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PART A: ARTICLES

HARMONISATION OF ASYLUM LAW AND POLICY WITHIN THE EUROPEAN UNION: A HUMAN RIGHTS PERSPECTIVE

HANNAH R. GARRY

ABSTRACT

From 1986 to the present, there has been a dramatic increase in the numbers of asylum applications within the borders of the European Union, largely from Eastern European countries and former colonies in Africa, Asia and the Middle East. Reacting to the influx of the 1980s, European States began to implement and coordinate policies to control entry of asylum seekers. Within this climate, the EU has moved towards harmonisation of asylum policy and procedure as necessary for its pursuit of an ‘area of freedom, security and justice’ without internal borders for the purpose of greater economic and political integration.

In light of the current reactive attitudes and policy towards asylum seekers in the individual Member States of the EU, the harmonisation of asylum policy through the institutions and law of the EU may prove to be problematic from a human rights perspective. This paper first traces the development of a common asylum policy within the EU through the Maastricht Treaty and the Amsterdam Treaty. Second, this paper analyses the implications of harmonisation after the Amsterdam Treaty with reference to the international obligations of the Member States under international human rights and refugee law. Third, this paper critiques the development of various current asylum policies and practices through intergovernmental developments of ‘sub law’. Through this overview and analysis, it is argued that further steps towards harmonisation will continue to reflect European concerns with security, economic prosperity, and cultural homogeneity unless the moves towards supra-nationalisation within the EU framework lead to a deliberate effort to make respect for human rights the core of asylum law and policy.

1 INTRODUCTION

1.1 The Context of Forced Migration Flows in Europe

Since the mid-1980s, the annual number of applications for asylum in the European Union dramatically rose from 206,000 in 1986 to 696,500 in 1992. The numbers dropped to 227,000 by 1997 but began rising again to 334,900 in 2001. The majority of the increased numbers has largely been generated within Europe itself from Romanian and Bulgarian asylum seekers in 1992 and from the Balkans throughout the

1 Juris Doctorate (JD), UC Berkeley, 2002; MIA, School of International and Public Affairs (SIPA), Columbia University 2001; Master’s Certificate, Refugee Studies Programme, University of Oxford, 1998; B.A., Wheaton College, IL, USA, 1995. Many thanks to Dr. Marco Martinuzzi, Maître de Recherches, F.N.R.S. Science Politique, Centre d’Etudes de l’Ethnique et des Migrations, Université de Liège, Belgique, for inspiring the writing of this paper and for his critique and insightful comments.


1990s. There has also been a growth in the number of applicants from former European colonies in Africa, Asia, and the Middle East. Before this time, refugee flows into Europe were relatively stable and controlled with fewer than 100,000 applicants annually. 20 percent of these were coming from East Europe and were integrated fairly easily. At this time, the European countries acted as if they were their moral, as well as political, duty to help every victim of a totalitarian regime who came knocking at the door in the context of the Cold War. However, with the demise of the Cold War in Eastern and Central Europe, with increased forced migration of persons for reasons not solely related to individual persecution or abuse of civil and political rights, and with the increased mobility of persons as a result of greater ease in transnational travel, Europe began to witness an increase in the number of applications for asylum. 6

Reacting to the influxes of the 1980s, European States began to implement and coordinate policies to control entry of asylum seekers such as the 'first country of asylum', manifestly unfounded claims, 'safe country of origin' and use of visa requirements as 'gradually a fear of invasion developed in Europe.' 7 Along with these restrictions, dubious policies of containment and 'safe havens' were also used to control the refugee flows from coming out of the Yugoslav crisis and thus contributed to the decrease in asylum applications in 1998. 8 A 'demonstration' necessary for the legitimisation of questionable policies began in earnest in the late 1980s. Asylum seekers were to be construed as such a crisis, an outlaw, perhaps even a terrorist, who posed a menace to order, and to interior and European security. 9 Thus, by 1992, several governments officially declared a 'zero immigration' policy. 10 Furthermore, steps were taken to deter asylum applications by reducing social benefits, detaining asylum seekers, and applying an increasingly narrow definition of who qualifies to be a refugee. In fact, in 1999, it was provisionally estimated that only 5-10 percent of all applications for asylum were admitted within ten European Union (hereinafter 'EU') Member States. 11

1.2 Towards Regionalisation of Asylum Policy in Europe

Within this climate of control of forced migration within the individual States in Europe, the EU has moved towards harmonisation 12 of asylum policy and procedure as necessary for its pursuit of an 'area of freedom, security and justice' without internal borders for the purpose of greater economic and political integration. 13 On 19 April 2000, the European Parliament articulated several reasons for support of harmonisation including the elimination of disparity in treatment of asylum seekers among Member States and the need to promote burden sharing among Member States. 14 On 11 and 12 December 1998, the Vienna European Council adopted an action plan (hereinafter 'Vienna plan') 15 for implementation of the provisions of a harmonised asylum policy within the EU in accordance with the new Title IV of the EC Treaty as amended by the 1997 Treaty of Amsterdam (hereinafter 'Amsterdam Treaty'). Guidelines were stipulated in the Vienna plan for full implementation of measures on asylum within two to five years of the coming into force of the Amsterdam Treaty in 1999. Also, as the EU enlarges its membership, harmonisation will be promoted through the current stipulation that applicant States adopt basic standards on provision of asylum as agreed upon by the Member States.

In light of the current restrictive attitudes and practice towards asylum seekers in the individual Member States of the EU, the harmonisation of asylum policy through the institutions and law of the EU may prove to be problematic. There is a danger that harmonisation will only further sacrifice protection for the individual asylum seeker under international human rights law in favour of increased efficiency, consistency, control, and national security. This paper will first trace the development of a common asylum policy within the EU through the 1992 Treaty on European Union (hereinafter 'Maastricht Treaty'), and the Amsterdam Treaty. It is evident in this development that there has been a gradual shift from intergovernmental cooperation on asylum policy towards more supranationalism, with a greater role being given to the EU institutions in the formation of a harmonised asylum policy. This paper will also highlight the influence of intergovernmental legal frameworks outside of the EU such as the 1990 Schengen Implementation Agreement (hereinafter 'Schengen') and the 1990 Dublin Convention Determining the State Responsible for Examining Applications for Asylum

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5 Kamin, loc. cit. (note 1), p. 3.
6 Ibid., p. 7.
14 Ibid., p. 5.

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15 Art. 5 of the Treaty on European Union (hereinafter 'Maastricht Treaty') states: "The Union shall set itself the following objectives (...) to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime."
Lodged in One of the Member States of the European Communities (hereinafter 'Dublin Convention') on harmonisation within the EU area.

Second, this paper will analyse the implications of harmonisation after the Amsterdam Treaty from a human rights perspective with reference to the international obligations of the Member States under the Universal Declaration of Human Rights (hereinafter 'UDHR'), the Charter of Fundamental Rights of the European Union (hereinafter 'EU Charter'), the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter 'European Convention'), the 1951 Convention Relating to the Status of Refugees (hereinafter 'Refugee Convention'), and its 1967 Protocol. The degree of protection of basic rights such as the right to seek asylum, the right to freedom of movement, the right to privacy, and freedom from discriminatory treatment will be addressed. Also, issues such as openness and transparency in making asylum policy in the EU; enforcement of asylum policies through the EU institutions; and emphasis on burden-sharing between Member States will be considered in terms of their implications for protection of the rights of asylum seekers.

Third, this paper will critique the development of various current policies and practice between the Member States both before and after Maastricht through intergovernmental development of 'soft law'. Such policies include dealing with root causes and the 'right to remain', deterrence through visas and carrier liability; manifestly unfounded claims and expedited removal; and safe third country lists.

Through this overview and analysis, this paper will assess whether refugee protection has been and will be better or worse off due to this push towards EU harmonisation. Are the goals of increased consistency, efficiency and burden sharing in Europe compatible with the international obligation to protect individual asylum seekers? It will be argued that up to the signing of the Amsterdam Treaty, asylum policy and law within the EU has not had respect for international obligations of refugee protection as its primary aim. Further steps towards harmonisation will continue to reflect European concerns with security, economic prosperity, and cultural homogeneity unless the moves towards supranationalism within the EU framework lead to a deliberate effort to make respect for human rights the core of asylum law and policy.

2 THE DEVELOPMENT OF ASYLUM POLICY IN EU LAW

2.1 The Roots of Harmonisation and Burden Sharing

The harmonisation of asylum law in the EU stems from the goal to create an area within the borders of the Member States where full economic integration and freedom of movement are realised. Article 134(a) of the 1957 European Economic Treaty established that one of the intentions for European integration was the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital. For the most part, States in Europe have preferred to keep asylum policy strictly as a matter of State sovereignty with each country responding in its own way to asylum seekers. However, a 'new logic' has been evolving of 'Europeanisation' of asylum policy via elaboration of European resolutions and directives which are then adopted by the nation-states, whether within a Community framework (...or within an intergovernmental framework (Schengen Agreement). This harmonisation process began around the time of the adoption of the 1986 Single European Act (hereinafter 'SEA') in which there was a revival among the Member States to completely realise an internal market as specified by the founding treaties of the EU. Of course, free movement of persons within this internal market has been one of the more problematic areas of implementation.

Around the same time as the adoption of the SEA, the Ad Hoc Group on Immigration met for the first time and recognised that 'lifting the frontiers between Member States to permit people to pass freely cannot take place to the detriment of the security of the population, of public order and of civil liberties.' Thus, liberalisation and lifting of border restrictions for a free movement within a single market resulted in an additional emphasis on security and control of third country nationals. Consequently, this led to the need for coordination of asylum law due to the consensus that there were abuses of the asylum process for entry into this area of free movement. Subsequently, the question arose as to whether non-EU nationals such as asylum seekers should still be subject to individual States' border controls within this area. For those countries answering yes, the result was the signing of the Dublin Convention in 1990 (which finally entered into force in 1997) addressing which State is responsible for hearing an asylum application through its own immigration laws. A Member State may

21 Ibid., p. 159.
22 Article 8(3) of the Single European Act states that the internal market is to be an area without internal borders in which the free movement of goods, persons, services and capital can be established.
25 Martiniello, Marco, European Union Citizenship, Immigration and Asylum; in Balcarce, Philippe (ed.), The European Union Handbook, Fitzroy Dearborn, Chicago, 1996, p. 850. The Ad Hoc Group stated that coordination of asylum policy was in order 'to end the abuses of the asylum process in the EC'.
27 AIden.
legally request that another Member State process the application on certain grounds. 30 A major criticism has been that these criteria are inefficient for achieving a common body of rights and obligations with regard to status determination where there are still significant differences between States in applying them. 31 The clear purpose of the Dublin Convention is to ‘eliminate abuse of member state asylum application processes through multiple application (asylum shopping).’ 32 For those countries answering no, the result was the signing of the 1990 Schengen agreement (entered into force in 1995) whereby the Member States designed a separate cooperative system of external border controls and procedural visa norms for entry of third country nationals into the Schengen area. 33 With regard to asylum, Schengen implemented the norms for status determination and procedure under the Refugee Convention and 1967 Protocol which were eventually superseded by Dublin. Schengen also established a system for tracking asylum seekers in the boundaries of the Schengen Group. 34

As demonstrated by the Dublin and Schengen frameworks, the initial stages of harmonisation in Europe were intergovernmental in nature and were primarily motivated by the desire to limit numbers and to check fraud. 35 From the late 1980s to the early 1990s, before the adoption of the Maastricht Treaty officially forming the EU, European States participated in a ‘growing web of multilateral forums and an explosion of international conferences and meetings in the European region’ organised by groups such as the UNHCR, the International Organization for Migration, the Council of Europe, and the Organization for Economic Co-operation and Development (hereinafter ‘OECD’). 36 This multilateral approach allowed for the sovereign States in Europe to ‘take the line of least resistance, adopting the lowest common denominator of agreement’ as a basis for future negotiations. 37 Indeed cooperation at the regional level allowed for Member States to ‘shift domestic legal and political constraints’ and international obligations for protection for asylum seekers because, at the regional level, the scope for political and judicial control is far weaker than at national level and within which the relation to international standards can appear tenous. 38

2.2 Intergovernmentalism and the Maastricht Treaty

The issue of asylum was first explicitly addressed within EU law through the Justice and Home Affairs Committee (hereinafter ‘JHA’) Council established under the Third Pillar of the Maastricht Treaty. That a coordinated asylum policy was first put under the JHA is worth noting given that cooperation in this area began in the mid-1970s as a response to rising terrorism in Europe. 39 Under Maastricht, asylum policy within Europe continued to be primarily of an ‘intergovernmental’ nature ‘providing for different institutional arrangements and a variety of legal effects.’ 40 Under the Third Pillar, almost all asylum policies were termed a ‘matter of common interest’ among the Member States, but were not governed by the institutions of the European Union via the Community framework. 41 It was possible under Article K.9 (the ‘passerelle’) of Maastricht for the Council to take unanimous action to move policies in the area of asylum to Pillar One thus ‘comunamitizing’ them, but this provision was largely not utilised. 42 The only exception was that of visa policy. Thus far, the Union has adopted binding regulations for a visa format and for a list of countries of origin requiring visas. The later has a proviso that more countries may be added on a national basis or in compliance with the Schengen Group which demands visas from 126 countries versus the Union’s 161 countries. 43

Within the framework of Maastricht, little was achieved with regard to harmonisation of asylum policy among the Member States primarily because of the requirement of unanimity for passage of measures by the Council and due to the fact that they are not always legally binding. The lack of a clear timeframe for implementation of measures also proved problematic. 44 Under the Third Pillar, the Council had the power to take measures on initiative of the Commission by a unanimous vote through a joint position, joint action, or drafting a Convention. The joint position does not have legally binding effect. 45 The joint action may have legally binding effect if stipulated in the individual decision. 46 The conventions are binding only if ratified by the Member States. 47 The

30 Biran, op.cit. (note 53), pp. 459-460. In December 1973, the Rome European Council agreed to organise a committee known as the ‘Treaty Group’ to lead officials in the national ministries of justice and the interior to share information with regard to security and territories.
31 Bank, loc.cit. (note 18), p. 4.
32 The Community Framework refers to the power of the institutions of the European Union, i.e. the Commission, the Council, the Parliament, and the Court of Justice, to issue binding measures which all of the Member States must follow. The normal procedure is that the Commission makes initiatives which the Council either approves after having heard the Parliament. The Court of Justice ensures that the initiatives of the institutions and the Member States are in compliance generally with EU law.
33 Kotelewski, loc.cit. (note 51), p. 176.
34 Bank, loc.cit. (note 18), p. 4.
37 Recently adopted joint actions include: burden sharing with regard to displaced persons (Official Journal C 262, p. 1); airport transit arrangements (96/197/9HJA, OJ L 63, p. 8); financing of...
Parliament was not given a specific role in this process except for the right to be heard on the 'most important aspects' of the decisions. Implementation of the measures could be passed by a two-thirds majority vote in the Council. Finally, the European Court of Justice (hereinafter "ECJ") had no jurisdiction for review or enforcement under the Third Pillar.

Thus, the Council continued to primarily generate non-legally binding soft law outside of the Third Pillar framework on various asylum issues through conclusions, recommendations and resolutions on matters such as minimum guarantees for asylum procedures. In May 1998, a list of JHA actions under the Third Pillar released that 120 legal instruments were adopted after 1992 with only nine being conventions and six being protocols. Prior to this time, the Council had already made statements regarding issues of manifestly unfounded asylum applications: a harmonised approach to host third countries, and safe countries of origin. This preferred approach after Maastricht was indicative of the continuing sensitive nature of border control. Asylum policy was clearly tied to the sovereignty of the Member States as matters of 'high politics'.

2.3 Supranationalism and the Amsterdam Treaty

The inefficiency, lack of impact, and increased public support for enhancement of security in the EU antagonised by far-right political parties, led to reconsideration of intergovernmentalism as the best approach for implementation of asylum policies. In addition, 'some domestic actors and member states were worried that without harmonisation, a patchwork of national standards would lead to contradictory, arbitrary, and unequal treatment of asylum seekers and other migrants across the EU. The 1996 intergovernmental conference, in negotiating the 1997 Treaty of Amsterdam, created a new Title IV entitled 'Vice, Asylum, Immigration and Other Policies Related to the Free Movement of Persons' and shifted harmonisation of asylum policy from the Third Pillar to the First Pillar of the Maastricht Treaty. The effect of this shift was that it made possible the application of full Community methods of decision-making on asylum issues after five years of ratification of the Amsterdam Treaty. Thus, the formation of asylum policy in Europe was made more supranational and a specific timeframe was set.

 Specific projects in favour of displaced persons and asylum-seekers/refugees (Joint Actions (JAF) and JHA-OJ), 136, pp. 8 and 9, and a program for training, exchange and cooperation in the areas of asylum, immigration and cross-border crime to COX/MUS (04, 1996, p. 19). The Commission also submitted a proposal for joint action concerning temporary protection of displaced persons (March 1997). As cited in Bank, loc. cit. (note 18), p. 40.

Two conventions were drafted and adopted by the Council but have not yet been ratified by the Member States: the Convention for the Establishment of a European Information System (ESIS) which is to improve border control by improving computerised access to information on persons entering the EU, and the Convention on Extradition. As cited in Bank, loc. cit. (note 18), p. 7.


10 Dinan op. cit. (note 55), p. 5.


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which stipulates that nationals in EU Member States may not be considered for asylum in other EU Member States.18

3 IMPPLICATIONS OF THE HARMONISATION OF ASYLUM POLICY IN THE EU

3.1 Enhanced Protection for Refugees?

From a human rights perspective, supra-nationalisation of asylum policy in the EU through the Amsterdam Treaty may potentially be a significant victory. First, individual status determination procedures should be as independent as possible from national interests.90 Development of binding standards through the Community law framework makes the procedure more objective, eliminating the democratic deficit under Maastricht. Prior to this time, a common criticism of harmonisation was that it lacked openness and transparency with the bulk of the work being done by centralised bureaucracies without ‘democratic scrutiny or parliamentary control’.91 Now, the increased transparency of legislative processes within the Community framework would work against epistemic communities imbued with the internal security ideology and in favour of epistemic communities focused on developing comprehensive immigration policies dealing with the root causes of migration while carefully protecting human rights.92

Second, provisions formed under the First Pillar will be legally binding and the ECJ can provide judicial review through preliminary and interpretive rulings 'according to all procedures established under Community Law'93. Bringing asylum policy under the jurisdiction of the ECJ has been argued as a 'powerful means for future enforcement'.94 This is particularly significant given that the ECJ has ruled that international human rights norms are a fundamental principle in the Union. The ECJ has the power to refer to the European Convention and EU Charter95 in interpreting Community law. Both documents deal directly with issues of torture, extradition, expulsion, deportation, family reunification, and detention, all of which have bearing on asylum cases in Europe. Furthermore, the human rights protections within both documents apply to all persons within the Member States' borders regardless of citizenship.96 Article 18 of the EU Charter explicitly provides for the right to asylum in accordance with the 1951 Refugee Convention, the 1967 Protocol, and the Treaty establishing the European Community. Also, as stipulated by the First Pillar, the ECJ may now interpret policies and actions taken by the EU and the Member States in certain areas according to their compliance with the 1951 Refugee Convention.

Third, the notion of refugee protection in the Refugee Convention is grounded in the principle of solidarity between States.97 Thus, the goals of discussion and agreement in order to come to new measures of burden-sharing98 in Article 50 TFEU of the Amsterdam Treaty will serve to meet the goal of effective protection of refugees. Promotion of burden-sharing should eliminate the tendencies of some States who have received the bulk of asylum seekers, such as Germany, to enact more restrictive laws and policies for deterring asylum seekers, also known as 'burden-shifting'. In the early 1990s, Germany was the preferred host country receiving more asylum applications than all the other EU Member States combined; by 1992, Germany hosted 438,000 asylum seekers or 65 percent of Europe's total.99 Consequently, in 1995, Germany amended its liberal asylum laws to deport 'manifestly unfounded claims' and to recognize 'safe third countries' and 'safe countries of origin' for a fast track system of processing asylum applications and rejecting them.100 Germany stood alone in the liberalization of the protection it afforded refugees, a situation that Germany could not sustain in the face of the more restrictive approaches taken by its European neighbors.101

3.2 Diminished Protection for Refugees?

On the other hand, this 'harmonisation' may actually be unevenly applied and may be discriminatory towards individual asylum seekers depending on which country in the EU handles their asylum applications request. Flexibility in Title IV allows for Member States to opt-out of certain provisions through the principle of 'variable geometry'. While this has been necessary in order to progress as far as the EU has been able to on asylum policy thus far, some of the dangers inherent in this process include agreement on the 'lowest common denominator' of asylum policy; inefficiency and lack of

91 Ibid., p. 15.
93 Ibid., p. 181.
96 Please note that the ECJ does not yet have the power to enforce the EU Charter; in its present form, it is a declaratory document which is not binding until it is actually incorporated into EU law through a treaty amendment. Individuals are not yet able to claim their rights under the Charter before the ECJ.
97 It is important to note, however, that both the European Convention and the EU Charter specifically preserve certain rights as available only for citizens of the Member States. See, e.g., Art. 16 of the European Convention which allows Member States to restrict the political activity of aliens or Chapter V of the EU Charter which provides for 'Citizens Rights'. Chapter V, Art. 45 only explicitly allows for freedom of movement and residence for citizens of the Union or nationals of third countries legally resident in the territory of a Member State.
98 Bank, loc.cit. (note 18), p. 15.
100 Guckel, op.cit. (note 96), p. 39.
transparency, and the ability of Member States to bypass the Community structure thus weakening the process of integration. For example, refugees within Britain, Denmark or Ireland will not enjoy the same rights to free movement of persons due to these countries' opt-out from the Schengen Protocol.

Second, the achievements made in openness and transparency under the new Title IV are tempered by the fact that much of the harmonisation which is to occur in the five-year timeframe will not occur under the Community method but will require unanimity. Thus, the method of realising these objectives were kept firmly in intergovernmental mode. After the five-year transitional period, full communitarisation of asylum and migration policy under the co-decision-making procedure of the European Parliament will only happen by a unanimous vote of the Council of Ministers which is "unlikely" to happen. Also, the role of the ECJ for judicial review asylum policy in Europe is limited to cases coming from national courts where there is no domestic remedy available. At the end of the five-year period, the Council will be able to decide the extent of expansion of the ECJ's jurisdiction in asylum policy, if any. Furthermore, only national courts and EU institutions may seek interpretations and rulings from the ECJ on asylum policy. Individual citizens or asylum applicants do not have standing before the ECJ.

Third, there is the question of the status of the so-called "soft law" developed before and after Maasbracht resulting in policies such as the manifestly unfounded status determination procedure, the safe country notion; and the interpretation of the Geneva Convention refugee definition. All of these resolutions are problematic in terms of human rights protection and it is not clear as to whether they will be incorporated as legally binding under Amsterdam. For example, in 1995, the JHA agreed to its first Joint Position on a common definition of a refugee under the Refugee Convention. Unhcr and human rights activists have criticised this position as "contrary to the spirit of the 1951 Convention" in that it "excludes those who flee civil wars, generalized armed conflict, and persecution by "non-state agents", such as armed militias and insurgent groups."

It is argued that such soft law should be openly reconsidered before being transferred to the First Pillar due to the fact that they were adopted in secrecy without legal and democratic scrutiny under Community cooperation procedures.

Fourth, the new Title IV jeopardises the individual's right to seek and enjoy asylum from persecution by incorporating the idea of the 1990 Dublin Convention on individual status determination by Member States as a method of burden sharing. The right to seek asylum under Article 14 of the UDHR and Article 18 of the EU Charter implies the right of an individual to choose which country she feels would provide her the best protection and Title IV deprives her of this choice. Thus, this emphasis in terms of which Member State is responsible to process a particular application, while it may deal more efficiently with forced migration crises, ignores the voice of the individual refugee in the process. Asylum is provided on a "take it or leave it" basis giving her only one chance among all the Member States in the EU for seeking asylum. Furthermore, any benefits of burden-sharing are tempered by the fact that States are not given a timeframe for doing so; they are not obliged to implement such policies within the five-year time-limit set for other policies under Title IV.

Fifth, while Title IV stipulates that minimum standards and procedures are to be established for status determination in accordance with the Refugee Convention, lesser protection is provided for those who fail to meet the individual criteria of a "well-founded fear of persecution". Title IV allows for the notion of "temporary protection" for "displaced persons". It has been acknowledged by refugee lawyers and academics that the definition of a refugee in the Refugee Convention is increasingly narrow and asynchronic being based upon the Cold War notion of an individual fleeing from Communism. Today, forced displaced persons within Europe are increasingly coming from situations of generalised violence such as in the Balkans and it is within this context that temporary protection first became an issue in Europe. Others are forced to migrate due to economic marginalisation or environmental disasters. States in Europe have responded by restrictively applying the refugee definition and giving displaced persons lesser statuses. Such "de facto refugees" are settled without the full set of rights guaranteed under the Refugee Convention.

For example, in the UK, the category of refugees with exceptional leave to remain in a type of de facto refugee status and such individuals are not allowed to be joined by their families for four years, while those with Convention status have an immediate right of family reunion.

While Title IV helps to address the reality of de facto refugees by stipulating that the Member States provide them temporary protection status, such status may fail to...
provide the displaced persons with the full benefits of rights they would enjoy as a refugee under the Refugee Convention. Such temporary status threatens to take away any individual choice as to voluntary repatriation or protection from refugeement as its primary purpose is 'the sole prospect of their return as soon as the situation permits'.

As pointed out by Ridge, these persons inhabit a twilight world possessing only rudimentary rights. Also, learning from the Yugoslav crisis, it is imperative that discrepancies in the implementation of temporary protection be avoided. 'Differences were not only apparent in the country of reception but conditions of reception within the same country could also vary depending if the person or persons involved were admitted under the 'vulnerable group' quota or whether they had arrived spontaneously from the former Yugoslavia.'

Sixth, incorporation of the Schengen acquis into the Community framework presents problems of potential violations of the rights to privacy, due process, as well as discrimination between EU citizens and nationals of third countries with respect to freedom of movement. The right to privacy is jeopardised by the Schengen Information System (SIS) (now the 'ESIS' or European Information Service under Article 213(b) of the Amsterdam Treaty) which is a shared database between the Member States of undesirable foreigners. Although strict privacy and confidentiality laws have been implemented to govern its use, the danger remains, as there is no supranational judicial control for data protection and safeguarding individual rights.

With regard to due process, as pointed out by Martellino and Rea, this system 'grants an important discretionary power to administrative and police authorities which no legal recourse can stop: registration in the SIS file means immediate expulsion.' Finally, as for freedom of movement under Schengen, discrimination exists as there is limited freedom provided for refugees who are considered like nationals of third countries and must declare their presence to the appropriate authorities within three days of entry into another Member State. Asylum seekers are not at all able to move out of the country where they have applied. Implementation of the treaty will most likely lead to an increase in arbitrary and random border checks based upon physical appearance.

Seventh, the Protocol on Asylum for EU nationals blatantly bars individuals within the EU from their right to seek asylum on the presumption that the Member States are always upholding human rights norms. The Protocol states that all Member States are considered to be 'safe countries' with regard to asylum. There are only two exceptions where a Member State may consider such an application — when another Member State

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violation of their fundamental rights in the name of security. In fact, the ECJ has been explicitly barred from jurisdiction over matters regarding public order and security under Title IV.144

4 THE FORMATION OF REGIONAL ASYLUM POLICIES AMONG THE EU MEMBER STATES

Prior to and during the harmonisation of asylum policy in EU law, there has been the development of common asylum policies among the EU Member States outside of the EU framework. It is crucial to consider these in analysing the harmonisation process within the EU because they "help to illustrate some distinct aspects of the contribution which Europe is making to legal developments in this area, and point to some of the norms that are gaining acceptance as a result."196 Not only are these norms having an impact on the EU Member States, but they are also being adopted by UNHCR; indeed "the emerging body of law and policy is influential in an international community where other regions are sensitive to new themes in regulatory strategies."197

4.1 Addressing Root Causes and the 'Right to Remain'

Within Europe, there has been a growing recognition that international refugee law is limited in that it deals only with the protection of rights of individuals after persecution or abuse of human rights has taken place. Consequently, "as part of its comprehensive migration policy, the EU has emphasized measures which address the root causes of flight." This has been accomplished by addressing human rights abuses in potential States of origin. For example, the Organization for Security and Cooperation in Europe (OSCE) has been active in conflict prevention and resolution in an attempt to prevent refugee flows. The problem with this approach is that, as Shacknave points out, this policy of prevention can quickly become one of containment.199

The promotion of the notion of the 'right to remain' has been used to justify making it more difficult for refugees to seek asylum in Europe. The promotion of peacekeeping and respect for human rights in this context has been the flip side of more restrictive asylum policies in Europe and has jeopardized the right to seek asylum where European States have not guaranteed that such preventative and root policies approaches are in fact effective. Perhaps the best example of the dangers of such a 'right' was the formation of so-called 'safe areas' within Bosnia like Ribac, Tulza and Srebrenica for temporary protection and the subsequent ethnic cleansing which took place in them. As argued by Levy, 'in this case the concept of safe areas may have been the functional equivalent of safehaven'201

144 Art. 69(2) states: 

In any event, the Court of Justice shall not have jurisdiction to rule on any measure or decision taken pursuant to Article 81 (the absence of controls on persons crossing internal borders related to the enforcement of law and order and the safeguarding of internal security).

196 Harvey, loc.cit. (note 9), p. 577.

197 Ibid., p. 592.

198 Ibid., p. 578.


122 ridge, loc.cit. (note 64), p. 108.


126 Harvey, loc.cit. (note 9), p. 582.

127 Ibid., p. 582.

128 Ibid., p. 585.
Resolution on Minimum Guarantees for Asylum Procedure was approved after the signing of Maastricht. While the resolution dealt with issues of protection of individual rights during asylum determi- nation; the right to appeal and revision of one’s application; and unaccompanied minors and women, it was criticised by Amnesty International for falling short of international standards due to its failure to protect from expulsion pending an appeal on a negative decision on status determination.112 Additionally, in applying the definition of a refugee under the Refugee Convention several Member States fail to recognize persecution as the hands of third party, non-State actors from whom the State is unwilling or unable to protect.113 This is contrary to the national legislation and case law in a number of Member States as well as the UNHCHR Handbook on Procedures and Criteria for Determining Refugee Status.114

In the efforts to deal with the increased asylum applications in Europe within the 1980s, Member States resorted to methods for speeding up individual status determination through use of the category of ‘manifestly unfounded claims’.115 These applications require a higher standard of proof for credibility and those who are refused are subjected to ‘expedited removal’ effectively preventing their right to an appeal of the decision. The risks of denial of due process and removal of refugees are increased in the interests of efficiency and of curtailing abuse; such a policy is contrary to the spirit of international refugee law whose focus is on protection of the individual applicant.

4.4 Burden-Shifting: Safe Countries and the Internal Flight Option

In Europe, it is widely presumed that asylum seekers are obliged to seek asylum in the first safe area which they pass through. This policy rests in part on the assumption that protection is better obtained closer to one’s home due to ‘cultural affinities within regions of origin’.116 The definition for the idea of a ‘safe country of asylum’ (also known as a ‘safe third country’, ‘host third country’ or ‘first asylum country’) is a country in which the asylum-seeker either found protection, or ‘reasonably could have done so’.117 Its origin is traced to Article 31 of the Refugee Convention which refers to refugees as ‘coming directly’ from a territory where they fear persecution.118 In the Edinburgh

113 Ibid., p. 29.
115 In 1992, a Resolution on Manifestly Unfounded Applications for Asylum was approved by the EU ministers stating in Art. 1: that
Applications for asylum will be considered as manifestly unfounded when they raise no substantive issue under the Geneva Convention and New York Protocol for one of the following reasons: there is clearly no substance to the applicant’s claim to fear persecution in his own country’ or, the claim is based on deliberate deception or is an abuse of asylum procedures.
116 Byrne and Shasknov, loc. cit. (note 73), p. 194.
117 Ibid., p. 180.
118 Art. 31(1) of the 1951 Refugee Convention states that: ‘The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without

Council of 1992, EU Member States introduced the norm that asylum-seekers should be encouraged to stay in the nearest safe area to their homes.119 First, the presumption is that the asylum seeker must always first seek the protection of her state of origin known as the internal flight option.120 However, UNHCHR has warned that ‘a decision concerning the existence of an internal flight alternative (…) should be based on a profound knowledge and evaluation of the prevailing security, political and social conditions in that part of the country’ and should not be applied in the framework of accelerated procedures.121 Failing to find protection there, she is then expected to seek asylum to the first “safe” country which she passes through. Thus, Member States in Europe have justified sending her back to these supposedly “safe” countries which often do not have the institutional capabilities for processing her claim or giving her protection; also, they may not even be parties to the Refugee Convention.122 Some countries such as Denmark have used even one hour in transit in a “safe” country as sufficient for sending the individual back.123

Not only has this practice resulted in taking away the freedom to choose one’s place of asylum, it has also resulted in cases of “refoulement” where asylum seekers have been sent back to countries where they are in danger of persecution or of being sent back to their countries of origin.124 Neither the Dublin Convention, the Schengen Agreement, the London Resolutions nor the Council of Europe Resolution on Minimum Guarantees for Asylum Procedures requires States to investigate as to the ‘safeness’ of a country for each individual case. Rather, lists have been drawn up among the Member States of supposed safe countries but there is no common consensus on what constitutes “safe”.125 Countries have been deemed “safe” by looking at factors such as the human rights record; the existence of democratic institutionalisation; stability; and past history of refugee flows.126 While application of this concept has become common practice in Europe, it is crucial to note that nowhere are they found in international refugee law. Furthermore, constitutional courts within Germany, the UK, and France have questioned the legality of the notion of “safe country” as it is found in Schengen, Dublin and Maastricht.127 Also, evidence exists that “cultural and political heterogeneity often mean that asylum-seekers receive less protection from persecution in neighboring states than in more distant ones”.128 In sum, the safe country notion whether of origin or of asylum severely limits access to protection by the individual refugee acting as an

119 Kosovski, loc. cit. (note 51), pp. 189, 171.
120 Harvey, loc. cit. (note 96), p. 586.
122 Harvey, loc. cit. (note 96), p. 586.
124 Harvey, loc. cit. (note 96), p. 586. See also Byrne & Shasknov, loc. cit. (note 73), pp. 186, 192.
125 Byrne and Shasknov, loc. cit. (note 73), p. 188.
126 Joly, loc. cit. (note 87), p. 25.
128 Byrne and Shasknov, loc. cit. (note 73), p. 194.
CONCLUSION

Without doubt, the steps that have been taken in Europe towards harmonisation of asylum law and policy are unprecedented. In which direction the recent developments under Amsterdam will go remains uncertain. It could result in either very restrictive policies or reasonably liberal and at least humane ones. 136 Unfortunately, as Joly points out, the transition in Europe on asylum policy since the 1980s has tended to move from uncoordinated liberalisation to harmonised restrictions. 137 Unlike other regions in the world such as Africa and Central America, Europe has not devised a ‘regional complement’ to the Refugee Convention for refugee protection; thus, Goodwin-Gill argues that ‘despite the relatively high level of unity and co-ordination, states, individually and collectively, have chosen to refuse the various regional institutions an effective role in refugee and migration matters (…)’; and hence, Europe has been a leader in devolving control and constraints, in jurisdiction, and a failure in providing solutions. 138 Overall, the development of coordinated asylum policy and practice in Europe to the present has been rooted in concerns for security, economic integration, and need to find ‘better’ asylum claims. The approach has been one of an intergovernmental nature with Member States in the EU unwilling to give up their sovereignty right to control entry and exit of outsiders. Protection of the human rights of refugees has not been at the forefront of the agenda. Thus, it is reasonable to think that Amsterdam represents a significant turning point from this general trend. The positive gains made by the signing of the Amsterdam Treaty include the steps taken towards freedom of movement of third country nationals among the Member States and the greater institutionalisation of asylum policy within the EU. 139 However, these gains are less influential in light of the procedural realities which exist after Amsterdam. It is sobering to note that all of the topics for co-ordinated asylum policy, which have been shifted under the First Pillar, have previously been worked on and the

136 Ibid., p. 227.
139 Ibid., p. 483.
harmonisation of asylum policy among the Member States through the EU for eliminating 'internal political considerations' and 'foreign policy constraints' which have resulted in 'discrepancies between them in terms of rates of recognition of refugees (...) and rights and status granted to these specific categories of newcomers. 139 However, at the center of this harmonisation must be respect for and not minimisation of the international obligations of the Member States to protect the rights of refugees. The current trends are not too promising, but the potential to change is. Europe has always played an important role in the development and interpretation of international refugee law; the question remains, will notions of human rights protection be at the core of this harmonisation process?140