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Fortress Europe and the Iraqi ‘intruders’: Iraqi asylum-seekers and the EU, 2003-2007

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Introduction

A full seven years ago, European leaders announced their intention to establish ‘a Common European Asylum System (CEAS), based on the full and inclusive application of the Geneva Convention’¹. In 2005, the first phase of the harmonisation process was completed with the adoption of four key pieces of legislation. Perhaps the most important of these is the Qualifications Directive which aims to ‘ensure that a minimum level of international protection is available in all member states... and to reduce disparities between member states’ legislation and practice in these areas’².

The influx of Iraqi asylum-seekers since the invasion of the country by coalition forces in May 2003 has exposed the intention of European Union (EU) governments to harmonise their asylum systems to its first serious test. How have they acquitted themselves? This is the principal question which this article seeks to answer. Sadly, the data analysed hereunder show that so far there is little indication of better convergence in national asylum practice or increased sharing of responsibility to accept asylum-seekers among EU states.

This apparent lack of progress is all the more disheartening if we consider that the total number of Iraqis who have been able to enter the EU is negligible compared to the number of those who have been displaced by the crisis. Of the 2.5 million Iraqis who fled the country since the invasion, only some 60,000 have deposited asylum claims in the EU. The numerical disparity exposes another problem area which this article aims to address. Not only are there continuing flaws in EU asylum policy, but the EU also still lacks an adequate refugee policy which is capable of addressing the international dimension of displacement crises.

The distinction between asylum policy and refugee policy has often been neglected by both the European press and policy makers alike. As signatories of the 1951 Convention, all EU states have an asylum policy which provides the procedural framework necessary for the handling of those persons who succeed in crossing the border into Europe in order to seek protection. As major donor countries and important players on the world political stage, however, EU member states also need a comprehensive refugee policy which should provide the basis for a joint EU approach to the provision of refugee assistance in regions of origin and the establishment of resettlement programmes. It should also include the adoption of measures to ensure that asylum-seekers are able to access the territory of a country of asylum in order to seek international protection³. As will be shown below, the lack of such a policy is painfully evident in the EU’s poor response to the Iraqi refugee crisis.

* Many thanks are due to José Riera, Andrew Harper, Susin Park, Stefan Sperl and Jeff Crisp for their invaluable assistance with the production of this article.

¹ Tampere European Council, *Presidency Conclusions 15 and 16 October 1999*, para. 13.

² European Commission, *Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*, p. 4.

³ Joanne van Selm, 2005, *European Refugee Policy: is there such a thing?*, in: *New Issues in Refugee Research – Working Paper No. 115*, p. 1.

It is probably fair to say that so far the most evident sign of a common EU refugee policy is a negative one: it consists of preventing asylum-seekers from reaching the territory of the Union in the first place. This much can be gauged from the difficulties and obstacles which Iraqi refugees face in trying to make the journey to Europe and which are the subject of the first part of this article. The second part presents and compares national policies towards Iraqi asylum-seekers in Greece, the United Kingdom, Germany and Sweden. These four states have been selected primarily because between them, they have received over two-thirds of all claims for asylum made in the EU since 2005⁴. In addition, each of these member states has adopted a position towards Iraqis which is unique within the Union, amply demonstrating the extent to which national asylum policy continues to vary. The third part of the article examines the implications of the EU response to the Iraqi refugees crisis for the future direction of its common asylum and refugee policy.

Iraqis and the journey to the EU

Although Iraq has been a significant refugee-producing country for several decades, the Iraqi displacement crisis has grown on an unprecedented scale in recent years, and in particular since the upsurge in sectarian violence since the February 2006 Samarra bombings. The steadily deteriorating security situation since the 2003 invasion has made Iraq unacceptably dangerous for millions of its citizens. As UNHCR stated in its September 2007 eligibility guidelines on Iraqi refugees, ‘the present situation in Central and Southern Iraq is characterised by pervasive extreme violence, serious violations of human rights and a general lack of law and order’⁵.

For Iraqis, seeking asylum in the EU is a dangerous and expensive luxury. EU member states have effectively closed their borders to Iraqis, and coalition troops and embassies within Iraq do not accept asylum claims. The small-scale resettlement operation run by UNHCR offices in Damascus and Amman remains the only possibility open to Iraqis to seek protection from industrialised countries while remaining in their region of origin.

In stark contrast to EU states, Iraq’s neighbours have shown themselves ready to assist persons displaced by the conflict. Indeed, it has been estimated by certain agencies that the number of refugees in Iraq’s neighbours is greater than the total number of refugees currently residing in the entire European Union⁶. Jordan has accepted 750,000 Iraqi refugees, and as it was already host to a sizeable contingent of Palestinians, the country currently has the highest number of refugees per capita in the world. Syria has accepted 1.4 million Iraqis. However, both countries have lacked the absorption capacity and resources necessary to continue their generous policies – Jordan was forced to tighten border regulations in mid-2007 to stem the flow of refugees, while Syria followed suit in September. Despite the obvious need for burden-sharing, EU member states have failed to facilitate access to their territory for Iraqis, and therefore only a tiny proportion of those in neighbouring countries have

⁴ See Annex for further details.

⁵ UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-seekers*, August 2007, p. 9.

⁶ Faisal al-Miqad, *Iraqi Refugees in Syria*, Forced Migration Review, June 2007, p. 20.

reached the EU. Iraqi refugees wishing to seek protection in Europe face a long and dangerous journey, with the EU's strictly controlled borders as the final barrier.

However, as the head of UNHCR's Iraq Support Unit, Andrew Harper, has pointed out, crossing the actual border into the EU is 'just another obstacle, another traumatic' experience which Iraqis must overcome when leaving their country. The beginning of the journey within Iraq itself is fraught with difficulties. Violent attacks at false checkpoints and criminal carjackings are just some of the risks involved in road travel, and the rise of sectarian violence has made travel for Sunni and Shia wishing to cross an area controlled by the armed forces of a different sect perilous. As UNHCR has stated in its September 2007 guidelines, 'the fact that Iraqis continue to travel should not be taken as an indicator that travelling is safe. Rather Iraqis travel out of necessity'⁷.

In order to stand a chance of being able to enter Europe legally, Iraqis must of course obtain a passport and a valid visa. Yet as EU countries do not accept the commonly available 'S' series passport due to the large number of available forgeries, even this initial procedure can pose great difficulties. They must now obtain the new 'G' series document, which is only available from one office in the whole country, situated in dangerous Baghdad⁸. Even if able to obtain this travel document, the next step of actually obtaining a visa from diplomatic representations of EU states in Iraq is virtually impossible⁹, and European governments have imposed strict penalties on airlines if they transport persons without valid papers. Not surprisingly, these obstacles have forced Iraqis to travel with false documents purchased on the black market, and human traffickers have been ready to further exploit the situation.

Greece is the most common entry point into the EU for Iraqis. A large proportion enter the country after a treacherous journey across the quasi-border separating Central and Southern Iraq from the northern KRG (Kurdish Regional Government)-controlled regions, from where they cross the mountains into Turkey. Thereafter, they continue along the same routes as thousands of illegal migrants, arriving at one of the Greek islands by speedboat or crossing the Greco-Turkish land border. Alternatively, Iraqis have reached the EU by air, first risking a trip to Baghdad airport along what has been labelled 'the most dangerous road in Iraq'¹⁰. From here, industrialised countries can be reached via flights to Damascus, Amman, Beirut or Dubai¹¹. From Greece, Iraqis generally travel on before making an asylum claim, either to the northern European countries, or to Madrid from where the USA or Latin America can be reached.

Due to the costs involved, the Iraqis that have been able to leave, even to seek refuge in neighbouring countries, are generally the elite. Most of those who are currently in Jordan and Syria belong to Iraq's well-educated middle-class, many of whom were able to cash in on their capital by selling property and cars at home in order to fund settling in Damascus or Amman. As Andrew Harper has stated, 'by the very nature of movement, the possibility of seeking asylum in Europe is limited to those sections of

⁷ UNHCR (n5), *Eligibility Guidelines*, p. 154.

⁸ Migration Policy Group, *Migration News Sheet* April 2007, p. 13.

⁹ Migration Policy Group, *Migration News Sheet*, February 2007 p. 15.

¹⁰ UNHCR (n5), *Eligibility Guidelines*, p. 156.

¹¹ Der Spiegel, *Iraq's Elite Fleeing in Doves*, 20 August 2007.

the Iraqi population with the greatest financial means at their disposal'. The cost of reaching Europe from Iraq is generally estimated at \$10,000. Those able to afford making the journey have either substantial financial resources or receive assistance from relatives in industrialised countries. The poorest are generally left behind.

The gates of fortress Europe being shut to immigrants and asylum-seekers alike, illegal entry remains effectively the only method of gaining access for both. The current state of affairs seems beneficial only to smuggling networks which have no shortage of Iraqi clients desperate to escape the life-threatening situation in Iraq. Contacting smugglers poses little difficulty – according to Interpol's Ralph Markert, 'if you want it, you can have it, in my view, everywhere in this region – Syria, Lebanon, Jordan'¹².

Inconsistent national policies towards persons with the same protection needs

Before beginning the analysis of EU member states' national policies, a brief summary of UNHCR's recommendations on the treatment of Iraqi asylum-seekers will be given, as these provide a 'yard stick' for measuring the quality of protection offered to Iraqis in individual states. As the UN agency mandated to ensure that states uphold their obligations under the 1951 Refugee Convention, UNHCR regularly issues guidelines containing information from a large variety of sources to assist national asylum authorities with refugee determination. Since the 2003 invasion, UNHCR's position has been that Iraqis asylum-seekers, in particular those from Central and Southern areas, should be either recognised as refugees or provided with another form of international protection.

Return Advisories issued by the UN Refugee Agency before the escalation of sectarian violence in September 2004¹³ and September 2005¹⁴ called for individual status determination to be carried out, with at least complementary protection for all Iraqi asylum-seekers until an improvement in the security situation made return feasible¹⁵. Guidelines released since the Samarra bombings in February 2006 have called more strongly for Iraqis to be granted refugee status. The most recent recommendations of September 2007 have reaffirmed UNHCR's December 2006 position, stating that all Iraqi asylum-seekers from Central and Southern Iraq 'should be considered as refugees based on the 1951 Convention criteria'. For those not granted refugee status, UNHCR continues to strongly recommend that 'international protection should be afforded' through a complementary form of protection¹⁶.

Since 2003, UNHCR has also maintained its opposition to imposing any forced returns of failed Iraqi asylum-seekers because of security concerns, and has discouraged states from implementing voluntary return programmes to Southern and Central Iraq which might encourage Iraqis to return home prematurely. The organization has also consistently stated that an Internal Flight Alternative (the possibility for Iraqis to find protection elsewhere in their country of origin) is

¹² International Herald Tribune, *Iraqis Turn to Gangs to Flee for Safety*, July 27 2007.

¹³ UNHCR, *Advisory Regarding the Return of Iraqis*, September 2004.

¹⁴ UNHCR, *Advisory Regarding the Return of Iraqis*, September 2005.

¹⁵ See UNHCR, *Advisory Regarding the Return of Iraqis*, September 2004, p. 15 and UNHCR, *Advisory Regarding the Return of Iraqis*, September 2005, p. 2.

¹⁶ UNHCR (n5), *Eligibility Guidelines*, p. 15.

generally unavailable because of the widespread violence and difficulties associated with travel. In addition, UNHCR has emphasized that despite the fall of the Iraqi Ba'ath government, those granted refugee status prior to 2003 due to a threat of persecution from Saddam Hussein's regime should not have their refugee status revoked, due to the continuing unstable situation in the country.

UNHCR's position regarding Northern Iraq has been slightly different. As the situation in the three Kurdish-controlled Northern Governates has been markedly more stable than in the rest of the country, the organization has stated that voluntary returns to this region may be a possibility. However, this position has been strongly qualified – states wishing to voluntarily or forcibly return Iraqis to this region are encouraged to be sensitive to the unstable security situation, and to the position of the KRG. The KRG authorities have indeed stated that they 'strongly oppose' any forcible returns to Northern Iraq¹⁷.

Several major international NGOs with expertise on refugee issues such as Amnesty International, the ECRE and Human Rights Watch have also issued declarations¹⁸ on Iraqi asylum-seekers containing calls consistent with UNHCR positions. In addition, the International Committee of the Red Cross has, since 2004, indicated that the current situation in Iraq qualifies as an 'internal armed conflict', confirming the seriousness of the country's security situation¹⁹. And at a major April 2007 conference organized by UNHCR to draw international attention to the plight of Iraqi refugees, both UN High Commissioner for Refugees Antonio Guterres and the UN Secretary General called on states to grant protection to Iraqi asylum-seekers.

As the following discussion will demonstrate, many EU member states have adopted positions which demonstrate an unwillingness to accept recommendations from organizations which are supposedly authorities on the subject of refugee protection. Only a few states have granted Iraqis full refugee status, with many failing to provide even complementary protection. Greece, which has one of the lowest recognition rates in the EU for Iraqis, will be treated first, as it is the point of arrival for most Iraqis. Thereafter, the generally restrictive but distinctively unique policies which the United Kingdom and Germany have adopted towards Iraqis will be looked at. And finally, Swedish policy will be analyzed, as it is one of the few countries in the EU to have gone against the grain and granted protection to a majority of Iraqis it has received.

Greece

As mentioned above, Greece is the entry point to Europe for the majority of Iraqis. 1,415 Iraqi asylum-seekers made claims in Greece in 2006, and with the increase in

¹⁷ See *KRG reiterates opposition to forcible returns of Kurdish asylum-seekers from Europe*, 22 February 2007, at <http://www.krg.org/articles/detail.asp?lngnr=12&smap=&nr=95&anr=16401>; *KRG and UK Immigration Minister Discuss Kurdish Asylum-seekers*, 9 September 2005, at <http://www.krg.org/articles/detail.asp?nr=95&lngnr=12&anr=5898&smap>.

¹⁸ See for example Amnesty International, *Iraqi Refugees Need Urgent EU Action*, AI Index: MDE 14/024/2007, 18 April 2007; ECRE, *Guidelines on the Treatment of Iraqi Asylum-seekers and Refugees in Europe*, April 2007; Human Rights Watch, *Iraq: From a Flood to a Trickle*, April 2007.

¹⁹ ICRC, *Iraq post 28 June 2004: protecting persons deprived of freedom remains a priority*, 5 August 2004.

Iraqis heading to Europe, the country has subsequently received a greater number of applications in the first half of 2007 than for the whole of the previous year. Greece's position as a border state of the EU is vitally important. However, concerns have been raised both about Greece's ability to identify those in need of protection among migration flows heading towards the country, and about its comparatively under-developed asylum system. The country's handling of the Iraqis that have fled as part of the displacement crisis would certainly suggest that much must still be done to improve Greece's ability to provide protection to refugees.

There have been worrying reports that Greece is preventing Iraqis who enter the country illegally from making asylum claims. Greek legislation clearly states that individuals who express a wish to seek protection in Greece may not be deported until a final decision on their claim has been reached. This also covers persons who have been detained as illegal entrants. However, according to the World Organization Against Torture, 'it has been a well established practice that the authorities dissuade such detainees from filing asylum applications'²⁰. In addition, an August 2007 statement by 16 NGOs also indicated that the Greek Ministry of Public Order (MPO) has begun deporting detained Iraqis to Turkey²¹, from where forcible returns to Iraq have occurred²². In 2006 alone the Greek Ministry of Public Order (MPO) arrested a total of 8,157 Iraqis as illegal entrants²³, so the numbers that could be affected by this policy are considerable.

As for those Iraqi asylum-seekers who were able to deposit an official claim with the Greek authorities, the overwhelming majority of them saw their claims rejected in the first instance (the acceptance rate in 2006 was 0 per cent). According to Greek law, rejected asylum-seekers have the right to appeal, but in a unique move the Greek authorities decided to freeze decision-making on all appeals from Iraqis who entered the country since 2003. As a result, virtually all Iraqis who have claimed asylum in Greece since that date are still treated as asylum-seekers and have not been given any protection status. The MPO ostensibly adopted this policy in order to protect Iraqis from possible rejection of their claims for asylum, which would mean that they would lose their right to remain in Greece²⁴. However, the status of asylum-seeker does not provide Iraqis with a durable solution, instead forcing them to survive on government support without the right to work for several years. Most Iraqis who reach Greece have therefore chosen to travel north or west to claim asylum elsewhere.

Greece's geographical position has added importance due to the EU's Dublin II Regulation, adopted as part of the first phase of harmonisation of asylum policies in 2003. This requires EU members to return asylum-seekers who make a claim to authorities in a country which is not their first point of entry to be returned to the first EU state where they could have claimed asylum, unless they have family ties to

²⁰ World Organization Against Torture, *Greece – Alleged Ill-treatment and fear of forcible deportation of Iraqi refugees*, 5 April 2007.

²¹ *Refoulement of Iraqi Citizens Fleeing to Greece – Common Statement by 16 NGOs*, 1 August 2007, at <http://cm.greekhelsinki.gr/index.php?sec=194&cid=3167>.

²² UNHCR, *UNHCR deplores reported forced return of 135 Iraqis by Turkey*, UNHCR Press Release, 26 July 2007.

²³ United Nations Information Centre Magazine, *How is the UN Refugee Agency dealing with Iraqi Refugees? A view from Greece*, April 2007.

²⁴ *ibid.*

another state. Although reliable statistics are unavailable, it is therefore very probable that a sizeable number of Iraqis have been returned to Greece by other EU states.

However, the Greek treatment of Iraqi asylum-seekers demonstrates that in order for Dublin II to work effectively, the level of protection and quality of asylum systems in EU states have to be similar. By introducing the Dublin II regulation before other Directives which aimed to ensure that the harmonisation process had sufficiently raised the quality of all European asylum systems, the Commission therefore allowed the return of asylum-seekers to countries where their claims might not be handled appropriately. Echoing calls made by UNHCR and NGOs to redress this problem, the European Parliament in July 2007 therefore urged 'Member States not to transfer people to another State under the Dublin II Regulation if it is known that that country does not properly consider Iraqi asylum claims'²⁵.

United Kingdom

Much criticism has been directed at both the UK and the USA for leaving Iraq's neighbours to shoulder the responsibility of assisting Iraqi refugees, despite their instrumental roles in the 2003 invasion of Iraq. For Bill Frelick of Human Rights Watch, both countries are 'conspicuously failing to provide minimally adequate burden sharing to encourage Jordan and Syria to keep their doors open'²⁶. Recognition rates for Iraqi asylum-seekers in the UK are low, and have dropped drastically since the fall of the Ba'ath regime, despite the unprecedented scale of the current displacement crisis and the dire security situation in Iraq.

Between 1997 and 2001, an impressive 44 per cent of some 18,000 Iraqis who sought asylum on British soil were granted protection. However of the 1,305 Iraqis who applied for asylum in Britain in 2006, only 3 per cent received refugee status, 8 per cent were granted subsidiary protection, and a total of 88 per cent of claims were rejected. In 2004 and 2005, the recognition rate was even lower, with a mere 0.4 per cent of the 3,475 applicants recognized as refugees under the 1951 Convention.

The British asylum authorities have rejected a number of important UNHCR recommendations in their handling of Iraqi asylum claims. This can be clearly seen in the UK Home Office's Operational Guidance Notes (OGN) on Iraq, which are the primary source of information used by asylum officials in the status determination process. The OGN on Iraq of February 2007 openly states, for example, that UNHCR's position on the absence of any Internal Flight Alternative in Iraq is not accepted, as 'there is generally freedom of movement within the country and it is unlikely that internal relocation would be unduly harsh for men, and women with partners or relatives'²⁷.

In addition, like several other EU states, the UK authorities have ruled that the current security situation in Iraq does not, on its own, constitute sufficient grounds for granting any form of protection. The February 2007 OGN states that 'unless the claimant is at serious risk of adverse treatment over and above others' and can

²⁵ European Parliament, *Resolution of 12 July 2007 on the humanitarian situation of Iraqi refugees*, para. 9.

²⁶ Bill Frelick, *Iraqis denied the right to asylum*, *Forced Migration Review*, June 2007, p. 25.

²⁷ UK Home Office, *Operational Guidance Note Iraq*, February 2007, p 11.

demonstrate ‘that internal relocation would be unduly harsh... a grant of asylum or humanitarian protection is unlikely to be appropriate’²⁸. This condition therefore allows the British authorities to dismiss the majority of Iraqi asylum claims as unfounded, as most Iraqis have fled the generalized violence in their country, not a State policy of persecution which targets only certain individuals. The UK’s stance on this issue not only fails to recognize the real and significant nature of the threat which the continuing conflict in Iraq poses to its citizens’ safety but, according to UNHCR, it also introduces requirements above and beyond the 1951 Convention, which contains ‘no requirement... that an individual has to be “targeted” in order to qualify for refugee status’²⁹.

The UK government’s reluctance to grant protection to Iraqi asylum-seekers has been coupled with policies demonstrating a striking willingness to encourage both voluntary and forcible returns to Iraq. In January 2005, the UK became the first EU member state to conclude a Memorandum of Understanding on forced returns with the Iraqi Interim Government³⁰. As mentioned above, the newly-elected KRG authorities thereafter registered their opposition to returning Iraqis home against their will, yet nevertheless in November 2005, a first group of 15 Iraqi Kurds was indeed deported to Northern Iraq. Several other planeloads of Iraqis have subsequently been returned to the KRG-controlled areas, although the British authorities have so far refrained from effecting deportations to Central and Southern Iraq.

All Iraqis whose asylum claims have been rejected in the UK are offered a place on the Home Office’s Voluntary Assisted Return and Repatriation Programme (VARRP) for Iraq, which is run in conjunction with the International Organization for Migration (IOM). The programme provides considerable financial assistance to facilitate reintegration, allowing those willing to return to do so in a dignified manner. However, the voluntary nature of the choice to return is undermined by the UK’s policy of withdrawing even minimum financial support (so-called Section 4 Support) from those Iraqis who fail to sign up for the VARRP, even if they originate from the war-torn Central or Southern regions. This has been the case since August 2005, when the British authorities stated that, due to the existence of a safe route of travel into Iraq, all failed Iraqi asylum-seekers should return home. Faced with the alternative of destitution, several thousand Iraqis have therefore returned through the VARRP programme³¹. Yet although precise figures are unavailable, estimates suggest that the majority of those whose claims have been rejected have preferred to stay in the UK, despite the fact that they have no right to work and no access to any form of financial support³².

As the UK Refugee Council’s Gary Bell has pointed out, the UK’s policy towards failed Iraqi asylum-seekers has been consistent with recent practice of setting targets for returns, and is further evidence of ‘a greater readiness of the UK government to use the language of return within days of a cessation of military action’³³. However, returning Iraqis home against their will in the midst of a growing refugee crisis serves

²⁸ *ibid*, p. 12.

²⁹ UNHCR (n5), *Eligibility Guidelines*, p. 9.

³⁰ Gary Bell, *Iraqi Refugees in London*, The Middle East in London, May 2007, p. 13.

³¹ Home Office (n27), p. 38.

³² International Herald Tribune, *Iraqis Receive Cold Greeting in London*, 17 May 2007.

³³ Gary Bell (n30), p. 13.

to worsen the dire humanitarian situation, and sends out a negative signal both to other EU states and to Iraq's neighbours who are bearing the brunt of the refugee crisis. At worst, this could encourage them to follow suit and enforce the premature return of the millions of Iraqis who have sought refuge on their soil.

Germany

In 2006, Germany received 2,117 applications for asylum from Iraqis - the third highest number in the EU. The country is already home to a sizeable Iraqi population, many of whom were granted protection by the German authorities after fleeing persecution from Saddam Hussein's Iraq before the 2003 invasion. However, as in the UK, the German government's generosity towards Iraqi asylum-seekers ended abruptly with the fall of the Iraqi Ba'ath regime. The recognition rate for Iraqis has fallen from an average of 57 per cent between 1997 and 2001, to a mere 11 per cent for the year 2006 – one of the lowest in the European Union.

However, Germany has adopted another policy towards Iraqi refugees which has distinguished it from all other EU states: the German Federal Ministry of the Interior has taken the unique step of systematically revoking the refugee status of thousands of Iraqis who were granted protection before 2003. The Ministry has defended this policy stating that it is 'legally obliged' to undertake the revocations due to a standard practice of reviewing recognised refugee's cases every three years³⁴. Since the threat of persecution from the Iraqi Ba'ath regime is no longer present, 18,000 Iraqi refugees who entered the country before the 2003 invasion have thus had their refugee status revoked, placing them in a situation of uncertainty and precariousness.

This policy directly contradicts all UNHCR recommendations since 2003, and has been the subject of intense criticism from several quarters. As Human Rights Watch stated in a July 2007 letter to the Federal Office for Migration and Refugees, the revocation practice is contrary to international law as 'it fails to take into consideration the question of the durability of changes in the country of origin'³⁵. The letter also called on the German government to recognise that 'due to the generalised violence and countless human rights violations which take place in Iraq, Iraqi refugees are once again entitled to protection'³⁶. Criticism has also come from Members of Parliament. Christoph Strässer, spokesperson of the German Social Democrat Party for human rights issues, criticised this practice for its consequences on integration, as it means that many Iraqis who have lived in Germany for several years are 'suddenly confronted with an uncertain future'³⁷.

Recently, the sustained lobbying campaign against this policy seems to have paid off. In June 2007, the German government asked the asylum authorities to temporarily suspend the revocation of refugee status for certain groups of Iraqis such as those

³⁴ Tageszeitung, *Terror in Irak kein Grund zu Flucht*, 28 June 2007.

³⁵ Brief von Human Rights Watch an die Deutsche Regierung von Bill Frelick und Holly Cartner, 10 July 2007.

³⁶ *ibid.*

³⁷ Christoph Strässer, *Irakische Flüchtlinge brauchen Solidarität und Sicherheit*, 10 June 2007, SPD-Bundestagsfraktion, p. 2.

from Baghdad, single women, and members of religious minorities such as Christians³⁸.

Despite this change in practice, the 18,000 Iraqis who have lost their refugee status remain in a precarious situation. Under Germany's asylum system, it is the Federal Office for Migration and Refugees which is responsible for first instance asylum decisions and revocation of refugee status, whilst the Aliens Authorities in each of the *Länder* are responsible for subsequent administration of residence permits and deportations. Although the various German Aliens Authorities have not been consistent in their rulings, many have chosen to withdraw long-term residence permits from Iraqis who have lost their refugee status. They are therefore granted the same permit as the many Iraqis whose claims for asylum have been rejected since the 2003 invasion: 'tolerated status' (*Duldung*).

German NGO Pro Asyl has described the provision of 'tolerated status' as a method of keeping asylum-seekers '*abschiebungsreif*', or 'ready for deportation'³⁹. In effect, this status places a failed asylum-seeker in a similar position to beneficiaries of the Section 4 Support in the UK to which rejected Iraqi asylum applicants were entitled until 2005. It is issued when deportation cannot be carried out for legal or factual reasons, and entitles the beneficiary to remain in Germany for a further six months, with only minimal support and without any right to work. Yet the German authorities have used *Duldungen* as *de facto* residence permits, issuing them consecutively to certain persons for several years. It was estimated in April 2007 that 14,000 Iraqis were living with 'tolerated status' in Germany⁴⁰, with the threat of possible imminent deportation hanging over them.

This state of affairs is possible because, like in the UK, both the German asylum authorities and the relevant courts have denied that the security situation in Iraq is serious enough to warrant any ban on returns as such. The Federal Administrative Court ruled in June 2006 that 'voluntarily returning' to Iraq would not expose a failed asylum-seeker to 'an unacceptable level of danger', and therefore the Aliens Authorities are not obliged to provide all Iraqis with humanitarian residence permits (*Aufenthaltserlaubnis*)⁴¹. The same ruling stated that the lack of any reliable flight connection into Iraq was the only remaining barrier to the deportation of failed Iraqis who no longer had the right to remain in Germany, opening the way for forcible returns to Iraq to commence.

Following the British example, the German Federal Interior Minister was therefore asked in November 2006 by the Interior Ministers of the *Länder* to begin negotiations with the Iraqi authorities on a Memorandum of Understanding on returns to Northern Iraq⁴². Reports indicate that the first forcible deportations of Iraqis to the KRG-

³⁸ *Erlasslage :Widerruf von Flüchtlingsanerkennungen irakischer Staatsangehöriger*, 4 July 2007, at <http://www.migrationsrecht.net/content/view/929/55/>.

³⁹ Tageszeitung (n34).

⁴⁰ Estimate taken from *Deutschland will offenbar Flüchtlinge in den NordIrak abschieben*, NGO Online, 20 April 2007, at http://www.ngo-online.de/ganze_nachricht.php?Nr=15793.

⁴¹ See Bundesverwaltungsgericht, *Humanitäre Aufenthaltserlaubnis für abgelehnte Asylbewerber aus dem Irak?*, Pressemitteilung Nr. 36/2006, 27 June 2006.

⁴² Bayerisches Staatsministerium des Innern, *Rückführungen in das autonome Kurdengebiet im Nordirak*, 17 April 2007, available at <http://irak.antira.info/wp-content/uploads/2007/05/irak-erlass-bayern-17-4-07.pdf>.

controlled regions took place in the summer of 2007, with Bavaria and Lower Saxony the first States to issue the relevant decrees⁴³.

Sweden

Unlike the three countries treated above, the Swedish response to the Iraqi refugee crisis has been unique due to its exceptional generosity. The country has a population of only 9 million, but in 2006 it granted protection status to more Iraqis than in all other EU states combined. However, the Swedish case has also demonstrated that without support from fellow European states, any country opting to 'go it alone' and provide a higher level of protection to a certain group of asylum-seekers will inevitably become a destination of choice – a fact which in itself will have inevitable repercussions on the policy the country adopts in the longer term.

Although the rate of Iraqis who actually received refugee status has been generally low in Sweden since the invasion of Iraq, the country has qualified many more Iraqi applicants as 'persons in need of protection' for non-Convention reasons. In 2005 only 0.1 per cent of Iraqis were recognised as refugees, but the total recognition rate including those granted complementary protection was a relatively high 24 per cent. In the year 2006 however, recognition rates leapt to a total of 91 per cent. How and why did this happen?

The Swedish Migration Board decided in early 2006 that all Iraqi asylum-seekers from Central and Southern Iraq whose claims had been rejected as part of the normal status determination process would nevertheless receive a permanent residence permit. This step was taken due to the fact that, as stated in UNHCR guidelines, no returns to these dangerous areas would be possible in the foreseeable future. Instead of spending years awaiting deportation as failed asylum-seekers with only minimal rights as in Germany or the UK, the majority of Iraqis in Sweden were therefore able to begin the process of fully integrating into Swedish society with a secure legal status.

In the context of the generally low recognition rates for Iraqis in other EU states, Sweden's generosity led to a surge in the number of applications received from Iraqis. Numbers jumped from 2,330 in 2005 to 8,951 the following year, with a further 1,500 new arrivals per month in the first half of 2007. Most of these persons have joined the existing Iraqi community in Sweden in municipalities such as Malmö and Södertälje, with the scale of the influx to these areas forcing newcomers to live in very poor conditions. Speaking in June 2007, Södertälje's mayor Anders Lago described the situation as being close to breaking point, with the authorities barely able to provide basic services and many newcomers sharing apartments with up to fifteen people⁴⁴.

Faced with a lack of assistance from the EU and other European states, the Swedish government made efforts to draw further attention to the Iraqi displacement crisis and encourage others to help Sweden with the burden it was bearing. Speaking after he had raised these issues at a February 2007 meeting of the justice and interior ministers

⁴³ Migration Policy Group, *Migration News Sheet*, June 2007, p. 17.

⁴⁴ International Herald Tribune, *Cold Comfort in Sweden for Iraqi Refugees*, 13 June 2007.

of EU states, Migration minister Tobias Billström said: ‘There must be solidarity between EU states so that more of us share the responsibility for offering protection... it is important to be prepared in case the situation in Iraq deteriorates further’⁴⁵. However, the EU Commission only committed itself to providing limited financial assistance to states facing an influx of refugees⁴⁶, and the Swedes received no guarantees from other EU states that they too would provide asylum to more Iraqis. Speaking on behalf of the EU justice and interior ministers in April 2007, the German Minister of the Interior Wolfgang Schäuble summed up the general mood among European governments, saying ‘the situation is not such at the moment that we have to start emergency measures’⁴⁷.

July 2007 finally saw the Swedish Migration Board bring its policy towards Iraqi asylum-seekers more in line with that of the majority of EU states. ‘If they [Iraqis] are not personally threatened or harassed, they cannot remain in our country’, said the Migration Board Director Dan Eliasson⁴⁸. In order to be granted asylum, Iraqis would thereafter have to demonstrate that they had individual protection needs, and the aforementioned practice of automatically granting residence permits was ended. Like in Britain and Germany, this policy was justified by legal rulings which denied that the generalised violence in Iraq was serious enough to warrant granting protection on a group-base. The SMB stated that it was bound to follow three separate rulings from the country’s highest migration court; these denied that the situation in Iraq amounts to an internal armed conflict. Despite his role as Migration minister, Tobias Billström denied responsibility for the policy change, stating ‘we look on this from a purely legal point of view... this is not something for me, or the Swedish government, to decide’⁴⁹.

The influx of Iraqis which Sweden received as a result of its generous asylum policies has proved that the phenomenon of ‘asylum shopping’ which the EU has attempted to prevent through harmonisation is alive and well. It is now expected that Sweden will again receive half of the 40,000 Iraqis expected to seek asylum in the EU in 2007. In the absence of internal EU border controls, Iraqis have understandably chosen to head to the country which was the most sensitive to their protection needs.

The treatment of Iraqi asylum-seekers in the context of the current process establishing a Common European Asylum System

Member states have so far demonstrated a general unwillingness to follow UNHCR recommendations and grant protection to Iraqi asylum-seekers. The preceding analysis has identified several similarities in the methods used to implement restrictive policies. For example, in Germany, the UK and more recently Sweden, legal arguments have been used to deny that the security situation is serious enough to warrant granting some form of protection to all Iraqi from Central and Southern areas,

⁴⁵European Voice, *Commission seeks to help Sweden with Iraqi refugees*, 22 February 2007

⁴⁶International Herald Tribune, *EU nations see no urgent need to take in more Iraqi refugees*, 20 April 2007

⁴⁷ibid

⁴⁸International Herald Tribune, *Sweden, A European Haven for Iraqi refugees, starts shutting the door*, 6 July 2007

⁴⁹Reuters, *INTERVIEW – Swedish Minister insists Iraqi asylum policy fair*, 10 July 2007 at <http://today.reuters.com/News/CrisesArticle.aspx?storyId=L09885483>

despite this ignoring UNHCR recommendations. And with the exception of Sweden, all of the countries focused on in this article have failed to grant any secure legal status to the great majority of Iraqi asylum-seekers which they have received, despite the likelihood that many of them will be unable to return home for several years due to security concerns.

Nevertheless, in light of the fact that the EU began the process of harmonising national asylum policies a full seven years ago, the disparities in treatment of Iraqis are certainly more striking than the similarities. There are marked differences with serious consequences for Iraqis in the policies adopted by all of the four states which have been looked at. While the Swedes distinguished themselves by automatically granting asylum to most Iraqis in 2006, the Greeks have taken the unique step of suspending decision-making on all claims. Germany has been the only EU Member State to systematically revoke the refugee status of Iraqis who were granted protection prior to 2003. And the UK decided well before its European neighbours that rejected Iraqi asylum-seekers would be expected to return to their unstable homeland. The examples highlighted in this article represent only a handful of the many serious discrepancies which experts have pointed out⁵⁰.

The EU Qualifications Directive and subsidiary protection

In the light of the fact that the EU Qualifications Directive aimed to reduce disparities in national asylum policies, many have questioned whether the divergent Iraqi recognition rates indicate that it is incapable of harmonising national policies in this field. However, making this assumption would be premature – only six EU states had actually transposed the Directive into their national legislation by the October 2006 deadline set by the Commission. It will be several years before the Qualifications Directive is transposed into all national legislation and fully influences legal practice.

Nevertheless, the treatment of Iraqi claims for asylum seems to confirm fears expressed by UNHCR and others that there are flaws with the subsidiary protection regime introduced by the Qualifications Directive. States are required to grant subsidiary protection to those who do not qualify for refugee status, but would be at risk of ‘serious harm’ if returned to their homeland. Article 15c of the Directive declares that a ‘serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict’ would warrant granting this type of protection. Hopes were therefore raised that it would improve treatment of Iraqis who had fled the violence in their homeland⁵¹. However, as UNHCR has noted, Article 15c is flawed because it requires an individual threat to be present for subsidiary protection to be granted, which fails to acknowledge that ‘situations of generalized violence are characterised precisely by the indiscriminate and unpredictable nature of the risks civilians may face⁵²’.

⁵⁰ For further examples see ECRE Guidelines (n18).

⁵¹ See for example Pro Asyl, *Schutz vor Abschiebung in bewaffnete Konflikte - BMI will EU-Standards nicht umsetzen*, 29 November 2006. Pro Asyl states that ‘as there is currently an internal armed conflict which is characterised by the random use of violence in Iraq and Afghanistan, asylum-seekers from these countries have a right to protection under this [Qualifications] Directive’.

⁵² UNHCR, *Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons*

Precisely the same criticism could be made of the handling of Iraqi asylum claims of countries such as the UK and Germany, who have required Iraqis to demonstrate that they are at risk above and beyond the general population. In dealing with Iraqi asylum-seekers, national asylum authorities have shown themselves to be apt at finding legal arguments to deny that group-based protection should be provided. The Iraqi case therefore suggest that Article 15c will most probably not lead to those displaced by the general effects of armed conflicts receiving even a minimal level of protection throughout the EU.

The Temporary Protection Directive

Another piece of EU legislation, the Temporary Protection Directive, could have led to Iraqis being provided with effective short-term protection if European states had chosen to invoke it. Adopted by the European Council in July 2001, this Directive is activated when the EU is faced with a ‘mass influx of displaced persons’⁵³, which makes individual status determination impractical. It contains provisions for burden sharing among member states accepting a large proportion of the displaced, and grants them a secure legal status with guaranteed access to accommodation and social benefits. However, so far, states have judged that the number of Iraqis in the EU does not constitute a ‘mass influx’, and the Temporary Protection Directive has not been invoked.

This decision is understandable due to the comparatively small number of Iraqis who have actually been able to enter the EU to seek protection. The 2006 figure of under 20,000 is after all substantially less than the 2002 equivalent of 50,000. However, as mentioned above, the fact that so few Iraqis have claimed asylum in Europe has less to do with the gravity of the current refugee crisis, and much more to do with the difficulty of gaining entry into the EU. Apparently activation of the Temporary Protection Directive is dependent only on how many Iraqis are able to breach fortress Europe and illegally enter the EU.

The Common European Asylum System – what prospects?

EU member states’ diverging treatment of Iraqi asylum claims clearly demonstrates that the first phase of harmonisation has so far failed to lead to a convergence in national asylum practice or increased sharing of the responsibility to accept asylum-seekers among EU states. Nevertheless, it would be unfair to place the blame for this situation solely on faults in the actual EU Directives. Delays, firstly in the adoption of the Directives, and secondly in their transposition into national legislation, have meant that the EU continues to move only very slowly towards harmonisation. Despite their shortcomings, hope remains that once the ‘building blocks’ of the first phase of harmonisation have fully influenced national practice, disparities will become less extreme.

as Refugees or as Persons who otherwise need International Protection and the Content of the Protection granted, p. 32.

⁵³ 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, art 5(1).

Rather than proving that harmonisation has so far failed, Europe's response to Iraqi asylum-seekers represents a *missed opportunity*. Faced with the first major refugee crisis on Europe's doorstep since Kosovo, the EU itself and its member states have so far failed to collectively address evident flaws in the EU protection system and improve the level of protection provided to Iraqis through the mobilisation of political willpower. Doing so would not only have been a strong demonstration of burden sharing with Iraq's neighbours who continue to bear the brunt of the refugee crisis. It would have shown the world that through cooperation, European states have the ability to collectively fulfil their obligations to refugees under international law. As it is, the EU has once again shown a divided and weak face to the international community.

But most importantly of all, recent asylum policy towards Iraqis has once again demonstrated the need for all EU states to have, as former High Commissioner Ruud Lubbers stated, 'similar asylum systems of equally high quality'⁵⁴: the successful completion of the Common European Asylum System is therefore a necessity. Without this, any country which chooses to adopt policies which are more generous than the generally low European average risks becoming the destination of choice for asylum-seekers and can face an influx which it may be unable or unwilling to cope with. As Sweden's Tobias Billström has commented, 'the irony of the matter is that if we did all have the same asylum rules, then more Iraqis would have had the opportunity to find protection in Europe. But whilst some countries do nothing, others are doing a lot'⁵⁵. Implicit in Billström's statement is the condition that the level of protection provided by a future CEAS must be markedly higher than that offered to Iraqis by the many countries who 'do nothing'.

Yet with so many European states still willing to leave others to fulfil their responsibility to protect refugees, it may be that the only way the EU will ever be able to ensure that European asylum policy is characterised both by a high level of solidarity between states *and* a high level of protection would be through jointly processing asylum claims. Whether the European Commission will be able to convince these reluctant member states to either relinquish national competence in this matter or sufficiently raise the bar remains to be seen.

European 'refugee' policy – conspicuous in its absence

Although the EU is indeed developing a common internal asylum policy, its handling of the Iraqi displacement crisis has shown that it still has no 'refugee policy' which takes into account the international dimension of refugee crises. In particular, the Iraqi case once again demonstrates that the European Union still urgently needs mechanisms to ensure that refugees are able to legally access its territory in order to seek protection. This despite the fact that as far back as 1999, the European Council ceremoniously stated in its Tampere Declaration that 'it would be in contradiction

⁵⁴ Ruud Lubbers, *EU should share asylum responsibilities, not shift them*, UNHCR Analysis/Editorials, 5 November 2004.

⁵⁵ Die Presse, "US Asyl für Iraker wäre Signal der Niederlage" – der Schwedische Innenminister übt Kritik an den USA und fordert einheitliche EU-Asylregeln, 24 August 2007.

with Europe's traditions to deny such freedom [of access] to those whose circumstances lead them justifiably to seek access to our territory'⁵⁶.

However, with current EU policy continuing to focus on keeping migrants out, only a handful of the two million displaced Iraqis have made it to Europe, and those who have are often forced to line the pockets of criminal smugglers to do so. In 2004, Lubbers reminded member states that 'a policy built on exclusion is not only morally reprehensible, it is also impractical: it will simply push all forms of migration, including refugees further underground'⁵⁷. Sadly, his prediction has rung true in the case of Iraqi refugees

Resettlement of the most vulnerable Iraqi refugees to EU member states with UNHCR's assistance could have allowed this problem to be bypassed. There is a heavy UNHCR presence in both Jordan and Syria. But with only seven EU member states operating resettlement schemes and these countries so far unwilling to raise their limited quotas to accept more Iraqis, this avenue has been insufficiently explored and has benefited only a few hundred Iraqi refugees up to now.

The EU has also so far failed to put together a major aid package to assist Iraqi refugees in their region of origin, despite the conference which UNHCR organized in April 2007 to sensitise the international community to the humanitarian crisis facing Iraq's displaced and to promote concrete actions and commitments to address these needs. European governments assisted in providing the additional \$60 million which UNHCR appealed for to continue its programme of assistance to Iraqi refugees, and EU Officials stated after the conference that €20 million would be donated to support Iraq's refugee-hosting neighbours. However, these figures pale into insignificance when compared with the actual cost of assisting the two million Iraqi refugees⁵⁸, or indeed with the €720 million which the EU Commission provided to assist with the reconstruction of Iraq between 2003 and 2006.

There are signs that the EU is attempting to address the flaws in its refugee policy. The Commission claims that as part of the second phase of the building of a CEAS, attaining a 'substantial and sustained EU commitment to resettlement'⁵⁹ and improving the European management of migration flows are among its priorities. However, if the EU wishes to become a real global player in refugee issues, it is vital that this rhetoric translates into action.

Conclusion

Judging by the findings of this article, the response of the EU and its member states to the Iraqi refugee crisis has been generally disappointing. The following issues stand out in particular:

⁵⁶ Tampere Declaration (n1), para. 3.

⁵⁷ Ruud Lubbers (n54).

⁵⁸ Jordan, which is hosting less than half of the total of displaced Iraqis, has estimated that the presence of Iraqis will cost its economy \$1 billion per year.

⁵⁹ European Commission, *Green Paper on the future Common European Asylum System*, 6 June 2007, para. 5.2.

- EU member states have adopted divergent policies towards Iraqi asylum-seekers, not just in terms of recognition rates but also regarding a variety of other important issues such as forcible returns and the status accorded to those whose asylum claims are rejected.
- A large number of European states have failed to provide even a minimum level of protection to Iraqis. With some notable exceptions (such as Sweden), most have demonstrated a general unwillingness to follow UNHCR recommendations to grant protection to all asylum-seekers from Central and Southern Iraq.
- It seems highly unlikely that the subsidiary protection regime introduced by the Qualifications Directive will in its present wording increase the level of protection provided to asylum-seekers who have fled the effects of an armed conflict in their homeland such as the one in Iraq.
- By providing no reasonable alternatives, Europe's border policy continues to force asylum-seekers to enter the EU illegally.
- Despite the presence of over 2 million Iraqi refugees at Europe's doorstep, the EU has failed to take steps such as increasing national resettlement quotas, providing substantial aid or activating the Temporary Protection Directive which could have provided clear demonstrations of burden-sharing with Iraq's neighbours.

In a July 2007 declaration on the Iraqi displacement crisis, the European Parliament called on member states to 'overcome their position of non-action towards the situation of Iraqi refugees and to fulfil their obligations under international and Community law'⁶⁰. With no political solution to the conflict in Iraq in sight, it is likely that the continuing refugee crisis will provide Europe's governments with ample opportunity to live up to these recommendations. Nevertheless, the story so far provides little ground for optimism.

⁶⁰ European Parliament (n25), para. 8.

Annex – Statistics

*Table 1 – Recognition rates for Iraqis in the EU in 2005 (in %)**

	Applied during year	Otherwise closed	Refugee status	Overall protection rate (Refugee status + complementary protection)
Austria	221	41	55	80
Belgium	357	60	16	16
Cyprus	144	83	66	83
Denmark	264	0	1	7
Finland	289	15	0	100
France	124	0	16	16
Germany	1,983	10	3	4
Greece	971	19	0	0.2
Ireland	55	18	19	19
Netherlands	1,620	15	2	68
Slovakia	35	54	4	4
Sweden	2,330	9	0.7	24
United Kingdom	1,595	14	0.3	10

* Only states which made more than 100 decisions in either 2005 or 2006 are included – first instance procedures only. All statistics from UNHCR.

Table 2 – Recognition rates for Iraqis in the EU in 2006 (in %)

	Applied during year	Otherwise closed	Refugee status	Overall protection rate (Refugee status + complementary protection)
Austria	380	40	48	74
Belgium	695	30	8	13
Cyprus	132	46	0	81
Denmark	507	0	0	2
Finland	225	15	6	63
France	116	0	10	23
Germany	2,117	24	7	11
Greece	1,415	11	0	0
Ireland	215	6	50	50
Netherlands	2,766	23	1	18
Slovakia	206	65	0	0
Sweden	8,951	12	3	90
United Kingdom	1,305	12	3	12

*Table 3 – Iraqi asylum applications received in the European Union Jan-Jun 2007 per country**

Country	Total Jan-June 2007
Austria	188
Belgium	372
Bulgaria	192
Denmark	449
Germany	817
Greece	3,483
Ireland	141
Italy	109
Netherlands	562
Spain	1,491
Sweden	9,330
UK	670

*Countries with more than 100 applications

Table 4 – Total Iraqi asylum applications received in the European Union 2004-2007

Year	Total
2004	8,384
2005	10,829
2006	19,496
2007 Jan-June	18,290