 (N= 10550)	6,5%	8,2%	NA		
1991 (N= 17240)	4,5%	11,1%	NA		
1992 (N= 32090)	15,3%	21,5%	NA		
1993 (N= 30770)	33,6%	15,2%	NA		
1994 (N= 51490)	12,9%	24,6%	NA		
1995 (N= 28220)	28,3%	22,0%	15,3%		
1996 (N= 57760)	15,3%	12,8%	12,8%		
1997 (N= 30770)	21,5%	16,8%	16,8%		
1998 (N= 26140)	9,0%	13,7%	35,0%		
1999 (N= 60920)	2,5%	5,7%	14,0%		
Absolute numbers[136]					
1999	1523	3473	8529		
2000	1810	4790	3130		
2001	440	1570	810	7230	530
2002				8080	750
2003				8350	1410
2004				6120	4050

Eventually in 1991 a circular letter formalized suspension of the expulsion order. In the final compromise war refugees were denied access to welfare but received a permanent residence permit (a *de facto* (C) status) after three years of temporary protection. The central IO/AO issued a suspension of expulsion order, which was valid for one year but could be renewed if the situation in the country of origin had not improved. The 'flip side of the coin' was that from then onward the one-year suspension of the expulsion order was only granted under the condition that the asylum seeker revoked his/her asylum application. The authorities wanted a watertight guarantee that the courts would no longer be bothered by these war refugees. Seemingly, in 1990 the toleration of all war refugees had not convinced them all to stop appealing the initial negative decision of the AO at the Council of State. The changes of 1991 improved to a certain extent their living conditions. Still, they often had no other choice but to remain in the asylum centers, but in the first year these refugees were granted access to basic education. In year two they could follow professional training and from year three onward they

[135] Dutch Minister of Justice, 1994; UNHCR 2000, 2001; Statline, 2007. Many of the *de facto* refugees whose expulsion orders were temporarily suspended ultimately got a humanitarian status on appeal based on the length of the procedure. Archives Dutch IO Z-336. A94 3621 725675. HSBO. Letter to Leden MT. 'Plan van Aanpak Voor de Oude Zaken van Gedoogden Waarin Het Gedoogaanbod Is Gedaan', February 28, 1994. 1994. The decisions concerning refugees fleeing ex-Yugoslavia (1990-1994) who did not have to apply for asylum as they were protected from August, First 1992 onward under a separate 'temporarily suspended expulsion order' are not included in these overview.

[136] We have no figures on the rejections and therefore we cannot calculate the recognition figures.

were authorized to have a gainful employment, which enabled them to leave the asylum centers (Franssen 2011: 38-41).

The strict condition to revoke the asylum application was attenuated in a circular letter in 1992, which only required them to 'suspend' the application. Moreover, this circular letter elaborated on the distinction between the *de facto* (C) status and mere suspension of the expulsion. In order to qualify for the *de facto* (C) status it was stipulated that the asylum seeker had to demonstrate that they ran a 'real' and 'individual' risk upon return to be a victim of violation of article 3 of the ECHR. The suspension of expulsion could be granted if, in view of the (human rights) situation in the country of origin, a return 'could' result in a violation of art. 3 ECHR and this risk was not an individual, but a collective risk (Franssen 2011; Spijkerboer 2014: 68). Few war refugees availed them of the opportunity to obtain a suspension of expulsion: of the 7,701 people who got offered this opportunity in 1992 and 1993, only about 200 people accepted the offer. Many of those who refused the offer still appealed and got a *de facto* (C) status, not based on protection needs but on the length of the procedure. The Dutch temporary solution for the war refugees from Yugoslavia made the refugee policy in the Netherlands even more fragmented: they were granted a suspension of expulsion not for one year, but only for three months and they could get this status upon arrival, they did not need to apply for asylum first.[137]

Several academics and members of parliament did not understand the need for suspension of expulsion as a new, weak kind of protection as the *de facto* (C) status was available. The Council of State agreed with the critics as they judged in several appeal cases that the difference between these two protection schemes was too unclear; additionally, they ruled that suspension of expulsion had no legal basis. In June 1993 the IO/AO realized that the arrangement was unsustainable because of the Council of State's jurisprudence and no longer issued suspensions of expulsion. In February 1994 all war refugees whose expulsion order was suspended were transferred to a *de facto* (C) status.[138]

The establishment of a second rate de jure status

The Ministry of Justice did, however, not want to give up its practice of suspension of expulsions orders. Taking into account the criticism of the Council of State, the Aliens Act of 1994 upgraded the suspension of expulsion into a 'second rate *de jure* status', both for Yugoslavians as for other nationalities who previously qualified for a suspension of expulsion order. The Bosnian war refugees served in particular as the incentive for the authorities to improve the protection of war refugees (Obdeijn & Schrover 2008: 330–32; van Selm-Thornburn 1998: 225-226). This 'second rate *de jure* status' implied a three-year residence permit that could be issued to foreigners who, in the opinion of the Minister of Justice, due to the particularly harsh situation in their country of origin, could not be forced to return.[139] As was the case with the suspension of expulsion, it could be revoked when there were no more obstacles to expulsion and it was granted in a collective manner. There was immediate yet limited access to the labor market. After three years the status could be traded for a *de facto* (C) status, a status not explicitly mentioned in the alien law, but which came with a permanent residency permit.[140]

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[137] For more details see 3.2.2.

[138] Anyhow, most of them had already been in this procedure for two years and would have qualified for a *de facto* (C) status after one more year. HSBO. Letter to Leden MT. 1994. 'Plan van Aanpak Voor de Oude Zaken van Gedoogden Waarin Het Gedoogaanbod Is Gedaan'. 28 February 1994. AIND Z-336. A94 3621 725675.; Staatssecretaris Justitie. Letter to Head IND. 1995. 'Brief Aan Staatssecretaris van Hoofd IND', 10 February 1995. AIND Z-336A95/3703/747446.; Fransen 2011; Spijkerboer 2014; Van Eijl 2012.

[139] Called *beleidsmatig niet-verwijderbare asielzoekers* by the Ministry of Justice.

[140] Secretary of State of the Ministry of Justice. 1993. 'Circulaire'. https://cmr.jur.ru.nl/cmr/tbv/tbv82/93/tbv-82-1993-88.pdf; Dutch IO. 1999. 'B7/15.2.2 Gedoogden En Ontheemden: De Voorwaardelijke Vergunning Tot

The IO could still suspend ad hoc expulsion orders on an individual basis. A system was worked out whereby the Minister would grant this 'second rate *de jure* status to certain nationalities whenever a pattern of such decisions by IO among this group became discernable.' The Minister had a fairly wide margin of discretion in introducing and discontinuing this policy of upgrading protection. The examples of Somalia between 1995 and 1999 illustrate how protection was adapted to the ever-changing circumstances in the country (see further). From 1994 onward the appeal bodies only assessed decisions marginally. Yet, toward the end of the 1990s because of the on-again-off-again-policy of the Minister, the courts sometimes imposed on the executive power mandatory 'second rate *de jure* status' policy (Spijkerboer 2014).

The use of many different refugee statuses throughout several decades led to ever longer asylum procedures as *de facto* refugees always tried to improve their status through appeal, to achieve the stronger *de jure* Convention status. The executive authorities had, however, whenever a choice had to be made between flexibility and legal certainty, chosen flexibility (van der Molen Kuipers 2016: 59). Both the IO/AO and appeal instances, as well the Council of State until 1994 as the Aliens Chambers of the regular courts afterwards felt this political choice to be detrimental to the interests of the people concerned. In the early 1990s the Council of State had demanded a more clear-cut rule of law approach for the protection of these war refugees who the AO did not consider refugees. The executive power had yielded to this demand by upgrading simple tolerance of war refugees to a new status codified in the Aliens Law. Codification diminished administrative discretion, but the executive authorities made the law somewhat flexible so that administrative discretion hardly diminished. Even the regular courts, which in 1994 became the successor to the Council of State in the asylum appeal and who had been reluctant to intervene, at times imposed a more stable policy.

In 2000 the new Aliens Law brought all *de jure*, *de facto* refugees as well as humanitarian statuses together in one refugee/humanitarian status, above all to avoid endless appeals.[141] When a refugee was recognized, based on the Convention of Geneva or the ECHR, (s)he was granted a residence permit initially limited in time, but after three years this could be upgraded to a permanent residence permit. Asylum seekers who because of humanitarian reasons got this status were given the same rights as refugees (Spijkerboer & Vermeulen 2005).

The weakening of the *de jure* Convention refugee status

The new Dutch aliens' law of 2000 had only provided for the possibility for *de facto* and *de jure* refugees to acquire a permanent residence permit after three years. In the past the entitlement to a permanent stay had been part of the status of those who had been recognized as (Convention) refugees. During the Cold War era it was accepted that refugees were to stay. The change in the geo-political situation after 1989 diminished the stability of persecuting regimes and the return of refugees to their country of origin had been put on the agenda. The Dutch authorities had integrated this return objective in their refugee policy early on. The creation of *de facto* refugee statuses already in the 1970s had served this objective. In 2000 the "privilege" of refugees once recognized by the asylum authorities as (Convention) refugees to be unconditional parts of the Dutch society was sacrificed to the return objective. Even these refugees were on probation for at least three years. They received a temporary residence permit and the prolongation of this residence permit depended on whether there were still risks for them upon return. Also, bad behavior could be punished with another prolongation of the temporary residence permit after three years instead of obtaining a permanent residence permit'.

Verblijf'. Ministry of Justice. https://cmr.jur.ru.nl/cmr/vc/vc94/DeelB/B7/B7-15.pdf; Franssen 2001; Dutch IO 1999; Doomernik, Penninx & Amersfoort 1996, 31.

[141] Ministerie van Justitie. 2000. 'Wet van 23 november 2000 tot algehele herziening van de Vreemdelingenwet (Vreemdelingenwet 2000)'. Officiële publicatie. Ministerie van Justitie. 7 December 2000. https://zoek.officielebekendmakingen.nl/stb-2000-495.html.

Not only denial of a permanent residence permit, but even removal could be as a second punishment for "criminal" refugees. Still after 2000 all those recognized as refugees by the Dutch authorities, even the previously *de facto* refugees were temporarily protected when they were still at risk, but after how many years of (temporary) residence can a state still force people to return where they came from? The argument of the Dutch authorities was that the weakening of the Convention refugee status was the price to be paid for the legal enshrinement of all the previously *de facto* refugee statuses, to strengthen these statuses not only in terms of residency status, but also to assimilate them in terms of social rights with the Convention Refugee Status. In exchange for the 'uplifting' of the former *de facto* statuses the legislators chose to 'weaken' the Geneva Convention status. As Spijkerboer & Vermeulen (2005, 124–27) show the goal of the assimilation of the statuses was not to improve refugee protection, but the decrease of appeals towards a stronger status. In the first decade of the 20th century group-based protection remained an important form of protection for persons from the DRC, Iraq (until November 22, 2008), Ivory Coast, Somalia (until July 2009) and Sudan. Although their protection status was quasi similar to the Convention status UNHCR (2011a) pointed out that their residence permits were easier to be revoked.

1.2.6. France: the Algerian turn

Jean-Marc Sauvé, director of the IO at the ministry of Interiors pointed out to Charles Pasqua when he returned as Minister of Interior in 1993 that a lot of progress had been realized in the last years in the acceleration of the processing of asylum requests, the repression of illegal stay and the prevention of unwanted immigration by a strict visa policy and border policy, but that the deportation of unwanted immigrants had been much less successful. These unwanted immigrants refused to return and therefor they destroyed their identity documents and as their consulates refused to grant them a laissez-passer they could not be returned. These to be deported immigrants could also mobilize a part of French civil society. Sauvé lamented "Une opinion prompte à se mobiliser sur des actions ponctuelles de défense d'étrangers faisant l'objet de decisions d'éloignement, soit au nom du respect des situations individuelles soit au nom d'une situation générale prevalent dans les pays d'origine….Ces actions de defense peuvent dépasser le simple réseau associative de défense des étrangers et compter sur des soutiens "illustres"". He also complained about the "jurisprudences extrêment protectrices pour les étrangers, mais très contraignantes pour les autorités administratives… les risques de contentieux (au niveau national et européen) génèrent dans les préfectures notamment un très lourd suivi des dossiers individuels". Domestic courts limited the state's actions to control the identity of unwanted immigrants and to detain them and the forced return was thwarted by the jurisprudence of the ECtHR which prohibited "des traitements inhumains ou dégradants en cas de renvoi d'un étranger dans son pays d'origine". He insisted strongly on reaffirming a strict state control over migration flows as the world they lived in underwent important economic and political changes which could provoke disorderly population movements.[142]

The return of Charles Pasqua as Minister of Interior in 1993 led to reforms which restricted access to the asylum procedure and enhanced expulsion measures. Pasqua was however forced by the judiciary to take the standards of the ECtHR into account and some of his measure to make expulsion more effective had to be watered down. Among others he had to accept appeals at the administrative courts against the expulsion decisions. For the first time in France, the strict separation between refugee and immigration policy was not respected. The legislation which parliament voted related as well to migration control as to protection of refugees. This was contrary to the French self-perception as the country of asylum. Pauti (1999: 127f.) called it the banalization of refugee law. The adoption of the Schengen treaty did break

[142] Jean Marc Sauvé to Directeur du Cabinet, 6.4.1993. AN, 19970381/6.

more French exceptionalism. Joining the Schengen region was contingent on compensatory measures for the safeguarding of external border control. France adopted instruments such as carrier sanctions, a common visa policy, but also the safe third countries concept.

The possibility to dismiss an asylum claim because of coming from a safe third country was introduced for those applying at the border. At airports, ports but since 1995 even railway stations asylum seekers were interned in newly erected internment centers and without any substantive examination of their claim they could be returned to a 'safe third country'. The practice at the border is not very well known, also because there was initially no external oversight. Only in 1995 UNHCR and selected NGO's got access to these centers.[143] The Council of State in its ruling of December 1996 criticized the extensive use of the safe third country rule at the border. Dismissing an asylum request because the immigrant came from a safe third country was only applicable, according to the Council of State when that third country is a member state of the Schengen area. The Constitution had been adapted to the Dublin Convention, but its provision guarantying a subjective right to request asylum was still applicable for the asylum application of immigrants who travelled from other countries. These immigrants' asylum request could not be dismissed like that (Lavenex 2001:171-178; Bousquet 2006). Still when the asylum request was taken into account in the border procedure, it demanded first a decision on admission to French territory.[144] In the asylum procedure at the border an interview for those detained in the airports of Paris was still organized by the AO as the numbers involved were limited (2% of the annual asylum requests). The AO had to judge whether the case was not manifestly unfounded. In 1992 73% of the asylum seekers who were judged in the border procedure could leave the (air)port to await the final decision in France, 45% in 1993-94, 41% in 1995 and 49% in 1996 (Amnesty International and France Terre d'Asile 1997: 152; IGC 1997:172). In the first half of 1990 the AO had interviewed all asylum seekers in the extra-territorial zone of the Roissy airport, but when by 1995 such detention zones were also erected in train stations all over France this turned out to be a logistical challenge for the AO.[145] Due to the lack of funding for travelling throughout France and limited staff many more decisions in the border procedure were taken on the file only. According to Menz (2009) in 2003 only 3% of those judged in the border procedure could enter French territory.

The AO lost ground to the Ministry of Interior in the case of asylum requests considered fraudulent or abusive. The Pasqua law of 1993 had given the prefects authority in the screening of requests for asylum. While during the 1980s the prefect could refuse a temporary residence permit to an asylum seeker in cases of a threat to public order, a fraudulent or abusive claim or the applicant used it to avoid an impending expulsion this did not prevent the AO to investigate the case as any other case. In 1993 the prefect obtained the authority to deny access to the asylum procedure for Dublin cases and for the other cases to whom he could as before refuse a temporary residence permit. Banning them from the asylum procedure could be concomitant with an expulsion order. The first draft had given the prefect full authority to do so, but finally the law stipulated that he had to wait for the decision of the AO for its execution. The AO had to examine these requests in an accelerated procedure while the asylum seeker was detained in

[143] Asylum seekers were detained in a so-called international zone at the airport, and were not considered by the authorities to be on French territory. This was confirmed by the ECtHT in his judgement Amuur v. France on 25 June 1996 which criticized that the concept of the international zone had no legal basis.

[144] In his rapport to the Council of Europe the Swiss MP Gross following his visit of the Paris airport on 8 January 1998 noticed considerable improvement in comparison to 1989: "Asylum applications are forwarded to the Minister of the Interior who delivers the decision on admissibility within one or two days in the majority of cases, the maximum period being 20 days.…The asylum seeker can appeal to the tribunal. After 4 days a judge can decide on a possible prolongation for 8 days, which in exceptional cases may be prolonged for further 8 days…. Border officials receive special training on treatment of asylum applications as part of their routine training." Gross (2000). https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=8952&lang=EN, accessed 5.9.2022.

[145] Law 94-1136 of December 27, 1994.

an administrative detention center. In the mid-1980s the then Minister of Interior Pasqua had already set up such a procedure informally, but by 1993 it became a formal procedure and the numbers involved probably increased. In 1994 there were 516 such cases, 620 in 1995 and 581 in 1996 (Amnesty International & France Terre d'Asile 1997: 180).

The AO in the shadow of the AT as symbol of French human rights standards

During the emergency operation to reduce the backlog, the AO had not bothered about its reputation. The French refugee policy had lost legitimacy in particular among the NGOs involved in refugee assistance. From 1992 onward the AO started to work on its public relations.[146] The office emphasized internally that protection had been neglected. The AO provided more training to the PO and insisted that the remaining asylum claims, due to their higher complexity, had to be investigated more seriously, including interviewing the asylum seekers.[147] Although the AO wanted to base its eligibility decisions increasingly on an interview, due to a lack of resources this ambition could not be realized. For example, sending protection officers to the administrative detention centers all over the country was not feasible for the AO, also as they were not allocated resources for such missions.[148] The AO wanted to legitimize its recognition policy. Different state authorities continued to insist on higher productivity. The AO had to organize their work more efficiently, with the intent of cutting costs by remaining very selective about who to interview. Within the AO however there was a consensus that the share of decisions based on interviews had to increase. Also, the Ministry of the Interior was in favor of more asylum seekers to be interviewed as rejected asylum seekers who appealed the expulsion decisions at the administrative court had less chance to have the expulsion decision reviewed if they had been interviewed by the AO. Accelerated procedures could be contra productive as they shifted the burden to other stakeholders, i.e., the courts in the process of deciding about asylum cases. In general, it was felt among the policy makers that having more asylum seekers interviewed increased the legitimacy of the asylum policy. The share of decisions of the AO based on an interview increased from 17% in 1990 and 26% in 1991 to 50% in 1992.[149] By then the French AO did not think it worthwhile to follow what they considered the German exaggeration to interview all asylum seekers. The director of the AO considered that manifestly unfounded and abusive applications could still be decided without an interview.[150] The AO linked this notion of clearly unfounded applications to the concept of safe countries of origins, as claims from Poland, Hungary, and Czechoslovakia from 1991 onward were treated as clearly unfounded applications for whom no in-depth interview was necessary. From 1992 onward this was also applied for asylum applications from Benin and Cap Verde, from Chile from 1994 onward and from Romania from 1995 onward. The AO based its judgement on an extensive interpretation of the cessation clauses of article 1C of the Convention of Geneva which refers to a change of circumstances in the country of origin to suspend protection. The AO used this provision in the Convention of Geneva by deciding to consider new asylum seekers from these countries as manifestly unfounded and to be handled

[146] This shift in strategy was probably also linked to the nomination of Francis Lott as new director of the AO in August 1991, serving until May 1996. https://www.ofpra.gouv.fr/fr/histoire-archives/galeries-d-images, accessed 24.2.2022.

[147] Conseil d'administration OFPRA, 5.12.1990, 21.4.1992, 2.11.1992**.** AOFPRA, Dir. 1/9-11.

[148] Conseil d'administration OFPRA, 26.9.1994. AN, 19970381/6; Conseil d'administration OFPRA, 29.11.1995. AOFPRA, Dir. 1/14.

[149] Conseil d'administration OFPRA, 23.10.1991; Lott, information note OFPRA, 13.11.1992, AOFPRA, Dir.1/10 ; Conseil d'administration OFPRA, 26.9.1994. AN, 19970381/6.

[150] Francis Lott, Rapport au Conseil d'administration OFPRA, 2.11.1992, AOFPRA, Dir.1/11.

by the accelerated procedure.[151] Still by 1994 the AO had increased its share of decisions based on an interview to 55% and the ambition of the director was to increase that share further to 75%, but it dropped in 1995 to 40%.[152]

Pressure on the AO mounted. While in 1996 the average asylum application was decided in three months, the government wanted to reduce the time necessary to process an application to three weeks. A possible instrument for accelerated decision making in asylum cases, even dismissing claims was safe countries of origin, but there was still strong opposition to the blind use of this instrument. The then Minister of Foreign Affairs opposed the use of the concept of safe countries of origin because it could create diplomatic frictions. However, the practice of the AO to use article 1C of the Convention of Geneva as a device for considering new applications from certain countries as collectively manifestly unfounded was condoned by the Minister. In particular, the large number of Romanian asylum applications were quickly examined on the paper file by the AO without a personal interview.[153]

In the mid-1990s the external advisers, mainly from the Ministry of Finance who had an important influence on the allocation of resources, had disagreed with the ambition of the AO to interview most of the asylum seekers. They opposed this so-called waste of resources and did not consider the decrease in the staff to 400 employees in 1994 to be problematic. They also insisted on a more flexible geographical expertise among the protection officers. Given that the countries of origin of the asylum seekers could change quickly an outspoken geographical specialization was not efficient.[154] Although they agreed that interviewing each asylum seeker strengthened the legitimacy of the asylum system, they considered that the AT should interview all its plaintiffs and that for the AO this was not necessary. They took it for granted that the AO had to decide without a rigorous examination of asylum requests, the burden could be shifted to the AT. To appeal at the AT legal aid was necessary. Since 1991 asylum seekers could apply for free legal support for their appeal at the AT, but only those who entered France in a legal manner qualified (Amnesty International & France Terre d'Asile 1997: 188-190). Still more and more asylum seekers appealed when the AO rejected their request.

Tab. 7. Staff involved in procedures[155]

	AO	AT	Total
1993	263	133	396 (152 PO)[156]
1994	208	127	385
1995	239	125	364
1996	219	107	326 (125 PO)

[151] The AO had collectively suspended refugee status from nationals from these countries respectively in 1991, 1992 and 1994 based on the cessation clauses of article 1C of the Convention of Geneva which states that the asylum state must ensure that the changes are effective, fundamental, and durable before proceeding to withdraw recognition of refugee status. IGC 1994: 6, IGC 1997: 173.

[152] Conseil d'administration OFPRA, 26.9.1994. AN, 19970381/6; Conseil d'administration OFPRA, 19.12.1994. AOFPRA, Dir.1/13; IGC 1994: 8.

[153] Réunion interministérielle, 23.1.1996; Minister of Foreign Affairs to Minister of Interior, 1996. AN, 19990260/8; Amnesty International & France Terre d'Asile 1997: 180.

[154] Conseil d'administration OFPRA, 26.9.1994 and 29.5.1995. AN, 19970381/6. Until the early 1990s the AO had mainly functioned with contractual personnel, by the mid 1990s the staff was increasingly on a tenure track. By the turn of the century the core of the staff was tenure track civil servants and contractual personnel was hired for alleviating the peak in asylum requests (Akoka 2020: 276-278; 2012: 411-430).

[155] IGC 1994: 13; IGC 1997: 112..

[156] PO were the A category, 46 were in the B category, and 198 were secretaries (C category).

In 1994 the AT saw an increase in its budget that by 1995 enabled the court to interview all the asylum seekers who appealed a rejection by the AO**.** The AT became the main focus of reform which had been one of the advices of the National Consultative Commission on Human Rights, a consultative body attached since 1984 to the Prime Minister's Office. This reform also aimed at improving the legal doctrine. The decree of July 3, 1992, had created *les sections réunies* which brought regularly all the judges together to settle questions of principle. Seeing the increasing number of judges since 1989, it was deemed necessary to harmonize the jurisprudence of the AT. [157] In the meantime the staff of OFPRA had further diminished, which by 1999 had forced the institution to make 63% of the decisions on the asylum requests based on only the initial declaration so without an interview by a OFPRA protection officer.[158] When the asylum applications began to increase in 1999 to reach a peak in 2003/4 the authorities were quick to react. By 2000 45 supplemental staff members were hired and the staff again reached 400 (Delouvin 2000). The reformed and still better equipped AT began to annul more decisions of the AO. The director of the AO had stated in 1995 that he closely followed the jurisprudence of the AT and that the low rate of annulation was to a certain extent testimony of this close relationship.[159] In 1994 the AT's annulation rate oscillated around 5**%** but it increased in the following years to 8% (IGC 1997: 177). One of the reasons for this higher share of annulment was the readiness of the AT to depart from the German definition of refugee.

Recognition policy of the AO (and AT): Algerians make France drop the German refugee definition

According to the AO in its overview of the attitude towards Algerian asylum seeker, the AT had changed its policy towards non state persecution from 1993 onwards. This change of policy was legitimized by referring to the precedent of the decision of the Council of State in the Dankha case (1983). The AT, followed by the AO entitled Algerian asylum seekers to protection in the sense of the Convention of Geneva if this non state persecution was based on the grounds enumerated in art.1A2 of the refugee Convention and if the authorities did deliberate abstain from any intervention to assist or protect. The AT elaborated on both notions since 1993 in the context of the Algerian context of violence by radical Islamic groups. If the passivity of the authorities or their repeated refusal to register complaints was well documented the asylum seekers from Algeria could be considered *de jure* refugees.[160] However, refugee status were not recognized where the state authorities were willing, but simply unable to offer protection. The Council of State confirmed this legal reasoning in a ruling of 1995, to the delight of the French Asylum Tribunal (AT) who saw its stand at that time confirmed.[161] As Tab. 8. illustrates the recognition rate for Algerian asylum seekers was at that time only 2,49%.

Tab. 8. Recognition rate of Algerian asylum seekers, 1993-1997[162]

	Number of decisions (n)	Recognition rate
1993	866	1,5
1994	1457	1,92
1995	2453	2,49

[157] De Bresson, the president of AT was for example not convinced that the high recognition rate of Tamils from Sri Lanka was justified. Conseil d'administration OFPRA, 26.9.1994. AOFPRA, Dir.1/13.
[158] In May 1996 Francis Lott left the AO and Jean-François Terral was his successor and remained Director until June 2000. https://www.ofpra.gouv.fr/fr/histoire-archives/galeries-d-images, accessed 24.2.2022.
[159] Conseil d'administration OFPRA 17.12.1995. AOFPRA, Dir.1/14.
[160] OFPRA reply to the CIREA-questionnaire on Algerian asylum seekers, 12.1997. AOFPRA, Dir 5/47.
[161] Conseil d'administration OFPRA, 29.11.1995, AN, 19970381/6.
[162] OFPRA reply to the CIREA-questionnaire on Algerian asylum seekers, 12.1997. AOFPRA, Dir 5/47. Seen the entanglement of the AO and AT in the French procedure at that time, it is probable that this recognition rate refers to decisions of the AO and AT.

1996	1080	4,54
1997 (eleven months)	624	4,33

However, there was an evolution toward allowing more flexibility on the point of what constituted state unwillingness to protect.[163] The standard of proof was lowered and even the asylum seeker exposed to persecution by the Islamists who had not requested state protection, and who could convincingly argue as senseless such a demand could be considered a *de jure* refugee. The Algerian recognition rose from 1 to 5% by 1996-7, an increase quasi totally to be attributed to a fear of persecution by non-state actors as most asylum seekers from Algeria evoked persecution by the Islamists.[164] Also the French Council of State (*Conseil d'État*) changed its opinion as they considered in 1997 that the existence of an armed conflict could give rise to a well-founded fear of persecution in the sense of the 1951 Convention.[165] The dangers arising from a situation of war thus posed a risk of persecution within the meaning of the 1951 Convention. The published jurisprudence on victims of civil war of the AT attest to what Luc Legoux (1995: 24) called the byzantine character of asylum jurisprudence. According to the published jurisprudence of the AT, the tribunal ruled in the 1980s that victims of civil war were not considered to be refugees according to the Convention of Geneva as there was no targeted persecution of the individual, in the early 1990s the AT put the subjective fear of persecution central and considered that victims of indiscriminate violence could fall within the scope of the Geneva Convention, while at the same time the AT in other rulings stated that persecution had to emanate from state authorities or quasi state authorities (Tiberghien 1987, 1992, 1993).

Territorial and constitutional asylum: hardly protection fragmentation

In 1998 the Aliens Law was reformed (Reseda Law). The provisions concerning asylum in the Pasqua law were taken out of the Aliens Law and introduced in the Asylum Law in line with the French tradition. At the same time two new protection statuses, supplementary to the protection *de jure,* were introduced, territorial and constitutional asylum. The Constitutional Asylum for 'fighters for liberty' was rather a cosmetic operation as 'fighters for liberty' mostly qualified for the Geneva Convention. The Constitutional Asylum underlined French exceptionalism rooted in its revolutionary history, so this seems to have served a nationalistic agenda.[166]

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[163] When in the CIREA meeting of September 3, 1996 the Belgian representative congratulated his French colleagues that the "évolution de la doctrine et de la jurisprudence françaises admettraient aujourd'hui que l'incapacité des autorités est de nature à ouvrir droit au statut de réfugié" the French representatives denied categorically that there was any change in policy. AOFPRA, dir.5/46.

[164] The few requests related to state persecution did rarely qualify for protection. The AO evoked a theoretical case of an asylum seeker who had been able to escape the collective persecution of a group of people in a region of Algeria where the radical Islamists held sway and where the state was absent. The AO whom grant the person *de jure* refugees status if the attitude of the state could be qualified as a deliberate abstention of offering assistance. The positive attitude towards such a claim was also due to France not using the concept of internal flight in its recognition policy, but this example seems to be beyond the legal reasoning of the Council of State in its ruling of 1995 on the state being unable to protect. OFPRA reply to the CIREA-questionnaire on Algerian asylum seekers, 12.1997. AOFPRA, Dir 5/47.

[165] Conseil d'État, 12 May 1997, no. 154321, Mlle STRBO. A similar judgement: An alien may not be returned to a state where he would be exposed to treatment in violation of article 3 ECHR and this was the case regardless of whether the risk emanated from states as long as the state authorities were unable to provide appropriate protection. Conseil d'État, 1 December 1997, no. 184053, Kechemir.

[166] The AO and AT granted constitutional asylum and the status was similar to Convention refugees. The AT only granted constitutional asylum to one (Algerian) case in 1998 and to three cases in 1999. Delouvin 2000; Pauti 1999: 104f.; Combarnous 2001: 78-79.

Fig. 5. Institutional timeline asylum determination France, 1993-2007

Pasqua Law 1993 and Reseda law 1998	
Institutions	Competences
IO Decentral	**Registration**
AO	**Eligibility** Border procedure (from 1982 onwards) MUC (from 1993 onwards)
AT	Appeal (non suspensive)
AO	**Recognition** + since 1998: constitutional asylum
AT	Appeal
Minister of Interiors	**Recognition de facto refugees** Since 1991 informal Since 1998 formal + upon recommendation of AO

Territorial asylum was a formalization of an already existing protection possibility. The circular letter of the Interior Minister on October 25, 1991 had opened the possibility for rejected asylum seekers to appeal at the prefecture if they believed the (forced) return to their country of origin would be a threat to their life or liberty or a danger for a breach of art 3 ECHR.[167] The prefect had to refer the claim to the Minister of the Interior, who could take a discretionary decision on the matter. In rare cases the Minister made a political decision that a war or situation of collective violence was a serious reason preventing *refoulement*, although the individual was not under the scope of the refugee definition of the Convention. As mentioned before (3.3.2) temporary protection had been provided to Yugoslavians from August 1992 onwards. Although the *préfets* had quite some discretionary power, this protection had been instructed through circular letters of the Minister of Interiors. For other nationalities the *préfets* could provide temporary protection on a case-by-case basis if upon return to their country of origin there was a threat to the life or liberty of the person or a danger for a breach of art 3 ECHR. This temporary protection has been used for citizens of Yugoslavia, Ruanda and Algeria (IGC 1995). They had received a temporary authorization to stay. There was no status attached to being such a *de facto* refugee. The only right the person had was that of being protected against *refoulement* until the situation improved in his/her country of origin. They received a suspension of their expulsion for three or six months, without the right to work (Lambert 1995: 126ff.). The protection of these *de facto* refugees was totally discretionary. There was no means of legal redress. The French authorities reported to the European Council that in 1997 they provided temporary protection to Algerians, who although not granted the status of political refugee would be at risk if returned.[168]

According to Weil (1995: 15-17) the AO proactively, it was not provided for in the legislation, informed the Minister if an asylum seeker they rejected was not deportable due to

[167] Lambert 1995 mentions a (forced) return to the country of origin that would be contrary to Article 33 of the 1951 Convention.
[168] General Secretariat of the Council to Migration and Asylum Working Group, 6.1.1992, p.3. EU Council, 13667/97.

a situation of war or collective violence in his/her country of origin. In the archival material we found proof of this allegation but only related to Algerians. In December 1991 the AO had plead for a status of temporary protection for the Algerians who would flee from Algeria if the FIS would win the elections.[169] In the annual report of 1993 the AO reported that they were being confronted with a number of asylum applications from Algerians who evoke real and serious fear for persecution by the FIS. However, they could not recognize them as Convention refugees as they are not persecuted by the state. Nevertheless, the AO decided to interview them and to investigate in depth their cases, which enabled the AO 'to negotiate in the best possible manner their possibilities for asylum and stay in France'.[170] It is possible that this intervention made the Minister of Interior decide on December 22, 1993 to grant an Algerian a leave to remain, accepting that his 'life, liberty and security were at risk as a result of the activities of Islamic groups'. This would set a precedent and, according to Delouvin (2000), between 1994 and 1998 about three to four thousand Algerians benefited from this form of tolerance. The AO seem to have intervened consistently at the ministry of Interior on behalf of these Algerian refugees who they had refused the *de jure* status. At the same time, as mentioned before the recognition rate for the Algerians rose from 1% to 5% by 1996.[171]

In 1998 this subsidiary protection was enshrined in the new Alien Law. It gave the Minister of Interior, after consultation with his colleague of Foreign Affairs, the power to grant territorial asylum to foreigners 'whose life or liberty is threatened in their countries' or who have been 'exposed to treatment contrary to article 3 of the European Convention on Human Rights'.[172] According to Weil (2004: 348) AO did not get the authority to decide on territorial asylum because the government feared its 'liberalism'.

Tab. 9. Share of decisions on two protection statuses, France 1992-2003[173]

	De jure refugee status	Subsidiary protection or territorial asylum
1992 (N= 14.347)	37%	
1993 (N= 16.331)	31%	
1994 (N= 18.275)	26%	
1995 (N= 20.239)	23%	
1996 (N= 22.203)	20%	
1997 (N= 24.167)	17%	
1998 (N= 22.405)	19%	3,6% (N= 224)
1999 (N= 24.151)	19%	10% (N= 6000?)
2000 (N= 30.278)	17%	?
2001 (N= 40779)	12%	?
2002 (N= 50206)	13%	?
2003 (N= 66344)	10%	0,3% (N= 28,000)

[169] Lott, note on a possible mass flight from Algeria, 11.1991. AN, 2010011187.
[170] Rapport d'activité 1993, Afrique de Nord. AOFPRA, Dir.1/4.
[171] Conseil d'administration OFPRA, 29.11.1995. Directot François Lott (AO) explained that very few Algerians were being recognized "dans la mesure ou la Convention de Geneve ne s'applique pas selon les organes français chargés de la reconnaissance de la qualité de réfugié si les autorités publiques du pays d'origine n'ont pas encourage ou toléré des persécutions. Les cas sérieux de menaces avérées sont signalées à l'attention de la DLPAJ en vue de recherche d'une solution dans une formule asile territorial." Conseil d'administration OFPRA, 29.5.1995. AN, 19970381/6 (Farde Conseil d'administration OFPRA, 20.11.1995).
[172] The Decree of 25 June 1998 mentioned that this protection should be limited to non-state persecution. This limitation was, however, cancelled by the Council of State on 26 January 2000.
[173] IGC 2009, 163; Clochard 2007, 402.

Territorial asylum got an upgrade as the beneficiaries were granted a (renewable) residency permit for one year. AO and AT obtained the authority to inform the Minister if an asylum seeker they rejected could qualify for territorial asylum. In 1998, after the law came into force, 30 cases were submitted by OFPRA to the Minister of the Interior (Delouvin 2000). The French asylum institutions, AO and AT, continued to be reluctant to provide protection in situations of indiscriminate violence. They considered that a situation of general violence in the country of origin could not justify protection in the absence of a clearly individualized risk of persecution or serious harm upon return. While the risk had to be by definition personal to the applicant, such a risk could be caused by collective treatment to a whole group of persons. The issue was not whether the claimant is more at risk than anyone else in his/her country, but rather whether he/she was personally at risk because of his/her membership of a particular group (Chetail 2007: 95). Probably those cases where the AO and AT could not delineate individualized risk were forwarded to the Minister for territorial asylum. The Ministry of Interiors received many more requests directly from applicants.

In 1998 there were in total 1,339 requests for territorial asylum but only decisions on 224 persons of whom 8 were protected (3,6 %). In 1999, of 6,000 applications at most 10% received protection. Between 2000 and 2003 the number of requests exploded: in 2003 there were 28.000 applications and only 0,3% were accepted (Combarnous 2001: 79ff.; Clochard 2007: 333; Mazzella 2005). According to Tiberghien (2021: 28) 1,100 persons received territorial asylum between 1998 and 2003, which meant an acceptance rate hovering around 1%.

1.2.7. Denmark goes on its own

Denmark continued to dismiss asylum applications in the border procedure on the basis of coming from a safe third country. Since 1995, at Copenhagen airport the police were required to inform all asylum seekers whose application was dismissed of their right to seek advice from the Danish Refugee Council, which was permanently on call. The Danish Refugee Council was granted access for counselling purposes (Gross 2000). In 1997 Denmark joined the Schengen region and used the Dublin principles, in addition the central IO stuck to the administrative practice to dismiss applications from countries on their own 'safe third country lists'.[174] When the applicant submitted his/her application, a civil servant from the IO's 'rapid decision unit' first made a decision whether the case would be handled through the regular procedure or dismissed on the grounds of coming from a safe third country. However, if a case was dismissed the applicant was referred to that country explaining that the application was refused on procedural grounds and not on its merits. An appeal against such a removal decision was possible yet without suspensive effect.[175]

The AO and refugee policy in political turmoil

Since 1992 immigration policy, including asylum was transferred from the Ministry of Justice to Ministry of Interior. The AO became a division within the Aliens Directorate, a branch of the Ministry of Interior. This directorate was sub-divided into two divisions, one of

[174] In 1997 the following countries were on the list (beyond the EU countries as these were part of the Dublin convention): Norway, Iceland, Switzerland, USA, Canada, and Hungary. The latter only for some nationalities. In 2001 also Poland was on that list. IGC 1997: 124. The Danish authorities used also the intensity of the connection to the third country or to Denmark to decide whether they would process an asylum application.

[175] As the IO had done before 1989, by the end of the 1990s the safe third country concept was again used for mere transit situations and there was no further assessment of the safety of these countries. Hvidtfeldt & Schultz-Nielsen 2018: 48–50; Vedsted-Hansen 2001.

which handled asylum cases, but also visa, residence, and work permits. We ignore whether the AO had any autonomy within the IO, therefore we write IO/AO. The other division dealt with registration and reception centers (IGC 1994: 2). In the regular procedure the asylum seeker was interviewed twice by the police of the local IO, once briefly for registration and a more thorough interview later regarding the protection need. The IO/AO did not interview the asylum seeker themself (IGC 1994: 6). In 1995 these interviews were transferred to the central IO/AO in a decision to concentrate all asylum matters centrally. In October 1995 the Danish Immigration Service was created as a branch within the Ministry of the Interior. In 1996, the total number of administrative personnel and decision-makers at this IO/AO was 370 persons (IGC 1997: 119).

Since long Denmark had an accelerated procedure without appeal for 'manifestly unfounded cases'. By 1994 a manifestly unfounded procedure was applied to individuals, but also collectively to all nationals of countries which the Danish authorities considered safe such as EU member states, Switzerland, the Nordic Countries, Lithuania, Poland, Czechoslovakia, Slovakia, Hungary, Romania, Bulgaria, Russia, Benin, Ghana, Niger, Senegal, Tanzania, Japan, New Zealand and Australia.[176] In 1995 in such cases the detention of an asylum seekers became possible (IGC 1997: 118). In this accelerated procedure both the IO/AO and the Danish Refugee Council interviewed the asylum seeker and decided whether it was a manifestly unfounded application (IGC 1994: 5). The purpose of this procedure was to spend less time on hopeless applications. It seems the IO/AO applied this concept in an expansive manner during the 1990s, as the Danish Refugee Council increasingly opposed its judgment. While the veto rates before 1994 oscillated around 20%, this increased to 35% in 1994, 40% in 1995, and 45% in 1996. It dropped again in 1997 to 25%, increased to 30% in 1998, dropped to 17% in 1999, and increased again to 21% for the first half of 2001. While the Danish Refugee Council agreed to a quick (negative) decision for applications that were clearly abusive or unrelated to the criteria of the Convention of Geneva, they opposed cataloguing cases in this manner on the basis, for example, of the assessment of individual credibility. A veto of the Danish Refugee Council meant that the case was no longer to be investigated in an accelerated procedure but according to the regular procedure, which implied that the IO/AO had to properly investigate the case on its merits and that the applicant could appeal an eventual negative decision, an appeal which suspended the order to leave the country (Vedsted-Hansen 2001: 69, 110).

The IO/AO could protect a refugee either with a *de jure* or *de facto* refugee status. UNHCR considered in 1992 that the IO/AO's interpretation of the Convention of Geneva was "rather restrictive".[177] From July 1992 onward each decision to reject an asylum request had to include a decision on whether the rejected applicant could be forcibly expelled from Denmark without contravening the principle of non-refoulement.[178] It is unclear to which extent this reservation was used and what the consequences were for the individuals concerned. By 1992 the IO could make use of another status outside of the asylum procedure for war refugees. In 1992 when the temporary protection of war refugees from Yugoslavia was being decided, the IO could also grant temporary protection to refugees from other war ridden areas.[179] Although, as mentioned before in the early 1990s war refugees who applied for asylum had mostly been granted *de facto* refugee status, this was not the case for the Bosnians as their applications were frozen. We ignore whether this status of temporary protection has been granted to other war refugees during the 1990s, but in 1999 a temporary protection status was granted to the war refugees from Kosovo. Similar to the war refugees from Bosnia in 1992 they were granted a

[176] This is the list of countries used in 1996 and quoted in IGC 1997: 125.

[177] Annual report 1992. AUNHCR, 600 DEN Protection and General Legal Matters Protection Denmark (1991-1994).

[178] AUNHCR, 600 DEN Protection and General Legal Matters Protection Denmark (1991-1994).

[179] AUNHCR, 600 DEN Protection and General Legal Matters Protection Denmark (1991-1994).

renewable permit of six months, which suspended the asylum application for maximum 2 years (Hedetoft 2006; Hvidtfeldt & Schultz-Nielsen 2018: 48–50). In 1998 the Aliens Act was amended and the criteria to obtain a *de facto* status were reclarified. It became a more explicit temporary protection and the substantive grounds had to involve a 'well-founded fear of persecution or similar injustice'.[180]

By the mid-1990s a humanitarian status based on compassionate grounds was introduced by the Danish Parliament following controversy over two individual cases where the applicants did not qualify for residence under any of the existing provisions of Danish Law, but the Parliament was strongly of the view that returning them to their country of origin would have been wrong.[181] Since then a rejected asylum seeker could apply at the Ministry of Interior for a humanitarian stay on a non-asylum basis (IGC 1997: 130).

Tab. 10. Danish decisions on two statuses in the asylum procedure, 1992-2004 (IGC 2009: 119)

	De jure refugee status	*De facto* refugee and humanitarian statuses[182]
1992 (N= 4570)	14%	37%
1993 (N= 4886)	14%	32%
1994 (N= 5680)	12%	21%
1995 (N= 22010)	22%	62%
1996 (N= 6943)	14%	54%
1997 (N= 7108)	12%	42%
1998 (N= 6107)	15%	43%
1999 (N= 5514)	17%	42%
2000 (N= 7046)	17%	32%
2001 (N= 8739)	21%	31%
2002 (N= 8951)	13%	16%
2003 (N= 3453)	14%	8%
2004 (N= 2155)	5%	5%

The asylum seekers rejected by the AO could appeal at the AT.[183] In 1995, the AT, which had been composed of seven members (of whom two were appointed by the Danish Refugee Council and the Danish Law Society's Council, the Ministries of Social Affairs, Foreign Affairs, and the Interior nominate one member each) was reduced to five members. The Ministry of Social Affairs did no longer participate in the AT. The Danish Refugee Council

[180] Within the first three years the *de facto* status could be revoked if the situation in the refugee's home country significantly improved (IGC 1997: 130).
[181] As mentioned before in the 1980s the competent minister had full power to grant a humanitarian status to an immigrant for compassionate reasons, this provisions was thus upgraded. (see 2.2.1).
[182] IGC 2009: 119 refers to complementary protection and other authorizations to remain.
[183] In 1994 the suspensive effect of an appeal to the Ombudsman was abolished (as well as a request for resumption of a decision) (IGC 1997: 118).

could only appoint one member while before two (IGC 1994: 6). An appeal against the decision of the AT was possible at the Courts of Justice, but it was not suspensive and only considered the lawfulness of the decision (IGC 1997: 103).

By 2001 the triumph of a nativist policy

Refugee and immigration matters became heavily politicized throughout the 1990s, receiving extra impetus through the foundation of the Danish People's Party (DPP) in 1995, which mobilized electoral support exclusively on the immigrant issue. The parliamentary discussion of two individual cases in the mid-1990s had been used to galvanize xenophobic support. This politicization dominated the electoral campaigns of 1998, 2001, and 2005. The strong support for DPP's anti-immigrant rhetoric has meant that, by and large, all parties in the Danish Parliament have chosen to prioritize the immigration issue in their policy statements and legislative proposals. The Amsterdam Treaty enabled EU states to opt-out from the immigration domain. Denmark did no longer want to participate and chose to remain outside with respect to every measure undertaken in this field. Denmark as a member state of the Schengen acquis could still implement follow-up decisions regarding Schengen when it considered it met their national interest. These decisions did no longer fall under EU law, but would be implemented as international accords, falling outside the scope of CJEU jurisdiction (Lavenex 2001: 128). In November 2001, after an electoral campaign solely dominated by the immigration issue, the Social Democratic-Radical (i.e., social liberal) Party coalition was ousted and a Liberal-Conservative government came to power, with the support of the Danish People's Party. This new government created a new ministry, the Ministry for Refugees, Immigrants, and Integration, whose new powers were previously within the Ministry of Interiors. The new coalition deliberately wanted to decrease the number of immigrants and refugees.

In 2002 the *de facto* refugee status was defined more restrictively as to be granted only if "*being returned to the home country would place the foreign national at risk of execution or of being subjected to torture or inhuman or degrading treatment or punishment"*. As Tab. 10 illustrates this caused a drop in *de facto* statuses granted. At the same time it was decided that *de jure* refugees, similar to *de facto* refugees, would first receive temporary protection during seven years and only then they could claim the protection of the *de jure* status (Mansouri, Leach & Nethery 2010: 136; Brochmann & Haelund 2011). Danish policy outdid the Dutch who had in 2000 decided that all those who they considered refugees, be it Convention refugees were three years on probation (see 1.2.5).

1.2.8. Italy: the AO expands its competence and its refugee definition[184]

In the 1980s two distinct drafts related to immigration policy were being discussed in Parliament, one on immigration and one on asylum. Only the first became law in 1990: this immigration law addressed mainly the procedure to meet (foreign) labor needs of the Italian economy. Due to the social alarm raised in public opinion by the Albanian crisis (see 3.2.2.), the draft asylum law was never approved. The immigration law perforce addressed only the basic aspects of Italian refugee policy so that Italy could become a member of the Schengen zone. The most urgent aspects of asylum policy were regulated: asylum seekers had to request asylum, either at the border or at the IO, at the local offices of the National Police of the Ministry of Interior.[185] For the border procedure the law provided the possibility to dismiss the asylum

[184] The chapter has benefitted from the generous input of Francesca Longo and Iole Pina Fontana (University of Catania) who shared their insights into Italian immigration and refugee policy with us.

[185] The local office of the National Police was called the 'Questura' office. The immigration law of 1990 enabled the non EU nationals and stateless persons irregularly staying on Italian territory at the date 31/12/1989 to apply for regularization. By June 1992 230,000 third countries nationals could legalize their stay in this manner. The

application if the applicant was coming from a safe third country, whereby safe was defined as a country having signed the Geneva Convention. The border guards had full discretion and they considered a mere transit in a third country sufficient and refused to take the actual protection situation in the third country into consideration.[186] This practice harbored a danger of indirect *refoulement,* but the asylum seeker could appeal this decision. An appeal which had a suspensive effect.

Immediately after the enactment of the law more and more Somalis applied at Rome's airport for asylum, partly with forged travel documents. The border guards increasingly returned them to Yemen, Kenya, or Djibouti, as these countries had signed the Geneva Convention. Although procedural safeguards were foreseen by law, the Somalis did not appeal the decision to dismiss their applications as they were unaware of their rights. Nobody informed them of the suspensive appeal possibility and there was no external control at all of the border guards.[187]UNHCR and the Council of Europe criticized the practice at the airport. It seems that the Italian authorities took the criticism to heart: in a circular letter in 1992 to the border guards it was stipulated that only (safe) third countries where the applicant had a genuine residence-- so not mere transit-- had to be considered. Also, the presence of NGOs and/or UNHCR in Rome's airport to give asylum seekers advice on the border procedure was discussed with the authorities.[188] However it took several years before the latter provision to inform asylum seekers of their rights became reality. When the Swiss MP of the Council of Europe Gross visited the airport in January 1998, he criticized that the border authorities who decided about the admission still had no specialized training in asylum matters. On top of that their decision could be appealed but the law did not specify the appeal authority or the time limit within which to apply. He noted that due to the absence of legal counselling very few appeals had been lodged (Gross 2000). The 1998 Immigration Act would finally provide for Information Services for asylum seekers in the transit area of the airport.[189]

The AO closer to the Convention of Geneva and beyond

Once immigrants lodged an asylum claim on Italian territory, they obtained a temporary residence permit with which they were eligible for social support. The request was to be decided by the AO.[190] The AO was embedded in the Ministry of the Interior and was composed of a representative of the national government at the regional level, a *Prefetto* (a civil servant of the Presidency of the Government who had to coordinate the activities of the AO with Italy's immigration policy), a representative of the Ministry of Foreign Affairs, as well as two representatives of the Ministry of the Interior (representing the security police and the refugee department). UNHCR, in contrast to the previous AO, no longer had a voice in the decision making, but the organization could still attend meetings of the AO, but only in an advisory

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only provision directly connected with refugees was that non European refugees under mandate of UNHCR-Rome were recognized as Convention refugees by the Italian authorities after a simple application to be sent to the Ministry of Interior. AUNHCR, 600. ITA (1992-1993); Sciortino 1999: 238.

[186] On 25 March 1991 the airport Fiumicino (Leonardo da Vinci) in Rome was visited by the MP of the Council of Europe, Lord Mackie of Benshie. It turned out that no clear rules were applied. The officials in charge lacked basic knowledge on the obligations deriving from the 1951 Geneva Convention. No accommodation or reception centre existed to lodge the asylum seekers waiting for an answer, and no information was provided to them on their rights or on the procedure. Lord Mackie of Benshie (1991).

[187] According to UNHCR the dismissal of these applications and the forced return of these Somalis had even caused Kenyan airlines to no longer accept Somali passengers. Annual report 1992 and reports on return of 70 Somalis in 1993. AUNHCR, 600. ITA (1992-1993)..

[188] The UNHCR annual report of 1992 mentioned that the authorities were willing to give NGO's (or UNHCR) the opportunity to provide legal counselling to the asylum seekers in the airport. AUNHCR, 600. ITA (1992-1993).

[189] Article 11, Para 6 of Decree 286/98.

[190] The AO was called the *Commissione Nazionale per il diritto di Asilo* (National Commission for the Right of Asylum).

capacity. As had been the case before, most asylum seekers were interviewed.[191] Interviews were carried out either by single members or by the five-member panel, depending on the complexity of the case and the number of asylum seekers to be examined. The high turnover among the members of the AO meant that the functioning of the AO was not optimal. Its members were inadequately prepared for the task.[192] In 1994 the AO had a staff of 30 persons and had four chambers, each dedicated to a specific geographical area. The four presidents of the chambers, the *Prefettos*, met at least twice a week to assure the unity of jurisprudence (Meneghini 1999: 248f; IGC 1994: 6).

In 1992 the Rome Branch of UNHCR called the protection practice of the AO at its start 'traditional' and 'restrictive' and elaborated on this assessment: the asylum seeker "had to have a well-founded fear of individual persecution (notion of being singled out) and the persecution has to come from governmental authorities or at least to be tolerated by them. Victims of civil war, or not governmental-tolerated persecution as well as victims of generalized human rights violations are hardly recognized as refugees".[193] Indeed, the AO adopted the German definition of refugee and denied many war refugees like Croatians, Bosnians, and Somalis the *de jure* protection. Only persecution by a state agent was taken into account. The AO qualified war refugees only for *de jure* protection if their suffering went further than the general suffering during war. The asylum applicant had to show that (s)he is singled out from other groups suffering from the civil war (Hein 1993, IGC 1995: 127-133).

De facto (war) refugees

The immigration law of 1990 contained some articles, which potentially extended protection as expulsion and also non admittance at the border of aliens was prohibited when the life or the personal freedom of the person was in danger for reasons of race, sex, language, nationality, religion, political opinion, or personal or social conditions.[194] Protection could be extended by this legal provision with its enumeration of reasons for persecution beyond the Convention of Geneva such as sex, language, and personal or social conditions, but even non admissible asylum seekers could evoke this provision. Although these articles did not foresee granting asylum to this category of persons, by 1992 there were a few cases where expulsion orders were not executed because the would-be expellee risked persecution in the country of origin. From 1991 onward the AO referred to these provisions in the law in a very small number of negative decisions on asylum requests of persons fleeing civil war situations. In 1992 the AO rejected a Somalian asylum request but asked the IO not to return the person to Somalia. Such a recommendation was not binding and had no legal value. Between 1990 and 1997 the AO issued 15 such recommendations when rejected an asylum request. The AO explained that such an advice was given when the situation in the country of origin of rejected asylum seekers justified it, but also in cases when military personnel were involved or because the health

[191] In 1992 56,62% of the asylum seekers about whom a decision was made in 1992 had been interviewed by the AO, 36,09% decisions had been made on the basis of the first intake interview at the IO at which the asylum applications was handed in. We ignore what happened with the other 7% of decisions. Annual report 1992. AUNHCR, 600. ITA (1992-1993).

[192] Annual report 1992. AUNHCR, 600. ITA (1992-1993). We ignore the reasons behind the high fluctuation in the membership of the AO. In 1993 Corrado Catenacci (1936-) was the prefetto, leading the Commission at its very start while A.Baldi was a member of the Commission who represented Italy in the Ad hoc group on immigration of the European Commission. Visit to Zirndorf, 11.1993. AUNHCR, 630 ITA Protection and General Legal Matters (1981-1994). In 1996 the president was prefetto G.Ieto. AOPRA, Dir 5/45.

[193] Annual report 1992. AUNHCR, 600. ITA (1992-1993)

[194] Article 6.6 of the immigration law of 1990 mentioned "where the life or personal freedom of the to be expelled person might be in danger for reasons of….the police authorities can decide to allow him/her to reach a different destination than the country of origin or provenance" and article 7.10 "In no case it is permitted to expel or reject at the border an alien towards a country where (s)he could be subject to persecution for reasons of….

conditions of the person to be returned made a deportation unacceptable.[195] Thus, the AO gave such an advice for protection and compassionate reasons. We ignore whether these persons were granted a residency status, but it is likely that they remained *de facto* in Italy.[196]

The Italian Aliens Law had no humanitarian status and therefore it obliged the Government to resort to an *ad hoc* legislation or special administrative measures in order to govern the influx of war refugees. A solution beyond the Geneva Convention was offered to 30,000 war refugees from Yugoslavia between 1990 and 1993 (see 3.2.3) and to 10,000 war refugees from Somalia between 1992 and 1994. Similar to the Albanian crisis procedure, the Italian authorities had issued a special decree that offered those people a humanitarian status, first in December 1991 to Yugoslavians of Italian origin and from July 1992 to all Yugoslavian war refugees. In September 1992 a similar protection was afforded to Somalian refugees (see 1.3). From then onward hardly any Somalian or Bosnian refugees requested asylum, but they applied to the Ministry of Interior through the IO (*Questura*) for temporary protection. From September 1992 onward those fleeing Somalia and Bosnia-Herzegovina received a residence, work, and study permit for one year, renewable upon request as long as a safe return was not possible (Hein 1993). Although this temporary protection did not preclude them from applying for *de jure* asylum, few did so. Given the restrictive recognition policy, the chances were slim to be protected by the Geneva Convention. The government was well aware that other war refugees could be in a similar situation, but they were numerically of far less importance and therefore no general *de facto* refugee status was introduced.[197]Asylum seekers from other war ridden regions as for example Liberia and Algeria due to the 'traditional' state-centered protection policy of the Italian AO did not qualify for the *de jure* refugee protection, but for them there was no *de facto* refugee status (Ferrari 1996). After 1995 the AO showed a more liberal approach toward asylum seekers fleeing non-state agents of persecution. The AO recognized among others some Algerian asylum seekers who had fled because of fear of persecution from Islamic terrorists as refugees under the Geneva Convention. Applications for asylum concerning countries in civil war remained largely rejected. Normal 'suffering' as a result of a civil war remained insufficient; this was seen as a result of the overall situation of disorder. If the applicant could demonstrate that (s)he was at greater risk than the rest of the population a recognition as Convention Refugee was possible (ECRE 2000: 47-48; Vermeulen a.o. 1998: 53-56).

In 1998 there was a comprehensive overhaul of the Aliens Law, which did introduce a temporary protection status and a humanitarian status. Granting temporary protection became a decision of the Council of Ministers in cases of conflict, environmental disaster, and other events of particular gravity. Such a decision was taken in 1999 by the Council of Ministers for the Kosovo war refugees and 18,400 refugees benefited from it. Similar to the early 1990s but now based on a provision in the law the temporary protection was granted by the IO based on the qualification of the person in need of protection as defined by the criteria of the Decree.

The humanitarian status was granted by the IO, independent from the asylum procedure and as a political decision of the Ministry of Interior. It had now become a fully integrated tool of migration management apart from the Geneva Convention and at the discretion of the authorities. Humanitarian status could also be proposed by the AO to the IO for asylum seekers who were not recognized as Convention refugees. The humanitarian status was thus an

[195] European Union, the Council 13667/97, ASIM 267 6.1.1998.

[196] Annual report 1992. AUNHCR, 600 ITA (1992-1993); Figures on these recommendations were listed in the quantitative reports of the CNDA activities (see Tab. 11.).

[197] Branch office UNHCR Rome to HQ, 17.11.1992. AUNHCR, 600. ITA (1992-1993). Such an *ad hoc* arrangement had been created for refugees from Yugoslavia, Albania, and Somalia but also, according to IGC 1995 for refugees from Rwanda. We ignore how many refugees from Rwanda benefitted from this *ad hoc* status and how it was designed. Maybe this status was never implemented as asylum seekers from Rwanda mostly were recognized as refugees CNDA, Overview of annual asylum requests and decisions (1990-2020).

institutionalization of an already existing practice that since the early 1990s had been based on a provision in the immigration law of 1990. In the early 1990s these were *ad hoc* recommendations, but the law of 1998 made this an integral part of the tools of the protection authority. The provision was, however, reformulated in the sense that a recommendation had to be based on serious humanitarian reasons in nature or resulting from constitutional and international obligations. The IO did not feel bound by this recommendation of the AO as it had the deciding power to grant this status (Paoli 2018; Zincone & Gregorio 2002; Vermeulen a.o. 1998).

In 1998 the IO had granted nearly 10,000 people a humanitarian status, which was partly due to a second Albanian mass influx in the spring of 1997. In March 1997, after the failure of a pyramid scheme in Albania that produced massive disorder, 10,619 Albanians crossed the Adriatic Sea to land in Italy. The mixture of temporary protection and external migration control in response to the first Albanian crises was repeated. The 10,619 Albanians were denied access to the asylum procedure, notwithstanding protest of UNHCR.[198] Still, the Italian authorities allowed the border guards to select at discretion between irregular immigration and bona fide refugees, the latter being those who could demonstrate "grave danger to personal safety as a result of events occurring in their area of origin". These refugees could stay for two months, and their residence permits were renewable.[199] By July 30, 1997 the number of Albanians who had arrived in Italy had risen to 16,964, and 7,381 were officially tolerated while 6,517 had been deported. Thus, a selective temporary protection was provided to those Albanians who had reached the Italian shore, but the Italian authorities had invested more in keeping the Albanians at bay. Italian ships patrolled the Adriatic Sea to keep the Albanians home, and the Italian authorities enlisted Albania's cooperation to stem emigration and to allow returns.[200]

At that time the AO was hardly implied in the granting of humanitarian status. In 1997 the AO recommended only five rejected asylum seekers for humanitarian status and in 1998 26 in line with the legislative mandate they had newly received. Among the latter half were refugees from regions in which a civil war was being fought in (4 Iraqi, 3 Algerians and 6 from Sierra Leone) whom the Italian AO with its still rather state centered refugee definition found difficult to recognize.[201] The AO used its new authority extensively only from 1999 onward. Between 1999 and 2002 the number of recommendations hovered annually around 1300, mostly for war refugees from Kosovo. The number of AO's recommendations for humanitarian status rose to 3000 in 2004 and up to 10,000 in 2007, all different nationalities but with a strong representation of rejected asylum seekers from Somalia and Eritrea.[202] From 2003 onward the AO recognized fewer asylum seekers as Convention refugees than they recommended asylum seekers for humanitarian protection. This coincided with a reform of the AO.

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[198] Only 1423 Albanians requested asylum in 1997. The recognition rate for Albanians in 1997 was 10% (N:1027), in 1998 it rose to 21 but n was only 97. CNDA, Overview of annual asylum requests and decisions (1990-2020).

[199] The border guards were thus charged to select, which meant that individual interviews were necessary, so contrary to the simplified collective procedure of a temporary regularization.

[200]The Minister of Interior Napolitano as well as the Minister of Foreign Affairs Dini intervened together before the parliamentary committees of the Senate and of the House of Representatives to explain their policy. Comunicazioni del Governo sulla questione dei profughi albanesi. Senate, 29.8.1997. https://www.senato.it/service/PDF/PDFServer/DF/15668.pdf Accessed 15.4.2022, see also Perlmutter 1998, Sciortino 1999: 242-243.

[201] We have no information on the discussion within the AO concerning its original stand to work with a German state centered refugee definition, but we mentioned already some decisions which indicated that the AO changed its reading of the Convention of Geneva towards a less state centered definition.

[202] CNDA, Overview of annual asylum requests and decisions (1990-2020), see Tab. 11 (Nascimbene & Guilini 2002: 575 ff).The humanitarian status was an explicit form of refugee protection as it protected *de facto* refugees, but we have no information to what extent the status also served non protective compassionate objectives. We have no figures for the number of humanitarian statuses granted by IO after 1999.

Tab. 11. First Instance Decisions of Italian AO and Granting Protection Status by IO, 1990-2007[203]

	Recognized de jure refugees	Recommended by AO for *de facto* refugee status (humanitarian status)	IO granted humanitarian status (including de facto refugee status) or temporary status
1990 (N: 1.705)	58%	0,06%	
1991 (N: 23.408)	7%	0,02%	-/ 18,000 from Albania
1992 (N: 8.393)	6%	0,01%	-/35,000 war refugees from ExYugoslavia and Somalia
1993 (N: 2.167)	9%	0,05%	-/35,000 war refugees from ExYugoslavia and Somalia
1994 (N: 2.063)	17%	0,05%	-/40,000 war refugees from ExYugoslavia and Somalia
1995 (N: 2.031)	19%	0,1%	
1996 (N: 797)	28%	0	
1997 (N: 2.175)	21%	0,2%	10,619/…..
1998 (N: 4.987)	29%	0,5%	9,830/?
1999 (N: 11.799)	9,5%	10%	860/18,400 war refugees from Kosovo
2000 (N: 36.548)	6%	4%	
2001 (N: 13.899)	21%	12%	
2002 (N: 8.325)	19%	14%	
Decentralization of the AO with creation of Territorial Commissions			
2003 (N: 6.159)	15%	37%	
2004 (N: 7.044)	14%	44%	
2005 (N: 10.731)	10%	40%	
2006 (N: 10.704)	11%	48%	
2007 (N: 16.786)	10%	60%	

Decentralization of the AO

In 2001-2 the asylum procedure was reorganized. Immigrants who were found to be irregularly present on the territory of the state or who were the subject of an expulsion order and who applied for asylum were to be processed according to an accelerated procedure.[204] The asylum institution was also reorganized. The Ministry of Interior was reorganized, and the Central Directorate for Immigration and Asylum Policy within the Department of Civil Right and Immigration of the Ministry became in charge of recognizing *de jure* refugees.[205] The central AO (National Commission for the Right to Asylum) no longer recognized refugees itself, but coordinated the assessment of asylum applications through a network of regional

[203] The figures of the first two columns on the first decisions were provided by the CNDA. For the humanitarian statuses granted by the IO in 1998 and 1999: Nascimbene & Guilini 2002: 575 ff. According to the IO in 1998, 9,830 persons benefitted from this status, as did 860 persons in 1999, although the AO recommended for a humanitarian status respectively 26 and 1192 rejected asylum seekers in those years.

[204] An accelerated procedure was adopted in the 2002 Law, but it was only implemented in 2005 (Oakley 2007, 6).

[205] It was called the *Dipartimento per i Diritti Civili e Immigrazione*. Another central directorate within this department is Civil Services on Immigration and Asylum (*Direzione Centrale sui Servizi Civili per l'Immigrazione e l'Asilo*) in which the *Ufficio III: Asilo, Protezioni Speciali e sussidiarie* is in charge of assistance and reception of asylum seekers. This new institution had to coordinate the regional AOs, but also manage the newly erected asylum centres, which had to receive the asylum seekers waiting for the decision of the AO (SPRAR: *Sistema di protezione per richiedenti asilo e rifugiati*). Before 2002 asylum-seekers received a lump sum payment.

AOs.[206] This decentralization had to accelerate the assessment process. The central AO had to provide central guidance, among others through Country-of-Origin reports and training activities. Each decentralized AO had four members: a representative from the department of Public Security, a representative of local territorial entities, a representative from UNHCR, and the president of each decentralized AO who was a representative of the national government at the regional level, a *Prefetto*. These members were nominated by the President of the Council of Ministers, on proposal of the Ministries of Interior and Foreign Affairs. In contrast to the central AO the latter Ministry was not represented in the decentralized AOs, while UNHCR recovered input in individual recognition decisions and the local territorial entities also had a representative.[207] Whether there was a link between the smaller share of asylum seekers being recognized as Convention refugees and the new decentralized AOs will be discussed in 2.2.

1.2.9. Greece reluctant to develop any provision for asylum

The Greek authorities had managed the Albanian crisis without any concessions to refugee rights. In June 1991 a mission of UNHCR concluded that denying Albanians access to an asylum procedure was the result of the dominant position in decision making of the Ministry of Public Order, since "the Ministry of Foreign Affairs more acquainted with Greece international obligations seems to have failed to convince the Ministry of Public Order to establish eligibility commissions and to apply the law. This reflects the prevailing situation in Greece as far as protection of refugees is concerned. The Ministry of Public Order often acts with no consideration of UNHCR's recommendations usually supported by Ministry of Foreign Affairs. This is a deeply rooted matter which should be addressed."[208] In the early 1990s most of the Albanians, as well as a small number of Yugoslavian war refugees were temporarily protected. They were administratively registered as such by the Ministry of Public Order and were denied access to the asylum procedure. Temporary protection as an *ad hoc* administrative measure was used as a collective device for them.[209] After the Greek policy makers had been confronted with the Albanian mass flight in the winter and spring of 1991 an Aliens Law was passed, which gave the police extensive power to combat irregular immigration (see 3.2.2). The law enabled the police to detain and deport irregular immigrants with summary procedures. This was also a repressive answer to the increasing illegal immigration of Turks and other third country nationals from Turkey (Sitaropoulos 2000, 107). While most irregular immigrants came over land, from 1992 onward people started to circumvent the border control by crossing the Aegean Sea. Some of these "boat people" applied for asylum; others did not but moved on further West.[210]

The new Aliens Law had few provisions on asylum. The 1991 law provided for the issuance of Presidential (inter-ministerial) Decrees to detail particular aspects of the asylum policy such as recognition, the right to work, and reception.[211] Notwithstanding the six-month limit provided by the law, these decrees took much longer to be promulgated. In 1993 a decree was published on the asylum procedure, and in 1995 a second followed on the economic rights

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[206] In Italy they were called the *Commissioni Territoriali Provinciali (*Provincial Territorial Commissions).

[207] Concerning the role of the Ministry of Foreign Affairs: The President of the central AO can propose the appointment of a representative of the Ministry of Foreign Affairs in specific situations in which a political analysis of a country of departure of a massive flow is required. Since 2008 the Ministry of Foreign Affairs has obtained an indirect influence on the process of refugee recognition as it has had input in the definition of safe countries of origin; not until 2019 was such a list published.

[208] Mission to Northern Greece 21.3-7.6.1991. AUNHCR, 100.GRE.ALB (Refugee Situations - Special Groups of Refugees - Albanian Refugees in Greece - Vol. 1 & 2).

[209] Annual report 1992, p.7. AUNHCR, 600 GRE (1988-1994).

[210] Annual report 1992, p.7 (mentions the numbers increased by the end of 1992 and that these "boat people" were mostly Iraqi of Assyrian-Chaldeen origin); Report of Mission to Greece, 1994. AUNHCR, 600 GRE (1988-1994).

[211] Annual report 1993. AUNHCR, 600 GRE (1992-1994).

of refugees. This slow legislative process, covering both the New Democratic (1990-1993) and Pasok (10.1993-2.2004) governments, reflected the reluctance of Greek policy makers to invest fully in refugee protection.[212] UNHCR pointed out in 1994 that refugee protection had to be promoted in Greece, but that one should be aware of some constraints as "in some quarters fear is being expressed that Greece will be overwhelmed by an influx of aliens as a result of its extensive sea and land borders with countries ridden by conflict. This fear is exacerbated by labor migration pressures (about 500.000 illegal economic migrants are estimated to be in the country)".[213]

An informal Greek asylum procedure, 1991-1993

The few provisions on asylum in the 1991 law borrowed from the restrictive toolbox of Denmark, Austria, and Switzerland. The law stipulated that asylum applications could be dismissed because they were not lodged immediately upon arrival or because the asylum seeker did not arrive directly from a country where his/her life or freedom was in danger. Even persons who had merely transited through another third country were to be returned to that country. This immediate rejection of a request for asylum meant that the substance of the claim was not considered at all, and refugees could be indirectly *refouler*.

Even for those refugees who arrived directly from the country of persecution and applied immediately upon arrival at the border, access to the asylum procedure was, according to UNHCR, difficult and largely dependent on the experience of the staff concerned as well as the manner in which the asylum seeker presented his/her case and his/her knowledge of refugee law.[214] The claims lodged could be handled in the ordinary asylum procedure or by an accelerated procedure for those considered manifestly abusive claims. The latter procedure against which there was no suspensive appeal was meant for asylum claims that 'served immigration purposes or to frustrate a legally ordered removal'.

The Ministry of Public Order was in charge of the Greek asylum procedure and, in particular, its Directorate for Immigration and Aliens of the Hellenic Police was responsible for the asylum applications. It was a centralized asylum system as all asylum applications were registered in Athens at the headquarters of the Hellenic Police Directorate for Immigration and Aliens. The asylum seekers were interviewed by an officer, but the decision-making authority officer was not the same as the one who interviewed the asylum seeker, so (s)he had no personal contact with the asylum seeker. Rejected applicants could file an appeal at an Asylum Tribunal (AT) at the Ministry of Public Order with suspensive effect. The AT was composed of three persons: two representatives of the Ministry of Public Order and one of the Ministry of Foreign Affairs; UNHCR had an observer status. The AT had no decision-making power, it advised the Ministry which decided.[215]

Among those who succeeded in applying for asylum, on land or at the border, very few were considered refugees by the Hellenic Police. In 1993 the recognition rate was 3,35%.[216] Being recognized refugee in Greece did not entail the opportunity to build up a new life under the same conditions as nationals as in other West European countries. Greece had not accepted article 17 of the Convention of Geneva and refugees were denied access to its labor market.

UNHCR decried the arbitrary and inconsistent recognition decisions made. Even many of those whom UNHCR had considered refugees were denied the Greek refugee status.

[212] A draft was launched in 1993 on relief centers and social care but only for 'urgent and serious situations of needs" and the Ministry of Health hinted at budgetary and financial constraints; we ignore when such a decree was finally published. AUNHCR, 600 GRE (1988-1994).
[213] Mission to Greece, 1994. AUNHCR, 600 GRE (1988-1994).
[214] Annual report 1991. AUNHCR, 600 GRE (1992-1994).
[215] Annual report 1992. AUNHCR, 600 GRE (1988-1994).
[216] Annual report 1993. AUNHCR, 600 GRE (1988-1994).

UNHCR blamed the lack of staff and their limited knowledge of refugee law and of the situation in countries of origin. The recognition policy showed a strong bias in favor of those who knew Greek or had relatives in Greece.[217] When an asylum seeker did not qualify for protection based on the Geneva Convention, the law of 1991 stipulated that these rejected asylum seekers could in exceptional cases remain in Greece on humanitarian grounds until departure became possible. For this purpose, they would only receive (renewable) six-months residence permits. Although the humanitarian grounds were not further specified and thus at the total discretion of the Greek authorities, it functioned as a *de facto* refugee status. For example, for Iraqis in the 1990s whose asylum requests were rejected, the humanitarian status provided some solace as the Greek authorities considered that the situation in their country did not permit their return. In fact, this status had more to do with the practical impossibility of deporting them, as Iraq and Turkey blocked their actual return, rather than with a protection desire.[218]However, Greece as an EC country willing to join the Schengen area had to develop its own asylum institutions. Being solely a transit country was no longer acceptable; the other member states of the EC wanted Greece to keep its asylum seekers and refugees within its territory. Greece became part of the Schengen area in November 1992. A year earlier the Dublin Convention had become domestic law, but it would take a while before the Dublin convention was implemented.[219]

The incipient Greek asylum procedure turned out to be largely defective and therefore UNHCR stuck to its old procedure of recognizing mandate refugees. Officially from January 1, 1990, UNHCR was no longer authorized to recognize refugees and to grant them 'blue cards', but due to the deficiencies in the Greek asylum system UNHCR continued to do so until May 26, 1993. Already in mid-1992, when the Greek authorities refused to issue residence permits to UNHCR's protégées, the local branch of UNHCR and its lawyers' network had stopped recognizing refugees and directed them to the Greek eligibility centers, but it seems shortly thereafter UNHCR resumed this practice for another year.[220] To fully formalize the Greek competence in refugee recognition from May 1993 onward a joint UNHCR/MPO committee was set up in March 1994 to regularize the stay of 4,854 refugees (2613 cases) whom UNHCR had considered to be under its mandate.[221]

A formal Greek asylum procedure, 1993-

The final cut-off date for UNHCR refugee recognition was postponed for more than three years due to the long-awaited presidential decree on the asylum procedure. The lacuna in its Aliens Law was finally filled with the Presidential Decree 83/1993, which institutionalized the pre-existing informal practice. The Supreme Administrative Court had also declared in its verdict 3832/1992 that this informal asylum procedure was illegal. The Presidential Decree entered into force on March 19, 1993.

Dismissing asylum applications remained a competence of the local Security Services of the police, but for Attica and Thessaloniki the decision was to be taken by the Head of the Security directorate of the alien's police. The first instance decisions remained the prerogative of the Ministry of Public Order. The Presidential Decree changed the composition of the AT with a stronger representation of the Ministry of Foreign Affairs (a Legal Counsellor of the Special Legal Service and a Senior officer of the diplomatic corps) and equal representation of the Ministry of Public Order (a legal counsellor and senior police officer). UNHCR could not

[217] The branch office of UNHCR reported that "according to high-ranking officials of the MPO the difficulties did not result from a government policy but rather due to a limited knowledge of refugee law and information on countries of origin at lower levels". Annual report 1992. AUNHCR, 600 GRE (1988-1994).
[218] Analysis by Sten A. Bronée, deputy Representative Greece, p.6. AUNHCR, 600 GRE (1988-1994).
[219] Law 1996/1991. Official Gazette, 196/16.12.1991.
[220] Annual report 1991. AUNHCR, 600 GRE (1992-1994); Annual report 1992 and 1993. AUNHCR, 600 GRE (1988-1994).
[221] Report of Mission to Greece, 1994. AUNHCR, 600 GRE (1988-1994).

vote when the AT formulated its advice, but their representative could always attend the meetings of this commission as an observer.[222] UNHCR was also notified of all decisions. The UN organization invested in providing support to the Greek protection officers by training them in refugee law and also providing them with a handbook of all Greek legislation, jurisprudence, and a translation of their own handbook.[223] Between 1993 and 1996 the recognition rate of the 5,060 asylum applicants was, according to the Greek authorities, about 12%.[224] Refugees were granted a (renewable) one year residence permit.

There was considerable international pressure as well from the other EC member states as from UNHCR to improve the Greek asylum procedure.[225] The former wanted only to integrate Greece fully into the Dublin arrangement if refugees in Greece were guaranteed stronger protection against *refoulement*. The procedure of lodging an asylum claim had to be simplified and the too large leeway given to the border police to dismiss applications had to be corrected. This apprehension was strengthened by the reply of UNHCR to the German Constitutional Court as to whether Greece was a safe country of first asylum. This reply stated in diplomatic terms – so not using these words- that Greece could not be considered as a safe country of first asylum. Determining for this statement was that Greece used the concept country of first asylum, without examining the claim in such a manner that refugees could be returned to Bulgaria and Turkey with a danger of indirect *refoulement*.[226] Even for those whom Greece acknowledged as refugees, a full commitment to the international refugee regime was demanded. Greece had to accept that refugees settled in Greek society. This was symbolized in 1995 by Greece withdrawing its reservation to article 17 so that refugees could obtain full access to its labor market.[227]

In 1996 a more comprehensive alien law was passed. Similar to developments in the other EC countries, the concept of safe third countries was added as a means of dismissing asylum applications. An accelerated procedure had to speed up the processing of asylum claims. It also included refugee protection measures. UNHCR acquired the right to visit any asylum seeker in detention or kept in the border zone in the (air)ports. The Presidential Decree 61/1999 of 6 April 1999 further specified the refugee status determination procedure as well as how the accelerated procedure would be implemented. Still the first instance procedure remained very similar to the early 1990s. Police and civil personnel of the Ministry of Public Order were assigned for the examination of asylum applications. The interview was conducted by a policeman with an officer's grade in co-operation; if possible, another officer or civil employee with a higher education degree would also attend. The interviewer had to assess, taking into account the benefit of the doubt, whether the claim fell under the Geneva Convention (or was manifestly unfounded). This advice then had to be passed to his superiors within the ministry, who would state their opinion on the proposals made by the interviewing officer and submit both opinions to the Directorate for Immigration and Aliens of the Hellenic Police (at the Ministry of Public Order) (Refworld 1999; Skordas 1999). The Hellenic police remained in charge of the first instance decisions. Between 1997 and 1999 the recognition rate rose from

[222] All negative decisions on asylum were subject to review by the Supreme Administrative Court but without suspensive effect. UNHCR provided financial support to test cases that had been flagrantly denied protection and were to be deported. For charges of illegal entry, one could appeal to the ordinary court. Annual report 1993; Mission to Greece, 1994. AUNHCR, 600 GRE (1988-1994); on the presidential decree see also AUNHCR, 600 GRE (1982-1994)

[223] Annual report 1993. AUNHCR, 600 GRE (1988-1994).

[224] Antonopoulos 2006: 142. The author does not mention whether these figures include both first instance and appeal decisions .

[225] Mission to Greece, 1994, p.2. AUNHCR, 600 GRE (1988-1994).

[226] Mission to Greece, 1994, p.4 and analysis by Sten A. Bronée, deputy Representative Greece. AUNHCR, 600 GRE (1988-1994).

[227] For the preliminary negotiations, see Mission to Greece, 1994, p.2 and 4. AUNHCR, 600 GRE (1988-1994).

9% in 1997 (N= 4.380) to 11% (N= 2.950) and even 27% in 1999 (N= 1.530). The composition of the AT was extended with two additional members, i.e., a representative from the Athens Bar Association appointed by its Board of Directors and the Legal Protection Officer of the Office of the UNHCR in Greece. The AT could decide to interview the asylum seeker, eventually accompanied by his/her legal representative a second time. The decisions of the Committee had to be made by a majority; a split vote was settled by the vote of the legal counsellor to the Ministry of Public Order, who was the chair of the AT.[228] The AT has however no full decision-making power. Until 2001 all immigration issues had felt under the competency of the Ministry of Public Order, and specifically of the police authorities, but in 2001 legal migration matters were transferred from the police to the Ministry of Interior and, partly, to the Ministry of Labor. This implied a normalization of the management of legal migration, but irregular immigration, be it for asylum remained a sole security issue (Kandilys 2019; Pallister-Wilkins 2018; Papageorgiou 2013: 76). The Ministry of Public Order remained exclusively focused on controlling and policing irregular entries. The Greek state was not able -or seemed not willing- to make its immigration policy serve the goal of controlling immigration as well as protecting refugees. The police, in particular the border offficals, were insufficiently trained in the human rights mission that was also allotted to them. Serious allegations were raised about denial of access to international protection and arbitrary deportations at the borders, mainly the Evros River in the North and the islands of Lesbos, Chios and Samos (Sitaropoulos 2000; UNHCR 2008: 3; Antonopoulos 2006: 142).

Very few people applied for asylum in Greece. The Hellenic police retained vast powers in the management of the asylum system, including the recognition of refugees. As mentioned before the recognition rate had risen from 3,35% in 1993 to 9% in 1997, 11% in 1998 and 27% in 1999, but in 2001 it had dropped to 11% and even 0,3% in 2002 and it would remain around those very low figures during the first decade of the 21th century. UNHCR Athens expressed serious concern at this stark fall of the recognition rate (Skordas & Sitaropoulos 2004: 27).

1.3. Somalian war refugees: very different national recognition policies

Tensions between the different Somalian clans have been present since the creation of Somalia in 1960. President Siad Barre, who reigned since a *coup d'état* in 1969 lost power in 1991. His political strategies had been based on repression and ethnic favoritism. While overthrowing the president could have improved basic human rights, new conflicts and human rights violations followed instead. A tug war between more than a dozen clans to gain control of state authority. made the situation very unstable. By late 1991 it was clear that there was no government left. The discussion of who would control the country from then on tore Somalia apart. Between 1988 and 1999, more than 800,000 Somalians fled the country. An additional difficulty was that the clans could no longer be assigned to one specific area, but increasingly spread across the country, as they increasingly took the shape of socio-economic and political organizations based on kinship. This meant that there were hardly any regions fully controlled by one clan. Thus, no one could ensure the protection of civilians from attacks of other clans. Between 1993 and the beginning of 1994, there was a small chance of improvement as several clans were negotiating for reconciliation. On March 24, 1994, the main 15 clans managed to sign a cease-fire agreement. However, the follow-up meeting regarding the cease-fire agreement never took place. By June 1994, fighting between the warring clans restarted. More peace negotiations followed and some of them seemed to give hope for improvement. However, there was still no permanent settlement of the conflict. Despite the reconciliation efforts, in

[228]Skordas 1999; REfworld 1999.

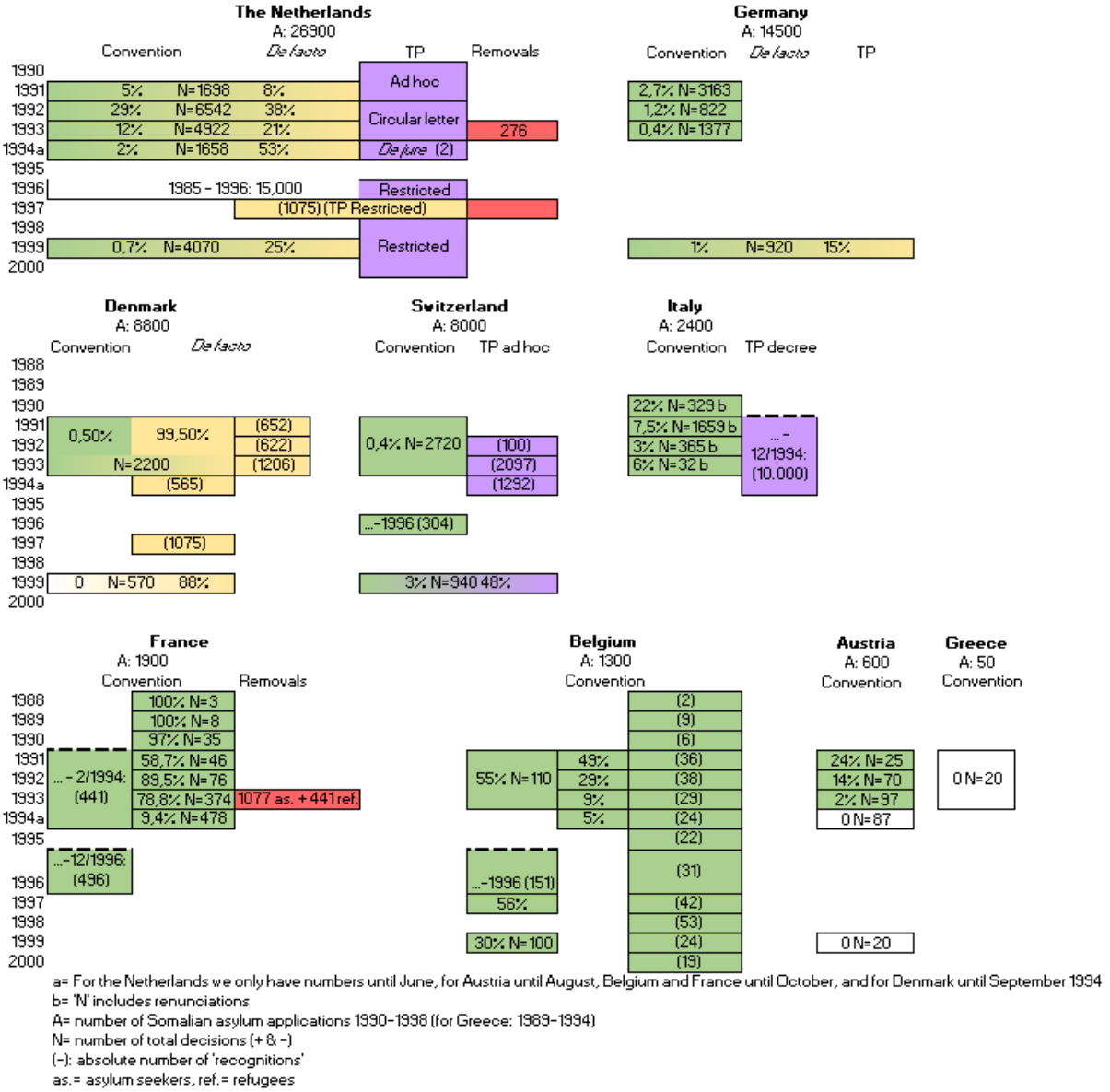
some parts of the country (mainly the South) the situation steadily worsened (UNHCR 1994, 1999).

As we did for Sri Lanka and Yugoslavia, in this section we mainly focus on the start of the conflict, covering the initial reactions of the countries of destination when Somalian asylum seekers started to arrive. In the case of Somalia, we also did this for pragmatic reasons as our main archival sources cover the period until 1996. However, we have used also public available information so our overview extends to the beginning of the 21th century. As is shown in Fig. 6[229] there was a lot of divergence between European countries in the response toward Somalian asylum seekers. Since 1990 asylum applications of Somalians in Europe have been on the rise. Between 1989 and 1993 Somalians accounted for 2 to 3 % of all asylum applications in Europe and 1.45% between 2000 and 2006.[230] The Netherlands was the most popular country of destination for Somalian asylum seekers, followed by Germany and Denmark. The profile of the Somalian asylum seekers in the mid-90s was people between 18 and 35 years old, but we also see some different characteristics of the asylum seekers, depending on the country where they applied for asylum, which might add insight into understanding the different recognition policies. While in Belgium, Denmark, Germany, and Austria most applicants were men, there was an equal distribution in the Netherlands. In Italy the gender balance was different, as more women applied. Also, in Belgium by the mid-1990s the gender balance tipped to female. Among the Somalian asylum seekers in Italy in 1996 11% were unaccompanied minors (which was half of the total unaccompanied minors in that country), while other countries had little or no unaccompanied minors. In France more than elsewhere, single mothers with children applied for asylum. While Germany and Austria reported that the majority of their Somalian asylum seekers originated form Mogadishu and its surroundings, France noticed that throughout the first half of the 1990s, its asylum seekers originated less and less from the capital region and had thus a more heteronomous origin.[231]

Reliable recognition rates are impossible to calculate due to the large number of rejections of asylum seekers registered from Somalia who were rejected because they were from elsewhere. Among the self-declared Somalians there were actually many from Djibouti, Kenya or even from Tanzania.[232] In 1996, the Danish AO had developed a thorough set of tools to check the applicant's self-declared nationality, including among others a language test (which was developed in cooperation with the Swedish IO), a photograph test, and systematic interviewing.[233] According to the French AO, one third of the Somalian asylum applicants in Lyon in 1993 did not originate from Somalia.[234]

[229] This is a provisional overview, which still has to be updated with new information that we have collected.
[230] UNHCR. 1994. 'Background Paper on Somali Refugees and Asylum Seekers'. Geneva: Centre for Documentation on Refugees. AOFPRA, 5/42July-December 1994.
[231] 'Somalia questionnaire draft analysis of responses'. N. n. AOFPRA. 5/46.
[232] General Secretariat to CIREA. 'Compilation of the replies to the questionnaire on Somalia'. 1996. AOFPRA. 5/46.
[233] 'Note from the Presidency to CIREA'. 1996. AOFPRA, 5/46; General Secretariat to CIREA. 'Compilation of the replies to the questionnaire on Somalia'. 1996. AOFPRA, 5/46.
[234] Conseil d'administration, 1993. AOFPRA, Dir 3/13-15.

Fig. 6. Recognition policy towards Somali asylum seekers between 1990 and 2000 in Nine European countries[235]



a= For the Netherlands we only have numbers until June, for Austria until August, Belgium and France until October, and for Denmark until September 1994
b= 'N' includes renunciations
A= number of Somalian asylum applications 1990-1998 (for Greece: 1989-1994)
N= number of total decisions (+ & -)
(-): absolute number of 'recognitions'
as.= asylum seekers, ref.= refugees

[235] This figure is still preliminary as we've found additional CIREA statistics (1992-1995) for several countries in our analysis that we have not yet been able to process. The current figure is based on the following sources:
Sources for the Netherlands: Böcker & Doornbos 1998; Dutch AO. Réponse de la délégation néerlandaise. AOFPRA. 5/42July-Dec 1994; Grütters 2006; Hirsch Balin, E. M. H. 1994. *Vaststelling van de begroting van de uitgaven en de ontvangsten van hoofdstuk VI (Ministerie van Justitie) voor het jaar 1994*. Accessed 28/04/2022. https://repository.overheid.nl/frbr/sgd/19931994/0000003271/1/pdf/SGD_19931994_0000718.pdf; UNHCR 1998, 1999, 2000. Germany: UNHCR 1999, 2000; German AO. *Réponse de la délégation allemande*. AOFPRA. 5/42July-Dec 1994. Denmark: Danish AO. *Réponse de la délégation danoise*. AOFPRA. 5/42July-Dec 1994; UNHCR 1994, 1998, 1999, 2000. Switzerland: IGC 1995; UNHCR 1994, 1999, 2000. Italy: Ferrari 1996; IGC 1995; Italian AO. *Réponse de la délégation italienne*. AOFPRA. 5/42July-Dec 1994; UNHCR 1999. France: French AO. 1994. *Evolution du nombre de premieres demandes et du taux d'accord de 1991 a 1994 (10 premiers mois)*. AOFPRA. 5/42July-Dec 1994 ; French AO. *Réponse de la délégation française*. AOFPRA. 5/42July-Dec 1994; UNHCR 1999. Belgium: Belgian AO. Réponse de la délégation belge. AOFPRA. 5/42July-Dec 1994; CGVS. 2002. 'Veertiende En Vijftiende Jaarverslag Werkingsjaren 2001 En 2002'. https://www.cgvs.be/sites/default/files/jaaverslagen/jv2001-2002_cgvs_nl.pdf.
UNHCR 1994, 1998, 2000. Austria: Austrian AO. *Réponse de la délégation autrichienne*. AOFPRA. 5/42July-Dec 1994; UNHCR 2000. Greece: UNHCR 1994.

1.3.1. Most West European states do not consider the Geneva Convention applicable to those fleeing Somalia

While in the 1980s most countries still granted some refugees from Somalia a *de jure* or *de facto* status, we see a decrease of recognition rates throughout the years from the moment the Siad Barre regime fell, and this parallels with increasing requests for asylum. The AOs referred to the lack of state authority in refusing to recognize these asylum seekers as Convention refugees.

As mentioned before, the German refugee definition prevented war refugees from being recognized as Convention refugees. Germany, which received 14,500 Somali asylum applications between 1990 and 1998, denied protection to those who claimed persecution by other clans. The most invoked ground for protection, serious harm, the '*threat to their personal survival as a result of the civil war and the anarchic conditions, citing lack of personal safety, loss of property and shortage of food',* was not taken into account. The German AO argued that since January 1991, due to the lack of state authorities in Somalia, no persecutions of ethnic groups nor collective persecutions could have taken place. Although the German AO acknowledged that there was a civil war raging, there was no question of granting these war refugees asylum. The German authorities considered that attempts to restore the state authorities had not been successful. The German AO did not consider the group that ruled Somaliland to be a quasi-state authority, as they were not internationally recognized. The German authorities had considered Somaliland safe between 1993 and 1994, yet safety was not guaranteed even then. A clan could not qualify as a persecutor since they didn't wield enough power to be called a '*quasi-state'*.[236] German authorities contended that internal clan structures could serve as protective actors', however, they were very provisional as no protective guarantees could be expected. In summation, the reasons for not granting the Convention refugee status to Somalian asylum seekers were twofold: First, there was no (quasi) state authority and second, the invoked flight motives concerning a general situation of violence were not deemed as persecution.[237] Austria, Greece, and Switzerland toed the German line and did not recognize asylum seekers from Somalia as Convention refugees.[238]

By 1996 the Austrian AO, then headed by Wolfgang Taucher, provided a small opening for Somalian asylum seekers. In 1996, almost all applicants gave '*the general state of civil war/the general situation on site'* as their flight motive. Ethnic/clan conflicts were also often provided as grounds for persecution. Political activities were rarely invoked.[239] The AO considered that persecution by non-state entities such as militias and other clans could in theory yield a Convention refugee status provided the other requirements were met. If the state was '*unable to curb such persecution*' these asylum seekers could qualify for Convention status. However, in practice clan persecution did not result in recognition, because the AO often did not find actual acts of persecution. In addition, the AO considered that there was an internal solution to this eventual persecution with the Internal Flight Alternative.[240] Denmark also

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[236] 'Note from the Presidency to CIREA'. 10.1996. AOFPRA. Folder 5/46; General Secretariat to CIREA. 'Compilation of the replies to the questionnaire on Somalia'. 1996. AOFPRA. Folder 5/46.

[237] 'Note from the Presidency to CIREA'. 1996. AOFPRA. 5/46.; General Secretariat to CIREA. 'Compilation of the replies to the questionnaire on Somalia'. 1996. AOFPRA. 5/46.

[238] Austrian AO. *Réponse de la délégation autrichienne*. AOFPRA. 5/42 (July-Dec 1994); Although the CIREA sources provide no information about the reasoning behind these rejections, see however 1.2.9 and especially 2.2.2 on the Greek AO. Greece got only 50 applications from Somalian asylum seekers between 1989 and 1994. Between 1991 and 1993 the Greek AO decided about 20 applications, which were all rejected. UNHCR. 1994. 'Background Paper on Somali Refugees and Asylum Seekers'. Geneva: Centre for Documentation on Refugees. AOFPRA, 5/42 (July-December 1994).

[239] General Secretariat to CIREA. 'Compilation of the replies to the questionnaire on Somalia'. 1996. AOFPRA. 5/46.

[240] 'Note from the Presidency to CIREA', 10.1996. AOFPRA, 5/46.

denied Somalian asylum seekers recognition based on the Geneva Convention [241] A similar attitude is to be discerned in France, but with more openness to persecution by a quasi-state. Such an openness would not be extended to Somalian clans as persecutors until the early 21st century. Belgium is the outlier in this overview, as from the very start it recognized Somalian asylum seekers as Convention refugees whose clan membership qualified them as a social group that could be persecuted by other clans in the absence of a protective state-- one of the five grounds of persecution recognized by the Geneva Convention.

1.3.2. Belgium recognized Somalian refugees as Convention refugees

Shortly after the downfall of Said Barre, the Belgian AO held that asylum seekers from Somalia qualified for protection based on the Geneva Convention. In this civil war, minority clans were at the mercy of the larger and richer clans. Group persecution of weaker clans was sometimes being considered for protection (Carpentier 1993). In 1996, the Belgian AO declared that they have '*always regarded Somalia as* a *country in which serious ground for persecution exists, mainly because of clan rivalries'*[242] For the Belgian AO, it was clear that there was no longer a state authority in Somalia, and thus persecution by the state per se no longer took place. However, there were warlords that acted as *de facto* authorities. Most importantly the AO argued that the '*persecution was unopposed by any protection from any authority'.* All applicants invoked motives of persecution that were related to their clan membership. Even if the persecuted was a member of a political organization, a victim of rape or otherwise attacked, these persecutions were all attributed to the clan membership.[243] Although the Belgian AO recognized that in individual cases clans could serve as a protective actor, by 1996 this argument was rarely used against asylum seekers. Certain clans could be either persecutors or victims of persecution. Still acts of persecution were important for recognition as a Convention refugee and imprisonment by other clans, and in many cases, sexual violence were grounds for recognition.[244] By 2003, although it was still acknowledged that factual protection was totally absent in Somalia, the AO held that civil war as such did not qualify an asylum seeker for protection. The AO did not elaborate what kind of (eventual individual) persecution yielded recognition as a Convention refugee. However, the AO acknowledged that some Somalian clans were in fact victims of collective persecution, and again it was emphasized that the AO only exceptionally applied this concept. Asylum seekers from those clans could thus qualify for a *de jure* status.[245]

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[241] General Secretariat to CIREA. 'Compilation of the replies to the questionnaire on Somalia'. 1996. AOFPRA. 5/46; Vedsted-Hansen 1993.

[242] General Secretariat to CIREA. 'Compilation of the replies to the questionnaire on Somalia'. 1996. AOFPRA5/46.

[243] The Belgian representative of the AO told his colleagues that the general situation in Somalia was sufficient to get a Convention status, provided that the applicant could present a consistent overview of their troubles to prove (s)he had fled effectively Somalia. This is probably an overstatement, as Belgium still returned people to Somalia. In 1993, 5 people were deported to Mogadishu, while between 1994 and October 1996, 7 people were returned to Somalia. Other Somalians were not recognized as refugees but obtained a leave to remain based on humanitarian consideration due to the length of their asylum procedure 'Note from the Presidency to CIREA'. 1996. AOFPRA5/46. 'In 1996, return through Mogadishu airport was '*extremely difficult and risky'.* General Secretariat to CIREA. 'Compilation of the replies to the questionnaire on Somalia'. 1996. AOFPRA5/46. We ignore if these returnees were rejected asylum seekers.

[244] While there was no other protection status than the Geneva refugee status, some Somalians did get regularized based on humanitarian consideration (the length of their asylum procedure).'Note from the Presidency to CIREA'. 1996. AOFPRA.

[245] Between 1988 and 2002, the Belgian AO granted 353 Somalians a *de jure* refugee status. Not all were recognized due to persecution by private actors in a context of civil war. In 2002 some female Somalians, likes female refugees from Guinea, were recognized as refugees due to the fear of female genital mutilation. CGVS. 2002. 'Veertiende En Vijftiende Jaarverslag Werkingsjaren 2001-2002'. p.46, 73; CGVS. 2003. 'Zestiende Jaarverslag Werkingsjaar 2003'. p.47.

From early 1990 onward the asylum court and the Council of State (cassation) shared the opinion that a situation of civil war did not prevent the Geneva Convention from being applicable. The asylum court considered the clan structures as *de facto* authorities as well, although the concept of a *de facto* authority was never properly defined.[246] By the 21st century the asylum court agreed by and large with the policy of the AO that in Somalia in some situations collective persecution had taken place against which there was no protection. In individual cases, the asylum court even extended it to other clans (and families) such that by 2002 the AO's negative decision on Somalian asylum requests was overruled by the court in 28 cases.[247]

1.3.3. The Council of State criticized the state obsession of the French AO and AT

When the regime of Said Barre started to be military contested as small armed groups disputed his monopoly of violence a small number of Somalians sought asylum in France. The AO decided in May 1990 that there was a *de facto* state authority in Somalia and that these asylum seekers were either persecuted by this state or not protected by this quasi state. After the fall of Said Barre and chaos and violence took hold of Somalia it took a while before Somalian asylum seeker arrived in large numbers in France. Only from 1993 onward Lyon became the place of settlement for a growing number of Somalian asylum seekers who mostly originated from Mogadishu and had been members of the local elite. Due to poorly substantiated claims, evoking the bad general situation in the country, but most importantly the absence of the state or any *de facto* authority in Somalia, the AO felt they had no choice but to reject these applications. The AT agreed with the AO, as it judged from the end of 1993 onward that the insecurity for individuals as a result of the conflict in Somalia did not fall within the scope of the Geneva Convention. According to the AT, the objectives of the parties in the conflict, which are more akin to banditry, did not allow the judges to apply the provisions of the Geneva Convention.[248] In the next years, following the reasoning that gangs without any political motivation were at the root of persecution and violence and that no state authority was present, the Somalian asylum applications were rejected.[249] Following the German refugee definition, it was claimed that persecution had to emanate from an authority. Regarding the required flight motives, they *'invoquent essentiellement des persecutions de la part d'autres groups claniques',* but even being persecuted as a member of a (minority) clan could not be attributed to any factual authority. Mostly the clans were unarmed, and thus vulnerable and, according to the French jurisprudence, they could not be considered even protective actors. Only Somalians politically active or active in NGOs, and because of those activities persecuted, could qualify for protection. However, by October 1996, some women were recognized specifically because of gender discrimination due to serious sexual violence.[250] The French

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[246] The asylum court recognized a draft evader who had refused to serve its clan militia. General Secretariat to CIREA. 'Compilation of the replies to the questionnaire on Somalia'. 1996. AOFPRA5/46.

[247] 'Réfugiés et Guerre Civile Réunion C.I.R.E.A. Jurisprudence de La Commission Permanente de Recours Des Réfugiés'. 1994. AOFPRA. 5/42July-December 1994

[248] Conseil d'administation, 1993-1994. AOPRA Dir 3/13-15. In November, 1993; the French AT stated: '*the fears expressed by Somalian nationals are linked to the general climate of insecurity that prevails in this country where, after the disappearance of all legal power, clans, sub-clans and factions of one and the same ethnic group are struggling to create or extend areas of influence within the national territory without, however, being in a position to exercise an organised power in these areas that would make it possible, if need be, to regard them as de facto authorities'*. This means the Somalian situation does not fall within the scope of the Geneva refugee convention. French AO. *Réponse de la délégation Française*. 5/42 (July-Dec 1994).

[249] Rapport d'activité 1993, p.6. AOFPRA, DIR 1/14; Situation particulière en Somalie, sd. AN, 19970381: CIREA 6-12.1994 meetings on Somalia, AOFPRA, Dir 5/42 ; French AO. *Réponse de la délégation Française*. AOFPRA. 5/42 (July-Dec 1994).

[250] 'Note from the Presidency to CIREA'. 1996. AOFPRA5/46.

authorities continued to be of the opinion that the Geneva Convention could not be applied as no 'group' had been able to act as a *de facto* state.[251]

This restrictive interpretation of the Geneva Convention became an important bone of contention in French jurisprudence. Although we have no clear overview of the vagaries of the attitudes of the asylum institutions, it seems the decision of the Council of State in December 1997 was a stone cast in the pond. The Council of State was the guardian of the legality of the AT's decisions, and it held that French protection was warranted against the risk to the asylum seeker's life or liberty. Whether or not the asylum seekers' treatment that was deemed to be in violation of Article 3 of the European Convention of Human Rights had emanated from state authorities did not matter. France also had to protect persons who were persecuted by groups of persons unrelated to the public authorities as long as the state authorities were unable to provide appropriate protection.[252] Nonetheless later on, it seems the AO (and AT) still frequently denied refugee status because there was no clearly individualized risk of persecution and the general situation in Somalia was not sufficient. In September 2004, the AT accepted group persecution as grounds for protection, since they recognized that persecution may also come from Somali clans (Chetail 2007: 94-96).

1.3.4. Austria, Switzerland and Denmark a weak *de facto* status

Several countries provided a solution for these asylum seekers from Somalia beyond the Geneva Convention. When in 1991 the Danish IO/AO rejected the Somalian asylum applications en masse, the Danish AT referred many pending cases back to the Danish IO/AO because the AT determined that the new Somalian situation, after the fall of Said Barre, was not evaluated properly. The Danish IO/AO reconsidered their position but still did not recognize these asylum seekers from Somalia as Convention refugees; rather, they recognized members of certain clans, among others the Issaq clan, as *de facto* refugee based on the collective persecution of these groups in Somalia. The single fact that one belonged to a certain minority clan was not enough to acquire the *de facto* refugee status, but it reduced the burden of proof (Vedsted-Hansen 1993). By 1996, only a few asylum seekers from Somalia had evoked flight motives that, according to the Danish IO/AO, could result in a Geneva Convention refugee status.[253] The clans were not sufficiently powerful to serve as a protective actor, so when most asylum seekers evoked '*the general situation in the country, with a civil war and poor* security' this entitled them to be protected with the *de facto* refugee or humanitarian status.[254] Between 1990 and 1998, the Swiss AO also granted at least half of Somalian asylum applicants *de facto* group protection.[255]

In Germany and Austria, rejected Somalian asylum seekers could not be deported due to logistical problems. Given that there were no flights to Mogadishu, they were tolerated, which did not entitle them to a residence permit. As soon as flights to Mogadishu were possible and the proper travel documents could be obtained, these rejected asylum seekers would be

[251] General Secretariat to CIREA. 'Compilation of the replies to the questionnaire on Somalia'. 1996. AOFPRA5/46.
[252] Conseil d'Etat, 1 December 1997, case 184053, Kechemir; Amnesty International and France Terre d'Asile 1997, 191-193; Chetail 2007.
[253] General Secretariat to CIREA. 'Compilation of the replies to the questionnaire on Somalia'. 1996. AOFPRA. 5/46.
[254] 'Note from the Presidency to CIREA'. 1996. AOFPRA. 5/46; General Secretariat to CIREA. 'Compilation of the replies to the questionnaire on Somalia'. 1996. AOFPRA. 5/46.
[255] This is a rough estimate, as in 1992, 1993, 1994, and 1999 combined, 3940 Somalians got temporary protection (not having figures of 1990, 1991, 1995-1998) knowing that between 1990 and 1998, 8000 Somalians asked for asylum. IGC 1995; Efionayi-Mäder 2014.

removed.[256] In Austria, the AO only rarely invoked a recommendation to grant Somalian asylum seekers *de facto* refugee status, a status that by 1996 was similar to the German non status.[257]

1.3.5. Italy a strong *de facto* refugee status

The situation for Somalians was better in Italy. Although they were largely denied Convention status, they collectively received temporary protection with the right to work.[258] A special decree was prepared by the Italian authorities for Somalian nationals in early 1992, but due to the elections it was only issued on September 9, 1992. From then onward, rejected Somali asylum seekers were granted collectively a 'temporary permission to stay' to enable them to stay in Italy and to work or study. These permits were renewable as long as the Somalian situation prevented their return. The humanitarian residence permits were granted by the provincial Police Headquarters (*Questure*). The Somalians could apply for this temporary protection directly at the *Questure,* although this temporary protection did not preclude them from applying for *de jure* protection new arrivals no longer applied for asylum,.[259] The ministries of Interior and Foreign Affairs were both responsible for granting temporary protection permits. The co-ordination between the two was guaranteed by the president of the Council of Ministers. The Italian government did not want to grant Somalians a permanent protection, as they expected them to return home soon (IGC 1995: 127-128; Hein 1993). By December 31, 1994, at least 10,000 Somalians got temporary protection (Ferrari 1996).

1.3.6. Flexible and second-rate protection in the Netherlands

Between 1990 and 1998, the largest share of Somali asylum applications (within Europe) -- about 26,900 applications-- was lodged in the Netherlands (UNHCR 1994, 1999). An asylum seeker fleeing the Somalian civil war could qualify for *de jure* status only if (s)he could prove an individual risk. In October 1996, the Netherlands reported that the Geneva Convention status was only granted based on one's origin or political convictions if the applicant had '*serious problems with the clan authorities'.* Still, the AO judged that there was no group persecution of Somalians. However, from November 1995 onward the Council of State judged that there could never be persecution if there was no (factual) state authority to carry out persecution. The Council of State referred to German and French case-law. Due to the opposition of lower courts, the Council of State eased up its policy, admitting that in some cases the presence of a *de facto* state might lead to a Geneva Convention status. (Vermeulen et al. 1998: 58–61). The chances for receiving Convention status for Somalian asylum seekers were slim. Temporary protection or a humanitarian status was granted to victims of sexual violence and those who had been punished for not following Islamic law.[260] From 1994 onward, Somalian asylum seekers qualified for the second rate *de jure* status. The IO was not very transparent about their policy

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[256] 'Note from the Presidency to CIREA'. 1996. AOFPRA. 5/46; General Secretariat to CIREA. 'Compilation of the replies to the questionnaire on Somalia'. 1996. AOFPRA. 5/46; The Austrian authorities expelled rejected Somalian asylum seekers into third countries based on re-admission agreements. 'Note from the Presidency to CIREA'. 1996. AOFPRA. 5/46.

[257] 'Note from the Presidency to CIREA'. 1996. AOFPRA. 5/46

[258] For the 2,445 decisions concerning Somalian asylum seekers in Italy between 1990 and 1993, the recognition rate was 9% (IGC 1994: 8-12).

[259] In 1996, the Italian authorities reported that the most invoked flight motives were 'Persécutions collectives dues à des conflits ethniques et peur de l'insécurité générale régnant dans le pays en raison de la guerre civile' General Secretariat to CIREA. 'Compilation of the replies to the questionnaire on Somalia'. 1996. AOFPRA, 5/46.

[260] Also, women who feared genital mutilation were granted non-Convention protection. 'Note from the Presidency to CIREA'. 1996. AOFPRA. 5/46. In 2000, the AO referred in the circular letter of 21/04/2000 to article 3 ECHR for recognizing them as *de facto* refugees.

toward Somalians.[261] There was an on-again off-again second rate *de jure* refugee status policy from 1994 onward, as illustrated by Fig. 7. Probably the general *de facto* (C) policy was attributed to asylum seekers who they considered unrepatriable based on the 'general living conditions' and in particular on the security situation in the country of origin. The better 'second rate *de jure* status was instead granted to Somalian asylum seekers depending on the region or clan/family.[262] In October 1996, this was considered to be the case for those who could not find protection within the region of origin, often the center of Somalia.[263]

In the first years of the civil war, those who were rejected by the AO were not expelled to Somalia.[264] However, in December 1996 a fact-finding mission went to North Somalia that had observed 'decision-making bodies' in the Nord-East of Somalia in which 'normal life' did restart, but this was an exceptional situation that did not apply to other regions.[265] The AO acknowledged that it was hard to establish whether there was in fact an actual authority in Somalia. Still, in 1996 deportation was considered for those whose "*clan was in a dominant position".*[266] Due to a lack of cooperation from the applicants and the local authorities, deportation turned out to be very difficult.[267] These policy guidelines were repeated in an instruction in 2000.[268] The Salek Seek verdict of the ECtHR in 2007 would denounce the Dutch return policy as contrary to article 3 ECHR (see 1.3.2).

[261]The Dutch IO/AO did not report how many Somalians benefitted from these temporary protection arrangements.

[262] Circular letter, 21/04/2000 of the head of the IND (IO/AO) Dirk Schoof (1999-2003) Werkinstructie 224 available at https://cmr.jur.ru.nl/cmr/tbv/tbv94/00/ accessed 21.3.2022.

[263] 'Note from the Presidency to CIREA'. 1996. AOFPRA. 5/46

[264] The country was on the list of countries in which expulsions were suspended 'Nota van de Nederlandse Delegatie'. 1994. AOFPRA. 5/42july-december 1994.

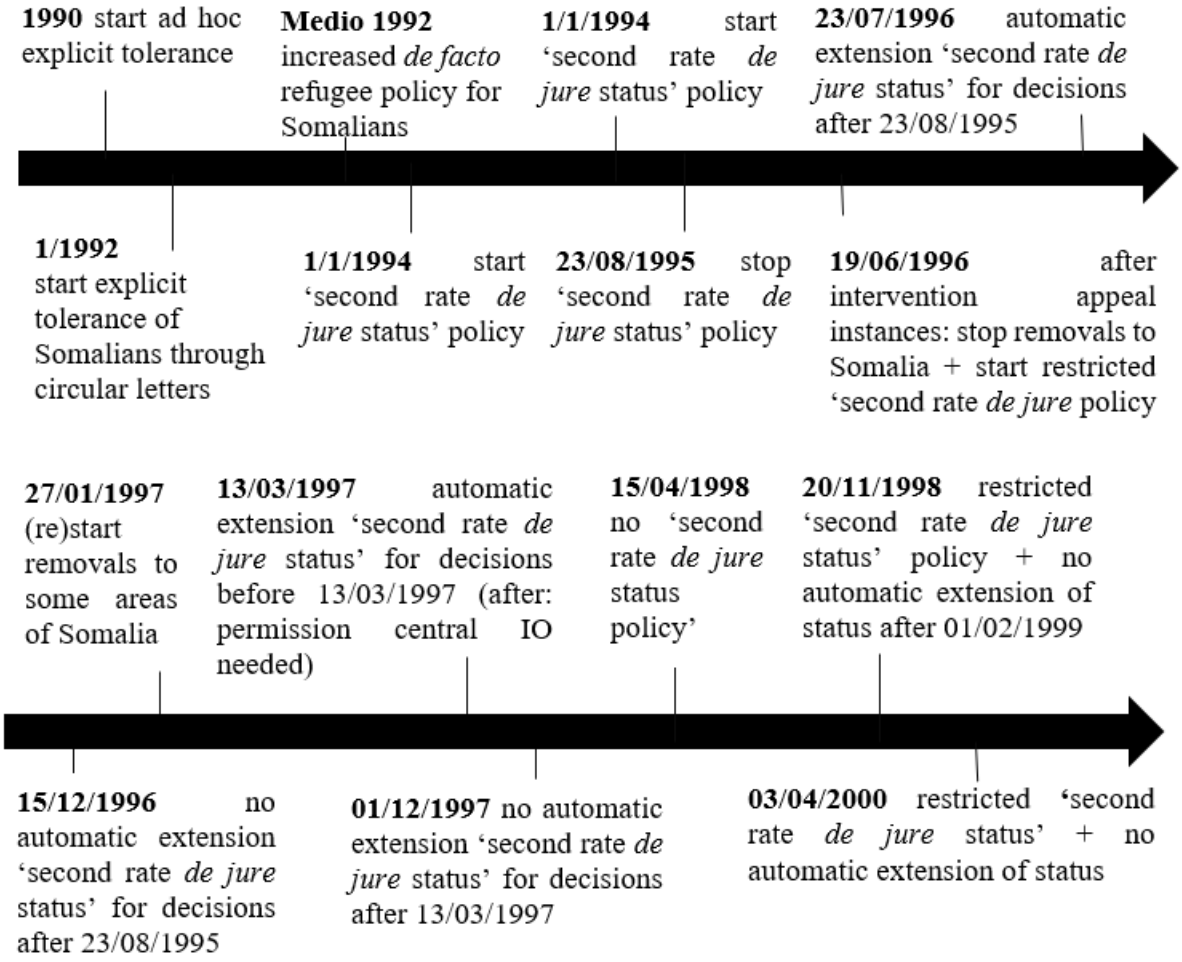
[265] 'Compte rendu de la réunion du CIREA à Bruxelles le 5 décembre 1996'. 1996. AOFPRA. 5/46..

[266] 'Note from the Presidency to CIREA'. 1996. AOFPRA. 5/46.

[267] 'Note from the Presidency to CIREA'. 1996. AOFPRA. 5/46..

[268] For Somalia 1991-1994: Grütters 2006; 'Nota van de Nederlandse Delegatie'. 1994. AOFPRA. 5/42july-december 1994. For Somalia 1995 onward: Grütters 2006 and circular letters 1996/2, 1996/8, 1996/13, 1997/4, 1997/13, 1998/9, 1998/29 all available at https://cmr.jur.ru.nl/cmr/tbv/tbv94/ and werkinstructie 224 available at https://cmr.jur.ru.nl/cmr/tbv/tbv94/00/. On 04/21/200, the head of the IND (IO/AO) Dirk Schoof (1999-2003) repeated this in a circular letter outlining the policy toward Somalian asylum seekers. Those who profiled themselves politically or militarily against a clan could be persecuted by that clan and could thus qualify for *de jure* Convention status. Werkinstructie 224 available at https://cmr.jur.ru.nl/cmr/tbv/tbv94/00/ accessed 21.3.2022.

Fig. 7. Dutch second rate de jure status policy towards Somalian asylum seekers 1990-1999



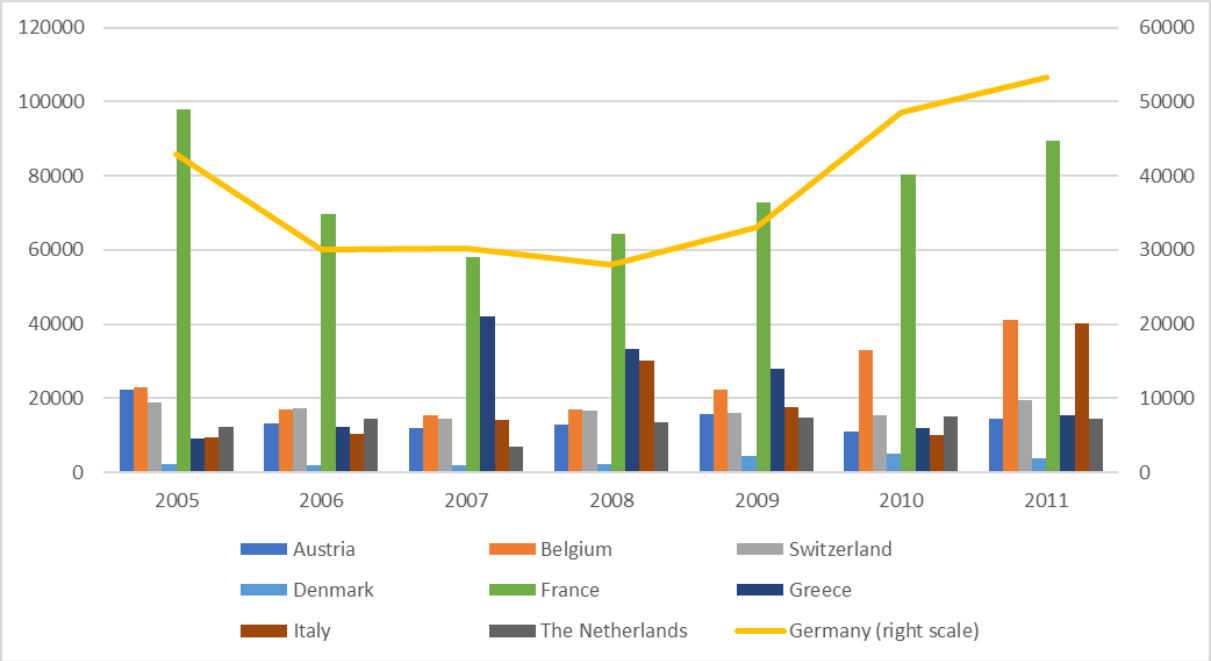
2. The new European management of asylum, 2005-2010

Between 2005 and 2010 the annual number of asylum applications in our sample of ten countries in continental West Europe stayed rather stable, oscillating around 230.000 applications.[269] This evolution was in line with the evolution of asylum applications across Europe.[270] Our ten countries received a slightly smaller share of the flow of asylum seekers to Europe (-2%) but that was also the case for most other European countries, except for the share in Norway, Finland, and Sweden, which increased from 8% to 14,5%. However, between 2010 and 2014 the number of asylum applications in Europe increased sharply. The annual number of asylum applications more than doubled: from 231.169 in 2010 to 510.329 (+121%) in 2014. This increase runs parallel with the general increase of asylum applications in Europe. The share of asylum applications in our sample countries related to all European asylum applications stabilized (73% in both 2010 and 2014), while Eastern Europe took a larger share (from 4% to 9%), which means that Scandinavia, the British Isles, and the Iberian Peninsula took in a smaller share of the asylum seekers in Europe. The enclosed graph illustrates that France and Germany

[269] We use UNHCR data: https://www.unhcr.org/refugee-statistics/download/?url=idMPs5 , accessed 15.8.2022.
[270] Included countries: Austria, Belgium, Switzerland, Germany, Denmark, France, Greece, Italy, The Netherlands, Luxembourg, Bulgaria, the Czech republic, Ireland, Spain, Hungary, Malta, Poland, Portugal, Romania, Slovakia, Finland, Sweden, Norway, UK (same as figure 1994-2004), and Estonia, Latvia, and Lithuania.

experienced an increasing number of asylum seekers, while Italy saw several short-lived upsurges, in 2008, in 2011.

Fig. 8. Asylum seekers in our countries of analysis, 2005-2011



2.1. European policy making

Throughout the 1990s the secrecy of the early inter-governmental initiatives gave way to a more open attitude. The Amsterdam Treaty, in force from 1999 onward, put the issue of migration and asylum firmly on the European Union's agenda, making them no longer a purely intergovernmental affair. With the communitarization of European migration policy, governmental initiatives were now much more open to public debate (Monar 2000; Pollet 2001). Still, during the first five years the European Parliament only served as an advisory body. However, in December 2005, when the European Parliament became a fully-fledged co-legislator, the public debate truly started. Whether the AOs played a role in these discussions, either at a national level or at the European level is unclear. In Euroasil (which in July 2002 had replaced CIREA) the national asylum institutions met and could communicate on policy-related matters with EU Member States and the European Commission. Already in 2006, the European Commission considered that Euroasil did not meet the expectation of a systematic approach towards asylum practices and that "its current working methods do not provide means for a structural follow-up".[271]

2.1.1. The Amsterdam Treaty

The Amsterdam Treaty adopted in June 1997 on the progressive establishment of an 'area of freedom, security and justice' shifted co-operation on migration into the Community framework. The Amsterdam treaty transferred asylum and immigration matters from the third to the first pillar. The Treaty, which came into force in May 1999, incorporated the Schengen

[271] Commission staff working document - Annexes to the Communication from the Commission to the Council and the European Parliament on strengthened practical cooperation - New structures, new approaches : improving the quality of decision making in the common european asylum system {COM(2006) 67 final} /* SEC/2006/0189 */ https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52006SC0189&from=EN, accessed 15.8.2022.

acquis into the EU framework via protocol. The transgovernmental processes dominated by law-and-order civil servants were reined in. The 'communitarization' of asylum and immigration had its limits, because the role of EC institutions was limited due to decisions requiring unanimous voting in the Council of Ministers, and the role of the ECJ was circumscribed. The Ministers of Foreign Affairs, the European Parliament, and particularly Italy and Greece (which had not been treated as equal partners in the Schengen negotiations) were satisfied with the turn of events. A new directorate was created within the Commission-- the Directorate General on Justice and Home Affairs- but for the first five years intergovernmental decision making was maintained.

The Amsterdam treaty was still a continuation of previous policy making. It contained a list of measures to be adopted within a time frame of five years, including, among others, minimum standards for asylum procedures, implementation of temporary protection, and a common interpretation of the refugee definition. For the latter, the Amsterdam Treaty acknowledged the existence of refugees (and displaced persons) other than Convention refugees (Lavenex 2001: 126-142; Guiraudon 2003). In 1999, at the Tampere meeting of the European Council, the Member States of the EU called for a comprehensive approach to asylum and migration policies. The EU was given the power to establish funds on the integration of migrants, management of external borders, voluntary return of migrants, and protection of refugees. In 2004, a new agency, Frontex, was created to help the Member States manage external borders.

The Treaty of Amsterdam was the legal first step toward a European harmonized asylum regime. Yet the plan to develop the Common European Asylum System (CEAS) was only introduced by the European Council in the Tampere conclusions.[272] Its plan was a two-step incremental harmonization. In the short term, a European framework was supposed to be developed with some common standards (regarding the asylum procedure) and some minimum conditions (regarding the reception and the content of international protection). In a second stage, a fully common European asylum procedure and uniform refugee status had to be established (full harmonization). According to Ackers (2005: 2) member states were reluctant to abandon their familiar national practices in favor of new supranational policy instruments with uncertain outcomes merely for the sake of the vague ideal of harmonization. The 'minimum standards' approach, providing for considerable national discretionary powers, was seen by the member states as an 'exercise' through which they did not (yet) entirely have to abandon their national habits. Chetail (2016: 10-11) considers CEAS as similar to the Schengen process, whereby the true driving force was a general political desire to exclude asylum seekers from free movement, which had been made possible by the recent abolition of internal borders.

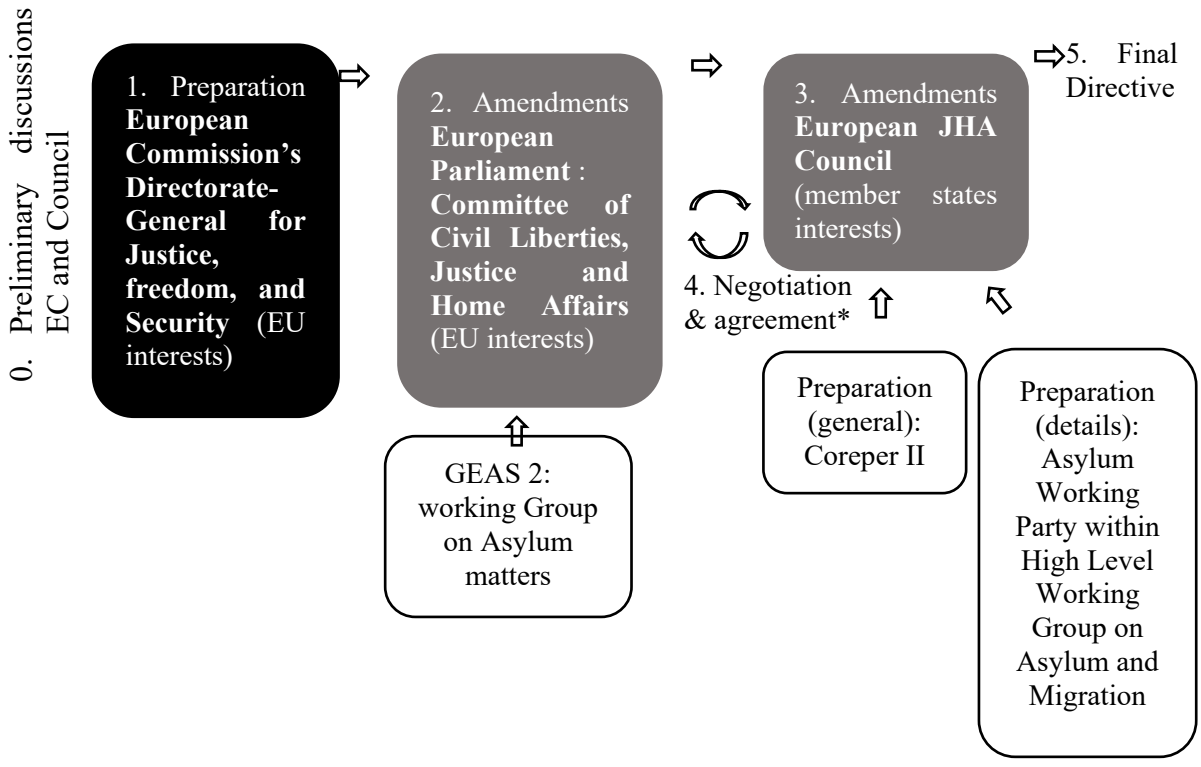
The outcomes of the first harmonization stage have to be understood in the context of many institutional actors that were still rather inexperienced at the time of negotiations. The European Commission's DG for Justice, Freedom, and Security, responsible for the first draft of the directives, was the newest and smallest DG at the time of the negotiations. As it had just been established in October 1999, the extent of knowledge in EU law was still weak, and knowledge of international human rights law and refugee law was even weaker. In addition, the DG did not yet have the opportunity to develop an institutional memory in the matter of cooperation and negotiation (Gil-Bazo 2007: 29). Even though the Council itself had more than twenty years of experience in intergovernmental cooperation, it still lacked experience in negotiating asylum law. Most European asylum law was decided upon by the European Council without holding into account the opinion of the European Parliament, which was sometimes not even asked. The Parliament even openly questioned the lawfulness of some pieces of the legislation. Furthermore, due to the closed operation of the Council, few external actors could

[272] *'[t]he European Council [...] has agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention'* . Chetail 2016, 10–11.

contribute to the proposals (Gil-Bazo 2007: 30). While the European Commission's first proposals were rather ambitious, after negotiations in the European Council, the European Commission's plans were mitigated. Yet the EU succeeded in adopting the first generation of CEAS within five years, a relatively short amount of time (Chetail 2016: 12).

Crucial for the development of the CEAS was the input of EU member states. In negotiating the legal framework of CEAS, the member states sought to develop the CEAS system in a manner that enabled them to keep their own national legislation unchanged (Ackers 2005). The member states were not yet prepared to share their sovereignty' hence, the decision-making procedure still followed the unanimity rule. This procedure caused the European Union to take initiatives that represented the lowest common denominator, so-called minimum standards. Indirectly, such European initiatives can exert a perverse negative influence on refugee policy by member-states by abusing these minimum standards as recommendations. At the same time, discussion of refugee protection on the European level demanded a more rule-of-law oriented approach. International arrangements between states excluded certain practical ad hoc solutions, which were at the disposal of national level executive powers when crises in immigration policy occurred. These contradictory influences resulting from the escalation of refugee policy to the European level are clearly discernible in the initiatives that the European Union took in the field of refugee protection (Monar 2000; Pollet 2001).

Fig. 9. Legislative procedure European Asylum legislation



The input of national states is crucial for understanding the first-generation asylum directives. Our overview shows that since 1980 (West-) Germany's deviant (and restrictive) interpretation of the Geneva Convention's definition of 'refugee' had been attractive to other European states building up an asylum infrastructure. However, by the end of the 1990s it had also isolated Germany as the European states who had adopted in one way or another this exclusive refugee

definition had provided better protection to their *de facto* refugees than the German authorities did. Still other European states had stayed loyal to the original refugee definition of the drafters of the Geneva Convention. Understanding the drafting of the asylum directives and in particular the qualification directive demands full attention to Germany, the elephant in the room.

As mentioned before the new millennium had brought significant changes to Germany's immigration policy. The SPD-Green coalition had transformed the manner in which immigrants and their descendants were looked up in Germany by enabling them to become legal part of the German nation. There was not only this spectacular reform of nationality law, facilitated by the German unification but also the manner immigration was discussed changed profoundly. The German public discourse on immigration underwent a profound transformation, as no longer immigration as a burden on state and society, but as a resource in global competition stood central. In asylum law the red-green coalition was much more prudent. The social group component of the Convention of Geneva in recognition policy was enlarged as gender-related persecution was explicitly promoted as a ground for recognition. Germany was thus changing but its restrictive attitude for example in terms of social rights granted to non-Convention refugees was still a reality (Borkert & Bosswick 2011; Zaun & Ripoll Servent 2021).[273] Still in 2004 the important difference since the early 1980s between constitutional refugee recognition and refugee recognition based on the Convention of Geneva in terms of a stronger residency status of the former was abolished. Upon recognition both had the same (strong) residency status (Bast 2007: 294-295).

The extension of the EU towards the East played no role in this political process. In 2004 Cyprus, Estonia, Latvia, Lithuania, Slovakia, Slovenia, and the Czech Republic joined the EU, but by then the first generation of asylum directives were already decided upon.

2.1.2. Temporary Protection Directive 2001/55/EG

At the time of the Yugoslavian civil war temporary protection had been the favored solution to deal with the mass flows of people fleeing a conflict at the EU borders. During the 1990s different states had modified their legislation to include temporary protection but with differences in terms of rights granted to the beneficiaries. Since the early 1990s, Germany had been demanding a European scheme of burden sharing in case of mass flight. The Amsterdam Treaty put this topic formally on the agenda and shortly thereafter the Kosovo crisis pointed sharply to the absence of legal provisions for these refugees and reinvigorated the German demand for burden sharing. The first directive in the field of asylum of July 2001 was meeting, to a certain extent, the German demand. The Directive on minimum standards for granting temporary protection in the event of a mass influx of displaced persons, provided for burden sharing based on the voluntary consent of the Member state.[274] Certainly as important is that it provided for protection for Convention refugees as well as for *de facto* refugees or refugees victim to general violence. It would give protection to Displaced Persons which were defined in particular as well as "persons who have fled areas of armed conflict or endemic violence" as "persons at serious risk of, or who have been the victims of, systematic or generalized violations

[273] In 2007 the German legislator addressed the legacy of this restrictive past by providing the possibility to legalize the stay to refugees who for six- to eight-year minimum stay had been 'tolerated' in Germany, thus merely enjoying a suspension of deportation without any regular residence title. By the end of 2007 22,900 refugees with humanitarian stay applied for this regularization, only approx. 12,000 persons were awarded a residence permit. Borkert & Bosswick (2011). We ignore why only a quarter of the potential claimants (see 1.2.1.) did apply for a regularization.

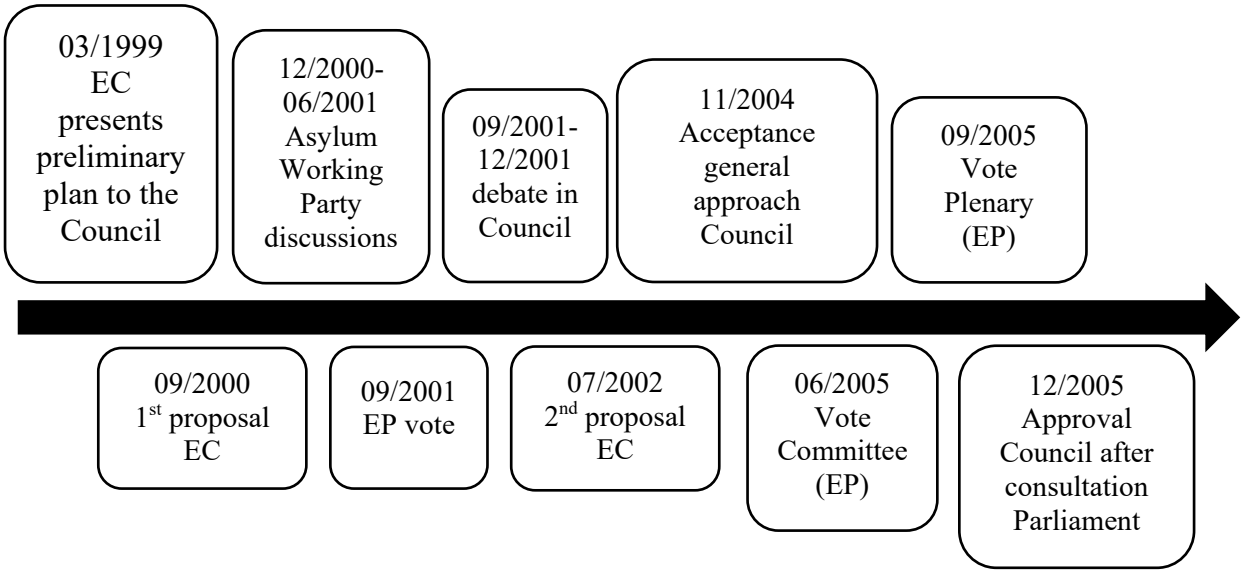
[274] O.J. of the E.U., L-212 of 7.8.2001. Temporary protection as an exceptional, interim protection measure can last for at most 3 years and the granting of temporary protection is without prejudice to the possibility of applying for Convention refugee status

of their human rights".[275] This formalization of the temporary protection at the EU level was translated in national legislation all over the EU (Meltem Ineli-Ciger 2017; Franssen 2011).

2.1.3. The Asylum Procedure Directive 2005/85/EC

The European Commission and the European Council had been discussing the content of a draft of the Asylum Procedure Directive (APD) since the late 1990s. In March 1999 the European Commission presented a working document to the European Council called 'Towards common standards on asylum procedures'.[276] As most member states preferred a flexible approach, the common EU- approach through a Regulation was quickly dropped in favor of a Directive with minimum standards. The main objective of this Directive was to fasten and simplify the asylum procedures without losing certain guarantees, Formal consultations turned into a stalemate; therefore, rather informal drafting meetings were organized between fifteen member states in order to deter the member states from focusing on their ideal solutions (which were often conflicting) but instead settling on 'acceptable' compromises (Ackers 2005: 9). The Coreper and Council came to a new proposal after several exchanges of opinions on the JHA Council meeting on December, 6 and 7 2001(Peers & Rogers 2006b: 370–72). In July 2002 the EC published a new second proposal for the APD. The Council issued its general approach in November 2004 (Ackers 2005: 1). The proposal was eventually approved by the EP in September 2005, although the EP was not satisfied with the APD as the EP had preferred higher protection standards.[277] The Council approved the APD in December 2005 (Peers & Rogers 2006b: 373).

Fig. 10. Legislative process Asylum Procedure Directive[278]



[275] Article 2 of the Temporary Protection Directive 2001/55/EG.
[276] 8446/99 LIMITE ASILE 18
[277] European Parliament. n.d. '2000/0238(CNS) Asylum: Granting and Withdrawing Refugee Status, Minimum Standards on Procedures, Common European Asylum System'. Accessed 20 June 2022. https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2000/0238(CNS)&l=en.
Earlier, on 20 September 2001 ,the EP had suggested the following changes: more referrals to the ECHR, a non-refoulement guarantee until the end of the final appeal, and a less strict application of the application of the "manifestly unfounded", "safe third country" and "safe country of asylum" principles. Peers & Rogers 2006b, 371–72.
[278] European Parliament 2005.

The quality of the asylum procedure

Crucial for our focus on the AO's role in obtaining optimal protection are the directive provisions on the quality of protection officers and the interview they conduct. The original proposal of the APD contained articles (art 13 and 14) requiring the AO to employ '*specialized personnel with the necessary knowledge and experience in the field of asylum and refugee matters*' and '*personnel likely to come into contact with persons at the stage where they may make an application for asylum, such as border officials and immigration officers, have received the necessary basic training to recognize an application for asylum*' in order to guarantee the quality of first instance decisions (Ackers 2005: 4; European Commission 2001, C 62E/232, C 62E/235). Yet, the final directive in article 4 is more ambiguous, requiring only that the staff have the '*appropriate knowledge or receive the necessary training to fulfill their obligations when implementing this Directive'* (European Council 2005). Spain and another member state opposed this mandatory training for protection officers because they maintained that such training went beyond the scope of the directive (Ackers 2005: 15). Both states were also opposed to the mandatory interview of asylum seekers imposed by article 12 of the APD.[279] They were opposed to the member state being required to give asylum seekers the opportunity to present their case in a personal interview, as they both had an administrative practice based solely on the written file. They let the applicant fill in a questionnaire in the presence of the official and made their decision on the basis of this written information (Ackers 2005: 5). Other member states pleaded for more flexibility in conducting a personal interview. This opposition to the mandatory interview resulted in the inclusion of several exceptions in the final directive.[280] The interview was recommended in the directive but could easily be evaded. The final Directive did not specify the stage of the asylum procedure in which the requirement for a personal interview with the asylum seeker should be conducted, but implicitly it should be the stage in which the asylum seeker could present the grounds for his/her application Also, the obligation to have a legal advisor present during the interview was made optional in the final directive (Ackers 2005: 15).

Manifestly unfounded applications (art 28)

The concept of manifestly unfounded claims was the first tool that had been used to speed up decisions in asylum cases in Europe. In 1999, some countries had stated that they preferred the Manifestly Unfounded Claim above STC as a practice to speed up the procedures.[281] Still, national practices were quite divergent.[282] Although the notion of 'inadmissibility' and 'manifestly unfounded' were not always that distinct in national practices, in the original APD proposal they were not only clearly separated from one another but also more clearly defined.[283] Yet two member states were opposed to the distinction between inadmissibility and

[279] Article 12: Before a decision is taken by the determining authority, the applicant for asylum shall be given the opportunity of a personal interview on his/her application for asylum with a person competent under national law to conduct such an interview.

[280] Article 12: The personal interview may be omitted where: the competent authority has already had a meeting with the applicant for the purpose of assisting him/her with completing his/her application and submitting the essential information regarding the application; he determining authority, on the basis of a complete examination of information provided by the applicant, considers the application to be unfounded….the absence of a personal interview in accordance with this Article shall not prevent the determining authority from taking a decision on an application for asylum.

[281] 8756/99 LIMITE PV/CONS 32 JAI 42

[282] For example, Ireland listed twelve grounds on which to reject a claim as manifestly unfounded, while the Czech republic listed only three. Oakley 2007, 8.

[283] Originally, an application was to be considered as manifestly unfounded if: it contained false information regarding identity; one got deliberately rid of documents proving his/her identity; the application is made in a final stage of a deportation procedure, merely to delay the deportation; the person does not provide issues in his/application that justifies protection based on the Geneva Convention or art 3 ECHR; the applicant comes from

manifestly unfoundedness, as neither state made this distinction themselves. Many other member states insisted on having more grounds for manifestly unfoundedness.[284] In line with the German practice, Germany wanted to remove the 'subsequent applications' from the list of grounds of manifestly unfoundedness. Instead, they persisted on an accelerated treatment of these cases. Eventually most member states agreed with the distinction between inadmissibility and manifestly unfounded cases but opposed the detailed nature of the grounds of manifestly unfoundedness. Eventually under the Swedish presidency, in the second EC proposal an explicit reference to the Geneva Convention was added, meaning that every manifestly unfounded case still had to be judged individually (Ackers 2005: 4–7).

Accelerated procedures (art 23)

As Chapter 1 described, in 1991 France had been the first member state to adopt an accelerated procedure. In 1993 Germany and the Netherlands added their approval, followed by Denmark in 1994, Greece in 1996, Austria in 1997, and Italy in 2002.[285] By 2005 the remaining member states, Belgium and Luxembourg, had introduced accelerated procedures as well.[286] As Oakley (2007: 22) remarks rightly, the importance of the accelerated procedure was not to be underestimated, as for example Austria and the Netherlands used the accelerated procedure more than the regular asylum procedure (Oakley 2007: 22).

Safe Third Country (STC) concept (art 27)

In 1999 the EC had presented the Safe Third Country (STC) concept as the tool for accelerating the asylum procedure. Delegations of countries that used the STC concept on a national level warned that this had not always delivered the desired results and doubted whether it would work on the European level.[287] The SCT concept had already been in use for nearly 20 years. Denmark was the first country to introduce a STC concept in 1986which spread fast, and by the end of the 1990s most West-European countries applied these concepts. The Schengen and Dublin Conventions from 1990 had promoted the STC concept. Furthermore, the readmission treaties of the (member states of the) EU had promoted the concept of STC. The European Council developed a policy from 1999 onward of concluding association or cooperation agreements with third countries only if they also agreed with readmission clauses, both for their own citizens and for other third country nationals. The readmission clauses facilitated the implementation of the STC concept (Costello 2005: 40-44).

By 1999 Austria was advocating for a common legally binding European STC list containing all candidate member states and possibly also the members of the Council of Europe.[288]Their proposition, however, was rejected.[289] Some safeguards had to be guaranteed, and comprehensive and tangible criteria for the rules had to be defined. In the first proposal of the Asylum procedure directive, a country could be regarded as a STC '*if there are no grounds for considering that the country is not a safe third country in [the applicant's] particular*

a SCO, or it is a subsequent application not containing any new relevant facts (European Commission 2001, C 62 E/237).

[284] For example: in case the applicant refused to cooperate with the authorities, in case of illegally arriving and apprehended at the border, and illegal immigrants applying for asylum before deportation. Ackers 2005, 5.

[285] Also, among other member states of the EU, no part of our sample had adopted accelerated procedures: Portugal and the UK adopted them in 1993, Spain in 1994, Slovakia in 1995, Estonia and Ireland in 1997, Hungary and Latvia in 1998; Slovenia, Lithuania, and the Czech Republic in 1999, Poland in 2001 and Cyprus in 2002. Oakley 2007.

[286] Ireland and Sweden had done so by then as well. The ten member states that joined the EU in 2004, already had an accelerated procedure in place before accessing. Only Malta introduced an accelerated asylum procedure after joining the EU. Oakley 2007, 7.

[287] 8756/99 LIMITE PV/CONS 32 JAI 42

[288] 7498/99 LIMITE ASILE 12 CK4 18; 7314/03 LIMITE ASILE 16; Costello 2005, 46.

[289] 11299/99 LIMITE ASILE 32; Costello 2005.

circumstances'. For the STC to be relevant for the asylum seeker, in the first draft of the Directive the applicant had to have a 'connection or close links with the country in question or 'a chance to invoke protection in that country during an earlier stay'. Yet the Council did not manage to make this more concrete. Again, the final directive left it up to the member states to elaborate on rules to establish whether there was a 'reasonable' connection with a STC that could substantiate the return of that person to that country (Costello 2005: 59–61).

In negotiating the STC concept for CEAS, no agreement could be reached on several aspects of the concept.[290] Moreover, Germany wanted to import its own national practice by proposing an additional 'neighboring safe country concept' for countries sharing a border with a member state, which abided the Geneva Convention and the ECHR. The German representatives advocated the immediate return of asylum seekers who had entered through these neighboring STC's (Ackers 2005: 21). Under the Irish presidency in the first half of 2004, the member states ministers were asked again to discuss some aspects of the concept, including among others what the connection to a STC should be. Two ministers explicitly stated that access to the asylum procedure should not be required. The German 'neighboring safe country' concept was explored but redefined more narrowly to an 'exceptionally safe third country' concept, as a common border with a EU member states would not be required anymore. Most member states were in favor of establishing a common list of STC, except for Germany, which explicitly asked to retain their own list (Ackers 2005, 25–27).

Safe Country of Origin (SCO) concept (art 30-31)

As discussed in Part 1, Switzerland was the first country to adopt a SCO in 1990. Many countries followed the Swiss example: Belgium was the first to do so, albeit only for a short time (1991-1993)[291].Other countries adopted the principle and used it throughout the 1990s. Austria and Luxembourg started to do so in 1991, Germany in 1992, Denmark in 1994, the Netherlands in 1995, and France in 1996.[292] The SCO concept was also promoted in the London resolutions of 1992 (Costello 2005: 40–41, 50–51).[293] The spread of the concept was not the consequence of a formal harmonization, but rather the result of administrative policy-sharing interactions characteristic of this field. However, by 1997 Belgium, Italy, Slovenia, Spain, and Sweden were still not using the SCO concept.

How the list was decided was very diverse. In most countries, the Ministry of Foreign Affairs' input was crucial in assessing a country as safe, but they also used other sources of information. For example, the Netherlands also relied on reports of Amnesty International and UNHCR. In most countries the situation in these safe countries or origin was monitored on a regular basis. While in Greece the list of safe countries was a prerogative of the executive power, this was not the case elsewhere. In the Netherlands, a Parliamentary debate on the concept of safe country of origin was held on February 7, 1995, and it was decided that Parliament should always give its consent on the list. From then onward two times a year, the Dutch Parliament was given the opportunity to discuss the use of the concept safe country of

[290] For a detailed analysis, see Ackers 2005, 20-23.

[291] According to Oakley (2007, 4) Belgium was the first EU country to implement the SCO concept (Oakley 2007, 4). The Belgian SCO practice lasted only a bit longer than a year as the Constitutional Court annulled it on the ground that that the practice was violating the right to equality, see 1.2.3.

[292] Other member states introduced it too: Finland in 1991, Portugal in 1993, and the UK in 1996.

[293] '*The London SCO Resolution defined as a safe country of origin as a country 'which can clearly be shown, in an objective and verifiable way, normally not to generate refugees or whether it can be clearly shown, in an objective and verifiable way, that circumstances which might in the past have justified recourse to the 1951 Convention have ceased to exist.'* This was to be assessed relying on the (i) previous numbers of refugees and recognition rates; (ii) observance of human rights; (iii) democratic institutions; and (iv) stability.' Costello 2005, 50.

origin. In Germany the initiative for such a list was in the hands of Parliament, and each year there was a discussion on the use of this concept in the asylum procedure.

In most countries, the list of safe countries of origin was being introduced either to give a warning about the increasing number of asylum seekers from that country or to be able to decide swiftly without opening an appeal at the second instance decision makers. However, in many countries, dismissing asylum applications based on the safe country of origin was not permissible. In these countries the judiciary had demanded an investigation of each case or an individual justification for the decisions. Therefore, in all countries that used the SCO concept, an asylum seeker was given the opportunity to put forward facts that could contest the assumption that the country was safe in his/her particular case. National practices differed as well as the countries of origin each deemed "safe", as Tab. 12. illustrating the practice in 1997 shows.

Tab. 12. lists of safe countries of origin of EU countries among our sample (beyond North Atlantic world, Japan, Australia and New Zealand)

	Eastern European countries	Ghana	Gambia	Senegal	Benin	Cape Verde	Chile	Niger	Russia	Tanzania
Germany 1993-1996	X		Until 22.7.1994	Until 3.9.1995						
1997										
Germany + the Netherlands[294]	X	X		X						
Austria	X									
France	Without Bulgaria				X	X	X			
Denmark[295]	Including Baltic republics				X			X	X[296]	X

The French representative for CIREA concluded in 1997 that the impact of the concept safe country of origin on the procession of asylum cases was rather weak since it had not diminished the workload and lead some countries, sometimes on the demand of Parliament, to consider ending the system.[297] Still the countries that used the concept considered that the list had a dissuasive effect on asylum seekers from the countries on the list. They could document this by evidence of a declining number of asylum seekers from these countries after the introduction of the list of safe countries of origin. However, it was difficult to pinpoint the effect of this

[294] In 1997 the Dutch authorities explained that they paid more attention to the asylum applications of members of minorities who were in a weak position in the Central and East European countries; in particular, homosexuals from Romania were given special attention. European Council - CIREA, analyses of the responses to the questionnaire 19.12.1996 on the safe country of origin principle, 6656/97. AOFPRA, Dir 5, 47.

[295] used for its accelerated procedure for MUC. Reply of the Danish responses to the questionnaire 19.12.1996 on the safe country of origin principle, 6656/97. AOFPRA, Dir 5, 47.

[296] with exceptions for example Jews. Danish responses to the questionnaire 19.12.1996 on the safe country of origin principle, 6656/97. AOFPRA, Dir 5, 47.

[297] Summary by the French representatives of the meeting CIREA, 3.4.1997. AOFPRA, Dir 5, 47.

measure, as the principle was mostly introduced within a range of other measures so that at times applications from countries that were not considered safe had also declined.[298]

There was not consensus within the EU as to the merits of the SCO concept. In 1999 Italy had not introduced the SCO concept and explicitly expressed the desire to delete the concept altogether, while Austria was a strong defender of the SCO concept.[299] The original ADP proposal from 2000 suggested the SCO concept was only to be used on a voluntary basis (Costello 2005: 65). Yet in June, 2003 a common EU list of SCO was suggested by France, Germany, Italy, Spain, and the UK, a proposal that was supported by the Benelux and Austria (Ackers 2005: 18). In October, 2003 the European Council agreed to establish a common list of SCOs that would be made compulsory for all member states (Costello 2005: 65). In March 2004 the European Council made a first attempt to draft a list of safe countries of origin (Sidorenko 2007: 97) with a standstill clause for countries already using such a list (Ackers 2005: 28).[300] However, as the member states did not agree on how to interpret and apply the criteria of designating a SCO, the common list was wiped off the table. The obligation to implement a SCO concept contradicted with the set-up of a directive, leaving member states some freedom to provide better protection than the minimum protection directive required. Compelling member states that did not yet apply the SCO concept to do so, did not comply with this set-up. Member states got to keep their own lists. Even the choice of whether an appeal had a suspensive effect or not was left up to national legislation (European Council 2005; Costello 2005: 50).[301] Regarding the border procedure, it was decided to let national law prevail and establish only a few conditions regarding the choices. It was even agreed that an authority other than the one designated in the regular procedure could examine the asylum application at the border (Ackers 2005: 20). Originally, the border procedure was not included in the first APD proposal as the philosophy at the start was that an asylum seeker should undergo the same asylum procedure, regardless of where in the EU (s)he had requested asylum. The national practices turned out to be too divergent and resistant to reach the goal of harmonizing the EU border procedures.

The asylum procedure directive provided also facilities for the supervisory role of UNHCR. Access to national asylum files was provided under the condition that the applicant for asylum agrees thereto. The directive explicitly consented that this was also the case for asylum seekers in detention and in airport or port transit zones .[302]

2.1.4. The Qualification directive 2004/83/EC

The first proposal of the QD was presented to the member states in September 2001 (Peers & Rogers 2006a: 323, 326). It referred to 'international protection' which served as a shorthand term to denote Convention refugees plus others in need of protection. The proposal implicitly

[298] European Council - CIREA, analyses of the responses to the questionnaire 19.12.1996 on the safe country of origin principle, 6656/97. AOFPRA, Dir 5, 47.

[299] Respectively 7498/99 LIMITE ASILE 12 CK4 18 and 11299/99 LIMITE ASILE 32.

[300] The following countries were on the list: Benin, Botswana, Cape Verde, Chile, Costa Rica, Ghana, Mali, Mauritius, Senegal, and Uruguay. Being EU candidate countries, Bulgaria and Romania were also on the list. Sidorenko 2007, 97.

[301] In the original proposal, a suspensive appeal was included. Yet Spain objected to this obligation as their national practice let the suspension decision (just as any administrative decision) up to the courts, and only at the request of the applicant. Ackers 2005, 6.

[302] Article 21 of the APD stipulated that Member States shall allow the UNHCR (a) to have access to applicants for asylum, including those in detention and in airport or port transit zones; (b) to have access to information on individual applications for asylum, on the course of the procedure and on the decisions taken, provided that the applicant for asylum agrees thereto; (c) to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure.

recognized the existence of other international legal sources of protection complementary to the Convention.

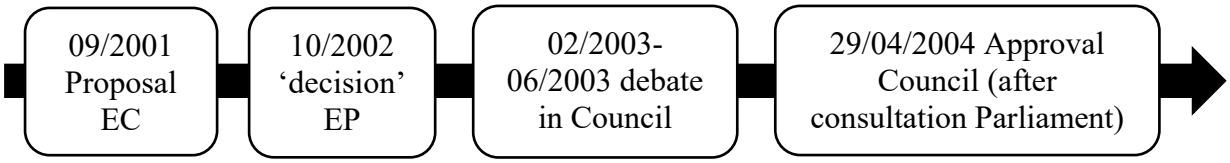
The Council held a first reading of the proposal in April 2002 regarding articles 1-12, which was finished in June 2002. Without the usual second reading, the Danish presidency had already suggested some alterations of the Directive that were inspired by the member state (Peers & Rogers 2006a: 323, 326).

In October 2002, the EP gave its view on the Directive. As it was agreed that the QD would work with minimum standards, the EP suggested including a 'non-regression clause,' meaning that member states who had already applied better standards than the QD would impose would be discouraged from reducing their standards to those of the QD. The EP also explicitly suggested adding 'sexual orientation, ethnic group status, and gender to the grounds of persecution for Geneva Convention refugees.' Last but not least, they proposed treating persons with subsidiary protection and refugee status equal with regard to all aspects of the content of protection.[303]

Discussions regarding some key definitions (refugee, subsidiary protection) followed, which were agreed upon at the JHA Council in October 2002 and shortly thereafter by COREPER as well. The JHA Council agreed to the other provisions in November 2002. In December 2002, more detailed discussions started by the Council's Asylum Working Party regarding the content of the status. The provisions restricting a member state's freedom were largely removed. For example, the initial proposal intended the residence permits to be issued automatically after the decision to grant protection, but it was later changed to 'as soon as possible.' Moreover, the permits would initially be extended automatically. Yet, due to pressure from Spain, Finland, Luxembourg, and the Netherlands, this provision was altered to 'extendable' (McAdam 2005, 503).

In June 2003 most aspects of the Directive were finalized except for the article dedicated to the actors of persecution or serious harm. The agreement was finally brokered in March 2004, and adopted in April 2004 (Peers & Rogers 2006a: 323ff.), only two days before ten new member states joined the EU. According to McAdam (2007: 7f.), the impending accession of these new member states accelerated the final agreement of the Qualification Directive. There was, in fact, a fear of having to involve the new Member States in the negotiations, given that it was already difficult enough to reach an agreement with the current Member States.

Fig. 11. Legislative process Qualification Procedure Directive



Revitalization of the refugee definition of the Convention of Geneva

The definition of the actors of persecution or serious harm and, in particular, whether non-state actors could be included among those persecuting a refugee was, as could be expected, one of the main stumbling blocks in negotiating the QD. In the final version of the QD non-

[303] The EP also wished to widen the exclusion clauses and delete the provision stating that activities posterior to their departure from their country could give rise to protection needs "sur place" (Peers and Rogers 2006a, 323, 326; Sidorenko 2007, 64–65).

state actors were included as actors of persecution.[304] Before the adaptation of the QD, the member states were divided into two camps regarding their approach to non-state persecution. On the one hand Belgium, Denmark, France, Greece, Luxembourg, the Netherlands, as well as Finland, Sweden and the UK did acknowledge that non-state persecution could amount to persecution within the scope of the Geneva Convention. On the other hand, other member states: Austria, Germany, Italy, as well as Ireland, Portugal and Spain, did consider that non-state persecution did not fall within the scope of the Geneva Convention. Yet, except for Germany, these latter states did provide these asylum seekers with a protection status, based on article 3 of the ECHR. This approach was similar to Denmark and Finland, who considered that non-state persecution qualified for protection but limited it only to a *de facto* refugee status (McAdam 2002: 17). Germany objected against qualifying non-state actors as actors of persecution within the scope of the Geneva Convention, as this was contrary to their current legislation (McAdam 2002: 17). Peers & Rogers (2006: 323-326) note that France supported the German opposition. Even by June 2003 when all other provisions were agreed upon in the JHA Council, the German and Austrian delegation still had reservations regarding non-state persecution. These last obstacles were finally cleared up in the beginning of 2004 (Peers & Rogers 2006, 323, 326). The Directive clearly stipulated that refugees fleeing persecution by a non-state actor in an area where the state is weak or non-existent could qualify for protection under the Geneva Convention.[305] There was however a restriction for those who had no state to protect them as refugee status could be denied to those asylum seekers if it were deemed that their safety could be guaranteed by parties or organizations, including by international organizations controlling a region or a larger area within the territory of the State. The latter provision referred to the internal protection alternative. The QD provided that this alternative could be applied, notwithstanding technical obstacles to return to the country of origin. That the proposed location in the country of origin is practically, safely and legally accessible to the asylum seeker seems to be a necessary precondition before deciding whether it is safe for the individual to be returned there. This provision was thus strongly criticized by human rights activists and UNHCR.

Another innovation introduced by this directive was that one of the grounds for persecution, the concept of social group was explicitly defined. As mentioned in the previous chapters, during the last decades within the EC a discrepancy in the interpretation of the Geneva Convention had occurred among European States. Some states used the membership of a particular social group as a ground of persecution for granting protection to women, homosexuals, and clan members who were persecuted; thus, in this manner they adapted the Geneva Convention to the spirit of the times. In other countries, persecution based on gender, or on clan membership was not considered to be covered by the Geneva Convention. These victims were denied protection. The directive explicitly mentioned, under pressure from the Dutch and German delegation, that "a particular social group might include a group based on a common characteristic of sexual orientation," Due to French insistence, the same article also referred to gender, but in a rather ambiguous manner: "Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article" (Peers & Rogers 2006, 330). The manner in which persecution based on gender is referred shows that opening up the refugee definition was not wholehearted. It encountered strong opposition mainly from the Spanish delegation, and as a compromise this totally obsolete

[304] Article 7 of 2004/83/EC: Actors of persecution or serious harm include:
(a) the State;
(b) parties or organisations controlling the State or a substantial part of the territory of the State;
(c) non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm.

[305] The discussion on the safeguards of this kind of protection is not yet solved. The discussion revolves on the issue of the temporality of this protection and to which extent this may be equated with national protection.

reservation was added as a concession to Spain.[306] The divergent interpretations of the Geneva Convention within Europe were being lifted and replaced by a more open refugee definition, taking into account the new realities (civil war) and new susceptibilities in matters of diversity.

Introducing Subsidiary protection, but do not broaden the scope too much!

Before the establishment of the QD, Belgium (as well as the UK and Ireland) were the only member states not yet operating under a legal definition for complementary protection. Belgium had used only a totally *ad hoc* mechanism for the Bosnian war refugees, a high-profile refugee group who had applied in large numbers for protection even though not all of them qualified for Convention status. Of the remaining member states that did provide a form of complementary protection, by 2004 the Netherlands and Austria granted them a second rate *de jure* refugee status, while Italy, Greece, and Germany did not deport them but denied them most rights.[307]

An important consideration of those drafting the directive was to restrict its scope, to make it a selective enough tool of protection. The plan was not to establish a whole new protection system, but to create and codify a status that was based on the best practices from the member states. As these practices were sometimes quite far apart from each other, harmonization was difficult. Some member states wanted the ECHR to be the cornerstone of Subsidiary Protection, while others feared this would widen the scope of the status too much. The final version of subsidiary protection was the result of a political compromise based on international and regional human rights standards.

The first definition of subsidiary protection was written in August 1998.[308] Back then, subsidiary protection was supposed to offer protection to those who did not fall under the scope of the Geneva Convention but were nevertheless in need of international protection because they could not return to the country of origin because of reasons similar to the Geneva Convention or because of urgent humanitarian reasons. Instruments of subsidiary protection could consist of the issuance of a residence permit or a tolerance status. The final directive specified the grounds more clearly. A person qualified for subsidiary protection if there were substantial grounds that there would be a real risk of suffering serious harm upon return.

The component of 'substantial grounds' was derived from case law from the ECtHR (art 3 ECHR) and the Committee against Torture (art 3 of the Convention against Torture). The component was intentionally added, upon insistence of Sweden (and the Netherlands) in order to avoid disparities between international and member state practices. Still during the drafting process, Sweden proposed to replace 'substantial grounds' with 'well-founded fear' in order to equate the same burden of proof for beneficiaries of subsidiary protection as for convention refugees. Notwithstanding that the Germans also opposed the use of the wording 'substantial grounds' and the French demanded a 'real and *individual* risk' in the final directive 'substantial grounds' was retained (McAdam 2010: 78, 81).[309]

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[306] "This addition was a concession to the Spanish, as they were totally opposed to this innovation. They insisted on having this "guarantee". Indeed, the potential beneficiaries of this new interpretation are half of human kind, but of course only women who are persecuted can count on protection. Interview Frank Carpentier (Belgian AO, international office), November 15, 2004 (on file with the authors).

[307] Also Denmark, Finland and Spain had a second rate *de jure* refugee status, while Portugal saw it as a positive right, instead of a favor of the state (McAdam 2005, 462–65, 474; Feijen 2021, 75.

[308] 6246/99 LIMITE ASILE 7.

[309] Article 2-e of directive 2004/83/EC: 'person eligible for subsidiary protection' means… a person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin… would face a real risk of suffering serious harm… and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

The second component central in assessing the need for subsidiary protection was the concept of 'serious harm', a concept not yet used in international law.[310] The Asylum Working Group had decided to use this concept in a meeting of June 4-5, 2002. In the final directive three kinds of serious harm were listed.[311] The first was the death penalty or execution. Originally this first paragraph had not been included in the article. At the request of one member state and several NGO's it was introduced by the Chair in September 2002. The second paragraph referred to torture or inhuman or degrading treatment or punishment of an applicant in the country of origin. This was the least controversial element of article 15 as all Member states bound themselves to the ECHR.[312]

The third paragraph refers to serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. The original purpose of art 15 (c) was to protect those who normally are protected by the Temporary Protection Directive, but did not fall under that Directive's scope, solely because it concerned people fleeing individually or in small groups, and not in a 'mass influx'.[313] The third paragraph started as "a serious threat to his or her life, safety or freedom as a result of indiscriminate violence".[314] This third paragraph was limited, after a Dutch proposal to civilians and (ex-)combatants who were thus no longer covered (McAdam 2005: 482–85). The concept of 'freedom', originally proposed by the EC, was removed, notwithstanding opposition from Germany and Finland because there were concerns that this would broaden the scope too much. Germany wanted to add 'real' to the 'serious threat', but instead 'individual' was added. This compromise was proposed by France and supported by most member states, as there was a fear that the scope of the directive would be too broad. France specifically worried that as originally written entire populations might invoke the provision, based on generalized violence. The directive stipulated thus that there has to be a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. This qualification is a contradiction in terms, as indiscriminate violence is never an individual, but rather a collective threat.[315]

In the directive subsidiary protection was defined, as it also listed a scale of rights attached to this legal status. The ad hoc and discretionary solutions developed in the 1990s were now replaced by a legal status for victims of general violence and others protected by the European Convention on Human Rights. The gap in the protection provided by the Geneva Convention for those who have to flee due to war and violence was now filled by institutionalizing subsidiary protection as part of European law.

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[310] In the original proposal the concept 'serious *and unjustified* harm' was used. As the word 'unjustified' aspect got a lot of external criticism it was deleted upon the suggestion of Germany, Greece, and Sweden (McAdam 2005, 475–76).

[311] Article 15 of directive 2004/83/EC: Serious harm consists of: (a) death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

[312] Persons who had been tortured, if they could demonstrate a link to a Convention ground were mostly recognized as Convention refugees. Subsidiary protection could thus be granted to persons victim of torture based on purely criminal motivation (McAdam 2005, 479).

[313] Yet the Temporary Protection Directive speaks of 'armed conflict', while art 15 (c) of the QD requires the armed conflict to be of 'international or internal' nature. Also the Temporary Protection refers to endemic violence and risk of systematic or generalised violations of human rights. UNHCR 2011, 23; McAdam 2010, 75.

[314] The initial wording of the third paragraph was: a threat to his or her life, safety or freedom as a result of indiscriminate violence arising in situations of armed conflict, or as a result of systematic or generalized violations of their human rights. McAdam (2010: 77).

[315] The selectivity for protecting war refugees is also exemplified in consideration 26 of the Council Directive, which stipulated that "risks to which a population of a country (…) is generally exposed do normally not create in themselves an individual threat which could qualify" (somebody for protection).

As chapter 1 has shown, the countries of our sample did not provide the same substantive right to beneficiaries of their different protection statuses. The Netherlands from 2000 onward provided them all first a temporary residence permit but with extensive rights that enabled social integration.[316] In all member states of the EU, convention refugees had full access to the labor market. Greece had been the last country to lift its reservations toward full access to the labor market in 1995, and all countries thus agreed with the Geneva Convention that refugees cannot be restricted in their labor market rights. Convention refugees also received health care and social rights on similar terms as nationals. The QD stipulated that those who were subsidiarily protected received fewer rights than Convention refugees as far as the duration of the residency permits, labor market access, and social rights were concerned. At the start of the negotiation, the UK delegation made a summary of their experience with war refugees during the 1990s. The delegation argued that there were no reasons to provide a weaker protection for beneficiaries of the Subsidiary Protection Status than for the Convention Protection Status. Distinguishing the protection for the different beneficiaries would not only be discriminatory but would also lead to an increase in appeals while in fact the duration of their protection needs was very similar to Convention refugees. Some other member states as well as the EP shared that reasoning, but this standpoint turned out to be a minority position (McAdam 2005).[317]

Although the experience of the 1990s had shown that the protection needs that subsidiary protection covered could last for several years, the drafters of the QD were still working under the premise that this was a kind of temporary protection. In reality, the experience of the 1990s had shown that those who had received Convention protection or subsidiary protection needed protection for several years, and if eventually a safe return was possible, the length of their stay abroad meant that the authorities could envisage promoting only a voluntary return. The temporary protection granted to asylum seekers from Kosovo was the only case in point where, due to the short duration of the war, temporary protection has been successful.

Still the residence permits in the original proposal for the QD were only valid for (at least) one year for beneficiaries of Subsidiary Protection, and for Convention refugees for (at least) five years. The European Parliament pleaded for an equalization of the length of both statuses: both 5 years and automatically renewable.

This entitlement to stay had been part of the status of those who had been recognized as refugees in the past. During the Cold War era, it had been accepted that refugees came to stay. The change in the geo-political situation after 1989 diminished the stability of persecuting regimes, and the return of refugees to their country of origin could be put on the agenda. In the early 21st century, refugees received temporary residence permits instead, and the prolongation of this residence permit depended on whether there were still risks for them upon return (and their good behavior). Refugees remained protected when they were still at risk, but after how many years of residence can a state still force people to return where they came from? The Netherlands wanted residents permits to Convention refugees to have a minimum duration of three rather than five years. The new Dutch aliens' law of 2000 had provided for *de facto* and *de jure* refugees only the possibility of acquiring a permanent residence permit after three years. This import of Dutch legislation was accepted by all member-states. Deterioration of the

[316] McAdam states this was also the case in the Scandinavian countries. Denmark had a similar position as the Netherlands but with a longer period of "probation," We ignore whether the other Scandinavian countries weakened the Convention status. McAdam writes that Portugal also had extensive social rights, but the rights differed in duration (McAdam 2002, 8)

[317] At a later stage in the negotiation of the Directive, the UK government changed its mind '*to the extent that it became 'instrumental in lowering the entitlements of people with subsidiary protection status''.* (McAdam 2005, 503).

residency status for Convention refugees was only agreed upon by some delegations under the condition that the length of the first residency permits for subsidiary protection would be raised to three years as well. Still, the final minimum duration of residence permits for Subsidiary Protection remained one year (McAdam 2005).

Access to the labor market for Convention Refugees was uncontested, as EU-countries no longer had any reservations about the provision in the Geneva Convention, which explicitly stipulated full access to the labor market for refugees. This right was not granted to the beneficiaries of Subsidiary Protection. In the original draft, beneficiaries of subsidiary protection got access to the labor market only after 6 months, but by the final version of the Directive, immediate access to the labor market was provided. At the negotiation table of the Asylum Working Party, several member states wanted discretion in the matter, as they wanted to regulate and control access to the labor market. Germany wanted labor market conditions to be taken into account indefinitely, Austria for five years, and the Netherlands for three years.[318]France on the other hand, but also Finland and Sweden wanted all beneficiaries of international protection to get immediate full access to the labor market. The final choice was a political compromise as the access could be restricted for a *'limited period of time*', giving states the opportunity to exclude from the labor market those who had been accepted as residents because for a need of (subsidiary) protection (McAdam 2005).[319] In addition their access to social welfare, healthcare and integration facilities was restricted which was mainly due to the insistence of Germany. A member state wanted to reduce the social benefits and health care of beneficiaries of Subsidiary Protection to the level of asylum seekers, but this proposal had no support.[320] Germany on the other hand who wanted to be able to reduce social benefits and healthcare for beneficiaries of Subsidiary Protection to 'core benefits' won the day.[321] Germany also managed to leave the full integration aid for subsidiary protected persons free to the discretion of Member States.[322] Belgium, France, and the Netherlands who had explicitly insisted on the same treatment as Convention refugees obtained only a recommendation in the Directive to give the two groups of refugees the same treatment (McAdam 2005: 510–12). Germany wanted the status of Subsidiary Protection to have the weakness of their explicit tolerance, thus a non-status at the level of refugees' rights. Germany had a restrictive view of what subsidiary protection was supposed to mean. The member states opposing the inferior character of the status for beneficiaries of subsidiary protection were indulgent as they realized that to lower the rights attached to the status of subsidiary protection was the only way Germany would agree to include those who were persecuted by non-state actors in the EU-interpretation of the refugee definition of the Geneva Convention (McAdam 2007: 90-91; Zaun 2017: 148). Anyhow most member states shared the conviction that the subsidiary status was a more temporary kind of protection than the status of the Geneva

[318] Initially Austria wanted to deny beneficiaries of subsidiary protection access to the labor market as 'it would make applying for asylum too tempting" (7498/99 LIMITE ASILE 12 CK4 18)

[319] Article 24 of the directive 2004/83/EC: Member States shall authorise beneficiaries of refugee status or of subsidiary protection status to engage in employed or self-employed activities subject to rules generally applicable to the profession and to the public service immediately after the subsidiary protection status has been granted. For beneficiaries of subsidiary protection status the Member States may be taken into account, including for possible prioritisation of access to employment for a limited period of time to be determined in accordance with national law. Member States shall ensure that the beneficiary of subsidiary protection status has access to a post for which the beneficiary has received an offer in accordance with national rules on prioritisation in the labour market.

[320] 9945/03 ADD 1 ASILE 32 (n213).

[321] Article 28 and 29 of the directive 2004/83/EC: Core benefits which will then be provided at the same levels and under the same eligibility conditions as nationals.

[322] This was addressed in article 33 of directive 2004/83/EC. Initially beneficiaries of subsidiary protection were supposed to get the same access to integration as Convention refugees within the year after the status acquirement. This one year time limit was later deleted as The Netherlands, Sweden, Finland, and the European Parliament opposed it.

Convention. By making the Convention refugee status hierarchically superior, the primacy of the Geneva Convention would be secured (Muraszkiewicz 2017: 16). The possibility of curtailing the right to work for those covered by subsidiary protection indicates that some states preferred refugees to live off welfare, rather than letting them work. Although it increased the financial burden for the state, barring them from work was considered an effort to forestall any competition with local labor and to make their stay in Europe unattractive. By forcing them to idleness, the pull factor of granting them protection might be neutralized. Refugee policy continued to be subverted by considerations of immigration policy.

Conclusion: The starting positions of the EU member states were too divergent for an immediate harmonization. As the previous chapters have shown, their asylum systems have been developed in different historical circumstances. While some asylum systems had been around for several decades, others were newly established. All of these systems within the EU had been developed in largely isolated domestic contexts and had been challenged by very different caseloads. The difficulty in finding common denominators meant that 'landing' on basic and at times ambiguous principles with minimum standards could be described, as Ackers (2005:2) does, as a 'necessary evil' in an incremental process towards convergence.

2.2. The implementation of the Asylum directives

The European legislation was complemented by collaboration between national asylum institutions. Eurasil created in 2002 helped asylum institutions throughout the EU to enhance working relationships with each other. In 2009, a European training module for protection officers within European AO's was launched. AOs also exchanged through Eurasil country of origin information. These policy instruments had to enhance a uniform asylum practice throughout all EU-member states.[323] In 2006 the European Commission advocated on the long term for the establishment of an EU COI database as an essential complementary tool to achieve real convergence in decision-making as well as to improve the quality of decision-making.[324]

2.2.1. The CJEU and the ECtHR complement the lawmakers' QD

In addition to new legislation, the jurisprudence of the European Court of Justice and the European Court of Human Rights had an important effect on the practices of states. In 2007 the decision Salah Sheekh the ECtHR addressed the tension between individual threat and 'indiscriminate violence' by stating that it was sufficient for the applicant to be member of a minority group that was targeted by dominant groups in Somalia to be eligible for protection. No further proofs that the applicant was individually in danger were necessary, the court stated that 'It might render the protection offered by [by Article 3] … illusory if, in addition to the fact that he belongs to …. [this minority group] …. the applicant be required to show the existence of further special distinguishing features concerning him personally in order to show that he was, and continues to be, personally at risk".[325] Membership of a group could be sufficient to prove individual risks. There is no need to demonstrate further distinguishing features. An individual risk should not be that the lot of a person within a war situation was exceptional, but that the person should individually be exposed to a real risk of an inhuman or degrading

[323] CGVS. 2009. 'Jaarverslag 2009'. p. 4-5.

[324] Commission staff working document - Annexes to the Communication from the Commission to the Council and the European Parliament on strengthened practical cooperation - New structures, new approaches : improving the quality of decision making in the common european asylum system {COM(2006) 67 final} /* SEC/2006/0189 */ https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52006SC0189&from=EN, accessed 15.8.2022.

[325] ECtHR, Salah Sheekh v Netherlands, No. 1948/04, 11 January 2007. https://hudoc.echr.coe.int/fre?i=001-78986 accessed 15.10.2022

treatment upon return. This danger could be the result of a person being a member of a group at risk (Turk 2011, Durieux 2008).

In 2009 the CJEU in the Elgafaje case further elaborated on the tension between individualized threat and situation of generalized violence in article 15c of the Qualification directive.[326] The CJEU ruled that in order for art 15 (c) QD to apply the asylum seeker does not have to be *'specifically targeted by reason of factors particular to his or her personal circumstances; and that a threat to life or person may exceptionally be considered to be established where the degree of indiscriminate violence characterizing the armed conflict reaches such a high level that substantial grounds are shown for believing that a civilian would solely on account of his or her presence on the territory face a real risk of being subject to that threat'* (UNHCR 2011: 29–30). Thus, the more an asylum seeker was individually targeted, the lower the burden of proof will be that (s)he is a victim of collective violence. The reverse also applied: the less someone was individually targeted, the heavier the burden of proof will be regarding the seriousness and indiscriminate nature of the violence. A 'sliding scale' has thus been introduced, meaning that the more an asylum seeker can show that (s)he is individually suffering from the general violence, the lower the level of general violence has to be in order to qualify for subsidiary protection based on art 15(c) (McAdam 2010: 70–71).

In the Elgafaje case of 2009 the CJEU distinguished art 15 (c) from the other paragraphs of article 15 as 15 (c) focused on risks that were 'situational' rather than 'individual', thus, adding a specific added value. The CJEU stated that the concept 'serious… threat to life or person' covers '*a more general risk of harm than articles 15(a) and (b) do'*. The Elgafaji case made clear that art 15(c)'s scope was broader than art 3 ECHR The European Commission held that the explanation of the CJEU 'removed any doubt' on the interpretation of art. 15 (c) and did away with any need for a further legal clarification of the apparent contradiction between 'individual threat' and 'indiscriminate violence'(Ippolito and Velluti 2011: 43). Finally for the handling of asylum application the principle outlined in the Elgafaji case was that states should examine first the applications on the Geneva Convention, also if it concerns areas of conflict. and only examine the subsidiary protection grounds after applicants do not qualify for the stronger Geneva protection.

2.2.2. Our member states recognize refugees with the QD

The Protect research project has a quantitative and qualitative part for the analysis of the recognition policies of member states in the EU in the first two decades of the 21st century. The university of Bergen in their quantitative analysis of recognition rates in the different EU states will provide insight in the similarities and differences in the recognition rates between the member states of our sample during the first two decades of the 20th century. This report addresses how the member states transposed the qualification directive and how this directive was implemented consequently. For the early 21st century we have at our disposal some comparative research commissioned by UNHCR on the recognition policy of a number of EU member states. UNHCR (2007 and 2011) are part of the lobby effort of UNHCR to influence the European legislator through building up expertise on national recognition policies within the EU. Both studies were made possible by the mandate of oversight which UNHCR is being given when a state becomes part of the international refugee regime based on the Convention of Geneva. As well UNHCR (2007) as UNHCR (2011) point out the very different national practices on the floor of the European AOs.

[326] ECJ case C-465/07: Elgafaji v. Staatssecretaris van Justitie, C-465/07, European Union: European Court of Justice, 17 February 2009, at: http://www. unhcr.org/refworld/docid/499aaee52.html.

2.2.2.1. Transposition of the Qualification directive

The Qualification Directive became directly applicable two years after its publication, in October 2006. Belgium transposed it and the directive went on October 10, 2006.[327] In Germany the provisions of the Qualification Directive were applied since 11 October 2006 by the AO.[328] Germany postponed the deadline for transposing the EU Asylum Directive until the last day. The bill transposing 11 EU Directives on asylum and migration into German law entered into force on 28 August 2007.[329] So only in 2007 the AO issued administrative regulations for the recognition of refugees, which changed the restrictive decision-making of the previous era. These regulations were according to the Federal Administrative Court insufficient as in a verdict of June 24, 2008, it pointed out that there was a contradiction between the kind of protection granted in European and German law to those fleeing because of a serious and individual threat by reason of general violence. The Court clarified that the AO had to prioritize the EU-status of subsidiary protection status and its more extensive rights above the national status of tolerated alien (Borkert & Bosswick 2011; Markard 2009: 147).

France was earlier as it incorporated the directive five months before its very adoption! A status on asylum was specifically adopted on December 10, 2003 in order to incorporate in domestic law the main components of the proposals of the European Commission, which eventually became –after several modifications- the QD five months later. According to Chetail (2007: 87) "the premature incorporation was clearly designed to influence the negotiations within the EU and thereby to reshape the content of the future directive. From a traditional French viewpoint, it made it possible to argue that the EU directive implements French law, rather than the contrary".[330] In 2008 subsidiary protection was introduced In Italy and Greece, in the latter country it entered in force with the relevant Presidential Decree in mid-2008.[331]

The countries of our sample transposed the QD in their national legislation according to different procedures.[332] Within this procedure it is highly likely that one of the involved stakeholders was the AO. Whether and to which extent the decision on the manner the QD was transposed in national law was influenced by (the specialist knowledge of) the AO is unclear to us, further research is necessary for that.[333] However within the leeway given to national authorities, member states could refuse to transpose optional parts of the QD. The most odious provision in the QD referred to the application of the internal flight alternative even when the asylum seekers could not be returned to the safe region in his/her country of origin due to 'technical obstacles'. Most countries refused to transpose this provision in national law. Only the Netherlands, Luxemburg and Germany considered an asylum request could be rejected as the person could be in theory in safety in a part of his/her country of origin. However, a region the rejected asylum seeker even could not reach.

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[327] CGVS. 2006. 'Jaarverslag 2006'. p. 40.

[328] Also some courts applied it since 11 October 2006. All courts did so from August 28, 2007onward. UNHCR 2007

[329] This Act was adopted by the Federal Parliament on 14 June 2007 and subsequently approved by the Chamber of the regions.

[330] Although France incorporated the QD selectively (only 7 of the 34 articles) it did not feel the need to introduce a new law to implement the QD fully. The Asylum Law of 10.12.2003 entered into force on January, first 2004.

[331] The Presidential Decree was entitled 'The reception of persons requesting international protection, procedures for examination, recognition and withdrawal of the status of international protection and deportation. Rights and obligations. Family reunification of refugees'. UNHCR 2007.

[332] For example in Sweden in 2004, a Commission of Inquiry (*Skyddsgrundsutredningen*) comprising academics, legal experts and public officials was appointed to give advice on how the Directive should be implemented. UNHCR 2007.

[333] In the Belgian case it is probable that the AO had significant influence. The interview with Frank Carpentier (Belgian AO, international office), November 15, 2004 (on file with the authors) was before the transposing of the QD in Belgian law, but this senior civil servant already expressed reservations concerning those parts of the QD which Belgium did eventually not transpose.

Belgium and France considered the totally redundant precision that gender related aspects did not create a presumption for granting refugee status an unnecessary disqualification of the openness to gender related persecution and refused to transpose that phrase in their national law.

Tab. 13. Transposition of contentious parts of the QD in our 9 EU-countries (Battjes & Lindholm 2007)

	Art.8.3:internal protection alternative without possibility to return	Article 10-11(d): possible limitation of gender related fear for persecution	Article 15(c): individual threat because of 'indiscriminate violence'
Austria	No	Yes	No individual threat necessary
Belgium	No	No	No individual threat necessary
France	No	No	'individual and direct threat because of 'generalized' violence [334]
Germany	Yes	Yes	Individual and *willkürliche Gewalt*[335]
Greece	No	Yes	No individual threat necessary
Italy	No	Yes	Yes
Luxemburg	Yes	Yes	Yes
Netherlands	Yes	Yes	Yes

Last but not least Belgium, Austria and Greece considered that Article 15(c) was a contradiction in terms and refused to transpose in their national law the strange combination of individual threat and 'indiscriminate violence', by not transposing the word individual in their national law.[336] The example of these three states would be followed by the CJEU who would decide in 2009 that this article covered risks that were 'situational' rather than 'individual' (see 2.2.1).

2.2.2.2. Implementation of the QD

The provision on actors of persecution of the QD as well as an explicit reference to the 1951 Convention had been introduced in German legislation in the immigration Act of 2004. As table 14 shows including non-state actors of persecution caused only a slight increase in the share of decisions recognizing Convention refugees, in particular Somali benefitted of this change of course (UNHCR 2007). According to UNHCR (2007) the interpretation of the refugee definition both by the authorities and a majority of the courts remained in some respects at variance with the standards of the 1951 Convention. However, in 2007 when Germany introduced the qualification directive in its national legislation this caused a spectacular increase in decisions granting Convention refugee status (see table 14). In France, Belgium and Italy this was hardly the case. Still while the French AO was very cautious about the internal protection

[334] In France an asylum seekers qualifies for subsidiary protection when he or she is exposed in his/her country of origin to a serious, direct and individual threat against his or her life or person because of generalized violence resulting from an internal and international armed conflict.

[335] The reference to 'indiscriminate violence" was not transposed in German law.

[336] Whether this was indeed the motivation for not transposing 15(c) fully in Greek, Austrian and Belgian legislation still needs further scrutiny as we had no information on the process (and motivation) of transposing the directive, only its outcome.

alternative, the German AO used this more frequently.[337] The French AO recognized numerous asylum seekers from Chechen as Convention refugees while the German AO accepted that most parts of the Russian Federation were a possible 'internal protection alternatives' for many of the Chechen applicants (UNHCR 2007).

UNHCR criticized the French AO however as several cases in which applicants who might fall under the scope of the Geneva Convention, were not recognized but only obtained subsidiary protection by the Asylum Court (UNHCR 2011, 50–54).

[337] In France, the Constitutional Court had stated that an asylum seeker must be able to access a substantial part of his/her country of origin in safe conditions for the internal protection alternative to be applied. UNHCR 2007.

Tab. 14. Share of decisions on Convention status and Subsidiary Protection, France, Belgium and Germany (2003-2011)[338]

France		
	Geneva Convention Status	Subsidiary Protection+
2003 (N: 66.344)	10%	
2004 (N: 68.118)	9%	0,2%
2005 (N: 51.272)	8%	0,3%
2006 (N: 37.715)	8%	0,5%
2007 (N: 29.323)	12 %	
2008 (N: 31.801)	16 %	
2009 (N 35.311)	11%	3%
2010 (N: 37.667)	11%	3%
2011 (N: 42.249	8%	3%
Germany		
	Geneva Convention Status	Subsidiary Protection+
2003 (N: 67.705)	5%	2%
2004 (N: 41.630)	5%	2%
2005 (N: 30.573)	8%	2%
2006 (N: 19.732)	7%	3%
2007 (N: 20.619)	35%	3%
2008 (N: 14.614)	50%	4%
2009 (N: 21.806)	38%	8%
2010 (N: 37.650)	20%	7%
2011 (N: 33.392)	21%	8%
Belgium		
	Geneva Convention Status	Subsidiary Protection
2006 (N: 6.904)	27,7%	0,07%
2007 (N: 10.599)	25,4%	2,95%
2008 (N: 11.095)	27,5%	4,24%
2009 (N: 10.860)	22,6%	4,41%
2010 (N: 16.129)	17%	4,97%
2011 (N: 21.633)	17,6%	5,84%

2.2.2.3. Granting subsidiary protection

In Belgium subsidiary protection was being applied from October 10, 2006, onward and immediately each year 4 to 6% of asylum applicants who probably previously were not returned

[338] We ignored other decisions defined as withdrawing claims, abandoned claims or claims otherwise resolved, so the total of decisions (N) is referring to the two protection statuses, eventually including a humanitarian status and the rejected asylum seekers. For Germany: IGC 2009, 188; IGC 2012, 230. *De facto* refugee status is referred in IGC 2009, 188 as complementary protection and other authorizations to remain, while the *de jure* refugee status refers to refugee and asylum status. In IGC 2012, 230 *de facto* refugee status is referring to subsidiary/complementary and humanitarian status, de jure to Convention status. Therefor we mentioned Subsidiary Protection +. For France: IGC 2009, 163 . In the figures of Convention refugees in 2007 and 2008 also the subsidiary protection is included. In IGC 2012, 203 *de facto* refugee status is referring to subsidiary/complementary and humanitarian status, thus Subsidiary Protection +. Clochard 2007:402 provides the number of refugees protected by subsidiary protection in 2005 and 2006. Belgium provided subsidiary protection from October 10 2006 onward and humanitarian status is not included in these figures as this was granted by the IO. The UNHCR figures are used: UNHCR, 2022, 'Refugee data finder', consulted on 17/10/2022, https://www.unhcr.org/refugee-statistics/download/?url=pdOw0L

but were not granted a protection status either received a protection status. Before October 10, 2006, these refugees had been at most explicitly tolerated. The AO in the other EU-countries of our sample had not only the choice between Convention status and subsidiary protection but could decide for their national protection status(es). Administrative inertia could be the cause for not changing the status refugees received. In France that was different as the administrative legacy of territorial asylum had been eradicated. Granting subsidiary protection became the competence of the AO and territorial asylum granted by the IO no longer existed. Still first little changed as few persons received subsidiary protection, similar to the small numbers covered by the pre 2005 territorial protection granted by the Ministry of Interiors (Clochard 2007: 402). Notwithstanding the European directive subsidiary protection was implemented in similar terms as the defunct French territorial protection, thus solely providing protection against private, non-state persecution (Chetail 2007: 97). Table 14 indicates that the AO seems only to adopt a broader focus --not only the actor of persecution but also the risk of serious harm-- by the end of that decade.

Before 2006 in Germany the threshold for a risk to qualify for national protection (a non-status) had been very high i.e., certain death or severest injuries. The German Ministry of Interior guidelines of October 13, 2006 related to the use of the QD in recognition decisions explained that the risk to life or person must be 'inevitable' (*gleichsam unausweichlich*). Requiring 'near certainty' of death or severest injury was a much higher threshold than the requirement of 'real risk' set by the QD. It does not seem this threshold was lowered when on August 22, 2007, subsidiary protection entered in force as only slightly more people were protected. Only when on June 24, 2008, the Federal Administrative Court clarified that the AO had to prioritize the subsidiary protection status above the national protection status must the share of subsidiary protection decisions have risen. Table 14 does not capture this shift from national *de facto* refugee statuses to subsidiary protection. In 2010 the AO decided to grant subsidiary protection to Somalian asylum applications, who were not recognized as Convention refugees and from whom there was risk of serious harm upon return. The AO however continued (63% of positive decisions) to protect asylum seekers from Afghanistan with the national protection non-status and not with subsidiary protection. For subsidiary protection the German AO demanded an individual factor aggravating the risk (UNHCR 2011: 89).

In Italy in 2008 subsidiary protection was introduced as a new status in Italian asylum policy and in that year 32% of the AO decisions were granting this kind of protection and at the same time the share of humanitarian statuses declined from 60% to 17% of the decisions. Since 2003, granting humanitarian status had been the most popular positive decision of the decentral AOs. Thus in 2008 the humanitarian status lost its protective dimension as asylum seekers from Eritrea, Somalia, and Afghanistan were mainly covered by the status of subsidiary protection (and Convention status). Decisions for humanitarian status were rather on compassionate grounds. The AO used the humanitarian status for vulnerable people, families or single women with children, and people who had suffered trauma during their journey to Italy. The same pattern of decision making is to be seen in 2009: protection was granted by subsidiary protection and Convention status, whereas compassionate grounds were the motivation for humanitarian status.

Tab. 15. First Instance Decisions of Italian AO, 2007-2011[339]

	Recognized de jure refugees	Subsidiary protection	humanitarian status	Total of positive decisions
2007 (N: 16.786)	10%		60%	70%
2008 (N: 21.795)	9%	32%	17%	58%
2009 (N: 21.263)	11%	25%	11%	47%
2010 (N: 12.256)	17%	15%	30%	62%
2011 (N: 21.419)	10%	12%	26%	48%

According to McAdam (2010: 65) subsidiary protection and in particular article 15(c)[340] of the directive is one of the main causes of the divergent recognition rates across the EU member states, which implemented and interpreted this article very disparately, without (hardly) taking into account other countries' interpretations, jurisprudence, or UNHCR's position. The principle outlined in 2009 in CJEU Elgafaji was that states should examine first the applications on the Geneva Convention, also if it concerns areas of conflict. and only examine the subsidiary protection grounds after applicants do not qualify for the stronger Geneva protection.[341] This has not been interpreted in a consistent manner by the member states. Some member states applied "the individual and serious threat in a situation of indiscriminate violence" of art 15(c) only in exceptional situations when there was a very high level of indiscriminate violence.

The Dutch authorities had introduced a suspension of expulsion orders for war refugees which yielded them collectively a temporary legal status. The government intended to abolish this status of collective protection as the situations that were covered by this status should be covered by the subsidiary protection status (UNHCR 2011: 91). However, the IO/AO and the Council of State did not apply the sliding scale in their assessment of article 15(c) as according to them individual factors should be ignored in the assessment. Only in '*exceptional situations*' was art 15(c) relevant in the sense of a high degree of indiscriminate violence.[342] The Dutch argued that when individual elements were supposed to be considered then art 15(b) or the case law of ECtHR should be applied.

[339] These figures were provided by the CNDA and put generously at our disposal by Iole Pina Fontana (University of Catania). We did not take into account the decisions based on applicants no longer to be traced or who did not receive a decision or who withdrew their application (which are highly likely covered by the category *Altro Esito*, although this category was not always specified). We have no figures on the decisions of the IO to grant effectively humanitarian status, which can be done independently from the AO.

[340] 'Article 15 make subsidiary protection dependent on serious harm*: Serious harm consists of: (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'*

[341]For Belgium, France, Germany and the Netherlands. UNHCR 2011, 18-19. This was not the case in Greece, see further and also in Italy this was not always the case.

[342] The Dutch Secretary of State declared: '*I am of the opinion that the wording of the judgment shows that this will involve a very limited number of situations*.' The Council of State stated it followed the CJEU arrest to only apply art 15(c) in '*exceptional situations*'. This was also the policy of both the IO/AO and the administrative courts. Several District Courts (arrondissementrechtbanken) where asylum seekers could appeal a decisions to reject an asylum claim of the IO/AO claimed however that personal elements should be taken into account in assessing art 15(c). Yet some of these decisions were overruled by the Council of State Albayrak, Nebahat. Letter to Voorzitter van de Tweede Kamer der Staten-Generaal. '*Brief van de staatssecretaris van Justitie (Doc. 19.637 nr. 1.258)*', March 17, 2009. https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2009Z04799&did=2009D12567 (accessed 25.6.2022), see also UNHCR 2011, 50-51.

The German AO on the contrary took also individual elements into consideration to qualify for applying art 15(c).[343] For example the location of an applicant's home or his/her professions as these were elements which could make a person more prone to serious harm from indiscriminate violence than others and thus qualify for subsidiary protection (UNHCR 2011: 50–54).[344] Still the German AO considered that the concept 'serious… threat to life or person' only covered 'physical integrity' (*life and limb*), while the CJEU considered in 2009 that the concept 'serious… threat to life or person' covers '*a more general risk of harm than articles 15(a) and (b) do',* thus one could extend it, UNHCR (2011a: 59) argues beyond life and limb to also liberty (UNHCR 2011: 56–58).

Subsidiary protection was protection against a real risk of suffering serious harm due to a situation of generalized violence resulting from a situation of internal (and international) armed conflict. When UNHCR conducted its research between March and July 2007 Iraq was a case in point and both the French and German AO agreed that the situation in Iraq qualified as an internal armed conflict. The Bavarian higher administrative court however disagreed as it held that the situation in Iraq did not fulfil the requirement of a civil war as the conflict was not 'countrywide'. The Bavarian higher administrative court considered that some parts of Iraq provided an internal protection alternative.[345] In 2010 many armed conflicts were going on in the world, the situation in Mogadishu, Somalia seems to be the only one in which the Netherlands but also France, Germany and Belgium, agreed at that time that the level of indiscriminate violence was high enough to qualify refugees collectively for subsidiary protection. In the Netherlands the minister of immigration and asylum even stated that the situation in Mogadishu was the first conflict ever to be considered severe and intense enough to qualify for the application of art 15(c). The Belgian AO considered that also the violence in central and southern part of Somalia was that severe that civilians mere presence posed a real risk of serious harm, the German and Dutch AO disagreed while the French AO qualified persons fleeing areas '*neighboring'* Mogadishu for subsidiary protection without the need to provide individual aspects to enhance the risk of harm.[346]

These divergent national practices resulted for asylum seekers from Somalia in 2010 in different recognition rates on the base of the Convention of Geneva. For Belgium 25%, 45% for France, 72% for Germany and a mere 2% for the Netherlands. In the Netherlands however 30% of the asylum seekers from Somalia received subsidiary protection, while in Belgium another 25% qualified for this status. About 13% of the Somalian asylum seekers were granted subsidiary protection as well in France as in Germany. In Belgium, France and in Germany subsidiary protection was largely based on paragraph c, while the Netherlands quasi exclusively decided for this status on paragraph b of article 15. Overall, the protection rate was thus

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[343] Although the Belgian law does not refer to an individual threat the asylum court did take into account individual elements to enhance a protection claim (UNHCR 2011, 49–50).

[344] The Federal Administrative Court however was agreeing with the Dutch approach as the court considered that both elements co-operate in a way that '*a high degree of danger* (is required in a way) *that practically every civilian would be subject to a serious individual threat merely on account of his or her presence in the affected area'.* (UNHCR 2011, 63–65).

[345] The impact of the position of the Bavarian higher administrative court on the position of the Iraqi asylum seekers in Germany in 2007 was limited as the AO, although considering it an internal armed conflict did not consider that there was an extreme danger which would necessitate the granting of subsidiary protection under the QD. The decisions of the German AO during first quarter of 2007 was 16% Convention refugees and qualified 1% for subsidiary protection, while the French AO in 2006 granted 13% of Iraqi applicants subsidiary protection and 21% were recognized as Convention refugees (n: 151). UNHCR 2007: 13.

[346] By December 2010, The German AO acknowledged the internal armed conflict in Mogadishu but did not made any statements about other Somalian regions. The above statement of the Minister was on November 19th, 2010, The Dutch government agreed in December, 2010, that the situation in Mogadishu was severe enough to fall under the scope of art 15(c), but called the situation in central and south Somalia (only) '*critical'.* UNHCR 2011, 74.

definitely lower in the Netherlands.[347] In 2009 a much larger share of the asylum seekers of Somalia had been protected (53% versus 36% in 2010), but mainly through the Dutch additional protection status. On July 2, 2009, however the Secretary of State had decided to end this collective protection status for Somalian asylum seekers, but still many (war) refugees had obtained this status in 2009 probably because of administrative routine. In 2010 this was quasi no longer the case and as the standard for protection for subsidiary protection was considerable higher those who had fled (merely) indiscriminate violence were no longer protected (UNHCR 2011: 92).

Unlike the asylum institutions in France, Germany and the Netherlands the Belgian AO between October 2010 and April 2011 not only considered the Somalian conflict to be severe enough to qualify for subsidiary protection based on art 15(c), also persons fleeing conflicts in certain regions of Afghanistan[348], Congo, Iraq, Sudan, and Gaza could in some cases collectively qualify for subsidiary protection (UNHCR 2011: 33–35 and 40-44).

Member states also wielded different methods in assessing the degree of general violence. Some countries used purely mathematical indicators to measure the level of violence. Although reliability of the figures is difficult to verify, certainly in times of war and these numbers have little predictive power it was a popular method used extensively in Germany and the Netherlands.[349] The Belgian AO also applied mathematical indicators to refuse subsidiary protection, yet this approach was discontinued when it as rejected by the Council of State in 2007. Likewise, the Dutch Council of State called back its minister of Justice when the AO referred simply to the number of civilian causalities to decide whether art 15 (c) could apply. Moreover, the Council of State emphasized that victims should not be limited to those killed or wounded, but also threats, cases of rape, arbitrary arrests, and detention should be taken into account. The Dutch Council of State disagreed also with the minister of Justice on the geographic scope of certain assessments. While the Council of State restricted the applicability of these analyses to certain cities or areas, the Minister wanted the assessments to cover entire regions (such as central and southern Somalia) (UNHCR 2011: 43–47).

2.2.3. Asylum policy and institutional changes in member states

By the time a genuine European immigration and asylum policy gets started the asylum institutions were firmly established in most of our member states. We point out the significant changes in national institutions and policy in our countries between 2006 and 2011. In 2011 it was revealed that the European asylum policy based on the Dublin agreement was a myth. In particular Greece did not live up to the quality expectations of a European asylum policy and therefore we give an overview of the Greek asylum policy in order to understand its underperformance. Underperformance is also due to the rise in asylum applications. Also, Italy was confronted with an increasing number of asylum applications and had considerable difficulties to coop with the case load and looked for ways to process all these asylum requests.

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[347]N in Belgium 173, in France 225, in Germany 509 and in the Netherlands 5277. The Netherlands but also France did provide data in which certainly Dublin cases were included in their negative decisions, while Belgium and Germany did not include 'otherwise closed cases', including Dublin cases. In the Netherlands in 2010 respectively 1% and 2% of the decisions on asylum seekers from Somalia were granting a humanitarian status and a national protection status. UNHCR. 2011a, 48, 90-92.

[348] Both first instance and appeal decisions did refer to the UNHCR eligibility guidelines concerning Afghan asylum seekers. UNHCR 2011, 37.

[349] Although the German minister of Interior stated to the UNHCR on November 30th, 2010, that '*the assessment* (of the level of violence) *should be holistic and include both a quantitative and qualitative assessment, although a pre-defined set of indicators was not considered to be appropriate'* the UNHCR did not find evidence of such assessments in case-law. UNHCR 2011, 43-47.

2.2.3.1. The French, Austrian and Belgian Asylum Court (and AO) strengthened

In Belgium in 2006 the distinction between the eligibility- and the protection phase of the asylum assessment was lifted. IO remained only involved in the asylum procedure during the registration phase, and the following Dublin assessment. The IO had lost its input in the assessment of asylum requests during the eligibility phase.[350] The position of the AO was strengthened within the asylum procedure.

The French alien law of 2003 introduced the concept of SCO in the asylum procedure. To lodge an asylum application in France, asylum seekers must still present themselves to the local prefecture to obtain a temporary residence permit on asylum ground. The Prefectures examined whether France is responsible for the examination of the claim by applying the criteria of the Dublin Regulation and as mentioned before other eligibility criteria mostly related to MUC considerations could be used. If the prefect admits the claim, the person enters into the asylum procedure, be it an accelerated procedure. More asylum seekers fall automatically under the accelerated procedure as France introduced SCO in its asylum legislation. The list of SCO was to be decided by the AO. As mentioned before the AO obtained also the authority to grant subsidiary protection, so for all protection issues there remained only a single procedure, this replaced the former territorial protection by the Ministry of Interior. Both protection statuses were being decided by the AO and the AT.

The rise in the number of asylum seekers since 2007 caused the backlog to increase and the institutions involved in the three administrative stages of the asylum procedure (the prefectures, the AO and the asylum court) struggled to keep up with the higher number of asylum applications (Létard & Touraine 2013). As mentioned before, since 1994 the AO stood in the shadow of the better funded AT. Due to a lack of staff the AO could only interview a minority of the asylum applicants. The AO was heavily criticized by the AT which became an asylum court in 2007. At that time the AO received more funding and could increase its staff. While it had employed 106 FTE in 2007 the number of staff had increased to 172 FTE in 2013. In 2012 it was for the first time in ten years that the AO protected more people than the asylum court (Létard & Touraine 2013: 19).

Due to the increased competence of the AO the Council of the AO was reformed in 2006, it was no longer a space of reflection assisting the director but became a decision-making body.[351] The director of the AO had to decide together with the other members of the council about his/her protection policy. However, determining the list of safe countries of origin was the competence of the Council, not of the director. As before members of the different ministries active in migration management were present, but 2 MPs were added, in 2007 also a MP form the EP. UNHCR and the representative of the NGOs assisting refugees could still attend the council but were excluded from the newly acquired decision-making power of the Council, however they could vote on the list of safe countries of origin. In 2007 the AO was transferred from the Ministry of Foreign Affairs to the Ministry of Immigration, Integration, National Identity and Development. Since the AO was founded, it had been part of a different ministry than the French agencies in charge of immigration policy, but in 2007 this strict separation was lifted.

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[350] CGVS 2005. 'Jaarverslag 2005'. p. 6, 12.

[351] Loi n° 2006-911 du 25 juillet 2006. The AO management board decides to include or withdraw a particular country of origin from the list of safe countries of origin. "This Board consists of members of the National Assembly, of the Senate, of French members of the European Parliament, of representatives of the government and of one OFPRA staff's representative. The UNHCR delegate and 3 qualified personalities (1 of them representing the organizations in charge of the reception of asylum seekers) also take part to the management board meetings, with a right to vote on the list of SCO. As for the general director of (the AO), although he/she attends the management board meetings, he/she has no right to vote on the list." In that respect, the SCO list results from a decision which is not in the hands of executive management of the AO. European Migration Network 2018, p. 8.

In France negative decisions of the AO could be appealed at the AT, which was given the means to interview all plaintiffs. While the AT's annulation rate had oscillated between 5% and 8% prior to 2005 it reached nearly 20% in 2005 and 10% in 2006.[352] In 2007 the AT was replaced by an asylum administrative court part of the Council of State. The law of 2007 also provided asylum seekers in financial need with legal aid to appeal the decision of the AO. While before only needy asylum seekers were eligible for legal aid, if they had entered France in a regular manner and their asylum claim was not deemed manifestly unfounded this provision became available to all asylum seekers. In 2009 ten permanent judges were nominated who decided collegiately with three (Tiberghien 2021: 16).[353] The panels were presided by a member of the Council of state (*Conseil d'Etat*) or a judge and another adjudicator is nominated by UNHCR and the third adjudicator is nominated by the Council of State (Létard & Touraine 2013).[354] The Asylum Court examined the appeal on facts and points of law. It can annul (therefore granting subsidiary protection status or refugee status) or confirm the negative decision of AO. Appeals could be decided by a single judge when the application did not merit a panel. In 2012 still 77,8% of the appeals were decided by a panel of three (Létard & Touraine 2013:16). At the start of the functioning of the asylum court the annulation rate was high with 31% in 2009. This rate declined slowly in the following years with 28% in 2010, 23% in 2011, 20% in 2012 (Létard & Touraine 2013:19).

Also, in Belgium the appeal procedure underwent a change. In 2006 the Asylum Court was replaced by an Asylum and Migration Court which not only exercised the duties of the former court, but also obtained the annulment and suspension competences in matters of alien legislation of the Council of State.[355] The Council of State could from then onwards only be invoked for cassation appeals. This reform was deemed necessary as the Council of State had been overwhelmed with appeals against AO decisions, and increasingly also IO decisions. The Asylum and Migration Court obtained this competence and also a 'filter procedure' was established to be able to refuse 'unfounded' appeals. The new administrative court consisted of 28 professional judges appointed for life assisted by about 80 legally trained staff members and 90 administrative employees (Caestecker & Vanheule 2010: 473).

In Austria in 2007 the Asylum Court became mandated to judge also the compliance of asylum procedures with general administrative principles. In this manner the Administrative Court would be relieved, and it was hoped that the Constitutional Court would no longer have to deal with (many) asylum cases. Killing two birds with one stone turned out not to be possible, part of the appeals which went previously to the Administrative Court became directed at the Constitutional Court. As Albert Kraler points out the coalition government between the Conservative party ÖVP and the populist FPÖ, later BZÖ (2000-2006) was under external oversight particularly in its respect for human rights which prevented radical changes in asylum policy although the FPÖ still pushed for it. Still the 2005 reform of the Aliens Act increased

[352] An onward appeal before the Council of State can be lodged. The Council of State does not review all the facts of the case, but only some legal issues such as the respect of rules of procedure and the correct application of the law by the asylum court. If the Council of State annuls the decision, it refers to the asylum court to decide again on the merits of the case, but it may also decide to rule itself for good on the granting or refusal of protection. The appeal before the Council of State has no suspensive effect on a removal order issued together with a negative decision of the asylum court.

[353] The AT (CRR) became the National Court of Asylum (CNDA) which examined the appeals against negative decisions of the AO, including a possibility for a person granted subsidiary protection by the AO to lodge an appeal to the asylum court in order to obtain Convention refugee status. The appeals have an automatic suspensive effect. The alien law of 2007 improved the border procedure as following the ECtHR judgement Gebremedhin the negative decisions on asylum claims in the border procedure could be appealed and this with suspensive effect

[354] At the Asylum Court a UNHCR representative sits, with voting rights, on the board responsible for appointing adjudicators to panels which hear asylum appeals at the Court (IGC 2009: 156).

[355] The Asylum and Migration Court was called the *Raad voor vreemdelingenbetwistingen/Conseil du contentieux des étrangers*.

the maximum detention period for irregular immigrants from six to twelve months.[356] From 2006 onward the government was again a coalition of the ÖVP, and the Social Democrats and immigration remained a hot issue. In 2009 a residence obligation was imposed on asylum seekers which implied they had to remain within the boundaries of a designated district, similar to German legislation. This was strengthened in 2011 when asylum seekers were required to stay in reception centers up to a week after submitting their claim. In 2007 due to the widely contested decision to deport the Zogaj family, a family who originated from Kosovo but whose asylum request was rejected the procedure for granting humanitarian status was reformed. The Zogaj family was perceived as well by local authorities as the media as well integrated immigrants, but they could not apply themselves for the humanitarian status. Since 1991 the humanitarian status could only be granted ex officio. This was considered an aberration. From then onwards rejected asylum seekers and other irregular immigrants had the opportunity to apply themselves for humanitarian stay (Kraler 2011). When the AO rejected the asylum request of nationals of safe countries of origin their appeal did not have automatic suspensive effect, meaning that they were not allowed to remain in Austria while awaiting the appeal decision. The authorities, but also the federal administrative court could decide within a short time span (one week) on a case-by-case basis whether the suspensive effect of an appeal may be lifted. The federal administrative court had to grant suspensive effect, if it was reasonable to assume that a rejection/removal/forcible return would result in a real risk of a violation of Article 2, 3, 8 ECHR.[357]

2.2.2.2. Italy: decentralization of the AO

As illustrated by Fig. 12 there was a short-lived first peak in asylum applications in 2011, the second peak, longer lasting and significantly more relevant in terms of numbers, took place between 2014 and 2017. In 2017, Italy received the second-highest number of asylum applications in the European Union (preceded only by Germany). In 2018, applications fell considerably, a trend that continued in the following years.

The sudden arrival of large numbers of Albanian asylum seekers by ship in 1991 and 1997 were emergency events and gave rise to a stricter border control in the sense of patrolling ports on the Ionian Sea, but also to an externalization strategy through cooperation with Albania aimed at curbing emigration. In the beginning of the 21st century the Italian authorities replicated this strategy on a broader scale by reinforcing the surveillance of the western Mediterranean maritime borders. In 2008 Italy started bilateral cooperation with Libya to impede smugglers from launching their boats from the Libyan shores or, if intercepted in the Mediterranean Sea, to make them return to Libya. Even after Qaddafi's death this cooperation was continued, and a similar agreement was concluded with the Tunisian government in 2011 (Longo 2019).

The strategy of returning asylum seekers to North Africa was opposed by the ECtHR. The landmark case was Hirsi Jamaa and Others v. Italy.[358] It concerns a group of about 200 Eritrean and Somali emigrants who were intercepted on the Mediterranean Sea, beyond the Italian waters by the Italian coastguard after departing Libya in three vessels. The Italian coastguard did not give any information to these emigrants on where they were taken nor given the opportunity to apply for asylum. The group was eventually handed over to the Libyan

[356] The asylum legislation was strengthened with a ban on new evidence during appeal procedures and abolished the suspensive effect of appeals against inadmissible decisions under the Dublin Convention. However the Constitutional Court ruled that several innovations in that law were unconstitutional and annulled them.

[357] Also in Germany, there is no suspensive effect of the appeal for applications from safe countries of origin, only If the Court has serious doubts on the rejection of the asylum application as manifestly unfounded is the suspensive effect ordered. EMN 2018.

[358] ECtHR No. 27765/09.

authorities despite their objections. For the Italian authorities this was a routine operation following the bilateral agreement between Libya and Italy to combat irregular immigration to Italy. The judgment issued by the Grand Chamber of the European Court of Human Rights on 23 February 2012 condemned Italy as there was a twofold breach of art 3 ECHR: first because of the exposure to ill-treatment in Libya, and second because of the risk to be send back to their countries of origin. The case was groundbreaking because the Court held that the applicants were within the jurisdiction of Italy notwithstanding the fact that the applicants were not even in Italian waters. The Italian responsibility was derived from principles of international law because the boat of the Italian coastguard sailed under the Italian flag. The emigrants had thus been on Italian territory and therefore Italy had to abide by its responsibility under the European Convention of Human Rights. It did not matter that the applicants did not explicitly request asylum. According to the Court, Italy could have assumed that returning the applicants to Libya could expose them to treatments conflicting with the Convention and even chain *refoulement*. The Court also condemned the fact that the authorities had not made any distinction between asylum seekers and illegal immigrants in the bilateral agreement.[359] The Hirsi Jamaa case stopped the Italian 'push-back' policy on the Mediterranean as asylum seekers their applications first had to be processed before an eventual return could be organized.

Decentralization of the AO to speed up decision-making, 2002-2017

In 2002 the first seven Territorial Commissions were established, followed by three more in 2008, for a total of ten permanent decision-making bodies coordinated by the central AO. The law of 2008 had foreseen the possibility of opening twenty permanent decentral AOs, one for each region. A 2013 reform enabled the Ministry of the Interior to create up to ten additional sub-commissions for a limited period in areas where asylum applications increased. Between September 2013 and January 2014 all ten sub-commissions had been activated. Finally, up to thirty temporary sub-commissions could be opened if the need arose (Pastore & Roman 2014). The sub-commissions are mostly located at the provincial level. As of December 2018, there were 20 Territorial Commissions and 28 Sub-Commissions across the country (Roman 2020: 8). These Territorial Commissions are mostly in the cities, but some, for example in Puglia and Trapani (Sicily), are located in a reception center.

The decentralized AOs did not function that smoothly. As mentioned above (1.2.8.) each regional AO had four members: a representative from the department of Public Security, a representative of local territorial entities, a representative from UNHCR, and the president who was a *Prefetto*, the representative of the national government at the regional level. Some civil servant members of these regional AOs were only involved in refugee recognition part time and had little expertise in refugee matters.[360] The representatives of local entities and the members from law enforcement authorities did not work *exclusively* for the AO, which caused delays in processing claims and in reaching decisions. By law, decisions on asylum claims had to be taken by three members in order to guarantee a fairer decision-making process more beneficial to refugees. In practice, only one member conducted the personal interview with the asylum seeker and then presented the case to the other members, after which all members took the decision jointly. This collective approach to decision making had detrimental effects on the

[359] European Database of Asylum Law. 2012. 'ECtHR - Hirsi Jamaa and Others v Italy [GC], Application No. 27765/09'. https://www.asylumlawdatabase.eu/en/content/ecthr-hirsi-jamaa-and-others-v-italy-gc-application-no-2776509 accessed 12.7.2022; Vermeulen and Battjes 2018: 404.

[360] "members are not required by law to possess prior experience and expertise in the field of asylum and they sometimes fill other positions during their tenure as members of Territorial Commissions. The specialization of decision-makers …are not adequately guaranteed through regular induction and compulsory trainings". UNHCR (2013) Recommendations on important aspects of refugee protection in Italy, p.8. https://www.unhcr.org/500950b29.pdf ; UNHCR (2012). Recommendations on important aspects of refugee protection in Italy, p.9. https://www.refworld.org/docid/5003da882.html accessed 24.6.2022.

overall length of the asylum procedure, largely due to the part time involvement of some members (Pastore & Roman 2014). The increasing number of asylum applications from 2011 onward put further strain on the asylum system; the authorities wanted the number of daily interviews with asylum seekers to be stepped up. The then Minister of Interiors Alfano (2014-2016) wanted the AOs to increase the number of daily interviews to four.[361]

Concerning the decisions, high protection effectiveness was difficult to obtain due to the diversity in background of the members of the panels. As Fontana (2019: 441) points out, the asylum procedure itself was affected by this heterogeneous composition of panels with law-enforcement officers' dealing with asylum-seekers in an arbitrary manner and according to the canons of police questioning rather than through interviews aiming at ascertaining whether the interviewee meets the conditions for international protection". The decisions taken by the decentralized AOs were to a certain extent dependent on the attitude of the individual regional AOs with important discrepancies throughout Italy (Fontana 2019: 435-437). This decentralization was not properly coordinated. UNHCR criticized the lack of independence of the administrative authority in charge of asylum, but the most important defect was the heterogeneous composition of the decentral AOs. UNHCR wanted the members of Territorial Commissions to occupy these positions full-time and the members to be selected on the basis of their experience and knowledge in the field of asylum. Members should also undertake regular and systematic training activities. UNHCR pressured for a professionalization of the AOs, but only in 2017 did the Italian authorities make this happen.[362]

Recognition policy of the decentralized AO

Italy already had a border and an inadmissible procedure; the latter became the Dublin procedure. The Europeanization of Italian asylum policy expressed itself in the introduction of the accelerated procedures and the subsidiary protection in the asylum law of 2008. The accelerated procedure was applicable when the asylum seeker was under administrative detention, had applied for asylum when (s)he was under the threat of an expulsion, when the application was considered to be manifestly unfounded, when (s)he came from a safe country of origin. That latter ground was only implemented in Italian legislation when in 2018 a first list of safe countries of origin was identified by the Ministry of Foreign Affairs in agreement with the Ministry of Justice and Interior.[363] The accelerated procedure also became applicable when the asylum seekers had passed through the hotspots (see further). The Italian asylum law of 2008 also provided for a procedure by priority, which was applicable when the applicant was considered vulnerable, when the application was considered to be manifestly founded, and when the application came from a country where the situation was such that there were sufficient grounds, according to the central AO, to grant him/her subsidiary protection status. In the latter case the interview could be omitted.

Since 1990 the central AO had recognized Convention refugees, but it could also recommend rejected asylum seekers to the IO (*Questura*) to be protected as *de facto* refugees (or because of compassionate grounds). This advice of the AO had been institutionalized in 1998; the IO could protect these *de facto* refugees or other cases by granting them humanitarian status. The IO considered the advice of the AO as non-binding and at times did not grant a

[361] Fontana 2019: 439; The protection officer who was interviewed handled 845 cases in 4 years (2018-2022). In the first two years, the PO had to decide on average three cases per day, but from 2020 the number of cases to be processed per day has been slightly diminished. Interview by Bob Mertens with a protection officer, 16.2.2022 (anonymous on file at University of Ghent).

[362] UNHCR (2013) Recommendations on important aspects of refugee protection in Italy, p.19. https://www.unhcr.org/500950b29.pdf ; UNHCR (2012). Recommendations on important aspects of refugee protection in Italy, p.9. https://www.refworld.org/docid/5003da882.html (accessed 20.7.2022).

[363] The list of safe countries was : Albania, Algeria, Bosnia and Herzegovina, Cape Verde, Ghana, Kosovo, North-Macedonia, Morocco, Montenegro, Senegal, Serbia, Tunisia and Ukraine.

humanitarian status to these recommended immigrants. The IO had full discretion to grant humanitarian status and they could even grant this independent of the AO to immigrants other than asylum seekers. Since 1998 the humanitarian status has yielded only a residence permit valid for one year. Depending on the decision of the AO, this status could be renewed yearly. A permanent stay depended on achieving another kind of residence permit (Pastore & Roman 2014; Tria 2013).

From 2008 onward the AOs not only could grant Convention status or recommend a humanitarian status but could also grant subsidiary protection. Italy had transposed the qualification directive 2004/83/EC in domestic law fully (see 2.1).[364] Granting the subsidiary protection status yielded a residence permit valid for three years, while Convention status implied the issuance of a five-year renewable residence permit.

In 2008 subsidiary protection was introduced as a new status in Italian asylum policy. The share of refugees recognized as Convention refugees remained the same and subsidiary protection was granted largely to those coming from regions with (civil) war while the humanitarian status lost its protective dimension, and it was only granted on compassionate grounds. In 2009 the United Sessions of the Court of Cassation established that, when the decentralized AOs recommended a rejected asylum seeker for a humanitarian status, the IO had to issue a residence permit for humanitarian reasons (Tria 2013).

2.2.2.3. Greece no part of the European Refugee Regime [365]

Already at the end of the 20th century Greece had become the entrance gate to Europe: thousands arrived by crossing the Evros River in the North of Greece, but a smaller number travelled over sea and entered the country at the islands of Lesbos, Chios, and Samos. As concerns the latter group, in 2007 the German NGO "Pro Asyl", in collaboration with the Athen's Group of Lawyers for the Rights of Refugees and Migrants, carried out an investigation into possible maltreatment by the Greek coast guard after receiving accounts from asylum seekers' hearings in Germany. This investigation into the policy of the Hellenic Coast Guard, which is responsible for interception at sea in Greek territorial waters, registered instances of human right violations at the Greek border in the forms of intentional *refoulement* of refugees at sea. The Greek coast guard was accused of circling boats in order to drive them back into Turkish waters or cause waves that forced them to return…but also of systematically abusing newly arrived asylum seekers.[366] The Greek authorities developed a policy of deterrence by detention and deportation. Most of the irregular immigrants who had succeeded in crossing the border moved on to other European countries, but this was not always a deliberate choice. The registration of asylum applications could not keep pace with demand, as more and more people wished to apply. The police tried to prevent these immigrants from lodging asylum applications. At the borders all irregular immigrants who got caught, including those applying for asylum, were detained. They could be detained for up to six months. Asylum seekers were as a rule detained longer that other irregular immigrants, at least until they had been interviewed, which could take several months (Gkliati 2011).

For those irregular immigrants who managed to pass the border zone, most went to Athens where they found it very difficult to register their asylum application at the Central Asylum Police Department. Only a limited number of asylum claims were accepted for

[364] Decree 251 (19.11.2007), the asylum procedure directive was transposed by the Law of 25-28.1.2008.

[365] The chapter has benefitted from the input of Evgenia Iliadou and Carmen Caruso (both University of Surrey) who made an extensive literature survey of Greek immigration and refugee policy in this period.

[366] The focus of their research was access to the Greek territory and reception on the islands of Chios, Samos, and Lesbos. PRO ASYL. (2007). The Truth May Be Bitter But It Must Be Told: The Situation of Refugees in the Aegean and the Practices of the Greek Coast Guard. Available at: https://rsaegean.org/en/reports-published-by-pro-asyl-for-greece/.

registration each week, while many more immigrants waited in queues to submit their applications.[367] In other Greek towns the police operated in a similar manner, as the demand for asylum claims far exceeded the very limited quota for asylum seekers (Gkliati 2011: 110).

The AO in Athens, part of the Directorate for Aliens at the Headquarters of the Hellenic Police, met twice a week and examined almost 150 applications per session. The quality of asylum claims assessment and decision-making was extremely poor. In 2007, a UNHCR-commissioned research project on a sample of applicants from Afghanistan, Iraq, Somalia, Sri Lanka and Sudan who had been rejected (N: 305) indicated that the decisions contained no reference to the facts nor any detailed legal reasoning. Every decision contained the same standard paragraph according to which the asylum applicant abandoned his country in order to find a job and improve his living conditions. With the consent of the Ministry of Public Order, these case files were reviewed. Out of 305 first instance case files reviewed, 294 did not contain the responses of the applicants to standard questions reportedly posed by interviewing police officers. No other information was provided in these files regarding the applicants' claims (UNHCR 2007: 13-14). Additionally, the Greek asylum procedure had no safeguards: legal aid was generally absent and language interpretation resources were severely inadequate. The AO rejected nearly all asylum applications. In 2007 the recognition rate was 1,22%.[368] In 2008, 2009, and 2010, less than 0,1 % of cases decided at first instance were granted refugee status or subsidiary protection.[369]

Appeal was possible. The AT's role was limited to giving advice while the final decision regarding granting refugee status belonged to the Minister of Public Order. The final decisions of the Minister of Public Order were stated in a few lines, and the summary of facts normally did not exceed two lines. The appellant's specific allegations were not stated, and no other reasons were given for the negative decision (UNHCR 2007: 13-14). As a result of this administrative practice, a considerable number of final decisions were annulled by the Council of State. That the decisions did not contain facts and the reasoning was not sufficiently detailed was in violation of the Code of Administrative Procedure and the Council of State's jurisprudence, which required full registered evaluation of each case and transcripts of the hearing before the Committee. The decisions had to be specified, and if the decision did not follow the recommendation of the Consultative Asylum Committee, the divergence from this advice had to be justified.[370] Chronic shortages of human resources and lack of appropriately trained personnel impacted negatively upon the system of protection for asylum seekers. As asylum applications started to increase significantly starting in the mid-2000s, a large number of them remained unprocessed for years. In 2010, the backlog amounted to 52,000 cases (Cabot 2018). The pressure on the frail Greek framework for international protection was exacerbated by the financial constraints caused by a severe recession at the national level. Probably due to the attitude of the Council of State, the deadlock in which the whole procedure found itself led to a decision in 2008 to make the AT an independent body with full decision-making power (IGC 2009).

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[367] Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: GREECE, November 2010. Available at https://www.refworld.org/pdfid/4cd8f2ec2.pdf (accessed 15.6.2022).

[368] UNHCR 2007, 34; Greek national commission for human rights, Observations regarding Asylum Procedure and Implementation of the Relevant Legislation, 17 January 2008 https://www.nchr.gr/images/English_Site/PROSFYGES/Asylum_2008.pdf, (accessed 15.9.2022)

[369] Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: GREECE, November 2010. Available at https://www.refworld.org/pdfid/4cd8f2ec2.pdf (accessed 15.6.2022)

[370] Greek national commission for human rights, Observations regarding Asylum Procedure and Implementation of the Relevant Legislation, 17 January 2008. https://www.nchr.gr/images/English_Site/PROSFYGES/Asylum_2008.pdf, (accessed 15.9.2022).

The AT as an independent body with full decision-making power could not prove its impact as it never went in operation. Presidential Decree (P.D.) 81/2009, which entered into force in July 2009, decentralized the asylum procedure in order to accelerate the procedure. The decisive competence was transferred from the Central Authority (the Directorate for Aliens at the Headquarters of the Hellenic Police) to the 54 Police Directors of Greece. The Police Directors received non-binding advice from a committee consisting of two Police Officers and a civil servant of the respective Prefecture. UNHCR had been asked to delegate one representative in these committees but had declined the offer. The AT was abolished and replaced by an appeal at the Council of State-- an appeal which was not suspensive and would only examine on the basis of the law but not on the merits. There would be no second examination on whether the particular applicant was entitled to be granted the refugee status on the basis of his/her allegations and the evidence submitted (GNCHR 2009: 28-32).[371] According to UNHCR, the reform would aggravate the already disastrous situation for refugees and, in particular, the abolition of the newly created independent review went down the wrong way.

With the transposing of the relevant European directives into Greek national law, by 2009 Greek asylum policy was formally "Europeanized", but behind this façade refugees in Greece had little chance of being protected, and many were forced to move on to other EU-states. On September 1, 2010, the UNHCR presented damning testimony on Greek asylum policy at the European Court of Human Rights in Strasbourg in the case M.S.S. v. Belgium and Greece UNHCR stated that even in cases where individuals "managed (against all odds) to have access to the asylum procedure in Greece, they were not afforded a fair and effective examination of their claims". The UNHCR Director of International Protection concluded that the Greek asylum system "did not adequately protect asylum-seekers, including Dublin transferees, against return to territories where there is a risk of persecution or serious harm".[372]

This testimony and the final verdict of the ECtHR in the case M.S.S. v. Belgium undermined the assumption of the Dublin system that all EU states respect the rights of asylum seekers, examine their claims in a fair and effective procedure, and grant protection in line with international and European law. Greece had shamed the inter-State trust at the expense of refugees.

3. Epilogue: European management of asylum in crisis, 2011-2018

A first crisis in the European management of asylum was the verdict of the ECtHR concerning M.S.S. v. Belgium and Greece. This crisis was addressed by strengthening the Greek asylum system (see 3.2.2). In 2015 the asylum applications throughout Europe more than doubled and a new lasting crisis erupted.[373] While we notice an increase in all European countries, the highest rise can be seen in Eastern Europe. That region took 14,5% of all European asylum applications (compared to a share of 9% in 2014). The rise was also important in Norway, Sweden, and Finland (15% of all European asylum applications). In absolute numbers, our ten sample countries experienced an important increase in asylum seekers in 2015 but, relatively, due to the increased 'popularity' of Eastern Europe and Scandinavia, as the share of asylum seekers in our sample countries compared to all asylum applications in Europe dropped from 73% in 2014 to 66% in 2015. Also, the British Isles saw a decrease in their share (from 5% to 3%) while the Iberian Peninsula maintained a share of 1%. The German use of the sovereignty clause in September 2015 to process asylum applications which it should not treat

[371] UN High Commissioner for Refugees (UNHCR), *Observations on Greece as a country of asylum*, December 2009, available at: https://www.refworld.org/docid/4b4b3fc82.html (accessed 16 June 2022).

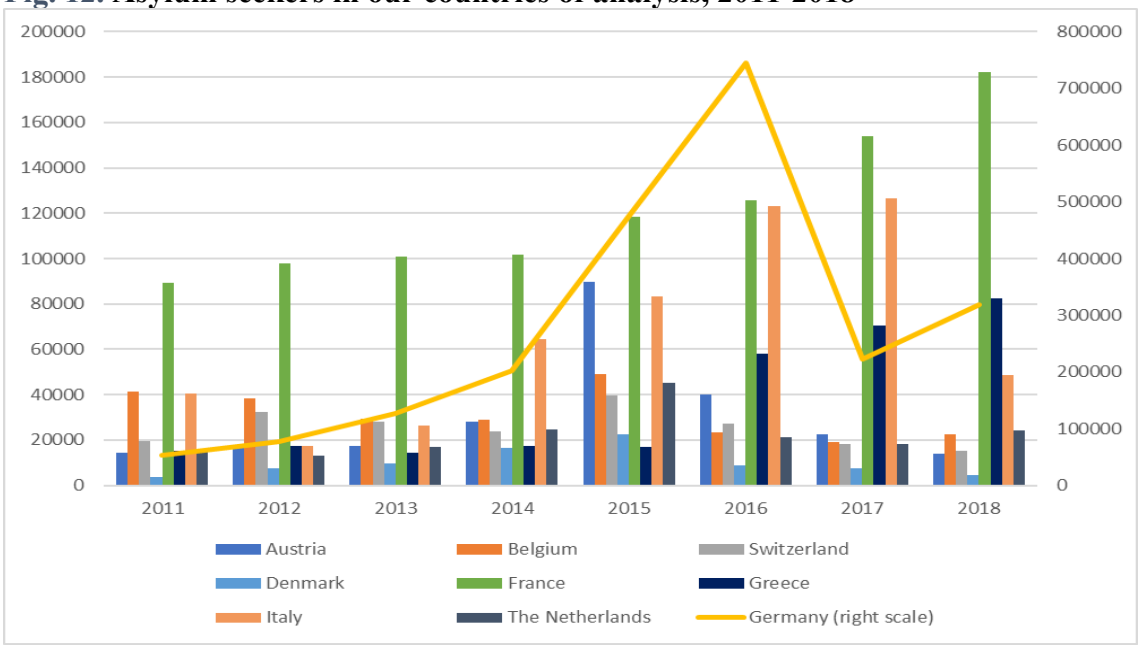
[372] UNHCR's oral intervention at the European Court of Human Rights Hearing of the case M.S.S. v. Belgium and Greece, Strasbourg, September 1, 2010. https://www.unhcr.org/uk/4c7fc44c9.pdf [accessed 16 October 2022]

[373] 2014-2015: All of Europe + 104%: Eastern Europe: +243%, Norway, Sweden, and Finland +141%, our sample of then mainly West European countries +85%, Spain and Portugal +147,5%, UK and Ireland + 28%.

according to Dublin explain the German increasing share of asylum applications. This decision stopped a further escalation in the competition between the EU-states, incited by the Hungarian decision to make "its" asylum seekers move on and saved the CEAS.[374]

After 2015 (until 2018) there was a sharp decrease in asylum applications throughout Europe, so that by 2018 the number of applications was brought down to almost the level of 2014.[375] In 2016 the EU concluded agreements with Turkey, Egypt…. to make the passage through the Mediterranean Sea more difficult and also the use of the Western Balkans route became more difficult.[376] Within this declining number the share of asylum seekers from the Iberian Peninsula increased from 1% to 7% among all European asylum applications, while in particular Eastern Europe and Scandinavia applicants accounted for only 1% and 3% of the total, respectively. Also, the share of the 10 countries in our sample in all European asylum applications increased from 66% in 2015 to 84% in 2018. However, it must be noted that within our sample there are two exceptions: While most countries saw a decrease in asylum applications between 2015 and 2018, France (+ 54%) and especially Greece (+380%) went through a sharp increase of asylum applications.[377]

Fig. 12. Asylum seekers in our countries of analysis, 2011-2018



[374] Der Spiegel.. (2016, August 24). Two Weeks in September: The Makings of Merkel's Decision to Accept Refugees. *Spiegel Online.* Retrieved from: https://www.spiegel.de/international/germany/a-look-back-at-the-refugee-crisis-one-year-later-a-1107986.html

[375] 2015-2018: All of Europe - 41%: Eastern Europe: -96%, Norway, Sweden, and Finland -89%, our sample of ten mainly West European countries -24%, Spain and Portugal +264% %, UK and Ireland -2%.

[376] The EU-Turkey Statement of 18 March 2016 served as a blueprint for migration policy relations with other third countries. Turkey promised to take any measures necessary to prevent emigration from Turkey to the EU, in return, the EU promised to grant Turkey visa liberalization, 6 billion Euros to help Syrian refugees in Turkey, resumption and extension of Turkey's accession negotiations to the EU. It also implied that from March 20, 2016 onwards irregular migrants entering Greece through Turkey could be returned to Turkey if they did not apply for asylum or if their application had been declared "unfounded" or "inadmissible". For every Syrian being returned to Turkey from the Greek islands, another Syrian could be resettled from Turkey to the EU. On the externalization strategy see also the research conducted within Protect by the university of Catania.

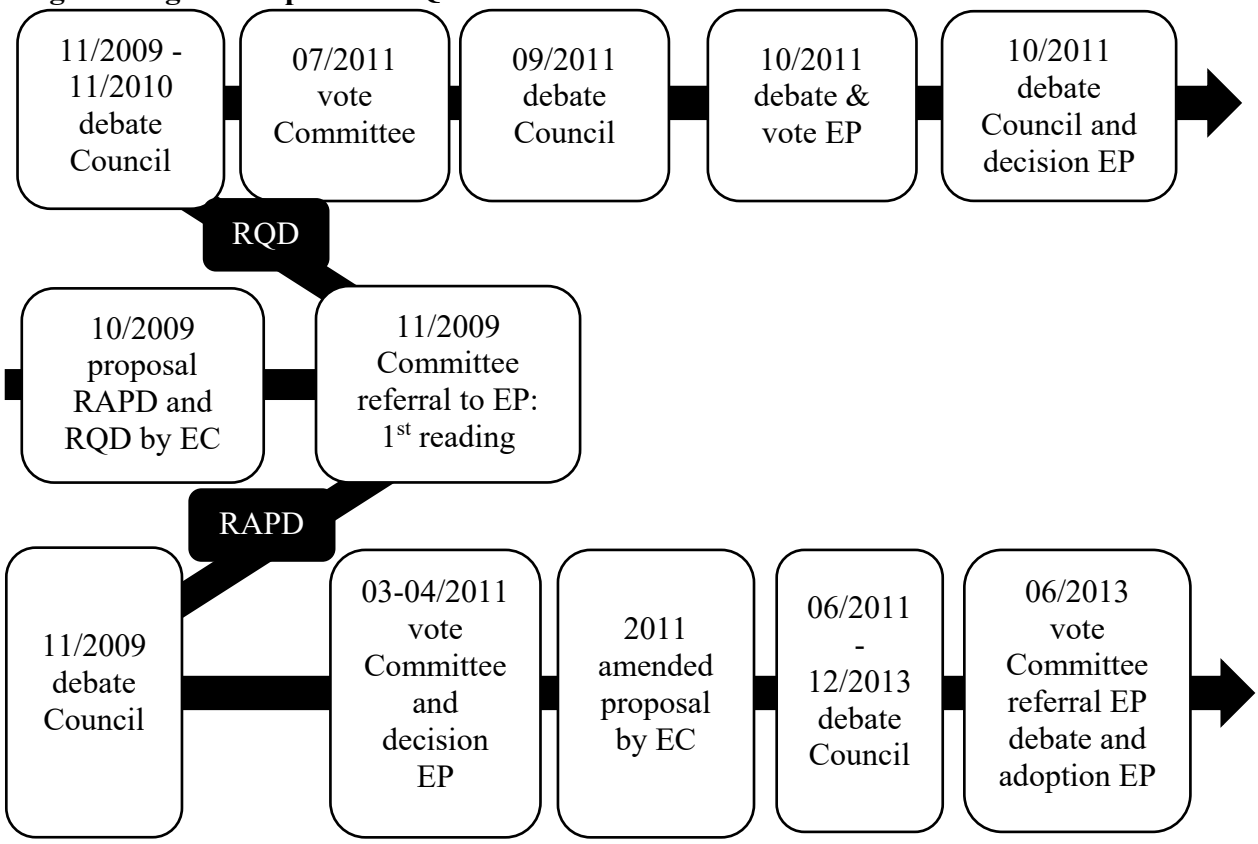
[377] 2015-2018 within our sample Austria -85%, Denmark -81%, Switzerland -61%, Belgium -54%, the Netherlands -47%, Italy -42%, Germany -33%, Luxembourg -24%.

3.1. European policy making

While the plan for further harmonization was already established in the Tampere conclusions in 1999, this intention was reinforced by the European Council in the Hague programme of 2004 and the Lisbon Treaty in 2007. In 2008, in its Policy Plan on Asylum the European Commission realized recognition rates of same countries of origin were still too divergent between the member states despite the attempt to increasingly convergence them through the several European asylum instruments. This unequal access to protection between the member states lead to undesirable secondary movements, a problem that had to be tackled in the second generation of CEAS. During the Stockholm program of 2009 the European Council acknowledged there was still a lot of work to be done (Chetail 2016: 17–22). While the initial deadline for the second generation of CEAS was set in 2010, it was rescheduled to 2012 (Van de Peer 2016: 55).

Differently from the first phase of CEAS, the European Parliament became more involved in the establishment of the second generation of CEAS. This is the consequence of the European Parliament becoming a co-legislator from December first, 2005, onwards, as was intended for the second generation of GEAS (as was foreseen by art 67(5) of the Treaty of Amsterdam). Fig. 13 gives an overview of the legislative processes of the Recast Qualification Directive (RQD) and the Recast Asylum Procedure Directive (Van de Peer 2016: 56–58). Moreover, from the Lisbon treaty onwards, the Council did no longer have to reach unanimity in immigration and asylum matters (Vedsted-Hansen 2011: 270). Yet in practice, because of the nature of asylum legislation, the final proposals were still approved through unanimity in order to have a better chance of an actual implementation by the member states.

Fig. 13. Legislative process RQD and RAPD[378]



[378] (European Parliament 2011; 2013; Costello and Hancox 2016, 386)

3.1.1. The Recast Qualification Directive (2011/95/EU)

The main objective of the RQD was to harmonize the EU member state recognition policy. It was no fundamental rethinking of the original Qualification Directive as one single protection status for both Convention refugees and beneficiaries of subsidiary protection was not obtained. Several member states insisted on retaining this distinction, but some concessions to this single status were agreed upon (Battjes 2016: 204–5). After criticism of the UNHCR, the European Commission acknowledged that the differences of rights between Convention refugees and beneficiaries of subsidiary protection were not justifiable. Thus, in the recast QD proposal, the EC suggested equalizing the residence permits accompanying both statuses (both 3 years), an objective which was supported in the 2009 Stockholm Program. Finland, Luxembourg, and the Netherlands supported this uniformized approach, but Austria, the Czech Republic, Germany, and France insisted on keeping the one-year residence permit for subsidiary protected refugees. The final RQD shows that there was no full harmonization. The final outcome became a compromise: subsidiary protected refugees got a residence permit valid for one year, renewable with two years while convention refugees received immediately a three year residence permit (Bauloz and Ruiz 2016: 241–44, 252–55). One of the most significant changes however, is the equalization of the access to the labor market, health care and integration facilities for both refugee statuses (Bauloz and Ruiz 2016: 246–48). Asides from the length of the residence permits, the other main difference between the two statuses concerned that remained was social welfare. Subsidiary protected refugees were still disadvantaged compared to Convention refugees as their social support could be limited to the core benefits (Bauloz and Ruiz 2016: 251)

The RQD addressed some protection gaps, but not all.[379] Concerning the qualification for subsidiary protection the European Commission decided not to address the contradiction between 'individual threat' and 'indiscriminate violence' as the case-law of the CJEU had moved any doubt' (see above). The RQD did however incorporate some improvements. Concerning the EU-interpretation of the Convention of Geneva, the RQD provides a link between the acts of persecution (art 9) and the reasons for persecutions (art 10), which the initial QD did not, and which broadens the scope of the status. For the concept of social group the RQD prescribes that instead of gender aspects 'might' be considered that gender related aspects 'will be' given consideration (Battjes 2016: 206–16). Another improvement is that the RQD summed up in an *exhaustive* list the 'actors of protection' that clarified that the protecting actor had to be 'willing and able to offer protection' and the protection must be 'effective and of a non-temporary nature'. Regarding the internal flight alternative (IFA) the provision that it even could be applied when the asylum seeker could not return to the country of origin due to 'technical obstacles' was removed. Instead, to comply with art 3 ECHR a provision was added that one could only take an internal flight alternative into account when the applicant could safely and legally travel to that region. This significant improvement can be attributed to the Salah Sheekh v. the Netherlands ECtHR arrest of 2007 where the Court considered 'that as a precondition for relying on an internal flight alternative certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, gain admittance and settle there, failing which an issue under Article 3 may arise, the more so if in the absence of such guarantees there is a possibility of the expellee ending up in a part of the country of origin where

[379] According to Battjes (2016, 215-216) the recast QD missed some opportunities to improve protection of refugees. For example instead of having to fulfill the two requirements for belonging to a social group one could be sufficient: ART.10 (1) QD: (*(1) The persons must have a characteristic they cannot change or cannot be asked to change, and (2) the group must be recognizable in the society in the country of origin).* Also the article on *refugee sur place* could have been altered.

he or she may be subjected to ill-treatment".[380] Moreover, while the old article prescribed that the absence of the fear for persecution or risk of suffering serious harm was sufficient to qualify as internal flight alternative the EC wanted to go further and to guarantee access to protection. Despite objections from the Dutch delegation, who wanted to keep the old provision, the article included a provision where the internal flight alternative could only be used to reject an asylum application if the applicant has access to protection against persecution or serious harm. Both personal and general circumstances had to be taken into account when considering this decision. Yet, on suggestion of the Dutch delegation, the burden of proof lies with the applicant (Battjes 2016: 198-202).

3.1.2 The Recast Asylum Procedures Directive (2013/32/EU)

While a first RAPD proposal was already issued in 2009, the EC had to come up with an amended proposal in 2011 as it couldn't get the required support from the member states in the Council. The second proposal did not take into account the EP's reading of the first proposal but was rather inspired by the views of the national governments. Eventually, Costello and Hancox (2016) argue that the EP had a rather liberal view on refugee protection at the time it did not yet have full legislative powers in asylum legislation. Yet a shift seemed to have taken place after the EP got full voting rights in the legislative procedure. Since then, the EP apparently was more willing to follow the Council's more restrictive views.

The Recast Asylum Procedure aimed to improve asylum seekers' rights through enhancing some procedural guarantees. Some significant changes with respect to the first APD include that a broad scale of authorities who could be 'addressed' by asylum seekers must be trained to respond to the asylum application or refer the asylum seeker to other facilitating authorities. 'Any staff' who conducts the interview needs to have had appropriate training to do so. Moreover, the RAPD abolished some situations when the interview could be omitted. Contrary to the APD, the interview cannot be skipped anymore if the applicant already had contact with the competent authorities by means of facilitating the lodging of the application or when the application could already be rejected as unfounded based on the information provided by the applicant. The asylum seekers gets also the opportunity to add clarifications to aspects of the interview before a final decision is taken (Schittenhelm 2019: 230).

The RAPD added a condition for member states to apply the STC concept, that is, '*there must be no risk of serious harm as is defined in the RQD'*. In applying the STC concept in individual cases, the RAPD introduced the opportunity for asylum seekers to challenge the application of the concept in his/her case. Yet while in the APD if a STC was applied, it was a ground for assessing the claim through an accelerated procedure, in the RAPD it became a ground for not examining the application any further. For SCO, while under the APD a SCO could serve as a ground for judging the application as unfounded, under the RAPD it became a ground to assess the application through an accelerated procedure. The APD had accepted border procedures, but the RAPD tightened the rules somewhat , but still left some discretion to the member states (Costello and Hancox 2016).

3.1.2.1. Safe countries ever more popular

The APD and RAPD allow member states, but they are not obliged, to create a national list of safe countries of origin and draft national regulations and procedures to give effect to this list. The proposal in 2003 of a European list of safe countries of origin which would be mandatory for member states while drafting the APD did not pass. Although it was mentioned in the APD, the RAPD did not refer to this list. In the panic of 2015, the European Commission

[380] ECtHR, Salah Sheekh v Netherlands, No. 1948/04, 11 January 2007, nr.141. https://hudoc.echr.coe.int/fre?i=001-78986 accessed 15.10.2022

tried again with a proposal for a Regulation establishing an EU common list of safe countries of origin. In the first phase this would include six Balkan countries which all countries with safe countries or origin had on their list as well as Turkey. Adding the latter was part of the strategy to curb the outflow of asylum seekers from Turkey, but nothing came out of this proposal.

In Austria as mentioned before since 2004 all asylum applications became processed in an accelerated procedure. The accelerated procedures got from September 2018 onward a new dimension as the asylum applicants whose claim had a highly likelihood of being unfounded mainly those coming from so-called safe countries of origin (countries of the Balkan, Georgia, Morocco and Algeria) had to remain in the reception centers until their claim was processed. Elsewhere they were denied any support.[381] Austria had an increasing number of countries which were considered safe countries of origin, from 2009 onward 19. By 2018 also the Netherlands had 19 countries, and this implied that for example in 2016 50% of the first asylum applications were processed in an accelerated procedure.[382] France had 16 safe countries of origin, Italy 13, Germany 8 and Belgium 7.[383] In Greece there was no adopted list of safe countries of origin, but the concept was included in the law.[384]

With also Belgium and Italy all our countries came round in the end

Belgium had stayed aloof of the accelerated procedures based on SCO and STC, but after the APD condoned the use of this tool also Belgium embraced both of them. In Belgium on November 24, 2011, the federal parliament approved a law which introduced the SCO concept in Belgian law.[385] The asylum requests from these countries were processed through an accelerated procedure and to refute the presumption of safety of his or her country of origin, the applicant has to present serious reasons explaining why the country cannot be considered safe in his or her individual situation. Applications from these SCO have to be treated by the AO within 15 days. Initially the AO could decide to not process SCO applications at all, without any appeal possibility. However, as the Belgian Constitutional Court judged that there had to be an effective remedy against a SCO decision, the law was altered and always an appeal at the Asylum Court remained possible.[386] The list of SCO has to be decided upon annually by the Council of Ministers (jointly proposed by the secretary of state for asylum and migration and the minister of Foreign Affairs). Before the list is final, the Council of Ministers is legally

[381] Also in Germany the asylum seekers from safe countries of origin are obliged to reside in a reception facility in the close vicinity to the responsible branch of the AO. They may only temporarily leave the area and need permission from the AO. In the Netherlands the applicants concerned start the procedure in the central reception facility and will not be relocated to another reception facility elsewhere in the Netherlands. Kraler 2011; European Migration Network 2018, p. 8.

[382] The first tier courts have renounced the decision to call in nine cases a country on the list to be safe, but in appeal the Administrative Jurisdiction Division of the Council of State (the highest administrative court in the Netherlands) has overturned all these first instance judgments and has ruled that these countries of origin have been deemed safe on good grounds. European Migration Network 2018, p. 8.

[383] The number refers to third countries, so not EU member states but in our number are also not included Norway, Switzerland, Iceland, Australia, Canada, Liechtenstein, USA, Japan as most EU-countries considered them safe. Some (Member) States have designated all EU28 countries, the EEA countries and Switzerland as safe, while others chose not to add these countries to the list, but nevertheless deem these countries to be safe. Among the 19 safe countries of origin in the Netherlands 7 were not considered safe for LHBTI*. Luxemburg considers Ghana and Benin as safe for men, but not for women. Zwaan, K. (2018). 'Veilig land van herkomst?' VluchtelingenWerk Nederland. https://www.vluchtelingenwerk.nl/nieuws/publicatie-rapport-%E2%80%98veilig-land-van-herkomst%E2%80%99.

[384] European Migration Network 2018, p. 8.

[385] Law of January 12, 2012.

[386] The amended law came into force on June, 1st 2014. EMN Belgium. 2016. 'Contribution from the Belgian Contact Point of the EMN To the Annual Policy Report 2015 Part 1'. p. 72.

obliged to consult the AO, but its advice is not binding. Belgium started the implement the SCO-concept from June 1st, 2012 onward.[387] The list started off with the following countries: Albania, Bosnia-Herzegovina, Montenegro, the Former Yugoslav Republic of Macedonia (FYROM), Kosovo, Serbia and India.[388] The 2012 list was reaffirmed in 2014 and 2015.[389] On August 3, 2016 Georgia was added to the list, notwithstanding the negative advice of the AO.[390] The then Commissioner General of the Belgian AO elaborates on the relevance of (determining) the SCO in the Belgian asylum procedure: "It is possible the first year we gave a negative advice on Georgia, but later we gave a positive advice taking count of the evolution in that country. We consider that the procedure by which the executive power decides, with a non-binding advice of the AO about the list of SCO as not thwarting our independence to recognize refugees. If you would give this competence to Parliament, as is the case in some countries, you would make it into a pure political decision. Then it is no longer an administrative decision, and you can no longer appeal this decision. Any country can be declared a safe country of origin but then you have to continue your recognition policy with the qualification of that country as safe in your decisions… Anyhow the SCO concept has limited importance in the Belgian recognition policy as basically all asylum requests, also those of the SCO are handled in a similar manner, the only difference is that we have to decide quicker… The independence of the AO is crucial for recognition policy as political interventions should be prevented".[391] Rejecting an asylum request from a safe country is indeed an administrative decision which can be appealed in an accelerated procedure at the Asylum Court. Each decision of the government can be scrutinized by the Council of State. The Council of State has in 2012 as well as the next three years rejected the inclusion of Albania on the list of safe countries of origin. The Council of State argued that the relatively high number of asylum seekers from Albania who were considered refugees by the AO was in contradiction with the status of the country as a safe country of origin. For example, the Council of State referred to a recognition rate of 14% in 2013, a clear testimony of the not blind treatment of these accelerated cases in Belgium.[392] Despite being allowed by the APD of 2005, Belgium did not transpose the articles related to the STC concept in Belgian legislation until 2017 when it was inserted in Belgian legislation. The judgement whether a country is to be considered a STC, was left to the head of the AO on a case-by-case basis. The criteria to be considered a safe third country are codified in the law, and the 'connection' between the applicant and the country in question is specified as making it reasonable to expect that the country in question will handle the asylum application.[393] Yet the AO stated in the same year that it would not develop a list of STC and the concept would only be applied exceptionally.[394]

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[387] CGVS. 2011. 'Jaarverslag 2011'. p. 47, CGVS. 2012. 'Jaarverslag 2012'. p. 16.

[388] IGC 2012: 62.

[389] Royal Decree of 24 April 2015.

[390] Royal Decree published in Belgian Gazette August 29, 2016. Information of MP Lanjri in Annual report of the secretary of state for asylum and migration 16.12.2016, p.28, see also other MPs p.38, 47. Parliamentary documents Chamber, doc54 (2109/036). The next year the secretary of state for asylum and migration proposed to extend the list with Algeria, Benin, Moldavia, Morocco, Senegal, Tunisia and Ukraine. Annual report of the secretary of state for asylum and migration 16.12.2016, p.8. Parliamentary documents Chamber, doc54 (2109/036). Not one of these countries was added to the list of SCO. The AO gave a negative advice, but we ignore whether this was decisive in not proceeding with this extension. Interview Dirk van den Bulck, December, 9 2021 Brussels.

[391] Interview Dirk van den Bulck, December, 9 2021 Brussels.

[392] EMN Belgium. 2016. 'Contribution from the Belgian Contact Point of the EMN To the Annual Policy Report 2015 Part 1'. p. 68, 73.

[393] 'Wet Betreffende de Toegang Tot Het Grondgebied, Het Verblijf, de Vestiging En de Verwijdering van Vreemdelingen.' 1980. 15 December 1980. https://www.ejustice.just.fgov.be/eli/wet/1980/12/15/1980121550/justel#LNK0110.

[394] ECRE (AIDA). 2017. 'Country Report: Belgium'. https://asylumineurope.org/wp-content/uploads/2018/03/report-download_aida_be_2017update.pdf. p. 53-55.

For a long time, Italy chose not to adopt a national list of safe countries as the Italian Constitution stipulated that applying for asylum is an individual right. Finally in 2018 also Italy adopted safe countries of origin as part of an accelerated procedure.

The history of the popularity of accelerated procedures, including SCO

These grounds for designating countries as safe countries or origin varied between countries The decision to process an asylum claim in an accelerated procedure had been made on the basis of one or more of the following four main grounds: (1) the applicant's claim is 'manifestly unfounded'; (2) the applicant is from a 'safe country of origin'; (3) the applicant transited through a 'safe third country'; (4) the applicant has no documents, or has forged documents. As the table below illustrates, although accelerated procedures had been introduced in several Western Europe in the 1990s the importance of these procedures, condoned by the APD increased strongly in the first decade of the 21st century. Even more important that the extension of the grounds for its use is that the scale of its use was enlarged. The scale of its use is illustrated by the Austrian and Dutch example. A massive acceleration of asylum decisions cannot do justice to a rigorous examination of asylum requests which causes that, if these decisions have not been kept out of the judicial procedure, the burden of the examination shifts to the courts. Even in Austria and Germany where the appeal in these cases is not suspensive the courts have still to verify whether the nationals of safe countries of origin whose asylum request has been rejected can be deported without a real risk of a violation of art.3 ECHR.

Tab. 16. Grounds for accelerated procedures in our 9 EU-countries, 1991-2018[395]

EU-country	Year introduced	Grounds			
		Manifestly unfounded	SCO	STC	Lack of valid documents
Austria	1997	X	X	X	
Belgium[396]	2011		X	X (°2017)	
Denmark	1994	X	X		
France[397]	1991	X	X (°2004)	X	X
Germany	1993	X	X		X
Greece	1996	X	X(°2011)	X	X
Italy	2002	X	X (°2018)		X
Luxemburg	2007		X	X	
Netherlands	1994	X	X	X	

3.2. National case studies

Below we give an overview of the asylum policy in Italy and Greece. Relevant developments in other countries have been integrated in our overview of the qualification and asylum procedure directives. Institutionally, at least to our knowledge little changed. In Austria in 2014 there was a change within the Ministry of Interiors as the AO was merged with the IO

[395] Oakley 2007 provided a first overview of the use of accelerated procedures and we build further on her work. Also in the 1980s many European countries treated 'manifestly unfounded claims' in an accelerated procedure, for this period see chapter 2 (part 1).

[396] Belgium had had an accelerated procedure based on SCO in 1992 and 1993 but this was abolished (see 1.2.3)

[397] The Pasqua law of 1993 introduced the accelerated procedure for those requests the *prefet* considered only to be lodged to evade an expulsion order or when the applicant was a danger to national security. A border procedure existed in France already in 1982 and in 1991 MUC cases had no longer a suspensive appeal possibility at the AT.

and the director of the AO Wolfgang Taucher became the director of the AO/IO.[398] We focus on these two Mediterranean countries as the relevant asylum institutions in Italy and Greece were rather young institutions, certainly for Greece and the challenges they faced were enormous. The asylum institutions in both countries were under considerable pressure to reform in order to be efficient, but also deliver high quality work. Elsewhere asylum institutions were firmly established and no important changes, at least to our knowledge occurred.

3.2.1. Italy: the professionalization of the decentralized AO

The upsurge of asylum application in 2014 turned out not to be a short-lived, but a permanent one. From 2014 onward the arrivals by sea continued, but the composition of the irregular immigrants changed. They no longer originated from North Africa, but from sub-Sahara. The explosion of arrivals caused that the other member-states criticized Italy because it tolerated that the immigrants who arrived at its shores moved on to claim asylum elsewhere in the EU. Italy should fingerprint everyone who arrived in Italy and some countries even demanded that Italy process all the asylum applications of those who arrived in Europe by the Italian coast (Fontana 2019: 439). In 2015 the European Union introduced the hotspot approach to support member states in the identification, registration, and fingerprinting of asylum seekers (see 3.1). Before its adoption, many disembarked migrants remained unregistered and unidentified at the border and could move on from Italy as the country of first arrival to another member state to lodge an asylum request. The hotspot approach meant that identified and fingerprinted immigrants were required to claim asylum exclusively in Italy. Previously, Italy had a permissive attitude toward irregular immigrants who wanted to claim asylum elsewhere in the EU.

From 2011 onward irregular immigration by sea became the main access to Italian territory for asylum seekers. From then onward Italy remained confronted with "mass" arrivals by sea (Longo 2019). On 3 October 2013, a fishing boat carrying Eritrean refugees sank off the island of Lampedusa. At least 368 people died and 155 people survived. This deadly disaster opened a political window for a more humanitarian approach to border control in Italy. A new government, led by the Democratic Party's Enrico Letta, had taken power in April and was willing to abandon the harsh approach of the previous government. In October 2013 the Italian authorities launched Mare Nostrum, a search and rescue operation which assured that there were less casualties on the Central-Mediterranean route. Just at that time this route was used by many sub-Saharan emigrants as the Arab spring had stopped the cooperation of the authoritarian authorities in North Africa with the Italian authorities to prevent the departure from their shores. The Italian search and rescue operation Mare Nostrum lasted until November 2014. It was aborted because other member states of the EU did not want to co-finance it and even opposed it (Kasparek 2015; Marchetti 2010; Zaiotti 2016). After 2015 the cooperation in combatting the departure from North Africa between authoritarian regimes in North Africa and the Italian authorities (and the European Union) was restored.

From 2014 onward the arrivals by sea continued, but the composition of the irregular immigrants changed. They no longer originated from North Africa, but from sub-Sahara. The explosion of arrivals caused that the other member-states criticized Italy because it tolerated that the immigrants who arrived at its shores moved on to claim asylum elsewhere in the EU. Italy should fingerprint everyone who arrived in Italy and some countries even demanded that Italy process all the asylum applications of those who arrived in Europe by the Italian coast (Fontana 2019: 439). In 2015 the European Union introduced the hotspot approach to support member states in the identification, registration, and fingerprinting of asylum seekers (see 3.1). Before its adoption, many disembarked migrants remained unregistered and unidentified at the

[398] The new IO/AO was called *Bundesamtes für Fremdenwesen und Asyl.* In 2020 Gernot Maier replaced Wolfgang Taucher.

border and could move on from Italy as the country of first arrival to another member state to lodge an asylum request. The hotspot approach meant that identified and fingerprinted immigrants were required to claim asylum exclusively in Italy. Previously, Italy had a permissive attitude toward irregular immigrants who wanted to claim asylum elsewhere in the EU.

When subsidiary protection was introduced the first two years the share of refugees recognized as Convention refugees remained the same while subsidiary protection was granted largely to those coming from regions with (civil) war while the humanitarian status lost its protective dimension, and it was only granted on compassionate grounds. However, as Tab. 17. illustrates by 2010 the AOs again granted mostly humanitarian statuses and it remained like that until 2018. During this period the share of humanitarian status oscillated between 20% and 30% of the decisions. In 2012 grants of a humanitarian status even constituted 57% of the AO's decisions, and half of the beneficiaries were people from Bangladesh, Ghana, and Nigeria--countries where the protection needs in terms of persecution or war seemed to have been rather limited. In 2011 the IO had made use of the humanitarian status for an operation to save the AO from being overburdened. Similar to the Albanian crises in 1991 and 1997, the arrival of nearly five thousand Tunisians who applied for asylum in 2011 in the wake of the uprising in Tunisia caused the authorities to declare a North African emergency. This implied that Tunisian, Egyptian, Moroccan, and Libyan immigrants who arrived in Italy during the heydays of the Arab spring were temporary tolerated.[399] The objective of this North African emergency was to alleviate the Italian asylum system and was discontinued in March 2013 (Fontana 2019). However, this decision to temporarily tolerate North Africans seems to have affected the AOs to adopt a more lenient policy towards many other nationalities too. Granting a humanitarian status, either decided by the IO or the AO was a temporary concession to prevent the asylum system from collapsing. The asylum system was under strong pressure due to the ever-increasing asylum requests. The decentralized system recruited many inexperienced protection officers. The central AO provided guidelines to these decentralized AOs among others on the granting of the humanitarian status to specific categories of asylum-seekers. For these categories there was no more need to scrutinize their personal need for protection (Fontana 2019: 437). The AOs may have interpreted the instructions in a generous manner as it was an easy way out. It was only a temporary concession for one year, in contrast to the five-year permit for the other two protection statuses.[400] Indeed following the transposition of the Recast Qualification Directive into Italian law in 2013 those who needed protection be it beneficiaries of subsidiary protection or Convention refugees both were granted a five-year renewable residence permit.[401]

Since 2011 among the ever-increasing number of decisions taken, humanitarian status is granted in particular to nationals of countries with very low recognition rates for the two protection statuses. Among the beneficiaries of humanitarian decisions, asylum seekers from Bangladesh, Gambia, Ghana, Ivory Coast, Nigeria, Mali, Pakistan, and Senegal are strongly represented. The decentralized AOs had full discretion to grant this temporary (but renewable) residence permit for one year. Many of the asylum seekers from these countries were rejected by the AOs, but a (vulnerable?) minority of them were granted a temporary residence permit of one year on compassionate grounds. When the North African emergency was closed down the

[399] For the first three nationalities they had to have arrived between January first and April 5, 2011. These three nationalities were largely kept out of the asylum system. Fontana 2019

[400] We have no information on the renewal of humanitarian permits.

[401] The rights of the Convention refugees and the subsidiary protected refugees in Italy have become very similar, except that the subsidiary protected refugee can only apply for Italian citizenship after ten years, while the Convention refugee can apply after five years.

share of positive decisions declined but it looks like, when analyzing the statuses granted to different nationalities that they were granted at random.

Tab. 16. First Instance Decisions of Italian AO, 2010-2018[402]

	Recognized de jure refugees	Subsidiary protection	Recommended for humanitarian status	Total of positive decisions
2010 (N: 12.256)	17%	15%	30%	62%
2011 (N: 21.419)	10%	12%	26%	48%
2012 (N: 27.290)	8%	16%	57%	81%
2013 (N: 21.157)	15%	26%	27%	68%
2014 (N: 35.135)	10%	24%	29%	63%
2015 (N: 66.948)	5%	15%	23%	43%
2016 (N: 87.830)	5%	15%	22%	42%
2017 (N: 76.573)	9%	9%	26%	44%
2018 (N: 87.431)	8%	5%	23%	36%

In July 2018 the Minister of Interiors Salvini (1.6.2018-9.2019) instructed the regional AOs to restrict the granting of humanitarian status. A legislative amendment abolished this status altogether in December 2018 (Fontana 2019: 441). The abolition of humanitarian protection meant that certain groups were no longer tolerated. As Tab. 17. shows, there was a significant increase in rejections at first instance.

Professionalization of the AO in 2018

The Italian asylum system had come under strong pressure, both from public opinion in Italy and from the European Commission and other European member states. The high number of positive decisions of the AO was criticized. Italy should be stricter, i.e., less discretionary and focus on granting protection and less on positive decisions based on compassionate grounds (Longo 2020, Fontana 2019: 439). In July 2018 the composition of the regional AOs was altered in favor of a more specialized profile of the protection officers. The representatives of local and law-enforcement authorities were replaced by experts in international protection who had passed a national public exam. In July 2018 250 protection officers were recruited, followed by another 160 caseworkers in 2019. Most have a master's degree in law or political science.[403] The new protection officers are fully dedicated to the asylum procedure as tenure-track civil servants. Common training and a similar university background are intended to improve the quality of decision-making in the AOs. New protection officers must undergo four weeks of training offered by UNHCR and EASO/EUAA, but the training program, provided by CNDA, UNHCR, and EASO/EUAA continues throughout their careers. These officers conduct interviews with the asylum seekers. The decision-making process is a combination of a proposal of a single member on the basis of the interview that (s)he carried out, and a decision by majority

[402] These figures were provided by the CNDA and put generously at our disposal by Iole Pina Fontana (University of Catania). We did not take into account the decisions based on applicants no longer to be traced or who did not receive a decision or who withdrew their application (which are highly likely covered by the category *Altro Esito*, although this category was not always specified). We have no figures on the decisions of the IO to grant effectively humanitarian status, which can be done independently from the AO.

[403] The official name given to the civil servants conducting interviews is *Funzionario istruttore altamente specializzato.* Among them, 30 have a PhD. Interview by Bob Mertens with an Italian protection officer, 16.2.2022 (anonymous on file at University of Ghent). The CNDA mentions the appointment of 427 new caseworkers who were distributed among the Territorial Commissions and CNDA. Interview by Bob Mertens with Francesca Ceccarini (CNDA), 27.5.2022.

in which four members of the regional AOs are involved.[404] The president, a Vice-Perfect, the UNHCR representative and two protection officers, one of whom conducted the interview, are the four members of the decision-making group. The president and the UNHCR representatives have (renewable) mandates of three years, but they no longer participate in the interviews. UNHCR has decided to disengage from the Italian RSD by 2023 given the improved quality of the decision making. As a first step, in 2021 the UNHCR staff in the AOs was replaced with experts on international protection and human rights. A public call was launched and academics, former lawyers, or people from NGOs were recruited and appointed by UNHCR, but they do not have a contract under UNHCR.[405] The panel decides and shares the responsibility for the decision. Tab. 19. shows that from 2018 onward the share of Convention refugees increased. Making abstract of the changing composition of the population of asylum seekers this shift could indicate that the AOs investigated whether war refugees in the chaos of violence of a (civil) war were targeted based on the five grounds enumerated in the Convention of Geneva. The AOs no longer chose the easiest solution of subsidiary protection but scrutinized the grounds of an eventual persecution.[406]

Special needs, either in the domain of protection or medical needs, could again be taken into account from 2019 onward. As the humanitarian status had been abolished in 2018, the new Minister of Interior Luciano Lamborgese (9.2019-2022) in the Conte government reintroduced a new humanitarian status called special protection. This protection status is granted to refugees who are excluded from protection due to the exclusionary clauses of art.1F of the Geneva Convention or because the authorities repealed the subsidiary protection of Convention status of a refugee due to a criminal record. A lack of evidence could also make the AO decide for humanitarian status. The residence permit for special protection is valid for (renewable) two years.[407]

Tab. 18. Recognition rate between 2017 and 2020 by the AOs[408]

	Convention protection	Subsidiary protection	Humanitarian status and from 2019 onward special protection
2017 (N: 76.573)	9%	9%	26%
2018 (N: 87.431)	8%	5%	23%
2019 (N: 79.850)	13%	9%	1%
2020 (N: 29.065)	16%	17%	3%

[404] Interview by Bob Mertens with a protection officer, 16.2.2022 (anonymous on file at University of Ghent).
[405] Interview by Bob Mertens with Michele Arcella (UNHCR *protection associate*), 5.4.2022 (on file at University of Ghent).
[406] The quantitative research of the University of Bergen can verify this statement by looking into the distribution of protection statuses by nationality.
[407] Interview by Bob Mertens with a protection officer, 16.2.2022 (anonymous on file at University of Ghent). The AO can recommend rejected asylum seekers to the IO for compassionate ground (medical reasons, integration in Italian society). A rejected asylum seeker can also apply directly at the Questura for a *Permesso di protezione special* because of his/her integration in Italian society, but it is the AO which decides about these applications. A ruling by the Court of Cassation states that, in the case of special protection, a balance must be struck between the life in Italy and in the country of origin. Interview by Bob Mertens with a protection officer, 16.2.2022 (anonymous on file at University of Ghent). ASGI. (2022). La "nuova" protezione speiciale nel sua primo anno di applicazione, https://www.piemonteimmigrazione.it/images/Presentazione_protezione_speciale_2_maggio.pdf Immigrazione migranti. (2021). *Permesso per protezione speciale, domanda anche in Questura*. https://integrazionemigranti.gov.it/. https://integrazionemigranti.gov.it/it-it/Ricerca-news/Dettaglio-news/id/1873/Permesso-per-protezione-speciale-domanda-anche-in-Questura- Accessed 7.7.2022.
[408] For the source see the previous table.

Appeal instances correcting the AOs?

Since the asylum legislation of 2008, appeal has been possible at the Civil Tribunal and had automatic suspensive effect, except in cases that had been processed in the accelerated procedure. Applicants have the right to be heard by the Tribunal, which in any event has the discretion to hear the applicant. The Tribunal may reject the appeal or grant international protection status to the applicant.[409] Pastore & Roman (2014) pointed out that in 2013 at the appeal stage, 71% of decisions consisted of granting subsidiary protection status. Between 2016 and 2020, the courts decided to grant protection in 37,5% of the appeals (Dallara & Lacchei 2021:2). If the first appeal was rejected, the applicant could appeal to the Court of Appeal and in case of a second negative judgement to the Supreme Court in Rome. In 2017 the law introduced specialized court sections authorized solely for examining asylum appeals. This reform of the judicial part of the asylum procedure applied to appeals lodged after 17 August 2017. Starting from that date, in case of a negative decision from the Civil Tribunal, the applicant can only lodge an appeal before the Court of Cassation. This final appeal is not suspensive and can only deal with the legal aspects of the decision. Thus, from 2017 onward the appeal at the second level (Court of Appeal) was abolished in order to accelerate the processing of asylum applications (Dallara & Lacchei 2021).

3.2.2. Greece: decentralization and professionalization under difficult times[410]

In the aftermath of the M.S.S. v. Greece and Belgium judgment in 2011, Dublin transfers from other EU member states to Greece were suspended, and Greece embarked on a complex reform of its asylum system. The strong internal as well as international pressure led to a complete overhaul of the asylum system and resulted in the establishment of an AO[411] and AT without any involvement of the police.[412] A large backlog of pending asylum cases lodged before June 7, 2013, were to be decided by the old procedure in which the competent authority for assessing applications for international protection remained the Hellenic Police. A new procedure was introduced for all asylum applications lodged after June 7, 2013, and a new AO was instituted as the competent authority for registering and assessing applications for international protection. Although this AO was established in 2011, it was only in June 2013 that it officially started operating. Its main duties were to 'receive, examine and decide on all applications for international protection lodged in Greece'.[413]

At the same time that recognition policy was no longer considered a matter for the law-and-order authorities, border management was strengthened. A fence was constructed along 10,3 km of the eastern land border with Turkey.[414] Work started in April 2012, and the fence was completed by the end of the year. UNHCR had proposed the creation of access points for the lodging and examination of asylum requests, but the Greek authorities turned down this proposal (Gkliati 2011: 109). UNHCR had insisted on this provision not only for Turkish asylum seekers, but also for those from beyond Europe, because Turkey --although an early member of the international refugee regime-- had not waived the geographic restriction of the Geneva Convention. Turkey accepted only asylum seekers from Europe. Hence, asylum seekers

[409]The appeal can also be against a decision to grant subsidiary protection instead of refugee status, and in case of rejection of any protection the appeal can be a request for a residence permit for humanitarian reasons.

[410] The chapter has benefitted from the input of Carmen Caruso and Evgenia Iliadou (both University of Surrey) who made an extensive literature survey on Greek immigration and refugee policy in this period.

[411] The AO was called Asylum Service in the English translation.

[412] Law 3907/2011, which was put into effect on January 26, 2011, included provisions for the establishment of an Asylum Service and Appeals Authority responsible for the procedures to determine international protection status (refugee and subsidiary protection status). The Presidential Decrees 113/2013 (and 141/2013) provided more details on the functioning of the Asylum Service.

[413] Law No. 3907/2011, 7/A/26-01-2011.

[414] A budget of 19 million Euros was allocated to this project. Official Gazette (FEK), 2.9.2011.

from beyond Europe in Turkey ran the risk of being sent back to their country of origin, and asylum in Greece would prevent this. The danger of chain refoulement loomed even more so over the decision of the Greek authorities to deport irregular immigrants to Turkey. Since the early 1990s Turkey had denied access to its territory to those irregular immigrants and rejected asylum seekers the Greek authorities had wanted to return over land. In 2001 Greece had concluded a readmission agreement with Turkey that enabled the Greek authorities to send back to Turkey not only Turkish nationals, but also citizens of Turkey's neighboring countries Iraq, Syria and Iran, who irregularly had entered Greece from Turkey (Gkliati 2011: 107f.). Only a well-functioning asylum system could prevent Greece from being involved in chain-refoulement. Luckily for the refugees who the Greek authorities had denied refugee status the Turkish authorities had not been eager to implement the readmission agreement.

In order to deal with the increasing number of asylum seekers Greece had four asylum procedures currently in use. During the 1990s, besides the regular procedure, an accelerated procedure (STC, MUC), a border procedure, and a Dublin procedure had been introduced. In 2015, a fast-track border procedure was added. Under the fast-track border procedure, interviews could also be conducted by European Asylum Support Office (EASO) staff. Contrary to the already existing asylum procedures, the fast-track border procedure was activated in cases of large numbers of irregular migrants arriving by sea on the Aegean islands from March 20, 2016, onward. Initially, the fast-track border procedure would be enforced for a maximum period of 6 months until January 3, 2017 (Greek Council for Refugees 2016a). However, due to reforms that had been applied in June 2016 and August 2017, the fast-track procedure remained in force beyond 2018. In the meantime, the EU–Turkey statement had changed the nature of this procedure. A central feature of the fast-track border procedure became the enforcement of (in)admissibility procedures and a differential nationality-based approach within the asylum procedure (Asylum Information Database, 2017). The concept of inadmissibility was related to the 'safe third country' and 'country of first asylum' concepts of the EU-Turkey Statement and formed the legal basis for returning irregular migrants back to Turkey (Gkliati, 2017). Under the fast-track border procedure, irregular immigrated asylum seekers were examined to assess whether Turkey could be considered a safe third country or a first country of asylum (Greek Council for Refugees 2016: 77, 81).[415] In June 2017 the AO Director had issued a regulatory decision (Gerasopoulos 2018) imposing a geographical restriction on the islands of Lesvos, Rhodes, Samos, Kos, Leros, and Chios. Under this exceptional policy, "a restriction on movement within the island from which they entered the Greek territory is imposed on applicants of international protection [...]" who are not allowed to travel into the Greek mainland but are obliged to stay on the islands.[416] Asylum seekers were kept in de facto detention, in the sense that they were not allowed to travel to the mainland; they were forced, instead, to lodge an asylum claim in the island's hotspot, and while their application was pending, they underwent a limitation of movement (Gerasopoulos 2018).

A decentralized AO staffed with civilian personnel

The AO is a Directorate within the Ministry of the Interior and Administrative Reform that examines and adjudicates all asylum requests; even the Dublin selection is decided by the

[415] Those belonging to vulnerable groups and those falling under the Dublin III Regulation concerning family reunification were exempted from these exceptional procedures. ECRE 2021; Greek Council for Refugees 2017.

[416] The geographical restriction is only lifted for some specific cases and particularly for those receiving international protection, for Syrian applicants whose claims have been determined as admissible, for those who have applied for family reunification, and for some of the applicants who have been recognised as vulnerable by the authorities. Greek Council for Refugees, 2018.

AO.[417] The Director of the AO is appointed by decision of the Minister of the Interior and Administrative Reconstruction, following a public call of interest, for a three-year term, which may be renewed once for a further period of three years. The Minister of the Interior and Administrative Reconstruction may dismiss the director before the end of the mandate either because they resign or in case, they are unable to perform their tasks or for any other serious reason related to the exercise of their duties.[418] The AO was decentralized, as it was composed of the Central Service and the Regional AOs. The Central Service plans, directs, monitors, and controls the action of twelve Regional AOs. In order to cover the very urgent needs of a temporary nature, the Director can set up Mobile Asylum Units. The economic situation of the country made the hiring of qualified staff a challenge. Although originally it had been planned to recruit 60 out of the 90 positions of specialized personnel with a renewable contract for three years, the law omitted this due to the financial crisis. There were limits to the recruitment of new staff, and many post had to be filled by civil servants who were transferred from other departments and did not always have the necessary qualifications.[419]

Applications for international protection have to be submitted by the asylum seekers in person at one of the Regional AOs or Mobile Units. Foreign nationals who express their desire to seek international protection in Greece at official ports of entry into the country (airports, seaports, and land border posts) are accompanied by the police, border guards, or coastguards to the nearest Regional AO or Mobile Units to submit their application for international protection in person. In practice, however, the vast majority apply for international protection once they are in Greece, rather than at a port of entry. The Dublin Unit of the AO bears overall responsibility for the implementation of the provisions of the Dublin Regulations. An accelerated procedure on the basis of identifying safe countries of origin was also introduced. The Ministers of Interior and Administrative Reconstruction and Foreign Affairs decide which countries are designated as safe countries of origin, based on a list of countries which the Director of the decentralized AOs proposed. The reform had immediate consequences for the recognition rate of the AO: while it was only 2% in 2011and 0.9% in 2012, it increased to 4% in 2013 and up to 25% in 2014 (Pastore and Roman 2005, 60).

Ever changing ATs

In 2013 the Composition of the AT had been reduced from six to three members. The AT was an autonomous service within the Ministry of Interior and Administrative Reconstruction. The members of the AT were appointed by the Minister from a list compiled by the National Commission for Human Rights (the President and one member) and from a list compiled by UNHCR for a (renewable) period of five years(Bolani, Gemi, and Skleparis 2016).[420] Each member of the AT alternated, on a yearly basis, as the chair of the Committee. UNHCR retained full authority to supervise the asylum procedure.[421] On July 1, 2013, 19 ATs started operations. However, from September 24, 2014, to September 24, 2015, only 10 Committees were in place, and after April 2015 only 8 of those remained operational, following the departure of members

[417] The new AO and AT fell initially under the competency of the Ministry of Public Order and Citizen Protection, but independent from the police. However, since January 2015, and in accordance with Presidential Decree 24/2015, the Ministry of Public Order and Citizen Protection, together with all the agencies and administrative bodies under its competence, have been subsumed under the new Ministry of Interior and Administrative Reform (IGC 2015).

[418] Article 2 of Law 4375/2016. The first Director of the Asylum Service was Maria Stavropoulou who is a lawyer and worked from 1990 until 2011 for the United Nations in Athens, Geneva, New York, and other countries. In 2011 she left her job as a senior regional protection officer at UNHCR's Regional Representation in Rome to direct the Greek Asylum Service in Athens. In April 2018 Markos Karavias became the Director of the Asylum Service.

[419] GNCHR (2010) https://www.nchr.gr/images/English_Site/Ektheseis/eng2010.pdf

[420] GNCHR (2012-13). https://www.nchr.gr/images/English_Site/Ektheseis/ENGLISHREPORT12_13.pdf

[421] Law No. 3907/2011, 7/A/26-01-2011

of two tribunals without being replaced. The functioning of the AT was halted on September 25, 2015, as the contracts with the members were not renewed. In July 2016 one Committee was established in order to examine appeals submitted before April 3, 2016, and its term expired on December 31, without being renewed. By then, about 3,000 appeals submitted before April 3, 2016, were still pending.[422] The operation of this AT has been scrutinized by Gkliati (2016 & 2017) in which she focused on reviews of 393 negative decisions of the AO concerning Syrian refugees who had arrived in Greece through Turkey after the EU-Turkey agreement came into force. In 390 cases out of 393, the AT examined the situation on an individual basis and overturned the ruling of the AO, deciding that the applicant's claim was admissible. They took into account the EU-Turkey deal, but did not accept an umbrella presumption of Turkey as a safe third country for Syrians. These decisions have essentially impeded the application in practice of the EU-Turkey agreement, as the applicants could not be returned to Turkey.

Law No. 4375/2016[423] modified the operation of the AT and stipulated that the members should have a university degree in Law, Political or Social Sciences, or Humanities with specialization and experience in the fields of international protection, human rights, or international or administrative law.[424] This AT never started operating as Law No. 4399/2016[425] amended their composition, introducing instead an Asylum Court[426], composed of two administrative judges (nominated for life): one chosen by the general commissioner for administrative courts and one member chosen by the UNHCR. The lifelong nomination of the majority of the court members was to assure they judged in an *independent* and impartial manner.[427] The amendment took place after 'reported EU pressure on Greece to respond to an overwhelming majority of decisions of the AT that reversed the decision of the AO not to consider the claims of asylum seekers as they could safely return to the first country of asylum, Turkey.[428] The Asylum Court with the administrative judges has upheld the inadmissibility decisions of the AO regarding applicants under the fast-track border procedure on the basis of the safe third country concept with respect to Turkey in 98% of its decisions.[429] By March 2020 the Greek authorities had returned 2.140 people to Turkey based on the EU-Turkey agreement. Nearly half of them (44%) were irregular immigrants who had not requested asylum.[430]

Provisional conclusion

Throughout the period 2006-2018 we observe a rather divergent implementation and interpretation of the Convention refugee and subsidiary protection status by member states. This divergence can be attributed to both preexisting (divergent) national practices and poor European legislation, neither contributing to the aspired harmonization. The Geneva

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[422] Asylum Information Database (AIDA), Country Report: Greece, Greek Council for Refugees, 2016. Retrieved from www.asylumineurope.org/sites/default/files/report-download/aida_gr_2016update.pdf.
[423] L 4375/2016, 51/A/3-4-2016.
[424] Asylum Information Database (AIDA), Country Report: Greece, Greek Council for Refugees, 2016. Retrieved from www.asylumineurope.org/sites/default/files/report-download/aida_gr_2016update.pdf.
[425] L 4399/2016, Gazette 117/A/22-6-2016
[426] In Greek Ανεξάρτητες Αρχές Προσφυγών, they were called Independent Appeals Committee in the English translation.
[427] European Parliament, International protection in Greece: Background information for the LIBE Committee delegation to Greece 22-25 May 2017, 2017. Retrieved from www.europarl.europa.eu/RegData/etudes/STUD/2017/583145/IPOL_STU(2017)583145_EN.pdf. For the best part of 2016, there were three different ATs. The new AT and the other, older Ats, which were dealing with appeals for different transitional regimes. Gerasopoulus 2018.
[428] Asylum Information Database, Country Report: Greece 2016, p. 14-15. Retrieved from www.asylumineurope.org/sites/default/files/report-download/aida_gr_2016update.pdf.
[429] Asylum Information Database, Country report Greece for 2017.
[430] UNHCR, Returns from - Greece to Turkey, March 30, 2022. file:///C:/Users/fcaestec/Downloads/GRC_Returns2Turkey_MonthlyUpdate_202003311.pdf

Convention of 1951 defined a refugee as a person who 'owing to well-founded fears of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country". The subjective refugee concept of the Geneva Convention and the many different grounds of persecution it enumerated was an expansion in contrast to previous, narrower, objective refugee concepts. This refugee definition turned out to be open enough to acknowledge in a time span of 70 years very different kinds of persecution and to respond to new sensitivity in this domain. International refugee law was not static, but a living phenomenon and the aim of international refugee law must be to craft a response to people in need of international protection so that they are harmed by the very selective immigration control of the states of continental Europe. EU law has added to this challenge by adopting the Convention refugee to the times we are living in and by designing subsidiary protection for those who have to flee for violence without being targeted on one of the five Convention grounds. Violence for which they were not protected by their state, sometimes because there was no more state.

Already by the 1980s, the law-and-order perspective on international migration largely dominated policy making to the detriment of a generous protection for refugees. Thus, before the demise of the Communist bloc and in its wake the large-scale migration from Eastern Europe the international humanitarian approach had lost ground. Denmark, Switzerland and Austria were leading the way, followed with great difficulty by Germany. Dismissing asylum claims, but also acceleration of the asylum procedure through tools as border procedure, MUC, STC, SCO, but also quick recognition decisions without interviewing the asylum seeker were the hallmarks of the new policy.

The feeling of an impending immigration crisis was aggravated in particular by the sudden flight from Yugoslavia and Albania. In Italy and Greece, the legislative preparation for a balanced Aliens Law, which provided as well space for refugee protection as gave the state the tools to implement a selective immigration policy was on its way, but the section of refugee protection was chucked away by the (perception of an) Albanian avalanche. The Yugoslavian refugee crisis in its turn provided policy makers with the opportunity to (further) experiment with circumventing *de jure* protection based on the Convention of Geneva. From 1992 onwards the support for refugee protection light strongly increased. At the same time the breakthrough of Article 3 of the ECHR implied a strengthened protection for refugees.

This is the background for our investigation into the institutional place and role of the Asylum Offices. This report traces the development of asylum offices as decision makers in asylum matters. It shows how asylum offices became an intrinsic part of the institutional landscape of the state in each of our countries. This working document provides us with strong foundations for a comparative analysis to unpack the changing role and place of this institution in the different country case studies. Policy makers in Germany and Belgium gave already in 1990 confidence to their AOs for interpreting article 3 of the ECHR in favor of refugee protection, while in France and Italy the Ministry of Interior hesitated for more than a decade to do so and retained this competence fully within their proper hands until respectively 2006 and 2009. In the Italian case the AO acquired this competence only with the help of the judiciary. The judiciary did also in the Austrian case in 2001 strengthened the role of the AO.

Our analysis of recognition policy points out the great variation in responses to protection needs. It provides numerous examples of a passive attitude of the AO towards the need of protection of refugees –the German and Austrian AO in the early 1990s-, but also active and even pro-active policies –the Belgian and French AO respectively in the early 21st century and the early 1990s. That we have a clearer insight into the attitude of the latter institutions is due to their greater autonomy, while the strategy of those asylum offices which were merely an

administrative unit within a larger department is more difficult to disentangle. Their decision making remained opaque. In our exploration of the governance of international protection we paid more attention to compare the results of the recognition decisions, in particular of war refugees. For our comparative approach the attitude of the AOs towards war refugees from Somalia, Sri Lanka and Yugoslavia has been pursued in more depth to find out more about similarities and differences. This in-depth analysis of the manner refugees were protected (or not) throughout the last decades in different national contexts provides us with a long term insight in how refugee policy is being formulated and what the role of the AO was in this response to protection needs. This remained largely a descriptive overview, but we will further our analysis in the work to come. The final conclusions will be integrated into the final result of the Protect research program.

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