

# Table of Contents

<i>Acknowledgements</i> .....	v
<i>List of Abbreviations</i> .....	xiii
1. Introduction: In Search of EU Standards for Asylum Procedures.....	1
1.1 Adequate and Fair Asylum Procedures in the EU: State of the Art .....	1
1.2 In Search of EU Standards for Asylum Procedures .....	10
1.2.1 Protection of Fundamental Rights in the EU Legal Order.....	10
1.2.2 Scope of Application of the Charter and General Principles of EU Law.....	12
1.2.3 Function of EU Fundamental Rights and General Principles.....	14
1.2.4 Sources of Inspiration of EU Fundamental Rights and General Principles.....	15
1.3 Aim of the Study .....	18
1.4 Scope and Limitations of the Study .....	20
<b>Part I Preliminary Issues</b> .....	<b>25</b>
2. The Common European Asylum System and the Applicability of EU Procedural Standards.....	27
2.1 The Common European Asylum System and its Legal Basis.....	28
2.1.1 Legal Basis of EU Asylum Legislation.....	28
2.1.2 Policy Framework: The Common European Asylum System .....	29
2.2 The Procedures Directive .....	32
2.2.1 Scope of Application.....	35
2.2.2 Overview of the Provisions of the Procedures Directive.....	36
2.2.3 Level of Harmonisation and Discretion of Member States.....	38
2.3 The Qualification Directive.....	39
2.3.1 Scope of Application.....	40
2.3.2 Overview of the Qualification Directive's Provisions.....	40
2.4 Applicability of EU Fundamental Rights .....	41
2.4.1 Testing the Legality of (Minimum) Standards.....	41
2.4.2 Interpreting and Filling in Gaps in EU Asylum Legislation.....	44
2.5 The Role of National Courts and the Court of Justice.....	45
2.5.1 Legality Review of EU Legislation .....	45
2.5.2 Interpretation of EU Law .....	47
2.5.3 The Important Role of the National Courts as EU Courts.....	47

3.	The Subsidiary Role of International Treaties as Sources of Inspiration for EU Fundamental Rights .....	49
3.1	International Treaties versus EU Fundamental Rights .....	50
3.1.1	Might EU Fundamental Rights provide a Lower Level of Protection?.....	50
3.1.2	Might EU Fundamental Rights provide Broader Protection? .....	52
3.2	International Treaties and the Common European Asylum System .....	53
3.2.1	The European Convention on Human Rights .....	53
3.2.2	The Refugee Convention .....	54
3.2.3	The International Covenant on Civil and Political Rights .....	55
3.2.4	The UN Convention against Torture.....	55
3.2.5	The UN Convention on the Rights of the Child .....	56
3.2.6	Direct Application of International Treaties?.....	57
3.3	The Weight of International Treaties in the Case Law of the Court of Justice .....	58
3.3.1	The Judgments of the ECtHR.....	60
3.3.2	Council of Europe Documents .....	64
3.3.3	UNHCR Documents and EXCOM Conclusions .....	65
3.3.4	The Views of the UN Committees.....	66
3.3.5	Should Non-binding Documents be taken into Account? .....	68
3.4	The Relative Weight of International Treaties as Sources of Inspiration .....	69
4.	The EU Right to an Effective Remedy and Related Procedural Rights and Principles.....	72
4.1	Limitations to the Procedural Autonomy of Member States .....	73
4.2	The Link between EU Procedural Rights and Principles .....	76
4.3	The EU Right to an Effective Remedy .....	81
4.3.1	Provisions of International Law inspiring the EU Right to an Effective Remedy .....	82
4.3.2	Application to Asylum Cases.....	85
4.3.3	Effectiveness .....	87
4.3.4	Institutions Responsible for Providing Effective Remedies .....	89
4.3.5	Effect in the National Legal Order .....	90
4.3.6	The Right of Access to a Court or Tribunal .....	92
4.3.7	The Right to Equality of Arms and Adversarial Proceedings.....	93
4.4	The EU Right to Good Administration.....	94
4.4.1	Provisions of International Law inspiring the EU Right to Good Administration .....	96

4.4.2	The Right to be Heard .....	96
4.4.3	The Duty to State Reasons .....	98
4.5	Three Basic Concepts.....	101
4.5.1	Balancing of Interests .....	102
4.5.2	Assessing the Overall Fairness of a Procedure .....	103
4.5.3	The Subject Matter of the Procedure.....	105
4.5.3.1	The Nature of the Rights Claimed.....	106
4.5.3.2	General Circumstances of the Party Concerned.....	108
4.5.3.3	Personal Circumstances of the Party Concerned.....	109
5.	Preliminary Conclusions and Methodology used for the Following Chapters.....	111
5.1	Method for Defining the Meaning of the EU Right to an Effective Remedy .....	113
<b>Part II</b>	<b>Key Issues of Asylum Procedures.....</b>	<b>115</b>
6.	The Right to Remain on the Territory of the Member State .....	117
6.1	The Right to Remain during the Examination of the Asylum Claim.....	118
6.2	The Right to Remain during the Time Necessary to Lodge the Appeal .....	122
6.3	The Right to Remain during the Appeal Proceedings .....	124
6.3.1	The Right to Interim Protection .....	126
6.3.1.1	The Case Law of the Court of Justice .....	126
6.3.1.2	Obligations Stemming from the ECHR, the ICCPR, CAT and the Refugee Convention.....	132
6.3.1.3	Subconclusion: The Right to Interim Protection.....	137
6.3.2	The Meaning of Automatic Suspensive Effect.....	139
6.3.2.1	The Case Law of the Court of Justice .....	139
6.3.2.2	Obligations Stemming from the ECHR.....	140
6.3.2.3	Subconclusion: The Meaning of Automatic Suspensive Effect .....	142
6.4	Synthesis of Findings .....	143
7.	The Asylum Applicant's Right to be Heard on his Asylum Motives.....	146
7.1	The Right to a Personal Interview in First Instance Proceedings .....	148
7.1.1	Dependent Adults .....	154
7.1.2	Accompanied and Unaccompanied Minor Asylum Applicants .....	155
7.2	Requirements as to the Conduct of the Interview.....	159
7.2.1	Language of the Interview .....	160
7.2.2	The Right to a Free and Competent Interpreter .....	162
7.2.3	The Competence of the Interviewer .....	163

7.2.4	Gender Sensitive Interviews .....	165
7.2.5	Child-friendly Interviews .....	166
7.3	The Asylum Applicant's Right to be Heard following the Personal Interview .....	168
7.3.1	The Right to Comment on the Report of the Interview .....	168
7.3.2	The Right to Comment on the Fact-finding and Risk Assessment .....	171
7.4	The Right to an Oral Hearing before a Court or Tribunal.....	174
7.5	Synthesis of Findings .....	179
8.	The Burden and Standard of Proof and Evidentiary Assessment.....	183
8.1	The Standard of Proof .....	185
8.2	The Burden of Proof.....	195
8.2.1	Adducing Evidence and Dispelling Doubts .....	195
8.2.2	Producing Evidence: A Shared Duty.....	202
8.3	Individual Assessment and the Use of Presumptions.....	208
8.4	Assessing the Credibility of the Applicant's Statements .....	212
8.5	Evidentiary Assessment.....	226
8.5.1	Expert Reports.....	232
8.5.2	Country of Origin Information Reports.....	234
8.5.3	Medical Evidence .....	239
8.6	Synthesis of Findings .....	244
9.	Judicial Review of the Establishment and Qualification of the Facts.....	249
9.1	Limitation of Judicial Review to Points of Law? .....	251
9.1.1	Case Law by the Court of Justice .....	251
9.1.2	Obligations Stemming from the ECHR, CAT and ICCPR .....	252
9.1.3	Subconclusion: Limitation of Judicial Review to Points of Law? .....	254
9.2	Thorough Review of the Assessment of the Facts.....	255
9.2.1	Case Law by the EU Courts.....	257
9.2.2	Obligations Stemming from the ECHR, CAT and ICCPR.....	267
9.2.2.1	Intensity of Judicial Review under the Right to an Effective Remedy.....	268
9.2.2.2	The Subsidiary Role of the ECtHR, ComAT and HRC in Asylum Cases.....	272
9.2.2.3	The Right to a Fair Trial .....	279
9.2.3	Subconclusion: Thorough Review of the Assessment of the Facts .....	282
9.3	The Relevant Moment in Time: <i>ex tunc</i> or <i>ex nunc</i> Review? .....	284
9.3.1	The Case Law of the Court of Justice .....	285
9.3.2	Obligations Stemming from the ECHR, CAT and ICCPR.....	288
9.3.3	Subconclusion: The Relevant Moment in Time .....	290
9.4	Synthesis of Findings .....	291

10.	The Use of Secret Information in Asylum Cases .....	294
10.1	The Use of Secret Information under EU Law .....	296
10.2	Obligations for the National Courts of Member States under EU Law.....	300
10.3	Competition Cases and the Protection of Business Secrets.....	305
10.3.1	The Right of Access to the File.....	305
10.3.2	The Right to Confidentiality.....	310
10.3.3	Confidentiality versus Access to the File .....	311
10.3.4	Judicial Review.....	314
10.3.5	Subconclusion: The Use of Secret Information in EU Competition Cases.....	316
10.4	EU Sanctions and the Protection of National Security.....	317
10.4.1	Legal Framework and Scope of Judicial Review .....	319
10.4.1.1	Anti-terrorism Sanctions based on UN Security Council Resolutions .....	319
10.4.1.2	Autonomous Anti-terrorism Sanctions.....	320
10.4.1.3	Autonomous Sanctions against Third States .....	322
10.4.2	The Right to be Heard.....	323
10.4.2.1	Possible Limitations to the Right to be Heard .....	324
10.4.2.2	Possible Compensation for the Absence of a Hearing .....	325
10.4.2.3	Application to Specific Cases .....	326
10.4.3	The Obligation to State Reasons.....	328
10.4.3.1	Possible Limitations to the Statement of Reasons.....	329
10.4.3.2	Possible Compensation for a Lack of Reasons .....	330
10.4.3.3	Application to Specific Cases .....	331
10.4.4	The Right to an Effective Remedy .....	335
10.4.4.1	Disclosure of Evidence to the EU Courts.....	337
10.4.4.2	Possible Limitations to the Right to an Effective Remedy.....	338
10.4.4.3	Possible Compensation for Limitations to the Rights of the Defence during the Appeal .....	338
10.4.5	Subconclusion: The Use of Secret Information in EU Sanction Cases.....	340
10.5	The Use of Secret Information under International Law.....	341
10.5.1	The ECtHR's Case Law on Secret Information .....	344
10.5.2	The Right to Adversarial Proceedings: Level of Procedural Protection.....	347
10.5.3	Limitations of the Right to Adversarial Proceedings .....	350
10.5.4	Confidentiality versus the Right to Adversarial Proceedings.....	356
10.5.5	Subconclusion: The Use of Secret Information under International Law .....	366
10.6	Synthesis of Findings.....	368

<b>Part III Conclusions</b> .....	<b>373</b>
11. Towards a Common and Fair European Asylum Procedure? .....	375
11.1 EU Procedural Law: Common Principles, Specific Applications .....	376
11.1.1 Common Procedural Principles.....	376
11.1.2 Specific Applications: The Three Basic Concepts .....	378
11.1.2.1 Balancing of Interests .....	378
11.1.2.2 The Overall Fairness of the Procedure .....	379
11.1.2.3 The Subject Matter of the Proceedings.....	380
11.1.3 Wider Applicability of the Methodology.....	382
11.2 The Procedures Directive: An Important Step Forward .....	382
11.2.1 The Potential Impact of the EU Right to and Effective Remedy .....	385
11.2.2 Broader Protection than the ECHR .....	387
11.2.3 Supervision and Practical Support for Member States .....	388
11.2.4 Subconclusion: The Procedures Directive, An Important Step Forward.....	390
11.3 A Set of EU Procedural Standards for Asylum Procedures.....	390
11.4 Enforcing the EU Right to an Effective Remedy in Practice.....	395
11.5 Towards Fair Asylum Procedures in Europe .....	396
Bibliography.....	397
<i>Index</i> .....	404