



# The RESEARCHER

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## Welcome to the October 2015 issue of *The Researcher*.

In this issue Maria Hennessy from the Irish Refugee Council writes on the refugee crisis in Europe and beyond.

Theresa McAteer, solicitor and Data Protection Officer discusses the issue of asylum seeker's rights relating to data protection.

David Goggins, Refugee Documentation Centre investigates human rights issues in Uzbekistan.

Librarian Zoe Melling also of the RDC provides an update on developments in the Common European COI Portal.

Brian Collins, Irish Refugee Council discusses the issue of discrimination or persecution in relation to LGBT asylum applicants.

Writing on Pakistan, Patrick Dowling of the Refugee Documentation Centre focuses on the troubled province of Balochistan.

Jeff Walsh discusses the Temporary Protection Directive its advantages and disadvantages in the current situation.

Many thanks to all our contributors, if you are interested in contributing to future issues please contact us at the email address below.

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## Respecting the right to asylum within the current refugee crisis in Europe



By Maria Hennessy<sup>1</sup>

### The refugee crisis in Europe and beyond

Globally we are experiencing the biggest forced displacement of people since World War II. In 2015 more than 300,000 persons crossed the Mediterranean with almost 3,000 persons reported missing or dead after undertaking that hazardous journey.<sup>2</sup> That is the stated figure but it is likely there have been many more deaths at sea and people that have been unaccounted for who have lost their lives along the way. This article aims to briefly examine Europe's response to the current refugee crisis by firstly analysing the current context and actions with respect to protection mechanisms within Europe and outline a number of measures which political leaders can take to ensure that the right to seek asylum is guaranteed in practice as well as in law.<sup>3</sup>

The majority of persons arriving in Europe have *prima facie* grounds for refugee status and subsidiary protection with many originating from the Syrian Arab Republic, Afghanistan, Eritrea and Iraq so it is misleading that some commentators refer to this as a 'migration' crisis, it is primarily a forced migration phenomenon i.e. refugee crisis due to conflict and persecution. During the first quarter of 2015 185,000

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<sup>2</sup> UNHCR, Refugees/Migrants Emergency Response-Mediterranean, September 2015; UNHCR, Crossings of Mediterranean Sea exceed 300,000 including 200,000 to Greece, 28 August 2015.

<sup>3</sup> The article mainly focuses on avenues to protection in Europe and does not examine joint operations Poseidon and Triton in the Mediterranean Sea which according to the Commission has saved more than 122,000 lives or the EUNAVFOR Med programme which is the naval operation against migrants and smugglers.

new applications for international protection were submitted in Europe more than half of which applied for asylum in Germany and Hungary.<sup>4</sup> Similarly, the second quarter of 2015 experienced 213,200 new asylum applications in Europe representing approximately 98,000 more than in the previous same quarter in 2014.<sup>5</sup> However, it is important to put this into perspective in terms of the broader context of regional protection. Turkey alone hosts more than 1.8 million refugees from Syria and Lebanon hosts approximately 1.1 million Syrian refugees which represents approximately 25% of their entire population.<sup>6</sup> These countries and others like Jordan are under significant pressure. The basic needs of many refugees are not being met there which is further exacerbated by the fact that humanitarian organisations and UN service providers such as the UN High Commission for Refugees are experiencing significant deficiencies in their funding which restricts their ability to deliver essential services on the ground. Therefore when examining Europe's approach to the refugee crisis it is necessary that the needs of those displaced within the region is also taken into consideration and sufficient funding is provided to support humanitarian work there.

### The response so far...

European leaders appeared hesitant at first to acknowledge and address the emerging refugee crisis, particularly so in light of the fact that the Syrian conflict started in March 2011.<sup>7</sup> Since then the response has formed part of broader migration proposals as the recasting of the Common European Asylum System 'asylum package' was due to be transposed and implemented at the national level by June 2015.

In May 2015 the European Agenda on Migration was established in order to provide a comprehensive approach to migration management over the medium to long term. It aims at linking both internal and external policies on migration and is composed of four pillars: Reducing the incentives for irregular migration, a strong asylum policy, saving lives and securing the external borders and establishing a new policy on legal

<sup>4</sup> Eurostat, Asylum in the EU in the first quarter of 2015, 11/2/2015 – 18 June 2015.

<sup>5</sup> Eurostat, Asylum Quarterly Report

<sup>6</sup> For more information on the crisis in the region see for example ICMPD, [The refugee crisis outside Europe is much worse by Claire Healy](#), 29 September 2015.

<sup>7</sup> Although it should be noted that people fleeing Syria remained within the region or where internally displaced within Syria for a significant period of that time. There are still at least 7.6 million internally displaced persons in Syria as of July 2015.

migration.<sup>8</sup> Following further tragedies and loss of lives at sea in May 2015, the Commission issued implementing measures including a proposal under the emergency response mechanism in Article 78(3) of the Treaty on the Functioning of the European Union for the emergency relocation of 40,000 asylum seekers from Greece and Italy over a two year period and a recommendation to Member States to resettle 20,000 people identified by UNHCR as being in clear need of international protection from outside Europe. Amongst other measures the Commission issued an EU action plan against migrant smuggling (2015-2020) which encompassed identifying, capturing and disposing of smuggler's vessels including towing them to shore and scrapping them.<sup>9</sup>

In terms of the relocation proposal, the frontline Member States of Greece and Italy were identified at that time as being confronted with 'exceptional migratory pressure.' The relocation proposal also contained specific guarantees for asylum seekers in that they had to be properly notified of the relocation decision and the right to be relocated with family members in the same Member State and the best interests of the child was a primary consideration.<sup>10</sup> It should be noted that the actual consent of the asylum seeker is not part of the relocation programme. In July 2015 it was announced that Ireland agreed to opt-in to this relocation measure in accordance with Protocol no. 21 to the Treaty on the Functioning of the European Union and thereby agreed to accept 600 asylum seekers as part of the relocation programme over the next two years. The European Council formally agreed upon these provisional relocation measures for the benefit of Italy and Greece on the 14<sup>th</sup> September.<sup>11</sup>

At a further European Council meeting in June 2015 a three-pronged approach was recommended to be advanced in parallel: 1) relocation and resettlement; 2) return, readmission and reintegration; 3) cooperation

<sup>8</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda for Migration, COM(2015) 240 final, 13.5.2015.

<sup>9</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU action plan against migrant smuggling (2015-2020), COM(2015) 285 final.

<sup>10</sup> European Commission, Proposal for a Council decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece, 2015/125 (NLE), COM(2015) 286 final.

<sup>11</sup> Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measure in the area of international protection for the benefit of Italy and of Greece, L 239/146, 15.9.2015.

with countries of origin and transit.<sup>12</sup> The European Council failed to agree to the full relocation of 40,000 asylum seekers from Greece and Italy at that time but agreed to the relocation of 32,256 persons along with a future pact to update the figures to 40,000 by December 2015.<sup>13</sup> The setting up of 'hotspots' in frontline Member States was also recommended for the 'swift identification, registration and fingerprinting of migrants' involving Europol, EASO and Frontex. The Council stated that such 'hotspots' were required as "this will allow to determine those who need international protection and those who do not."<sup>14</sup> Referring to the 'hotspots' for that purpose appears to indicate a type of screening, admissibility procedure which is questionable in terms of its compliance with international human rights law and the right to seek asylum if fair procedural safeguards are not in place. As examined by Frances Webber many questions arise as to the procedures surrounding these 'hotspots'.<sup>15</sup> The international human rights obligations of screening Member States in these 'hotspots' are also of relevance in cases where other asylum seekers are left behind to seek protection in flawed asylum procedures bearing in mind the principle of non-discrimination.<sup>16</sup>

The European Council conclusions also established a pilot project of an EU resettlement scheme for the resettlement of 20,000 persons outside of Europe. Ireland agreed to participate in this proposal by offering to resettle 520 persons. Despite these measures the main emphasis in the Council conclusions was on return and non-admittance to the territory. The European Council called upon the Commission to establish provisions to strengthen the use of 'safe country of origin provisions' in the recast Asylum Procedures Directive including the potential establishment of a common EU list of 'safe countries of origin' as well as emphasising the need for a swift and effective return policy including the establishment of a dedicated European Return Programme.<sup>17</sup>

In light of further arrivals of asylum seekers and the need for more support for Greece, Italy and Hungary, on the 9<sup>th</sup> of September 2015 the Commission

<sup>12</sup> European Council Conclusions, Brussels 26 June 2015, EUCO 22/15, CO EUR 8, CONCL 3

<sup>13</sup> Council of the European Union, Outcome of the 3405<sup>th</sup> Council meeting on Justice and Home Affairs, Brussels 20 July 2015, 11097/15.

<sup>14</sup> European Council, European Council Meeting Conclusions (25-26 June 2015), 26 June 2015, EUCO 22/15, page 2.

<sup>15</sup> EU Law Analysis, 'Hotspots' for asylum applications: some things we need to urgently know, Frances Webber, 29 September 2015.

<sup>16</sup> This may be drawn from the jurisprudence of the European Court of Human Rights such as ECHR, M.S.S. v. Belgium and Greece, Application no. 30696/09, 21 January 2011.

<sup>17</sup> Ibid, page 4.

announced a second emergency measure to relocate a further 120,000 asylum seekers from those Member States along with a permanent relocation mechanism within the Dublin Regulation framework to deal with future similar events.<sup>18</sup> This action also occurred due to a significant change in public opinion and mood and therefore political climate upon the release of stark images capturing the human tragedy of the refugee crisis, the death of three year old Aylan Kurdi and his five year old brother Galip and their mother. Among other measures the Commission suggested a Regulation to establish a common European list of safe countries of origin which would include the following proposed countries Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Kosovo, Montenegro, Serbia and Turkey.<sup>19</sup> It is questionable whether all of these countries can be deemed safe in terms of respect for the human rights of minorities such as Roma and other human rights breaches as demonstrated by European Court of Human Rights jurisprudence.<sup>20</sup> Furthermore, the Commission proposed a common Return Handbook and an EU Action Plan on Return to make return policy more effective in practice. On 22 September 2015 during the EU summit the European Council agreed on the relocation of 120,000 persons within Europe whilst noting that Hungary indicated its wish not to be included as a beneficiary in the relocation scheme. In the coming months, these proposals will be implemented and asylum seekers will be relocated across Europe from Greece and Italy.

Overall apart from a number of unilateral actions by some Member States to welcome refugees such as Germany and the relocation and resettlement proposals, the dominant European approach has been one of delayed action, deterrence and border control with the focus on restricting access to Europe, returns and targeting smugglers with limited discourse on even addressing root causes. That said, whilst addressing root causes is central to resolving the situation in the future, this should also be complemented by measures to improve access to international protection in Europe now. In his address to the European Parliament on the informal meetings of heads of State or government, President Donald Tusk stated “*It is our common obligation to assist refugees as well as to protect EU’s*

*external borders.*”<sup>21</sup> Assisting refugees should be the primary goal and this can only be addressed by ensuring safe and legal avenues to protection in Europe within any border control measure. The proposed relocation and resettlement measures are positive steps of solidarity but some Member States could still do so much more. For example, Ireland, only after strong public pressure, announced that it will take 3,500 asylum seekers under the relocation scheme.<sup>22</sup> Though a positive measure to be welcomed, it is somewhat insufficient in comparison to Greek islands like Kos which at times are receiving approximately 2,000 persons per week arriving by sea seeking international protection.

### Ensuring access to protection

Despite the current measures taken at the European level, more needs to be done to ensure access to protection for those seeking safety in Europe. Many questions remain as to proposals being explored such as the reference to swift effective returns at ‘hotspot’ areas as well as the establishment of common safe countries of origin. It is important that a ‘most favoured’ refugee approach focusing primarily on Syrians and Eritreans is not taken in that many asylum seekers from many other countries will also have individual strong grounds for protection. This is also important in light of the principle of non-discrimination in Article 3 of the 1951 Refugee Convention.

Ensuring access to protection should be the central objective at the heart of these developments. Here are a few suggested measures in this regard:

- Provide safe and legal avenues to access protection

People are risking their lives in order to access protection in Europe by taking to dangerous waters on unseaworthy vessels or hiding in lorries at the mercy of smugglers. Sophisticated and sometimes ruthless smuggling networks can only be weakened if alternatives are available so refugees have more safe and legal avenues to access protection in Europe.

Mandatory visa requirements, carrier sanctions and the use of restrictive admissibility procedures within flawed procedures all restrict access to international

<sup>18</sup> European Commission, State of the Union 2015: Time for Honesty, Unity and Solidarity, Strasbourg, 9 September 2015.

<sup>19</sup> European Commission, Refugee Crisis: European Commission takes decisive action, Strasbourg 9 September 2015.

<sup>20</sup> For a good analysis of the Commission’s proposal on safe countries of origin see EU Law Analysis, ‘Safe Countries of Origin’: Assessing the new proposal, Steve Peers, 14 September 2015.

<sup>21</sup> European Council Press Office, Address by President Donald Tusk to the European Parliament on the informal meeting of heads of State or government of 23 September 2015, 702/15, 06/10/2015.

<sup>22</sup> References in Irish media to the figure of 4,000 persons for the Irish response to the refugee crisis also includes the figure of 520 persons who are currently being resettled here under a two year programme.

protection procedures in Europe. Some unilateral actions of Member States such as pushbacks at land, sea and air borders also constitute a breach of the *non-foulement* principle. Some steps to improve access include the abolishment of carrier sanctions as well as the issuing of humanitarian visas and the waiving of visa requirements in certain circumstances for example by taking a more flexible approach to documentation requirements where obstacles exist to access such documents in the respective country of origin. Member States may also issue visas on humanitarian grounds as noted in a 2014 European Parliament study which reported that the possibility to issue national visas for humanitarian reasons has been deployed by nine Member States in the past.<sup>23</sup> Humanitarian visas would allow for access to the territory by the issuance of visas at embassies and consulates to enable vulnerable people seeking protection to access EU territory legally and therefore not take risks at the fate of smugglers on hazardous journeys. A common EU approach to humanitarian visas could also be envisaged by the revision of the EU Visa Code.

Improving and enhancing the facilitation of family reunification could also form part of this response by extending it to include broader family members and relatives and waiving some of the dependency and documentation requirements for vulnerable persons. Other avenues of legal migration could also be further explored such as ensuring a more flexible approach to the extension of other work or student visas for people coming from crisis regions as well as waiving some of the requirements for such admission categories whilst bearing in mind that these are not alternatives to accessing the protection system.

- An alternative to the Dublin system

The Dublin system simply is not working and this is all the more evident in the current refugee crisis. Germany, for example, unilaterally suspended the Dublin system for Syrian asylum seekers in August 2015 and Chancellor Angela Merkel referred to it as being obsolete in its current form and called for a new approach based on fairness and solidarity.<sup>24</sup> As long as the baseline for the Dublin system remains the requirement that asylum applications be dealt with by the first country of entry it will continue to be inherently flawed. The autonomy of refugees and

<sup>23</sup> European Parliament, Directorate-General for Internal Policies, Policy Department –Citizens Rights and Constitutional Affairs, Humanitarian visas: option or obligation? Study for the LIBE Committee, September 2014; See also EU Law Analysis, Do potential asylum seekers have the right to a Schengen visa?, Steve Peers, 20 January 2014.

<sup>24</sup> Irish Times, Migrant Crisis: Merkel, Hollande warn against nationalism, 7 October 2015.

asylum seeker's own preferences and wishes are lost in the current Dublin system which also means that it will not deter secondary movement in practice. Even the proposed relocation measures which are an exceptional derogation to the Dublin system do not take into consideration asylum seeker's own choices. Alternative models of responsibility sharing need to be piloted where the voice of the asylum seeker is to the fore and their own free choice forms part of the allocation of responsibility for the examination of their protection applications. Other models such as distribution keys based on GDP and other factors have also been suggested. However, as long as such systems involve forced movement of asylum seekers to Member States other than where they expressed a wish to claim asylum they will remain problematic.

The lessons learnt by the current refugee crisis and the failure of the Dublin system needs to be analysed with respect to the forthcoming evaluation of Dublin. In the meantime the current recast Dublin III Regulation should be suspended by all Member States except where it is used for the purposes of family unity and humanitarian reasons to bring families and relatives together.

- Explore the application of the Temporary Protection Directive

The Temporary Protection Directive has to date never been applied in Europe.<sup>25</sup> This is also partly due to the requirements needed to activate this Directive to address what it refers to as 'mass influxes of displaced persons.' It requires a Council decision adopted by a qualified majority based on a Commission proposal to be triggered and contains a rather unclear definition of 'mass influx' which complicates matters.<sup>26</sup> However there are a number of useful provisions in the Directive which could be adapted to meet the demands of the refugee crisis without prejudice to individual protection applications such as the solidarity mechanism. The Commission is currently undertaking an evaluation of the Temporary Protection Directive and the feasibility of its adaptation and application to

<sup>25</sup> Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, O.J. L212/12, 07.08.2001.

<sup>26</sup> Article 2(d) of Council Directive 2001/55/EC refers to 'mass influx' meaning a "arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme".

address the present crisis should also form part of that evaluation.<sup>27</sup>

All of this needs to be combined with comprehensive funding and budgetary support. It is important that frontline Member States have sufficient reception facilities to respect the fundamental rights of asylum seekers including their right to personal dignity even in such exceptional situations. Therefore the activation of the Civil Protection Mechanism could be explored further as well as increasing emergency funding for most affected Member States as suggested by the European Commission.<sup>28</sup>

### The future

Many of the measures proposed by the EU institutions are short and medium term priority actions and are not adequate to meet the ongoing needs of refugees. As military action increases in Syria and conflicts continue in other regions of the world it is evident that more and more people will continue to be displaced and seek protection. Along with the proposed measures as outlined above the core instruments that comprise the Common European Asylum System, principally the recast Qualification Directive, the recast Asylum Procedures Directive and the recast Reception Conditions Directive, should not be ignored as part of a common response. In that regard the action of the European Commission to take forty infringement decisions against Member States concerning the asylum acquis on 23 September is to be welcomed.<sup>29</sup> Effective implementation of EU human rights and asylum law will be crucial in going forward.

Strong political leadership is essential. A somewhat overlooked aspect of the response to the refugee crisis has been the inspiring generosity of individual members of the public, communities and non-governmental organisations who have committed selfless acts of solidarity with refugees as well as providing essential humanitarian services for those seeking protection in Europe and beyond where government action has been lacking or piecemeal. The political leaders of Europe should learn from and build upon these exemplary actions of the general public to provide a comprehensive response which places

<sup>27</sup> European Commission, Forward Planning of Evaluations by the European Commission for 2014 and beyond.

<sup>28</sup> European Commission, Managing the refugee crisis: Immediate operational, budgetary and legal measures under the European Agenda on Migration, Brussels, 23 September 2015. Greece and Hungary have previously requested and received funding in relation to the asylum crisis under the Civil Protection Mechanism.

<sup>29</sup> European Commission, More responsibility in managing the refugee crisis: European Commission adopts 40 infringement decisions to make European Asylum System work, Brussels 23 September 2015.

fundamental human rights at the centre of common asylum and migration policy and action.

Steps have been taken but more action is required in order to address the current situation in a coherent, comprehensive and efficient manner. A combined response is required in sharing responsibility for those seeking protection in Europe. The primary aim should be correctly identifying the protection needs of all persons seeking asylum in a non-discriminatory manner. Immediate effective action is vital if the right to asylum is to be upheld in Europe and as winter approaches and more people undertake dangerous journeys by sea and land this is even more urgent. As Jean- Claude Juncker, President of the European Commission plainly stated *“Do not underestimate the urgency. Do not underestimate our imperative to act. Winter is approaching – think of the families sleeping in parks and railway stations in Budapest, in tents in Traiskirchen, or on shores in Kos. What we will become of them on cold, winter nights?”*<sup>30</sup>

-END-



<sup>30</sup> European Commission, State of the Union 2015: Time for Honesty, Unity and Solidarity, Strasbourg, 9 September 2015.

## The rights of asylum seekers to data protection in the EU



Theresa McAteer, solicitor, Certified Data Protection Officer

In recent times, there have been huge developments in technology that allow bigger and better collation and processing of data. The advent of cloud computing has enabled an almost limitless capacity for storage of data. The ease of transfer of data by technological means facilitates immediate access to vast swathes of information. Furthermore, data processing can now go deep into peoples' private space to ascertain their most personal choices.<sup>31</sup> Reconciling privacy rights of individuals with these developments pose challenges at both national and EU level.<sup>32</sup>

With high profile cases such as *Schrems v Data Protection Commissioner*<sup>33</sup>, *Digital Rights Ireland*<sup>34</sup> and *Google Spain*<sup>35</sup> attracting popular attention, the question of how best to protect the individual's right to privacy in their personal data is very real and pressing.

<sup>31</sup> See Chapter 23 Denis Kelleher, *Privacy and Data Protection Law in Ireland* 2<sup>nd</sup> edition (Bloomsbury 2015)

<sup>32</sup> See the commentary of the EDPS in Opinion 4/2015 "Towards a new digital ethics" dated 11<sup>th</sup> September 2015 available at [https://secure.edps.europa.eu/.../site/.../15-09-11\\_Data\\_Ethics\\_EN.pdf](https://secure.edps.europa.eu/.../site/.../15-09-11_Data_Ethics_EN.pdf)

<sup>33</sup> *Schrems v Data Protection Commissioner* C-362/14 (finding that the "safe harbour agreement" under which data is shared between eu and us is invalid)

<sup>34</sup> *Digital Rights Ireland* (Judgment of the Court) [2014] EUECJ C-293/12

<sup>35</sup> *Google Spain* (Judgment of the Court)[2014]EUECJ C-131/12

It is vital that, within the EU, the right to privacy and the broader right to data protection are protected in respect of those who are particularly vulnerable (such as asylum seekers).

### The right to data protection under EU law.

The right to data protection is promulgated in both ECHR and the EU Charter on fundamental rights. It is a qualified right.

Article 8 of the European Convention of Human Rights and Fundamental Freedoms (ECHR) provides for a right to respect for privacy and family life.<sup>36</sup>

A broadly similar right is found at Article 7 and Article 8 of the EU Charter on Fundamental Rights.<sup>37</sup>

Article 7 states:

*"Everyone has the right to respect for his or her private and family life, home and communications."*

Article 8 states:

*"1. Everyone has the right to the protection of personal data concerning him or her.*

*2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.*

*3. Compliance with these rules shall be subject to control by an independent authority."*

The seven data protection principles as set out in the Charter are as follows: necessity, proportionality, fairness, data minimisation, purpose limitation, consent and transparency. These principles must apply to data processing in its entirety.

### What constitutes personal data?

The Court of Justice of the European Union ("CJEU") has set some parameters on what constitutes personal data for the purpose of EU law in the joined cases of *YS, M, and S v Minister for Immigratie, Integratie en Asiel*.<sup>38</sup>

<sup>36</sup> OJ 2000 C 364, p1

<sup>37</sup> On the application of the Charter and that of the ECHR see Denis Kelleher, *Privacy and Data Protection Law in Ireland* 2<sup>nd</sup> edition (Bloomsbury 2015) at Chap 4

<sup>38</sup> *YS* [2014] EUECJ C-141/12 (17 July 2014)

This case concerned asylum seekers who sought access to their case files in the Netherlands where they had sought asylum.

The applicants; YS, M and S had each made an application for residency in the Netherlands. While M and S were successful in their applications, YS was not granted residency. The three applicants had requested the full “minute” containing the legal analysis which informed the Dutch Immigration authorities respective decisions in relation to the three residence applications. One of the three received a summary of their personal data. However all three were refused access to the full “minute” containing the legal analysis that informed the refusal. The three applicants did not rely on the asylums procedure Directive when making a request for the entire “minute” but instead made a subject access request pursuant to the Data protection directive.<sup>39</sup>

The applicants brought the matter to the Dutch courts who in turn referred a number of questions to the CJEU.

They can be summarised as follows:

- 1) Was the data as contained in the “minute” personal data within the meaning of Article 2 (a) of the Data Protection Directive<sup>40</sup>?
- 2) Was the legal analysis contained in the minute “personal data” as per Article 2 (a) of the Directive?
- 3) Do Article 12(a) of the Directive and Article 8(2) of the Charter of Fundamental Rights of the European Union require that the applicant be given a copy of the entire minute or is it sufficient to provide a summary, in intelligible form, of the personal data?

With regard to the facts as set out in the “minute” the CJEU held that there was no doubt that such data as the applicant's name, date of birth, nationality, gender, ethnicity, religion and language, constituted information relating to the applicant, and was therefore 'personal data'.

With regard to the second question, according to the CJEU, the legal analysis as contained in the “minute” was not personal data. The court held that although

such an analysis ‘may contain personal data, it does not in itself constitute such data within the meaning of’ that Directive. That analysis ‘is not information relating to the applicant for a residence permit, but’ rather ‘information about the assessment and application by the competent authority of that law to the applicant’s situation’, based on the personal data available to the authorities.

With regard to the third question, the Court held that a summary of the personal data would suffice.

The Dutch court had also asked about the possible application of Article 41 of the Charter, which sets out the right to good administration. The CJEU stated that this Charter right applied only to EU bodies, not to national administrations and accordingly could not be relied on by the applicant. However, the court noted that it had only been asked to decide whether Article 41 applied in this instance. The Court did re-iterate that the right to good administration could still be invoked against national authorities as a *general principle*, as distinct from a Charter right.

*“It should be noted from the outset that Article 41 of the Charter, ‘Right to good administration’, states in paragraph 1 that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the European Union. Article 41(2) specifies that that right includes the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy.*

*67 It is clear from the wording of Article 41 of the Charter that it is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union (see, to that effect, the judgment in Cicala, C-482/10, EU:C:2011:868, paragraph 28). Consequently, an applicant for a resident permit cannot derive from Article 41(2)(b) of the Charter a right to access the national file relating to his application.*

*68 It is true that the right to good administration, enshrined in that provision, reflects a general principle of EU law (judgment in HN, C-604/12, EU:C:2014:302, paragraph 49). However, by their questions in the present cases, the referring courts are not seeking an interpretation of that general principle, but ask whether Article 41 of the Charter may, in itself, apply to the Member States of the European Union.”*

<sup>39</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data *Official Journal L 281*, 23/11/1995

<sup>40</sup> Ibid



With increased data sharing between EU countries by national law enforcement agencies and by EU law enforcement agencies, the question of what legal principles inform such data sharing arise.

Data sharing occurs in the Area for Freedom, Security and Justice (AFSJ) in areas relating to border checks, asylum, immigration, judicial cooperation in civil and criminal matters and police cooperation within the EU.<sup>41</sup> Under the Lisbon Treaty, Ireland and the UK negotiated an ‘opt-in’ protocol - Protocol 21 to the Treaty on European Union and to the TFEU - in respect of measures proposed under the area of Title V (Freedom, Security and Justice). In practice, Ireland has opted in to the majority of measures in this area. The AFSJ actors at EU level in the data processing and data protection framework of the EU are Europol, Eurojust, Frontex as well as the European Commission anti-fraud unit OLAF.

The information systems established in the framework of policing, custom/border control and immigration control within the AFSJ are Schengen Information System (SIS and SIS II) the Visa Information System (VIS), the Customs Information System (CIS) and Eurodac.<sup>42</sup>

This paper examines the data protection issues that arise in the context of Eurodac only.

## Eurodac

The original Eurodac regulation was adopted in 2000 and was in operation in the EU since 2003.<sup>43</sup> It was originally intended to prevent multiple asylum applications and unauthorised entry by third country nationals into the states participating in Eurodac, being enacted to implement the Dublin II regulation.<sup>44</sup> As well as taking fingerprints of asylum seekers for the purpose of comparison with the fingerprint data previously (and subsequently) transmitted to the Eurodac database, the Eurodac regulation also required

that Member states record the fingerprints of those illegally crossing borders so that they can be checked against those fingerprints subsequently taken from asylum seekers.<sup>45</sup>

A new Eurodac Regulation to implement the Dublin III regulation<sup>46</sup> has been operational since 20<sup>th</sup> July 2015.<sup>47</sup> The new regulation significantly extends national law enforcement and Europol powers to examine and share data in Eurodac.

Article 1(2) of the regulation provides that data may be searched for the purposes of the “prevention, detection and investigation of terrorist offences and other serious criminal offences” (article 1(2)).

In November 2012, UNHCR expressed their concern at the proposals for a recast Eurodac and made a number of specific recommendations as follows:

“In particular, UNHCR recommends that:

- the possibility of error in matching fingerprints and the wrongful implication of asylum-seekers in criminal investigations is fully examined and eliminated to the greatest extent possible before the possibility to search ‘Eurodac’ with latent fingerprints is introduced;
- the provisions on the prohibition of transfer of information on asylum-seekers or refugees to third countries are reinforced and clarified to eliminate any gaps in the protection of data;
- the potential for stigmatisation of asylum-seekers as a particularly vulnerable group is evaluated;
- the scope of the instruments is limited to cases where there is substantial suspicion that the perpetrator or suspect has applied for asylum; and

<sup>45</sup> Chapters II-III Eurodac Regulation, OJ 2000, L-316/1.

<sup>46</sup> Council Regulation EU No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-Country national or a stateless person.

<sup>47</sup> Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of ‘EURODAC’ for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with EURODAC data by Member States’ law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operation management of large-scale IT systems in the area of freedom, security and justice.

<sup>41</sup> For a comprehensive overview of the AFSJ see “The Legitimacy of The European Union Through Legal Rationality: Free movement of third country nationals” Richard Ball, Routledge Press 2014 at chapter 3 ...

<sup>42</sup> Regarding UK participation in EU border control and the CEAS see the policy primer “The UK, the Common European Asylum System and EU immigration law” by Dr Cathryn Costello, May 2014 Migration Observatory Oxford

<sup>43</sup> Council Regulation No 2725/2000 of 11 December 2000 concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention

<sup>44</sup> [COUNCIL REGULATION \(EC\) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national](#). *Official Journal of the European Union* L (50/1). 2003-02-25.

- the applicant is informed that his/her data may be used for the purpose of criminal investigations.<sup>48</sup>

The European data Protection Supervisor is charged with supervising the implementation of the Eurodac Regulation (recast). Two years ago, the Eurodac Supervision Coordination Group indicated that given the wider right of access by law enforcement authorities there would be required under the recast directive “close monitoring of the new rules that allow also law enforcement authorities to have access to Eurodac data. This could take the form of a future visit to the Eurodac Central System, and the national systems of some Member States, to check the embedment of the privacy by design principle and data protection requirements foreseen by the Eurodac Recast.”<sup>49</sup>

### What principles of EU law inform data retention?

It is worth contrasting the provisions of the Eurodac directive (recast) with the ill-fated Data retention directive.<sup>50</sup> The data retention directive required that member states store telecommunications data used within the EU for a minimum of 6 months and at most 24 months. Under the directive, law enforcement agencies were empowered to request access to details such as IP address and time of use of every email, phone call and text message sent or received.

In a challenge to the validity of the Directive, Digital Rights Ireland<sup>51</sup>, the ECJ held that the retention of data as per Article 3 and 5 of the Directive constituted an interference with Article 7 (privacy) Article 8 and Article 11 of the Charter. The Court accepted the argument of the EU institutions that such interference could be justified on the grounds of the Directive’s usefulness in the fight against serious crime and terrorism.<sup>52</sup>

<sup>48</sup> UNHCR :An efficient and protective Eurodac- UNHCR comments on the Commission’s amended proposal for a Regulation of the European Parliament and of the Council on the establishment of ‘EURODAC’ for the comparison of fingerprints for the effective application of Regulation (EU) No (...) (Recast version) November 2012

<sup>49</sup> Eurodac Supervision Coordination Group -19th meeting on 16 October 2013 available at [https://secure.edps.europa.eu/.../Eurodac/13-10-16\\_Eurodac\\_SCG\\_Summary](https://secure.edps.europa.eu/.../Eurodac/13-10-16_Eurodac_SCG_Summary)”

<sup>50</sup> Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ L105/54

<sup>51</sup> Ibid at 34

<sup>52</sup> The usefulness of such data retention for security purposes had previously been questioned. See European Data Protection Supervisor opinion on the evaluation report from the Commission

However, the Court went on to hold that although the interference pursued a legitimate objective, namely, the prevention and detection of serious crime, it did not comply with the principle of proportionality as set out in Article 52(1) of the Charter.

The Court set out a number of criticisms of the directive which can be summarised as follows:

- Since the retention directive covers all users “without any differentiation, limitation or exception”, it thus applies to all individuals without exception with no requirement for evidence showing even an indirect link between the behaviour of an individual and serious crime.
- Regarding the right of national authorities to access the data for the purposes of law enforcement and security the Directive failed to lay down any objective criterion or substantive and procedural conditions by which to determine the limits of this access, or indeed the parameters of the subsequent use of the data so procured
- The Directive failed to make national authorities’ access to retained data dependent on a prior review carried out by a court or by an independent administrative body,
- The Directive did not provide any indication as to how member states should apply the wide range of possible retention periods to the retained data
- Since it was not a requirement that the data be retained within the EU, national authorities could not ensure compliance with data security requirements.
- The Directive did not provide for sufficient safeguards to ensure effective protection of the data against the risk of abuse, and did not ensure the irreversible destruction of the data on expiry of the retention period.

The court referred not only to the Charter rights but also to the guarantees as contained in the ECHR and their interpretation in the ECtHR case Law. The judgment thus establishes general principles for other similar data retention measures in the broader EU legal order.

When the Eurodac regulation (recast) is assessed in light of the Digital Rights Ireland judgment a number of concerns arise;

### 1. Lack of independent appeals mechanism

Rather than giving national law enforcement agencies direct access to the Eurodac database, a national access point acts as an intermediary to communicate with the central system.

Once the access conditions in the Eurodac regulation are complied with, the verifying authority at national level then forwards a request for the comparison of fingerprints to the national access point. The same national law enforcement authorised to request comparisons with Eurodac can also act as the “verifying authority.”<sup>53</sup>

Similarly, as regards Europol access to the database, article 7 of the Eurodac regulation simply requires that Europol shall designate a specialised unit with duly empowered Europol officials to act as its verifying authority, which shall act independently of the designated authority

While the regulation behoves the verifying authority to “act independently” of the designated authority, this clearly does not meet the bar as set out in the Digital Rights Ireland judgement; there is no mechanism for a court or independent body to determine the lawfulness of access requests for the prevention of serious crime.

### 2. Data Retention period

Article 12 and 16 of the Eurodac regulation provide for a retention period of up to ten years for data relating to applicants for international protection and 18 months for persons arrested in connection with the irregular crossing of an external border. As well as the potential for such a long retention period, there is also the fact

<sup>53</sup> “For the purposes laid down in Article 1(2), each Member State shall designate a single national authority or a unit of such an authority to act as its verifying authority. The verifying authority shall be an authority of the Member State which is responsible for the prevention, detection or investigation of terrorist offences or of other serious criminal offences.

The designated authority and the verifying authority may be part of the same organisation, if permitted under national law, but the verifying authority shall act independently when performing its tasks under this Regulation. The verifying authority shall be separate from the operating units referred to in Article 5(3) and shall not receive instructions from them as regards the outcome of the verification.

Member States may designate more than one verifying authority to reflect their organisational and administrative structures, in accordance with their constitutional or legal requirements.”

that biometric data is retained on all persons of at least 14 years of age.

While the main purpose of Eurodac is not for the purposes of fighting serious crime, there is still contained within it the real possibility of access requests being made for law enforcement purposes to a database for up to 10 years where such database includes data of minors.

This blanket retention raises legal difficulties being analogous to the provisions criticised in the Data Rights Ireland judgment. While such a retention period might be justified for the original purposes of the Eurodac regulation, it is highly questionable whether the retention for such a long period is justified for national and EU security purposes.

### 3. No distinction as to categories of data

Under Eurodac, data of minors, victims of crime and perpetrators of crime are all stored under the same conditions. There is no distinction as to length of storage or access conditions. This offends the principle of proportionality as identified in the Digital Rights Ireland judgment.

## Conclusion

The right to data protection is guaranteed under EU law. Eurodac was originally established only to determine which country within the EU was responsible for an asylum claim. This database can now be examined and information shared among EU national law enforcement agencies to prevent, detect and investigate terrorism and serious crime.

This type of function creep has serious privacy and data protection implications for persons that are already vulnerable.

With the recent CJEU ruling in *Schrems v Data Protection Commissioner* addressing the impact of surveillance on data sharing under “safe harbour”, it is perhaps time to examine how EU law enforcement agencies themselves observe the principles of data protection when collating, sharing and retaining data of third country nationals. While recognising that balancing security concerns with the right to data protection is a difficult task, it is submitted that any interference with the right to data protection should be at a minimum. At the very least, the data protection measures impacting on the lives of asylum seekers should be informed by the same principles of law that inform similar measures affecting the lives of others.

## Uzbekistan: No Respect for Human Rights? RDC Researcher David Goggins investigates.



David Goggins, Refugee Documentation Centre

### Some Basic Facts about Uzbekistan

Uzbekistan is a landlocked central Asian republic which was formerly part of the Soviet Union. The country is the most populous of the central Asian republics, with about 29 million people. The capital city is Tashkent. The only official language is Uzbek, which is the language spoken by about 74% of the population, although there is also a Russian-speaking minority. Islam is the religion of approximately 93% of the population, most of whom are Sunni of the Hanafi School. Uzbekistan is one of the world's major cotton growing countries.

### A Brief History

A country with an ancient history, Uzbekistan was conquered by imperial Russia during the 19<sup>th</sup> century. The Russian revolution saw the creation of the Uzbek Soviet Socialist Republic, which remained in existence until the dissolution of the Soviet Union, after which the independent republic of Uzbekistan was declared on the 1<sup>st</sup> September 1991. Prior to independence the country was ruled by Communist party strongman Islam Karimov, who was subsequently elected as president of the new republic in what many observers regarded as an unfair election. Although Uzbekistan is nominally a democracy with regular elections, Islam Karimov has remained as the country's only president since 1991. His rule has been described as highly authoritarian, with no toleration of any political opposition.

### Human Rights

The Uzbek government has been widely criticised for its record on human rights by international groups such as Amnesty International and Human Rights Watch, as

well as domestic human rights activists. In one report Amnesty International offers the following assessment of the Uzbekistan regime.

“Uzbekistan is one of the most authoritarian states in the world. The authorities are responsible for grave, systemic and widespread human rights violations, including severe restrictions on the rights to freedom of assembly, association and expression and endemic torture and other ill-treatment of detainees and prisoners by security forces.”<sup>54</sup>

This assessment of the human rights situation in Uzbekistan is shared by the French human rights NGO ACAT<sup>55</sup> which, in a briefing to the UN Human Rights Committee, states:

“All opposition parties and movements are prohibited, any signs of dissidence are repressed, and any criticism of the regime's practices by human rights defenders or journalists is severely punished. Since 2011 not a single international independent NGO has been allowed to work in Uzbekistan.”<sup>56</sup>

Another commentator on Uzbekistan's dubious reputation regarding human rights is Katie Morris of the London-based organisation Article 19 who states:

“Uzbekistan has a grave history of human rights violations, including the systemic use of torture within the criminal justice system. Karimov has eliminated all political opposition, paralysed civil society and silenced independent media, with the number of people in prison on politically motivated charges reaching thousands.”<sup>57</sup>

### The Andijan Massacre

The most notorious example of the regime's oppression of its own citizens occurred in the city of Andijan on 13 May 2005, an event in which a great many lives were lost. Human Rights Watch characterised this event as follows:

“On May 13, 2005, Uzbek government forces killed hundreds of unarmed people who participated in a massive public protest in the eastern Uzbek city of Andijan. The scale of this killing was so extensive, and

<sup>54</sup> Amnesty International (April 2015) Secrets and Lies: Forced confessions under torture in Uzbekistan

<sup>55</sup> Action by Christians for the Abolition of Torture

<sup>56</sup> ACAT-France (June 2015) Uzbekistan: Briefing to the Human Rights Committee

<sup>57</sup> Article 19 (24 March 2015) Uzbekistan elections a farce of democracy

its nature was so indiscriminate and disproportionate, that it can best be described as a massacre.”<sup>58</sup>

Prior to this event there had been a series of peaceful protests in Andijan aimed at obtaining the release of twenty three successful businessmen who were popular due to their providing their employees with well-paid jobs and good working conditions in an economically depressed region. The BBC reported on these protests as follows:

“People have been protesting peacefully outside a city court for four months over the trial of 23 local businessmen accused of Islamic extremism. Their families say the men are innocent and have been unfairly targeted. The BBC’s Jenny Norton describes the protesters as quiet, orderly and very well organised.”<sup>59</sup>

The background to this tragedy is explained in a Human Rights Watch report which states:

“The May 13 killings began when thousands of people participated in a rare, massive protest on Bobur Square in Andijan, voicing their anger about growing poverty and government repression. The protest was sparked by the freeing from jail of twenty-three businessmen who were being tried for ‘religious fundamentalism.’ These charges were widely perceived as unfair, and had prompted hundreds of people to peacefully protest the trial in the weeks prior to May 13.”<sup>60</sup>

In the early hours of the morning of 13 May the businessmen and many other inmates were freed from Andijan prison by a group of their supporters who had become frustrated by what they saw as a lack of justice for the accused. Some of these businessmen and their rescuers later appeared at a mass protest held later in the day in Bobur Square which attracted a large crowd of people. This gathering is depicted by Human Rights Watch as follows:

“As the crowd grew into the thousands, the protest was transformed from the actions of several dozen armed gunmen into a massive expression of dissatisfaction with the endemic poverty, corruption, unemployment, repression, and unfair trials that plagued the area. The first speakers were the attackers themselves, who explained to the crowd that they had acted because ‘they were displeased about the unjust imprisonment of the twenty-three defendants, and demanded justice and a fair sentence in the case. They were followed by

some of the freed prisoners themselves, who described their unfair trials and the terrible conditions they faced in prison.”<sup>61</sup>

While acknowledging that there were some armed individuals present at this assembly Human Rights Watch and other reputable sources are adamant that the great majority of the protesters were unarmed and that they were airing grievances about the government’s mishandling of the economy and the lack of freedom in the country rather than expressing support for Islamic fundamentalism, as was later claimed by the government.

While this meeting was in progress there occurred a number of drive-by incidents in which government troops in armoured vehicles fired shots into the crowd, making no attempt to distinguish between the few gunmen who were present in the square and the vast majority of unarmed protesters. These attacks continued throughout the day, inflicting a number of casualties. People who attempted to leave later in the afternoon discovered that the military had blocked the exits from the square. Bobur square was then stormed by government forces who opened fire without warning, which resulted in the indiscriminate killing of many civilians. One of the freed businessmen who survived the massacre described events as he experienced them:

“Most people died near School 15, near the Cholpon Cinema. There were armoured cars there, and troops on the road. They were also shooting from the buildings. It was getting dark...The road was completely blocked ahead. We couldn’t even raise our heads, the bullets were falling like rain. Whoever raised their head died instantly. I also thought I was going to die right there.”<sup>62</sup>

How many people were killed in Andijan on 13 May 2005 may never be known as accurate casualty figures were never published, though some sources suggest that at least 500 people lost their lives that day.<sup>63</sup> The Karimov regime has consistently refused to accept responsibility for these deaths, instead describing the protests as an uprising and laying the blame for the killings on “Islamic extremists”. The government’s efforts to downplay the extent of the slaughter and to deflect blame from its own forces is challenged in a Human Rights Watch report which states:

<sup>61</sup> Ibid at 60

<sup>62</sup> Ibid at 60

<sup>63</sup> RTÉ News (14 May 2005) Reports of high death toll in Uzbekistan

<sup>58</sup> Human Rights Watch (7 June 2005) “Bullets Were Falling Like Rain”: The Andijan Massacre, May 13, 2005

<sup>59</sup> BBC News (17 May 2005) How the Andijan killings unfolded

<sup>60</sup> Human Rights Watch (7 June 2005) “Bullets Were Falling Like Rain”: The Andijan Massacre, May 13, 2005

“The government has denied all responsibility for the killings. It claims the death toll was 173 people— law enforcement officials and civilians killed by the attackers, along with the attackers themselves. The government says the attackers were ‘Islamic extremists,’ who initiated ‘disturbances’ in the city. Uzbek authorities did everything to hide the truth behind the massacre and have tried to block any independent inquiry into the events.”<sup>64</sup>

The government’s actions have similarly being condemned by Amnesty International:

“Before the blood was dry on the streets a veil of official secrecy descended on Babur Square. Indeed a decade on, no one knows the exact number who died that day. The locations of mass graves which human rights defenders say are scattered around Andizhan, have never been confirmed. An independent international investigation has not been carried out and no one has been held to account for the killings.”<sup>65</sup>

Survivors of the massacre have since referred to this occasion as the blackest day in the history of an independent Uzbekistan.

### Freedom of Expression

Freedom of expression does not exist in Uzbekistan. Instead there is widespread repression of all actual or perceived opponents of the regime. According to Human Rights Watch:

“The victims span broad categories, including human rights activists, journalists, political opposition activists, religious leaders and believers, cultural figures, artists, entrepreneurs, and others, imprisoned for no other reason than their peaceful exercise of the right to freedom of expression and the government’s identification of them as “enemies of the state.”<sup>66</sup>

### Torture

Despite official denials there are credible reports that the use of torture is endemic in Uzbekistan. One such report comes from the ecumenical organisation ACAT-France which states:

<sup>64</sup> Human Rights Watch (7 June 2005) “Bullets Were Falling Like Rain”: The Andijan Massacre, May 13, 2005

<sup>65</sup> Amnesty International (12 May 2015) Uzbekistan’s rights record can no longer be ignored

<sup>66</sup> Human Rights Watch (25 September 2014) “Until the Very End”: Politically Motivated Imprisonment in Uzbekistan

“Torture in Uzbekistan affects anyone suspected of committing a crime. It is a regular method of criminal investigation.”<sup>67</sup>

Individuals who have survived torture in Uzbek places of detention have revealed that the techniques most frequently practiced on them included beatings, asphyxiation, rape and sexual assault.

Regarding the divergence between the country’s laws and actual practice the US Department of State comments:

“While the constitution and law prohibit such practices, law enforcement and security officers routinely beat and otherwise mistreated detainees to obtain confessions or incriminating information. Sources reported torture and abuse were common in prisons, pretrial facilities, and local police and security service precincts. Reported methods of torture included severe beatings, denial of food, sexual abuse, simulated asphyxiation, tying and hanging by the hands, and electric shock. There also were continued reports that authorities exerted psychological pressure on inmates, including by threats against family members.”<sup>68</sup>

Amnesty International has also castigated the use of torture by the Uzbek authorities, stating:

“Torture and other ill-treatment continue to be used in Uzbekistan specifically to extract confessions and other incriminating information and more generally to intimidate and punish detainees in pre-charge and pre-trial detention. The Uzbekistani courts, in turn, continue to rely heavily on so-called ‘confessions’ extracted under duress or deception to reach a verdict.”<sup>69</sup>

Regarding the regime’s disdain towards criticism from international bodies John Dalhuisen of Amnesty International made the following comment prior to a visit to the country by UN Secretary General Ban Ki-moon:

“Even with Ban’s impending visit, the Uzbekistani police and security apparatus continues to brazenly commit acts of torture.

### Prison Conditions

<sup>67</sup> ACAT-France (June 2015) Uzbekistan: Briefing to the Human Rights Committee

<sup>68</sup> US Department of State (25 June 2015) 2014 Country Reports on Human Rights Practices - Uzbekistan

<sup>69</sup> Amnesty International (April 2015) Secrets and Lies: Forced confessions under torture in Uzbekistan

ACAT-France considers conditions in prison to be a form of torture, stating that:

“As well as the abuse that is deliberately inflicted, living conditions generally in Uzbekistan’s penitentiary facilities amount to inhuman and degrading treatment and even torture.”<sup>70</sup>

Supporting these allegations Human Rights Watch states:

“Information gathered by Human Rights Watch shows that in many cases the conditions in which persons imprisoned on politically motivated charges are held—overcrowded cells, poor quality and insufficient food and water, and inadequate medical treatment—do not meet international prison standards. Authorities have routinely denied these prisoners treatment for serious medical problems, many of which emerged over the course of prolonged imprisonment.”<sup>71</sup>

Listing some of the infringements for which a prisoner may be punished Human Rights Watch states:

“Minor, insignificant, or absurd alleged infractions, such as ‘failure to lift a heavy object,’ ‘wearing a white shirt,’ ‘failing to properly place one’s shoes in the corner,’ and ‘failing to properly sweep the cell.’”<sup>72</sup>

The worst conditions are said to be in Jaslyk prison, where according to reports:

“Former inmates recall gruesome methods of torture being employed at Jaslyk, including electric shocks, sexual assault, the pulling out of prisoners’ fingernails, and long stints of solitary confinement without food or drink.”<sup>73</sup>

One former inmate has compared Jaslyk prison to a Nazi concentration camp.

## Religious Freedom

Freedom of religion is a contentious issue in Uzbekistan with strict laws governing religious observance and a deep suspicion of individuals who practice their faith outside of government approved institutions. Such individuals are at risk of being denounced as extremists who seek to overthrow the state and at risk of arrest and torture. The regime has

<sup>70</sup> ACAT-France (June 2015) Uzbekistan: Briefing to the Human Rights Committee

<sup>71</sup> Human Rights Watch (25 September 2014) "Until the Very End": Politically Motivated Imprisonment in Uzbekistan

<sup>72</sup> Ibid

<sup>73</sup> Radio Free Europe/Radio Liberty (5 August 2012) Uzbekistan’s ‘House Of Torture

been reproached for its restrictions on religious freedom by a number of international bodies, including Amnesty International which states:

“Uzbekistan is a secular state with a predominantly Sunni Muslim population. The authorities tightly regulate religious practice, whether Islamic, Christian or other, with strict laws governing all aspects of religious life, including the private teaching of religion and religious dress.”<sup>74</sup>

In an interview with Radio Free Europe/Radio Liberty Steve Swerdlow of Human Rights Watch referred to the following people who may be at risk:

“Independent Muslims are people that practice their belief or their religion outside of the strict state controls that the Uzbek authorities established, which could mean praying in your home, it could mean carrying an unauthorized piece of literature such as a Koran, or wearing a beard or a hijab in the wrong place.”<sup>75</sup>

In a report on religious freedom in Uzbekistan the US Department of State notes that:

“The constitution and some laws provide for religious freedom; however, other laws and policies restrict religious freedom and, in practice, the government generally enforced those restrictions. The law restricts the religious freedom of unregistered groups and prohibits many activities, such as proselytizing. Members of registered and unregistered minority religious groups faced jail terms, heavy fines, confiscation and destruction of religious literature, and in some cases police beatings for violations of these laws.”

## Corruption

The lack of accountability for the ruling elite has contributed to widespread corruption in Uzbekistan, with Transparency International calling Uzbekistan one of the world’s 10 most corrupt countries. This situation has been highlighted by a number of sources, including an Amnesty International report which states:

“A small elite – with the immediate presidential family at its heart – controls most of the country’s natural resources, including land, gold, uranium and copper reserves, and presides over the billion-dollar cotton

<sup>74</sup> Amnesty International (April 2015) Secrets and Lies: Forced confessions under torture in Uzbekistan

<sup>75</sup> Radio Free Europe/Radio Liberty (13 May 2015) HRW’s Swerdlow: Uzbekistan In ‘Category Of Its Own’ on Human Rights

industry. The economic situation for the vast majority of Uzbekistan's population, especially in rural areas, continue to be difficult."<sup>76</sup>

Although the government has taken measures to curtail corruption these have been dismissed as ineffective. One report quotes a businessman in the western town of Bukhara as saying:

"Despite these measures, we've seen no progress in the battle against corruption. The country and its society are corrupted through and through."<sup>77</sup>

Allegations of corruption have even extended to the president's daughter who is accused of having received massive bribes from Scandinavian telecommunications companies.

### Forced Labour

A prevalent form of corruption is the use of forced labour in the government controlled cotton industry. This practice has been decried by Human Rights Watch in a report which states:

"For years, the government has relied on the forced labor of over a million people each year – including children, teachers, medical workers, college and university students, and public employees – to pick cotton. It uses coercion, including intimidation and threats of loss of job, social welfare benefits, utilities, expulsion, and even prosecution to force people into the fields."<sup>78</sup>

These allegations are repeated in a report on child labour in Uzbekistan which states:

"Multiple sources reported cases of local administrators, in several provinces, mobilizing children for the harvest. Available evidence suggests that across the country local administrators mobilized predominantly age 18, third-year secondary school students. However, in the course of doing so, an unknown number of 17 year-old third-year students were also mobilized through this practice."<sup>79</sup>

The use of children even younger than age 17 in the harvesting of cotton is mentioned in a report which states:

<sup>76</sup> Amnesty International (April 2015) Secrets and Lies: Forced confessions under torture in Uzbekistan

<sup>77</sup> Institute for War and Peace Reporting (15 October 2011) Uzbekistan's Half-Hearted War on Corruption

<sup>78</sup> Human Rights Watch (24 September 2015) Uzbekistan: Activists Beaten, Detained

<sup>79</sup> US Department of Labor (30 September 2015) 2014 Findings on the Worst Forms of Child Labor - Uzbekistan

"Local observers say younger children seem to be absent, but the authorities are still forcing high-school pupils aged 15 to 18 out to work, along with university and college students and public-sector workers."<sup>80</sup>

Forced labour in Uzbekistan is not restricted to the cotton growing industry. A report documenting the compulsion of teachers, doctors and other public service workers to perform unpaid labour states:

"The work they are required to do ranges from construction work and building repairs to landscaping of public spaces. Refusal to take part carries the risk of dismissal from their day jobs."<sup>81</sup>

### Elections

Presidential and parliamentary elections are held every five years, but outside observers do not regard any of these as having been either free or fair, a typical assessment being:

"In the 23 years since Uzbekistan gained independence from the Soviet Union, there has not been a single election deemed even remotely 'free and fair' by international monitoring bodies."<sup>82</sup>

Regarding the March 2015 presidential election a EurasiaNet report states:

"Human rights campaigners have criticized the election for offering voters in Uzbekistan (where no genuine opposition parties exist and dissenters are routinely jailed) no real competition. They also charge that Karimov is flouting the constitution – which limits presidents to two terms of office – by standing for his fourth term."<sup>83</sup>

The outcome of this election was never in doubt and it came as no surprise when Islam Karimov was re-elected with over 90% of the vote.

### Extra-Territorial Repression

Human Rights Groups have alleged that critics of the Karimov regime living abroad have been targeted by government security forces, with some of them having been kidnapped and assassinated. One prominent critic

<sup>80</sup> Institute for War and Peace Reporting (1 November 2013) Coercive Labour for Uzbek Cotton

<sup>81</sup> Institute for War and Peace Reporting (7 February 2013) "Volunteering" Gone Mad in Uzbekistan

<sup>82</sup> Human Rights Watch (25 September 2014) "Until the Very End": Politically Motivated Imprisonment in Uzbekistan

<sup>83</sup> EurasiaNet (29 March 2015) Uzbekistan: Tashkent Voters Back Strongman as He Cruises to Victory



who survived an apparent assassination attempt was Obidkhon Qori Nazarov, who was left in a coma after he was shot in his apartment building in Stromsund, Sweden. Less fortunate was Uzbek imam Abdullah Bukhari who was shot and killed in Istanbul, where he had been living with his family. That the Uzbek authorities may have had Russian assistance in carrying out these attacks is alluded to in an EurasiaNet report which states:

“Officials in Sweden and Turkey suspect Russian intelligence operatives, working with Uzbek authorities, may have played a part in the two attacks against the Uzbek clerics. Amnesty International’s Weicherding also believes Uzbek authorities are working together with Russian officials. Uzbek exiles in Moscow are especially vulnerable to what rights activists describe as ‘extra-territorial repression’”<sup>84</sup>

### Returned Asylum Seekers

A number of sources have contended that returning failed asylum seekers to Uzbekistan would breach the principle of non-refoulement. According to the International Partnership for Human Rights:

“Refugees from Andijan fleeing to other CIS countries have in some cases been returned to their country of origin, in violation of the non-refoulement ban set out by international human rights law. Upon arrival in Uzbekistan, many of them are known to have been subjected to torture and sentenced to long periods of imprisonment.”<sup>85</sup>

Similar concerns have been expressed by ACAT-France to the UN Human Committee in a briefing which states:

“The individuals who fled the country or sought asylum abroad, are at risk of torture upon return. In several cases, the ECHR has ruled against the return of individuals to Uzbekistan due to such risk.”<sup>86</sup>

### International Relations

Despite its record of human rights violations being widely publicised Uzbekistan has faced only muted criticism from the governments of western democracies. The authors of an EurasiaNet report explain this paradox as follows:

<sup>84</sup> EurasiaNet (12 May 2015) Uzbekistan: Fearful Silence Is Andijan Massacre’s Legacy

<sup>85</sup> International Partnership for Human Rights (6 July 2015) Uzbekistan: Decades of despair for prisoners sentenced on politically motivated charges

<sup>86</sup> ACAT-France (June 2015) Uzbekistan: Briefing to the Human Rights Committee

“Uzbekistan is one of the most repressive states on earth. It also happens to be a northern neighbour of Afghanistan, so for most of the 21<sup>st</sup> century, Tashkent has been a key cog in the US-led struggle to contain Islamic militants.”<sup>87</sup>

The response of western governments to the situation in Uzbekistan is also deplored by Amnesty International, which states:

“And yet, despite these blatant and egregious abuses, the USA, Germany and other European Union countries seem to have a blind-spot when it comes to Uzbekistan. Security, political, and military interests are placed ahead of any meaningful action to pressure this strategically important country to respect human rights.”<sup>88</sup>

The consensus of human rights groups is that the western democracies will never be too critical of the Karimov regime if doing so would harm their own interests.

### Conclusion

Islam Karimov is now aged 77 and is said to be in declining health, which has led to speculation as to who will succeed him. Reflecting on this situation is a report which states:

“Leaving office may be fraught with security risks for Karimov – but observers say that an aging president clinging to power is fraught with political risks for Uzbekistan. Ultimately, Karimov’s eventual departure from the political scene could be accompanied by a destabilizing power struggle”<sup>89</sup>

As Karimov has been Uzbekistan’s sole ruler since independence and there has never been a transition of power there is considerable apprehension as to what may happen once he is gone. Observers consider it likely that Karimov will be succeeded by one of the leader’s of the country’s two most powerful clans. This may ensure a measure of stability but which will be no guarantee of any real improvement in human rights.

All documents and reports referred to in this article may be obtained upon request from the Refugee Documentation Centre.

<sup>87</sup> EurasiaNet (28 January 2015) Uzbekistan and the American Myth of “Strategic Patience”

<sup>88</sup> Amnesty International (12 May 2015) Uzbekistan’s rights record can no longer be ignored

<sup>89</sup> EurasiaNet (26 March 2015) Uzbekistan: Karimov Heads for Landslide in Competition Free Vote

## Common European COI Portal – Update and New Developments



Zoe Melling, Refugee Documentation Centre

There were two significant achievements relating to the EU COI Portal this year:

1. Connection of the Refugee Documentation Centre's (RDC) COI database, *Eolas*.
2. Development of a "new generation" Portal including a public interface.

### Connection of *Eolas*

On August 13th the RDC's COI database, known as *Eolas*, was successfully connected to the COI Portal's production platform. This provides users of the Portal with access to around 5000 documents published by the RDC, including query responses, Country Information Packs, Country Marriage Packs, Country Adoption Packs and *The Researcher* newsletter. Connection to the Portal also allows for remote access to RDC resources for the first time, as the RDC E-Library, which is currently undergoing an upgrade, is available to users via the LAB & DJE internal intranets but is not accessible to external stakeholders who don't have access to these networks.

Launched in July 2011, the COI Portal aims to support practical co-operation and decision making in asylum procedures in the context of the Common European Asylum System, and to enable a more integrated and standardised approach to the provision of COI both in Ireland and Europe. It provides a common entry point allowing asylum officials from EU+ countries (including Norway and Switzerland) to access COI from multiple sources via a web-based interface. The Portal also includes an upload area for each country, a communications forum and a notification system.

Besides *Eolas*, other COI systems currently connected to the Portal are MILO (Germany), OFPRA (France), LANDINFO (Norway), LIFOS (Sweden) and TELLUS (Finland).

The RDC has been involved in the COI Portal project since its initiation by the European Commission in 2007, and in 2012 secured funding from the European Refugee Fund (ERF) to connect its COI database to the Portal. This also covered upgrades to the RDC library system and digital archive which were required prior to the connection. In January 2015, after a public procurement process, a contract for development of web services for the connection was awarded to Ostia Software Solutions, a company based in Co Wicklow. The OAI-PMH protocol for metadata harvesting was used to export data from the RDC's document repository to the Portal. In September some changes to the web services and metadata mapping were made to comply with quality standards for the development of a revamped "new generation" COI Portal, including the exclusion of case law and other materials which are deemed to fall outside the scope of COI resources.

### "New Generation" COI Portal

The European Asylum Support Office (EASO), which took over management of the COI Portal in 2012, has been working on a revamped "new generation" Portal this year. The prototype, which is based on a Microsoft Sharepoint platform, will be unveiled at the Strategic Network meeting at the end of October, and is due for release in January 2016. The new Portal is the result of extensive consultation and feedback from stakeholders over the past few years, including the RDC which has been represented on the COI Portal Steering Group, Working Party and Expert Advisory Group. The main catalyst for the revised Portal was the need to extend access to a wider group of users in the asylum/migration field.

Under EASO ownership access is restricted to first instance asylum agencies, excludes a number of Irish asylum agency users, some of who previously had access, and contravenes the RDC's "equality of arms" principle. Moreover, there is an increasing trend for greater COI transparency and dissemination on an international level. Many EU+ states only use publicly available COI and the majority are willing to make their COI documents public if not already so. Other driving factors included an outdated technological platform, obsolete software with licences due to expire at the end of 2015, an overly complicated registration system, copyright issues, and duplication with other COI sources such as RefWord and Ecol.net.

The key features of the revised Portal are a public interface for the majority of COI resources (approximately 90%), a small percentage of internal documents available to registered COI specialists (COI researchers, members of COI units or EASO specialist networks), the elimination of the European Commission Authentication System (ECAS) registration process, a focus on national products rather than a “one stop shop” with duplication of third party COI, collaborative areas for COI specialist networks, and notification/personalisation features available to all users.

Unlike the current Portal, which indexes connected systems on a daily basis and directs users to remote repositories to access full text documents, the new Portal will store documents directly in order to avoid overloading the capacity of the existing web services when the Portal is live to the public. EASO plan to relocate the Portal’s ICT infrastructure from its current location at the European Commission Directorate-General for Informatics (DIGIT) offices in Brussels and Luxembourg, to EASO’s headquarters in Valletta. They have increased their internal support and maintenance capacity, with the recruitment of a COI Portal ICT Maintenance Officer in February 2015. EASO also intend to link the Portal to other IT systems planned for the future, including an Information and Document System incorporating legislation and caselaw, and an Early Warning and Preparedness System (EPS) including asylum statistics.

## COI Portal homepage

The screenshot shows the homepage of the Common European Country of Origin Information (COI) Portal. At the top, there is a navigation bar with the EASO logo, the text 'EUROPEAN ASYLUM SUPPORT OFFICE (EASO)', and a language dropdown set to 'English (en)'. Below this is the header 'Common European COI Portal' and a user profile for 'Zoe MELLING (NCPA) Log Out'.

The main content area is titled 'WELCOME' and contains a brief introduction: 'The Common European Country of Origin Information (COI) Portal is a secure platform that enables Member State asylum officials to access COI from multiple sources.' It lists three key features: a search engine, an upload area, and a forum area.

Below the welcome message are three main sections: 'SIMPLE SEARCH', 'ADVANCED SEARCH', and 'THESAURUS SEARCH'. Each section provides a brief description and a link to access the feature. A search bar is located below the simple search section.

Further down are three 'NOTIFICATION AREA' sections: 'Interested in receiving email updates...', 'National specialists may contribute to the Portal...', and 'Consult the Forum...'. Each section includes a link to manage settings or access the feature.

At the bottom, there are two columns: 'Latest News' and 'COI SYSTEM STATUS'. The 'Latest News' section lists recent updates, including 'OPFRA documents available again' and 'Ukraine - COI Specialist Network Ki...'. The 'COI SYSTEM STATUS' section is a table showing the status of COI systems for various Member States.

Member State	COI System	Status	Documents	Last update
EU	UPLOAD AREA	✓	610 documents	01/10/2015
DE	MILO (Germany)	✓	89,274 documents	06/10/2015
SE	LIFOS (Sweden)	✓	1,500 documents	06/10/2015
FR	OPFRA (France)	✓	52 documents	05/10/2015
FI	TELLUS (Finland)	✓	1,360 documents	06/10/2015
NO	LANDINFO (Norway)	✗	1,428 documents	28/09/2015
IE	EOLIAS (Ireland)	✓	4,984 documents	06/10/2015

At the bottom of the page, there is a footer with a logo for 'WAG-MA-AA WAG 1.0', a navigation menu (Help | Search | Contact | Legal Notice), version information (Version: 4.3.2 - Last Update: 11/12/2014), and a 'Top' link.

For any queries relating to the E-Library or COI Portal please contact:

Zoë Melling  
 Librarian  
 Research & Information Unit  
 Legal Aid Board  
 Montague Court  
 7-11 Montague St  
 Dublin 2  
 Ph: (01) 4776214  
 Email: zxmelling@legalaidboard.ie



## Discrimination or Persecution? - A focus on LGBT applicants for asylum.



By Brian Collins<sup>90</sup>

*This article will briefly look at the issue of discrimination in asylum law and when it reaches the threshold of persecution. In this article, it is submitted that LGBT asylum claims are particularly vulnerable to erroneous refusals of refugee status on the basis that the treatment feared does not reach the level of persecution. It is argued that asylum decision makers should not merely focus on minor improvements in conditions for LGBT persons in their countries of origin, but rather focus on the nature of homophobic persecution which is a complex interaction between legal, political, social, religious and familial spheres.*

### LGBT claims for asylum

The passage of the same sex marriage referendum and the Gender Recognition Act 2015 are welcome watershed moments for the rights of LGBT persons in Ireland which have no doubt affirmed the character of Irish society, and enriched the country. There is a generation of young Irish people, for whom the Ireland of twenty or thirty years ago would be almost unrecognisable; where, until 1993, homosexuality was a criminal offence.<sup>91</sup> However, these recent developments in Ireland stand in stark contrast with the continued mistreatment of LGBT communities, which persists in many countries worldwide. We are

<sup>90</sup> Brian Collins is a Solicitor at the Irish Refugee Council's Independent Law Centre. Any views expressed here are the author's own.

<sup>91</sup>S. 61 of the Offences Against the Person Act, 1861.

reminded that in many states there is much work to be done to allow LGBT persons to freely express, develop and fulfil their sexual orientation in public, without fear of discrimination or persecution. More than 80 states worldwide have enacted legislation which criminalises private, consensual sexual conduct between adults of the same sex. Laws remain in Iran, Mauritania, Saudi Arabia, Sudan and Yemen allowing for capital punishment for consensual homosexual acts.<sup>92</sup> In Kyrgyzstan, Nigeria, Moldova, Russia, Ukraine and Uganda, "anti-propaganda" laws lay down sentences of up to 10 years for merely speaking about sexual orientation in a public setting.

A recent report of the UN Human Rights Council makes for particularly grim reading, and is a sombre reminder of how many countries so egregiously fail their LGBT citizens.<sup>93</sup> While the report indicates some improvements for the LGBT community in a number of countries, it also shows that in many states, virulent homophobia is still deeply entrenched; with gay people often fearing persecution from a variety of sources; government authorities, wider society and often their own families. The report documents the following, for example; the murder of transsexual women in Uruguay and the "corrective rape" and murder of black lesbians in South Africa; over 300 murders in Brazil in which homophobia or transphobia was a motive in 2012 alone and Islamic State's murder of men suspected of being gay by throwing them off high buildings. In many countries worldwide, the realisation of Article 1 of the Universal Declaration of Human Rights; that is that all human beings are born free and equal in dignity and rights, couldn't seem further away for persons who happen to be LGBT. It appears that pandering to prejudice of the majority, and political posturing on the issue of LGBT rights often takes precedence over the obligation to protect all persons including LGBT persons from torture, ill treatment, discrimination, arbitrary arrest and detention.

In this context it is little surprise that persons flee in desperation from cruel, brutal and discriminatory treatment in their countries of origin and seek protection in societies which they hope will better respect their dignity and human rights.

### Well-founded fear- the requirement that fear of 'persecution' is established.

<sup>92</sup> See also- 'Gay Rights and Wrongs', Eamonn McCann, The Irish Times, Jun 18<sup>th</sup> 2015, last accessed 10<sup>th</sup> October 2015, available at <http://www.irishtimes.com/opinion/eamonn-mccann-gay-rights-and-wrongs-from-the-us-to-uganda-1.2253221>

<sup>93</sup> "Discrimination and violence against individuals based on their sexual orientation and gender identity": Report of the Office of the United Nations High Commissioner for Human Rights, 4 May 2015.

The system of refugee protection provides surrogate protection to persons in need, and provides a ‘safety net’ to persons who are unwilling or unable to access protection in their country of origin owing to their fears. However, the system of refugee protection as it stands is not intended to ensure that there is absolute and total uniformity in respect human rights the world over, and it is well established that persons seeking asylum must demonstrate a well-founded fear of ‘persecution’ in order to qualify for a grant of refugee status.<sup>94</sup> Thus, an applicant for asylum may have their credibility accepted in its totality by a decision maker, but be refused refugee status on the grounds that the treatment feared simply does not reach the requisite standard of ‘persecution’.

Refugee law makes an important distinction between discrimination and persecution, and though the concept of persecution is at the very heart of the definition of a refugee, there is often a lack of clarity as to what exactly qualifies as such. The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status notes at paragraph 51 of the text that “there is no universally accepted definition of ‘persecution’”<sup>95</sup>, however the kernel of persecution appears to be a serious breach of human rights, coupled with an absence of state protection. The Qualification Directive provides that acts of persecution within the meaning of article 1 A of the Geneva Convention must be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights.<sup>96</sup> The concept of persecution is not defined in the Refugee Act 1996 (as amended) although it does provide express protection against a serious assault (including a serious assault of a sexual nature) at s. 5(2) of the Act. The Qualification Directive is also instructive in relation to what may qualify as acts of persecution, and provides that acts of persecution as qualified can, inter alia, take the form of: (a) acts of physical or mental violence, including acts of sexual violence; (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner; (c) prosecution or punishment, which is disproportionate or discriminatory; (d) denial of judicial redress resulting in a disproportionate or

discriminatory punishment; (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2); (f) acts of a gender-specific or child-specific nature.<sup>97</sup>

However, in many cases decision makers are left to grapple with whether the treatment feared by the applicant for asylum is ‘mere’ discrimination or whether it has reached the required threshold to be deemed persecution, thus making a grant of refugee status appropriate. Hathaway and Foster remark in this context that: “Decision-makers are left largely to their own devices, determining on a “case by case approach” whether a given risk is sufficiently serious to amount to a risk of being persecuted.”<sup>98</sup>

### Discrimination or persecution?

Professor Hathaway’s textbook, *The Law of Refugee Status*, Lexis Nexis, 1991 provides guidance on what constitutes persecution. Hathaway makes express reference to the right to enjoy fundamental freedoms without discrimination as enshrined in international human rights instruments. He states that “persecution may be defined as sustained or systematic violation of basic human rights demonstrative of a failure of state protection. A well-founded fear of persecution exists when one reasonably anticipates that remaining in the country may result in a form of serious harm which a government cannot or will not prevent, including whether “specific hostile acts or... an accumulation of adverse circumstances such as discrimination existing in an atmosphere of insecurity and fear.”<sup>99</sup>

A threat to life or freedom on account of race, religion, race, religion, nationality, political opinion or membership of a particular social group, it seems will always amount to persecution, having regard to the principle of *non-refoulement* as expressed in Article 33 of the Refugee Convention 1951.<sup>100</sup> What is less clear is when acts or measures, such as discrimination, harassment or disproportionate punishment will qualify as persecution.

In the assessment of whether discrimination reaches the threshold of persecution in a given case, Hathaway and Foster advocate for an approach which puts “human rights as the benchmark” framed against the

<sup>94</sup>Article 1 A (2) of the 1951 Convention Relating to the Status of Refugees.

<sup>95</sup> UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, last accessed 10<sup>th</sup> October 2015, available at <http://www.refworld.org/docid/4f33c8d92.html>

<sup>96</sup>Council Directive 2004/83/EC, last accessed 9<sup>th</sup> October 2015 available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:304:0012:0023:EN:PDF>

<sup>97</sup>ibid.

<sup>98</sup>Hathaway J. and Foster M. ‘The Law of Refugee Status’, Cambridge University Press, 2014, at p. 187.

<sup>99</sup>The Law of Refugee Status’, James Hathaway, Lexis Nexis, 1991, pages 103-104.

<sup>100</sup>Refugee Convention 1951 last accessed 8<sup>th</sup> October 2015 available at <http://www.unhcr.org/4ca34be29.pdf>

preamble of the Convention<sup>101</sup>, stating as follows: “International human rights standards are rather uniquely suited to the task of defining which risks involve unacceptable forms of harm in a manner that offers not only consistency, but also normative legitimacy—these being precisely the standards that states themselves have established to define impermissibly serious harms”. In addition, Hathaway and Foster comment that this approach “is also an invaluable means of ensuring that the benchmark for the identification of relevant forms of serious harm does not stagnate, but rather evolves in line with authoritative international consensus”.<sup>102</sup> This approach ensures that recent developments in terms of abuses and discrimination perpetrated against LGBT persons are judged according to human rights standards, on a principled basis, and not on any preconceived or arbitrary assessment of persecution.

UNHCR gives guidance on the issue and notes at paragraph 53 of the Handbook that discrimination can reach the threshold of persecution on cumulative grounds<sup>103</sup> and suggests at paragraph 54 of the that the appropriate standard to apply in this regard is whether “measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned”.

### **Laws criminalising homosexuality or homosexual acts: automatic persecutory effect?**

In relation to LGBT claims and criminalisation of homosexuality or homosexual acts, the CJEU in *X, Y and Z*<sup>104</sup> considered whether criminal laws in Sierra Leone, Uganda and Senegal could be said to amount to persecution.<sup>105</sup> The Court also looked at when discrimination could be said to reach the threshold of persecution. The Court of Justice referred to the provisions of Article 9 of the Qualification Directive,

<sup>101</sup> ‘The Law Of Refugee Status’, Hathaway and Foster, Cambridge University Press, 2014 at p 193.

<sup>102</sup> *ibid.* at p 194.

<sup>103</sup> ‘In addition, an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on “cumulative grounds”. Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context’.

<sup>104</sup> (*C-199/12*) *Minister voor Immigratie en Asiel v X, (C-200/12) Y v Minister voor Immigratie en Asiel and (C-201/12) Z v Minister voor Immigratie en Asiel* unreported, Court of Justice of the European Union, November 7, 2013.

<sup>105</sup> *ibid.* at paragraph 26.

referring to the threshold for acts to be considered persecutory, and found that “not all violations of fundamental rights suffered by a homosexual asylum seeker will necessarily reach that level of seriousness.”<sup>106</sup> In addition, the court held as follows: “the mere existence of legislation criminalising homosexual acts cannot be regarded as an act affecting the applicant in a manner so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution within the meaning of Article 9(1) of the Directive.” The Court held that the term of imprisonment which accompanies a legislative provision which punishes homosexual acts is capable in itself of constituting an act of persecution within the meaning of Article 9(1) of the Directive, in circumstances where it is actually applied in the country where such legislation has been adopted.<sup>107</sup>

However, the question remains about what other forms of mistreatment would constitute persecution, for example in states where criminal laws against gay people are not enforced, or where homosexuality and/or homosexual acts have been decriminalised, but at the same time, LGBT persons may still be subject to myriad other forms of discrimination.

### **Discrimination vs. persecution in LGBT cases**

It is submitted that the distinction between discrimination and persecution is particularly relevant to LGBT asylum claims as many claims will hinge on whether the threshold for persecution has been reached. UNHCR notes that discrimination is a common element in the experiences of many LGBT individuals and gives examples of the many ways in which discrimination can manifest in this context:

24. LGBTI individuals may also be unable to enjoy fully their human rights in matters of private and family law, including inheritance, custody, visitation rights for children and pension rights. Their rights to freedom of expression, association and assembly may be restricted. They may also be denied a range of economic and social rights, including in relation to housing, education, and health care. Young LGBTI individuals may be prevented from going to school, subjected to harassment and bullying and/or expelled. Community ostracism can have a damaging impact on the mental health of those targeted, especially if such ostracism has lasted for an extended period of time and where it occurs with impunity or disregard. The cumulative effect

<sup>106</sup> *ibid.* at paragraph 53.

<sup>107</sup> *ibid.* at paragraphs 55-56.

of such restrictions on the exercise of human rights may constitute persecution in a given case.

25. LGBTI individuals may also experience discrimination in access to and maintenance of employment. Their sexual orientation and/or gender identity may be exposed in the workplace with resulting harassment, demotion or dismissal. For transgender individuals in particular, deprivation of employment, often combined with lack of housing and family support, may frequently force them into sex work, subjecting them to a variety of physical dangers and health risks. While being dismissed from a job generally is not considered persecution, even if discriminatory or unfair, if an individual can demonstrate that his or her LGBTI identity would make it highly improbable to enjoy any kind of gainful employment in the country of origin, this may constitute persecution.

LaViolette notes that there is a developing trend in LGBT claims of certain types of treatment being deemed by decision makers to be discrimination rather than persecution.<sup>108</sup> Following consideration of a body of asylum decisions in Canada, she comments that one reason for the increased relevance of the issue in the last ten years is the fact that in several countries the social, political and legal situations of sexual minorities has been changing, with some countries becoming more accepting of sexual diversity.<sup>109</sup> LaViolette notes that in some LGBT cases, there is a tendency for decision makers to focus on positive developments in the country of origin, often ignoring existing human rights violations; the end result being that the standard for what constitutes persecution appears to be raised even higher for LGBT applicants. This is alarming given that LGBT applicants may already face distinct challenges in proving their protection claims including identification and identity issues; delayed disclosure; shame and internalised homophobia; and stereotyping by decision makers.<sup>110</sup> Wessels refers to the Canadian case of *Muckette v Canada*, in which a variety of incidents including death threats and acts of violence were deemed to be discriminatory but not persecutory.<sup>111</sup> In this context, there could be a temptation for decision makers to look

at the conditions in a particular country on a sliding scale, and come to a speedy conclusion on well founded fear, having given cursory consideration to the full impact on the physical and mental health of an LGBT person living in that particular country. Both lawyers and decision makers should remain open-minded and guard against being presumptuous in this context.

LaViolette notes that the challenge for decision makers is to make sure that in weighing the evidence, minor social and legal progress outlined in independent country information is not favoured over more serious reports of homophobic violence and impunity. She also notes that progress on LGBTI human rights can be reversed, citing alarming examples of retrograde steps in Russia, Nigeria and Uganda for example, where measures have been adopted which further stigmatise rather than protect LGBT individuals, and she notes that courts in both India and Singapore have upheld laws that criminalise same sex relations.<sup>112</sup>

Wessels notes that LGBT cases may be impacted by the inability of decision makers to imagine the situation of a gay person in a heterosexist environment. It may be difficult for a decision maker to properly appreciate the reality of ‘everyday’ injustices and more subtle acts of discrimination which an LGBT person may experience in an oppressive society. O’ Dwyer criticises the US asylum system’s tendency towards recognising an exceptionally high threshold of abuse for cases based on sexual orientation. She notes that a “repeated refrain from the court of appeals is that certain incidents, such as police raids on bars, arbitrary short term detention of gay people, and discrimination, will not constitute persecution.”<sup>113</sup> Such experiences may be dismissed by decision makers on the basis of the appearance of a lack of seriousness; however it is imperative that rigorous, individual and critical consideration is given to each set of facts so as to determine whether the threshold of persecution has been reached in the given case.

It is notable that an LGBT person, if returned to an oppressive country of origin, might be forced to live the entirety of their lives exposed to regular acts of discrimination of varying degrees of seriousness. In relation to assessing the concept of persecution, it is submitted that the following quote from Schiemann LJ in the case of *Blanusa*<sup>114</sup> is instructive and of persuasive value. He wrote that *‘It appears that what amounts to*

<sup>108</sup>N. LaViolette, Independent Human Rights Documentation and Sexual Minorities; An Ongoing Challenge for the Canadian Refugee Determination Process, 13:2 Int’l JHR 437 [2009] P.451

<sup>109</sup> *ibid* at p. 458.

<sup>110</sup> See also S. Arnold, ‘The Culture of Credibility in the United Kingdom and Ireland and the Sexual Minority Refugee’, (2012) 30 ILT 55.

<sup>111</sup> *supra* note 19.

<sup>112</sup> *supra* note 19 at p.74

<sup>113</sup>P O’ Dwyer, A Well- Founded Fear of Having my Sexual Orientation Claim Heard in the Wrong Court, New York School Law Review, Vo. 52 [2008] p. 186.

<sup>114</sup>*Blanusa -v- The Secretary of State of the Home Department* 18 May 1999 (unreported C. A.).

*persecution is a flexible concept and depends on the gravity of the invasion of an individual's human rights, gravity being established by reference to the nature of the invasion and the length of time of the invasion.'* (Emphasis added). It is certainly arguable that to subject a person to consistent acts of discrimination or 'less serious' breaches of human rights for an entire lifetime would strengthen a claim of persecution on cumulative grounds, particularly when the potential impact on a person's mental health and wellbeing is considered.

### **A Gap in Country of Origin Information regarding the treatment of LGBT persons.**

LaViolette also notes an additional problem in that country of origin information may not always show the full picture in relation the treatment of LGBT persons. She notes that independent human rights documentation continues to be difficult to obtain for many parts of the world, meaning the assessment of whether a particular country's conditions constitutes discrimination rather than persecution is sometimes based on little objective evidence. She notes that some adjudicators may continue to reason that the scarcity or absence of reports evidences a lack of persecution.<sup>115</sup> However, in certain repressed societies, it may be difficult if not impossible for LGBT support organisations to operate, let alone gather information in relation to the treatment of LGBT persons in their country, given the serious risks involved. The offices of LGBT support organisations are often the subject of arbitrary raids, with authorities sometimes making dubious use of the law in order to punish and deter human rights activists.

LaViolette comments that decision makers on asylum claims should be careful to avoid drawing conclusions without clear positive evidence.<sup>116</sup> She quotes Amnesty International who warn that: "Lesbians and Gay men who have experienced torture or ill treatment may not have access to documented evidence of their personal experiences. Patterns of torture and other abuses facing lesbian and gay men are not well documented in most countries, although some non-governmental organisations have begun to track these abuses."<sup>117</sup> It is also notable that persecution of LGBT persons frequently occurs in the private sphere and consequently, it may be more difficult to evidence acts of persecution.

<sup>115</sup> N. LaViolette, Sexual Orientation, Gender Identity and the Refugee Determination Process, *Journal of Research in Gender Studies*, Volume 4(2), 2014, at p 72.

<sup>116</sup> *ibid.* at p 72.

<sup>117</sup> Amnesty International Crimes of Hate, Conspiracy of Silence last accessed 9<sup>th</sup> October 2015 available at <https://www.amnesty.org/en/documents/ACT40/016/2001/ar/>

In relation to a lack of supporting COI in an asylum claim, the multidisciplinary training manual from the Hungarian Helsinki Committee is instructive and is persuasive. The manual indicates that "COI cannot reflect the entire realities in countries of origin, the vast majority of events and facts remain unreported even today."<sup>118</sup> In relation to the absence of country information, the report notes some points of caution, stating: "First, decision-makers should distinguish between public information that contradicts an applicant's statement from the absence of information... Human rights reporting is highly incomplete."

LaViolette argues that decision makers require a diversity of country information to paint a complete picture of the situation for them to be able to understand 'the nature of homophobic persecution, which is cemented by a complex interaction between legal, political, social, religious and familial spheres.<sup>119</sup> A failure to consider the totality of available COI can result in incorrect findings and erroneous refusals since an LGBT person may face violations of their human rights in a wide variety of contexts, by State and non-State actors.

### **Case hardening and hierarchies of suffering.**

UNHCR notes in the Beyond Proof report on credibility assessment<sup>120</sup> that routine exposures to narratives of torture, violence or inhuman and degrading treatment can take its toll on decision makers. The report goes on to note that recent research notes that for decision makers 'it is becoming increasingly difficult to approach each case afresh and to avoid hierarchies of suffering which demand high levels of abuse to incite sympathy.'<sup>121</sup> Both lawyers and decision makers will no doubt have experience of harrowing narratives of physical persecution and torture; however both practitioners and decision makers should be alert to the possibility of quickly dismissing certain types of treatment as 'mere' discrimination, without having conducted a detailed

<sup>118</sup> Hungarian Helsinki Committee, *Credibility Assessment in Asylum Procedures - A Multidisciplinary Training Manual*, 2013, Volume 1, last accessed 8<sup>th</sup> October 2015 available at: <http://www.refworld.org/docid/5253bd9a4.html>

<sup>119</sup> N. La Violette, *Independent Human Rights Documentation and Sexual Minorities; An Ongoing Challenge for the Canadian Refugee Determination Process*, 13:2 Int'l JHR 437 [2009]

<sup>120</sup> Beyond Proof, *Credibility Assessment in EU Asylum Systems: Full Report* May 2013, last accessed 10<sup>th</sup> October 2015 available at: <http://www.refworld.org/docid/519b1fb54.html>

<sup>121</sup> H Ballot, S Cowan, V Munro, *Research Briefing: Rape Narratives and Credibility Assessment (of Female Claimants) at the AIT*, April 2012, as quoted in the Beyond Proof report.



assessment as to whether there is a risk of persecution on a cumulative basis.

## Conclusion

The recent report of the UN highlights how LGBT persons can be subject to especially vicious and grotesque punishments, simply for living openly as who they are in the society in which they live, with reports of knife attacks, anal rape, genital mutilation, stoning and dismemberment<sup>122</sup>. However LGBT persons may also be subject to a variety of more subtle forms of harm and discrimination in their lives and workplaces; discrimination in relation to education, welfare, health, acts of verbal abuse, threats of physical harm, psychological harm and social ostracism. Acts of discrimination viewed cumulatively, will often reach the threshold of persecution, and applicants for protection should and must be granted protection in appropriate cases. It is submitted that both practitioners and decision makers should conduct a full and rigorous assessment of the applicant's circumstances in order to assess the genuine risk to the claimant, and to ensure that protection gaps are not created by cursory or presumptuous considerations of what constitutes discrimination or persecution.

## Balochistan



Patrick Dowling, Refugee Documentation Centre

### Introduction

A description in 2010 of Balochistan province in Pakistan included its lawlessness;<sup>123</sup> Human Rights Watch in 2011 noted the ongoing failure of governance in the region;<sup>124</sup> persistent daily violence in Balochistan was recorded in 2012;<sup>125</sup> the Carnegie Endowment for International Peace described in a report on the province issued in 2013 as that of a “descent into anarchy”;<sup>126</sup> reports issued in 2014 highlighted the instability of Balochistan;<sup>127</sup> a publication released in 2015 by the Human Rights Commission of Pakistan comments on the continuing lawlessness in the province.<sup>128</sup> In recent years the very

<sup>123</sup> South Asia Terrorism Portal (2 August 2010) *Balochistan: Behind an Iron Curtain*

[http://www.satp.org/satporgtp/sair/Archives/sair9/9\\_4.htm](http://www.satp.org/satporgtp/sair/Archives/sair9/9_4.htm)

<sup>124</sup> Human Rights Watch (28 July 2011) “*We Can Torture, Kill, or Keep You for Years*”, *Enforced Disappearances by Pakistan Security Forces in Balochistan*, p.14

<http://www.hrw.org/report/2011/07/28/we-can-torture-kill-or-keep-you-years/enforced-disappearances-pakistan-security>

<sup>125</sup> Inter Press Service (7 March 2012) *Human Rights Hell' in Balochistan Inflames Separatist Sentiments*

<http://www.ein.org.uk/members/country-report/human-rights-hell-balochistan-inflames-separatist-sentiments>

See also:

South Asia Terrorism Portal (2 January 2012) *Balochistan: Achilles Heel*

<http://www.ein.org.uk/members/country-report/balochistan-achilles-heel>

<sup>126</sup> Carnegie Endowment for International Peace (April 2013) *Balochistan, The State Versus the Nation*, p.4

<http://carnegieendowment.org/2013/04/11/balochistan-state-versus-nation>

<sup>127</sup> South Asia Terrorism Portal (6 October 2014) *Balochistan: Disappearing Justice*

[http://www.satp.org/satporgtp/sair/Archives/sair13/13\\_14.htm](http://www.satp.org/satporgtp/sair/Archives/sair13/13_14.htm)

Agence France Presse (5 March 2014) *The 10-year-old victim of Pakistan's 'forgotten war'*

<http://reliefweb.int/report/pakistan/10-year-old-victim-pakistan-forgotten-war>

<sup>128</sup> Human Rights Commission of Pakistan (18 July 2015) *HRCP's alarm over sectarian, ethnic violence in Balochistan*

<sup>122</sup>Discrimination and violence against individuals based on their sexual orientation and gender identity: Report of the Office of the United Nations High Commissioner for Human Rights, 4 May 2015, at paragraph 23.

writ of the state has been called into question concerning the governance of Balochistan.<sup>129</sup> This article focuses on the current security situation in the province.<sup>130</sup>

## Geography

Balochistan is approximately the size of Germany<sup>131</sup> and is the largest province in Pakistan.<sup>132</sup> Its landscape is predominately mountainous and desert<sup>133</sup> leaving the province sparsely populated<sup>134</sup>. Balochistan is however, the most resource rich region of Pakistan with gas and mineral deposits including silver and gold.<sup>135</sup> The province is also the least developed in

<http://www.ein.org.uk/members/country-report/hrcps-alarm-over-sectarian-ethnic-violence-balochistan>

See also:

Centre for Research & Security Studies (July 2015) *Security Report, April-June, 2015*, p.11

<http://crss.pk/reports/research-reports/>

<sup>129</sup> Bertelsmann Stiftung (2014) *Political Transformation*.

*Bertelsmann Stiftung, BTI 2014 — Pakistan*, p.7

<http://www.bti-project.org/reports/country-reports/aso/pak/index.nc>;

IRIN (19 February 2014) *Unnoticed conflict quietly shatters Pakistan lives*

[http://www.irinnews.org/report/99671/unnoticed-conflict-quietly-shatters-pakistan-lives](http://www.irinnews.org/report/99671/unnoticed-conflict-quietly-shatters-pakistan-lives;); &

South Asia Terrorism Portal (10 February 2014) *Balochistan: Deepening Catastrophe*

[http://www.satp.org/satporgtp/sair/Archives/sair12/12\\_32.htm](http://www.satp.org/satporgtp/sair/Archives/sair12/12_32.htm)

<sup>130</sup> It is not within the scope of this paper to discuss political endeavours in Balochistan. For commentary on the politics see: International Crisis Group (23 January 2014) *Policing Urban Violence in Pakistan*, p.16

<http://www.crisisgroup.org/en/regions/asia/south-asia/pakistan/255-policing-urban-violence-in-pakistan.aspx>

<sup>131</sup> IRIN News (1 March 2010) *Pakistan: A dangerous mixture in Balochistan*

<http://www.irinnews.org/report/88267/pakistan-a-dangerous-mixture-in-balochistan>

<sup>132</sup> International Crisis Group (14 September 2006) *Pakistan: The Worsening Conflict in Balochistan*, p.2

<http://www.crisisgroup.org/en/regions/asia/south-asia/pakistan/119-pakistan-the-worsening-conflict-in-balochistan.aspx>

<sup>133</sup> Agence France Presse *op.cit.*;

IRIN News (16 February 2006) *Pakistan: Roots of the Balochistan conflict run deep*

<http://www.irinnews.org/report/33731/pakistan-roots-of-the-balochistan-conflict-run-deep>

<sup>134</sup> Center for Research & Security Studies (2015) *Voices from Balochistan*, p.9

<http://crss.pk/reports/research-reports/>;

international Crisis Group *op.cit.*, pp.2-3;

Pak Institute for Peace Studies (2010) *Conflict and Insecurity in Balochistan: Assessing Strategic Policy Options for Peace and Security*, p.4

<http://san-pips.com/index.php?action=books&id=main~san-pips.com/download.php?f=141.pdf>

<sup>135</sup> Agence France Presse *op.cit.*;

European Asylum Support Office (August 2015) *EASO Country of Origin Information Report. Pakistan Country Overview*, p.76

<http://www.refworld.org/docid/55e061f24.html>

Pakistan<sup>136</sup> and the allocation of revenues is a source of contention for the Baloch population.<sup>137</sup>

## Development

Since its accession to Pakistan in 1948, the province of Balochistan has been the most deprived of the new state.<sup>138</sup> Poverty levels have been the highest in the country which has festered resentment among the Baloch.<sup>139</sup> An inequality deriving out of control of resources in the province is among the highest of the Baloch grievances.<sup>140</sup> Gas from Balochistan for example, has been prioritised to other provinces<sup>141</sup> and many towns in the province remain off the supply grid.<sup>142</sup> Both historical and present underdevelopment in Balochistan has been underpinned by the relationship between the province and central government.<sup>143</sup>

<sup>136</sup> IRIN News (12 April 2009) *Pakistan: Outsiders flee violence-stricken Balochistan after nationalist murders*

<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=printdoc&docid=49e44bdcl1a>;

IRIN News (1 March 2010) *Pakistan: A dangerous mixture in Balochistan*

<http://www.irinnews.org/report/88267/pakistan-a-dangerous-mixture-in-balochistan>

<sup>137</sup> International Crisis Group *op.cit.*, p.16;

Amnesty International (3 June 2011) *Pakistan: Government must stop unlawful killings in Balochistan*

<http://www.amnesty.org.au/news/comments/25861/>; &

Amnesty International (23 February 2011) *Pakistan must provide accountability for rising atrocities in Balochistan*

<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=printdoc&docid=4d679e661e>; &

Human Rights Commission of Pakistan (28 June 2011)

*Balochistan: Blinkered slide into chaos*

<http://www.ein.org.uk/members/country-report/balochistan-blinkered-slide-chaos>

<sup>138</sup> Pak Institute for Peace Studies *op.cit.*, p.35

<sup>139</sup> IRIN News (16 February 2006) *Pakistan: Roots of the Balochistan conflict run deep*

<http://www.irinnews.org/report/33731/pakistan-roots-of-the-balochistan-conflict-run-deep>;

International Crisis Group *op.cit.*, p.1

<sup>140</sup> Pak Institute for Peace Studies *op.cit.*, p.7

<sup>141</sup> South Asia Terrorism Portal (2 August 2010) *Balochistan: Behind an Iron Curtain*

[http://www.satp.org/satporgtp/sair/Archives/sair9/9\\_4.htm](http://www.satp.org/satporgtp/sair/Archives/sair9/9_4.htm)

<sup>142</sup> The Guardian (29 March 2011) *Pakistan's secret dirty war*

<http://www.theguardian.com/world/2011/mar/29/balochistan-pakistans-secret-dirty-war>

See also:

South Asia Terrorism Portal (2 January 2012) *Balochistan: Achilles Heel*

<http://www.ein.org.uk/members/country-report/balochistan-achilles-heel>

<sup>143</sup> United States Institute of Peace (7 February 2014) *Mapping Conflict Trends In Pakistan*, p.15

<http://www.usip.org/publications/mapping-conflict-trends-in-pakistan>

## Governance

The provincial government in Quetta is weak:<sup>144</sup> centralised rule from Islamabad has tended to treat Balochistan as a subsidiary arm operating to its directive.<sup>145</sup> Islamabad has been, in other words, unwilling to cede political or economic autonomy to the province.<sup>146</sup> This relationship remained unchanged when Balochistan got provincial status in Pakistan in 1970 and has continued since.<sup>147</sup> Under President Musharraf's rule between 1999 and 2008, the relationship significantly worsened.<sup>148</sup> A government package issued from Islamabad in 2009 acknowledging the provinces lacunas has not been fully implemented.<sup>149</sup> Balochistan's distrust of the centre's polity has continued into 2015 leaving local disaffection potent.<sup>150</sup> The Baloch have long felt ethnically threatened in what they regard as their own province.<sup>151</sup>

## Ethnicity

Balochistan province is where the majority of the Baloch of Pakistan reside.<sup>152</sup> The province has a majority Baloch population, followed by Pashtun.<sup>153</sup>

<sup>144</sup> BBC News (22 February 2014) *Balochistan: The untold story of Pakistan's other war*

<http://www.bbc.com/news/world-asia-26272897>

For historical context see:

IRIN News *op.cit.*,

<sup>145</sup> International Crisis Group *op.cit.*, p.1,3,13

<sup>146</sup> International Crisis Group (22 October 2007) *Pakistan: The Forgotten Conflict in Balochistan*, p.1

<http://www.crisisgroup.org/en/regions/asia/south-asia/pakistan/B069-pakistan-the-forgotten-conflict-in-balochistan.aspx>

For historical reasons see also:

Pak Institute for Peace Studies *op.cit.*, p.6

<sup>147</sup> *ibid*, p.4,9;

Center for Research & Security Studies *op.cit.*, p.10

<sup>148</sup> Human Rights Watch *op.cit.*, p.11&

Human Rights Watch (13 July 2011) *Pakistan: Upsurge in Killings in Balochistan*

<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=printdoc&docid=4e3112c82>

<sup>149</sup> South Asia Terrorism Portal (14 January 2013) *Balochistan: Continuing Carnage*

[http://www.satp.org/satporgtp/sair/Archives/sair11/11\\_28.htm#assessment1](http://www.satp.org/satporgtp/sair/Archives/sair11/11_28.htm#assessment1); &

United States Institute of Peace *op.cit.*, p.15

<sup>150</sup> Bertelsmann Stiftung *op.cit.*, p.20; &

European Asylum Support Office *op.cit.*, p.76

<sup>151</sup> Pak Institute for Peace Studies *op.cit.*, p.10

<sup>152</sup> Minority Rights Group International (Undated) *Baluchis*

<http://www.minorityrights.org/5626/pakistan/baluchis.html>

<sup>153</sup> Pak Institute for Peace Studies *op.cit.*, p.11

See also:

*ibid*, p.10;

IRIN (14 September 2012) *Pakistan: Sectarian violence slipping out of control in Balochistan*

<http://www.irinnews.org/printreport.aspx?reportid=96303> &

IRIN News (16 February 2006) *Pakistan: Roots of the Balochistan conflict run deep*

The Baloch have claimed that their ethnic group has been deliberately marginalised by Islamabad to the benefit of other ethnicities in Balochistan.<sup>154</sup> Balochs and particularly Baloch insurgents have regarded other ethnicities in the province as “settlers” and consequently threats.<sup>155</sup> The South Asia Terrorist Portal in 2010 reporting on Balochistan noted a prevailing “provincial xenophobia”.<sup>156</sup> By 2010 killings of settlers in Balochistan had increased significantly;<sup>157</sup> killings were ongoing into 2015.<sup>158</sup>

<http://www.irinnews.org/report/33731/pakistan-roots-of-the-balochistan-conflict-run-deep>

For a discussion of Baloch ethnicity see:

Carnegie Endowment for International Peace *op.cit.*, p.8;

Minority Rights Group International *op.cit.*;

Pak Institute for Peace Studies *op.cit.*, p.10

<sup>154</sup> Asia Society (July 2012) *Stabilizing Pakistan through Police reform*, p.111

<http://asiasociety.org/policy-institute/stabilizing-pakistan-through-police-reform>; &

International Crisis Group (14 September 2006) *Pakistan: The Worsening Conflict in Balochistan*, p.4

<http://www.crisisgroup.org/en/regions/asia/south-asia/pakistan/119-pakistan-the-worsening-conflict-in-balochistan.aspx>

<sup>155</sup> Human Rights Commission of Pakistan (14 October 2013)

*Balochistan: Giving the people a chance, Report of an HRCP*

*fact-finding mission, June 22-25, 2013*

<http://www.ein.org.uk/members/country-report/balochistan-giving-people-chance-report-hrcp-fact-finding-mission>

For a discussion of the influx from Afghanistan, see:

International Crisis Group (28 October 2014) *Resetting Pakistan's Relations with Afghanistan*, p.21

<http://www.crisisgroup.org/en/regions/asia/south-asia/pakistan/262-resetting-pakistan-s-relations-with-afghanistan.aspx>; &

South Asia Terrorism Portal (8 June 2015) *Balochistan: Sanguinary Faultlines*

<http://www.ein.org.uk/members/country-report/balochistan-sanguinary-faultlines>

<sup>156</sup> South Asia Terrorism Portal (2 August 2010) *Balochistan: Behind an Iron Curtain*

[http://www.satp.org/satporgtp/sair/Archives/sair9/9\\_4.htm](http://www.satp.org/satporgtp/sair/Archives/sair9/9_4.htm)

<sup>157</sup> Pak Institute for Peace Studies *op.cit.*, p.12

<sup>158</sup> South Asia Terrorism Portal (20 April 2015) *Balochistan: Enduring Tragedy*

<http://www.ein.org.uk/members/country-report/balochistan-enduring-tragedy>; &

South Asia Terrorism Portal (8 June 2015) *Balochistan: Sanguinary Faultlines*

<http://www.ein.org.uk/members/country-report/balochistan-sanguinary-faultlines>

See also:

IRIN (19 February 2014) *Unnoticed conflict quietly shatters Pakistan lives*

<http://www.irinnews.org/report/99671/unnoticed-conflict-quietly-shatters-pakistan-lives>

Ethnic groups have left the province as a result of the violence, see:

Office of the Commissioner General for Refugees and Stateless Persons (16 June 2015) *Pakistan: Security Situation*, p.20

<http://www.refworld.org/docid/55b7592f4.html>; &

South Asia Terrorism Portal (2 August 2010) *Balochistan: Behind an Iron Curtain*

[http://www.satp.org/satporgtp/sair/Archives/sair9/9\\_4.htm](http://www.satp.org/satporgtp/sair/Archives/sair9/9_4.htm)

It is not within the scope of this paper to discuss the Hazara situation in Balochistan. See the following:

International Crisis Group *op.cit.*, p.21;

## Conflict history

The current period of unrest in Balochistan which began in 2004, is the longest to affect the province since partition of the sub-continent in 1947 and the creation of Pakistan.<sup>159</sup> The first revolt against state rule occurred in 1948 only months after the creation of the nascent country.<sup>160</sup> That revolt was followed by others in 1958, 1962 and 1973 by Baloch groups either advocating autonomy or independence.<sup>161</sup>

## Conflict 2015

The ongoing insurgency in Balochistan unlike its predecessors, has a greater geographical reach in the province, and increased involvement of younger educated people.<sup>162</sup> Both the United States Institute of Peace and the Human Rights Commission of Pakistan have called the current levels of violence “unprecedented”.<sup>163</sup> Increasing human rights violations

International Crisis Group (23 January 2014) *Policing Urban Violence in Pakistan*, p.18

<http://www.crisisgroup.org/en/regions/asia/south-asia/pakistan/255-policing-urban-violence-in-pakistan.aspx>;

United States Department of State (25 June 2015) *2014 Country Reports on Human Rights Practices – Pakistan*

<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=printdoc&docid=559bd54a28>; & Department of Foreign Affairs and Trade Australia (29 November 2013) *Country Information Report: Pakistan* <http://www.ein.org.uk/members/country-report/dfat-country-report-pakistan>

<sup>159</sup> Asia Society *op.cit.*, p.113

<sup>160</sup> The Guardian *op.cit.*,

<sup>161</sup> Amnesty International (3 June 2011) *Pakistan: Government must stop unlawful killings in Balochistan*

<https://www.amnesty.org/en/documents/asa33/003/2011/en/>

For further coverage of twentieth century and historical conflicts, see:

International Crisis Group (14 September 2006) *Pakistan: The Worsening Conflict in Balochistan*, p.3,4

<http://www.crisisgroup.org/en/regions/asia/south-asia/pakistan/119-pakistan-the-worsening-conflict-in-balochistan.aspx>;

Minority Rights Group International *op.cit.*;

Carnegie Endowment for International Peace *op.cit.*, p.7;

IRIN News (16 February 2006) *Pakistan: Roots of the Balochistan conflict run deep*

<http://www.irinnews.org/report/33731/pakistan-roots-of-the-balochistan-conflict-run-deep>; &

Inter Press Service *op.cit.*,

<sup>162</sup> Dawn (1 June 2015) *Situationer: Who's who of Baloch insurgency*

<http://www.dawn.com/news/1185401>;

International Crisis Group (23 January 2014) *Policing Urban Violence in Pakistan*, p.17

<http://www.crisisgroup.org/en/regions/asia/south-asia/pakistan/255-policing-urban-violence-in-pakistan.aspx>

It is not within the scope of this paper to discuss the issue of Indian and Afghan involvement in Balochistan, see:

Stratfor (6 May 2015) *Balochistan: An Overlooked Conflict Zone*

<https://www.stratfor.com/geopolitical-diary/balochistan-overlooked-conflict-zone>

<sup>163</sup> United States Institute of Peace *op.cit.*, p.3;

Human Rights Commission of Pakistan *op.cit.*,

have been reported by both Baloch insurgents and government forces.<sup>164</sup> Baloch militants have targeted security forces, Punjabis and infrastructure.<sup>165</sup> These attacks have included targeting gas installations, non-Baloch businesses, police stations and military bases.<sup>166</sup> Baloch insurgent groups operating in the province include: the Baloch Liberation Front, the Baloch Republican Army, the Balochistan Liberation Tigers, the Baloch Liberation Army, the Baloch United Liberation Front, Lashkar-e-Balochistan and the United Baloch Army.<sup>167</sup> The Balochistan Liberation Army is the most prominent militant group operating in the province, most notably in Bolan and Khuzdar districts, with approximately 3,000 fighters.<sup>168</sup>

<sup>164</sup> Amnesty International *op.cit.*; & Bertelsmann Stiftung *op.cit.*, p.2

<sup>165</sup> Freedom House (5 May 2015) *Freedom in the World 2015 – Pakistan*

<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=printdoc&docid=55506fa758>;

Agence France Presse *op.cit.*; &

Radio Free Europe/Radio Liberty (11 June 2015) *Four Policemen Killed In Southwest Pakistan*

<http://www.rferl.org/content/pakistan-balochistan-4-police-killed/27066814.html>

<sup>166</sup> Human Rights Watch *op.cit.*;

Reuters (24 September 2013) *Special Report: The struggle Pakistan does not want reported*

<http://in.reuters.com/article/2013/09/24/pakistan-disappearances-special-report-idINDEE98N0AF20130924>;

South Asia Terrorism Portal (20 April 2015) *Balochistan: Enduring Tragedy*

<http://www.ein.org.uk/members/country-report/balochistan-enduring-tragedy>;

South Asia Terrorism (4 May 2015) *Balochistan: Shooting the Messenger*

<http://www.ein.org.uk/members/country-report/balochistan-shooting-messenger>; &

Asia Society *op.cit.*, p.116

<sup>167</sup> Department of Foreign Affairs and Trade Australia *op.cit.*;

South Asia Terrorism Portal (6 October 2014) *Balochistan: Disappearing Justice*

[http://www.satp.org/satporgtp/sair/Archives/sair13/13\\_14.htm](http://www.satp.org/satporgtp/sair/Archives/sair13/13_14.htm);

Human Rights Watch (28 July 2011) “We Can Torture, Kill, or Keep You for Years”, *Enforced Disappearances by Pakistan Security Forces in Balochistan*, p.14,22

<http://www.hrw.org/report/2011/07/28/we-can-torture-kill-or-keep-you-years/enforced-disappearances-pakistan-security>; &

United States Institute of Peace (13 May 2015) *Charting Pakistan's Internal Security Policy*

<http://www.ein.org.uk/members/country-report/charting-pakistans-internal-security-policy>

United States Institute of Peace (7 February 2014) *Mapping Conflict Trends In Pakistan*, p.16

<http://www.usip.org/publications/mapping-conflict-trends-in-pakistan>; &

Asia Society *op.cit.*, p.117

<sup>168</sup> Dawn *op.cit.*;

United States Institute of Peace *op.cit.*;

Carnegie Endowment for International Peace (9 April 2014) *Situation Report: Pakistan*

<http://carnegieendowment.org/2014/04/09/situation-report-pakistan/h7mc>;

International Crisis Group (14 September 2006) *Pakistan: The Worsening Conflict in Balochistan*, p.12

Human rights organisations have been among those to criticise the response of the government to militant attacks which has included extrajudicial killings, torture and enforced disappearances by security forces.<sup>169</sup> “Kill and dump” operations by state forces, where people have been abducted and killed and their bodies left discarded, is increasingly used as a counter terrorism method.<sup>170</sup> A mass grave discovered in 2014 in Khuzdar was one of the most significant findings in recent years of those subject to state counter terrorism activities.<sup>171</sup> Many of those suspected of having links

<http://www.crisisgroup.org/en/regions/asia/south-asia/pakistan/119-pakistan-the-worsening-conflict-in-balochistan.aspx>; &

Carnegie Endowment for International Peace (April 2013)

*Balochistan, The State Versus the Nation*, p.5

<http://carnegieendowment.org/2013/04/11/balochistan-state-versus-nation>; &

European Asylum Support Office *op.cit.*, p.62

<sup>169</sup> Human Rights Watch (13 July 2011) *Pakistan: Upsurge in Killings in Balochistan*

<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=printdoc&docid=4e3112c82>;

Redress & Asian Legal Resource Centre (October 2013) *Torture in Asia: The law and practice*, p.11

<http://www.refworld.org/docid/5232e4b24.html>;

Minority Rights Group International (2 July 2015) *State of the World's Minorities 2015*, p.179

<http://www.minorityrights.org/>;

Human Rights Commission of Pakistan (2015) *Annual report 2014*, p.78

<http://hrcp-web.org/hrpweb/annual-report-2014/>; &

United States Department of State *op.cit.*,

Accounts vary regarding the numbers of those disappeared see:

Inter Press Service *op.cit.*;

Carnegie Endowment for International Peace *op.cit.*;

BBC News *op.cit.*;

United States Institute of Peace *op.cit.*, p.16;

United States Department of State *op.cit.*;

Deutsche Welle (26 April 2015) *Activist's murder spotlights army's abuses in Pakistan's Balochistan*

<http://www.dw.com/en/activists-murder-spotlights-armys-abuses-in-pakistans-balochistan/a-18409895>;

South Asia Terrorism (4 May 2015) *Balochistan: Shooting the Messenger*

<http://www.ein.org.uk/members/country-report/balochistan-shooting-messenger>; &

European Asylum Support Office *op.cit.*, p.76

Some disappeared may have also gone into hiding, see:

Reuters *op.cit.*,

<sup>170</sup> Pak Institute for Peace Studies *op.cit.*, p.36;

Human Rights Watch (13 July 2011) *Pakistan: Upsurge in Killings in Balochistan*

<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=printdoc&docid=4e3112c82>;

Human Rights Commission of Pakistan (28 June 2011)

*Balochistan: Blinkered slide into chaos*

<http://www.ein.org.uk/members/country-report/balochistan-blinkered-slide-chaos>;

Reuters *op.cit.*;

International Crisis Group (23 January 2014) *Policing Urban Violence in Pakistan*, p.15

<http://www.crisisgroup.org/en/regions/asia/south-asia/pakistan/255-policing-urban-violence-in-pakistan.aspx>;

BBC News *op.cit.*,

<sup>171</sup> South Asia Terrorism Portal (19 January 2015) *Balochistan: Persistent Crisis*

with Baloch insurgent groups have continued to disappear and youth activists have increasingly been targeted by the state.<sup>172</sup>

Islamist extremist groups have also been active in Balochistan, including the Taliban, Lashkar-e-Janghvi and Sipah-e-Sahaba Pakistan.<sup>173</sup> Traditionally Baloch insurgents have not been receptive to overtures from Islamist groups though that has not prevented the expansion of the latter in the province, particularly in northern parts bordering Punjab and tribal areas.<sup>174</sup>

The resurgence of violence in Balochistan left an already depleted police force further exposed:<sup>175</sup> militant groups have been able to exploit this situation.<sup>176</sup> The Human Rights Commission of Pakistan reported in 2015 that the police numbers in Balochistan fell below sanction.<sup>177</sup> The Baloch have criticized the police for its mainly Punjabi composition and lack of communal affinity.<sup>178</sup> The jurisdiction of police in the province is principally confined to urban areas with the remainder policed by levies and local tribal chiefs, alongside the paramilitary Frontier

[http://www.satp.org/satporgtp/sair/Archives/sair13/13\\_29.htm](http://www.satp.org/satporgtp/sair/Archives/sair13/13_29.htm);

European Asylum Support Office *op.cit.*; &

Office of the Commissioner General for Refugees and Stateless Persons *op.cit.*, p.19

<sup>172</sup> Agence France Presse *op.cit.*; &

Dawn *op.cit.*,

<sup>173</sup> South Asia Terrorism Portal (20 April 2015) *Balochistan: Enduring Tragedy*

<http://www.ein.org.uk/members/country-report/balochistan-enduring-tragedy>;

Carnegie Endowment for International Peace (9 April 2014)

*Situation Report: Pakistan*

<http://carnegieendowment.org/2014/04/09/situation-report-pakistan/h7mc>; &

United States Institute of Peace *op.cit.*, p.17

<sup>174</sup> International Crisis Group *op.cit.*, p.20;

International Crisis Group (22 July 2015) *Revisiting Counter-terrorism Strategies in Pakistan: Opportunities and Pitfalls*, p.9

<http://www.crisisgroup.org/en/regions/asia/south-asia/pakistan.aspx>;

Carnegie Endowment for International Peace *op.cit.*; &

South Asia Terrorism Portal (2015) *Balochistan Assessment - 2015*

<http://www.satp.org/satporgtp/countries/pakistan/Balochistan/index.html>

<sup>175</sup> Human Rights Watch (28 July 2011) “We Can Torture, Kill, or Keep You for Years”, *Enforced Disappearances by Pakistan Security Forces in Balochistan*, p.14

<http://www.hrw.org/report/2011/07/28/we-can-torture-kill-or-keep-you-years/enforced-disappearances-pakistan-security>; &

Asia Society *op.cit.*, p.119

<sup>176</sup> *ibid*, p.119

<sup>177</sup> Human Rights Commission of Pakistan *op.cit.*, p.78

<sup>178</sup> Asia Society *op.cit.*, pp.114-115;

A similar accusation is levelled at the Frontier Corps, see:

international Crisis Group (23 January 2014) *Policing Urban Violence in Pakistan*, p.21

<http://www.crisisgroup.org/en/regions/asia/south-asia/pakistan/255-policing-urban-violence-in-pakistan.aspx>

Corps.<sup>179</sup> The levies are recruited from local tribes and compose an informal method of policing, administering to approximately 95% of the province.<sup>180</sup>

Movement is restricted into Balochistan including for NGOs.<sup>181</sup> Media coverage and discussion of the situation in the province is scant, meaning most in Pakistan outside of Balochistan have limited knowledge of events there.<sup>182</sup> Journalists who have reported on the province have faced threats and been killed by militant groups and state forces.<sup>183</sup>

## Conclusion

The ongoing violence in the province has displaced thousands internally and equal numbers have fled to other parts of the Pakistan,<sup>184</sup> Balochistan seems to be

<sup>179</sup> United States Institute of Peace (13 May 2015) *Charting Pakistan's Internal Security Policy*  
<http://www.ein.org.uk/members/country-report/charting-pakistans-internal-security-policy>

<sup>180</sup> Center for Research & Security Studies *op.cit.*, p.9; Asia Society *op.cit.*, p.114; & Commonwealth Human Rights Initiative & Human Rights Commission of Pakistan (May 2010) *Police Organisations in Pakistan*, p.63  
<http://hrpc-web.org/publication/book/police-organisations-in-pakistan/>

<sup>181</sup> United States Department of State *op.cit.*; & Freedom House *op.cit.*,

<sup>182</sup> International Federation for Human Rights (14 April 2015) *Pakistan: Government silences academics speaking about Balochistan*  
<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=printdoc&docid=555da76b38;>

The Guardian *op.cit.*;  
Human Rights Commission of Pakistan (28 June 2011) *Balochistan: Blinkered slide into chaos*  
<http://www.ein.org.uk/members/country-report/balochistan-blinkered-slide-chaos;>

Agence France Presse *op.cit.*; Reuters *op.cit.*; & Deutsche Welle *op.cit.*,

<sup>183</sup> South Asia Terrorism (4 May 2015) *Balochistan: Shooting the Messenger*

<http://www.ein.org.uk/members/country-report/balochistan-shooting-messenger;>  
BBC News *op.cit.*; Reporters Without Borders (31 August 2014) *Two news agency journalists shot dead in Quetta*  
[http://en.rsf.org/pakistan-two-news-agency-journalists-shot-31-08-2014\\_46867.html;](http://en.rsf.org/pakistan-two-news-agency-journalists-shot-31-08-2014_46867.html;)

Reuters *op.cit.*; & Freedom House (1 December 2014) *Freedom of the Press 2014 – Pakistan*  
<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=printdoc&docid=54a148e1e>

<sup>184</sup> IRIN News (12 April 2009) *Pakistan: Outsiders flee violence-stricken Balochistan after nationalist murders*  
<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=printdoc&docid=49e44bdc1a;>  
Human Rights Commission of Pakistan (2015) *Annual report 2014*,  
[http://hrpc-web.org/hrpcweb/annual-report-2014/;](http://hrpc-web.org/hrpcweb/annual-report-2014/)

Center for Research & Security Studies *op.cit.*;  
South Asia Terrorism Portal (20 April 2015) *Balochistan: Enduring Tragedy*  
<http://www.ein.org.uk/members/country-report/balochistan-enduring-tragedy;>

caught up in “an endless cycle of violence”.<sup>185</sup> Nevertheless, there have been a reduced number of terrorist incidents and fatalities in the province, including dating from August 2015.<sup>186</sup> In 2015 hundreds of militants have laid down their arms and availed of a government amnesty and rehabilitation package.<sup>187</sup> The Supreme Court continues to take the government to task over the disappeared in Balochistan.<sup>188</sup> And despite the ongoing insurgency and developmental issues, the majority of the Baloch population wish to remain as part of Pakistan.<sup>189</sup>

International Displacement Monitoring Centre (24 August 2015) *Pakistan: solutions to displacement elusive for both new and protracted IDPs*

<http://www.internal-displacement.org/south-and-south-east-asia/pakistan/2015/pakistan-solutions-to-displacement-elusive-for-both-new-and-protracted-idps>

<sup>185</sup> BBC News *op.cit.*; & See also: Stratfor *op.cit.*,

<sup>186</sup> South Asia Terrorism Portal (19 January 2015) *Balochistan: Persistent Crisis*

[http://www.satp.org/satporgtp/sair/Archives/sair13/13\\_29.htm;](http://www.satp.org/satporgtp/sair/Archives/sair13/13_29.htm)  
Office of the Commissioner General for Refugees and Stateless Persons *op.cit.*; European Asylum Support Office *op.cit.*;  
The Express Tribune (31 August 2015) *Balochistan sees ‘substantial drop’ in violence*

[http://tribune.com.pk/story/947842/balochistan-sees-substantial-drop-in-violence/;](http://tribune.com.pk/story/947842/balochistan-sees-substantial-drop-in-violence/)

Center for Research & Security Studies (2015) *Annual Security Report 2014*, p.30

[http://crss.pk/reports/research-reports/;](http://crss.pk/reports/research-reports/) &

Pakistan Today (2 September 2015) *August witnesses rare calm in troubled Balochistan*

<http://www.pakistantoday.com.pk/2015/09/02/national/august-witnesses-rare-calm-in-troubled-balochistan/>

<sup>187</sup> The Express Tribune (14 August 2015) *Balochistan insurgency: 400 militants surrender on Independence Day*

[http://tribune.com.pk/story/938017/balochistan-insurgency-400-militants-surrender-on-independence-day/;](http://tribune.com.pk/story/938017/balochistan-insurgency-400-militants-surrender-on-independence-day/) &

Pakistan Today *op.cit.*,

<sup>188</sup> South Asia Terrorism (4 May 2015) *Balochistan: Shooting the Messenger*

<http://www.ein.org.uk/members/country-report/balochistan-shooting-messenger;>

South Asia Terrorism Portal (6 October 2014) *Balochistan: Disappearing Justice*

[http://www.satp.org/satporgtp/sair/Archives/sair13/13\\_14.htm;](http://www.satp.org/satporgtp/sair/Archives/sair13/13_14.htm)

South Asia Terrorism Portal (10 February 2014) *Balochistan: Deepening Catastrophe*

[http://www.satp.org/satporgtp/sair/Archives/sair12/12\\_32.htm;](http://www.satp.org/satporgtp/sair/Archives/sair12/12_32.htm)  
Bertelsmann Stiftung *op.cit.*;

BBC News *op.cit.*; &

Reuters *op.cit.*,

<sup>189</sup> Carnegie Endowment for International Peace (April 2013) *Balochistan, The State Versus the Nation*, p.4,19

<http://carnegieendowment.org/2013/04/11/balochistan-state-versus-nation;>

The Express Tribune (31 August 2015) *Balochistan sees ‘substantial drop’ in violence*

[http://tribune.com.pk/story/947842/balochistan-sees-substantial-drop-in-violence/;](http://tribune.com.pk/story/947842/balochistan-sees-substantial-drop-in-violence/) &

Dawn (22 August 2015) *Joint efforts have brought Balochistan out of crisis, say army, govt*

<http://www.dawn.com/news/1202096>

## Is Temporary Protection the Answer to Europe's Refugee Crisis?



Jeff Walsh<sup>190</sup>

### Introduction

The term 'refugee crisis', as it is often referred to in the media, pertains to the large influx of people fleeing conflict in Syria, Iraq and Afghanistan. While piling in comparison to the numbers of refugees residing in much poorer countries like Lebanon, Jordan and Turkey, the EU, in particular, has struggled to cope with huge numbers of people crossing its borders to claim asylum, many of whom are risking treacherous journeys across conflict zones, desert and sea.

Political responses to this crisis have seen endeavours to establish relocation quotas aiming to ease the caseload of Member States such as Italy and Greece, unable to provide sufficient reception conditions to asylum seekers, and also Member States such as Germany, Finland and Sweden, where higher recognition rates, greater employment prospects and more welcoming tones generally are seen as pull factors.

As a result of the numbers crossing the EU's external borders, there have recently been calls to invoke the EU's Temporary Protection Directive,<sup>191</sup> as a

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<sup>191</sup> Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance

mechanism to deal with the crisis. The huge influx of people seeking asylum from the former Yugoslavia in the 1990s led to calls for mechanisms at an EU level to deal with such situations.<sup>192</sup> Despite being the first such mechanism to deal with such issues the Temporary Protection Directive has never been invoked or triggered.<sup>193</sup>

This article examines the potential levels of protection afforded by the Temporary Protection Directive, and what that means for asylum seekers in the current situation. Is the Directive a better alternative to the current relocation program? In discussing the options available to the EU this article aims to do so with the aim of maintaining both integrity in the asylum system and the rights, both procedural and substantive, of those crossing into the EU seeking asylum.

### Defining Temporary Protection and its Scope under the Directive

Temporary protection is defined in the 2001 Directive as:

a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection.<sup>194</sup>

The Directive defined 'displaced persons' as those falling under Article 1A of the 1951 Refugee Convention, as well as those fleeing armed conflict or endemic violence and those who have, or are at risk of, generalised and systematic violations of their human rights.<sup>195</sup> A 'mass influx' is defined as the spontaneous arrival of large numbers of displaced persons in the EU, who come from a specific geographical location.<sup>196</sup>

of efforts between Member States in receiving such persons and bearing the consequences thereof.

<sup>192</sup> European Commission, "Temporary Protection" <[http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/temporary-protection/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/temporary-protection/index_en.htm)>.

<sup>193</sup> *ibid.*

<sup>194</sup> Temporary Protection Directive (note 2), Article 2(a).

<sup>195</sup> *ibid.*, Article 2(c).

<sup>196</sup> *ibid.*, Article 2(d).

The invocation of the provisions of the Temporary Protection Directive depends on a decision of the European Council, on proposal from the Commission.<sup>197</sup> The provision of temporary protection shall come to an end when ‘the maximum duration has been reached’ or at any time on foot of a Council Decision.<sup>198</sup> That Council Decision shall be based on the establishment of the fact that the situation in the country of origin of those receiving temporary protection ‘is such as to permit a safe and durable return.’<sup>199</sup>

Articles 8-16 of the Directive lay down the obligations owing by Member States to those granted temporary protection. Member States are obliged to:

- (i) Issue a residence permit to those granted temporary protection for the duration of that protection;<sup>200</sup>
- (ii) Provide a document containing the provisions relating to the temporary protection;<sup>201</sup>
- (iii) Register the personal data of those granted protection;<sup>202</sup>
- (iv) Take back those granted temporary protection where those persons have attempted to enter and/or remain in another Member State;<sup>203</sup>
- (v) Provide access to employment, education, vocational training;<sup>204</sup>
- (vi) Provide needs-based access to accommodation, social welfare/subsistence and medical care;<sup>205</sup>
- (vii) Provide access to the education system for those under 18 under the same conditions as nationals;<sup>206</sup>
- (viii) Provide for the principle of family unity;<sup>207</sup>
- (ix) Provide for the legal guardianship of unaccompanied minors.<sup>208</sup>

<sup>197</sup> *ibid*, Article 5.

<sup>198</sup> *ibid*, Article 6(1).

<sup>199</sup> *ibid*, Article 6(2).

<sup>200</sup> Article 8.

<sup>201</sup> Article 9.

<sup>202</sup> Article 10.

<sup>203</sup> Article 11. This Article operates for the duration of the temporary protection and may be suspended by bilateral agreement between Member States.

<sup>204</sup> Article 12. Priority may be given to EU/EEA citizens and legally resident third country nationals who are unemployed when providing for access to employment.

<sup>205</sup> Article 13.

<sup>206</sup> Article 14. The Member State may also provide such access to adults.

<sup>207</sup> Article 15.

<sup>208</sup> Article 16.

The Directive also provides for the right of access to asylum procedures for those holding temporary protection.<sup>209</sup> Member States may limit the refugee to holding either refugee status or temporary protection; however, if a person is found not to be eligible for refugee status, they are entitled to continue to hold temporary protection.<sup>210</sup>

Chapter V of the Directive lays down provisions in the respect of Member State obligations when bringing temporary protection to an end. Member States are obliged to provide for voluntary repatriation, including allowing for readmission to those who return home and find that the situation has not sufficiently improved, provided that temporary protection has not ended.<sup>211</sup> Member States must ensure the protection of the human dignity of those being forced to return and take ‘compelling humanitarian reasons’ into account.<sup>212</sup> Without prejudice to the foregoing, the laws of the Member States also apply.<sup>213</sup>

The Directive also lays down provisions for a burden sharing mechanism in the ‘Solidarity’ provisions.<sup>214</sup> However, this is dependent on Member States indicating their own capacity.

### **What are the advantages and disadvantages of protection under the Directive?**

There are some benefits available under the Directive. While still providing for burden sharing in Article 26, the Directive creates a status that appears to be universal across the Union. As such, Article 26 obliges Member States to cooperate in the transfer of persons holding temporary protection. This system, overseen by the Commission and UNHCR, would be based on the consent of the persons being transferred and the capacity of the Member State receiving the transferees.

The system under the Directive also provides for a speedy response, removing the need for refugee status determination procedures, other than those to establish membership of the particular group set out by the EU Council.<sup>215</sup> However, Orchard and Chatty are unclear

<sup>209</sup> Article 17. Article 18 applies the Dublin Convention (as it then was) to the determination of refugee status.

<sup>210</sup> Article 19.

<sup>211</sup> Article 21.

<sup>212</sup> Article 22. Article 23 allows for ‘necessary measures’ in respect of those whose health is such that they cannot be expected to travel, or for families whose children are in the education system – they may be allowed to finish a particular school period.

<sup>213</sup> Article 20. It is unclear how this provision sits with general asylum directives and their provisions for the ending of refugee status/subsidiary protection.

<sup>214</sup> Articles 25 and 26.

<sup>215</sup> Cynthia Orchard and Dawn Chatty, ‘High Time for Europe to Offer Temporary Protection to Refugees from Syria?’ Oxford



as to the levels of protection that should be required in line with Article 1C(5) of the Refugee Convention.

Practically, the creation of this new (and temporary) status has the potential to be confusing when implemented. While it is to be welcomed that a temporary protection holder has a right of access to asylum procedures, this should be part of an automatic procedure. In a situation where such temporary protection holders voluntarily apply for asylum, in many cases losing many of the benefits listed above, there is considerable scope for such asylum systems to become overburdened if everyone granted temporary protection were to apply for asylum at once. It may have been more useful to Member States to provide for an automatic, but phased system of assessment under the regular asylum procedure. For those not granted refugee status or subsidiary protection, temporary protection could continue until such time as it is ended under Article 6.

While the list of entitlements laid down in the Directive are to be welcomed, it has the effect of discriminating against asylum seekers from other countries not covered by the Council Decision pursuant to Article 5.

In addition, while the inclusion of a compelling circumstances exception to the cessation of protection is also to be welcomed, it is worrying that no reference to cessation more generally was made in Article 6 and Chapter V of the Directive.

### Problems associated with invoking the Directive

Bearing this in mind, the question must be asked as to whether the Temporary Protection Directive should be invoked to deal with the current crisis.

It has been noted that the Temporary Protection Directive could have been implemented on two previous occasions since it entered into force.<sup>216</sup> Ineli-Ciger argues that the Temporary Protection Directive should be triggered as part of 'a more effective response to cope with the irregular arrival of mixed flows through the Mediterranean'.<sup>217</sup> However, opinion on this issue is not uniform.

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Human Rights Hub, 27 October 2014. Available at <<http://ohrh.law.ox.ac.uk/high-time-for-europe-to-offer-temporary-protection-to-refugees-from-syria/>> last accessed, 11 October 2015.

<sup>216</sup> Meltem Ineli-Ciger, 'The Missing Piece in the European Agenda on Migration: the Temporary Protection Directive,' EU Law Analysis, 8 July 2015. Available at <<http://eulawanalysis.blogspot.ie/2015/07/the-missing-piece-in-european-agenda-on.html>> last accessed, 30 September 2015.

<sup>217</sup> *ibid*

Alice Edwards stated that measures dealing with the Yugoslavian refugee crisis in the 1990s merely serves to highlight how the operation of temporary protection measures allowed suspension, and even the disapplication of Refugee Convention-related procedures, including cessation.<sup>218</sup> She highlights, as has been highlighted above, that Article 6 of the Directive does not correspond to Article 1C(5); 'instead persons are and can be returned as soon as the triggering event has been resolved.'<sup>219</sup>

This absence of a reference to cessation of refugee status under Article 1C of the Refugee Convention in Article 6(2) of the Directive raises concerns similar to those raised in respect of Australia. There, a Temporary Protection Visa (TPV) system has been operated intermittently since the 1990s, whereby asylum seekers are granted a time-limited visa pursuant to the Refugee Convention.<sup>220</sup> The cessation-related issue came to a head in 2008 when the High Court of Australia ruled that when the TPV comes to an end and the refugee is re-applying for protection, a TPV holder is not entitled to rely on Article 1C(5) of the Convention, which would have the effect of placing a burden on the state to prove that circumstances had ceased and protection was available in the country of origin.<sup>221</sup> As such, TPV holders had to constantly re-apply for protection pursuant to Article 1A(2) of the Refugee Convention.

Given the lack of clarity surrounding the application of cessation to those who fall within the remit of the Directive, there is little protection for those who, despite having a right of access to asylum procedures, have their claim rejected. Those persons will continue to hold temporary protection, until such time as Article 6 of the Directive is invoked.

It is therefore likely that invocation of the Directive will lead to a situation where nationals of Syria, Iraq, Afghanistan and possibly Eritrea will be classed somewhere between asylum seekers and declared refugees. receive greater assistance than regular asylum seekers, however, there is no guaranteed durable solution. Remaining within the temporary protection scheme also leaves the holder without the protection of Article 1C of the Refugee Convention, an express omission from Article 6. Such a situation will

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<sup>218</sup> Alice Edwards, 'Temporary Protection, Derogation and the 1951 Refugee Convention' (2012) 13 Melbourne Journal of International Law 1, 8.

<sup>219</sup> *ibid*, 8-9.

<sup>220</sup> Maria O'Sullivan, 'Withdrawing Protection Under Article 1C(5) of the 1951 Convention: Lessons from Australia' (2008) 20(4) International Journal of Refugee Law 586, 587.

<sup>221</sup> *ibid*, generally. See, *Minister for Multicultural Affairs v QAAH* [2008] HCA 53.

also prove detrimental to those seeking asylum from other states who may see determination of their claims substantially delayed as a result of the unlimited right of access to asylum procedures for those granted temporary protection.

### **Conclusions – Is Relocation the Better Option?**

Relocation, or dispersal of asylum seekers across the Union to be processed under national procedures, appears to be the favoured option by the majority of EU Member States at present. This has the effect of relieving pressure on Member States who are the first point of entry, such as Greece and Italy, as well as those seen as the ultimate destination – Germany, Finland and Sweden.

EU agreements in September have resolved to ‘relocate’ asylum seekers from Italy and Greece. This will apply to those nationalities that will have greater than a 75% chance of being granted protection. The Member State receiving these asylum seekers will be responsible for deciding their protection claim.<sup>222</sup>

Given the uncertainty surrounding the operation of temporary protection, it appears to me to be preferable that the relocation agreements being set in place funnel asylum seekers through the regular procedure (as laid down in the Procedures and Qualification Directives). It appears, at this stage anyway, that outside of Greece and Italy, no major pressure is being placed on national asylum procedures that would call for an emergency response. In allowing for relocation of asylum seekers, dispersing them to other Member States, equitable access to asylum procedures is ensured, as is the likelihood of finding a durable solution for those fleeing conflict in the Middle East and the Horn of Africa. Such a suggestion adds credence to calls for more uniform levels of international protection across the EU, providing for a status that is more easily transferrable within the bloc.

Can the Temporary Protection Directive be part of a multi-faceted approach to the refugee crisis? Absolutely, but not in its current format without additional protection in relation to cessation and access to asylum procedures. A more balanced approach is necessary.



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<sup>222</sup> Steve Peers, ‘Relocation of Asylum-Seekers in the EU: Law and Policy’. Available at <http://eulawanalysis.blogspot.ie/2015/09/relocation-of-asylum-seekers-in-eu-law.html> last accessed, 11 October 2015.