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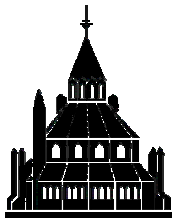

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THE HARMONIZATION OF ASYLUM POLICY IN THE EUROPEAN UNION: LESSONS FOR NORTH AMERICA

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> [W]hen refugees cannot seek asylum because of offshore barriers, or are detained for excessive periods in unsatisfactory conditions, or are refused entry because of restrictive interpretations of the Convention, the asylum system is broken, and the promise of the Convention is broken too.
>
> United Nations Secretary-General Kofi Annan,
> Address to the European Parliament in Brussels,
> 29 January 2004

INTRODUCTION

There is an obvious tension between refugee protection and migration control, yet regional approaches to asylum policy have been offered as a means of improving both. What the United Nations High Commissioner for Refugees (UNHCR) calls "responsibility sharing" – but what most states refer to as "burden sharing" – has now become a policy goal. But can a multilateral regime be constructed that allows states to regulate who has access to their territory and at the same time guarantees protection to genuine refugees?

This paper examines the harmonization of asylum policy in the European Union (EU), including the processes begun by the Schengen(1) and Dublin(2) Conventions, with a view to assessing both compliance with international law norms and the overall impact on the international asylum system. It begins by outlining the international legal context and then provides an overview of the development of the EU's asylum framework. Legal issues that arise in Europe are then assessed vis-à-vis the Refugee Convention and the Convention Against

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(1) *Convention applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders*, 19 June 1990.

(2) *Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities – Dublin Convention*, Official Journal C 254, 19 August 1997, pp. 0001-0012.

Torture, as well as international human rights law and humanitarian law generally. Specifically, it addresses the following topics: inadmissibility based on route of entry (the "safe third country" rule); the use of expedited processes for "manifestly unfounded claims"; practices relating to the detention and deportation of claimants; the legal interpretation of the definition of a refugee, including exclusion from refugee status pursuant to Article 1F of the Geneva Convention; appeal rights; and secondary grounds of protection.

The American and Canadian asylum systems are then discussed and the possibility of harmonization is addressed, with emphasis given to the very recently implemented "Safe Third Country Agreement." The paper revisits concerns that have been highlighted in the European context and suggests lessons for North America. Finally, it considers the underlying perceptions that shape asylum policy and identifies the concern, expressed by many, that harmonization is having a negative impact on refugee protection.

THE INTERNATIONAL LEGAL CONTEXT

The international refugee protection regime comprises legal instruments, international norms, and institutions that embody the ancient and universal tradition of giving sanctuary to those in peril.(3) The origins of our contemporary system can be found in the late 1940s when, in the shadow of the Holocaust, the United Nations General Assembly approved the Universal Declaration of Human Rights.(4) Article 14 of the Declaration provides that:

> Everyone has the right to seek and enjoy in other countries asylum from persecution.

The 1951 UN Convention relating to the Status of Refugees (hereafter the "Geneva Convention" or "Refugee Convention") and its 1967 Protocol are the principal instruments that create binding obligations for state parties. They set out the core elements that form the foundation for the protection of refugees.

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(3) Volker Türk and Frances Nicholson, "Refugee protection in international law: an overall perspective," in Erika Feller, Volker Türk and Frances Nicholson, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge, 2003, p. 3.

(4) *Universal Declaration of Human Rights*, adopted by General Assembly Resolution 217(A)(III)(1948).

Under the Convention and Protocol, a refugee is defined as a person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his (her) nationality and is unable or, owing to such fear, is unwilling to avail himself (herself) of the protection of that country; or who, not having a nationality and being outside the country of his (her) former habitual residence, is unable or, owing to such fear, is unwilling to return to it.(5)

In terms of protecting those who meet this definition, the most crucial provision of the Convention – the prohibition against *refoulement* – is found in Article 33:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

A plain reading of Article 33 clearly also indicates that indirect refoulement – sending a refugee to a state other than the state of origin where there would be a risk of persecution or a risk of return to the original state – is prohibited.(6) Indeed, the drafters' Ad Hoc Committee report confirms that Article 33 refers to "not only the country of origin but also to other countries where the life or freedom of the refugee would be threatened."(7) The fact that signatories are not permitted to make reservations with respect to Article 33 further emphasizes its overriding importance.(8)

The other provisions of the Convention focus primarily on the rights that States are obliged to respect for those recognized as refugees. It does not impose duties concerning those seeking asylum or impose mechanisms for the recognition of status. In fact, it does not commit signatories to provide asylum or permanent residence; they expressly agree only that

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(5) Article 1(A)(2) of the Convention and Article 1(2) of the Protocol.

(6) Gretchen Borchelt, "The Safe Third Country Practice in the European Union: A Misguided Approach to Asylum Law and a Violation of International Human Rights Standards," *Columbia Human Rights Law Review,* Vol. 33, 2002, p. 478.

(7) *Report of the Ad Hoc Committee on Refugees and Stateless Persons,* U.N. #scor, 2D Sess., p. 61, U.N. Doc. E/1618/E/AC.32/5 (1950), as cited in Borchelt (2002), p. 478.

(8) Article 42(1), *Convention relating to the Status of Refugees*, 189 U.N.T.S. 150, entered into force 22 April 1954.

they will not return a refugee to face persecution.(9) Moreover, and unlike the international system of human rights protection, there is no formal mechanism in international refugee law to receive individual or inter-state complaints.(10)

But refugee law is a dynamic body of law; and other instruments, such as the Convention Against Torture,(11) also establish legal obligations, as do more general principles of human rights law and public international law. For instance, the International Covenant on Civil and Political Rights (ICCPR) provides a standard of protection. The UN Human Rights Committee has issued a comment in respect of the rights of aliens under the ICCPR, which reads in part:

> Aliens thus have an inherent right to life, protected by law, and may not be arbitrarily deprived of life. They must not be subjected to torture or to cruel, inhuman or degrading treatment or punishment; nor may they be held in slavery or servitude. Aliens have the full right to liberty and security of the person. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person. … They have the right to liberty of movement and free choice of residence; they shall be free to leave the country.
>
> …
>
> Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights.(12)

The ICCPR's non-discrimination principle, set out in Article 26, is an essential element for real protection in the country of refuge.(13) It reads:

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(9) Maryellen Fullerton "Failing the Test: Germany Leads Europe in Dismantling Refugee Protection," *Texas International Law Journal*, Vol. 36, 2001, p.238.

(10) Brian Gorlick, "Human rights and refugees: enhancing protection through international human rights law," UNHCR Working Paper No. 30, 2000, p. 8, available via the UNHCR Web site: www.unhcr.ch. Gorlick also notes that effect has not even been given to Article 35 of the Convention, whereby state parties are obliged to provide the UNHCR with information and statistical data.

(11) *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36, Article 3(1) of which provides: "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

(12) Human Rights Committee, General Comment No. 15, The Position of Aliens Under the Covenant (27th Session, 1986), U.N. Doc. HRI/GEN/1/Rev.1, p. 18, 1994.

(13) Morten Kjaerum, "Refugee Protection Between State Interests and Human Rights: Where is Europe Heading?" *Human Rights Quarterly*, Vol. 24, 2002, p. 514.

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The European Convention for the Protection of Human Rights and Fundamental Freedoms(14) also contains (in Article 3) a prohibition against torture that the European Court of Human Rights has interpreted to be applicable to state actions that could result in the return of people seeking protection to situations that threaten their life and safety.(15) While the Convention emanates from the Council of Europe and not the EU's institutions, it has been incorporated into EU law by the Maastricht Treaty(16) and by the EU's judicial body, the European Court of Justice, both discussed in greater detail later in this paper.

Some suggest that the prohibitions on return to torture or refoulement are now so well established and near-universally accepted that they have become customary law. Borchelt, for example, makes reference to the jurisprudence of the International Court of Justice that sets out the key factors to be considered when assessing whether a particular treaty has attained this status and thus becomes binding on non-parties: the number of states that have formally accepted the treaty; the presence or absence of "pertinent" states among the parties to the treaty; and the existence of reservations.(17) With 140 parties to the Refugee Convention and/or the

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(14) *Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 with Protocol Nos. 1, 4, 6, 7, 12 and 13*, Council of Europe, Registry of the European Court of Human Rights, February 2003 (the European Human Rights Convention).

(15) See the following cases, as cited in Fullerton (2001), in footnote 47: *Sarialtun* v. *Germany*, App. No. 37534/97 (2000) (concerning deportation of a rejected Kurdish asylum-seeker to Turkey, where he faced potential violence targeted at him; would violate art. 3); *Chahal* v. *United Kingdom*, App. No. 2241/93, 23 Eur. H.R. Rep. 413 (1997) (concerning deportation of a Sikh activist to India; would violate art. 3); *Ahmed* v. *Austria*, App. No. 25964/94, 24 Eur. H.R. Rep. 278 (1997) (concerning deportation of a Somali who had lost his refugee status to Somalia, where he risked serious mistreatment; would violate art. 3); *Altun* v. *Federal Republic of Germany*, App. No. 10308/83, 36 Eur. Comm'n H.R. Dec. & Rep. 209 (1984) (concerning deportation of a student rights activist with pending asylum application to Turkey, where he might face torture; would violate art. 3); *Amekrane* v. *United Kingdom*, 1973 Y.B. Eur. Conv. on H.R. 356, 370-72, 376-78, 382-88 (Eur. Comm'n on H.R.) (concerning deportation from Gibraltar to Morocco of an asylum-seeker accused of participating in a failed coup d'état in Morocco; violated art. 3).

(16) Article 6 (2) (F.2) of the EU Treaty commits the EU to respect fundamental rights, as guaranteed by the European Human Rights Convention.

(17) See *North Sea Continental Shelf (F.R.G.* v. *Den.; F.R.G.* v. *Neth.)*, 1969 I.C.J. 3.

Protocol, including many states that must be considered "pertinent,"[18] plus the preclusion of reservations with respect to refoulement in Article 42(1), there is indeed strong evidence that this principle has reached the status of customary international law.

THE EUROPEAN UNION

A. The Development of the Framework

On 9 May 1950, French Foreign Minister Robert Schuman, inspired by the former Deputy Secretary General of the League of Nations, Jean Monnet, proposed the first tentative step in European integration. As a means of preventing the destruction and suffering of World War II from ever occurring again, he proposed the pooling of coal and steel resources. To the surprise of many, six European governments – Belgium, West Germany, Luxembourg, France, Italy and the Netherlands – agreed to delegate part of their sovereignty to a supranational authority, the European Coal and Steel Community (ECSC). Despite some initial setbacks, the next stage in establishing a common market came to fruition in the 1957 Treaty of Rome,[19] where the broad objective of the "free movement of goods, persons, services and capital" was articulated. The Rome process established two new communities: the European Atomic Energy Community (EURATOM) and the European Economic Community (EEC). A decade later, the institutions of the three communities were merged and a single Commission, Council of Ministers and Parliament began operations.

Historically, European integration has been focused on economic cohesion and development. The notion of refugee protection has figured mainly as a technical problem within the context of free movement between the Member States.[20] Until the 1980s, asylum was a limited political issue with policy varying across the European nations.[21] Germany, for example, was recognized as having a more generous definition of asylum than Britain or

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(18) Among the states that have ratified or acceded to the Geneva Convention are: Australia, Belgium, Canada, China, France, Germany, and the United Kingdom. The 1967 Protocol has been acceded to by, *inter alia*, the five permanent members of the UN Security Council: the United Kingdom, the United States, China, the Russian Federation and France.

(19) *Treaty Establishing the European Community*, 298 U.N.T.S. 3 (1957), signed in Rome.

(20) Gregor Noll and Jens Vested-Hansen, "Non-Communitarians: Refugee and Asylum Policies," in Philip Alston, ed., *The EU and Human Rights*, Oxford University Press, Oxford, 1999, pp. 362-363.

(21) Randall Hansen, "Asylum Policy in the European Union," *Georgetown Immigration Law Journal*, Vol. 14, 2000, p. 779.

France.[22] However, as internal borders disappeared and a sharp increase in asylum applications became evident, the political will for a uniform framework arose. This led to a series of binding conventions and non-binding intergovernmental agreements that now form the EU's still-evolving asylum framework.

1. The Schengen Agreement (1985) and Convention (1990)

Despite the grand expectations set out in the Treaty of Rome, it was not until 1985 that France, Germany and the Benelux countries, working outside of the European Community framework, signed the Schengen Agreement, which provided for the gradual abolition of inspections at their common borders. Article 17 of the Agreement required that the parties "endeavor to harmonize … the Laws and administrative provisions concerning the prohibitions and restrictions which form the basis for the controls and to take complementary measures to safeguard security and combat illegal immigration by nationals of States that are not members of the European Communities." To address these security concerns, between 1985 and 1990 the State Parties negotiated the Schengen Convention, one aspect of which addresses the movement of non-EU nationals and, in particular, asylum seekers.[23] The Schengen Convention refers to the Geneva Convention, restricts the right of the State Parties to expel an alien (Article 23), and requires that the parties "process any application for asylum lodged by an alien within the territory of any one of them" (Article 29(1)). However, the Convention also states that the parties "retain the right to refuse entry or to expel any applicant for asylum to a Third State on the basis of its national provisions and in accordance with its international commitments" (Article 29(2)). As well, it provides for the introduction of common visa policies and penalties against transportation companies ("carrier sanctions") to stem the flow of asylum seekers.

2. The Dublin Convention on Asylum (1990)

In response to concerns about asylum shopping and multiple claims, the Dublin Convention created a mechanism for determining the state responsible for examining an asylum application lodged in the EU. Although signed in June 1990, it did not come into force until

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(22) *Ibid.*

(23) Title II, Chapter 7, of the *Convention applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders*, 19 June 1990.

September 1997, due in large part to difficulties in national parliaments.(24) Like the Schengen asylum chapter, the Dublin Convention sets out criteria for identifying which Member State will be responsible for determining an individual asylum claim and ensuring that only one State hears the claim.

The Dublin Criteria for determining the responsibilities of Member States are, in order of priority:

1. If the applicant has a family member who has refugee status and is legally resident in a Member State, that state will be responsible if the applicant so desires: Article 4.

2. If the applicant has a valid residence permit, the issuing Member State will be responsible: Article 5(1).

3. If the applicant has a visa, even an expired one, the issuing Member State will be responsible: Article 5(2) to 5(4).

4. If it can be shown that the applicant irregularly crossed the border into a Member State from a non-Member State, that Member State will be responsible: Article 6.

5. The Member State responsible for controlling the entry of the person into the EU will be responsible unless there was a waiver of the visa obligation in the first Member State *and* the Member State in which the applicant is now present: Article 7.

6. If none of the above apply, the first Member State in which the application for asylum is lodged is responsible: Article 8.

Member States, it should be noted, retain the right under the Dublin Convention to process asylum applications made on their territory, even if they are not responsible under the Convention.(25)

3. The Maastricht Treaty (1992)

The Treaty on European Union was signed at Maastricht, the Netherlands, in 1992 and came into force in November 1993, establishing the European Union and its so-called “three pillar” structure. The first pillar consists of the European Communities: the ECSC, EURATOM, and the EEC, which was renamed the European Community. The second pillar involves

(24) Hansen (2000), p. 781.

(25) Art. 3(4).

common foreign and security policy. The third pillar comprises cooperation in justice and home affairs, which includes asylum issues.

Under the third pillar, the decision-making process is intergovernmental and unanimity of Member States is required. In the first pillar, the EU institutions play a larger role. For example, the European Commission has the sole right of initiative (i.e., the sole right to propose legislation) and the Council of Ministers(26) makes decisions by qualified majority voting. Thus, as a third-pillar matter, the process of forming a common asylum policy was to be formulated by intergovernmental committees, rather than from within the administrative framework of the EU itself.

4. The London Resolutions (1992) and Calls to Stem the Tide

With Justice and Home Affairs Ministers empowered to establish a framework for a Europe-wide asylum policy, a meeting was soon arranged in the British capital. The resulting London Resolutions of 1992 dealt with a number of important asylum issues and established a series of non-binding resolutions on "manifestly unfounded" asylum claims, "safe third countries" transited by asylum seekers, and countries in which no serious risk of persecution is deemed to exist.(27)

That the meeting focused on restricting access is indicative of what was at the time becoming the overarching trend of EU asylum policy: what Amnesty International has referred to as the development of "a network of organized irresponsibility."(28) With the explosion of asylum seekers in the early 1990s, due in part to the collapse of the Soviet Union and war in the Balkans, the issue of non-EU migration was dominating the headlines, and calls to "stem the tide" were loud and plentiful.

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(26) Also known as the Council of the EU, this body is made up of the representatives of Member States and its main task is to lay down and implement legislation.

(27) European Communities, *Conclusions of the Meeting of the Ministers responsible for Immigration* (London, Nov.30-Dec.1, 1992), Doc.10579/92 IMMIG.

(28) Stefan Telöken, "It's a long way to … harmonization," *Refugees Magazine*, 1 January 1999, available via UNHCR Web site: www.unhcr.ch.

The situation at the time in Germany, seen by many as the bellwether of refugee law and policy for Europe, is particularly telling. The country was significantly affected during this period, receiving 50% of all asylum applications lodged in Europe.(29) The German government responded by severely curtailing access to its asylum system and restricting its recognition policies for those who were able to receive a hearing.(30) Germany's post-war constitution had been straightforward: "Persons persecuted on political grounds shall enjoy the right of asylum."(31) When the rest of Europe failed to provide substantive assistance as Germany struggled to cope with its disproportionate share of refugees, the government acted by fundamentally rewriting its Basic Law in 1993.(32) Achieving a single European market and a united front for the continent were ambitious goals that necessitated common policies not only in respect of migrant flows within EU territory, but also from without. The new German restrictions, discussed in greater detail later in this paper, were to become a model for the continent.

Other non-binding (or "soft acquis") third-pillar instruments were also adopted during the 1990s, including the resolution on Minimum Guarantees for Asylum Procedures(33) and the Joint Position on the Harmonized Application of the Definition of the Term "Refugee" in Article 1.(34) While binding instruments such as the Dublin Convention were implemented to prevent access to the system, the protection of refugees in accordance with international law was left to these "soft" resolutions and their enunciation of the lowest acceptable standard.

5. The Amsterdam Treaty (1997)

The amendments to the Treaty on European Union resulting from the Amsterdam Treaty provided that immigration and asylum policies would move from the third to the first pillar as of May 2004. Article 63 of the Amsterdam Treaty provided for the establishment of a

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(29) Fullerton (2001), p. 232.

(30) *Ibid.*, pp. 232-233.

(31) Grundgesetz (Basic Law) of the Federal Republic of Germany, Art. 16(2).

(32) Fullerton (2001), pp. 232-234.

(33) Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures, Official Journal C 274, 19 September 1996.

(34) Joint Position defined by the Council on the Basis of Article 3 of the Treaty of the European Union on the Harmonized Application of the Definition of the Term "Refugee" in Article 1 of the Geneva Convention Relating to the Status of Refugees, 1996 O.J. (L 63) 2.

Common Asylum System and set out an ambitious series of tasks to be accomplished over five years.[35] It should be noted that Article 63 speaks of "minimum" standards and not of harmonizing to what might be "higher" standards of protection in some Member States. The possibility of enhancing EU asylum policy and making it less restrictive might be accomplished through the Council. However, during the five-year transition phase, the adoption of policy measures required unanimity, and reversing the trend was not considered achievable during this period.

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(35) *Article 63 (ex Article 73k)*

> The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:
>
> (1) measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties, within the following areas:
>
> (a) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States,
>
> (b) minimum standards on the reception of asylum seekers in Member States,
>
> (c) minimum standards with respect to the qualification of nationals of third countries as refugees,
>
> (d) minimum standards on procedures in Member States for granting or withdrawing refugee status;
>
> (2) measures on refugees and displaced persons within the following areas:
>
> (a) minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection,
>
> (b) promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons;
>
> (3) measures on immigration policy within the following areas:
>
> (a) conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion,
>
> (b) illegal immigration and illegal residence, including repatriation of illegal residents;
>
> (4) measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States.
>
> Measures adopted by the Council pursuant to points 3 and 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements.
>
> Measures to be adopted pursuant to points 2(b), 3(a) and 4 shall not be subject to the five year period referred to above.

6. Council Regulation No. 343 (2003)

At the Tampere European Council of 1999, the EU declared its intention to establish a Common European Asylum System based on the full and inclusive application of the Geneva Convention. As part of this process, Council Regulation No. 343/2003 replaced the Dublin Convention in February 2003. This Regulation is sometimes referred to as "Dublin II." The stated goal of the Regulation is to identify which Member State will be responsible for determining an individual asylum claim and to ensure that only one State hears the claim. The Regulation mirrors much of the Dublin Convention and is considered a further stepping-stone in the harmonization process.

7. The EU Charter of Rights

On another front, the EU agreed on a Charter of Fundamental Rights, including a right to asylum, at the European Council in Nice in December 2000. Article 18 of the Charter reads: "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community." At this point, however, the Charter has not yet been included in the Treaty on European Union and is therefore not legally enforceable.

8. The EU Asylum *Acquis*

The entire body of legislation of the European Communities and Union, of which a significant portion relates to justice and home affairs, is referred to as the *acquis communautaire*. Membership in the EU requires that States accept and adhere to the *acquis*. The *acquis* of the European Union relating to asylum matters that the new members are told they must accept provides a useful summary of the current situation and includes the following:(36)

- The Geneva Convention and Protocol
- The Dublin II Regulation
- Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 (Dublin II)

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(36) ASYLUM ACQUIS JHA 2003 Justice and Home Affairs, Consolidated version, available via the European Commission Web site: http://europa.eu.int/comm/justice_home/doc_centre/asylum/acquis/wai/doc_asylum_acquis_en.htm.

- Joint Position of 4 March 1996 on the harmonized application of the definition of the term "refugee" in Article 1 of the Geneva Convention

- Council Decision of 28 September 2000 establishing a European Refugee Fund

- Council Regulation (EC) 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

- 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

- Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers

The European Human Rights Convention has a similar status, as accession to it is required for entry into the EU. However, it is not listed under the asylum *acquis*, but rather under the more general heading of human rights.(37)

The *acquis communautaire* arguably tends to entrench the status quo and places an obstacle in the way of those who would like to repatriate aspects of policy to the national level or simply take policy in a new direction within the Union. EU processes are cumbersome and difficult, with unanimity requirements in some cases and weighted voting in others. Thus, EU asylum policy that was developed through intergovernmental negotiations, without the oversight of the European Parliament or European Court of Justice, has become the default strategy. A less restrictive approach would face significant procedural roadblocks and, as a result, we are left with the framework negotiated in third-pillar meetings.

B. The European Courts

While there is little in the way of human rights provisions in the EU treaties, the European Court of Justice (ECJ) has developed significant jurisprudence in this area.(38) Based on the doctrine of the supremacy of Community law over national Member State law, the ECJ has stated that "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired

(37) Noll and Vedsted-Hansen (1999), p. 375.

(38) Gerald Quinn, "The European Union and the Council of Europe on the Issue of Human Rights: Twins Separated at Birth?" *McGill Law Journal*, Vol. 46, 2001, p. 861.

by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community."(39)

The European Convention for the Protection of Human Rights, while separate from the EU framework, must of course be considered as part of the common tradition. This was clarified by the 1997 Treaty of Amsterdam, Article 6(2) of which makes it clear that Member States must respect fundamental rights as guaranteed by the European Convention:

> The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

Of particular import in the asylum context is Article 3 of the European Convention, which reads:

> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Although the ECJ has not always been in agreement with the precedents of the European Court of Human Rights, their judgments do inform the ECJ's decisions. And the European Court of Human Rights has been called upon to review asylum decisions made by EU Member States. In 1991, for example, the European Court of Human Rights reinforced the principle of non-refoulement, confirming that asylum seekers should not be returned to a country where they would be exposed to the danger of torture or ill-treatment.(40)

As noted earlier, the proposed Charter of Fundamental Rights includes a right to seek asylum. The Charter was announced at the European Council in Nice on 7 December 2000, by the presidents of the Council, the European Parliament and the Commission. However, it was not incorporated into the EU treaty system, and thus does not have the force of law. The Council called for further consideration of the Charter's status to take place, and in 2001 the European Council met in Laeken, Belgium. A Declaration outlining the role of the Convention was issued, but the question of whether the Charter of Fundamental Rights should be included in the basic treaty was left open for future consideration.

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(39) *Internationale Handelsgesellschaft mbH* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Reference for a preliminary ruling by the Verwaltungsgericht Frankfurt)*, C-11/70, [1970] E.C.R. 1125, at 1134.

(40) *Cruz Varas* v. *Sweden, 20 March 1991, European Court of Human Rights, Series A, No. 201*; *Vilvarajah* v. *United Kingdom, 30 Oct. 1991, Series A, No. 215,* as cited in United Nations High Commissioner for Refugees, *The State of the World's Refugees 2000: Fifty Years of Humanitarian Action*, Oxford University Press, Oxford, 2000, p. 171 and endnote 23.

C. Harmonization Concerns

1. Inadmissibility Based on Route of Entry ("first host" and/or "safe third" country)

As the preceding section of this paper has illustrated, the genesis of the regionalization of asylum policy in Europe lies in intergovernmental migration control initiatives meant to affect rising claim numbers. The first steps in harmonization purported to address two commonly asserted suspicions: first, that refugees entering the EU make multiple claims for status in different countries, either consecutively or concurrently; and second, that asylum seekers transit EU Member States on their way to others where they perceive better opportunities to obtain protected status or social welfare benefits. While both concerns arise from anecdotal evidence, the response by the EU in pursuing a safe third country arrangement has been decidedly enforcement-oriented, and many argue that it has had very negative implications for the international refugee protection regime.

The premise of Commission Regulation No. 343/2003, and its precursor the Dublin Convention, is that EU Member States that claimants have previously transited are safe countries to which they may be returned. As a multilateral readmission agreement, it is meant to ensure not only that the person will in fact be admitted to the transit country, but also that the transit country will hear the person's claim to asylum. But many Member States do not limit the safe third country process to EU countries. Germany, for example, has listed all of its bordering neighbours, which include Norway, Poland, Switzerland and the Czech Republic.(41) Finland, the Netherlands and the United Kingdom have similar lists.(42) To distinguish between safe countries within the EU and without, EU Member States are sometimes referred to as "first host countries" while those outside the EU are labelled "safe third countries." However, as will become clear, this distinction may not be significant, since returns to both classes of countries have led to violations of the principle of non-refoulement.

Article 3(5) of the Dublin Convention specifically provided that "Any Member State shall retain the right, pursuant to its national laws, to send an applicant for asylum to a third State, in compliance with the provisions of the Geneva Convention." This principle has been reiterated in Council Regulation No. 343/2003.(43) The Ministers at the London conference of

(41) Poland and the Czech Republic became members of the EU on 1 May 2004.

(42) S. Weidlich, "First Instance Asylum Proceedings in Europe: Do Bona Fide Refugees Find Protection?" *Georgetown Immigration Law Review*, Vol. 14, 2000, p. 652.

(43) Article 3(3).

1992 addressed this issue and set out the "fundamental requirements" to be met prior to the removal of an asylum seeker to a third country. It was determined that the following factors should be assessed:(44)

- The life or freedom of the asylum applicant must not be threatened, within the meaning of the non-refoulement provision in Article 33 of the Geneva Convention.
- The asylum applicant must not be exposed to torture or inhuman or degrading treatment in the third country.
- The asylum applicant must have either been granted protection in the third country or had an opportunity to make a claim for protection of the authorities in the third country.
- The asylum applicant must be afforded effective protection in the host third country against refoulement.

Unfortunately, despite these avowals, the removal of claimants to first host or safe third countries has often proved problematic. There are three main concerns expressed about the process that has evolved in the EU: first, many countries that are deemed safe are not, and Dublin is responsible for what is referred to as "chain refoulement"; second, the concept of a country of first asylum is inconsistent with the Geneva Convention; and third, the process is ineffectual in practice. This paper will provide an overview of these issues in this section before turning to the consequential harmonization problem: that EU Member States have vastly different protection systems, which many suggest undermines communitarian efforts in respect of burden-sharing.

a. Chain Refoulement

In recent years, evidence has substantiated what is referred to as a "refoulement chain" whereby an EU Member State removes an asylum seeker to a safe third country, which then removes the claimant to another transit country, and so on, until the claimant is returned to the state where they face persecution or torture. Such a process clearly violates Article 33 of the Geneva Convention and Article 3 of the CAT.

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(44) European Communities, *Conclusions of the Meeting of the Ministers responsible for Immigration* (1992).

Abell provides the example of Afghan and Pakistani asylum seekers who arrive in Greece via Turkey.(45) Under Dublin and Schengen, Greece would be their first transit country, and thus an application in another EU Member State would require that the claimants be sent back to Greece. However, Greek law provides that Turkey is a safe third country to which applicants can be returned, despite the fact that refugees in Turkey are routinely returned to their home country in violation of the principle of non-refoulement. Other refoulement chains have been reported. Germany, for example, has designated Poland as a safe third country, despite the fact that Poland has readmission agreements with various countries, including the Ukraine and Moldova, to which Germany would not be prepared to directly return people.(46)

The fact that some EU countries return refugees to designated safe third countries that are not, in fact, safe – some of which are not even party to the Geneva Convention(47) – was also apparent in the British asylum system, at least before amendments to the law were made in 1996. According to the European Council for Refugees and Exiles, almost 40% of safe third country declarations relating to conditions in other EU Member States were referred back to the Home Secretary by immigration appeals adjudicators. Substantive consideration of the claims was required due to concerns about indirect refoulement.(48) It was fortunate for some claimants that inadmissibility based on the transit route could be challenged in the U.K. system. In Germany and the Netherlands, however, the presumption of safety is non-rebuttable.

b. The Safe Third Process in International Law

Some suggest that the very concept of a "country of first asylum" violates the Geneva Convention, under which each signatory has an obligation to make its own judgment on an individual's asylum claim.(49) It is also arguably discriminatory and in contrast with Article 26

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(45) N. A. Abell, "Safe country provisions in Canada and in the European Union: A critical assessment," *The International Migration Review*, Vol. 31, No. 3, p. 569.

(46) Wanda Sendzimir, "Refugee Status Determination in the European Union and its Accordance with the 1951 Refugee Convention," *Forced Migration, Asylum and Refugees*, Vol. 1, 2002, available on-line at: http://www.csu.edu.au/student/forcedmigration/refugee/Vol1/Vol1_a3.htm.

(47) Weidlich (2000), p. 657.

(48) European Council for Refugees and Exiles, "Safe Third Country – Myths and Realities" (1995), as referred to in Rosemary Byrne, "Redesigning Fortress Europe: European Asylum Policy," *Oxford International Review*, Vol. 7, 1996, note 14.

(49) Gabriela I. Coman, "European Union Policy on Asylum and its Inherent Human Rights Violations," *Brooklyn Law Review*, Vol. 64, 1998, p. 1235.

of the ICCPR,[50] quoted earlier in this paper. Moreover, the legal status of the "safe third country" concept in international law is contentious. While the UNHCR suggests that it is not an established doctrine, the European Commission refers to it as a legal principle and the Irish High Court has gone so far as to deem it part of customary international law.[51]

The UNHCR Executive Committee stated in its 1979 Conclusion 15:

> The interests of the asylum seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account. Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another state. Where, however, it appears that a person, before requesting asylum, already has a connection or close links with another state, he may, if it appears fair and reasonable, be called upon to request asylum from that state.

Arguably, then, if the connection to the third country is based on nothing more than passing through its territory, this should not prevent a claim from being heard in the destination country. However, there is no legal consensus that the current international refugee protection regime creates a legal obligation to hear every claim to asylum and, indeed, the practice in Europe runs counter to such a notion. Clearly, the process of indirect refoulement that has occurred and may continue to occur as a result of the safe third country process is a violation of the international legal obligations created by the Refugee Convention. In cases involving substantial grounds for believing someone would be in danger of being subjected to torture, it also violates the CAT and European human rights instruments. While the Refugee Convention does not require that a claim to asylum be made in the first country entered, neither does it explicitly provide a right to choose the country of refuge. As such, while individual safe third country cases may result in violations of international law, the process itself does not necessarily fall foul of the "hard" legal obligations of the international refugee protection regime. That said, just because the concept is not illegal does not mean that it will not result in violations of the principle of refoulement, and it certainly does not mean that it is an effective means for addressing international refugee flows.

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(50) *Ibid.*, p. 1239.

(51) Rosemary Byrne, Gregor Noll and Jens Vedsted-Hansen, "Western European Asylum Policies for Export: The Transfer of Protection and Deflection Formulas to Central Europe and the Baltics," in Rosemary Byrne, Gregor Noll, and Jens Vedsted-Hansen, eds., *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union*, Kluwer Law International, The Hague, 2002, p. 17, footnote 29. The Irish High Court case cited by the authors is *Anisimova* v. *Dept. of Justice*, (not reported) (High Court, 18 February 1997).

c. Does the Safe Third Process Work in Practice?

In the EU, of those deemed ineligible to have their claim heard because they transited a safe third country, only a portion are actually transferred to the state that has been determined as having processing responsibility. From 50 to 75% of those who could be transferred disappear into "irregularity."(52) In fact, the Dublin criteria in their full application from 1998-1999 resulted in the transfer of only 1.7% of all asylum applicants between Member States,(53) suggesting than any benefits may be superficial and political, rather than practical.

The administration of the system must also be considered. Rather than spending resources on determining protection needs, the first matter that has to be addressed with inland claims is the route of transit. Time and money must be spent investigating whether the asylum seeker likely passed through another EU country and, if so, whether any of the Dublin exceptions apply. At the end of the day, the most notable effect of the safe third country process has probably been the increase in clandestine border crossings, which is a boon for smugglers and traffickers and a serious threat to life and limb for those being smuggled.

d. A Key Challenge: Different Standards of Protection

In the case *T.I.* v. *United Kingdom*,(54) the European Court of Human Rights was called upon to intervene in the matter of a Sri Lankan claimant who had been declared ineligible to claim asylum in Britain because his claim had been previously rejected in Germany, largely due to the fact that he had been targeted by non-State agents. The Court held that the ECHR did not preclude his return from the United Kingdom to Germany because he had not established that there was a real risk that Germany would expel him to Sri Lanka in breach of Article 3. The Court found that he was unlikely to succeed in another refugee claim in Germany, but this "apparent gap in protection resulting from the German approach to non-State agent risk" was addressed by a provision in German law that would allow temporary protection to people facing risk to life and limb from non-State entities.(55) In fact, the German government in

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(52) Joanne van Selm, "Access to Procedures: 'Safe Third Countries', 'Safe Countries of Origin' and 'Time Limits'," Paper commissioned by the UNHCR and the Carnegie Endowment for International Peace, 2001, p. 25.

(53) *Ibid.*, p. 28.

(54) Application No. 43844/98, the European Court of Human Rights (Third Section), sitting on 7 March 2000.

(55) *Ibid.*, p. 17.

representations to the Court provided assurances that the applicant would be permitted to stay in Germany.(56)

This case clearly illustrates that the outcome of an asylum claim in the EU could very well depend on where the claim is decided. Many commentators argue that this is a serious flaw in the Dublin system, as it is presumed in any safe third country arrangement that the sending and receiving states will use similar criteria when assessing a claim. As Guy Goodwin-Gill puts it, the system is "founded on an assumption of cross-Union moral equivalency – in terms of underlying principles and policies – that is patently lacking."(57) And as the European Court of Human Rights specifically noted in *T.I. v. United Kingdom*, "the effectiveness of the Dublin Convention may be undermined in practice by the different approaches adopted by Contracting States to the scope of protection offered."

Rather than revisit the concept of a safe third country system, however, EU Member States have shown a determination to harmonize their asylum policies. The following sections of this paper will examine selected areas where different standards are evident. Unfortunately, it appears as though harmonization in these fields has led to a diminution of protection and human rights guarantees.

2. Manifestly Unfounded Claims

A policy development that coincided with the Dublin process and was designed to limit asylum applications involved procedures for the quick processing and removal of applicants whose cases were deemed to be "manifestly unfounded." The perception that some refugee claimants abuse the asylum system with frivolous claims is increasingly widespread. The response by many states has been to accelerate claims that are identified as such. Also referred to as "fast track" and "expedited procedures," they have generated much controversy.(58)

The nature of decision-making in asylum cases is complex. To begin with, the definition of a Convention refugee is forward-looking. It attempts to answer the question: Will the individual face persecution on an enumerated ground if returned to his/her country

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(56) Catherine Phuong, "Persecution by Third Parties and European Harmonization of Asylum Policies," *Georgetown Immigration Law Journal*, Vol. 16, 2001, pp. 88-89.

(57) Guy Goodwin-Gill, Remarks at the Conference on Asylum Policy and Practice in Europe and the United States, Christ Church, Oxford, July 1999, as cited in Hansen (2000), p. 797.

(58) Hansen (2000), p. 782.

tomorrow? The issue of proof is also particularly difficult. Many refugees arrive with no identity documents or with fraudulent ones. Documentation regarding persecution is often not available; and when it is, decision-makers may have difficulty in assessing its authenticity. The 1996 Joint Position of the European Council(59) regarding the definition of the term "refugee" clearly reflects the unique nature of the procedural requirements of asylum proceedings. Article 3 provides, in part:

> The question of whether fear of persecution is well-founded must be appreciated in the light of the circumstances of each case. It is for the asylum-seeker to submit the evidence needed to assess the veracity of the facts and circumstances put forward. It should be understood that once the credibility of the asylum-seeker's statements has been sufficiently established, it will not be necessary to seek detailed confirmation of the facts put forward and the asylum-seeker should, unless there are good reasons to the contrary, be given the benefit of the doubt.
>
> The fact that an individual has already been subject to persecution or to direct threats of persecution is a serious indication of the risk of persecution, unless a radical change of conditions has taken place since then in his country of origin or in his relations with his country of origin.

Since an appreciation of the circumstances of each case is necessary, it is possible, if not likely, that the quick removal of cases deemed to be manifestly unfounded would be accomplished only at the cost of refusing protection to some genuine refugees.(60) That decisions that may result in death or torture could be treated in a less thorough fashion than an application for a liquor licence is disconcerting for many, particularly given the known errors that have been made in other contexts, discussed elsewhere in this paper.(61)

While the UNHCR Executive Committee has accepted the practice of expediting "manifestly unfounded" claims, it did so only in respect of very specifically defined criteria.(62) For such claims to be processed with abridged rights of review, they should be either "clearly

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(59) See note 34, above.

(60) Weidlich (2002), p. 672.

(61) See the sections entitled "Inadmissibility Based on Route of Entry" and "Appeal Rights," below.

(62) Rosemary Byrne, "Future Perspectives: Accession and Asylum in an Expanded European Union," in Byrne, Noll, and Vedsted-Hansen (2002), p. 404.

fraudulent" or "not related to the criteria for the granting of refugee status."(63) EU practice, however, goes further than this. The London Resolution on Manifestly Unfounded Applications, for example, suggests expanding the grounds to include cases where there is "an effective internal flight alternative" or where the claim is "manifestly lacking credibility – whereby the story is inconsistent, contradictory or fundamentally impossible."(64) According to Byrne, 14 of the 15 current EU Member States have adopted policies for manifestly unfounded claims that go beyond the categories set out by the UNHCR Executive Committee.(65)

Also of note is paragraph 11 of the London Resolution, which provides as follows:

> This Resolution does not affect national provisions of Member States for considering under accelerated procedures, where they exist, other cases where an urgent resolution of the claim is necessary, in which it is established that the applicant has committed a serious offence in the territory of the Member States, if a case manifestly falls within the situations mentioned in Article 1F of the Geneva Convention, or for serious reasons of public security, even where the cases are not manifestly unfounded.

Concerns about exclusion based on Article 1F will be discussed later in this paper. In the context of expedited processes, however, it is important to recognize the EU Ministers' perspective that exclusion based on serious criminality or the commission of acts that are contrary to the principles of the UN can *precede* refugee status determination. The UNHCR Handbook suggests that the issue will normally arise in the course of a hearing to determine whether the claimant has a well-founded fear of persecution for a Convention reason.(66) Indeed, a proposal from the European Commission in 2000 similarly stated that when there are grounds for considering that Article 1F may apply, Member States should not consider this as "grounds

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(63) UNHCR Executive Committee Conclusion No. 30 of 1983, available on-line at: http://www.unhcr.bg/other/refugee_studies_book_2_en.pdf.

(64) *London Resolution on Manifestly Unfounded Applications for Asylum*, para. 6-8, part of the London Resolutions; see note 31, above.

(65) Byrne (2002), p. 405.

(66) United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1979 (re-edited 1992), para. 141.

for the dismissal of applications for asylum as manifestly unfounded."[67] This proposal, however, does not have the effect of law, and Member States continue to use Article 1F in a preemptive fashion.

3. Detention and Return of Claimants

In 1986, the United Nations Human Rights Committee issued General Comment No. 15 on the Position of Aliens under the International Covenant on Civil and Political Rights (ICCPR). In respect of detention, it was affirmed that:

> Aliens have the full right to liberty and security of the person. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person. Aliens may not be imprisoned for failure to fulfil a contractual obligation. They have the right to liberty of movement and free choice of residence; they shall be free to leave the country.

Human Rights Watch reports that asylum seekers in the EU are sometimes subjected to cruel and dangerous methods of restraint during forcible deportation.[68] For example, reference is made to an Urgent Intervention Case from the World Organization against Torture regarding a Nigerian national who was tortured, including by electric shock, in the course of a failed forcible deportation from Greece.

In April 2002, the European Commission published a Green Paper on return policy.[69] In respect of detention, it was suggested that minimum standards *could* be set and that returnees who are detained in ordinary prisons *might* be separated from convicts.[70] No reference is made to Article 10(2)(a) of the ICCPR, which provides that "Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons." While the Green Paper is obviously a discussion document, its methodology appears to be typical of what many refer to as

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(67) European Commission, *Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, COM (2000) 578 final, 20 September 2000, Art. 28(2).

(68) Human Rights Watch, "Treating 'Illegals' Legally: Commentary regarding the European Commission Green Paper on a Community Return Policy on Illegal Residents," August 2002.

(69) European Commission, "Green Paper on a Community Return Policy on Illegal Residents," Brussels, 2002, available on-line at: http://europa.eu.int/eur-lex/en/com/gpr/2002/com2002_0175en01.pdf.

(70) *Ibid.*, p. 14.

the lowest common denominator approach to asylum policy harmonization. It is consistent with the restrictionist trend in asylum policy that treats migration as a threat to security and stability, and has resulted in some states – Germany is one example – declaring that their airports are legally external to the country to facilitate deportation with minimal due process guarantees.(71)

4. Legal Interpretation of the Definition of a Convention Refugee

There are various components of the refugee definition that are interpreted differently in EU States. The absence of harmonized definitions for asylum applications has proven problematic as Member States develop often-conflicting case law regarding the refugee definition.(72) It would be beyond the scope of this paper to address the conflicting jurisprudence throughout Europe, but the following selected issues should illustrate the difficulty of harmonizing asylum rules. It is apparent that there is neither a procedural nor a substantive harmonization of refugee law norms – an issue that is clearly not addressed in Schengen or Dublin – and unfortunately it appears easier to move to lower standards rather than insist that others expand the protection accorded to asylum seekers. Indeed, the March 1996 Joint Position on the harmonized application of the definition of the term "refugee" uses this lowest common denominator approach.

a. Exclusion Based on Article 1F of the Refugee Convention

Article 1F of the Geneva Convention identifies applicants who are excluded from refugee status. It reads:

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(71) Hansen (2000), p. 783.

(72) Jacqueline Bhabha, "European Harmonization of Asylum Policy: A Flawed Process," *Virginia Journal of International Law*, Vol. 35, 1994, p. 108.

> (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

Created with the aim of preventing the abuse of refugee status by its grant to undeserving cases, Article 1F is nonetheless a limitation on a humanitarian provision and should thus be interpreted restrictively.(73) However, a notably increasing interest in Article 1F prohibitions is evident in Europe, and to some degree in North America, and the expansion of its application can be seen as part of the overall trend towards more restrictive responses to asylum seekers.(74)

Related to Article 1F is Article 33(2) of the Convention, which authorizes signatories to refuse to protect a refugee whose presence threatens the State's most basic interests.(75) Whereas the application of Article 1F precludes recognition as a refugee, Article 33(2) allows for refoulement of a recognized refugee in cases of serious criminality and national security. Hathaway and Harvey argue that governments are increasingly relying on the preemptive Article 1F for safety and security reasons, which are supposed to be relevant only in respect of refoulement under Article 33(2). In doing so, they contravene international law.(76) Summary denial of refugee status under the Convention is permitted only in cases where the claimant meets the external standards of international or extraditable criminality. Denial of protection to a refugee based on internal government concerns of safety or security is supposed to meet the more demanding procedural requirements of Article 33(2); Article 1F speaks of "serious reasons for considering," while Article 33(2) refers to the higher standard of "reasonable grounds."(77)

The European Council Joint Position of 1996 does caution that "[i]n view of the serious consequences of such a decision for the asylum-seeker, Article 1F must be used with care and after thorough consideration, and in accordance with the procedures laid down in national

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(73) Geoff Gilbert, "Current issues in the application of exclusion clauses," in Feller, Türk and Nicholson, (2003), p. 428.

(74) *Ibid.*, p. 429.

(75) Article 33(2) reads: "The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

(76) James C. Hathaway and Colin J. Harvey, "Framing Refugee Protection in the New World Order," *Cornell International Law Journal*, Vol. 34, 2001, p. 260.

(77) *Ibid.*

law." Arguably, the use of this ineligibility criterion would therefore be inappropriate in the context of expedited claims, as discussed earlier.

b. The Agent of Persecution

A factor that can severely limit who will be accepted as a Convention refugee in some EU countries – and thus seriously undermines any notion of cross-Union equivalency – is the recognition of who may be an agent of persecution for the purposes of the refugee definition. The 1996 Joint Position, while suggesting that it would clarify the application of the definition of "persecution," deliberately left the matter open to interpretation by the individual Member States. Arguably, this can lead to more restrictive interpretations,(78) particularly with provisions such as that found at paragraph 5.1.1(b):

> Measures directed against one or more specific categories of the population may be legitimate in a society, even when they impose particular constraints or restrictions on certain freedoms.

The 1996 Joint Position does state that persecution by third parties will be considered to fall within the scope of the Convention, but the persecution must be either encouraged or permitted by the authorities. Where there is simply a failure to act on the part of a state, it is stated (in paragraph 5.2) that "such persecution should give rise to individual examination of each application for refugee status, in accordance with national judicial practice, in the light in particular of whether or not the failure to act was deliberate." This definition is narrower than that applied in some countries or as set out by academics such as Hathaway.(79) The UNHCR Handbook indicates that non-state agents can be responsible for persecution within the meaning of the Convention if their acts "are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection."(80) In Canada, protection may be conferred in cases where the state concedes it is unable to protect an applicant(81) or where

(78) See, for example, Sendzimir (2002).

(79) James C. Hathaway, *The Law of Refugee Status*, Butterworths, Toronto, 1991.

(80) United Nations High Commissioner for Refugees, (1979; re-edited 1992), para. 65.

(81) This was the case in *Canada (Attorney General)* v. *Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1, 20 Imm. L.R. (2d) 85.

there has been a complete breakdown of the state apparatus.(82) Other instruments, such as the Convention Against Torture and the European Human Rights Convention, make no distinction between the state and other actors who are responsible for torture or other similar treatment. In fact, the European Court of Human Rights addressed the issue of the agents of persecution in the *Osman* case.(83) Although no violation on the part of the British government was found, the Court relied on the "right to life" provision in Article 2 of the ECHR(84) to find that there exists a positive obligation to protect human life against attacks by private persons.

Leaving the issue to national judicial practice permits Member States to interpret the refugee definition as narrowly as they desire, and the Joint Position's emphasis on the state actually encouraging or assisting in the persecution may promote a more restrictive view. An examination of the German government's actions in response to the Balkan crisis demonstrates how protection can be eroded in this context. Article 16(2) of the German Constitution (Basic Law) used to read, "Persons persecuted on political grounds shall enjoy the right of asylum." Constitutional amendments in 1993, however, specifically excluded from the refugee definition persecution by non-state actors, and a decision of the country's Federal Constitution Court in 2000 confirmed that political persecution could thus not take place in a country without an effective government. This excludes not only situations where there is anarchy in the state claimed against, but also situations where the state is willing to intervene but is unable to provide protection.

The different national approaches to the issue of non-state actor persecution have, as one would expect, come into play in the course of applying the EU safe third country rule. In December 2000, the U.K. House of Lords confirmed that the Secretary of State could not return two asylum seekers to France and Germany because their courts did not recognize persecution by non-state agents for the purposes of the refugee definition.(85) In France, the leading case has established that non-state persecution can be a basis for refugee status only when tolerated or

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(82) *Zalzali* v. *Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 605 (C.A.).

(83) *Osman* v. *United Kingdom*, [1998] 29 Eur. H.R. Rep. 245.

(84) Article 2 provides as follows: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

(85) *Ex parte Adan and Aitseguer*, 1 All E.R. 593 (H.L. 2001), affirming 4 All E.R. 774 (C.A. 1999).

encouraged by public authorities.(86) As a result, most asylum seekers from Somalia, Liberia and Algeria cannot obtain refugee status in France.(87)

c. The Concept of a "Particular Social Group"

The UNHCR Handbook's discussion of what constitutes a "particular social group" is general and brief, reflecting the undeveloped nature of the ground at the time it was published.(88) It reads:

> **Membership of a particular social group**
>
> 77. A "particular social group" normally comprises persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality.
>
> 78. Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies.
>
> 79. Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution.(89)

The European Council's 1996 Joint Position similarly provides limited guidance, simply stating (in paragraph 7.5):

> A specific social group normally comprises persons from the same background, with the same customs or the same social status, etc.
>
> Fear of persecution cited under this heading may frequently overlap with fear of persecution on other grounds, for example race, religion or nationality.

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(86) *Esshak Dankha*, Conseil d'État No. 42.074 (27 May 1983).

(87) Phuong (2001), p. 83.

(88) Alexander Aleinikoff, "Protected characteristics and social perceptions: an analysis of the meaning of 'membership of a particular social group," in Feller, Türk, and Nicholson (2003), p. 266.

(89) United Nations High Commissioner for Refugees (1979; re-edited 1992).

> Membership of a social group may simply be attributed to the victimized person or group by the persecutor. In some cases, the social group may not have existed previously but may be determined by the common characteristics of the victimized persons because the persecutor sees them as an obstacle to achieving his aims.

As one might expect, there are conflicting views on whether certain asylum seekers meet the refugee definition, with two groups generating significant discussion: women and homosexuals.

The inclusion of "gender" as a particular social group has not been accepted in all EU Member States. Many types of harm that may arise in asylum claims are more commonly applicable to women, such as sexual abuse, genital mutilation, forced marriage, family violence, forced sterilization and forced abortion.(90) Canada was the first country to produce a comprehensive set of guidelines in 1993, and this precedent has been followed by the United Kingdom. Most countries, however, have chosen not to follow suit, but instead issue non-binding regulations on how officials might evaluate claims of gender persecution.(91)

Similarly, people facing persecution because of their sexual orientation do not receive equal protection throughout the European Union. In the United Kingdom, the Immigration Appeal Tribunal has ruled that homosexuals constitute a "particular social group" and may apply for protection on this basis,(92) a finding that has been upheld by the House of Lords in another context.(93) In France as well, homosexuals have been recognized as refugees since the *Ourbih* decision of the Conseil d'État, which involved an Algerian transsexual.(94) In Germany, however, the requirement that political persecution be demonstrated makes sexual orientation claims difficult to establish.(95) A questionnaire published by the Council of Europe in 2001 regarding gay and lesbian asylum seekers indicates that no German superior court

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(90) European Council on Refugees and Exiles, "Position on Asylum Seeking and Refugee Women," December 1997, para. 8.

(91) Nahla Valji and Lee Anne De La Hunt, *Gender Guidelines for Asylum Determination*, University of Cape Town Legal Aid Clinic and European Union Foundation for Human Rights, Rosebank, South Africa, 1999, pp. 5-6.

(92) *Vraciu* v. *Secretary of State for Home Department*, Appeal No. HX/70517/94 (11559) (Immigration Appeal Tribunal) (12 November 1994).

(93) In *Islam (A.P.)* v. *Secretary of State for the Home Department, Regina* v. *Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.)* (Conjoined Appeals) (House of Lords) (25 March 1999), the Lords were considering the meaning of the words "membership of a particular social group" as it related to two women who faced being falsely accused of adultery in Pakistan. In discussing sexual identity as a basis for an asylum claim, four of the five Lords specifically referred to homosexuals as a particular social group.

(94) *Ourbih*, Conseil d'État, SSR, Decision No. 171858, 23 June 1997, in which the Court held that membership in a particular social group existed "en raison des caractéristiques communes qui les définissent aux yeux des autorités de la société."

(95) Alexander Aleinikoff (2003), p. 283.

rulings are known to have recognized the persecution of homosexuals because of membership in a particular social group, although some case law suggests that measures directed against those with an "irreversible homosexual orientation" as opposed to a "mere tendency towards homosexuality" could be construed as political persecution.(96)

d. The "Well-Foundedness" of the Fear of Persecution

Another example of conflicting case law in the European Union relates to the determination of what situation will objectively ground a well-founded fear of persecution. Individual decision-makers may have different views on any particular fact or situation, and it is thus not surprising that EU Member States have conflicting jurisprudence in this regard. Bhabha provides an example involving women claiming a well-founded fear of persecution in Eritrea because of their opposition activities.(97) In one case, a member of the Ethiopian military had sexually abused a claimant who had distributed leaflets for an Eritrean liberation organization and whose husband was a fighter with that organization. In another case, a claimant had cared and cooked for Eritrean resistance fighters. The Dutch government refused the former's asylum application as it was determined that her actions were not enough to make her an opponent of the regime, while the German government granted full refugee status to the latter.(98)

e. Appeal Rights

Given the nature of refugee determination proceedings – the evidentiary difficulties, language and cultural barriers, the fact that it is forward-looking – appeal rights are essential to protect the integrity of the process. U.K. government data demonstrate that the Home Office errs on initial refugee decisions in approximately 20% of cases; nearly 14,000 appeals to the Courts were successful in 2003.(99) This error rate rises to more than

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(96) Council of Europe Ad Hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR), *Replies to the questionnaire on gay and lesbian asylum seekers*, Strasbourg, 19 September 2001.

(97) Bhabha (1994), p. 108.

(98) Anne Leiss and Ruby Doesjes, *Female Asylum Seekers: A comparative study concerning policy and jurisprudence in the Netherlands, Germany, France, the United Kingdom, also dealing summarily with Belgium and Canada*, Dutch Refugee Council, Amsterdam, 1994, Case 3.14 and Case 4.17.

(99) Amnesty International, News Release: "UK: Asylum – new report exposes home office failures causing nearly 14,000 wrong asylum decisions in one year," 9 February 2004.

33% in Sudanese and Eritrean claims, and nearly 40% in cases involving Somalia.(100) Yet plans announced by Home Secretary David Blunkett in 2003 would reduce appeal rights by establishing a one-tier appeals body whose decisions would not be subject to judicial review.(101)

Another aspect that is being harmonized in the EU is a lack of transparency surrounding decisions to return asylum seekers to safe third countries.(102) In Germany, for instance, border guards make this critical decision, the person is immediately removed, and there is no possibility of appeal or administrative review.(103) And as noted earlier, there are significant concerns about limited or non-existent appeal rights with respect to "manifestly unfounded" claims. As Fullerton notes, in Germany, even where an appeal may be available, the 1993 constitutional amendments provide that deportation shall generally not be suspended pending a decision in expedited cases.(104)

5. Other Grounds of Protection

The Refugee Convention does not cover all situations faced by asylum seekers. Arguably, it captures only a minority of migrants who flee their homelands for what many people would view as completely understandable and legitimate reasons, such as widespread famine, civil war or natural disasters. As such, most countries offer some form of refuge beyond the scope of the Convention. But there are significant differences among EU Member States in how they provide subsidiary and complementary forms of protection. Some countries have set up specific categories of beneficiaries, while others simply have a single form of protection that is broadened to include those who cannot be returned due to a risk of human rights or similar violations.(105) A few States provide protection to those fleeing natural disasters and those who simply cannot be returned for practical reasons.(106)

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(100) *Ibid.*

(101) In the Home Office's Report *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain*, released in February 2002, appeal "streamlining" would be accomplished by making the Immigration Appeal Tribunal a Superior Court of Record, with the result that "there should be no scope for judicial review of its decisions": paragraph 4.66.

(102) Fullerton (2001), p. 245.

(103) *Ibid.*, p. 246.

(104) *Ibid.*, p. 253.

(105) European Council on Refugees and Exiles, "Complementary/Subsidiary Forms of Protection in the EU Member States: An Overview" (updated December 2003), p. 4.

(106) *Ibid.*, pp. 4-5.

Given the obvious interconnection between secondary grounds of protection and asylum processes under the Convention, the EU has begun to address harmonization in this realm as well. The Amsterdam Treaty, in fact, requires (in Article 63) that the EU Council of Ministers adopt minimum standards for granting temporary protection to displaced persons from third countries who cannot return to their country of origin, and to persons who otherwise need international protection. In September 2001, the Commission published a proposal for a directive that is meant to provide protection that complements the Convention.(107)

While secondary grounds obviously enhance the protection of forced migrants who do not meet the Convention criteria for refugee status, fears have been expressed that informal and discretionary protection measures – many of which are temporary and do not allow for long-term status – could dislodge refugee protection from the realm of enforceable human rights.(108) In essence, the formalization of a regional system of temporary complementary protection could shift refugee protection from the realm of law, where treaty-based norms are enforceable in domestic tribunals, to an "uncertain realm of political bargaining and humanitarian assistance."(109) As well, the regionalization of temporary protection measures could erode the UNHCR's influence.(110) Some suggest that this is another example of harmonization becoming a tool to address Member States' concerns about asylum numbers, rather than a method of enhancing or expanding the level of protection available.

D. EU Summary

The European Union has made a great effort to regulate the movement of asylum seekers, but the issue of protection has been largely left to the discretion of each country. Arguably, the harmonization experiment in the European Union has resulted only in the piecemeal adoption of "a lowest common denominator of restrictive measures"(111) as European refugee policies over the past 20 years have changed from being primarily rooted in

(107) 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* (2002/C 51 E/17), (submitted by the Commission on 30 October 2001).

(108) Joan Fitzpatrick, "Temporary Protection of Refugees: Elements of a Formalized Regime," *American Journal of International Law*, Vol. 94, 2000, p. 280.

(109) *Ibid.*, p. 305.

(110) *Ibid.*, p. 280.

(111) Bhabha (1994), p. 101.

humanitarian considerations to becoming more focused on state interests.(112) Some argue that under the guise of harmonization, European governments are, in effect, renouncing their commitment to an inter-regional system of asylum.(113) It has become a process of burden-shifting rather than burden-sharing, according to a Russian delegate to a UNHCR Executive Committee meeting,(114) and Article 63 of the Amsterdam Treaty is merely perpetuating the reductive approach to protection by requiring the adoption of only "minimal standards with respect to the qualification of nationals of third countries as refugees."(115)

Even the United Nations High Commissioner for Refugees, an office that has supported harmonization and safe third country policies in the past, is now warning that the European Union's recent initiatives could result in the deterioration of refugee protection standards. The present High Commissioner has highlighted three specific concerns – safe countries, border procedures, and the right to remain during an appeal – and suggested that the recent EU directives might be at variance with established international law.(116)

Two main points may be gleaned from the preceding review of some of the aspects involved in creating a regional asylum regime. First, safe third country arrangements should be based on common standards of protection. With respect to manifestly unfounded claims, detention practices, the interpretation of the refugee definition, and the existence of other grounds of protection, the European Union is far from unified in its approach. As a result, not only is the Dublin process undermined, but so too is the global asylum system; and violations of the fundamental premise of non-refoulement become practically inevitable. Second, as many commentators suggest, recognition of this problem needs to be addressed not by the enunciation of minimum standards – which has led to what may be a "race to the bottom" – but by a strengthening of protection that can be accomplished only by returning to a focus on humanitarian concerns, rather than border control interests.

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(112) Kjaerum (2002), pp. 513-514.

(113) James C. Hathaway, "Harmonizing for Whom? The Devaluation of Refugee Protection in the Era of European Economic Integration," *Cornell International Law Journal*, Vol. 26, 1993, p. 719.

(114) European Consultation on Refugees and Exiles, Minutes and Conference Papers from Biannual General Meeting, 13 (1994), as cited in Bhabha (1994), p. 107.

(115) Noll and Vedsted-Hansen (1999), p. 377.

(116) UNHCR, News Release, "Lubbers Warns EU Asylum Law May Erode International Standards," Geneva, 24 November 2003.

In May 2004, EU asylum policy became genuinely communitarized. The legislative procedure of co-decision[117] came into effect and the European Court of Justice gained jurisdiction. This may result in a more human rights-oriented approach to asylum. However, it is possible that the restrictive framework is already set. Hathaway argues that the erosion of protection in Europe has resulted from bypassing the supranational organizations of the European Parliament and the Council of Europe – which, he suggests, embraced a largely humanitarian vision of refugee law – in favour of the informal intergovernmental mechanisms that resulted in Dublin.[118] By using an intergovernmental, as opposed to EU, approach, Member States committed to deterrence could coordinate immigration policy without ceding domestic jurisdiction or submitting to substantive scrutiny.[119] It is apparent that a peak of restrictive policy marked the early 1990s, and the common EU asylum system as called for in Tampere in 1999 appears destined to maintain this orientation. In 1993, Hathaway suggested that the momentum generated to that point might be too great to be redirected, despite belated efforts by EU institutions to reassert themselves.[120] Dublin II, a European Council resolution that simply mirrors the earlier intergovernmental efforts, may have proved him right. Indeed, the EU institutional activity since asylum matters moved to the first pillar has not had a significant impact on state asylum systems. However, a Council Directive[121] on minimum standards for refugee status procedures has been reached, but it is clearly too early to gauge its impact.

If the motivation for harmonization in Europe was to combat illegal migration, avoid lengthy queues and prevent country-hopping, it has not succeeded. The Dublin Convention and Council Regulation No. 343/2003 both assume that asylum seekers will arrive with documents and that their route of entry and countries of transit will be possible to establish. This has not been the case. What has largely happened instead is the asylum system has been corroded by an atmosphere of deceit and mistrust, and the enforcement approach has driven migrants and asylum seekers into the hands of smugglers and traffickers. This compounds the problems of government and, obviously, those of the asylum seekers themselves.

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(117) Co-decision refers to the idea that the European Parliament has equal power with the Council of Ministers to take decisions. The draft constitution would extend co-decision substantially.

(118) Hathaway (1993), pp. 729-730.

(119) *Ibid.*, p. 733.

(120) *Ibid.*, p. 734.

(121) Directives are, in essence, instructions to Member States to modify or create domestic legislation. Unlike regulations, which are directly applicable in Member States and take precedence over national law, directives must be “approximated” into national law within a give time frame.

Focusing on asylum as a security problem has created an environment wherein even more radical proposals are being made. A "migration strategy" paper published in 1998 under the Austrian presidency of the European Union, for example, went so far as to call for amending or even replacing the 1951 Convention and suggested that the right of asylum be replaced by "political offers" of finite protection by Member States.(122) It was widely criticized after being leaked, and was subsequently withdrawn. Similarly, in Britain in 2003, another confidential policy document was leaked in which the government's "new vision for refugees" would include a "global network of safe havens" – in other words, the creation of detention camps to which asylum seekers who actually reached the European Union could be sent pending a determination of their claim. Albania was mentioned in the press as one possible site for such a camp.(123)

HARMONIZATION BETWEEN CANADA AND THE UNITED STATES

Even before the terrorist attacks of 11 September 2001, Canada and the United States were actively involved in developing "a strategic, regional approach to migration issues through their Border Vision process."(124) In an increasingly security-conscious North America, the harmonization of immigration and refugee policies has been espoused by many as a necessary corollary to a "North American security perimeter." Some speak of a "North American community of law," with a common boundary and common criteria for entering and moving within it.(125) Others contend that a *de facto* perimeter already exists, and that a joint security and economic space was decided upon years ago, based on agreements such as NATO,

(122) Strategy paper on immigration and asylum policy, from the Austrian Council Presidency to the K4 Committee, 1.7.98, 9809/98 CK4 27, ASIM 170, Limite; Second draft, 29 September, 9809/1/98, Rev 1 Limite, CK4 27, ASIM 170.

(123) Colin Brown and Francis Elliott, "Blunkett plans to send asylum seekers to Albania," *The Weekly Telegraph*, 9 February 2003.

(124) Department of Foreign Affairs, *Canada–U.S. Cooperation – Customs and Immigration*, from the Web site: http://www.dfait-maeci.gc.ca/can-am/menu-en.asp.

(125) Allan Gotlieb, former Canadian Ambassador to the United States, made this argument in a speech to the Borderlines Conference at the Woodrow Wilson International Center for Scholars on 27 February 2003. The text is available on-line at www.borderlines.ca/washington/speech_alangotlieb.phtml.

NORAD, the Auto Pact and NAFTA.(126) Still others go so far as to suggest that full-scale political union with the United States is inevitable.(127)

Maintaining Canadian political independence vis-à-vis the United States is a concern that predates Confederation. Today, many worry that enhancing collaboration will result in a loss of sovereignty to Canada's neighbour to the south. In fact, some fear that Canada's existing economic treaties with the United States are so "politically pregnant" that they already amount to a second, external constitution.(128) Conversely, there are a vocal few who allege that Canada's refugee system undermines all of the security measures being taken in Canada and the United States to construct an effective North American defence against terrorism.(129) Some even go so far as to suggest that Canada should withdraw from the Refugee Convention to ensure regional security.(130)

This section of the paper will provide a brief description of the Canadian and American asylum systems and, with references to the European Union, review some of the likely challenges should harmonization be pursued. Many of these issues have already been brought to the fore in the debates relating to the Canada–U.S. Safe Third Country Agreement, and a review of the concerns that have arisen in that context may prove instructive.

A. The Two Systems

Canada and the United States both accept significant numbers of people fleeing persecution. However, the processes employed by the two nations in determining whether someone is deserving of protection differ in many ways. As in the European Union, legal protections for asylum seekers will be threatened in a safe third country framework where the parties have contrasting approaches to detention, appeal rights, secondary grounds of protection and some aspects of the refugee definition itself.

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(126) Michael Hart and William Dymond, *Common Borders, Shared Destinies: Canada, the United States and Deepening Integration*, Centre for Trade Policy and Law, Ottawa, 2001, p. 24.

(127) Anthony Westell, "Why union with the U.S. is inevitable," in *Canadian Speeches, Issues of the Day*, Vol. 18, No. 3, pp. 17-18.

(128) Stephen Clarkson, "Canada's secret constitution: The implications of North America's grand bargain," *Inroads Journal*, Vol. 13, 2003, p. 30.

(129) James Bissett, "Canada's Asylum System: A Threat to American Security," Center for Immigration Studies, Washington, D.C., May 2002.

(130) Diane Francis, *Immigration: The Economic Case*, Key Porter Books, Toronto, 2002, p. 180.

1. Canada

A person either in Canada or appearing at a port of entry who wishes to claim refugee status first notifies an immigration officer. It is then determined whether the person is eligible to have his or her claim heard by the Refugee Protection Division of the Immigration and Refugee Board (IRB). Eligibility determination is governed by the criteria listed in section 101 of the *Immigration and Refugee Protection Act* (IRPA).(131) If the person is eligible, he or she will be given 28 days to file with the IRB a "Personal Information Form" detailing the claim and providing personal information. If the claimant does not have valid status, the immigration officer will issue a conditional departure order that will take effect if the person is determined by the IRB not to be a Convention refugee or a person in need of protection. The claimant will also be photographed and fingerprinted when initiating a claim. In some cases, claimants may be detained for specific reasons, including cases where their identity cannot be ascertained to the satisfaction of an immigration officer, or there is reason to suspect that they are inadmissible because they are a danger to the security of Canada, or because they are unlikely to appear for future proceedings.(132) Detention, however, tends to be an exception rather than the rule.

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(131) Section 101(1) of the IRPA reads:

> A claim is ineligible to be referred to the Refugee Protection Division if
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> (*a*) refugee protection has been conferred on the claimant under this Act;
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> (*b*) a claim for refugee protection by the claimant has been rejected by the Board;
>
> (*c*) a prior claim by the claimant was determined to be ineligible to be referred to the Refugee Protection Division, or to have been withdrawn or abandoned;
>
> (*d*) the claimant has been recognized as a Convention refugee by a country other than Canada and can be sent or returned to that country;
>
> (*e*) the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence; or
>
> (*f*) the claimant has been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality …

(132) Section 244 of the *Immigration and Refugee Protection Regulations* sets out the factors to be considered in respect of detention; these include whether a person: (a) is unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister; (b) is a danger to the public; or (c) is a foreign national whose identity has not been established. Considerations to be used in assessing the preceding are set out in regulations 245 (flight risk), 246 (danger to the public) and 247 (identity not established).

Refugee claimants receive a hearing before the IRB's Refugee Protection Division, where they are often represented by counsel paid for by provincial legal aid plans. The grounds for protection have been consolidated and now include not only Convention refugee status, but also protective status based on the CAT, other risk to life, or a risk of cruel and unusual treatment or punishment.(133) Pending a determination, claimants may be eligible for employment or study permits and will receive medical coverage and some social welfare benefits. Given the backlogs that exist, claims can take anywhere from six months to two years to be processed. Judicial review of a negative decision requires leave of the Federal Court and is not a redetermination on the merits, but simply a review of the legality of the IRB decision. Other grounds for granting protection exist, such as humanitarian and compassionate applications and the Pre-Removal Assessment Process(134) for people subject to a removal order.

2. United States

There are two types of processes for asylum applicants in the United States. An alien in the country who is not in immigration proceedings may make an "affirmative" application. If an asylum officer denies the application and the person has lawful status in the United States, he or she may reapply in the future if ever placed in removal proceedings. Those who do not have lawful status and are not granted asylum by an asylum officer are referred to an immigration judge, where the claim can be raised again.

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(133) Section 97 of the IRPA provides:

> (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally
>
> (*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
>
> (*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
>
> (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,
>
> (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
>
> (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
>
> (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(134) Sections 112-115 of the IRPA.

A "defensive" application is one that is raised in the course of removal proceedings. The 1996 *Illegal Immigration Reform and Immigrant Responsibility Act* (IIRIRA) substantially altered this process for most asylum seekers appearing at the border. Upon a foreign national's arrival at a port of entry, the IIRIRA authorizes an immigration officer to order the person removed from the United States without further hearing or review if the officer believes that the person arrived without proper travel documents. If the foreign national without proper documents makes a claim to asylum at a port of entry, or if a claim to asylum was made when the foreign national had previously entered the country without being inspected at a port of entry, the claimant can still be removed from the United States if an immigration officer determines that he or she does not have a "credible fear" of persecution. The person claiming asylum must be detained until this decision is made. The IIRIRA permits an immigration judge to review a negative decision of an asylum officer, if requested by the claimant. The judge's review must be completed within seven days. Detention is discretionary pending a decision by the immigration judge.

Also of note is the one-year time limit to access the American asylum system. Exceptions are made for claimants who can demonstrate changed circumstances, such as a recent coup in their home country that puts them in danger, or extraordinary circumstances that relate to the delay in filing, such as serious illness or ineffective assistance from counsel. However, most claimants who have been in the country for more than a year will be precluded from initiating a claim.

The IIRIRA was clearly intended to address perceived abuses of the American asylum system and is enforcement-oriented. Canada, in contrast, has chosen a course that provides greater due process guarantees and permits more discretion in respect of the detention of asylum seekers. The new *Immigration and Refugee Protection Act*, while strengthening enforcement, does not go as far in this respect as the American legislation.

B. The Safe Third Country Agreement

Under the *Immigration and Refugee Protection Act*, the Minister may designate a country as a state to which refugee claimants may be returned to make their claim for protection.[135] The provision for naming a "safe third country" has existed in Canadian law since 1989, but was only recently implemented. A similar provision exists in the American Immigration and Nationality Act; it precludes an application for asylum where "pursuant to a

(135) Sections 101(1)(e) and 102 of the IRPA.

bilateral … agreement, the alien may be removed to a country where the alien's life or freedom would not be threatened …, and where the alien would have access to a full and fair procedure for determining a claim to asylum."(136) In August 2002, Canada and the United States signed the Safe Third Country Agreement, representing the first step in this reciprocal arrangement. The Canadian safe third country regulatory framework was pre-published in October 2002, and in March 2004 the Americans published their proposed regulations for comment. The Agreement took effect on 29 December 2004.

The flow of refugee claimants between Canada and the United States is decidedly lopsided. While non-status migrants may be entering the United States via Canada – numbers are difficult to discern, given the clandestine nature of human smuggling – the number of those transiting Canada on their way to the United States to make a formal claim to asylum appears to be small.(137) In a December 2002 report, the House of Commons Standing Committee on Citizenship and Immigration noted the following in respect of transborder refugee flows:

- From 1995 to 2001, approximately one-third of all refugee claims in Canada (31% to 37% annually) were made by claimants known to have arrived from or through the United States.
- In 2001, 13,497 people known to have come from or through the United States made refugee claims, and 95% of these applications were initiated at land border ports of entry.
- While no one could provide data regarding the flow of refugee claimants from Canada to the United States, it appears likely that they would number no more than a few hundred per year.(138)

From the Canadian government's perspective, there may be some incentive to stem the flow of refugee claimants coming through the United States.

The allocation of responsibility for examining refugee claims in Canada and the United States was consciously borrowed from Europe.(139) While the Agreement is based upon

(136) Section 208(a)(2)(A).

(137) The discrepancy in numbers may lead readers to question the American incentive in signing the Agreement. Although no formal "tit-for-tat" has been announced, it is noteworthy that a supplementary agreement was signed at the same time that would permit the United States to refer to Canada up to 200 people annually for resettlement provided that they are "outside the United States and Canada, as defined in respective national immigration laws, and have been determined by the Government of the United States of America and the Government of Canada to be in need of international protection."

(138) *The Safe Third Country Regulations, Report of the Standing Committee on Citizenship and Immigration*, House of Commons, 37th Parliament, 2nd Session, December 2002.

(139) Abell (1997), p. 569.

the same burden-sharing premise as the EU arrangement, it differs in some respects. Of course, it is clearly more limited in scope than the vast array of European instruments, directives and regulations that aim to eventually establish a fully harmonized system. Most significant, though, is the fact that it is limited in its application to people claiming refugee status at a land border port of entry.

Like the Dublin process, the Canadian regulations stipulate that the Agreement will not apply to people with a valid Canadian visa, or those who do not require a visa to enter Canada but who would need a visa to enter the United States The Canada–U.S. Agreement is also similar to the Dublin process in that exceptions are made for particular individuals who would otherwise be subject to the safe third country rule, e.g., unaccompanied minors and applicants with family members who have previously been given status in the destination country.

Of note as well is Article 6 of the Agreement, which provides that either country may, at its own discretion, examine *any* refugee claim where it determines that it is in the public interest to do so. (As mentioned earlier, a similar provision exists in the EU Council Regulation.) Pursuant to this article, the Canadian regulations provide that claimants will not be returned to the United States if they have been charged or convicted of an offence punishable by the death penalty.

C. Analysis of the Challenges to Canada–U.S. Harmonization

The Canada–U.S. safe third country model is obviously less restrictive than Dublin II. Some argue, therefore, that it is preferable.(140) It should be noted, however, that since 11 September 2001, Canada and the United States have increased intelligence sharing and moved towards harmonizing third country visa requirements, a situation reminiscent of the Schengen stage of EU harmonization. Whether seen as a step on the path to greater harmonization or simply as a unique burden-sharing arrangement, many of the challenges that have been identified in the EU are likely to arise in the North American context.

There are, of course, obvious differences between the EU and the Canada–U.S. arrangements, not least of which is the fact that the former involves coordination amongst a

(140) *Ibid.*

larger group of States on a broader range of issues. Comparison, however, is appropriate, as the same goal is purportedly being pursued: regional cooperation to control the movement of asylum seekers in compliance with the legal obligations of the Refugee Convention and related instruments. A review of some of the key incongruities in the Canadian and American systems echoes what has been discussed with respect to the European Union and suggests that a safe third country scheme may lead to a deterioration of protection in North America as well.

As discussed earlier, one of the main issues that has arisen in Europe is that the safe third country process can result in chain refoulement. While the Safe Third Country Agreement specifically provides (in Article 3) that a person's asylum claim must be heard in one of the two countries, some suggest that the American expedited removals process and the one-year time limit to file a claim may result in the return of claimants without a substantive determination of their case. With respect to the former, the Department of Homeland Security counters that for a person to enter the expedited removals process, he or she must meet the definition of an "arriving alien,"(141) and the Board of Immigration Appeals has held that an alien who is returned to the United States after being refused entry abroad is not an applicant for admission.(142) But by this same token, a return to the United States from Canada under the Agreement would also not count as an arrival for the purpose of determining whether an applicant has filed for asylum within one year of the date of last arrival, as required by section 208(a)(2)(B) of the *Immigration and Nationality Act*.(143) This could prove to be a real problem for thousands of people who have been living "underground" in the United States for some time and now fear being deported to prosecution or torture as the Homeland Security Department rounds up more and more non-status migrants.(144)

Differing interpretations of the Refugee Convention also raise concerns. It is beyond the scope of this paper to review in detail the differences in the determination processes in Canada and the United States and the jurisprudence regarding the application of the refugee definition. For the most part, both countries adhere to the letter of the Convention and its Protocol, but authors such as Mark von Sternberg have identified clearly dissimilar approaches in

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(141) *Federal Register*, Vol. 69, No. 45, 8 March 2004, p. 10624.

(142) *Matter of T.*, 6 I&N Dec.638 (1955).

(143) *Federal Register*, Vol. 69, No. 45, 8 March 2004, p. 10620.

(144) The problem seems especially pronounced for Pakistani nationals: see Adrienne Tanner, "Record number of refugees come to Canada from U.S.," CanWest News Service, 10 March 2004.

many areas. For example, his analysis suggests that the test in Canadian jurisprudence for establishing racial persecution is comparatively "liberal,"[145] as is the interpretation of "political opinion" persecution.[146]

The understanding of what constitutes a "particular social group" also diverges in certain instances,[147] and spousal abuse claims were a sensitive issue during the Agreement's implementation phase. In respect of gender-based persecution, Canadian law clearly accepts that household domestic violence may found a claim, while the situation in American jurisprudence is currently unclear. In the *Regulatory Impact Analysis Statement* that accompanied the Canadian regulations, Citizenship and Immigration Canada conceded that the two countries "have different approaches" in this regard. While the United States does recognize gender-based claims generally, the area involving claims based on domestic violence has been considered problematic since the Board of Immigration Appeals' 1999 decision in *Matter of R-A-*.[148] In that case, a restrictive view of the Refugee Convention ground of "particular social group" led to the rejection of a claim based on domestic abuse. Former Attorney General Janet Reno vacated the decision and indicated a desire to establish guidelines recognizing the status of domestic abuse victims in American asylum law, but under the new administration, no rules have yet been published. Hope has recently been expressed that standards similar to Canada's will be announced,[149] but the situation remains unclear.

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(145) Mark von Sternberg, *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law: Canadian and United States Case Law Compared*, Martinus Nijhoff Publishers, New York, 2002, p. 24.

(146) *Ibid.*, p. 67.

(147) *Ibid.*, pp. 195-221.

(148) *Matter of R-A-*, Interim Decision 3403 (BIA 1999). The BIA did find that the abuse the claimant suffered at the hands of her husband rose to the level of persecution but ruled, in a 10 to 5 split decision, that she failed to establish that the harm was committed "on account of" either her political opinion or her membership in a particular social group. The social group identified by the Immigration Judge who had granted the claim was defined as Guatemalan women who have been involved intimately with Guatemalan male companions who believe that women are to live under male domination.

(149) Rachel Swarns, "Ashcroft Weighs Granting of Asylum to Abused Women," *New York Times*, 11 March 2004.

The fact that the Safe Third Country Agreement applies only to land border ports of entry is also clearly problematic. Smuggling is endemic in the European Union, where the Dublin process applies regardless of where an asylum claim is registered. Implementation of the Canada–U.S. arrangement provides even greater incentive for surreptitious entry, as inland claims will be accepted, regardless of the route of transit. Not only is increased smuggling likely to result, but the procedures in place at the border – where refugee claimants make appointments, arrive with interpreters, are fingerprinted and photographed, and detention is possible – will be avoided.

The status of those found to be in need of protection is also an issue. Hathaway argues that American Supreme Court jurisprudence is "strikingly anomalous"(150) vis-à-vis the rest of the developed world, as it ignores fundamental duties under international refugee law. He suggests that a person found to be a Convention refugee in the United States is not guaranteed the rights set out in the Geneva Convention. A refugee is not even granted the right of non-refoulement, which is reserved for what he calls "the subset of super-refugees"; i.e., those who can show a "probability of persecution" as opposed to the Convention's test of a "well-founded fear" of persecution.(151)

A post-9/11 concern with respect to the American asylum system is the USA Patriot Act, which permits the indefinite detention of some foreign nationals, including asylum seekers.(152) This legislation amended the *Immigration and Nationality Act*(153) by creating new provisions for the detention of "alien terrorists." Who is detained is completely within the discretion of the Attorney General, who may make a designation if he has "reasonable grounds to believe" that the person falls into one of a list of specified categories(154) or, more broadly, "is

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(150) James C. Hathaway and Anne K. Cusick, "Refugee Rights are Not Negotiable," *Georgetown Immigration Law Journal*, Vol. 14, 2000, p. 484.

(151) *Ibid.*, pp. 485-486.

(152) Inna Nazarova, "Alienating 'Human' from 'Right': U.S. and U.K. Non-Compliance with Asylum Obligations Under International Human Rights Law," *Fordham International Law Journal*, Vol. 25, 2002, p. 1414.

(153) 8 U.S.C. 1101 et seq.

(154) Those included in the list are: Any alien who has engaged, is engaged, or at any time after admission engages in any activity to violate any law of the United States relating to espionage or sabotage or to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information (s. 237(a)(4)(A)(i)); any alien who has engaged in any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means (s. 237(a)(4)(A)(iii)); and, any alien engaged in "terrorist activity" (s. 237(a)(4)(B)), which is defined in section 212(a)(3)(B)(iv) as any member of a foreign terrorist organization, as designated by the Secretary of State, or a political, social or other similar group whose public endorsement of acts of terrorist activity the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities.

engaged in any other activity that endangers the national security of the United States."[155] Given the limited information available regarding security detainees – apart from the fact that they are often held incommunicado with no access to legal counsel – compliance with international law norms is difficult to ascertain.

Perhaps the most serious issue that has arisen as the United States enhances its security measures is the allegation that C.I.A. policy openly flouts the most basic principles of international law. Recently, the Maher Arar case brought to the public's attention the American practice of "extraordinary renditions." In blatant violation of the Refugee Convention and the Convention Against Torture, U.S. officials have reportedly admitted to knowingly deporting people to torture.[156] In effect, they are alleged to torture by proxy to obtain intelligence.

The summary accompanying the American proposed rules in the U.S. Federal Register states:[157]

> During the bilateral negotiations that have resulted in the Safe Third Country Agreement, the delegations of both countries acknowledged certain differences in their respective asylum systems. However, harmonization of asylum laws and procedures is not a prerequisite to entering into a responsibility-sharing arrangement.

Surely, though, the contravention of laws that make up the international refugee protection regime by any State that is party to such a "responsibility-sharing" arrangement cannot be acceptable. As has occurred in the European context, it will lead to a deterioration of protection. If the allegations about the U.S. practice of extraordinary rendition are accurate, then Canada will become a party to a violation of international law.

Another aspect of the American asylum system that contrasts sharply with Canadian refugee determination proceedings is the lack of legal aid representation for asylum seekers in the United States, particularly for those in detention. Although statistics suggest that claimants in the United States are four to six times more likely to be successful when represented by counsel, more than a third have no representation in immigration court. Worse still, those in

(155) S. 236A(a)(3)(B).

(156) Deneen L. Brown and Dana Priest, "Deported Terror Suspect Details Torture in Syria: Canadian's Case Called Typical of CIA," *Washington Post*, 5 November 2003.

(157) *Federal Register*, Vol. 69, No. 45, 8 March 2004, p. 10620.

detention are twice as likely to have no representation.(158) Those that do must often depend on the charity of non-governmental organizations.

Conflicting interpretations of the right of asylum in international law are also apparent from the American policy of interdicting asylum seekers at sea. Forcing back vessels in international waters may not be directly related to the issue of a safe third country arrangement with the United States, but the fact that the refoulement of Haitians in clear violation of international law is American government policy should be a concern to any partner in an asylum responsibility-sharing arrangement.

While coordination between two nations, as opposed to 15, and now 25, might seem a straightforward task, at present there is apparently no desire to pursue a uniform asylum policy for North America. Rather, as suggested in the American comments accompanying their implementing regulations, the Safe Third Country Agreement is proceeding on the basis that responsibility-sharing does not require the harmonization of policy and procedures.

IS THERE A CRISIS?

Is there really a crisis in Europe or North America that necessitates drastic changes to the international refugee protection system? Statistically, the jump in the number of asylum claims in the EU in the early 1990s appears to be subsiding. In 2003, the total number of asylum seekers arriving in 36 industrialized countries fell by 20% to 463,000, with a 22% drop in claims evident in the European Union.(159) In the United Kingdom, applications for asylum declined significantly in 2003, falling 41% to 49,370.(160)

In Canada, statistics from the Immigration and Refugee Board show a relatively stable influx of asylum seekers:

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(158) Eleanor Acer, "Living up to America's Values: Reforming the U.S. Detention System for Asylum Seekers," *Refuge*, Vol. 20, No. 3, 2002, p. 50.

(159) *Asylum Levels and Trends: Europe and Non-European Industrialized Countries, 2003,* UNHCR Population Data Unit, Geneva, 24 February 2004.

(160) Cathy Newman, "Applications for asylum decline by 41%," *Financial Times of London*, 25 February 2004.

Year	Claims Referred to the IRB
1993	35,702
1994	22,375
1995	26,407
1996	26,099
1997	22,720
1998	23,904
1999	29,450
2000	34,283
2001	43,891
2002	39,495
2003	31,937

According to the section of the American Department of Homeland Security that was formerly the Immigration and Naturalization Service, asylum claims in the United States appear to have been substantially reduced since the early 1990s. The drop in claims filed after the passage in 1996 of IIRIRA is particularly notable:(161)

Year	Asylum Cases Filed
1993	142,680
1994	143,225
1995	147,430
1996	116,877
1997	76,620
1998	48,976
1999	38,013
2000	46,599
2001	63,166
2002	63,427

These statistics do not support the notion that refugee systems are facing collapse due to overwhelming demands. In fact, a recent study by the European Commission as the May 2004 enlargement was nearing indicated that fears of waves of migrants heading for the rich western European countries were unfounded.(162) Perhaps the use of carrier sanctions, visa requirements and overseas enforcement is having its intended effect of reducing claims volumes.

(161) Department of Homeland Security, *2002 Yearbook of Immigration Statistics*, available on-line at: http://uscis.gov/graphics/shared/aboutus/statistics/Asylees.htm.

(162) Tobias Buck, "Migrant fears unfounded, says EU report," *Financial Times of London*, 27 February 2004.

As suggested by the figures cited earlier with respect to Dublin removals, it would be difficult to argue that the EU's safe third country process is responsible for these declining statistics. Nor could one reasonably suggest that the push factors that exist in the developing world have ameliorated over this period.

So where is the restrictionist impetus coming from? One incentive for attacking the international refugee protection regime is not difficult to identify. Coordinated international approaches to managing migration began to be actively pursued in the early 1990s, as Western nations grappled with increasing numbers of asylum seekers. This development coincided with a swelling mood of xenophobia,(163) which has since been further inflamed by the events of 11 September 2001. This sentiment has provided support for strategies that assert the notion of "protection elsewhere" to the maximum extent possible.(164) Recent advances by anti-immigrant political parties in Austria,(165) Greece,(166) Denmark(167) and Holland(168) are arguably symptomatic of this populist tide, and some government officials have actually begun to decry the international system of refugee protection.


Open fire on asylum seekers before they land, says Italy's Minister of Extremes

Source: *The Daily Mail* [London], 11 June 2003.

(163) Catherine Halliday-Roberts, "Building a Common Frontier or Deconstructing National Identity?: An Analysis of the Effort to Centralize Control of Third Country Immigration in the European Union," *ILSA Journal of International & Comparative Law*, Vol. 9, 2003, p. 502.

(164) Rosemary Byrne, Gregor Noll, and Jens Vedsted-Hansen, "Western European Asylum Policies for Export: The Transfer of Protection and Deflection Formulas to Central Europe and the Baltics" in Byrne, Noll, and Vedsted-Hansen (2002), p. 10.

(165) George Jahn, "Haider's Freedom Party Wins Election," *The Guardian* [Manchester, U.K.], 7 March 2004.

(166) Helena Smith, "'Le Pen' of Athens alters the Greek political landscape," *The Observer* [London], 7 March 2004.

(167) Andrew Osborn, "Danes justify harshest asylum laws in Europe," *The Guardian* [Manchester, U.K.], 29 June 2002.

(168) Ian Black, "Dutch pass law to expel failed asylum seekers," *The Guardian* [Manchester, U.K.], 18 February 2004.

People take notice of headlines proclaiming that Western asylum systems are under siege, that we are being inundated with undocumented foreigners with questionable intentions, and that every refugee claimant is a queue-jumper, benefits-seeker or potential Ahmed Ressam.(169) When security experts say that our liberal refugee policies create terrorist havens(170) or officials suggest that asylum seekers are "swamping" our public services and draining resources meant for our own taxpayers,(171) the focus of migration policy is arguably being distorted. Rather than addressing the complex but manageable issues of integration, clamping down on those desperate enough to uproot themselves and their families threatens to become the major focus, if it is not already. This process vilifies immigrants. Many argue that if there is indeed a crisis, it is not a crisis of the developed nations being overwhelmed by the sundry masses, but a crisis of the international refugee protection regime brought about by the restrictionist policies these developed nations have created.

CONCLUSION

A. Harmonization May Threaten the Refugee Protection Regime

The approach to asylum policy in the European Union has proven a threat to the international system of refugee protection. Beginning with carrier sanctions and harmonized visa requirements to prevent migrants from reaching its "fortress," EU Member States moved to an examination of transit countries to further thwart access. Added to that have been measures to reduce or eliminate appeal rights, expedite removals and narrow the refugee definition. And most of these measures have been pursued by the Member States on an intergovernmental basis,

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(169) Ahmed Ressam was an Algerian national convicted of planning to bomb the Los Angeles Airport. He had been denied refugee status in Canada and been ordered deported, but managed to obtain a Canadian passport under a false name. He was arrested trying to enter the United States from British Columbia with a car full of explosives.

(170) For example, David Harris, former chief of strategic planning for the Canadian Security Intelligence Service, suggests that Canada's refugee policies make it easy for terrorists to operate here: see the Web site for PBS Frontline, *Is Canada a Safe Haven for Terrorists?*, at: http://www.pbs.org/wgbh/pages/frontline/shows/trail/etc/canada.html. Another example (although many question whether the authors could be called "expert" in respect of the issue) is LaVerle Berry, *et al*., *Nations Hospitable to Organized Crime and Terrorism: A Report Prepared by the Federal Research Division*, Library of Congress, Federal Research Division, Washington, D.C., October 2003.

(171) For example, British Home Secretary David Blunkett suggested that the children of asylum seekers were swamping British schools, and subsequently defended the remark: "Blunkett Stands by 'Swamping' Remark," 25 April 2002, BBC news, available on-line at: http://news.bbc.co.uk/1/hi/uk_politics/1949863.stm.

outside of the apparatus of the EU and without oversight by its institutions or Court. Coming mainly from the Member State interior ministries, the officials involved brought a perspective that focused on the issue of border-crossing, rather than on humanitarian needs. Thus, the issue became subsumed under the broader concept of migration and was linked to other border control issues, such as terrorism and drug smuggling.(172)

Whether one agrees with the argument that refugees have a right under international law to choose their country of asylum or that a signatory to the Geneva Convention is obliged to assess an asylum claim regardless of the route the claimant took, it is clear that the Dublin safe third country rules have resulted in incidents that violate the principle of non-refoulement, a principle that European governments still profess to respect. It is also apparent that harmonization, when it has focused on refugee determination procedures and not on processes designed to keep them away, has resulted only in the articulation of minimum standards. In so doing, Member States with low standards have no motivation to enhance protection, while those that offer greater protection than the suggested baseline may in fact feel pressure to reduce their standards to be more "competitive" in the race to reduce asylum numbers. Rather than enhancing refugee protection, harmonization in Europe has arguably had the opposite effect by legitimizing a restrictive curb of those Member States who have traditionally had more generous asylum policies.(173)

At its core, this debate is a conflict between what Noll and Vedsted-Hansen call "universalism" and "particularism"; the former strives for the global realization of human rights, while the latter gives preference to a certain state population.(174) But even those who could be labelled "particularists" must realize that there is a fundamental difference between those seeking asylum from persecution and those simply seeking economic betterment. Refugee protection should not be considered a matter of migration control. By definition, refugees have lost the protection of their home State and are thus conceptually different from migrants.

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(172) Sandra Lavenex, *The Europeanisation of Refugee Policies: Between Human Rights and Internal Security*, Ashgate Publishing, Aldershot, 2001, p. 139.

(173) Maarten Vink and Frits Meijerink, "Asylum Applications and Recognition Rates in EU Member States 1982-2001: A Quantitative Analysis," *Journal of Refugee Studies*, Vol. 16, No. 3, 2003, p. 297.

(174) Noll and Vedsted-Hansen (1999), p. 360.

It is true that some in the asylum queue are "economic migrants" rather than Convention Refugees; but as Randall Hansen argues, in the European Union at least, this is a problem that has been created by European policy makers. A formal end to primary migration to most European countries in the 1970s, combined with the difficulty of securing a visa if an individual comes from the developing world, has resulted in the sole legal channel into the European Union being the asylum process.(175) Even more perverse is the possibility that those with the best chance of entering may be the wealthy, clever and unscrupulous – those who can obtain forged documents and pay smugglers thousands of dollars.(176) Home Office research carried out in the United Kingdom dramatically illustrates how the EU asylum system advantages those with money by comparing the socio-economic background of asylum seekers in Europe with that of government-assisted, or "quota," refugees. The impact that is apparent from restrictionist policies leads Morrison and Crosland to wonder whether the trafficking and smuggling of refugees is actually the European Union's policy goal.(177)

An analysis of 20 OECD countries by Thielemann suggests that policy making in this area appears to exaggerate the degree of choice and the level of information that asylum seekers have, and he calls into question the concerns expressed about "asylum shopping."(178) His empirical analysis demonstrates that legacies of migrant networks, employment opportunities and perceptions about the "liberalness" of a host country are key factors that lead asylum seekers to choose one destination over another, when they actually have such a choice. As he notes, in the short and medium term, these factors are not fully within the reach of policy makers. In specific reference to the European Union, Thielemann notes that cooperating on restrictive policy responses – that is, minimizing pull factors and maximizing deterrence – is unlikely to have a long-term impact on the problem of inequitable burden-sharing in Europe.(179) The answer arguably lies in addressing the push factors – why people leave their homes.

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(175) Hansen (2000), p. 789.

(176) *Ibid.*

(177) John Morrison and Beth Crosland, "The trafficking and smuggling of refugees: the end game in European asylum policy?" UNHCR Working Paper No. 39, 2001, p. 21, available via UNHCR Web site: www.unhcr.ch.

(178) Eiko R. Thielemann, "Does Policy Harmonization Work? The EU's Role in Regulating Migration Flows," Paper prepared for presentation at the 8th European Union Studies Association Biennial International Conference, 27-29 March 2003, Nashville, Tennessee, available on-line at: http://aei.pitt.edu/archive/00000424/01/EUSA-APS-Thielemann.html.

(179) *Ibid.*, see "Conclusion."

Surely this process cannot simply be the result of xenophobia or mean-spiritedness. But where does the impetus come from? Chimni suggests that the evolution of restrictionist practices in the West is directly correlated to the end of the Cold War.(180) He argues that the end of superpower conflict meant "the refugee no longer possessed ideological or geopolitical value."(181) Gibney suggests that a more important factor – one that is related to the end of the Cold War – was the "democratization" of asylum policy in Western states.(182) He argues that the end of the epic struggle between Capitalism and Communism deprived State leaders of the most powerful argument they had for constraining restrictionist public sentiment. As a result, populist anti-migrant attitudes fostered by the media and opposition parties increasingly held sway; as he puts it, there was a shift from high politics to low politics.(183)

Source: Steve Bell on the media and asylum seekers, accompanying the article "New asylum centres open by end of year: UK-bound refugees to be processed outside the EU," *The Guardian* [Manchester, U.K.], 9 May 2003.

(180) B. S. Chimni, "The Geopolitics of Refugee Studies: A View from the South," *Journal of Refugee Studies*, Vol. 11, No. 4, 1998, p. 350.

(181) *Ibid.*, p. 351.

(182) Matthew Gibney, "The state of asylum: democratization, judicialization and evolution of refugee policy in Europe," UNHCR Working Paper No. 50, 2001, p. 7, available via UNHCR Web site: www.unhcr.ch.

(183) *Ibid.*

Most academic commentators argue that the last two decades of EU asylum development have had a mostly negative impact on international refugee and human rights obligations. Whether the Union's institutions, which profess to respect the Refugee Convention, will be able to change course as asylum becomes communitarized remains to be seen. To date, and despite the Tampere declarations, initiatives are limited to the proposal of minimal standards for asylum procedures and the refugee definition. Comprehensive harmonization would likely have to involve a universal asylum procedure, a common refugee definition and a uniform protective status. Short of establishing a single asylum agency – which does not appear to be a consideration at this point – the lowering of standards may be destined to continue.

B. Final Thought

The end of the Cold War and the rise of populist anti-migrant attitudes in Europe have resulted in the developed world producing increasingly restrictionist responses to refugees and asylum seekers. While capital, goods and information are flowing more freely across borders, the same cannot be said of people. Whether fleeing poverty or persecution, migrants have been finding the borders of the developed world increasingly difficult to cross. It is broadly accepted that the three essential elements of modern international public order are human rights law, international humanitarian law and the law of refugee status.(184) Many argue that EU harmonization has adversely affected the global asylum system and can thus be seen as a threat to international order and a model to be avoided.

As UN Secretary-General Kofi Annan notes, the true problem is that people migrate when they see no future for themselves and their family in their home country.(185) Whether they are Convention refugees or just fleeing war, poverty or corruption, they will continue to do so. The restrictions put in place by the developed world have led to human trafficking, slavery and the all-too-frequent tragedies that result from clandestine travel. The European experience to date has not demonstrated long-term effectiveness, and many believe that intergovernmental initiatives in the North American context could further jeopardize the international refugee protection system.

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(184) Mark von Sternberg, *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law: Canadian and United States Case Law Compared*, Martinus Nijhoff Publishers, New York, 2002, p. 313. Von Sternberg cites O. Hieronymi, "Human Rights, Refugee Protection and Humanitarian Action," *Refugee Survey Quarterly*, Vol. 18, 1999, p. 1.

(185) Secretary-General Kofi Annan, *Address to the European Parliament Accepting the Andrei Sakharov Prize for Freedom of Thought*, European Parliament, Brussels, 29 January 2004.

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