

Redefining the Limits of Refugee Protection?

The Securitised Asylum Policies of the

‘Common European Asylum System’

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Abstract

This thesis employs discourse analysis to examine the human rights contradictions contained in the Common European Asylum System (CEAS). It follows the development of the CEAS since its inception in 1999. However, the principal emphasis of the thesis falls on the scope for realising a rights-based asylum regime in the post-Lisbon context.

The research takes the form of policy analysis, and is grounded in a human rights framework of inquiry. This human rights perspective is used to examine the normative and legal inconsistencies inherent to the EU's securitised approach to asylum, and to put forward suggestions for an approach to asylum in the EU, which engenders a rights-based approach to protection. The analysis of contemporary EU asylum policy and practice demonstrates the extent to which securitisation is present in EU asylum policymaking. It shows that, until the security paradigm in this policy area is supplanted, the realisation of a rights-based asylum system in the EU will not be possible. It also addresses the further challenges to the realisation of the EU as a 'single asylum space,' which stem from the limitations in the current instruments of the acquis, most notably the absence of burden-sharing mechanisms to ensure that the EU's humanitarian obligations are shared equally amongst Member States. The recent ratification of the Treaty of Lisbon holds significant potential for the development of a rights-based asylum regime in the EU. However, it remains in question whether Member States have the political will necessary to accomplish this.

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Introduction

The international refugee regime is in crisis. The total refugee population of 10.4 million is vastly greater than the number of protection places available. The problem has grown more pronounced in recent years as elevated concerns about terrorism, state security, and economic recession have substantially weakened the ideological value of refugee protection, which is enshrined in the 1951 Refugee Convention.¹ This has precipitated the development of elaborate policies of deterrence and deflection in Western liberal democratic states, which serve to limit the scope of their protection obligations at international law.² The highly interconnected global landscape allows for an extensive network of readmission agreements, which, coupled with the development of sophisticated border control technology, allow Western states an unparalleled capacity to deflect refugee movements from their territories.³ These widespread practices have greatly reduced the global asylum space. The lack of avenues to protection leave two thirds of the world's refugees trapped in situations of protracted exile, with no immediate hope of being granted asylum.⁴ The prevalence of these restrictive practices in the global North has also amplified the asymmetrical geography of the international protection landscape.⁵ 80% of refugees are currently supported in developing countries.⁶

¹ 1951 Convention relating to the Status of Refugees hereafter the Refugee Convention. 189 *UNTS*150, entered into force on 22 April 1954.

² Matthew Gibney, *The Ethics and Politics of Asylum*, (Cambridge: Cambridge University Press, 2004), 2.

³ Alexander Betts, "The Refugee Regime Complex," *Refugee Survey Quarterly* 29(1) (2010): 26.

⁴ UNHCR defines a protracted situation as a situation where 25 000 or more individuals of a particular nationality have been in exile for more than five years in a particular country. UNHCR, "2009 Global Trends: Refugees, Asylum Seekers and Internally Displaced and Stateless Persons," accessed 30 November, 2010, http://www.reliefweb.int/rw/lib.nsf/db900sid/ASAZ.../UNHCR_Jun2010.pdf.

⁵ Ninette Kelley, "International Refugee Protection: Challenges and Opportunities," *International Journal of Refugee Law* 19(3) (2007): 404.

⁶ UNHCR, "2009 Global Trends: Refugees, Asylum Seekers and Internally Displaced and Stateless Persons," 2.

The European Union's creation of a supranational asylum regime has been at the vanguard of this restrictive trend. In 2009, EU Member States granted international protection to 78,800 refugees.⁷ This figure corresponds to less than one asylum seeker per 2,200 European citizens.⁸ The EU in fact possesses the means and the capacity to create a rights-based protection regime, which would provide long-term refugee protection to those refugees who claim international protection within the European Union.⁹ Yet, against a rhetorical commitment to the ideological value of the Refugee Convention, the EU and its Member States have pioneered a range of policy innovations to limit their protection responsibilities. This practice has substantially weakened the ideological value of asylum and ultimately threatens to undermine the global institution of refugee protection.¹⁰

This thesis explores the development of the EU's common asylum policy, since its genesis in 1999. It considers the impact of the EU's counter terrorism response on the development of the EU as an asylum space. The ensuing proliferation of security tools, which have heavily focussed on strengthening controls at the EU's external border and enhancing information-sharing and surveillance practices, have specifically targeted and excluded asylum seekers.¹¹ However, the primary focus falls on the scope for realising a rights-based asylum regime in the post-Lisbon context.

⁷ Eurostat News Release: "Asylum decisions in the EU27: EU Member States Granted Protection to 78 800 asylum seekers in 2009," accessed 27 June 2010, http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-18062010-AP/EN/3-18062010-AP-EN.PDF.

⁸ Eiko Thielemann, Richard Williams and Christina Boswell, "What System of burden-sharing between Member States for the reception of asylum seekers?" (Study, Directorate General for Internal Policies), accessed 30 November 2010, www.europarl.europa.eu/activities/committees/studies/download.do, 159, 12.

⁹ Madeleine Garlick, "The EU Discussions on Extraterritorial Processing: Solution or Conundrum?," *International Journal of Refugee Law* 18(3-4) (2006): 615.

¹⁰ Emek M Uçarer, "Burden-Shirking, Burden-Shifting, and Burden-Sharing in the Emergent European Asylum Regime" *International Politics*. 43 (2) (2006): 219.

¹¹ Elspeth Guild, "International Terrorism and EU Immigration, Asylum and Borders Policy: The Unexpected Victims of 11 September 2001," *European Foreign Affairs Review* 8(2003): 334.

The number of refugees in the EU has dramatically decreased since Member States embarked on the creation of a Common European Asylum System (CEAS).¹² This does not reflect a reduction in asylum seekers wishing to access the EU; it is evidence of the efficacy of the EU's arsenal of extraterritorial controls, which make it virtually impossible for refugees to lawfully enter EU territory.¹³ The indiscriminate use of pre-frontier patrols, carrier sanctions, stringent visa requirements, as well as restrictions on legal access, force refugees into irregular patterns of migration. These irregular journeys are notoriously perilous. An unknown number of refugees perish every year in their bid to access international protection in the EU.¹⁴

Those refugees who do gain access to EU territory may find that their claim is deemed 'manifestly unfounded' due to their provenance from a 'safe country of origin,' or because they have transited through a 'safe third country.'¹⁵ The EU has established an extensive system of readmission agreements with third countries, which facilitate the removal of asylum seekers from its territory. These return agreements have been coupled with increased support for border enforcement and detention capacity in neighbouring transit countries, which are effectively used to transfer the responsibility for refugee protection onto other states.¹⁶ The EU's twin policies of non-arrival and non-admission have earned the EU the epithet of 'Fortress

¹² In 1992, 700,000 protection seekers applied for asylum in the EU-15; in 2008 240,000-asylum applicants claimed protection in the EU-27. UNHCR, "2008 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons," accessed 30 November, 2010, <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=4a375c426&query=2008%20global%20trends>.

¹³ Elspeth Guild, "The Legal Framework: Who is entitled to Move?," in *Controlling Frontiers: Free Movement Into and Within Europe*, ed. Didier Bigo and Elspeth Guild (Aldershot: Ashgate, 2005), 35.

¹⁴ ECRE, "Defending Refugees' Access to Protection in Europe," December 2007, accessed 15 February, 2010, <http://www.ecre.org/.../Refugees%20Access%20to%20Protection%20in%20Europe%20EX,2>.

¹⁵ EU Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, O.J. 2005, L326/13 of 1 December 2005.

¹⁶ Cathryn Costello, "The Asylum Procedures Directive and the Proliferation of Safe Third Country Practices: Deterrence, Deflection and the Dismantling of International Protection?" *European Journal of Migration and Law* 7 (2005): 45.

Europe.’ This is a marked departure from the rights-based approach to protection, which was once a defining feature of European refugee policies.

Background to European refugee protection

In the wake of the Second World War, Western European States were among the principle advocates of a liberal universalist rights-based approach to refugee protection.¹⁷ The signing of the Refugee Convention codified this approach to refugee protection in international law for the first time. Its humanitarian approach formed the guiding assumption behind domestic asylum policy in Western Europe for the following four decades.¹⁸

During the Cold War there were strong political motivations behind Western European countries accepting refugees from neighbouring communist states. Asylum was only sought by a small number of individuals of predominantly European ethnicity.¹⁹ The 50s and 60s saw strong economic growth in Western Europe. To fuel the demand for workers, immigration was actively encouraged.²⁰ However, at the beginning of the 70s the oil crisis brought the economic boom to a sudden end and Western Europe plunged into recession. Faced with growing unemployment and an increased demand on their welfare systems, Western European states introduced legislation to stem migration.²¹ This left asylum as one of the only remaining avenues

¹⁷ Christina Boswell, *European Migration Influx: Changing Patterns of Inclusion and Exclusion* (Oxford: Blackwell, 2003), 53.

¹⁸ Asylum is absent from the 1950 European Convention for the Protection of Fundamental Rights and Freedoms. This is most likely because the 1951 Convention was initially intended for use in Europe. See Catherine Teitgen-Colly, “The European Union and Asylum: An Illusion of Protection,” *Common Market Law Review* 43 (2006): 1504.

¹⁹ Boswell, *European Migration Influx: Changing Patterns of Inclusion and Exclusion*, 53.

²⁰ Jef Huysmans, *The Politics of Insecurity: Fear, Migration and Asylum in the EU* (New York: Routledge, 2006), 59.

²¹ Although Member States introduced policies more or less simultaneously, there was no formal coordination of policies between them at this stage. See Sandra Lavenex and Emek M. Uçarer, *Migration and The Externalities of the European Union* (Lanham: Lexington Books, 2002), 19.

of access to the West. Would-be migrants applied instead for refugee status, inevitably raising questions about the legitimacy of their asylum claims.²²

The fall of the Iron Curtain in 1989 made access from Central and Eastern European countries much easier, which exacerbated Western European fears of an influx of asylum seekers.²³ This anxiety about a deluge from the East precipitated a move towards protectionist policies.²⁴ The end of the Cold War also marked a change in the ideological value of refugees; asylum seekers were no longer seen as victims of communist repression and began to be perceived pejoratively as ‘economic migrants.’²⁵ Attempts to stem the increase failed.²⁶

By the beginning of the 1980s Western European countries began to portray the growing numbers of asylum seekers as an “asylum crisis.”²⁷ In the ensuing polemic ‘asylum seekers’ became a generic term to describe all migrants.²⁸ Public debate failed to distinguish between immigrants and protection seekers, and this fuelled the politicisation of asylum.²⁹ In the domestic context, media and politics began to challenge the commitments to asylum seekers and raise concerns about ‘bogus

²² Huysmans, *The Politics of Insecurity: Fear, Migration and Asylum in the EU*, 66.

²³ Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (The Hague: Kluwer Law International) (2000), 119.

²⁴ Gallya Lahav, *Immigration and Politics in the New Europe: Reinventing Borders*, (Cambridge: Cambridge University Press, 2004), 42.

²⁵ Arthur Helton, *The Price of Indifference* (Oxford: Oxford University Press, 2002), 10.

²⁶ Aninia Nadig, “Human Smuggling, National Security and Refugee Protection,” *Journal of Refugee Studies* 15(1) (2002): 3.

²⁷ Although claims of rising numbers of asylum seekers were used to justify restrictive policies, Christina Boswell questions whether this situation in fact qualified as an asylum ‘crisis.’ Christina Boswell, “European Values and the Asylum Crisis,” *International Affairs* 76 (2000): 541. Sandra Lavenex echoes this, pointing out that it was not until the war in the Balkans that Europe faced a serious influx of asylum seekers. Yet, by this time most parts of the second agreement of Schengen 1990 had already been agreed, and therefore cannot be justified as a policy response. Sandra Lavenex, “The Europeanization of Refugee Policies: Normative Challenges and Institutional Legacies,” *Journal of Common Market Studies* 39 (2001), 857.

²⁸ Roger Zetter, “More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization,” *Journal of Refugee Studies* 20 (2007): 180.

²⁹ Jef Huysmans, “The European Union and the Securitisation of Migration,” *Journal of Common Market Studies* 38(5): 752.

refugees.³⁰ Migration came to be seen as a threat to the welfare state.³¹ The resulting swing in public perception played a significant role in driving policy direction; foreigners were portrayed as a threat to stability and security.³² This led to a paradigm shift, from rights-based refugee policies based on reception and inclusion, to securitised asylum policies geared at exclusion.

Across Western Europe, domestic asylum policies became more hostile as countries began to discourage asylum seeking, and looked instead at containing refugees in their home state.³³ Initially there was no attempt at formal policy co-ordination, although all countries took up similar policies at more or less the same time to avoid incurring an increased asylum burden as a consequence of neighbouring states' restrictive policies.³⁴ The unifying feature of these policies was that they defined protection and persecution in a restrictive, legalistic framework. Asylum seekers were faced with restricted access to social services as states attempted to reduce the 'pull factor' by reducing welfare entitlement.³⁵ Policies of deterrence were directed at *all* migrants from the less-developed world, with no distinction between immigrants and forced migrants.³⁶ It was against this restrictive background that Member States began to forge a common European approach to asylum. These

³⁰ Christina Boswell, *European Migration Influx: Changing Patterns of Inclusion and Exclusion*, 54.

³¹ Huysmans, "The European Union and the Securitization of Migration," 756.

³² Boswell, *European Migration Influx: Changing Patterns of Inclusion and Exclusion*, 54. See also Sandra Lavenex, *The Europeanisation of Refugee Policies: Between human rights and internal security* (Aldershot: Ashgate, 2001):857. Lavenex illustrates that this view was reinforced at the end of 80s when the dramatic increase in asylum seekers was perceived as a threat both to the viability of the Member States and to the security of the Union.

³³ Virginie Giraudon, "Immigration and Asylum: A High Politics Agenda," in *Developments in the European Union 2*, ed. Desmond Dinian and Margaret Green Cowles (London: Palgrave Macmillan, 2004):162.

³⁴ Emek M. Uçarer, "Guarding the Borders of the European Union: Paths, Portals and Prerogatives," in *Migration and the Externalities of European Integration*, eds. Sandra Lavenex and Emek M. Uçarer (Lanham: Lexington Books, 2002), 20.

³⁵ Andrew Geddes, "The EU Migration Regime's Effects on European Welfare States," in *Migration and the Externalities of European Integration*, ed. Sandra Lavenex and Emek M. Uçarer (Lanham: Lexington Books, 2002), 203.

³⁶ James C. Hathaway, "Harmonizing for Whom? The Devaluation of Refugee Protection in an Era of European Economic Integration" *Cornell International Law Journal* 26: 723.

changes in the response to forced migrants saw the development of the security paradigm, which has yielded policies based on deterrence and exclusion at the European level.

The beginning of a common European asylum policy

The security paradigm, which pervades all aspects of the EU's asylum policy, has been closely linked to the development of the single market. The overarching aim of 'securing' the economic area of free movement inexorably focussed EU policy cooperation on the deterrence and exclusion of asylum seekers.³⁷ The catalyst for formal European cooperation in the area of asylum was the creation of an area of free movement, which began with the signing of the Single European Act (SEA) on 31 December 1992.³⁸ Dismantling the internal borders between the signatory states inevitably raised the issue of control at the external frontiers. Individual states perceived a need to protect themselves against a possible influx of migrants and asylum seekers where a neighbouring state failed to control its borders.³⁹ Ultimately, the spectre of open internal borders became a pretext for justifying security measures geared at prevention of access.⁴⁰ The relaxing of internal control was counterbalanced by a strengthening of the external frontier of the Union.⁴¹

³⁷ Ingrid Boccardi, *Europe and Refugees- Towards an Asylum Policy* (The Hague: Kluwer Law International, 2002), 48.

³⁸ Article 13 of the SEA describes the internal market as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.' Andrew Geddes, *Immigration and European Integration: Towards Fortress Europe?* (Manchester: Manchester University Press, 2002), 3.

³⁹ Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, 21.

⁴⁰ Didier Bigo, "Frontier Controls in the European Union: Who is in Control?" in *Controlling Frontiers: Free Movement into and within Europe* ed. Didier Bigo and Elspeth Guild (Aldershot: Ashgate, 2005): 68.

⁴¹ Gregor Noll and Jens Vested-Hansen, "Non-Communitarians: Refugee and Asylum Policies," in *The EU and Human Rights*. Ed. Philip Alston (Oxford: Oxford University Press, 1999), 362.

Following the signing of the SEA, common asylum policy was developed in the trans-governmental arena. Negotiations drew upon a network of security experts who were very influential in policy-making.⁴² The inevitable focus on migration control fuelled the discursive construction of asylum seekers as a potential threat to the EU.⁴³ This approach naturally favoured a narrow interpretation of the Refugee Convention with the explicit aim of reducing refugee flows.⁴⁴

European asylum policy cooperation gained momentum due to the proximity of the 1991 Yugoslav crisis, which created an influx of asylum seekers into Europe. Policy initiatives favoured a restrictive approach.⁴⁵ Thus, concepts such as safe third countries, safe countries of origin and manifestly unfounded claims were introduced into the *acquis*. They were taken up by the Third Pillar of the TEU under the Treaty of Maastricht in 1993 and eventually became incorporated into the provisions for the Area of Freedom, Security and Justice under the Treaty of Amsterdam. In this way, these securitised measures came to form the foundations for the common asylum policies of the EU.⁴⁶

What is the Common European Asylum System?

After nearly a decade of European cooperation on asylum policy, the EU voiced a commitment to the creation of a common asylum policy within a broader context of political and human rights and grounded in absolute respect for the right to seek asylum. The goal of creating a Common European Asylum System (CEAS) was

⁴² Huysmans, *The Politics of Insecurity; Fear, Migration and Asylum in the EU*, 72.

⁴³ Virginie Guiraudon, "European Integration and Migration Policy: Vertical Policy-making as Venue Shopping," *Journal of Common Market Studies* 38 (2000): 259.

⁴⁴ Boccardi, *Europe and Refugees- Towards an Asylum Policy*, 25.

⁴⁵ Satvinder Singh Juss, "The Decline and Decay of European Refugee Policy," *Oxford Journal of Legal Studies*, 25(4) (2005): 759.

⁴⁶ Lavenex, *The Europeanisation of Refugee Policies: Between Human Rights and Internal Security*, 83.

tabled in 1999 at the Tampere European Council. The common asylum policy was to be based on the full and inclusive application of the Refugee Convention.⁴⁷ The common EU asylum regime was to be a constituent part of the newly created Area of Freedom, Security and Justice. Harmonised policies would allow the EU to become a ‘single asylum space,’ thus ensuring a consistent asylum process and equivalent levels of protection throughout the Union.⁴⁸

The CEAS comprises an integrated system for regulating asylum policy and practice to ensure similar reception conditions and levels of protection in all Member States. It consists of a body of Directives, which are binding on Member States as to the result to be achieved, and Regulations, which are directly binding on Member States. These instruments form an organised body of law, which comprises the EU’s asylum *acquis*.⁴⁹ To date, the EU has adopted six major pieces of legislation in the field of asylum: the Temporary Protection Directive⁵⁰; the Reception Directive⁵¹; the Dublin II Regulation,⁵² the Qualification Directive,⁵³ the Procedures Directive⁵⁴ and the Returns Directive.⁵⁵

⁴⁷ Presidency Conclusions, European Council, Tampere 15-16 October 1999, paragraph 14.

⁴⁸ Presidency Conclusions, European Council, Tampere 15-16 October 1999, paragraph 13.

⁴⁹ Hemme Battjes, *European Asylum Law and International Law*, (Leiden and Boston: Martinus Nijhoff, 2006), 195.

⁵⁰ EU Council Directive 2001/55/EC 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, OJ L 212/12 of 20 July, 2001.

⁵¹ EU Council Directive 2003/9/EC on laying down minimum standards for the reception of asylum seekers, OJ L 31/18 of 27 January, 2003.

⁵² Council Regulation 343/2003 on responsibility for asylum applications, OJ 2003 L 50/1 of 1 Sep. 2003.

⁵³ EU Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L304/12 of 30 September 2004.

⁵⁴ EU Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ 2005, L326/13 of 1 December 2005.

⁵⁵ EU Council Directive 2008/115/EC on common standards and procedures for illegally staying third country nationals, OJ L 348/98 of 16 December 2008.

Phase One of the CEAS was implemented between 1999-2004 under the Tampere programme. This process involved the adoption of common instruments to set minimum standards to harmonise key components of Member States' domestic asylum systems, with the aim of reducing secondary movements between Member States.⁵⁶ The first phase instruments were unanimously agreed by the Council, while the European Parliament's role was limited to consultation. The unanimity requirement seriously impaired the decision-making process, and allowed Member States to engage in lowest common denominator bargaining, with an express focus on policies of deterrence.⁵⁷

The Hague Programme retained the ambition of the creation of a "common asylum procedure and uniform status based on full and inclusive application of the Refugee Convention and other relevant treaties."⁵⁸ Changes in decision-making meant that instruments were agreed under co-decision, with the European Parliament and the Council on equal terms. However, the asylum policy initiatives developed under the Hague Programme were imbued with a heavy emphasis on security, at the expense of refugees' human rights.⁵⁹

The 'second phase' of the CEAS was launched with the Commission's 2007 Green Paper on the Future Common European Asylum System,⁶⁰ which attempted to inject transparency into the process through the establishment of a consultation process

⁵⁶ Madeleine Garlick, "The Common European Asylum System and the European Court of Justice: New Jurisdiction and New Challenges," in *The European Union's Area of Freedom, Security and Justice Ten Years On*, ed. Elspeth Guild, Sergio Carrera and Alejandro Eggenchwiler, Brussels: CEPS, 2010, 50.

⁵⁷ Frances Nicholson, "Challenges to Forging a Common European Asylum System in Line With International Obligations," in *EU Immigration and Asylum Law*, ed. Steve Peers and Nicola Rogers (The Hague: Kluwer Law International, 2006), 507.

⁵⁸ The Hague Programme: Strengthening freedom, security and justice in the European Union, Presidency Conclusions of the European Council, 4-5 November 2004, OJ 2005 C 53/01 para 1.3.

⁵⁹ Didier Bigo, "Liberty, whose Liberty? The Hague Programme and the Conception of Freedom," in *Security vs. Freedom: A Challenge For Europe's Future*, ed. Thierry Balzacq and Sergio Carrera (Aldershot: Ashgate, 2006), 35.

⁶⁰ European Commission, "Green Paper on the future Common European Asylum System," (COM (2007) 301, final).

with stakeholders. However, the 2008 Returns Directive represented a further blow to the human rights of protection seekers. The policy plan “Asylum – an integrated approach to protection across the EU,”⁶¹ released in 2008 as part of the new five-year programme for Justice, Freedom and Security includes a commitment to creating higher protection standards, and provides for the amendment of the Qualification Directive, the Procedures Directive and the Reception Directives as well as the Dublin Regulation.

The CEAS is now in its final phase of construction, under the Stockholm Programme: An Area of Freedom, Security and Justice Serving the Citizen.⁶² The Stockholm Programme sets the objective of a CEAS “based on high protection standards” and states that “individuals, regardless of the Member State in which their application for asylum is lodged, are offered an equivalent level of treatment as regards reception conditions, and the same level as regards procedural arrangements and status determination.”⁶³ It is currently forecast that a fully integrated EU-wide system of asylum including a common asylum procedure and a uniform European Union refugee status is to be in place by 2012.⁶⁴

The creation of a supranational asylum regime has led to a dramatic erosion of refugees’ rights in the EU.⁶⁵ In spite of proclaimed commitments to the human rights of protection seekers, the harmonisation of asylum policies has in fact lowered

⁶¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “Policy Plan on Asylum: An integrated approach to protection across the EU,” COM(2008) 360 final.

⁶² The Stockholm Programme: An open and secure Europe serving and protecting the citizen, Presidency Conclusions of the European Council of the European Union, 9-10 December, 2009. OJ 2010 C83/47.

⁶³ “The Stockholm Programme: An open and secure Europe serving and protecting citizens,” para. 6.2.

⁶⁴ Communication from the Commission to the European Parliament and the Council, “An area of freedom, security and justice serving the citizen,” COM (2009) 262/4, 27.

⁶⁵ Juss, “The Decline and Decay of European Refugee Policy,” 752.

protection standards in many Member States.⁶⁶ Moreover, the creation of binding supranational asylum instruments has been coupled with a dramatic increase in admission controls at the external frontier of the Union, as well as stringent visa requirements and travel restrictions. These barriers prevent asylum seekers from even gaining access to the EU's asylum system in order to claim international protection. The EU's failure to provide human guarantees for refugees is a significant challenge to its global role in the field of human rights.

Methodology and literature review

This thesis employs discourse analysis to examine the gulf which separates the official rhetoric emphasising the overarching importance of creating a common European asylum system based on the “full and inclusive application” of the Refugee Convention, and the securitised content of the *acquis*, which clearly fails to safeguard the fundamental rights of those seeking asylum in the European Union. The research takes the form of policy analysis, and is grounded in a human rights framework of inquiry. This human rights perspective is used to investigate the normative inconsistencies inherent to the EU's securitised approach to asylum, and to put forward recommendations for an approach to asylum in the EU that engenders a rights-based approach to protection. The analysis of contemporary EU asylum policy and practice demonstrates that, until the security frame embedded in the trans-governmental structures of EU asylum policymaking is supplanted, the realisation of a rights-based asylum system in the EU will not be possible.

The examination of the EU's asylum policies centres on the key legislative instruments of the CEAS, and the Commission Communications and European

⁶⁶ Nicholson, “Challenges to Forging a Common European Asylum System in Line With International Obligations,” 525.

Council Conclusions which support them. The Dublin II Regulation, the Qualification Directive, and the Procedures Directive are examined in greater detail. The study also examines proposals for an integrated approach to refugee protection as contained in the Commission's 2008 Policy plan on asylum, and the European Pact on Immigration and Asylum.⁶⁷

This thesis draws extensively on official policy analysis and policy briefs which provide ongoing commentary on developments in the EU's asylum policy. The UNHCR⁶⁸ and the European Council for Refugees and Exiles (ECRE)⁶⁹ closely monitor developments in the CEAS. Other NGOs, such as Oxfam and Amnesty International, also play a key advocacy role for the human rights of refugees, and have released responses to EU law and policy. These position papers have been a significant source of research material.

The securitisation of asylum in the EU has eroded the distinction between refugee protection and migration control in asylum policymaking, and has legitimised the pursuit of highly restrictive asylum policies, although this fundamentally contradicts the international obligations of the EU and its Member States at international refugee and human rights law. Jef Huysmans demonstrates that securitisation theory is crucial to understanding the restrictive trajectory, which has characterised EU asylum policymaking.⁷⁰ He shows how this theoretical framework illuminates the governmental processes, which have allowed refugee protection to

⁶⁷ Council of the European Union, "European Pact on Immigration and Asylum," Doc. 13440/08 of 24 September 2008.

⁶⁸ UNHCR, the UN Refugee Agency, is guardian of the 1951 Refugee Convention and works in more than 110 countries around the globe to protect refugees, internally displaced and stateless people. UNHCR has 19 offices in the EU, and its Director for Europe is located in Brussels, accessed 1 December 2010, <http://www.unhcr.org/cgi-bin/texis/vtx/home>.

⁶⁹ The European Council on Refugees and Exiles (ECRE) is a pan-European alliance of 69 non-governmental organisations in 30 European countries, concerned with the needs of all individuals seeking refuge and protection in Europe, accessed 1 December 2010, <http://www.ecre.org/>.

⁷⁰ Huysmans, *The Politics of Insecurity: Fear, Migration and Asylum in the EU*.

become transposed into a security issue in the EU.⁷¹ Didier Bigo also examines the securitisation of asylum in the EU. He explores the dynamics, which have allowed bureaucratic actors and security technologies to precipitate the securitisation of asylum in the EU. Bigo shows that the inherent security focus of security agencies inevitably assimilates asylum with criminality, illegality and irregular migration.⁷² He contends that the securitarian frame, which pervades the EU's Area of Freedom, Security and Justice has destabilised the boundaries of fundamental rights, to the extent that security controls, which undermine the human rights of protection seekers occur in the name of freedom.⁷³

Although securitised asylum policies have been a defining feature of EU asylum policy cooperation since its inception, the securitisation of asylum in the EU intensified as a consequence of the EU's counter terrorism response. Thierry Balzacq examines the ways in which the EU's counter terrorism approach has allowed the development of securitised policy tools, which allow security to override fundamental human rights considerations.⁷⁴ Elspeth Guild has also explored the impact of the EU's anti terrorist measures on its responses to forced migration. She demonstrates that the focus on enhancing external border control, which underpins the EU's counter terrorism measures, has inevitably placed forced migration at the centre of the debate over national security.⁷⁵ Guild also investigates the EU's prioritisation of security concerns within its asylum policy has occurred at the expense of its international

⁷¹ See also Jef Huysmans, "A Foucaultian View on Spill-Over: Freedom and Security in the EU," *Journal of International Relations and Development* 7(2004): 294-318 and Jef Huysmans, "The European Union and the Securitisation of Migration," *Journal of Common Market Studies* 38(5) (2000).

⁷² Didier Bigo, "Frontier Controls in the European Union: Who is in Control?" in *Controlling Frontiers: Free Movement Into and Within Europe*, ed. Didier Bigo and Elspeth Guild (Aldershot: Ashgate, 2005), 234.

⁷³ Bigo, "Liberty? Who's Liberty?," 35-44.

⁷⁴ Thierry Balzacq, "The Policy Tools of Securitization: Information Exchange, EU Foreign and Interior Policies," *Journal of Common Market Studies* 46 (2008).

⁷⁵ Elspeth Guild, "International Terrorism and EU Immigration, Asylum and Borders Policy: The Unexpected Victims of September 11, 2001" *European Foreign Affairs Review* 8 (2003): 332.

human rights commitments, in ways that have considerably damaged its international role in the field of human rights.⁷⁶

The policy analysis released by the Centre for European Policy Studies has also expressly monitored the securitisation of the EU's asylum policies. For example, the CHALLENGE project,⁷⁷ which operated during The Hague Programme, evaluated the relationship between freedom and security in the Area of Freedom, Security and Justice, and focussed on the fundamental human rights impacts of the policy initiatives of the AFSJ. In a similar vein, the Centre for European Policy Studies is currently running the INEX project, which is following policy developments in the Stockholm programme, with an express focus on monitoring the ongoing developments in security technologies in terms of their human rights impact.⁷⁸

The security focus in the EU's approach to asylum is codified in the supranational legislative content of the asylum *acquis*. This substantially undermines the 'duty to protect,' as it is enshrined in international refugee and human rights law. The implications of this are followed by a number of legal commentators. Guy S. Goodwin Gill has followed the restrictive developments of the EU's supranational asylum regime. His research emphasises the fundamental importance of a good faith commitment to fundamental human rights principles in achieving refugee protection.⁷⁹ He demonstrates the ways in which the EU's supranational asylum provisions fail to respect the fundamental principles of human rights, which form the basis of refugee law. In *The Refugee in International Law* Goodwin Gill and Jane Mc Adam provide

⁷⁶Elspeth Guild, "The Europeanisation of Europe's Asylum Policy," *International Journal of Refugee Law*, 18 (2006): 630-651.

⁷⁷ The findings of the Challenge project are available at <http://www.libertysecurity.org>, accessed 10 November, 2010.

⁷⁸ The findings of the INEX project are available at <http://www.ceps.eu/catalog/inex-reports>, accessed 30 November, 2010.

⁷⁹ Guy S. Goodwin Gill, "Forced Migration: Refugees' Rights and Security," in *Forced Migration Human Rights and Security*, ed. Jane Mc Adam (Oxford: Hart Publishing, 2008), 17.

an exhaustive analysis of the legal inconsistencies contained in the EU's supranational refugee regime.⁸⁰ This highlights the extent to which the legislative content of the CEAS diverges from the protection norms of international refugee law. The recent ratification of the Treaty of Lisbon has opened the possibility for a further stage of legislative cooperation, which would allow the development of supranational asylum instruments that fully adhere to international law. However, whether these recent changes will enhance the conditions for protection seekers in the EU remains in question. Marià-Teresa Gill-Baso argues that the fact that right to asylum has become legally binding in the EU will significantly improve human rights guarantees for refugees.⁸¹ Madeleine Garlick also argues that the changes ensuing from Treaty of Lisbon have the potential to enhance the EU's single asylum space, yet she remains cautious about the extent that these developments will effect change.⁸²

The EU needs to replace its securitised vision of asylum with an approach to refugee protection which addresses refugees' moral claim to international protection. Seyla Benhabib provides such a human rights framework in *The Rights of Others*.⁸³ She demonstrates that principles of fundamental human rights place an imperative on states to open their borders and guarantee admission to asylum seekers. She uses this to unpack the normative inconsistencies inherent in approaching refugee protection from a state security perspective. Benhabib stresses the fundamental importance of

⁸⁰ Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd ed. (Oxford: Oxford University Press, 2007).

⁸¹ Marià-Teresa Gill-Baso, "The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law," *Refugee Survey Quarterly* 72(3)(2008).

⁸² Madeleine Garlick, "The Common European Asylum System and the European Court of Justice: New Jurisdiction and New Challenges," 52.

⁸³ Seyla Benhabib, *The Rights of Others*, (Cambridge: Cambridge University Press), 2004.

admission of refugees to guarantee their rights.⁸⁴ Her argument makes it clear that measures which thwart access to protection are morally untenable.⁸⁵

An inherent flaw in Benhabib's argument for universal inclusion is that it diverges greatly both politically and practically from what is achievable. In *The Ethics and Politics of Asylum* Matthew Gibney articulates an alternative solution. He outlines a response to refugees, which he argues has both "ethical force" and "practical relevance."⁸⁶ He contends that, although those refugees present at the external border have particularly strong claim to admission, the moral obligation to refugees extends to the entire global refugee population.⁸⁷ Thus, while Gibney accepts that states may be justified in refusing entry to refugees where the state's protection capacity has been exceeded, strategies that seek to minimise protection obligations at international law, where protection spaces are available, such as those employed by the EU, are not morally defensible.⁸⁸ He observes that a failure to guarantee refugees' rights degrades the value of human rights more generally.⁸⁹ As part of a commitment to the fundamental values of human rights it is imperative that the EU ensures that its asylum policies facilitate access to international protection.

The development of a rights-based asylum regime in the EU is also crucial to its external relations. The EU's restrictive asylum measures externalise responsibility for a growing number of refugees. This practice has a profound impact on the asylum burden incurred by neighbouring countries, and colours the EU's relations with countries in the European neighbourhood. Christina Boswell has followed the

⁸⁴ Benhabib, *The Rights of Others*, 16-17.

⁸⁵ Seyla Benhabib, "The legitimacy of human rights," *Daedalus* 137(3) (2008): 97.

⁸⁶ Gibney, *The Ethics and Politics of Asylum*, 15.

⁸⁷ Gibney, *The Ethics and Politics of Asylum*, 240.

⁸⁸ Gibney, *The Ethics and Politics of Asylum*, 196.

⁸⁹ Gibney, *The Ethics and Politics of Asylum*, 254.

developments in this ‘external dimension’ of the EU’s asylum policies.⁹⁰ Her research shows that the EU’s own restrictive practice influences neighbouring countries’ responses to refugees. It is therefore imperative that the EU demonstrates a rights-based approach to protection in its own practices towards refugees.

The challenge of realising a single asylum space in the EU is compounded by the lack of consistency in Member State practice. UNHCR research has found that the implementation of the supranational asylum provisions is highly variable.⁹¹ This lack of coherence leads to great discrepancies in reception conditions and asylum decision-making, which seriously impairs the functionality of the ‘single asylum space.’ These disparities also have significant human rights implications, as the EU asylum system is premised on the understanding that only one Member State is responsible for processing an asylum claim. A further barrier to the realisation of a common asylum system in the EU is the absence of intra-EU burden-sharing mechanisms to spread humanitarian obligations evenly across Member States. Eiko Thielemann argues that, ultimately, the viability of the EU’s single asylum space rests on the creation of an intra-EU burden-sharing mechanism to mitigate the imbalances, which impair its asylum space.⁹²

The completion of the EU’s common asylum system remains shrouded in uncertainty. The new legal framework for creating asylum legislation, and the

⁹⁰ Christina Boswell, “The ‘External Dimension’ of EU Immigration and Asylum Policy,” *International Affairs* 79(3) (2003); Christina Boswell, “Evasion, Reinterpretation and Decoupling: European Commission Responses to the ‘External Dimension’ of Immigration and Asylum,” *West European Politics* 31(3) (2008).

⁹¹ UNHCR, “Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice. Key Findings and Recommendations,” March 2010, accessed 1 December, 2010, <http://www.unhcr.org/4ba9d99d9.html>; UNHCR, “Asylum in the European Union: A Study of the Implementation of the Qualification Directive,” November 2007, accessed 1 December, 2010, <http://www.unhcr.org/47302b6c2.html>.

⁹² Eiko Thielemann. “The Future of the Common European Asylum System: In Need of a More Comprehensive Burden-Sharing Approach,” (Swedish Institute for Policy Studies, 2008), accessed 15 October, 2010, personal.lse.ac.uk/thielema/Papers-PDF/Sieps-2008.pdf, 7.

increased competence of the European Court of Justice in adjudicating the EU's asylum policies and Member States' compliance with them are necessary preconditions for ensuring a rights-based asylum policy in the EU. However, although the changes brought about by the Treaty of Lisbon have established sound institutional foundations from which to develop comprehensive asylum legislation, the EU's capacity to achieve such a regime ultimately requires the commitment of Member States. Elizabeth Collett and Carl Levy argue that recent moves towards intergovernmental asylum cooperation may portend a decision to abandon the goal of realising a fully functioning asylum system in the EU.⁹³ It is clear that a rights-based asylum policy in the EU's asylum policy can only be achieved if asylum policymaking is de-securitized. This would allow refugee protection be approached from a human rights perspective, and facilitate the development of policies grounded in human security. However, such a change will only be possible if it is wholly supported by Member States.

Chapter outlines

This thesis explores the ways in which the EU's restrictive approach to asylum manifestly departs from the protection imperative of international refugee and human rights law, as well as damaging the integrity of the human rights principles, which underpin the global protection regime. The first chapter "The Securitisation of Asylum in the EU," examines the development of the securitized policy frame in EU asylum policy-making. It demonstrates that the roots of the EU's restrictive asylum policies can be traced to the first stages of European asylum cooperation. This

⁹³ Elizabeth Collett, "Beyond Stockholm: Overcoming the Inconsistencies of Immigration Policy," (Working Paper 32, European Policy Centre, Brussels, December 2009), accessed 15 September 2010. www.kbs-frb.be/uploadedFiles/KBS-FRB/.../EPC%20Working%20Paper.pdf; Carl Levy, "Refugees, Europe, Camps/States of Exception: "Into the Zone," the European Union and Extraterritorial Processing of Migration (Theories and Practices)," *Refugee Survey Quarterly* 29(1) (2010):108.

chapter then evaluates the impact of the EU's counter terrorism approach and shows that the EU's focus on enhancing external border control in response to the spectre of international terrorism raised by the terrorist attacks in the USA on 11 September, 2001 entrenched the security focus already present in EU asylum politics. The EU's anti terrorism initiatives, which saw the development of surveillance and control technologies, were aimed at enhancing control of the EU's external borders. This focus on internal security has led the human rights of protection seekers to be further subsumed by exceptional security demands. The analysis of the securitisation of asylum in the EU illustrates that the realisations of a rights-based refugee policy in the EU will only be possible if a paradigm shift occurs, to allow refugee protection to be approached from a human security perspective.

The second chapter "International Refugee Law and the EU's Duty to Protect" examines the EU's securitised approach to asylum, as it is manifest in the supranational legislation of the CEAS. Although the EU presents its asylum instruments against a commitment to build a rights-based refugee policy based on the 1951 Refugee Convention, the content of the *acquis* is fundamentally incompatible with the object and purpose of this covenant. This chapter backgrounds the EU's 'duty to protect' at international refugee and human rights law, at both the European and the international levels. It assesses the legislative content of the EU's supranational asylum instruments against these normative requirements and illuminates the ways in which the EU's asylum policy currently fails to adhere to the fundamental principles of human rights and refugee law. The chapter then looks at the ways in which the Treaty of Lisbon strengthens the human rights guarantees for asylum seekers in the EU.

The third chapter “A Rights-based Approach to Protection in the EU Context” addresses the requirements for a morally defensible asylum policy in the contemporary global context, where two thirds of the world’s refugees are in situations of protracted exile. It shows that the universal moral element contained in the ‘duty to protect’ refugees transcends the statist prerogative to control entry into its territory. This argument is used to outline the minimum substantive requirements for a EU asylum policy, which truly engenders a rights-based approach to protection. The EU needs to ensure that its refugee and border policies are anchored in the human rights values it purports to defend, by facilitating spontaneous access to its asylum space. It also needs to receive a much larger number of refugees through its resettlement programmes. In addition to this, the EU may develop supplementary mechanisms, which provide refugees with protection in their regions of origin. However, extraterritorial protections initiatives must be developed in parallel with a fundamental reorientation of the securitised measures that currently prevent refugees from accessing the EU’s own protection space.

The fourth chapter “Towards a ‘Single Asylum Space’?” turns to an evaluation of the EU’s protection area as it enters its final phase of construction. The EU must overcome significant obstacles to realise a fully functioning common asylum system. The single asylum space is highly fragmented and there are great discrepancies in protection standards within the EU. The variable geometry of the EU’s protection space insulates certain Member States from asylum flows, while placing a disproportionate burden on those States whose frontiers span the external border of the EU. This chapter examines the prospects for the development of an intra-EU burden-sharing mechanism to mitigate this problem.

The final chapter of the thesis “The CEAS in the Post-Lisbon Environment: Challenges Ahead,” summarises the prospects for realising a rights-based asylum regime in the EU in the wake of the Treaty of Lisbon. The ratification of this treaty provides the institutional and legal framework necessary to ensure a rights-based approach to protection. However, although the finalisation stage of the CEAS presents a unique opportunity for the EU to realign its asylum *acquis* with the principles of refugee protection, it remains in question whether this avenue will be taken.

Conclusion

The creation of a regional protection area in the EU, through the binding supranational legislation of the CEAS, is of pivotal significance for the global refugee regime. With 27 Member States the EU is a major player within the system of international refugee protection, and its restrictive actions have severely impacted on the global asylum space and substantially weakened the asylum norm. At present, the EU’s role as an international human rights actor is jeopardised by the normative incongruities of its securitised asylum and border policies. The EU’s exclusionary approach towards asylum seekers has damaged its reputation as a human rights protector.⁹⁴ The EU’s use of control measures to limit its protection responsibilities at international human rights and refugee law is fundamentally inconsistent with its proclaimed commitment to human rights values. Ultimately, the EU’s approach to refugee protection serves as a litmus test for its commitment to the ideological value of human rights. The consummate failure to respect the human rights imperative of international protection compromises the EU’s authority in the human rights field and

⁹⁴ Ségolène Barbou des Places, “Taking Legal Rules into Consideration: EU Asylum Policy and Regulatory Competition,” *Journal of Public Policy* 24(1) (2004): 84.

undermines its credibility in the global arena. The first step towards achieving a common asylum system grounded in fundamental human rights values would be for the EU to remove the securitising conditions which currently impede the development of a common European asylum policy. The security paradigm, which informs EU asylum policymaking, is examined in the following chapter.

Chapter One:

The Securitisation of Asylum in the EU

Introduction

The launch of the Common European Asylum System was accompanied by an express political commitment to “absolute respect for the right to seek asylum,” embedded in a vision of “an open and secure European Union, fully committed to the obligations of the Geneva Convention and other relevant human rights instruments.”⁹⁵ This signified the political will to re-align European asylum policy with the principles of international refugee law, following a decade of restrictive intergovernmental cooperation, which had seen a dramatic erosion of human rights values in asylum policies.

However, thirteen years into the project, the EU’s asylum regime continues to be geared at reducing the scope of Member States’ protection obligations to refugees and asylum seekers by preventing the spontaneous arrival of asylum seekers on EU territory through extra-territorial controls, interception measures, and strict entry requirements. As the EU has developed harmonised asylum instruments and policies, security has remained the ideational focus in this policy area.⁹⁶ This has substantially weakened the legal status of asylum seekers in the EU.⁹⁷ In fact, the harmonisation

⁹⁵ European Council, Presidency Conclusions, Tampere, October 1999, Annex 4, para. 13.

⁹⁶ Sandra Lavenex and Rahel Kunz, “The Migration-Development Nexus in EU External Relations,” *European Integration* 30(3) (2008): 454.

⁹⁷ Anastassia Tsoukкала, “Looking at Migrants as Enemies,” in *Controlling Frontiers: Free Movement Into and Within Europe*, ed. Didier Bigo and Elspeth Guild (Aldershot: Ashgate, 2005), 161.

process has seen a dramatic erosion of refugees' rights.⁹⁸ This has been exacerbated by exceptional security measures developed in the EU's counter terrorism response, which have specifically targeted asylum seekers.

The EU's securitised asylum policies are the manifestation of the security paradigm, which informs this policy area. This is a consequence of the asylum-migration nexus in EU asylum policymaking, which leads refugee protection to be approached from a migration control perspective. This distorts the human rights imperative of refugee protection and prevents the realisation of a rights-based protection regime in the EU. The EU's highly defensive asylum regime is not at all consistent with the liberal universalist vision of refugee protection enshrined in the Refugee Convention.

The first part of this chapter applies the theory of securitisation to the development of asylum policies in the EU. This theoretical framework illuminates the processes which have precipitated the transposition of asylum into a security issue in the EU, and accounts for the ways in which the security focus has continued to displace international human rights norms in of refugee protection. This discussion is followed by an examination of EU asylum policy in its nascent stages, which demonstrates the ways in which the institutional configuration of trans-governmental decision-making has allowed control and security to dominate the policymaking agenda, perpetuating the securitisation of asylum. The next section looks at EU asylum policymaking in the AFSJ. It shows that, in spite of institutional changes in the EU, asylum policymaking has not been fully communitarised; instead the policy process has been characterised by a hybrid form of intergovernmental supranationalism, which has facilitated the development of securitised asylum

⁹⁸ Juss, "The Decline and Decay of European Refugee Policy," *Oxford Journal of Legal Studies* 25(4) (2005): 752.

policies.⁹⁹ This is examined against the backdrop of the EU's counter terrorism approach, which inexorably intensified the focus on internal security in the AFSJ and justified the use of exceptional security measures, to the detriment of the EU's protection obligations. The chapter concludes with a discussion of the conditions necessary for the de-securitisation of asylum policy. The dynamics of securitisation are such that a rights-based refugee policy in the EU will only be possible if the existing securitarian frame is supplanted by a human rights approach to policymaking, placing the human security of protection seekers as its reference point.

Theoretical focus: securitisation

Securitisation theory uses a social-constructivist approach to examine the processes through which issues become perceived and handled as security measures.¹⁰⁰ The rhetorical structure of securitisation presents a given issue as an existential threat that demands an exceptional emergency response beyond the normal parameters of the political process.¹⁰¹ As Jef Huysmans explains, “[s]ecuritization is characterized by a circular logic of defining and modulating hostile factors for the purpose of countering them politically and administratively.”¹⁰² The constitutive nature of the securitised policy frame means that, once exceptional measures have been legitimised, a return to normal politics can only occur through the de-securitisation of an issue, a transformation which occurs through “the shifting of issues out of emergency mode and into the normal bargaining processes of the political

⁹⁹ Levy, “Refugees, Europe, Camps/States of Exception: “Into the Zone,” 106.

¹⁰⁰ Wolfgang Wagner and Sandra Lavenex, “Which European Public Order? Sources of Imbalance in the European Area of Freedom, Security and Justice,” *European Security* 16(3-4) (2007): 229.

¹⁰¹ Barry Buzan, Ole Waever and Jaap de Wilde, *Security: A New Framework for Analysis*, (Boulder: Lynne Reiner, 1998), 27.

¹⁰² Huysmans, *The Politics of Insecurity: Fear, Migration and Asylum in the EU*, 61.

sphere.”¹⁰³ The focus on the discursive construction of threats makes securitisation a highly applicable analytical tool for examining the normative dilemmas that inevitably arise when refugee protection is approached as a security issue.¹⁰⁴ In the EU, the presentation of asylum seekers as a security threat has legitimised the pursuit of securitised asylum policies, to the detriment of its international refugee protection obligations.

The analysis of securitisation as it is manifest in contemporary EU asylum policy draws on two distinct but complementary approaches. The Copenhagen school, which first articulated the securitisation paradigm, centres the analysis on the political construction of insecurity and danger. It focuses on the representation of a given issue as a security concern. In this view, nothing constitutes a security issue *a priori*: securitisation is a process by which a threat is “written and talked into existence.”¹⁰⁵

In contrast, the Paris school, of which Didier Bigo is the main proponent, places its emphasis on the political-social construction of bureaucratic actors within the field of security.¹⁰⁶ Bigo describes securitisation as a governmentality based on fear and suspicion of unsolicited migrants, among them asylum seekers.¹⁰⁷ In focussing on the practice and agencies of securitisation, he illustrates the ways in which security professionals have shaped the development of administrative practices surrounding

¹⁰³ Buzan, Waever and de Wilde, *Security: A New Framework for Analysis*, 4.

¹⁰⁴ Jef Huysmans and Vicki Squires, “Migration and Security,” in *Handbook of Security Studies*, ed. Miriam Dunn Cavety and Victor Mauer (London: Routledge, 2009), 1.

¹⁰⁵ Huysmans, *The Politics of Insecurity: Fear, Migration and Asylum in the EU*, 7.

¹⁰⁶ Rens van Munster, “Security on a Shoestring: A Hitchhikers’ Guide to Critical Schools of Security in Europe,” *Cooperation and Conflict* 42 (2007): 235-6.

¹⁰⁷ Didier Bigo, ‘Security and Immigration: Toward a Critique of the Governmentality of Unease,’ *Alternatives*, 27 (2002): 63.

EU asylum policy, leading to a convergence in internal and external ideas of security and perpetuating the political construction of asylum as a security risk.¹⁰⁸

Bigo has examined the ways in which intergovernmental security networks are implicated in steering EU asylum policy away from a rights-based approach to protection. He illustrates the profound influence that the trans-national culture of security professionals exerts on EU governance mechanisms, and emphasises that the autonomy afforded to surveillance and control bureaucracies allows them to operate outside the scope of the judiciary. This means that their policymaking is not subject to human rights considerations.¹⁰⁹ Bigo shows that this phenomenon has become more pronounced post-September 11, as the spectre of international terrorism is used by security agencies to depict an ongoing state of emergency, which justifies the pursuit of exceptional policies.¹¹⁰ He explains the ways that this phenomenon has impaired the development of a rights-based asylum policy in the EU, and led the security of Member States to be prioritised over individual security.¹¹¹

Jef Huysmans blends the political-social analysis of the Paris school with the social-constructivist approach of the Copenhagen school in his description of what he terms ‘the politics of insecurity,’ which have shaped the EU’s asylum system.¹¹² Huysmans emphasises the causal link between the creation of the internal market and the construction of an “internal security field” in the European Union.¹¹³ He demonstrates the ways that political framing of refugees and asylum seekers has

¹⁰⁸ Didier Bigo, “Frontier Controls in the European Union: Who is in Control?” in *Controlling Frontiers: Free Movement Into and Within Europe*, ed. Didier Bigo and Elspeth Guild (Aldershot: Ashgate, 2005), 49.

¹⁰⁹ Didier Bigo, “Internal and External Aspects of Security” *European Security* 15(4) (2006): 397-8.

¹¹⁰ Bigo, “Frontier Controls in the European Union: Who is in Control?,” 90.

¹¹¹ Didier Bigo, “Liberty? Whose Liberty?” in *Security vs. Freedom: A Challenge for Europe’s Future*, ed. Thierry Balzacq and Sergio Carrera (Aldershot: Ashgate, 2006), 35-44.

¹¹² Rens van Munster, “Security on a Shoestring: A Hitchhikers’ Guide to Critical Schools of Security in Europe,” 239.

¹¹³ Huysmans, “The European Union and the Securitisation of Migration,” 770.

inevitably transformed asylum into an existential threat to the functional autonomy of the EU, and shows how political discourse has fuelled the ‘othering’ of refugees through the employment of powerful metaphors of ‘flood’ and ‘invasion.’¹¹⁴

Huysmans shows the ways in fear and hostility towards asylum seekers in the EU is essentially a “politically constitutive act,” which has become institutionalised by technologies of government, to the extent that an exclusionary approach to third country nationals has become one of the ordering principles of the EU.¹¹⁵ Huysmans argues that the EU’s increased use of surveillance technology; profiling and data collection to monitor and regulate the movement of asylum seekers within EU territory is an inevitable consequence of securitisation.¹¹⁶

Thierry Balzacq argues that security tools are the “empirical referents of policy,” and can therefore be used to illuminate the latent effects that underpin the dynamics of securitising practices, an approach, which is particularly applicable to the complexities of the EU context.¹¹⁷ Balzacq combines the discursive method employed by Huysmans and Bigo with a tool-based approach to show how the invocation of ‘exceptional circumstances’ as part of the EU’s counter terrorism approach has transformed policy tools into securitising instruments.¹¹⁸ He argues that the inherent focus on security in the EU’s counter terrorist responses has allowed the development of policy tools which transcend normal data politics, and undermine fundamental human rights, particularly those of refugees and asylum seekers.¹¹⁹

¹¹⁴ Huysmans, *The Politics of Insecurity*, 49.

¹¹⁵ Huysmans, *The Politics of Insecurity*, 49; van Munster, “Security on a Shoestring: A Hitchhikers’ Guide to Critical Schools of Security in Europe,” 239.

¹¹⁶ Huysmans, *The Politics of Insecurity*, 98.

¹¹⁷ Thierry Balzacq, “The Policy Tools of Securitization: Information Exchange, EU Foreign and Interior Policies,” *Journal of Common Market Studies* 46 (2008): 76.

¹¹⁸ Balzacq, “The Policy Tools of Securitization: Information Exchange, EU Foreign and Interior Policies,” 82.

¹¹⁹ Balzacq, “The Policy Tools of Securitization: Information Exchange, EU Foreign and Interior Policies,” 76.

Some commentators have questioned whether securitisation is present in EU asylum policymaking.¹²⁰ For instance, Felix Ciutà cautions that the basic premise of securitisation theory, which focuses on actors' identification of threats and formulation of exceptional measures to deal with them inevitably skews the analysis towards security; looking at measures as 'exceptional' obscures the possibility of their being simply part of 'normal' politics.¹²¹ He asserts that an investigation of migration policies elsewhere in the world shows that the policies in place in the EU are quite 'normal.'¹²² Christina Boswell also emphasises the limitations of securitisation theory as a heuristic device and outlines the limitations of using securitisation as a guide for empirical inquiry.¹²³ She contends that, although the logic of securitisation may have narrow application in explaining the behaviour of agencies concerned with surveillance and intelligence, the over application of securitisation theories can obscure other trends in migration control. Others have emphasised the limitations of using securitisation theory as an analytical tool in the EU, due to the complex policymaking process.¹²⁴ However, the securitisation of the EU's asylum policies is amply demonstrated in the EU's departure from the normative requirements of international refugee law, in spite of its obligations under the Refugee Convention.

¹²⁰ Christina Boswell, "Migration Control after 9/11: Explaining the Absence of Securitization," *Journal of Common Market Studies* 45(3) (2007): 589-610. This is echoed by Christian Kaunert, "Liberty versus Security: EU Asylum Policy and the European Commission," *Journal of Contemporary European Research* 5(2) (2009): 148-70.

¹²¹ Felix Ciutà, "Security and the Problem of Context: a hermeneutical critique of securitisation theory," *Review of International Studies* 35 (2009): 313.

¹²² Ciutà, "Security and the Problem of Context: a hermeneutical critique of securitisation theory," 313.

¹²³ Boswell, "Migration Control after 9/11: Explaining the Absence of Securitization," 593.

¹²⁴ Andrew Neal argues that "The complex technocratic nature of political, legal and institutional processes in the EU means that policy outcomes may not resemble 'securitizations' along the lines assumed by securitization theory." Andrew W Neal, "Securitization and Risk at the EU Border: The Origins of Frontex," *Journal of Common Market Studies* 47(2): 339.

The emergence of the securitarian frame in EU asylum policy

The genesis of the security paradigm is found in intergovernmental security networks which predate formal European asylum policy cooperation. TREVI (an acronym for Terrorisme Radicalisme Extremisme and Violence Internationale), was established in 1975 to allow Immigration and Justice Ministers to co-ordinate policies to combat the cross-border issues of terrorism.¹²⁵ The dramatic increase in asylum seekers claiming protection in Western Europe at the end of the 1980s was perceived as a security threat. The rapid change in patterns of spontaneous arrival in the post Cold-War context displaced the ideological significance, which had accompanied refugee protection in Western European States. To deal with the growing numbers of asylum seekers, TREVI extended its scope, and, in 1980, immigration and asylum were added to its agenda. This configuration inextricably linked terrorism and international violence with migration and asylum.¹²⁶

The organisational setup of the TREVI group served as a prototype for the intergovernmental negotiations from which the harmonised European asylum policy emerged.¹²⁷ Police and customs cooperation evolved into the security continuum connecting border control, terrorism, international crime and migration, which now pervades all aspects of EU asylum policy.¹²⁸ It was from this defensive standpoint that formal asylum policy coordination between European states began.

¹²⁵ Geddes, *Immigration and European Integration: Towards Fortress Europe*, 26.

¹²⁶ Juss, "The Decline and Decay of European Refugee Policy," 772.

¹²⁷ Carl Levy, "European asylum and refugee policy after the Treaty of Amsterdam: the birth of a new regime?" in *Asylum Seekers, Refugees and the Future of Citizenship in the EU*, ed. Alice Bloch and Carl Levy (Basingstoke: Macmillan, 1999), 22.

¹²⁸ Huysmans, *The Politics of Insecurity: Fear, Migration and Asylum in the EU*, 71.

Early European asylum cooperation

The signing of the Single European Act¹²⁹ in 1985 created “an area without internal frontiers in which the free movement of goods, persons and capital is ensured.”¹³⁰ The dismantling of internal borders within the EC territory was the catalyst for formal coordination of European asylum policies. The Single European Act introduced an internal differentiation between EU citizens and third country nationals, as it ensured that the rights of EU citizens would transcend borders, at the same time excluding third country nationals.¹³¹

The SEA limited free movement of persons to citizens of the European Community, meaning that common policy inevitably focussed on controlling the entry, movement and residence of third country nationals.¹³² This led to a strengthening of the external borders of the EC.¹³³ In essence, enhanced external border controls became a pre-requisite for the internal freedom of the area of free movement.¹³⁴ This control focus is manifest in the EU’s contemporary approach to border management, which employs techniques of deflection and interdiction and inevitably prevents refugees from accessing the EU asylum space.

Subjecting refugee protection to the economic logic of the single market severely constrained the possibility of a human rights focus, and inevitably placed the emphasis on security. As Andrew Geddes observes, the “processes of securitisation and the control of population are the foundation stones of liberalisation with the effect

¹²⁹ Single European Act, signed 28 February 1986, entered into force on 1 July 1987, OJ L 169 of 29.06.1987.

¹³⁰ Art 14(2), Single European Act.

¹³¹ Geddes, *Immigration and European Integration: Towards Fortress Europe?* 173.

¹³² Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, 121.

¹³³ Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, 123.

¹³⁴ Didier Bigo, “Internal and External Aspects of Security,” 402.

that migration becomes a part of the security issue.”¹³⁵ This economic approach allowed refugee policy to become identified as a constituent part of immigration controls.¹³⁶ In this way the SEA created the ideological and institutional conditions necessary for securitisation; it ensured that formal European asylum policy cooperation would take place in the trans-governmental context, and it placed the emphasis of this policy process on the potential risks associated with the obligation to grant international protection, rather than on the protection of fundamental rights.¹³⁷ This meant that initial efforts at asylum policy harmonisation focussed on combating irregular migration and reducing forum shopping, with the principal aim of enhancing migration control.¹³⁸ Once this initial framing became institutionalised in public policies, there was limited scope for reform.¹³⁹

Following the signing of the SEA, the Europeanisation of asylum policy was pursued in two intersecting transgovernmental fora: the *Ad-Hoc Group Immigration*, and the Schengen group, which produced the Dublin Convention¹⁴⁰ and the Schengen Convention¹⁴¹ respectively. These two groups retained TREVI’s organisational configuration, as well as its overarching aim of intensifying police and judicial cooperation to combat irregular migration.¹⁴² The decision-making structure, which

¹³⁵ Geddes, *Immigration and European Integration: Towards Fortress Europe?*, 26-27.

¹³⁶ Guild, “The Europeanisation of Europe’s Asylum Policy,” 634-635.

¹³⁷ Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, 121.

¹³⁸ Gallya Lahav, *Immigration and Politics in the New Europe: Reinventing Borders*, (Cambridge: Cambridge University Press, 2004), 42.

¹³⁹ Lavenex, *The Europeanisation of Refugee Policies: Between Human Rights and Internal Security*, 139.

¹⁴⁰ Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities- Dublin Convention, Dublin, signed 15 June 1990, entered into force 1 September 1997, OJ (1997) C 254/1.

¹⁴¹ 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, signed 14 June 1985, entered into force 19 June 1990.

¹⁴² Boswell, “The ‘external dimension’ of EU immigration and asylum policy,” 622.

afforded migration and security officials a key role in policy development, provided the ideal context for the securitisation of asylum.

Many commentators have described Member States' decision to pursue trans-governmental cooperation as a deliberate move to prevent Community institutions from encroaching on the sensitive turf of territorial sovereignty.¹⁴³ Virginie Guiraudon describes it as a clear case of venue shopping, and argues that migration control agencies and law and order officials favoured the vertical dimension of policy-making, as it allowed them to sidestep the judicial constraints of the domestic level, and at the same time, avoid input from EU institutions.¹⁴⁴ This situation was self-perpetuating; the dominance of security experts led to the strengthening of "executive authority at the expense of legislative or judicial oversight," which, in turn, made the agenda of security and control easier to advance.¹⁴⁵

This phenomenon characterised the policymaking process of both the Dublin and the Schengen groups, which sought to create legislation to secure and regulate the area of free movement. This security-oriented approach ultimately laid the foundations for the common asylum policies of the EU.¹⁴⁶ Migration and police officials, who presented securitisation as an unavoidable policy response, dominated

¹⁴³ Lavenex, *The Europeanisation of Refugee Policies: Between Human Rights and Internal Security*, 91; Virginie Guiraudon, "European Integration and Migration Policy: Vertical Policy-Making as Venue Shopping," *Journal of Common Market Studies* 38 (2) (2000): 263; Huysmans, "The European Union and the Securitization of Migration," 757; Geddes, *Immigration and European Integration: Towards Fortress Europe*, 13-15.

¹⁴⁴ Virginie Guiraudon, "Immigration and Asylum: A High Politics Agenda," in *Developments in the European Union 2*, ed. Desmond Dinian and Margaret Green Cowles (London: Palgrave Macmillan, 2004): 164. Christina Boswell argues that the description of venue shopping attributes rationality to a process where none exists. See: Christina Boswell, "Evasion, Reinterpretation and Decoupling: European Commission Responses to the 'External Dimension' of Immigration and Asylum," *West European Politics* 31(3) (2008): 493.

¹⁴⁵ Andrew Geddes, "The EU Migration Regime's Effects on European Welfare States," in *Migration and the Externalities of European Integration*, ed. Sandra Lavenex and Emek M. Uçarer (Lanham: Lexington Books, 2002), 203

¹⁴⁶ Lavenex, *The Europeanisation of Refugee Policies: Between Human Rights and Internal Security*, 83.

both sets of negotiations.¹⁴⁷ Policymaking took place beyond the Community framework and supranational institutions had no competence in the decision-making process.¹⁴⁸ This meant that the traditional advocates of a humanitarian approach to asylum, such as the UNHCR and the Council of Europe and the European Parliament were excluded entirely from negotiations and allowed asylum policy to depart from the protection ideals enshrined in the Refugee Convention.

The Dublin and Schengen agreements yielded restrictive measures, such as carrier sanctions, safe countries and manifestly unfounded claims, which are fundamentally inconsistent with protection principles. Both treaties placed the responsibility for determining an asylum application with the State “which permitted the individual to arrive in the Union.”¹⁴⁹ In this competitive climate, instead of focussing on the substantive assessment of asylum claims, Member States invested their resources in locating the ‘safe third country’ responsible for the protection seeker in question, and reducing the scope of their protection responsibilities.¹⁵⁰ The provisions on determining the state responsible for processing an asylum claim undermined the international duty of each state to apply obligations under Refugee Convention independently.¹⁵¹

The official beginnings of a common European asylum policy

European asylum policy collaboration became institutionalised under the 1993 Treaty of Maastricht, which made asylum an issue of “common interest” to the

¹⁴⁷ Huysmans, “The European Union and the Securitization of Migration,” 757.

¹⁴⁸ Lavenex, *The Europeanisation of Refugee Policies: Between Human Rights and Internal Security*, 89.

¹⁴⁹ Guild, “The Europeanisation of Europe’s Asylum Policy,” 636.

¹⁵⁰ Nicholson, “Challenges to Forging a Common European Asylum System in Line With International Obligations,” 508.

¹⁵¹ James C. Hathaway, “Harmonization for Whom? The Devaluation of Refugee Protection in an Era of European Economic Integration” *Cornell International Law Journal* 26 (1993): 726.

Community.¹⁵² The treaty brought asylum policymaking into the Community arena, though a complex pillar structure, which ultimately imported the existing trans-governmental decision-making structures into the Community context.¹⁵³ This actually allowed Member States to increase their national executive authorities and control of their territorial sovereignty, as the Community setting allowed policy-makers to circumvent political and judicial constraints at the domestic level.¹⁵⁴

Under Maastricht, policy frames linking migration and security continued to dominate the asylum policy agenda.¹⁵⁵ Policymaking featured a strong security impulse and freedom of movement for EU citizens was counterbalanced with tighter controls on movement for third country nationals.¹⁵⁶ The Maastricht era saw the adoption of many non-binding soft law provisions, such as the London Resolutions of 1992, which contained highly contentious specifications surrounding the identification of manifestly unfounded claims and dealing with applications from third countries and the identification of safe third countries. These securitised practices were subsequently incorporated into the provisions for the Area of Freedom, Security and Justice (AFSJ), created by the Treaty of Amsterdam, which entered into force May 1, 1999.¹⁵⁷

The Treaty of Amsterdam was a pivotal moment in the development of EU asylum policy. It established an enhanced and accelerated harmonisation process for

¹⁵²Treaty of Maastricht, signed 7 February 1992, entered into force 1 November 1993, OJ 2002 C 325/5.

¹⁵³ Emek M. Uçarer, "Guarding the Borders of the European Union: Paths, Portals and Prerogatives" in Sandra Lavenex and Emek M. Uçarer, *Migration and the Externalities of the European Union*. (Lanham: Lexington Books, 2002): 24.

¹⁵⁴ Geddes, *Immigration and European Integration: Towards Fortress Europe*, 13-14.

¹⁵⁵ Guiraudon, "European Integration and Migration Policy: Vertical Policy-Making as Venue Shopping," 259.

¹⁵⁶ Geddes, *Immigration and European Integration: Towards Fortress Europe?*, 108.

¹⁵⁷ Treaty of Amsterdam amending the Treaty on European Union, the Treaty establishing the European Community and related acts, signed 2 October 1997, entered into force 10 November, 1997, OJ 1997 C 340/1.

the development of common asylum instruments towards the creation of its Common European Asylum System (CEAS), which was to be a constituent part of its newly created Area of Freedom Security and Justice (AFSJ).¹⁵⁸ The institutional framework created by the Treaty of Amsterdam incorporated Title IV (asylum and immigration) into the Community pillar, and shifted policymaking to legally binding modes of cooperation. This move towards communitarianism introduced democratic accountability, judicial control, the rule of Community law, and introduced a clearly defined role for the Commission in the policymaking process. The links between the JHA Council and other EU institutions promised significant change, and were expected to inject a human rights approach to asylum policy to break the security continuum of earlier cooperation.¹⁵⁹ Commentators predicted that the increased role for the Commission in drafting legislative proposals for the common asylum instruments would result in a move away from the state-centrist development of asylum law and facilitate an institutional norm-creating system.¹⁶⁰ The improved transparency and conditions for democratic debate, as well as increased consultation with UNHCR offered high hopes for improved refugee protection.¹⁶¹ The fact that the European Court of Justice had jurisdiction over Title IV was hailed as a significant advancement.¹⁶²

The legislative guidelines for the common European asylum policy were also promising. Under Art 63(1) of the Amsterdam Treaty asylum measures were to be in accordance with the 1951 Refugee Convention and the 1967 Protocol. This was an

¹⁵⁸ European Commission, "Towards a Common Asylum Procedure and a Uniform Status, Valid Throughout the Union, for Persons Granted Asylum," (COM(2000) 755).

¹⁵⁹ Juss, "The Decline and Decay of European Refugee Policy," 792.

¹⁶⁰ Rosemary Byrne and Gregor Noll and Jens Vedsted-Hansen, 'Understanding Refugee Law in an Enlarged European Union,' (2004) 15(2) *European Journal of International Law* 355: 383.

¹⁶¹ Gregor Noll and Jens Vested-Hansen, "Non-Communitarians: Refugee and Asylum Policies," in *The EU and Human Rights*, ed. Phillip Alston (Oxford: Oxford University Press, 1999), 410.

¹⁶² Nicholson, "Challenges to Forging a Common European Asylum System in Line With International Obligations," 516.

indication that the Union was also to be guided by the provisions of the Refugee Convention, as well as the Member States, who were already party to it.¹⁶³ This connection between Community law on asylum and the international protection system was further strengthened in Declaration 17 of the Amsterdam Treaty, providing that “consultations shall be established with the United Nations High Commissioner for Refugees and other relevant international organizations on matters relating to asylum policy.”¹⁶⁴

However, contrary to expectations, the EU’s increased role in the policy process was not accompanied policy change towards initiatives, which reflected the “full and inclusive application” of the Refugee Convention. The normative and political configuration of liberty and security under Amsterdam effectively imported the security paradigm into the AFSJ.¹⁶⁵ The unanimity requirement allowed Member States to continue to be the dominant actors in policymaking, and ensured that the initial harmonisation of asylum policy favoured a restrictive approach to refugee protection.¹⁶⁶

Although the Amsterdam Process had provided an opportunity to restructure faltering cooperation in the area of asylum and migration, the Treaty provisions lacked legal force, and were therefore unable to effect substantive change.¹⁶⁷ This weakness meant that the EU institutions inevitably failed to legitimate the pursuit of their substantive preferences in policymaking, and the securitarian frame of trans-

¹⁶³ Nicholson, “Challenges to Forging a Common European Asylum System in Line With International Obligations,” 514.

¹⁶⁴ Garlick, “The Common European Asylum System and the European Court of Justice: New Jurisdiction and New Challenges,” 52.

¹⁶⁵ Ryszard Cholewinski, “The EU Acquis on Irregular Migration: Reinforcing Security at the Expense of Rights,” *European Journal of Migration and Law* 2 (3-4) (2000): 373.

¹⁶⁶ Cathryn Costello, “The Asylum Procedures Directive and the Proliferation of Safe Third Countries: Deterrence, Deflection and the Dismantling of International Protection?,” *European Journal of Migration and Law* 7 (2005): 38.

¹⁶⁷ Noll, *The EU Acquis: Extraterritorial Protection and the Common Market of Deflection*, 297.

governmental cooperation endured.¹⁶⁸ This meant that the harmonisation process pursued initiatives to control and limit asylum and immigration.¹⁶⁹ The vision of a common European asylum policy remained embedded in a framework of exclusion and the goals of prevention of access, and deterrence continued to feature on the agenda.¹⁷⁰

The securitisation of asylum within the Area of Freedom, Security and Justice

The Treaty of Amsterdam ensured that the internal security field of the internal market became institutionalised within the Area of Freedom, Security and Justice.¹⁷¹ As the Area of Freedom, Security and Justice has been progressively established, security has continued to dominate the agenda.¹⁷² The primary focus of the AFSJ has fallen on creating conditions of internal security, which has entrenched the perception that the external border is a prerequisite for the area of free movement.¹⁷³ Ultimately, the security rationale has replaced the initial economic orientation of the area of free movement.¹⁷⁴ The perceived need to secure the area of free movement has led to policy which specifically excludes asylum seekers through the harmonisation of visa policy, carrier liability and readmission agreements.¹⁷⁵ This has had a profoundly negative effect on the EU as a destination of international protection.

The ongoing focus on security is, in part, because of conceptual weaknesses: neither the EU nor the EC treaties contained an explicit definition of ‘freedom,’

¹⁶⁸ Andreas Maurer and Roderick Parkes, “The Prospects for Policy Change in EU Asylum Policy: Venue and Image at the European Level,” *European Journal of Migration and Law* 9 (2007): 177.

¹⁶⁹ Huysmans, *The Politics of Insecurity; Fear, Migration and Asylum in the EU*, 68.

¹⁷⁰ Didier Bigo, “Frontier Controls in the European Union: Who is in Control?,” 69.

¹⁷¹ Huysmans, *The Politics of Insecurity; Fear, Migration and Asylum in the EU*, 101.

¹⁷² Didier Bigo, “Liberty, whose Liberty? The Hague Programme and the Conception of Freedom,” 35.

¹⁷³ Bigo, “Internal and External Aspects of European Security,” 402.

¹⁷⁴ Lavenex and Wagner, “Which European Public Order? Sources of Imbalance in the European Area of Freedom, Security and Justice,” 239.

¹⁷⁵ Huysmans, *The Politics of Insecurity; Fear, Migration and Asylum in the EU*, 96.

‘security’ or ‘justice.’¹⁷⁶ The rhetoric of the AFSJ has repeatedly depicted the need for a “balance” between freedom and security, which falsely implies that a choice between the two is necessary.¹⁷⁷ This focus on security has seriously impaired the development of a rights-based asylum policy in the EU. Bigo argues that the adoption of measures designed to ensure free movement has modified the dialectic between freedom and security to the extent that the control-focus threatens to undermine the very concept of freedom in the AFSJ.¹⁷⁸

The securitisation paradigm is also highly visible in the EU’s external border controls, which are regulated within the Schengen framework. The operational practices of FRONTEX,¹⁷⁹ which was established to manage the EU’s integrated border management strategy through surveillance and enforcement practices are blind to protection considerations and, as a consequence, its maritime operations regularly deflect vessels carrying Convention refugees.¹⁸⁰ This encapsulates the inherent limitations of the security paradigm, as it effectively prevents the EU from creating a common asylum regime capable of offering genuine protection.¹⁸¹

The enduring presence of the securitisation paradigm in EU asylum policy is attributable to persisting trans-governmental policymaking structures. Although the EU institutions have been afforded an increased competence in policymaking, trans-governmental structures have allowed interior ministers an ongoing role in asylum

¹⁷⁶ Olga Sidorenko, *The Common European Asylum System: Background, Current State of Affairs, Future Direction*, (The Hague: TMC Asser, 2007), 30.

¹⁷⁷ Didier Bigo and Elspeth Guild. “The Worst-Case Scenario and the Man on the Clapham Omnibus,” in *Security and Human Rights*, ed. Benjamin J. Goold and Liora Lazarus (Hart: Portland, 2007), 113.

¹⁷⁸ Didier Bigo, “Policing at a Distance: Schengen Visa Policies,” in *Controlling Frontiers: Free Movement Into and Within Europe*, ed. Didier Bigo and Elspeth Guild (Aldershot: Ashgate, 2005), 253.

¹⁷⁹ Council Regulation 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union of 26 October 2004, OJ 2004 L349.

¹⁸⁰ Andreas Fischer-Lescano, Tillmann Löhr, Timo Todhidipur, “Border Controls at Sea: Requirements under International Human Rights and Refugee Law,” *International Journal of Refugee Law* 21(2): 256.

¹⁸¹ Collett, “Beyond Stockholm: Overcoming the Inconsistencies of Immigration Policy,” 41.

policymaking.¹⁸² Security professionals have also remained heavily involved in determining policy direction.¹⁸³ Their views on security tend to favour notions of threat and exception, at the expense of human rights.¹⁸⁴

The “latent duality” embedded in the decision-making processes of the AFSJ has meant that the trans-governmental securitarian frame has continued to pervade this policy area, leading security to be prioritised over the goals of freedom and justice, and impairing the development of asylum instruments grounded in the Refugee Convention.¹⁸⁵ This is particularly evident in the Asylum Procedures Directive where the technical requirements of the negotiations led to political compromise, and saw the Commission’s original proposals diluted through lowest common denominator bargaining.¹⁸⁶ The end result was a piece of legislation, which failed to comply with international protection standards.¹⁸⁷

The ongoing tension between the sovereign prerogative of Member States and the demands of communitarisation has also proved a significant barrier to policy convergence in the AFSJ.¹⁸⁸ It has also led solidarity among sovereign states to be privileged over the rights of individual protection seekers.¹⁸⁹ For example, the Treaty of Prüm, signed in 2005 by only seven Member States provides for the possibility of enhanced cooperation to increase cross-border cooperation in counter terrorism,

¹⁸² Meng-Hsuan Chou, “The European Security Agenda and the ‘External Dimension’ of EU Asylum and Migration Cooperation,” *Perspectives on European Politics and Society* 10(4) (2009), 553.

¹⁸³ Lavenex and Wagner, “Which European Public Order? Sources of Imbalance in the European Area of Freedom, Security and Justice,” 227.

¹⁸⁴ Bigo and Guild. “The Worst-Case Scenario and the Man on the Clapham Omnibus,” 105.

¹⁸⁵ Levy, “Refugees, Europe Camps/States of Exception: “Into the Zone,” the European Union and Extraterritorial Processing of Migrants (Theories and Practice),” 106.

¹⁸⁶ Doede Ackers, “The Negotiations on the Asylum Procedures Directive,” *European Journal of Migration and Law* 7 (2005), 1.

¹⁸⁷ Catherine Teitgen-Colly, “The European Union And Asylum: An Illusion of Protection,” *Common Market Law Review* 43 (2006) : 1518.

¹⁸⁸ Thierry Balzacq and Sergio Carrera, “Migration, Borders and Asylum: Trends and Vulnerabilities,” (Centre for European Policy Studies, Brussels, 2005), accessed 30 November, 2010, www.ceps.eu/.../migration-borders-asylum-trends-and-vulnerabilities-eu-policy, 1.

¹⁸⁹ Elspeth Guild, “The Europeanisation of Europe’s Asylum Policy,” 643.

illegal migration and cross-border fight against crime, at the trans-governmental level, beyond the scope of EU framework.¹⁹⁰ The Treaty of Prüm actually stands in opposition to the overarching objectives of the AFSJ, and, in so doing, weakens the EU.¹⁹¹ The EU Pact on Immigration and Asylum of February 2009¹⁹² allows exclusive competencies for Member States. These fragmented initiatives sit oddly with the overarching goal of a common European asylum system. The persistence of the transgovernmental method of coordination also threatens the functionality of the newly created European Asylum Support Office (EASO).¹⁹³ The trans-governmental paradigm is diametrically opposed to the human rights paradigm.¹⁹⁴ Therefore, as long as EU trans-governmental structures modulate EU asylum policymaking, the CEAS will follow a securitised trajectory.

The focus on security in the AFSJ needs to be examined against the background of the EU's response to international terrorism. This heightened the territorial vision of security, and increased the perceived need to control the external border.¹⁹⁵ The resultant tightening of external border controls and accompanying surveillance practices have had very negative consequences for the human rights of protection seekers in the EU.

¹⁹⁰ Lavenex and Wagner, "Which European Public Order? Sources of Imbalance in the European Area of Freedom, Security and Justice," 232.

¹⁹¹ Elspeth Guild, Sergio Carrera and Thierry Balzacq, "The Changing Dynamics of Security in an Enlarged European Union," (Research Paper 12, CHALLENGE, October 2008), accessed 1 November 2010, www.libertysecurity.org/article2277.html, 5.

¹⁹² Council of the European Union, "European Pact on Immigration and Asylum," 13440/08, <http://register.consilium.europa.eu/pdf/en/08/st13/st13440.en08.pdf>, accessed 2 October 2010.

¹⁹³ Levy, "Refugees, Europe, Camps/States of Exception: "Into the Zone," the European Union and Extraterritorial Processing of Migrants (Theories and Practice)", 116.

¹⁹⁴ Juss, "The Decline and Decay of European Refugee Policy," 756.

¹⁹⁵ Guild, "International Terrorism and EU Immigration, Asylum and Borders Policy: The Unexpected Victims of 11 September 2001," 334.

The EU's counter-terrorism policies: security tools, securitised borders and the securitisation of asylum

The terrorist attacks in the USA on 11 September 2001 made counter terrorism a major policy objective in the EU.¹⁹⁶ In the securitised rhetoric of the EU's counter terrorism response, border control was immediately isolated as an essential aspect of the EU's counter terrorism strategies, inevitably placing forced migration at the centre of the debate over national security.¹⁹⁷ Thus, a restrictive approach to forced migration became entrenched in the EU's counter terrorism response and the ensuing asylum policy developments have further undermined the integrity of protection principles in the EU.

The prioritisation of security concerns over human rights commitments was evidenced in the EU's initial response to the terrorist attacks. The JHA Council held an extraordinary meeting on 20 September 2001 to agree the 'EU counter terrorism roadmap', and declared the need "to examine urgently the relationship between the safeguarding of internal security and complying with international protection obligations and instruments."¹⁹⁸ The agenda of this meeting was devoted exclusively to the EU's response to security and measure to combat terrorism, with the end result being to require the Commission to re-examine the relationship between safeguarding internal security and human rights obligations, including those towards refugees.¹⁹⁹ These conclusions were integrated into the *Plan of Action to Combat Terrorism*,

¹⁹⁶ Elspeth Guild, "The Uses and Abuses of Counter-Terrorism Policies in Europe: The Case of Terrorist Lists," *Journal of Common Market Studies* 46(1) (2008): 178.

¹⁹⁷ Guild, "International Terrorism and EU Immigration, Asylum and Borders Policy: The Unexpected Victims of September 11, 2001" 332.

¹⁹⁸ Council of the European Union, Conclusions of the Extraordinary Council Meeting- Justice, Home Affairs and Civil Protection, Brussels, 20 Sept 2001, 40 ILM (1257).

¹⁹⁹ Council of the European Union, "Conclusions of the Extraordinary Council Meeting- Justice, Home Affairs and Civil Protection."

which was adopted on September 21 at the European Council.²⁰⁰ In December 2001 the Commission released a “Working Document on the relationship between safeguarding internal security and complying with international protection obligations and instruments,” which described a “balancing act,” that necessitated examining the “relationship between safeguarding of internal security and complying with international protection obligations and instruments”²⁰¹ This included a reassessment of the relationship between international protection obligations and instruments and the safeguarding of internal security.²⁰² The Laeken Summit on the 14 and 15 December 2001 reiterated the need to balance protection principles and migration control.²⁰³

This ‘balancing’ approach attracted some high profile criticism for its negative impact on the human rights of refugees. For example, in late September 2001 the Parliamentary Assembly of the Council of Europe stated: “The Assembly expresses its conviction that introducing additional restrictions on freedom of movement, including more hurdles for migration and for access to asylum, would be an absolutely inappropriate response to the rise of terrorism, and calls upon all member states to refrain from introducing such restrictive measures.”²⁰⁴ In November 2001 the UNHCR emphasised the need to balance terrorism concerns against human rights obligations.²⁰⁵

²⁰⁰ Council of Europe, “Conclusions adopted by the Council,” 20 September 2001, SN 3926/6/01.

²⁰¹ European Commission, “The Relationship Between Safeguarding Internal Security and Complying With International Protection Obligations and Instruments,” of 5 Dec 2001 COM (2001) 743 final.

²⁰² European Commission, COM(2001)743.

²⁰³ European Council, Presidency Conclusions, Laeken14-15 December 2001, SN 300/1/01, paragraph 17.

²⁰⁴ EU Council Resolution 1258(2001), “Democracies facing terrorism” of 25-26 September, 2001, para 13.

²⁰⁵ UNHCR, “Addressing security concerns without undermining refugee protection- UNHCR’s perspective,” November 2001, Accessed 12 October 2010, www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3c0b880e0.

The majority of the tools and instruments employed in the EU's fight against terrorism were not new.²⁰⁶ The EURODAC Regulation,²⁰⁷ which created a fingerprint database for storing the details of asylum seekers, was introduced in 2000, and the EU's restrictive visa policy, was adopted in March of 2001.²⁰⁸ However, as Thierry Balzacq has illustrated, the EU's policies on counter terrorism have transformed security tools into securitising instruments, to the detriment of the human rights of protection seekers.²⁰⁹ This approach has featured proliferation of security tools and changes in operational, administrative and institutional practices, which have specifically targeted asylum seekers.²¹⁰ For example, the EU's Visa Information System (VIS)²¹¹ was created as part of the EU's counter terrorism response, to complement the EURODAC Regulation.²¹² This approach accelerated the development of a series of surveillance, tracing and control measures, and saw the transformation of databases such as EURODAC and SIS from reporting tools into investigative and reporting systems, where the inherent emphasis on tracing and localising inevitably invites the policing these individuals, perpetuating the process of securitisation.²¹³

²⁰⁶ Thierry Balzacq and Sergio Carrera, "The EU's Fight Against International Terrorism: Security Problems, Insecure Solutions," (Policy Brief No 80, Centre for European Policy Studies, July 2005), accessed 15 September, 2010, www.libertysecurity.org/article340.html, 1.

²⁰⁷ EU Council Regulation 2725/2000 concerning the establishment of Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention, OJ 2000 L326/1 of 15 January 2003.

²⁰⁸ EU Council Regulation 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement of 15 March 2001, OJ 2001 L116.

²⁰⁹ Balzacq, "The Policy Tools of Securitization: Information Exchange, EU Foreign and Interior Policies," 76.

²¹⁰ Balzacq, "The Policy Tools of Securitization: Information Exchange, EU Foreign and Interior Policies," 85.

²¹¹ EU Council Decision 2004/512/EC establishing the Visa Information System (VIS) of 8 June 2004, OJ L 231.

²¹² Anneliese Baldaccini, "Counter-Terrorism and the EU Strategy for Border Security: Framing Suspects with Biometric Documents and Databases," *European Journal of Migration and Law* 10 (2008): 37.

²¹³ Balzacq, "The Policy Tools of Securitization: Information Exchange, EU Foreign and Interior Policies," 76.

The use of security tools in the fight against terrorism is in itself highly contestable; there is no indication that databases are a vital tool in countering terrorism.²¹⁴ It remains in question whether mass surveillance in any way mitigates security risks.²¹⁵ It is clear that biometric identifiers would not have prevented the terrorist attacks in London in 2007.²¹⁶ The use of biometrics remains an unreliable means of identifying individuals.²¹⁷ It is becoming increasingly apparent that the dangers of profiling and the inherent implications on human rights are not adequately considered in the EU.²¹⁸ The deepening of links between law enforcement agencies and border controls by allowing them access to data and exchange of information has dramatically increased the vulnerability of asylum seekers trying to gain protection in the EU.²¹⁹

The EU's increased use of technologies of control has transformed the nature of 'Fortress Europe.' Advances in control technology make it increasingly difficult to determine where the EU's border controls begin.²²⁰ The frontiers of the EU extend well beyond the external border, preventing individuals who fit a certain profile, such as asylum seekers, from departing their country of origin.²²¹ As Bigo demonstrates, the security perimeter has been replaced by control at a distance.²²² The EU's system of 'policing at a distance' has fundamentally changed the nature of border security.

²¹⁴ Evelien Brouwer, "Immigration, Asylum and Terrorism: A Changing Dynamic Legal and Practical Developments in the EU in Response to the Terrorist Attacks of 11.09," *European Journal of Migration and Law* 4 (2003), 423.

²¹⁵ Baldaccini, "Counter-Terrorism and the EU Strategy for Border Security: Framing Suspects with Biometric Documents and Databases," 49.

²¹⁶ Balzacq and Carrera, "The EU's Fight Against International Terrorism: Security Problems, Insecure Solutions," 5.

²¹⁷ Baldaccini, "Counter-Terrorism and the EU Strategy for Border Security: Framing Suspects with Biometric Documents and Databases," 38.

²¹⁸ Gloria González Fuster, Serge Gutwirth, Erika Ellyne, "Profiling in the European Union: A High Risk Practice," (Policy Brief No. 10, INEX June 2010, aei.pitt.edu/.../INEX_PB10_Fuster_et_al_on_Profiling_in_the_EU_e-version.pdf, 8.

²¹⁹ Balzacq and Carrera, "The EU's Fight Against International Terrorism: Security Problems, Insecure Solutions," 5.

²²⁰ Bigo, "Frontier Controls in the European Union: Who is in Control?," 49.

²²¹ Bigo, "Frontier Controls in the European Union: Who is in Control?," 234.

²²² Bigo, "Policing at a Distance: Schengen Visa Policies," 255.

As Bigo observes, neither the narrative of ‘fortress Europe’ nor that of ‘Europe passoire’ (sieve Europe) captures the extent to which Europe is now managed by technologies of control.²²³ The increase in pre-entry screening mechanisms have effectively relocated the external border away from the territorial boundary of the Union, to a target barrier isolating certain individuals. Profiling is used to distinguish between legitimate and illegitimate mobility.²²⁴ This practice allows the EU to prevent asylum seekers from making the journey to the EU. These barriers have been described as “invisible policy walls.”²²⁵ This phenomenon, of ‘policing at a distance’ is much less visible than traditional border controls, and therefore this violation of civil liberties is more likely to occur beyond scrutiny.²²⁶

The spectre of the international terrorist threat has fundamentally altered the concept of border security and increased the perceived link between border control and internal security.²²⁷ The EU’s response to international terrorism has led to border policies over determined by securitarian reasoning.²²⁸ The focus on the external border has led the obligation to admit those seeking international protection to be identified as a threat to internal security amid fears that refugee status could be open to abuse.²²⁹ The argument that the EU’s asylum system will easily allow terrorists to access the EU is erroneous, as applying for asylum is a highly regulated process, and therefore an unlikely avenue for a potential terrorist to choose.²³⁰

²²³ Bigo, “Frontier Controls in the European Union: Who is in Control?,” 90.

²²⁴ Louise Amoore, “Biometrics borders: Governing mobilities in the war on terror”, *Political Geography*, 25 (2006): 336.

²²⁵ Jennifer Hyndman and Alison Mountz, “Another Brick in the Wall? Neo-*refoulement* and the Externalization of Asylum by Australia and Europe,” *Government and Opposition* 43(2) (2008), 256.

²²⁶ Bigo, “Policing at a Distance: Schengen Visa Policies,” 235.

²²⁷ Baldaccini, “Counter-Terrorism and the EU Strategy for Border Security: Framing Suspects with Biometric Documents and Databases,” 31.

²²⁸ Anastassia Tsoukkala, “Looking at Migrants as Enemies,” in *Controlling Frontiers: Free Movement Into and Within Europe*, ed. Didier Bigo and Elspeth Guild (Aldershot: Ashgate, 2005), 161.

²²⁹ Nadig, “Human Smuggling, National Security and Refugee Protection,” 18.

²³⁰ Feller, “Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of things to come,” 520.

The impact that the EU's counter terrorism strategies have had on the securitisation of asylum policies in the EU continues to be widely debated. It has been argued that the events of 11 September 2001 were used as justification for security measures, which were already under consideration.²³¹ Carl Levy argues that the overarching goal of a CEAS based on the Refugee Convention was all but subsumed by the counter terrorism agenda.²³² Bigo contends that the EU's response to the attacks of 11 September 2001 saw the goals of freedom and justice wholly subordinated to the attainment of security in the AFSJ.²³³ In contrast, Christina Boswell contends "neither political discourse nor policy practice apparently securitised post 9/11 or London or Madrid."²³⁴ It has also been argued that the Commission prevented the impetus towards securitisation of asylum in the EU and ensured that the EU's approach to asylum within its counter terrorism response has remained within the ambit of the Refugee Convention.²³⁵

The exclusion of asylum seekers was the *modus operandi* of EU asylum policy well prior to 11 September 2001. However there is abundant evidence that EU's response to international terrorism has further entrenched the security paradigm in EU asylum policymaking.²³⁶ This has had a significant impact on the development of the legislative instruments of the CEAS.²³⁷ For instance, the Qualification Directive,

²³¹ Evelien Brouwer, "Immigration, Asylum and Terrorism: A Changing Dynamic Legal and Practical Developments in the EU in Response to the Terrorist Attacks of 11.09," *European Journal of Migration and Law* 4 (2003): 422.

²³² Carl Levy, "The European Union after 9/11: The demise of a liberal democratic asylum regime?," *Government and Opposition*, 40(1), 2005, 35. See also Carl Levy, *Refugees, Europe, Camps/States of Exception: "Into the Zone," the European Union and Extraterritorial Processing of Migration (Theories and Practices)*.

²³³ Bigo, "Liberty, whose Liberty? The Hague Programme and the Conception of Freedom," 35.

²³⁴ Boswell, "Migration Control in Europe After 9/11: Explaining the Absence of Securitization," 606.

²³⁵ Christian Kaunert, "Liberty versus Security: EU Asylum Policy and the European Commission," *Journal of Contemporary European Research* 5(2) (2009): 148-70.

²³⁶ Huysmans, *The Politics of Insecurity; Fear, Migration and Asylum in the EU*, 63.

²³⁷ Thierry Balzacq and Sergio Carrera, "The Hague Programme: The long road to freedom, security and justice", in *Security versus Freedom? A Challenge for Europe's Future*, ed. Thierry Balzacq and Sergio Carrera, (Aldershot, Ashgate, 2006), 4.

adopted in 2004 explicitly links security to terrorism and addresses these concerns in the procedures for determining refugee status and granting asylum.²³⁸ Its provisions vastly expand the grounds for exclusion of asylum seekers far beyond what is provided for in the Refugee Convention, listing being a danger to national security as grounds for rejection of an asylum claim.²³⁹

The EU's counter terrorism approach has intensified the security focus of the AFSJ. This was particularly apparent during the Hague Programme, where "respect for fundamental freedoms and rights" was juxtaposed with a variety of overarching security goals.²⁴⁰ The Stockholm Programme maintains a commitment to fundamental rights, which continues to be couched within a strong security focus, as it aims to achieve "wider freedom in a safer environment."²⁴¹

The EU counter terrorism documents continue to discursively link migration control measures to counter terrorism responses.²⁴² This has intensified the securitisation of asylum, and normalised the construction of the migrant 'other' as a security threat.²⁴³ For instance, the EU's counter terrorism strategies, such as tracing and increased search powers have fuelled an increased suspicion surrounding asylum

²³⁸ EU Qualification Directive, Recital 28: 'the notion of national security and public order also covers cases in which a third country national belongs to an association which supports international terrorism or supports such an association.' Refugee in International Law 236. Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* 3rd ed. (Oxford: Oxford University Press, 2007), 61.

²³⁹ Voller Türk, "Forced Migration and Security" *International Journal of Refugee Law* 15(1): 2003:116.

²⁴⁰ Elspeth Guild and Sergio Carrera, "The European Union's Area of Freedom, Security and Justice Ten Years On," in *The Area of Freedom, Security and Justice Ten Years On: Successes and Future Challenges Under the Stockholm Programme*, ed. Elspeth Guild, Sergio Carrera and Alejandro Eggenchwiler (Brussels: Centre for European Policy Studies, 2010), 4.

²⁴¹ COM(2009) 262/4, 2.

²⁴² Christopher Baker-Beall, "The Discursive Construction of EU Counter-Terrorism Policy: Writing the 'Migrant Other,' Securitisation and Control," *Journal of Contemporary European Research* 5(2) (2009): 190.

²⁴³ Baker-Beall, "The Discursive Construction of EU Counter-Terrorism Policy: Writing the 'Migrant Other,' Securitisation and Control," 189.

seekers and “confirm the public notion that...each migrant or asylum seeker is a possible terrorist.”²⁴⁴

The spectre of international terrorism has led to the deepening of the security nexus between irregular entry and border security in EU law and policy.²⁴⁵ For instance, the EU’s focus on border control is identified as a key aspect of the need to “protect our societies against terrorism.”²⁴⁶ The EU’s counter terrorism policies depict an ongoing state of emergency, which is used as justification for the suspension of freedoms.²⁴⁷ The presence of terrorist concerns has legitimised normative responses designed to promote security, which extend well beyond traditional policy constraints.²⁴⁸ This has implications for the EU’s authority in the field of human rights. It has been argued that undermining the EU’s AFSJ by allowing exceptional measures may ultimately represent a greater threat to the EU than international terrorism.²⁴⁹

The securitisation paradigm also impairs the development of the external dimension of the EU’s asylum policy. As Sandra Lavenex has argued, the EU’s externalisation of its responsibility for refugees is a further manifestation of the securitarian frame, which underpins EU asylum policymaking: “the shift towards extraterritorial control is less a new phenomenon than the continuation of the trans-governmental logic of cooperation. In substantive terms, it reflects justice and home

²⁴⁴ Brouwer, “Immigration, Asylum and Terrorism: A Changing Dynamic Legal and Practical Developments in the EU Response to the Terrorist Attacks of 11.09,” 424.

²⁴⁵ Guild and Carrera, “The European Union’s Area of Freedom, Security and Justice Ten Years On,” 3.

²⁴⁶ European Council ‘Implementation of the Strategy and Action Plan to Combat Terrorism’. Brussels, 19 November 2008, 15912/08, 4.

²⁴⁷ Bigo, “Frontier Controls in the European Union: Who is in Control?,” 90.

²⁴⁸ Guild and Carrera, “The European Union’s Area of Freedom, Security and Justice Ten Years On,” 1.

²⁴⁹ Thierry Balzacq and Sergio Carrera, “The EU’s Fight Against International Terrorism: Security Problems, Insecure Solutions,” (Policy Brief No. 80, Centre for European Policy Studies, Brussels, July 2005), accessed 15 September, 2010, www.libertysecurity.org/article340.html, 5.

affairs officials' emphasis on control, and, therewith, the security aspect of migration."²⁵⁰

The effects of the EU's use of measures to enhance internal security as part of its counter terrorism approach have highlighted the critical importance of balancing security policies against human rights considerations. The debate about terrorism and security inevitably distorts the essence of human rights language.²⁵¹ However, securitisation is not an inevitable policy response to the terrorist threat; the EU can achieve internal security without compromising its international obligations to refugees and asylum seekers. The foundations for this can be found in international refugee and human rights law.²⁵²

Conclusion

The security paradigm in the EU's asylum policymaking obscures the specific protection claims of refugees and thereby prevents the development of a functioning CEAS. Human security and state security are not in fact diametrically opposed.²⁵³ Realising a refugee policy, which is grounded in principles of protection demands that policymakers engage with the human security element of refugee protection. This can be achieved through a reframing of the relation between migration and security, which places the emphasis on human security.²⁵⁴ The human security approach brings the moral dimension of refugee protection into sharper focus and inevitably leads to

²⁵⁰ Sandra Lavenex, "Shifting Up and Out: The Foreign Policy of European Immigration Control," *West European Politics* 29(2) (2006), 346.

²⁵¹ Conor Gearty, *Can Human Rights Survive?* (Cambridge: Cambridge University Press, 2006), 136.

²⁵² Alice Edwards, "Human security and the rights of refugees: transcending territorial and disciplinary boundaries," *Michigan Journal of International Law* 30(3) (2009): 783.

²⁵³ Fiona B. Adamson, "Crossing Borders: International Migration and National Security," *International Security* 31 (2006), 167.

²⁵⁴ Huysmans and Squire, "Migration and Security," 2.

policies focussed on protection.²⁵⁵ This would open up protection space in the EU and ensure the development of a common EU asylum policy, which balances security concerns against “absolute respect for the right to seek asylum.”²⁵⁶

From the outset the trans-governmental mode of policymaking has prevented the development of rights-based asylum policies in the EU. The ongoing role of interior ministers in asylum policy cooperation presents a significant barrier to de-securitisation.²⁵⁷ Therefore, the realisation of an asylum policy grounded in fundamental rights requires that asylum policymaking take place entirely in the Community arena. This is a necessary first step towards the creation of a EU asylum policy, which truly engenders a rights-based approach to protection.

The codification of the EU’s securitised approach to asylum in the asylum *acquis* leaves the EU at odds with its obligations at international refugee and human rights law. The following chapter will examine the human rights contradictions enshrined in the EU’s asylum *acquis*. It will also address the incompatibility of the *non-entrée* mechanisms, which surround the EU’s asylum space with the protection imperative of international refugee law.

²⁵⁵ Edwards, “Human security and the rights of refugees: transcending territorial and disciplinary borders,” 774.

²⁵⁶ European Council, Presidency Conclusions, Tampere, Annex 4, para. 13.

²⁵⁷ Meng-Hsuan Chou, “The European Security Agenda and the ‘External Dimension’ of EU Asylum and Migration Cooperation,” *Perspectives on European Politics and Society* 10(4) (2009), 554.

Chapter Two:

International Refugee Law and The EU's Duty to Protect

Introduction

EU Member States are bound by the provisions of the 1951 Geneva Convention Relating to the Status of Refugees (Refugee Convention) and its 1967 Protocol.²⁵⁸ This commitment is explicitly acknowledged in the preambles of the instruments, which comprise the binding supranational asylum legislation of its Common European Asylum System (CEAS). However, the legislative content EU's asylum *acquis* manifestly fails to adhere to the human rights imperative of refugee protection and, in some instances, seeks to minimise the EU's obligations under this convention. Moreover, the EU's border policies and visa regime effectively seal off the EU's protection space from thousands of prospective asylum seekers. This practice is fundamentally at odds with the protection imperative of the international law.

This chapter begins with an examination of the basic parameters of international and European refugee law, in terms of the legal duties that this imposes on the EU and its Member States. This is followed by a more detailed examination of those provisions in the Procedures Directive, and the Qualification Directive, which represent a significant departure from the provisions of the Refugee Convention.²⁵⁹

²⁵⁸ 189 UNTS150, entered into force on 22 April 1954.

²⁵⁹ The Commission has issued proposals for the recasting of these Directives, which address some of the legal inconsistencies outlined in this chapter; however at the time of writing it is unclear whether the proposed changes will result in legislative changes. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Policy Plan on Asylum: An integrated approach to protection across the EU" of 17 June 2008 COM(2008) 360 final. The proposed changes do not fully address the shortcomings and protection gaps contained in the original instruments. For a detailed analysis of the proposed changes see: ECRE, "Comments on the European Commission Proposal to recast the Qualification Directive," March 2010, accessed 15 September, 2010, www.ecre.org/resources/Policy_papers/1534, and ECRE, "Comments on the European Commission

The chapter then examines the EU's non-admission and non-arrival policies, which prevent asylum seekers from claiming international protection in the EU, against the normative requirements of international refugee law. The final section will canvas the emerging possibilities for improving the protection provisions of the *acquis*, which are presented by the Treaty of Lisbon.

Refugee protection and international refugee law in the EU

The legal duty of EU Member States to offer protection to refugees can be found in a combination of refugee, human rights and humanitarian law. The Refugee Convention is the centrepiece of this regime; however Member States remain liable under international human rights law, if they fail to safeguard against *refoulement*.²⁶⁰ This principle is supported by general rules of international law, most significantly the principle of good faith.²⁶¹

As signatories of the Vienna Convention on the Law of Treaties (VCLT) Member States are bound by *pacta sunt servanda* to remain true to all international agreements to which they are party.²⁶² The "General Rule of Interpretation" contained in Article 31(1) of the VCLT states that treaties "shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in light of its object and purpose."²⁶³ This means that Member States' commitments to international law have primacy over any legislation produced at the

Proposal to recast the Asylum Procedures Directive," May 2010, accessed 15 September, 2010, www.ecre.org/resources/Policy_papers/1580.

²⁶⁰ *Non-refoulement* is a fundamental principle of international refugee law, which prohibits the expulsion of a refugee to a situation where they would face persecution or be subject to cruel, inhuman or degrading treatment or punishment. The legal foundations for the principle are discussed in Goodwin-Gill and McAdam, *The Refugee in International Law*, 373-4.

²⁶¹ Goodwin-Gill and McAdam, *The Refugee in International Law*, 390.

²⁶² Vienna Convention on the Law of Treaties, 1155 UNTS 331, entered into force 27 January 1980 ("Vienna Convention"), Article 26: "Pacta sunt servanda- Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

²⁶³ Art 31(1), Vienna Convention on the Law of Treaties.

EU-level. Furthermore, the EU is obliged not to impede Member States' obligations under international law.²⁶⁴ EU legislation is thus secondary to international obligations. The EU and its Member States remain legally bound to comply with the Refugee Convention, as well as the other international human rights treaties to which they are party, ahead of any instruments, which are to apply at the EU level. In addition, the Refugee Convention and the 1967 Protocol are a source of general principles of EU law, as they have been ratified by all Member States.²⁶⁵

The refugee definition found in the Refugee Convention provides the standard for determining refugee status at international law. Formal recognition of refugee status is declaratory, rather than constitutive; Convention refugees become so as they fulfil the definition provided for in Article 1(A):

persons who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a social group, or political opinion, are outside their country of nationality or last habitual residence for stateless persons, and are unable because of such fear to return to that country.

States are prohibited from limiting the personal scope of this Article under Article 42 of the Refugee Convention. Article 31 allows that refugees may enter states in an irregular manner, where that they can provide justifiable grounds for entering without the requisite documentation.²⁶⁶ International law indicates that those with a *prima facie* claim to refugee status are entitled to protection, regardless of whether they have been recognised as refugees.²⁶⁷ It has been argued that, when

²⁶⁴ Article 27 of the Vienna Convention on the Law of Treaties provides that international law has primacy over domestic law "a state may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

²⁶⁵ It is arguable that customary international law and the application of legal rules that have become *jus cogens* are further sources of general principles of EC law. See: Steve Peers, "Human Rights, Asylum and European Community Law," *Refugee Survey Quarterly* 24 (2004), 29-30.

²⁶⁶ Goodwin-Gill and McAdam, *The Refugee in International Law*, 384.

²⁶⁷ Goodwin-Gill and McAdam, *The Refugee in International Law*, 232.

Convention reasons are applied, this represents a *de facto* duty to admit refugees that fulfil the Convention definition.²⁶⁸

International law contains no absolute right to be granted asylum. However, there are specific conditions surrounding the granting of refugee status, which serve to provide human rights guarantees for the protection seeker: under international law, states are responsible for examining asylum claims made in their jurisdiction.²⁶⁹ A failure to recognise genuine refugees as such constitutes a violation of international law.²⁷⁰ Moreover, asylum seekers have a right to full protection until their refugee status has been determined.²⁷¹

The principle of *non refoulement*

The *non refoulement* principle forms the fundamental protection safeguard at international refugee law.²⁷² EU Member States are bound to respect the principle of *non refoulement*, which encompasses *non refoulement* to persecution, based on article 33 of the 1951 Convention, and also *non refoulement* to torture or cruel, inhuman or degrading treatment or punishment. Crucially, the provisions surrounding *non refoulement* do not amount to a legal right to admission.²⁷³ However, as Goodwin-Gill argues, “it would scarcely be consonant with considerations of good faith for a State to seek to avoid the principle of *non refoulement* by declining to make a determination of status.”²⁷⁴ This view has also been articulated by the UNHCR

²⁶⁸ James C Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005), 301.

²⁶⁹ Under Article 2(1) of the ICCPR, rights are applicable to “all individuals within [a State’s] territory and subject to its jurisdiction.”

²⁷⁰ Goodwin-Gill and McAdam, *The Refugee in International Law*, 412.

²⁷¹ Goodwin-Gill and McAdam, *The Refugee in International Law*, 234.

²⁷² While the principle of *non refoulement* continues to be debated, the majority of commentators concur that *non refoulement* is a principle of customary international law. Goodwin-Gill and McAdam, *The Refugee in International Law*, 415.

²⁷³ Goodwin-Gill and McAdam, *The Refugee in International Law*, 382.

²⁷⁴ Goodwin-Gill and McAdam, *The Refugee in International Law*, 205.

Executive Committee, which describes *non refoulement* to entail “access to fair and efficient procedures for determining status and protection needs.”²⁷⁵ This has profound implications for the EU’s use of non-arrival policies, such as visa requirements and carrier sanctions, as well as for its practice of interdiction.²⁷⁶

As *non refoulement* extends to territory over which the state has jurisdiction, the obligation inevitably extends to all points of entry, such as border posts and transit zones.²⁷⁷ Article 33 of the Refugee Convention dictates that once refugees have entered a State’s territory, they must not be returned to persecution. The legal basis for the *non refoulement* principle extends beyond the Refugee Convention to international human rights and humanitarian law. It is supported by international obligations contained in the body of international humanitarian and human rights law, which provides significant safeguards against expulsion or extradition.²⁷⁸

Article 3 of the UN’s Convention against Torture (CAT)²⁷⁹ precludes the return of a person to a country where there are substantial grounds for believing that they would be subject to torture or cruel, inhuman or degrading treatment or punishment. In contrast to the Refugee Convention, which allows for certain exceptions, relating to ‘national security’ and ‘public order,’ Article 3 of the CAT provides absolute protection from *refoulement*.²⁸⁰ In support of this, Articles 7 and 2(1) of the International Covenant on Civil and Political Rights²⁸¹ demand that States uphold the

²⁷⁵ UNHCR, Executive Committee Conclusion No. 99 (2004).

²⁷⁶ An asylum seeker’s claim to protection from *refoulement* is not absolute; Article 33 also provides that reasons of ‘national security’ and ‘public order’ are justifiable grounds for derogation from the principle.

²⁷⁷ Goodwin-Gill and McAdam, *The Refugee in International Law*, 250.

²⁷⁸ Goodwin-Gill and McAdam, *The Refugee in International Law*, 285.

²⁷⁹ 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (entered into force 26 June, 1987): 1465 *UNTS* 85.

²⁸⁰ Goodwin-Gill and McAdam, *The Refugee in International Law*, 210.

²⁸¹ International Covenant on Civil and Political Rights (entered into force 23 March 1976): 999 *UNTS* 171.

rights contained in this Covenant to anyone in their jurisdiction and territory, which includes refugees.²⁸²

The European Convention on Human Rights and Fundamental Freedoms (ECHR)²⁸³ is also a significant source of safeguards against *refoulement*.²⁸⁴ Article 3 of the ECHR provides that “No one shall be subjected to torture or inhuman or degrading treatment or punishment.” This means that any return of an individual from within Europe to a country where they would face a substantial risk of suffering torture, inhuman or degrading treatment or punishment would breach the State’s international human rights law obligations.²⁸⁵ The European Court of Human Rights is entitled to interpret the protection obligations of Council of Europe Member States under the European Convention on Human Rights. The Court has repeatedly reaffirmed the absolute nature of Article 3, even in light of recent terrorist threats.²⁸⁶ The ECHR has thus been a very effective instrument for protecting refugees from *refoulement*.²⁸⁷

The *non refoulement* jurisprudence, of the European Court of Human Rights has strong implications for the policies of the CEAS, and on several occasions has ruled against EU practice.²⁸⁸ For example, in *Soering*²⁸⁹ the ECHR held that extradition was prohibited, where an individual faced a real risk of being subject to torture or inhuman and degrading treatment or punishment in the receiving state, as “the object and

²⁸² Goodwin-Gill and McAdam, *The Refugee in International Law*, 209.

²⁸³ 1950 European Convention on Human Rights and Fundamental Freedoms, (entered into force 3 September, 1953): CETS 5 1950.

²⁸⁴ Goodwin-Gill and McAdam, *The Refugee in International Law*, 366.

²⁸⁵ Gilbert, “Is Europe Living Up to Its Obligations to Refugees?,” 966.

²⁸⁶ See *Chahal v. United Kingdom*, Application 22414/93, 15 November 1996; *Ahmed v. Austria*, Application 25964/94, 17 December 1996; *Jabari v. Turkey*, Application 40035/98, 11 July 2000; *Thampibillai v. the Netherlands*, Application 61350/00, 17 February 2004.

²⁸⁷ Gilbert, “Is Europe Living Up to Its Obligations to Refugees?,” 987.

²⁸⁸ Guild, “Seeking asylum: storm clouds between international commitments and EU legislative measures,” 216.

²⁸⁹ *Soering v United Kingdom*, (Application No 14038/88). European Court of Human Rights. (1989).

purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards *practical* and *effective*.²⁹⁰ *Chahal v United Kingdom* ruled against expulsion on similar grounds.²⁹¹

More recently, the European Court of Human Rights has again stressed the unconditional nature *non refoulement*, and has established the principle that a State wishing to deport an individual on the grounds of having committed a serious criminal offence or constituting a threat to national security must first make an independent evaluation of the circumstances the individual would face in the country of return. The inadmissibility decision in *T.I.vUK*²⁹² demonstrates that removing an individual to an intermediary country, which is also a Contracting State, does not alter a state's obligation to ensure that an applicant is not expelled and then exposed to a treatment contrary to Art 3 ECHR.²⁹³ Instead, the removing State incurs a further duty to ensure that the receiving State does not compromise the right of protection.²⁹⁴ Thus, the protection of the individual is reinforced.²⁹⁵ The EU's use of safe third country mechanisms is not consistent with this obligation to ensure that its actions do not expose an individual to *refoulement*.

²⁹⁰ *Soering v United Kingdom*, (1989) 11 EHRR 439, para 87.

²⁹¹ *Chahal v United Kingdom*, (Application No 22414/93). European Court of Human Rights. (1996).

²⁹² *T.I. v. The United Kingdom*, (Application No. 43844/98). European Court of Human Rights. (2000).

²⁹³ It was found that indirect removal under the Dublin Convention does not detract from the UK's responsibility to adhere to Art 3 of the Convention: "it would be incompatible with the object and purpose of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such an attribution." European Court of Human Rights, *T.I. v. United Kingdom*, Decision as to Admissibility, 7 Mar. 2000. p.15.

²⁹⁴ Elspeth Guild, "Jurisprudence of the European Court of Human Rights: Lessons for the EU Asylum Policy," in *The Emergence of an EU Asylum Policy*, ed. Constança Urbano de Sousa (Brussels: Bruylant, 2003), 335.

²⁹⁵ Guild, "Seeking Asylum: Storm Clouds between International Commitments and EU Legislative Measures," 205.

Safe third countries

The EU does not accept responsibility for asylum claims from protection seekers arriving on its territory from a ‘safe country of origin’ or a ‘safe third country.’ These procedural mechanisms underpin the EU’s extensive network of readmission agreements with third countries.²⁹⁶ The effects of this practice are difficult to assess, as there is no monitoring arrangement by the EU or its Member States for persons readmitted to third countries.²⁹⁷ However, under international refugee law, it is acceptable to transfer an asylum seeker to a third state where that state has a meaningful link to the asylum seeker, and where the state is capable and willing to determine the needs for protection and will provide it.²⁹⁸ The EU’s use of safe third countries is rather more loosely construed. As Elspeth Guild observes: “[t]he link of the external dimension, which was based on making countries outside the Union responsible for human rights protection of asylum seekers, [is now] shuffling them off completely to countries through which they have never passed and which owe them no other duty than that which comes into existence by reason of the Member States’ actions.”²⁹⁹ The EU’s use of the safe third country concept to divert its obligations under the Refugee Convention is contrary to the good faith principle which underpins the multilateral treaty regime and also incompatible with the convention’s object and purpose.³⁰⁰

²⁹⁶ Costello, “The Asylum Procedures Directive and the Proliferation of Safe Third Country Practices: Deterrence, Deflection and the Dismantling of International Protection?,” 45.

²⁹⁷ Judith Kumin, “Europe: Control vs. Protection: Refugees, Migrants and the EU,” *Refugee* 148(4), 28, 2007.

²⁹⁸ Daphné Bouteillet-Paquet, “Passing the Buck: A Critical Analysis of the Readmission Policy Implemented by the European Union and its Member States,” *European Journal of Migration and Law* 5(3) (2003): 367.

²⁹⁹ Guild, “The Europeanisation of Europe’s Asylum Policy,” 647.

³⁰⁰ Goodwin-Gill and McAdam, *The Refugee in International Law*, 390.

The concept of ‘safe country of origin’ has no legal basis in the Refugee Convention.³⁰¹ The notion of a safe country is inherently problematic, as it obscures the possibility of the threat pertaining to a particular individual only, even where the country is generally safe. Goodwin Gill argues that this potential protection gap undermines the integrity of the *non refoulement* principle.³⁰² Ultimately, the ‘safe country of origin’ concept is fundamentally inconsistent with the guiding assumptions of international refugee law, which require that individual asylum claims be determined on the basis of personhood, not nationality.³⁰³

The EU’s designation of ‘safe third country’ is also contentious. The EU returns asylum seekers to safe countries under the argument that they could have claimed asylum in their territory. The return of asylum seekers to safe third countries from the EU is predicated on the assumption that the asylum seeker in question had access to ‘effective protection’ in this country.³⁰⁴ However, the concept of ‘effective protection’ in international law remains weak, and in the absence of a comprehensive definition the safe country mechanism is vulnerable to protection failures.³⁰⁵

The EU’s ‘safe third country’ mechanisms expose refugees to *refoulement*, where they are applied without sufficient protection safeguards. For instance, the EU’s practice of return of asylum seekers to Libya, which is not a signatory of the

³⁰¹ Costello, “The Asylum Procedures Directive and the Proliferation of Safe Third Country Practices: Deterrence, Deflection and the Dismantling of International Protection?,” 50.

³⁰² Goodwin-Gill and McAdam, *The Refugee in International Law*, 400.

³⁰³ Nicholson, “Challenges to Forging a Common European Asylum System in Line With International Obligations,” 507.

³⁰⁴ UNHCR ExCom Communication 58 defines safe third country as describing a country where an individual has already found protection in a third state, is protected from *refoulement* and is treated in accordance with basic human rights until a durable solution is found. UNHCR, “UNHCR Note on the Principle of Non-Refoulement,” November 1997, accessed 4 December 2010. <http://www.unhcr.org/refworld/docid/438c6d972.html>.

³⁰⁵ Steven Legomsky, “Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection,” *International Journal of Refugee Law* 15(4) (2003): 573.

Refugee Convention, risks violating the non *refoulement* principle.³⁰⁶ There is much evidence that the EU's application of 'safe third country' rules expose refugees to chain deportations, as they are transferred from safe third country to safe third country.³⁰⁷ The EU's measures also fail to allow for the varying reception capacities of individual states. In instances of return to developing countries the host state may be unable to provide the material conditions to provide refugees with meaningful human rights guarantees.³⁰⁸ As Erika Feller articulates: "[a] State is clearly in violation of its Convention obligations if, by its own actions, a situation is created whereby international protection that is needed is not available."³⁰⁹ In spite of their obvious incompatibility with the protection assumptions of international refugee law, these safe third country provisions have been codified in the EU's binding supranational legislation.

The Asylum Procedures Directive

The Asylum Procedures Directive endows safe country practices with binding force. In so doing it fatally undermines the EU's promise to guarantee fundamental rights in its harmonised asylum legislation.³¹⁰ The Directive codifies exceptional provisions, such as 'safe third country', 'safe country of origin', 'safe European third country' and 'country of first asylum.' These provisions are applied with no consideration of the underlying protection claim, and the Directive provides no scope

³⁰⁶ Kelly, "International Refugee Protection: Challenges and Opportunities," 423.

³⁰⁷ Madeleine Garlick, "The EU Discussions on Extraterritorial Processing: Solution or Conundrum," *International Journal of Refugee Law* 18(3-4) (2006): 608.

³⁰⁸ Legomsky, "Secondary Movements and the Return of Asylum Seekers," 595.

³⁰⁹ Feller, "Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come," 525.

³¹⁰ Costello, "The Asylum Procedures Directive and the Proliferation of Safe Third Country Practices: Deterrence, Deflection and the Dismantling of International Protection?," 69.

for suspensive effect.³¹¹ The Directive lacks the requisite safeguards to ensure that asylum seeker will not be subjected to *refoulement*.³¹²

Under the Directive, applications from ‘safe countries of origin’ are generally treated as ‘manifestly unfounded.’³¹³ Article 26 of the Procedures Directive defines ‘first country of asylum’ as one in which an applicant was recognised as a refugee and, if readmitted, is still able to access that protection, or otherwise enjoy ‘sufficient protection’ including the benefit of the principle of *non refoulement*.³¹⁴

Under Article 36(1) Member States have the discretion to refuse to examine an application where the individual arrives from such a ‘safe third country.’ The ‘safe third country’ notion assumes the inherent safety of any State that has ratified and observes the 1951 Refugee Convention and ECHR, has an asylum procedure prescribed by law and has been designated a safe third country by the Council.³¹⁵ This could lead to cases of ‘refugees in orbit’ or chain *refoulement*.³¹⁶

The Qualification Directive

The Qualification Directive claims to be “based on the full and inclusive application of the Geneva Convention” (Recital 2).³¹⁷ Yet, it limits its scope to third country nationals or stateless persons and does not cover claims for asylum brought by a national of a Member States. This is a direct contradiction of Article 3 of the Refugee Convention, which reads:

³¹¹ Guild, “The Europeanisation of Europe’s Asylum Policy,” 642.

³¹² Goodwin-Gill and McAdam, *The Refugee in International Law*, 397.

³¹³ Costello, “The Asylum Procedures Directive and the Proliferation of Safe Third Country Practices: Deterrence, Deflection and the Dismantling of International Protection?,” 52.

³¹⁴ Goodwin-Gill and McAdam, *The Refugee in International Law*, 398.

³¹⁵ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* 3rd ed. (Oxford: Oxford University Press, 2007), 400.

³¹⁶ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* 3rd ed. (Oxford: Oxford University Press, 2007), 400.

³¹⁷ EU Qualification Directive, Recital 2.

The Contracting States shall apply the provisions of the Convention to refugees without discrimination as to race, religion or country of origin.

All Member States are signatories of the Refugee Convention and are thus bound by its provisions. Article 42 of the Refugee Convention permits no reservation to the refugee definition contained in article 1, unless revisions are requested under Article 45; this avenue has not been taken.³¹⁸

The Directive also fails to cover the breadth of civil, political, social and economic rights contained in the Refugee Convention.³¹⁹ The exclusion clauses listed under Article 17 of the Directive are much wider in scope than those provided for in Article 1F of the Refugee Convention, as they rule out granting international protection to any individual who has ever committed a serious crime, as well as “those who constitute a danger to the security of the Member State in which he or she is present”(Article 17 1d)) This is also contrary to the case law of the European Court of Human Rights, which has shown protection from *refoulement* to be absolute.³²⁰

A further inconsistency with the Refugee Convention can be found in the Directive’s definition of ‘subsidiary protection,’ which allows for a legal status surrounding international protection needs beyond the scope of the Convention definition.³²¹ At first glance, this juxtaposition of ‘subsidiary’ protection, alongside ‘conventional’ protection seems to represent a widening of the scope of protection provisions, and some commentators see the development of rights and benefits for

³¹⁸ Goodwin-Gill and McAdam, *The Refugee in International Law*, 61.

³¹⁹ Hugo Storey, “EU Refugee Qualification Directive: A Brave New World?,” *International Journal of Refugee Law* 20 (1) (2008): 8.

³²⁰ See above discussion of *Chahal v. UK* (1998) 23EHRR 413. “non return to torture, or cruel, inhuman or degrading treatment is absolute, no matter how reprehensible or dangerous the individual’s conduct.”

³²¹ Storey, “EU Refugee Qualification Directive: A Brave New World?,” 1.

recipients of subsidiary protection as a major advance in protection standards.³²² An individual who qualifies for subsidiary protection is defined as a “third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm.” These provisions formalise a legal status for individuals who benefit from protection under Member States’ *non-refoulement* obligations under international and regional law, but do not qualify for Convention status.³²³

However, this additional status has, in fact, created significant protection gaps. Roger Zetter argues that the creation of the two-tier system of protection in the Qualification Directive has fractioned the refugee label.³²⁴ The broader scope offered by “subsidiary” protection category is tempered by the increased suspicion surrounding the assessment of applications.³²⁵ ECRE and UNCHR have voiced the need for equivalent levels of rights across all protection statuses, and are particularly critical that individuals need to demonstrate that “indiscriminate violence” is directed at them individually, in order to qualify for subsidiary protection.³²⁶

In effect, subsidiary protection provisions have created a protection hierarchy, as ‘subsidiary protection’ status is subordinate to Convention status, and does not encompass the same level of integration rights.³²⁷ UNHCR has pointed out that subsidiary protection beneficiaries are seriously disadvantaged by their lesser status,

³²² Storey, “EU Refugee Qualification Directive: A Brave New World?,” 7.

³²³ Goodwin-Gill and McAdam, *The Refugee in International Law*, 325.

³²⁴ Roger Zetter, “More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization,” *Journal of Refugee Studies* 20(2) (2007), 181.

³²⁵ Teitgen-Colly, “The European Union And Asylum: An Illusion of Protection,” 1520.

³²⁶ ECRE and UNHCR, “The Qualification Directive: Asylum in Europe: Now it’s up to you,” accessed 30 November, 2010, <http://www.ecre.org/EP>.

³²⁷ Goodwin-Gill and McAdam, *The Refugee in International Law*, 332.

where they remain in the EU for long periods.³²⁸ The Qualification Directive has thus created a situation where asylum seekers in the EU are placed in legal limbo; they are protected by *non refoulement* provisions at international law, and simultaneously excluded from national versions of ‘subsidiary protection.’³²⁹ Ultimately the asylum provisions contained in the directive, particularly those surrounding ‘subsidiary protection’ threaten to make the institution of protection more precarious.³³⁰ Because of the EU’s global significance as a protection space, and the highly transferable nature of its policies, the Qualification Directive and the Procedures Directive will have a significant and lasting negative impact on the international refugee regime.³³¹

Access to protection

The range of *non entrée* measures which surround the EU’s protection space make it very difficult for asylum seekers to even access the EU’s asylum system at all. Asylum seekers are prevented from reaching the EU through the combined actions of hard border controls, interception practices, readmission agreements, stringent visa requirements, and carrier sanctions. The use of these deterrence and deflective strategies to thwart the spontaneous arrival of protection seekers on EU territory is wholly inconsistent with the protection principles enshrined in the Refugee Convention.

The legal architecture of the Refugee Convention represents a very cautious attempt to balance the competing demands of individual security and the sovereign

³²⁸ UNHCR, “Six steps towards convergence, quality and shared responsibility UNHCR’s Recommendations to Belgium for its EU Presidency July-December, 2010,” accessed 2 October 2010, <http://www.unhcr.org/4c245ea79.html>, 4.

³²⁹ Marià-Teresa Gill-Bazo, “Refugee Status, Subsidiary Protection and the Right to be Granted Asylum under EC Law,” (Research Paper No. 136, UNHCR, Geneva, 2006, accessed 1 December, 2010), <http://www.unhcr.org/455993882.html>, 11.

³³⁰ Teitgen-Colly, “The European Union And Asylum: An Illusion of Protection,” 1544.

³³¹ Kelly, “International Refugee Protection: Challenges and Opportunities,” 429.

prerogative to exercise control over state territory, and as a consequence leaves certain elements of protection within the ambit of State discretion.³³² The most significant lacuna is the absence of first admittance rights for refugees and asylum seekers.³³³ The EU has exploited this gap in its development of extraterritorial controls, which effectively block asylum seekers from accessing its asylum space, where they would be able to invoke the right to *non refoulement*.³³⁴

This use of geography to circumvent the legal framework of refugee protection has been termed *neo-refoulement*.³³⁵ Elspeth Guild argues that these strategies of prevention amount to the ‘de-territorialisation’ of sovereignty, which she describes as an “opportunistic exclusion of protection responsibilities which are tied to sovereignty,” which enables EU Member States to enjoy their sovereign rights without incurring the corresponding sovereign duties.³³⁶

The legality of these non-arrival practices is widely questioned. James Hathaway argues that States have a duty not to prevent an individual from seeking asylum in their territory.³³⁷ Geoff Gilbert takes this argument one step further in his argument that the declaratory nature of refugee status under the Refugee Convention makes prevention of access tantamount to *refoulement*.³³⁸ Goodwin Gill contends that Article 31 of the Refugee Convention, when read in conjunction with Article 33 on *non refoulement*, provides support for a limited right of, at a minimum, temporary admission of asylum seekers to access fair and efficient refugee status procedures.³³⁹

³³² Kay Hailbronner, “Detention of Asylum Seekers,” *European Journal of Migration and Law*, 9(2) (2007): 162.

³³³ Goodwin-Gill and McAdam, *The Refugee in International Law*, 370.

³³⁴ Guild, “The Legal Framework: Who is Entitled to Move?” 35.

³³⁵ Jennifer Hyndman and Alison Mountz, “Another brick in the wall? *Neo refoulement* and the externalisation of asylum by Australia and Europe,” *Government and Opposition* 43(2) (2008):268.

³³⁶ Guild, “The Europeanisation of Europe’s Asylum Policy,” 631.

³³⁷ James C. Hathaway, “What’s in a Label?” *European Journal of Migration and Law* 5 (2003), 2.

³³⁸ Gilbert, “Is Europe Living Up to Its Obligations to Refugees?,” 966.

³³⁹ Goodwin-Gill and McAdam, *The Refugee in International Law*, 384.

However, he points out that in the absence of a right to asylum at international law, States enjoy a great deal of discretion to pursue such measures, and while interception and non-arrival policies may be demonstrably inconsistent with a commitment to human rights standards, they remain legally permissible.³⁴⁰

The EU has developed the most comprehensive regime of carrier sanctions and visa requirements in the world.³⁴¹ The EU's visa 'black' list effectively prevents individuals coming from these countries from legally accessing the EU asylum system. The main refugee producing countries in 2009 (Afghanistan, Iraq, Colombia, Sudan and Somalia) are all on the EU visa black list.³⁴² Visa nationals are prevented from travel as sea and air carriers are obliged to check the validity of travel documents, and refuse passage for individuals who do not have the requisite documentation or else face penalties.³⁴³ This is a significant barrier to the EU's protection space.

The EU's extraterritorial controls under the auspices of FRONTEX regularly prevent refugees from accessing the EU's protection space.³⁴⁴ The technical approach taken by FRONTEX is not compatible with the EU's protection responsibilities.³⁴⁵ Preventing refugees from accessing the EU asylum system, where they arrive irregularly at the external border is demonstrably at odds with protection principles, as the international protection regime provides that neither the mode of flight or the means of entry into the country of refuge should be a consideration which decides

³⁴⁰ Goodwin-Gill and McAdam, *The Refugee in International Law*, 370.

³⁴¹ Gilbert, "Is Europe Living Up to Its Obligations to Refugees?," 972.

³⁴² Elspeth Guild and Sergio Carrera, "Towards the Next Phase of the EU's Area of Freedom, Security and Justice: The European Commission's Proposals for the Stockholm Programme," (Research Paper 196, Centre for European Policy Studies 20 August, 2009), accessed 15 September 2010, www.ceps.eu/ceps/download/1719, 5.

³⁴³ Guild, "The Legal Framework: Who is Entitled to Move," 36.

³⁴⁴ Andreas Fischer-Lescano, Tillmann Löhr, Timo Todhidipur, "Border Controls at Sea: Requirements under International Human Rights and Refugee Law," *International Journal of Refugee Law* 21(2): 256.

³⁴⁵ Thomas Spijkerboer, "The Human Costs of Border Control," *European Journal of Migration and Law* 9 (2007): 132.

who is more deserving of international protection.³⁴⁶ As the UNHCR notes, ‘Interception measures that effectively deny refugees access to international protection, or which result in them being returned to the countries where their security is at risk, do not conform to prevailing international guidelines.’³⁴⁷

Moreover, European primary and secondary law obliges border-control bodies to uphold the principle of *non-refoulement* and border control officials are bound by international law, even where acting extra-territorially, and must ensure that individuals who are intercepted are presented with the opportunity to stake their claim to asylum on EU territory.³⁴⁸ The subcontracting of border management in FRONTEX³⁴⁹ operations does not dilute the EU’s obligations at international law; Member States retain full responsibility to ensure that border control practices are consistent with international requirements.³⁵⁰ The use of interception measures against asylum seekers in fact violates the protection provisions contained in the *acquis* of the CEAS, as the Asylum Procedures Directive provides that Member States need to guarantee access to asylum.³⁵¹ The Council Decision of April 2010 reaffirms the *non refoulement* obligations which apply during interceptions at sea.³⁵² However, the EU needs to integrate protection safeguards into FRONTEX operations to ensure that *non refoulement* is respected.

³⁴⁶ Feller, “Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of things to come,” 523.

³⁴⁷ UNHCR, “The State of the World’s Refugees 2006: Human Displacement in the New Millennium,” accessed 30 November 2010, <http://www.unhcr.org/4a4dc1a89.html>, 40.

³⁴⁸ Andreas Fischer-Lescano, Tillmann Löhrr, Timo Todhidipur, “Border Controls at Sea: Requirements under International Human Rights and Refugee Law,” *International Journal of Refugee Law* 21(2): 296.

³⁴⁹ EU Council Regulation 2007/2004, October 2004.

³⁵⁰ ECRE, “Defending Refugees’ Access to Protection in Europe,” December 2007.

³⁵¹ Andreas Fischer-Lescano, Tillmann Löhrr, Timo Todhidipur, “Border Controls at Sea: Requirements under International Human Rights and Refugee Law,” *International Journal of Refugee Law* 21(2): 296.

³⁵² Council Decision of 26 April 2010.

Supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (2010/252/EU), para 3.

The use of control strategies to thwart the spontaneous arrival of protection seekers on EU territory is wholly inconsistent with the liberal Universalist approach to protection enshrined in the Refugee Convention. International refugee law forms the safety net for refugees, but it can only provide legal guarantees insofar as protection seekers are able to access it. As Kofi Annan noted in an address to the European Parliament: “When refugees cannot seek asylum because of offshore barriers...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.”³⁵³ Ultimately, the notion of a EU asylum system is worthless, if refugees are unable to access it. Thus, to demonstrate a “full and inclusive application” of the Refugee Convention, the EU needs to assure refugees “the widest possible exercise of...fundamental rights and freedoms.”³⁵⁴ As part of this, it needs to ensure that any mechanisms to stem irregular migration are protection sensitive and do not prevent the arrival of asylum seekers onto its territory.

The Treaty of Lisbon

The potential for the asylum *acquis* to be reconciled with the protection norms of the Refugee Convention has been significantly enhanced by the recent ratification of the Treaty of Lisbon,³⁵⁵ which has elevated the Charter of Fundamental Rights of the European Union³⁵⁶ to EU primary law. The Charter of Fundamental Rights voices a clear commitment to fundamental principles essential to the fair treatment of

³⁵³ Kofi Annan, UN Secretary General, Address to the European Parliament, 29 January 2004, accessed 30 November, 2010, http://www.europa-eu-un.org/articles/en/article_3178_en.htm.

³⁵⁴ Preamble, 1951 Refugee Convention.

³⁵⁵ The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, entered into force 1 December 2009, OJ 2007/C 306/01.

³⁵⁶ European Union, Charter of Fundamental Rights of the European Union, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (2000/C 364/01), accessed 20 July 2010, <http://www.unhcr.org/refworld/docid/3ae6b3b70.html>.

refugees and asylum seekers.³⁵⁷ Under the Charter, asylum is an autonomous concept, which means it must be interpreted in accordance with the fundamental rights protected by the Union. Article 18 therefore “applies in all areas of activity if the Union and its Member States that fall into the scope of application under the Union’s law.”³⁵⁸ This means that compliance with the Charter is now a requirement for the validity and legality of the Union’s secondary legislation.³⁵⁹ Article 18 of the Charter provides:

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 in accordance with the Treaty establishing the European Community.

However, Goodwin-Gill contends that this ‘right to asylum’ does not add anything in terms of Member States’ duties, as it merely consolidates asylum rights already in existence, and thus remains limited a procedural right to apply for asylum, rather than constituting a substantive right to obtain it.³⁶⁰ Nonetheless, the fact that Article 18 of the Charter of Fundamental Rights can now be invoked directly has significantly strengthened the legal guarantees for asylum seekers in the EU.³⁶¹ This has vast potential to open up legal arguments in EU asylum policy, particularly in relation to refugees’ access to asylum procedures and protection in the EU.³⁶²

³⁵⁷ Nicholson, “Challenges to Forging a Common European Asylum System in Line With International Obligations,” 515.

³⁵⁸ Marià-Teresa Gill-Baso, “The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union’s Law,” *Refugee Survey Quarterly* 72(3)(2008), 52.

³⁵⁹ Gill-Baso, “The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union’s Law,” 33.

³⁶⁰ Goodwin-Gill and McAdam, *The Refugee in International Law* 3rd ed. (Oxford: Oxford University Press, 2007), 367.

³⁶¹ Gill-Baso, “The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union’s Law,” 33.

³⁶² Garlick, “The Common European Asylum System and the European Court of Justice: New Jurisdiction and New Challenges,” 59.

The Treaty of Lisbon also provides for significant improvements to the legislative content of the *acquis*; the ‘minimum standards,’ which underpin the legislative content of the *acquis* are to be replaced by an advanced level of harmonisation encompassing “common procedures for the granting or withdrawing of uniform status.”³⁶³ The accompanying changes to the legislative process may also enhance protection standards as the European Court of Justice (ECJ) will now play a role in developing EU asylum law and can now rule directly on its legality.³⁶⁴ The prospective impact of the ECJ’s role is, as yet, unclear; the ECJ cites the Refugee Convention as the cornerstone of the international legal regime for the protection of refugees, but has also expressed support for some of the elements of the Qualification Directive, which are not based in the Refugee Convention.³⁶⁵

Conclusion

The restrictive legislative content of the EU’s asylum *acquis*, combined with the EU’s extensive use of readmission agreements and exclusionary border control mechanisms has resulted in a shrinking asylum space in the EU. The existing legislative content of the CEAS categorically fails to demonstrate a “full and inclusive application” of the Refugee Convention.³⁶⁶ The securitised policy and practice of the contemporary *acquis* is fundamentally inconsistent with the protection assumptions of international law, which are anchored in the human rights paradigm.³⁶⁷ It has also weakened the asylum norm of the international refugee regime.³⁶⁸ The inevitable

³⁶³ Art 78, Treaty of Lisbon.

³⁶⁴ Koen Lenaerts, “The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice,” *International Comparative Law Quarterly* 59 (2) 2010, 271.

³⁶⁵ Garlick, “The Common European Asylum System and the European Court of Justice: New Jurisdictions and New Challenges,” 9.

³⁶⁶ Teitgen-Colly, “The European Union and Asylum: An Illusion of Protection,” 1504.

³⁶⁷ Edwards, “Human Rights, Refugees and the right to enjoy asylum,” 297.

³⁶⁸ Emek M Uçarer, “Burden-Shirking, Burden-Shifting, and Burden-Sharing in the Emergent European Asylum Regime,” 224.

policy export means that the EU's incorporation of policies of deterrence and deflection into binding supranational instruments has huge implications for global refugee protection.³⁶⁹ For example, the 'safe third country' notion is now extensively applied in Eastern Europe and in Central Asia to deny access to asylum procedures.³⁷⁰

The EU's policies of deflection, which effectively externalise responsibility for thousands of protection seekers, embody a clear failure to implement the 'duty to protect' in good faith. The normative inconsistencies contained in the EU's securitised approach to asylum substantially weaken the EU's authority in the field of human rights.³⁷¹ The EU's asylum *acquis* contains many protection gaps and shortcomings, which need to be addressed to ensure the legal coherence of the asylum space. In addition to improving its asylum instruments, the EU needs to resolve the policy clashes, between the EU's external border policy and the protection requirements of its common asylum system.³⁷² The following chapter will employ a human rights framework of analysis to articulate the minimum substantive requirements for a rights-based asylum regime in the EU context, which adheres to the protection imperative of international refugee and human rights law.

³⁶⁹ Gilbert, "Is Europe Living Up to Its Obligations to Refugees?," 987.

³⁷⁰ Nicholson, "Challenges to Forging a Common European Asylum System in Line With International Obligations," 530-1.

³⁷¹ Guild, "The Europeanisation of Europe's Asylum Policy," 647.

³⁷² Collett, "Beyond Stockholm: Overcoming the Inconsistencies of Immigration Policy," 76.

Chapter Three:

A rights-based approach to protection in the EU context

Introduction

In the wake of the second World War, Hannah Arendt wrote: “No paradox of contemporary politics is filled with a more poignant irony than the discrepancy between the efforts of well-meaning idealists who stubbornly insist on regarding as “inalienable” those human rights, which are enjoyed only by citizens of the most prosperous and civilized countries, and the situation of the rightless themselves.”³⁷³ The lack of guarantees surrounding refugees’ human rights remains an urgent political issue in the 21st century. In recent years, the international protection regime has deteriorated. Technological advances and geopolitical changes have dramatically altered the international protection landscape, as Western states are now able to effectively prevent refugee movements and seal off their asylum systems from refugee flows.³⁷⁴

The shrinking global asylum space means that there simply is no scope for accommodating the 11 million refugees in need of protection and there are currently 5.5 million refugees, classified as being in “protracted situations.”³⁷⁵ Many of those in protracted exile are housed in makeshift camps, where their daily existence is precarious and basic, to the extent that they are unable to meaningfully exercise their human rights.³⁷⁶ Their plight is redolent of the desperate situation described by Arendt half a century ago.

³⁷³ Hannah Arendt, *On the Origins of Totalitarianism*, (London: George Allen and Unwin, 1967), 279.

³⁷⁴ Betts, “The Refugee Regime Complex,” 26.

³⁷⁵ UNHCR, “2009 Global Trends: Refugees, Asylum Seekers and Internally Displaced and Stateless Persons,” 6. This represents two thirds of the global refugee population.

³⁷⁶ The Economist, “Lost in Limbo: Refugee Trends,” August 29, 2009.

This chapter will examine the minimum substantive requirements for a morally defensible refugee policy within the contemporary global context, and propose criteria for a refugee policy, which engenders a rights-based approach to protection. This will be used to describe a putative protection framework for the EU, which is consistent with the human rights principles of refugee protection. The EU has the means and the capacity to realise this.³⁷⁷

Delimiting refugee protection

Approaching refugee protection from a human rights point of view inevitably raises the question of delimitation. Refugees are symptomatic of much greater problems and injustices on the global landscape, and represent only a very small proportion of the global population of forced migrants, which numbered 43.2 million in 2009.³⁷⁸ While the majority of these individuals do not qualify as Convention refugees, they nonetheless have a very compelling moral claim to international protection on the grounds of human rights.

In the contemporary global context, the political bias of the refugee definition is highly problematic. There are inherent difficulties in drawing the distinction between ‘push’ and ‘pull’ factors, and distinguishing between refugees and economic migrants, as political violence and poverty are often interlinked, and refugee protection is inextricably linked to the broader issue of global inequality.³⁷⁹

In many ways, refugee law provides benefits to a somewhat arbitrarily selected group of people. As Jacqueline Bhaba observed: “The institution of asylum... acts as a filtering process that is designed to separate eligible from ineligible travellers [and]

³⁷⁷ Garlick, “The EU Discussions on Extraterritorial Processing: Solution or Conundrum?,” 615.

³⁷⁸ UNHCR, “Number of forcibly displaced rises to 43.3 million last year, the highest level since mid-1990s,” 15 June, 2010, accessed 29 September, 2010, <http://www.unhcr.org/4c176c969.html>.

³⁷⁹ Gibney, *The Ethics and Politics of Asylum*, 259.

is constructed to be a strictly limited humanitarian safety valve, permitting only a fraction of would-be immigrants, the discrete class of ‘genuine’ refugees, to trump immigration restrictions and gain access to the developed world.”³⁸⁰

The growing numbers of ‘environmental refugees’ are another potent example of the blurring distinction between refugees and other displaced populations.³⁸¹ These inconsistencies have ignited a complex legal debate over whether humanitarian refugees are recognised under current international law norms.³⁸² The UNHCR now provides assistance to other categories of forced migrants, and has highlighted the need for the international community to consider such persons to be in need of protection.³⁸³ However, these additional protection concerns fall beyond the scope of this thesis, and do not detract from the EU’s primary protection obligations to refugees and asylum seekers. The duty owed to refugees and asylum seekers is especially urgent, as their vulnerability epitomises human insecurity.³⁸⁴ In fact, the development of a coherent rights-based asylum policy in the EU would be a significant step towards confronting the broader issues of global injustice, and provide a rudimentary framework for tackling the expanding protection challenges, which the world will inevitably face in the coming century.³⁸⁵

The sheer scale of the global refugee crisis means that a rights-based vision of refugee protection needs to extend beyond the *non-refoulement* provisions of international refugee law, and engage with the human rights needs of the global refugee population. While a comprehensive approach to protection is essential to

³⁸⁰ Jacqueline Bhaba, “International Gatekeepers? : The Tension Between Asylum Advocacy and Human Rights,” *Harvard Human Rights Journal* 15 (2002): 161.

³⁸¹ Satvinder Singh Juss, *International Migration and Global Justice*, (Aldershot: Ashgate, 2006), 169.

³⁸² Juss, *International Migration and Global Justice*, 188.

³⁸³ UNHCR (2008) Report on High Commissioner’s Dialogue on Protection Challenges, December 2007, Geneva: UNHCR.

³⁸⁴ Helton, *The Price of Indifference*, 12.

³⁸⁵ Kelley, “International Refugee Protection: Challenges and Opportunities,” 438.

addressing the plight of those refugees in protracted exile, protection through admission must remain the cornerstone of the international refugee regime.

A rights-based argument for refugee protection

The EU's creation of barriers to its protection space places it in a significant normative quandary, as the human rights imperative of refugee protection demands that States make an exception to the sovereign prerogative to control access to their territory, and ensure that refugees are able to gain admission in order to access international protection. Seyla Benhabib addresses this in *The Rights of Others*. She emphasises that it is only through admission that refugees are able to exercise their human rights. She argues that for 'the right to have rights' to be meaningful, states must guarantee first admission rights for refugees.³⁸⁶

Benhabib's argument for refugees' rights to first admission is grounded in Kant's principles of universal hospitality outlined in his 1783 essay "Perpetual Peace." In the Kantian view, the cosmopolitan right of hospitality resides in the humanity of each and every person; all human beings have both a right to associate, and a right to the common possession of the surface of the Earth.³⁸⁷ Therefore, to deny an individual the opportunity to enjoy the land and resources of a territory, when it can be done peacefully and without endangering the life and welfare of the original inhabitants is not defensible.³⁸⁸ Kant also argued that to refuse a claim to temporary residency would be fundamentally unjust, if such a refusal would entail the destruction (Untergang) of the other.³⁸⁹

³⁸⁶ Benhabib, *The Rights of Others*, 16-17.

³⁸⁷ Benhabib, *The Rights of Others*, 39.

³⁸⁸ Benhabib, *The Rights of Others*, 39.

³⁸⁹ Seyla Benhabib, *The Rights of Others*, 28.

Benhabib expands on this version of *jus cosmopolitanus*, arguing that a rights-based approach to protection must go beyond temporary residency and also incorporate a vision of *just membership*.³⁹⁰ She contends that refugees must be granted a right to political membership, which observes the constraints of non-discrimination and right of immigration in due process.³⁹¹ Her argument specifically addresses the situation of refugees and asylum seekers in the EU, as she illustrates that in the EU the ‘right to have rights’ remains inexorably attached to EU citizenship status.³⁹² This means, to a great extent, refugees in the EU are denied the possibility of exercising their human rights. Their rights of movement, employment and association are heavily curtailed, meaning that they remain in a state of ‘exception.’³⁹³

Benhabib maintains that restrictive measures, which prevent asylum seekers from accessing international protection, are morally untenable. She argues that “porous borders” are the only way to guarantee the right to admission.³⁹⁴ Her argument for porous borders is normative; it places no functional constraints on state obligations towards refugees and offers no legal context on which to base this approach. This is a significant weakness, as the pragmatics of asylum policy is ultimately essential to its realisation.³⁹⁵ Therefore, Benhabib’s rights-based argument does not provide sufficient criteria on which to scaffold a rights-based asylum regime in the EU.

³⁹⁰ Seyla Benhabib, *The Rights of Others*, 3.

³⁹¹ Seyla Benhabib, *The Rights of Others*, 39.

³⁹² Benhabib, *The Rights of Others*, 162.

³⁹³ Benhabib, *The Rights of Others*, 162.

³⁹⁴ Benhabib, “The legitimacy of human rights,” *Daedalus* 137(3) (2008): 97.

³⁹⁵ Stefan Heuser, “Is there a Right to have Rights? The Case of the Right to Asylum,” *Ethical Theory, Moral Practice* 11(3) (2008): 11.

A rights-based approach to protection within pragmatic constraints: the humanitarian principle

Matthew Gibney argues that in focussing on the morally ideal, normative theories consistently fail to describe the ways in which states need to act to address morally defensible responses to refugees' claims.³⁹⁶ In Gibney's view, creating a coherent refugee policy is essentially a moral balancing act between the duty of assistance owed to refugees and legitimate state interest.³⁹⁷ He argues that all refugees have a moral claim to admission, as "the cost of not entering can be the loss of their life or condemnation to a life barely worth living."³⁹⁸ He underscores the importance of upholding the refugee definition found in the Refugee Convention.³⁹⁹ However, he argues that the sovereign obligation to grant protection remains in place only until the reception capacity of the host state has been reached.⁴⁰⁰

Gibney formulates his pragmatic response to refugee protection in *The Ethics and Politics of Asylum*. He outlines this as a 'humanitarian principle,' which policymakers may use to guide the development of morally defensible asylum policies in the contemporary context. This approach takes into account the varying integrative capacity of states and compensates for the disproportionate protection obligations incurred by certain states, due to their geographical location.⁴⁰¹ The protection framework outlined in the 'humanitarian principle' encompasses both the

³⁹⁶ Gibney, *The Ethics and Politics of Asylum*, 16.

³⁹⁷ Gibney, *The Ethics and Politics of Asylum*, 82.

³⁹⁸ Gibney, *The Ethics and Politics of Asylum*, 35.

³⁹⁹ Gibney, *The Ethics and Politics of Asylum*, 215.

⁴⁰⁰ Gibney, *The Ethics and Politics of Asylum* 83. "An acceptable ideal would ... see states as justified in restricting entry only in order to protect the institutions and values of the liberal democratic state, defined quite broadly to include not only civil and political rights, but also the kind of social rights associated with a generous welfare state that ensure some kind of economic justice amongst members."

⁴⁰¹ Gibney, *The Ethics and Politics of Asylum*, 56, 231.

admission of refugees into state territory, and their subsequent inclusion in the ‘political culture.’⁴⁰²

The ‘humanitarian principle’ has global reach. Gibney argues “humanitarianism has no respect for distance; it is owed to all refugees on the basis of need alone.”⁴⁰³ Therefore, although those refugees present at the external border of a given state have a particularly strong claim to admission, the moral obligation to refugees extends to the entire global refugee population.⁴⁰⁴ In this view, as well as ensuring admission for refugees, states are morally obliged to engage with the protection claims of all refugees through generous resettlement.⁴⁰⁵ Measures which focus on development issues and addressing root causes are also crucial to a humanitarian response to refugees: “working towards a domestic and international environment favourable to refugees and asylum seekers is a logical corollary to taking humanitarianism seriously.”⁴⁰⁶ These wider considerations need to guide the formulation of a rights-based refugee regime in the EU.

A rights-based approach to protection in the EU context

This section will address the ways in which the policies of the CEAS could be reformulated, to ensure that the EU facilitates access to its protection space. A rights-based asylum regime must exemplify both the sovereign granting of protection through admission into its territory, and the permanent integration of an individual into the community of the asylum state. The development of a rights-based approach to integration is essential to the creation of a rights-based approach to protection within the EU’s asylum space. Refugees in the EU remain a marginalised category;

⁴⁰² Gibney, *The Ethics and Politics of Asylum*, 43.

⁴⁰³ Gibney, *The Ethics and Politics of Asylum*, 240.

⁴⁰⁴ Gibney, *The Ethics and Politics of Asylum*, 240.

⁴⁰⁵ Gibney, *The Ethics and Politics of Asylum*, 249.

⁴⁰⁶ Gibney, *The Ethics and Politics of Asylum*, 254.

their freedom of movement is restricted, and in many Member States they do not enjoy full political participation, and consequently are able to fully exercise their human rights, and risk becoming ghettoised.⁴⁰⁷ However, the first step in creating a viable protection framework for the EU is the creation of an admission policy for refugees, which guarantees the principle of *non-refoulement*. Therefore, the following section will focus exclusively on describing minimum substantive requirements to ensure that refugees are able access to international protection in the EU.

Ensuring access to protection

For the EU to be consistent with its proclaimed commitment to human rights, it needs to guarantee the refugees are able to access its protection space. As Gibney argues, entrance policies provide a crucial measure of moral legitimacy.⁴⁰⁸ The EU's current array of *non-entrée* mechanisms, which encompass carrier sanctions, stringent visa requirements, hard border controls, safe third country mechanisms and readmission agreements are indefensible, as they prevent vulnerable individuals from accessing protection. The human rights imperative of refugee protection does not preclude the use of migration control measures. However, it is critical for the EU to ensure that all such measures are sensitive to the reality of mixed migration. In essence, the EU must create "borders with doors," to ensure that refugees are not prevented from accessing international protection on its territory.⁴⁰⁹

The EU's practice of enforcing carrier sanctions against those providers carrying non-documented migrants poses a clear barrier to refugees, many of whom

⁴⁰⁷ Kelley, "International Refugee Protection: Challenges and Opportunities," 439.

⁴⁰⁸ Gibney, *The Ethics and Politics of Asylum*, 56.

⁴⁰⁹ ECRE, *An Agenda for Change*, 2004. ECRE, "An Agenda for Change", 2004. www.ecre.org/files/agendapaper.pdf, accessed 1 December 2010, 15.

have good reasons for being without the requisite travel documents.⁴¹⁰ Moreover, private carriers are not trained in refugee protection and their *ad hoc* profiling practices can be very inadequate, meaning that they inevitably risk refusing passage to refugees, who would otherwise be granted international protection upon arrival in the EU.⁴¹¹ Instead of engaging officials to enforce stringent visa requirements the EU should issue travel documents specifically for refugees, in the form of a humanitarian visa or an entry permit.⁴¹²

In addition, the EU's external border controls need to be softened to ensure they facilitate admission of refugees spontaneously seeking protection in the EU. At present, the EU's border management practices, such as the use of interdiction, through its engagement of FRONTEX prevents refugees from accessing EU territory.⁴¹³ To prevent this from occurring there is a need to ensure that FRONTEX employees have training in identifying persons in need of international protection.⁴¹⁴ Alternatively, FRONTEX operations could ensure that a representative from a human rights or refugee agency was present during their operations.⁴¹⁵ In the short term, there

⁴¹⁰ Sile Reynolds and Helen Muggeridge, "Refugee Council: how UK border controls are endangering the lives of refugees," Refugee Council, 2008, www.refugeecouncil.org.uk/Resources/.../Remote%20Controls.pdf, accessed 1 December, 2010, 4.

⁴¹¹ Reynolds and Muggeridge, "Refugee Council: how UK border controls are endangering the lives of refugees," 5.

⁴¹² ECRE "An Agenda for Change," 15.

⁴¹³ Fischer-Lescano, Löhr, and Todhidipur, "Border Controls at Sea: Requirements under International Human Rights and Refugee Law," 256.

⁴¹⁴ Amnesty International and ECRE, "Briefing on the Commission proposal for a Regulation amending Council Regulation EC/2007/2004 establishing a European Agency for the Management of Operational Coordination at the External Borders of the Member States of the European Union (FRONTEX)," September 2010, www.ecre.org/resources/Policy_papers/1622, accessed 1 December, 2010, 8.

⁴¹⁵ Amnesty International and ECRE, "Briefing on the Commission proposal for a Regulation amending Council Regulation EC/2007/2004 establishing a European Agency for the Management of Operational Coordination at the External Borders of the Member States of the European Union (FRONTEX)," 10.

is also a need for a mechanism to monitor and report on protection failures arising from the agency's activities.⁴¹⁶

The creation of legal channels for refugees to access protection would significantly enhance the safety of refugees wishing to claim protection in the EU. The current restrictions on access to travel documents simply force many refugees into perilous and protracted journeys overland as they seek to gain access international protection in the EU.⁴¹⁷ The issue of temporary travel documentation under a humanitarian visa regime would also significantly reduce the administrative costs involved in asylum processing. Currently a disproportionate percentage of resources are spent on determining 'who' is a refugee.⁴¹⁸ This regime would also need to ensure that those refugees with extreme needs, such as women, children, minors, and elderly persons were identified before they make the journey to the EU to allow them to be processed appropriately upon arrival. The treatment of minors is of particular importance, as a quarter of asylum seekers in the EU are minors.⁴¹⁹

The proposed Protected Entry Procedure (PEP) may provide a means of guaranteeing entry for those who qualify for international protection.⁴²⁰ This mechanism would allow for asylum claims to be processed in regions of origin. This approach would both facilitate the development of an intra-EU burden-sharing regime and present EU Member States with the possibility of limiting access, in the event of a mass influx or where their protection capacity was exceeded. However, this

⁴¹⁶ Didier Bigo and Julien Jeandesboz, "Border Security, Technology and the Stockholm Programme," (INEX Policy Brief No. 3, November 2009), accessed 1 December 2010, <http://www.ceps.eu/book/border-securit-technology-and-stockholm-programme>, 5.

⁴¹⁷ Collyer, "Stranded Migrants and the Fragmented Journey," 290.

⁴¹⁸ Edwards, "Human Rights, Refugees and The Right 'to Enjoy' Asylum," 294.

⁴¹⁹ UNHCR, "Trees Only Move in the Wind: A Study of Unaccompanied Afghan Children in Europe," June 2010, accessed 1 December 2010, www.unhcr.org/4c1229669.html.

⁴²⁰ Gregor Noll and Jessica Fagerlund, "Safe Avenues to Asylum? The Actual and Potential Risk of EU Diplomatic Representations in Processing Asylum Requests, (Refugee Research Programme 04/2002, Danish Centre for Human Rights, 2002), accessed 23 September 2010, www.unhcr.org/3cd000a52.pdf, 119.

approach must not in any way interfere with the EU's obligation to uphold the norm of *non refoulement* and process asylum seekers arriving spontaneously at its external borders.

Protection through resettlement

The moral duty to accept asylum seekers and the duty to engage in international burden-sharing arrangements are intertwined. Therefore, in addition to ensuring that refugees can access international protection on its territory, a rights-based approach to protection would see the EU engage in global burden-sharing measures, which address the vast imbalances in refugee distribution across the global protection landscape. Currently developing nations support upwards of 80% of the world's refugees.⁴²¹ These countries often lack the means to provide effective protection, and, in some cases, these overburdened states employ exclusionary and deterrent policies towards refugees to incite them to return home or seek protection elsewhere.⁴²²

Resettlement programmes would allow the EU to ensure that it assumes responsibility for a number of the world's refugee commensurate with its protection capacity. As the UNHCR has noted, resettlement is absolutely vital to solving protracted situations.⁴²³ The absolute number of refugees resettled in the EU is far less than its protection capacity; in 2009, the EU received fewer than 7 per cent of the total global offshore refugees.⁴²⁴ At present only ten Member States participate annually in resettlement.⁴²⁵ There is scope for the EU's Resettlement programme to be

⁴²¹ Kelly, "International Refugee Protection: Challenges and Opportunities, 407.

⁴²² Kelly, "International Refugee Protection: Challenges and Opportunities, 406.

⁴²³ UNHCR, Finding Durable Solutions, "UNHCR Global Appeal 2010-2011," 1 December 2009, accessed 3 December 2010, www.unhcr.org/4b03ca759.html, 55.

⁴²⁴ European Commission, "Communication from the Commission to the European Parliament and the Council on the establishment of a joint EU resettlement programme", COM(2009) 447 Final, 2 Sept. 2009, 6.

⁴²⁵ European Commission, COM (2009) 447, 3.

significantly expanded. The foundations for an EU-wide scheme may be found in the Söderköping Process, which allows participating countries to engage in Resettlement on a voluntary basis.⁴²⁶

The EU's moves towards developing a comprehensive settlement scheme are in their infancy, as an EU approach to resettlement was first addressed in the Commission's 2008 policy plan on asylum.⁴²⁷ The Commission describes its proposals for increased Resettlement as a way to "meet the protection needs of refugees in third countries and to show solidarity with third countries of first asylum."⁴²⁸ This move towards Resettlement may represent a promising step towards a more holistic approach to refugee protection in the EU. Nonetheless, as Erika Feller has cautioned: "Asylum and resettlement are two distinct and separate possibilities. It is therefore critical to the integrity of the international protection system that resettlement processing and national asylum systems work in tandem, not against each other."⁴²⁹ The development of a comprehensive approach to resettlement is a key component of ensuring that the EU's refugee policies are consistent with fundamental human rights. It offers the possibility of extending protection to the most vulnerable refugees, who would otherwise remain in their region of origin. However, an expansion of the EU's Resettlement programme must occur in parallel with the development of measures to ensure that asylum seekers are able to spontaneously access protection in the EU.

⁴²⁶ Kelley, "International Refugee Protection: Challenges and Opportunities," 436-7.

⁴²⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, "Policy Plan on Asylum: An Integrated Approach to Protection Across the EU," COM(2008) 360 final.

⁴²⁸ European Commission, COM(2009) 447.

⁴²⁹ Feller, "Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of things to Come," 523.

Providing protection in regions of origin

A further possibility for providing human rights guarantees for refugees may be found in the creation of programmes to provide protection to refugees in their regions of origin. This approach to international protection represents a significant change of focus from an international protection regime based on the Refugee Convention.⁴³⁰ It constitutes a fundamental departure from the traditional system of refugee protection based on the individual responsibility of each asylum country.⁴³¹ The international regulatory framework surrounding these initiatives is relatively underdeveloped, and the sparse normative and legal framework leaves much up to state discretion.⁴³² However, it has the potential to significantly enhance global refugee protection landscape. As Alexander Betts argues, the complexity of migration in the contemporary global context means that this approach may be the best way to open up protection space for refugees.⁴³³ Protection capacity building must be approached with a good faith commitment, to ensure that refugees' rights are genuinely enhanced by such measures.⁴³⁴

The EU's involvement in schemes, which enhance the protection capacity of third countries inevitably raises the question of conflict of interest. Emek Uçarer argues that the EU has strategically employed such policies to create a "buffer zone" around the EU "without going much beyond instrumental reference to assistance and burden-sharing."⁴³⁵ Christina Boswell has also observed that Member States "have an interest in strengthening refugee protection in the countries around them to try and

⁴³⁰ Susan Kneebone, "The Legal and Ethical Implications of Extraterritorial Processing of Asylum Seekers: The Concept of Safe Third Countries," in *Studies in International Law: Forced Migration, Human Rights and Security* Ed. Jane Mc Adam. Portland Oregon: Hart Publishing, 2008, 136

⁴³¹ Lavenex, "Shifting up and Out: The Foreign Policy of European Immigration Control," 343.

⁴³² Betts, "The Refugee Regime Complex," 18.

⁴³³ Betts, "The Refugee Regime Complex," 29.

⁴³⁴ Kelley, "International Refugee Protection: Challenges and Opportunities," 427.

⁴³⁵ Uçarer, "Burden-Shirking, Burden-Shifting, and Burden-Sharing in the Emergent European Asylum Regime," 224.

ensure that more people will not feel impelled to continue moving further north or west in search of asylum.”⁴³⁶ Boswell addresses the inconsistencies inherent to the EU’s approach, as it simultaneously acknowledges the destabilising effects of refugees in developing countries and insists that they remain there.⁴³⁷

Some of the EU’s initiatives to enhance protection in neighbouring countries have had a positive impact on refugees’ rights. For example, in recent years the EU has improved asylum and refugee policy in parts of the European Neighbourhood.⁴³⁸ However, there have been other instances where the result has been the creation of *de facto* border controls in third countries, to the detriment of refugees’ human rights. For example, the EU’s cooperation with Libya has not translated into improved conditions for refugees; instead it has focused heavily on developing border control and surveillance, which has precipitated *refoulements*.⁴³⁹

Since 2005, the EU has been pursuing the development of Regional Protection Programmes (RPPs) under the direction of the Commission, to enhance the reception capacity of third countries so that they become providers of ‘effective protection.’⁴⁴⁰ This improves protection prospects for the many refugees who lack the means to make the long journey to the EU, and also removes the incentives for refugees to resort to people smugglers as a means of accessing protection.⁴⁴¹ However, while RPPs seek to inject protection instead of concentrating on the management of migration flows, the extent to which these measures effect and overall improvement

⁴³⁶ Christina Boswell, “The ‘external dimension’ of EU immigration and asylum policy,” *International Affairs* 79(3) (2003): 612.

⁴³⁷ Christina Boswell, “Evasion, Reinterpretation and Decoupling: European Commission Responses to the ‘External Dimension’ of Immigration and Asylum,” *West European Politics* 31(3) (2008): 507.

⁴³⁸ Liv Feijin, “Facing the asylum-enlargement nexus: The establishment of asylum systems in the Western Balkans”, *International Journal of Refugee Law*, 20(3), 2008, 414.

⁴³⁹ Sara Hamood, “EU-Libya Cooperation on Migration: A Raw Deal for Refugees and Migrants?,” *Journal of Refugee Studies* 21(1) (2008), 20-8.

⁴⁴⁰ European Commission, “Communication from the Commission to the Council and the European Parliament on *Regional Protection Programmes*,” COM/2005/0388 final.

⁴⁴¹ Emma Haddad, “The External Dimension of EU Refugee Policy: A New Approach to Asylum,” *Government and Opposition* 43(2) (2008): 204.

for the human rights of refugees need to be evaluated.⁴⁴² Gregor Noll argues that onshore processing provides superior protection guarantees for protection seekers, as it is subject to judicial scrutiny.⁴⁴³

The EU's engagement in protection in regions of origin holds much potential for enhancing the global protection space. However the creation of regional protection initiatives is only morally defensible if they serve to complement a rights-based asylum regime in the EU; such measures cannot replace the EU's primary duty to ensure that refugees are able to access protection on its own territory. The EU's practice of limiting its own protection responsibilities seriously undermines the integrity of its involvement in enhancing protection in regions of origin. Moreover, because the EU is a locus of policy export, its own policies will ultimately have the greatest impact on the international protection regime.⁴⁴⁴ The inevitable transfer of the EU's policies of deterrence and deflection will undermine any efforts to construct rights-based regional protection initiatives in third countries. For example, Tanzania has explicitly used the asylum control practices of the European Union as a justification for its own restrictive practices towards Burundian refugees.⁴⁴⁵

Conclusion

Although, the securitised rhetoric surrounding asylum in the EU has fuelled the misperception that the EU's asylum space is overburdened, the asylum demands on the EU are relatively small. As a point of comparison, the 246,000 asylum claims in

⁴⁴² ECRE, "Protection Beyond Europe," accessed 3 November 2010, http://www.ecre.org/topics/protection_beyond_europe.

⁴⁴³ Gregor Noll, "Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones," *European Journal of Migration and Law* 5(3) (2003), 341.

⁴⁴⁴ Uçarer, "Burden-Shirking, Burden-Shifting, and Burden-Sharing in the Emergent European Asylum Regime," 219.

⁴⁴⁵ Alexander Betts and James Milner, "The Externalisation of EU Asylum Policy: The Position of African States," (Working Paper 36, Centre for Politics, Migration and Society, Oxford, 2006.) www.compas.ox.ac.uk/fileadmin/files/pdfs/WP0636-Betts-Millner.pdf, accessed 1 December 2010, 23.

the EU in 2009 is equivalent to the number of Somali refugees currently housed in the Dadaab refugee camp in Kenya.⁴⁴⁶ The EU in fact has the means and the capacity to provide long-term protection within the European Union to those who are in need of it.⁴⁴⁷ To ensure that its refugee policies reflect the values of fundamental human rights, the EU needs to ensure that its asylum space is accessible. This demands embedding international protection guarantees across the full spectrum of its migration control mechanisms, as well as creating legal channels for refugees to spontaneously access its protection space. Further to this, the EU must comprehensively engage in resettlement programmes, which specifically addresses the plight of those refugees in protracted exile. By implementing these parallel avenues to its own protection area, the EU will lay the foundations for the development of a holistic approach to asylum, which also encompasses extraterritorial protection initiatives. This will see the creation of a morally defensive refugee regime, in which the EU assumes responsibility for a proportion of the global refugee population, commensurate with its protection capacity, and in keeping with fundamental human rights values. The combined effect of these actions will significantly enhance the global asylum regime. However, these mechanisms will only be effective if they complement a functioning ‘single asylum space.’ There are significant flaws in the EU’s common asylum system, which need to be overcome for the EU’s single protection area to be viable. The following chapter will address the urgent need for consistent and full implementation of the supranational asylum provisions across EU Member States. It will also illustrate the necessity for an intra-EU burden-sharing mechanism, to relieve the disproportionate asylum pressure

⁴⁴⁶ ECRE, “The EU Evades its Obligations to protect refugees and trusts Colonel Gaddafi to do the job,” (Editorial, 8 October 2010), accessed 30 October 2010, www.ecre.org/node/1640.

⁴⁴⁷ Garlick, “The EU Discussions on Extraterritorial Processing: Solution or Conundrum?,” 615.

currently faced by certain Member States. These changes are essential to the operability of the EU as a single protection area, and ultimately to the EU's ability to make a meaningful contribution to refugee protection.

Chapter 4:

Towards a ‘Single Asylum Space’?

Introduction

The Common European Asylum System (CEAS) is projected to be fully operational by 2012.⁴⁴⁸ This is a very ambitious deadline. At present, the CEAS is far from complete. The treatment of asylum seekers and the final outcome of asylum applications vary dramatically throughout the EU.⁴⁴⁹ The lack of cohesion within the EU’s asylum space has led the ECRE to describe it as an “asylum lottery.”⁴⁵⁰ This is irreconcilable with the ‘one chance only principle,’ on which the allocation of asylum seekers in the EU’s asylum system is premised. The distribution of asylum seekers amongst Member States is also highly unequal and certain Member States incur disproportionately high asylum costs.⁴⁵¹ The excessive asylum burden incurred by some Member States significantly impairs their capacity to provide effective protection. This wholly undermines the notion of a ‘single asylum space.’ Ultimately, the viability of the EU’s common asylum system hinges on the development of a comprehensive intra-EU burden sharing system, which takes into account the varying reception capacities of individual Member States and ensures that humanitarian obligations are equally distributed throughout the Union.

⁴⁴⁸ Communication from the Commission to the European Parliament and the Council, “An area of freedom, security and justice serving the citizen,” COM (2009) 262/4, 27. Note: The initial deadline for the completion of the CEAS was 2010, but this was postponed to 2012, “European Pact on Immigration and Asylum”, adopted at the Council of European Union Meeting in Brussels, 16 Oct 2008, D/08/14.

⁴⁴⁹ UNHCR, “Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice. Key Findings and Recommendations,” March 2010.

⁴⁵⁰ ECRE, “Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered,” 31 March 2008, accessed 3 November 2010, www.ecre.org/.../Sharing%20Responsibility_Dublin%20ReconsideredEXSUM.pdf.

⁴⁵¹ Thielemann, Williams and Boswell, “What System of burden-sharing between Member States for the reception of asylum seekers?,” 12.

The variable geometry of ‘Fortress Europe’

The variance in recognition rates amongst similar categories of asylum seekers across the EU reveals the extent that asylum policy harmonisation has not been achieved.⁴⁵² For example, the Member State receiving the largest number of Afghani asylum applications had a recognition rate of 44%, while the recognition rate in the country receiving the second largest number of applications was just 1%.⁴⁵³ In recent years the disparity in recognition rates throughout EU Member States has increased.⁴⁵⁴

This marked divergence in practices and standards across Member States is, to a large extent a consequence of gaps in the EU’s asylum legislation. The negotiation of common instruments was characterised by lowest common denominator bargaining, in which minimum standards prevailed.⁴⁵⁵ These cost-benefit calculations have significantly impaired the functionality of the EU’s asylum *acquis*.⁴⁵⁶ The flexibility embedded in the supranational instruments is now seriously impairing the functioning of the EU’s common asylum system. For example, the minimum standards contained in the Qualification Directive allow for wide divergence in practice amongst Member States, which inevitably leads to a variance in recognition rates.⁴⁵⁷ Similarly, the

⁴⁵² UNHCR, “Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice. Key Findings and Recommendations,” March 2010.

⁴⁵³ Didier Bigo, Sergio Carrera and Elspeth Guild, “The Challenge report: Final Policy Recommendations on the Changing Landscape of European Liberty and Security,” (Research Paper 16, CHALLENGE Programme, Centre for European Policy Studies, September 2009), accessed 1 December, 2010, <http://www.ceps.eu/book/challenge-project-final-policy-recommendations-changing-landscape-european-liberty-and-security>, 9.

⁴⁵⁴ Bigo, Carrera and Guild, “The Challenge report: Final Policy Recommendations on the Changing Landscape of European Liberty and Security”, 9.

⁴⁵⁵ Teitgen-Colly, “The European Union And Asylum: An Illusion of Protection,” 1511.

⁴⁵⁶ Eiko R Thielemann, ‘Between Interests and Norms: Explaining Burden Sharing in the EU,’(2003) 16(3) *Journal of Refugee Studies*, 258.

⁴⁵⁷ UNHCR, “Asylum in the European Union: A Study of the Implementation of the Qualification Directive,” 9.

Reception Directive leaves many details up to the discretion of Member States, which allows for inconsistencies.⁴⁵⁸

However, the striking variations in recognition rates also stem from the fact that many Member States have simply neglected to transpose the supranational provisions into their domestic practice.⁴⁵⁹ To achieve a functioning common European asylum system, there is a need for both an upgrade of the existing legislative framework to provide for higher common standards of protection and an improvement in practical cooperation to ensure the implementation of these measures.⁴⁶⁰ Recent developments indicate a growing tendency for Member States to focus on operational coordination of asylum measures in lieu of a harmonised approach.⁴⁶¹ This practice may amplify existing disparities in Member State practice.

The European Asylum Support Office (EASO)⁴⁶² has been developed as a regulatory agency to assist in the synchronisation of asylum practice across the EU. This agency is to be based in Malta, and will become operational in June 2011. It aims to ensure a common EU asylum procedure through practical cooperation on asylum, with a focus on the dissemination of best practice.⁴⁶³ EASO is also intended to support EU Member States whose asylum and reception systems are under particular pressure due to large number of asylum applications. In the short term, EASO will focus on reception and qualification. However in 2013, pending an

⁴⁵⁸ Kelly, "International Refugee Protection: Challenges and Opportunities," 430.

⁴⁵⁹ UNHCR, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice. Key Findings and Recommendations," 4.

⁴⁶⁰ Remarks of United Nations High Commissioner for Refugees António Guterres at the Informal Meeting of EU Ministers of Justice and Home Affairs, Brussels, 15 July 2010, accessed 3 November 2010, <http://www.unhcr.org/4c44034f9.html>.

⁴⁶¹ Sergio Carerra and Elspeth Guild, "The French Presidency's European Pact on Immigration and Asylum: Intergovernmentalism vs. Europeanism? Security vs. Rights?", (CEPS Policy Brief 170, Centre for European Policy Studies, Brussels, September 2008), accessed 3 December, 2010, www.ceps.eu/ceps/download/1372.

⁴⁶² EU Regulation No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office.

⁴⁶³ EU Regulation No 439/2010, para 5.

evaluation, it may play a role in monitoring burden-sharing arrangements, and become involved in intra-EU transfer of asylum seekers.⁴⁶⁴

EASO's role will be limited to coordination; the agency has no decision-making power. Some commentators caution that in focusing on operational coordination, EASO will precipitate a departure from the goal of deeper harmonisation.⁴⁶⁵ As Carl Levy observes that EASO follows in the tradition of "supranational intergovernmentalism," and is therefore unlikely to be effective in ensuring implementation or enhancing asylum capacity building.⁴⁶⁶ ECRE and the UNHCR also caution that the office will only be able to enhance the efficiency of the CEAS as long as it is well resourced, operationally transparent and democratically accountable.⁴⁶⁷ The UNHCR has suggested that, in addition to the asylum support office, the EU should create an asylum authority and a EU asylum court to ensure that the *acquis* is consistently implemented.⁴⁶⁸ Barry Juncker has also highlighted the need for a wholly centralised asylum system in the EU, with a centralised office and uniform asylum laws.⁴⁶⁹

The Dublin Regulation: entrenching imbalances?

It is clear that the EU urgently needs to address the inconsistencies in asylum reception and recognition, which undermine the viability of its common asylum

⁴⁶⁴ Communication from the Commission to the European Parliament and the Council, "An area of freedom, security and justice serving the citizen," COM (2009) 262/4, 27.

⁴⁶⁵ Collett, "Beyond Stockholm: Overcoming the Inconsistencies of Immigration Policy," 28.

⁴⁶⁶ Levy, "Refugees, Europe, Camps/States of Exception: "Into the Zone," the European Union and Extraterritorial Processing of Migrants (Theories and Practice), 116.

⁴⁶⁷ ECRE and UNHCR, "The European Asylum Support Office" Asylum in Europe: Now its up to you," accessed 3 November 2010, www.ecre.org/EP.

⁴⁶⁸ Volker Türk, Director of International Protection, UNHCR, "The Common European Asylum System – a vision for the future," (paper presented at the conference on 'The Common European Asylum System: Future Challenges and Opportunities,' Stockholm 3 November, 2009), 4.

⁴⁶⁹ Barry Juncker, "Burden-Sharing or Burden-Shifting?" *Georgetown Immigration Law Journal* 20(2) (2005-2006): 318.

system. The Dublin Regulation,⁴⁷⁰ which effectively determines the distribution of asylum seekers in the EU, is highly problematic on a number of fronts. Its system of allocation, which generally places responsibility for an asylum seeker with the Member State of first entry, is premised on the equivalent treatment of asylum seekers in all EU Member States. The current variances in reception conditions and asylum assessments across the ‘single asylum space’ potentially leave refugees exposed to *refoulement*.⁴⁷¹

The Dublin Regulation codifies the ‘once chance only’ principle, which was designed to solve the problem of ‘refugees in orbit’ within the EU and to guarantee that each asylum application would be processed.⁴⁷² However, it has emphatically failed to achieve this. Many Member States have failed to implement the Dublin Regulation properly, which has led to cases of applicants unjustifiably being denied access to asylum procedures in the responsible state.⁴⁷³ In some cases, the return mechanism under the Regulation prevents applicants from receiving a substantive assessment of their claims.⁴⁷⁴ As Madeleine Garlick has observed, the Dublin Regulation has entrenched the problem of ‘refugees in orbit’: “some asylum seekers, under the combined effect of Dublin II within the EU and ‘safe third country’ rules for third countries, are being shifted from one state to another in which their claims are never properly examined.”⁴⁷⁵

⁴⁷⁰ (EC) No. 343/2003.

⁴⁷¹ ECRE, “Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered,” 16.

⁴⁷² Olga Sidorenko, *The Common European Asylum System: Background, Current State of Affairs, Future Direction*, (The Hague: TMC Asser Press, 2007), 53.

⁴⁷³ ECRE, “Summary Report on the Application of the Dublin II Regulation in Europe,” March 2006, accessed 3 November 2010, www.ecre.org/.../ECRE%20Dublin%20Report%2007.03.06%20-%20final.pdf (AD2/3/2006/EXT/MH, Mar 2006), 3.

⁴⁷⁴ Madeleine Garlick, “The EU Discussions on Extraterritorial Processing: Solution or Conundrum?,” *International Journal of Refugee Law* 18, (3-4) (2006): 602.

⁴⁷⁵ Garlick, “The EU Discussions on Extraterritorial Processing: Solution or Conundrum,” 608.

Furthermore, the Regulation works against the overarching objective of a common asylum system, as it does not promote intra-EU solidarity.⁴⁷⁶ Its system of allocation entrenches the inherent geographical imbalances of the EU's asylum space. The Dublin system effectively insulates many northern and western European countries from protection obligations, as they are generally reached by overland journeys, meaning that the majority of asylum seekers presenting on their territory have passed through the territory of another Member State *en route*.⁴⁷⁷ This inevitably places the Southern and Eastern Member States at a significant disadvantage, as their geographic location means that they inevitably incur responsibility for a greater number of refugees.⁴⁷⁸ The Dublin Regulation contains no compensatory mechanism to allow for the disproportionate protection obligations inevitably incurred by certain Member States.

The intrinsic flaws in the Dublin mechanism are currently being demonstrated in the return of asylum seekers to Greece, where its overburdened and under-resourced asylum system is incapable of providing adequate protection standards. Greece currently has 52,000 asylum cases pending.⁴⁷⁹ As they await processing, these people are being detained in critically crowded conditions.⁴⁸⁰ Asylum seekers claiming international protection in Greece face serious difficulties in accessing the asylum system and registering a claim in the first instance. Once lodged, their claims risk being unfairly examined. For asylum seekers in Greece there is a dire lack of the requisite procedural safeguards to ensure the correct identification of those in need of

⁴⁷⁶ ECRE, "Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered," 4.

⁴⁷⁷ Garlick, "The EU Discussions on Extraterritorial Processing: Solution or Conundrum," 608.

⁴⁷⁸ Eiko Ralph Thielemann and Torun Dewan, "The Myth of Free-Riding: Refugee Protection and Implicit Burden Sharing," *West European Politics* 29(2) (2006): 13.

⁴⁷⁹ ECRE, "Open letter to EU Governments, Stop sending asylum seekers to Greece," Brussels, 29 October 2010, accessed 31 October 2010, http://www.ecre.org/files/2010_10_29%20Stop%20transfers%20Greece_ECRE.pdf.

⁴⁸⁰ William Spindler, "Greek Studies," *Refuge* 148(4), 28.

international protection, and to prevent violation of the principle of *non-refoulement*.⁴⁸¹

In September 2010, UNHCR described the situation in Greece as a “humanitarian crisis,” and urged other EU Member States not to initiate asylum transfers back to Greece.⁴⁸² The crisis situation in Greece has led the constitutional courts of a number of other Member States to prohibit returns of asylum seekers to Greece and the European Court of Human Rights has issued stays of return in numerous cases pending its examination of the situation.⁴⁸³ There are a series of cases pending before the European Court of Human Rights regarding the risk of breaches of Article 3 of the European Convention on Human Rights⁴⁸⁴ through actual or proposed transfers from other member states to Greece under the Dublin II Regulation.⁴⁸⁵ At the time of writing, Belgium, the UK and the Netherlands had suspended transfers to Greece.⁴⁸⁶

The situation in Greece highlights the imperative for human rights safeguards to be included in the Dublin Regulation. It demonstrates that the Dublin Regulation needs to be tempered with a mechanism to suspend transfers where a Member State has demonstrably reached its protection capacity, or is otherwise failing to provide effective protection. The imbalanced system of allocation of the Dublin Regulation

⁴⁸¹ Amnesty International, “The Dublin Trap: Transfers of Asylum Seekers to Greece,” March 2010, accessed 3 November 2010, www.amnesty.org/en/library/info/EUR25/001/2010/en, 7.

⁴⁸² UNHCR, “UNHCR urges Greece to step up implementation of asylum reform,” 21 September 2010, accessed 2 October 2010, <http://www.unhcr.org/4c98c20b6.html>.

⁴⁸³ Elspeth Guild and Sergio Carrera, “Introduction,” in *The Area of Freedom, Security and Justice Ten Years On: Successes and Future Challenges Under the Stockholm Programme* CEPS, 2010, 9.

⁴⁸⁴ Article 3 of the ECHR provides that “No one shall be subjected to torture or inhuman or degrading treatment or punishment.” This means that any return of an individual from within Europe to a country where they would face a substantial risk of suffering torture, inhuman or degrading treatment or punishment would breach the State’s international human rights law obligations.

⁴⁸⁵ Garlick, “The Common European Asylum System and the European Court of Justice: New Jurisdiction, New Challenges,” 54.

⁴⁸⁶ ECRE weekly bulletin 29 October 2010, accessed 30 October, 2010, www.ecre.org/files/ECRE_Weekly_Bulletin_29_October_2010.pdf.

embodies the politics of deflection, which is inherent to the securitised approach to asylum in the EU.

These deflective dynamics are also highly visible in the accession process. At present, the principal aim is to make candidate states an asylum destination, as raising the protection standards in accession countries substantially increases the pool of states to which asylum seekers can be returned.⁴⁸⁷ The requirements imposed on the EU's peripheral southern and eastern members within the framework of successive enlargement processes has led acceding States to implement asylum policies that outstrip their protection capacity.⁴⁸⁸ The 2004 and 2007 Enlargement processes have expanded the EU to the extent that the external border of the Union is now contiguous with countries, which generate a large number of the world's refugees.⁴⁸⁹ These newer Member States are in many cases unable to cope with the pressure on their newly created asylum systems.⁴⁹⁰ For example, Eastern European Member States lack adequate reception arrangements and procedural safeguards.⁴⁹¹ The dynamics of burden shifting is again being evidenced in the pre-accession process in the Western Balkans, where their asylum systems are being improved, with the explicit aim of making them a region of destination for asylum seekers, instead of transit countries.⁴⁹² This phenomenon of burden shifting through the Enlargement process further

⁴⁸⁷ Rosemary Byrne, *Harmonization and Burden Redistribution Between the Two Europes*, (2003) 16(3) *Journal of Refugee Studies* 336, 348.

⁴⁸⁸ Maurer and Parkes, "The Prospects for Policy Change in EU Asylum Policy: Venue and Image at the European Level," 182.

⁴⁸⁹ Susan Kneebone, "The Legal and Ethical Implications of Extraterritorial Processing of Asylum Seekers: The Concept of Safe Third Country," in *Studies in International Law: Forced Migration, Human Rights and Security*, (Oxford: Hart Publishing, 2008), 134.

⁴⁹⁰ Barry Junker, "Burden-Sharing or Burden-Shifting?" 293.

⁴⁹¹ UNHCR, 10 point plan of Action for Refugee Protection and Mixed Migration for Countries Along the Eastern and Southern Borders of European Union Member States: Söderköping Process, 29 June 2007. Accessed 15 October 2010. www.unhcr.org/ua/img/uploads/docs/tenpointplan.pdf.

⁴⁹² Liv Feijen, "Facing the Asylum-Enlargement Nexus: The Establishment of Asylum Systems in the Western Balkans," *International Journal of Refugee Law* 20(3) (2008): 417.

highlights the need for a reorientation of the deflective approach to asylum, which characterises intra-EU dynamics.

Intra-EU burden-sharing

As the CEAS has been developed, there have been repeated references to solidarity amongst Member States. However, Member States have been reluctant to commit to a comprehensive approach to intra-EU burden sharing, which would provide a tangible demonstration of solidarity.⁴⁹³ In recent years it has become clear that the development of a responsibility sharing mechanism is critical to the functioning of the EU's common asylum system. At present, the share of asylum spending in relation to GDP varies dramatically across Member States. A recent report demonstrated that asylum costs in Malta are a thousand times greater than in Portugal.⁴⁹⁴

The imperative of developing an intra-EU burden sharing mechanism was addressed in the 2008 European Policy Plan on Immigration and Asylum. The Stockholm Programme also places an emphasis on increasing solidarity and burden sharing within the EU. However, a consensus has yet to be reached on which costs should be shared at the European level, and the current proposals being considered by the EU are not sufficiently comprehensive to equalise the asylum burden across Member States.⁴⁹⁵

An intra-EU burden-sharing regime may take many forms. Gregor Noll has categorised asylum burden sharing into three different forms: physical burden-

⁴⁹³ Garlick, "The EU Discussions on Extraterritorial Processing: Solution or Conundrum," 610.

⁴⁹⁴ Thielemann, Williams and Boswell, "What System of burden-sharing between Member States for the reception of asylum seekers?," 145.

⁴⁹⁵ Thielemann, Williams and Boswell, "What System of burden-sharing between Member States for the reception of asylum seekers?," 145.

sharing; financial burden-sharing, and harmonisation of asylum policy.⁴⁹⁶ In the EU, the nascent burden-sharing initiatives have focussed on the two latter options. EU level asylum policy harmonisation emerged from a desire to address the unequal distribution of asylum seekers across the Union.⁴⁹⁷ It has also been shown that while restrictive policy may deter asylum seekers, this is only one factor in an asylum seeker's decision-making process, and may have less of an impact on asylum numbers than previously thought.⁴⁹⁸

The European Refugee Fund (ERF) represents a form of financial burden-sharing to compensate Member States who incur a greater asylum burden.⁴⁹⁹ The fund was initially created in September 2000 in response to the Yugoslav crisis.⁵⁰⁰ The most recent edition, ERF III, was established in 2008, "to demonstrate solidarity between Member States by achieving a balance in the efforts made by those Member States."⁵⁰¹ While this fund provides financial incentives for resettlement, its operating budget is insufficient to the task of equalising the asylum burden in the EU.⁵⁰² For the ERF to be a true burden-sharing instrument, it needs to allocate funds on relative,

⁴⁹⁶ Noll, *Negotiating Asylum, the EU Acquis, Extraterritorial Asylum and the Common Market of Deflection*, 264.

⁴⁹⁷ Eiko Thielemann, "Why Asylum Policy-Harmonisation Undermines Refugee Burden-Sharing," *European Journal of Migration and Law*, 6(1) (2004): 43.

⁴⁹⁸ Eiko Thielemann, 'Between Interests and Norms: Explaining Burden Sharing in the EU,' (2003) 16(3) *Journal of Refugee Studies*, 258.

⁴⁹⁹ Decision 573/2007/EC of the European Parliament and of the Council establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme "Solidarity and Management of Migration Flows" and repealing Council Decision 2004/904/EC of 23 May 2007 (OJ L 144, 6.6.2007).

⁵⁰⁰ Council Decision of 28 September 2000 establishing a European Refugee Fund, OJ 2000 No. L252.

⁵⁰¹ Council Decision 573/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme of Solidarity and Management of Migration Flows and repealing Council Decision 2004/904/EC, OJ L 144, 1.

⁵⁰² Thielemann, Williams and Boswell, "What System of burden-sharing between Member States for the reception of asylum seekers?," 145.

rather than absolute numbers of protection seekers to allow for the varying protection capacity of Member States, depending on their size and economic output.⁵⁰³

In general, provisions for intra-EU burden sharing have focussed on situations of temporary mass influxes of refugees and have remained restricted to the context of temporary protection. The Temporary Protection Directive⁵⁰⁴ provides for transfers, which amount to physical burden sharing, although these putative arrangements are based on the principle of ‘double voluntarism,’ which means that the agreement of both the receiving state and the refugees is required before protection seekers can be moved from one country to another.⁵⁰⁵ The Commission’s proposal for temporary suspension of transfers under the Dublin Regulation, and the potential for EASO to facilitate a voluntary redistribution of asylum seekers also amount to measures grounded in physical burden-sharing.⁵⁰⁶

However, Eiko Thielemann has argued that the EU clearly needs a vastly broader burden-sharing regime than that which currently exists.⁵⁰⁷ Thielemann describes such an approach thus: “[a]n equitable burden sharing regime will require that Member States commit to a collective decision making process, which promotes the well being of others, even where this occurs at significant cost to themselves.”⁵⁰⁸

In his discussion of what form an intra-EU burden-sharing solution might take, Thielemann highlights the need to consider Member States’ reception capacity in

⁵⁰³ Eiko Thielemann and Torun Dewan, “The Myth of Free-Riding: Refugee Protection and Implicit Burden-Sharing, *West European Politics* 29(2) (2006):362.

⁵⁰⁴ Council Directive 2001/55/EC.

⁵⁰⁵ Thielemann and Dewan, “The Myth of Free-Riding: Refugee Protection and Implicit Burden-Sharing, *West European Politics*, 364.

⁵⁰⁶ Thielemann, Williams and Boswell, “What System of burden-sharing between Member States for the reception of asylum seekers?,” 170.

⁵⁰⁷ Eiko Thielemann. “The Future of the Common European Asylum System: In Need of a More Comprehensive Burden-Sharing Approach,” 7.

⁵⁰⁸ Thielemann, ‘Between Interests and Norms: Explaining Burden Sharing in the EU,’ 258.

relative, rather than absolute numbers, using a per capita calculation.⁵⁰⁹ He suggests the development of a mechanism, which allows both for variances in the number of asylum applications received in Member States, and the varying ability of Member States to manage their caseloads. This may involve redistribution mechanisms to equalise numbers or asylum seekers in respective Member States, or it may use a compensatory logic, based on financial considerations.⁵¹⁰

A recent study on the feasibility of burden-sharing mechanisms in the EU concluded that the most effective way to equalise asylum costs throughout the EU would be to create a system for the physical relocation of asylum seekers throughout Member States.⁵¹¹ Physical burden-sharing raises some critical fundamental human rights considerations. ECRE has argued that allocation of asylum seekers must reflect a meaningful connection between the refugee and the host state, or else the Member State of destination must be left to the subjective choice of the refugee.⁵¹²

Gregor Noll argues that intra-EU burden sharing would maximise the protection capacity of the EU by allowing existing resources to be fully exploited.⁵¹³ However, he cautions that discussions surrounding burden-sharing are inherently problematic as they risk obscuring the significant benefits that refugees bring to the host state.⁵¹⁴

The need for a comprehensive approach to burden-sharing in the EU is clear. Equalising the asylum burden across Member States would mitigate the danger of

⁵⁰⁹ Thielemann. "The Future of the Common European Asylum System: In Need of a More Comprehensive Burden-Sharing Approach," 2.

⁵¹⁰ Thielemann. "The Future of the Common European Asylum System: In Need of a More Comprehensive Burden-Sharing Approach," 3-4.

⁵¹¹ Thielemann, Williams and Boswell, "What System of burden-sharing between Member States for the reception of asylum seekers?," 146.

⁵¹² ECRE "Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered," 31 March 2008, accessed 3 November 2010, www.ecre.org/.../Sharing%20Responsibility_Dublin%20ReconsideredEXSUM.pdf.

⁵¹³ Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, 265.

⁵¹⁴ Gregor Noll, "Risky Games? A Theoretical Approach to Burden-Sharing in the Asylum Field," *Journal of Refugee Studies* 16(3) (2003): 237.

protection failures that result from overburdened asylum systems, such as in Greece. It would therefore translate into a significant advancement in protection standards across the 'single asylum space.' The realisation of an intra-EU burden-sharing mechanism will require both a considerable demonstration of solidarity, and the development of asylum legislation, which departs from the cost-benefit approach, which has hitherto influenced the development of the main instruments of EU asylum policy. The current proposals for recasting the main directives contain some positive steps towards achieving this aim. However, harmonised asylum instruments based on common protection standards would provide the ideal platform on which to base an intra-EU burden-sharing mechanism. The institutional changes brought about by the Treaty of Lisbon may facilitate such a further legislative phase.

Conclusion

For the Common European Asylum System to be a viable project, the EU must urgently address the normative and operational inconsistencies, which prevent its asylum system from fulfilling its protection objectives. The EU faces the dual challenges of aligning its supranational asylum instruments with the normative demands of international refugee law, and ensuring that these provisions are implemented consistently across the EU. As part of ensuring consistent practice across its asylum space, the EU needs to develop an intra-EU burden-sharing scheme, which proportionally allocates protection responsibility amongst Member States. For burden sharing to succeed in the EU, compliance structures must be in place to ensure that asylum practice is consistent throughout the EU. It is as yet unclear whether the newly created EASO will be sufficient to the task. The ratification of the Treaty of Lisbon has significantly enhanced the prospects of the EU completing the requisite

legislative changes. It opens the possibility for a new phase of legislative harmonisation for the *acquis*, which would enhance refugees' rights.⁵¹⁵ However, it remains in question whether the EU will be able to capitalise on the political momentum surrounding the Treaty of Lisbon and realise the advanced level of legislative harmonisation necessary for a fully functioning common asylum system. The final chapter will address the scope for the realisation of a fully operational EU rights-based asylum system in the post-Lisbon context.

⁵¹⁵ Elspeth Guild and Sergio Carrera, "Introduction" in *The Area of Freedom, Security and Justice Ten Years On: Successes and Future Challenges Under the Stockholm Programme*, CEPS, 2010, 2.

Chapter 5:

The CEAS in the post-Lisbon environment: challenges ahead

The fundamental challenge in creating a robust refugee policy lies in balancing the tension between the universalist imperative to admit protection seekers and the sovereign prerogative of states to control access to their territory. As Guy Goodwin-Gill has observed: “The art is to translate the rhetoric of human rights protection into a working reality that is commensurate with human dignity, compatible with international obligations and consistent with the rule of law.”⁵¹⁶ The EU has so far emphatically failed to achieve this.

This examination of the protection failings of the EU’s common asylum system has highlighted the urgent need for the EU to ensure that its refugee regime is grounded in fundamental human rights values. The principal barrier to the realisation of a rights-based Common European Asylum System is the security paradigm, which informs EU asylum policymaking. The analysis of the securitisation of asylum in the EU presented in the previous chapters demonstrates how trans-governmental decision-making structures continue to allow refugees to be considered as an exceptional category. It demonstrates how this framing has translated into supranational asylum legislation, which abjectly fails to provide adequate protection safeguards for protection seekers in the EU. Although the EU now has binding supranational legislation in place to cover the full spectrum of its asylum system, the EU’s asylum *acquis* contains significant protection gaps. Moreover, the EU’s

⁵¹⁶ Guy S. Goodwin Gill, “Forced Migration: Refugees Rights and Security,” in *Studies in International Law: Forced Migration, Human Rights and Security*, ed. Jane Mc Adam (Oxford: Hart Publishing, 2008), 17.

indiscriminate use of migration control mechanisms and border controls runs counter to the good faith requirements of refugee protection.

The human rights framework of analysis used in this thesis has revealed the complexity of the questions involved in developing a fair and humane approach to refugee protection in the EU. It shows that a rights-based approach to protection in the EU context demands a multi-dimensional solution, one which extends beyond the refugee protection provisions of the Refugee Convention, and which also encompasses protection in regions of origin. The EU has the potential to develop a comprehensive solution to refugee protection, which engages with the global refugee crisis. This would involve the development of measures to facilitate refugees' access to Europe, as well as a significant expansion of resettlement programmes to provide protection for those refugees in protracted situations. It would also encompass an engagement with the root causes of refugee generation through development assistance. This would translate into a stronger international role for the EU.

The global 'export value' of EU policies means that the EU practice has substantially weakened the asylum norm of the global protection regime. Deflective mechanisms used in the EU are adopted and adapted by other states with the justification that they are used in Europe. Elements of the EU *acquis* have found their way to the Meroscur states of Latin America, even though these states receive relatively few asylum claims.⁵¹⁷

In the first instance, the EU needs to ensure that its own asylum regime is consistent with the protection imperative of international refugee and human rights law, and that these supranational provisions are consistently implemented across the EU. To achieve this, the EU needs to fully develop supranational asylum legislation,

⁵¹⁷ Nicholson, "Challenges to Forging a Common European Asylum System in Line with International Obligations," 532-3.

which guarantees a full and fair examination of asylum claims. The recasting of the Qualification Directive and the Procedures Directive, the planned Resettlement Programme and the Creation of a European Asylum Support Office represent the beginnings of such a shift. A further legislative stage will be necessary to ensure that the EU's asylum *acquis* is fully consistent with the principles of refugee protection.

Furthermore, the EU needs to ensure that its asylum space is accessible. Protection guarantees must be embedded across its entire spectrum of migration control and security mechanisms. For example, EU border policy must be developed with consideration for the indirect impact it will have on the EU's asylum system.⁵¹⁸ Resettlement programmes also need to be expanded to provide protection for those refugees in protracted situation as well as engaging with the root causes of refugee generation. There is also scope for the development of measures, such as an humanitarian visa regime, to facilitate refugees' access to international protection in the EU.

The recent ratification of the Treaty of Lisbon has come at an auspicious moment in the development of the Common European Asylum System. It coincides with the beginning of the AFSJ's new multi-annual programme under the Stockholm Programme. The changes to the decision-making process give the Union the capacity to fully harmonise asylum measures and enhance relevant legislation. The treaty sets an advanced level of harmonisation encompassing "common procedures for the granting or withdrawing of uniform status" as an explicit goal.⁵¹⁹ The European Court of Justice can now rule directly on the legality of the EU's asylum legislation.⁵²⁰ The Treaty of Lisbon represents a unique opportunity to realign the *acquis* of the Common

⁵¹⁸ Collett, "Beyond Stockholm: Overcoming the Inconsistencies of Immigration Policy," 45.

⁵¹⁹ Art 78, Treaty of Lisbon.

⁵²⁰ Lenaerts, "The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice," 271.

European Asylum System with the values of fundamental rights.⁵²¹ It provides the institutional scaffolding for the overhaul of the EU's asylum legislation. The formal recognition of the European Convention on Human Rights and the Refugee Convention provides the foundations from which to build "a true common area of protection and solidarity based on respect for human rights, high standards of protection and a general improvement in the quality of national systems."⁵²²

There remains however, a caveat: the EU's capacity to realise a truly common, coherent and concerted asylum system depends entirely on the political will of Member States. There are some indications that Member States do not possess the political will to fully complete the project of a common asylum system, and are opting for operational coordination, instead of uniform procedures.⁵²³ There have been instances of select groups of Member States engaging in trans-national arrangements such as the Treaty of Prüm,⁵²⁴ with the aim of achieving enhanced cooperation.⁵²⁵ This kind of trans-governmental cooperation calls into question whether Member States have a common approach to asylum as their overarching goal.⁵²⁶ The Treaty of Lisbon allows for this fragmented approach. It allows for increased flexibility in the form of opt-outs, enhanced cooperation, and emergency brakes.⁵²⁷ This may actually amplify

⁵²¹ Collett, "Beyond Stockholm: Overcoming the Inconsistencies of Immigration Policy," 19.

⁵²² European Commission, COM (2009) 262 final, 27.

⁵²³ Collett, "Beyond Stockholm: Overcoming the Inconsistencies of Immigration Policy," 29.

⁵²⁴ Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation particularly in combating terrorism, cross-border crime and illegal migration, Prüm (Germany), 27 May 2005, Council Secretariat, 10900/05, (Brussels, 7 July 2005).

⁵²⁵ Bigo, Carerra and Guild, "The CHALLENGE Project: Final Recommendations on the Changing Landscape of European Liberty and Security," 5.

⁵²⁶ Collett, "Beyond Stockholm: Overcoming the Inconsistencies of Immigration Policy," 15.

⁵²⁷ Elspeth Guild, Sergio Carrera and Thierry Balzacq, "The Changing Dynamics of Security in an Enlarged European Union," (Research Paper 12, CHALLENGE, Centre for European Policy Studies, October 2008), accessed 1 November 2010, www.libertysecurity.org/article2277.html, 13.

the disparities within the EU's asylum system and preclude the realisation of a fully functioning CEAS.⁵²⁸

Nonetheless, the possibility for developing an EU asylum system which is accessible, equitable, and effective has been significantly enhanced by the ratification of the Treaty of Lisbon. The EU now has refugee protection principles enshrined in the Charter of Fundamental Rights, and the Lisbon Treaty. The treaty-based architecture significantly strengthens the legal foundations of the common EU asylum policy.⁵²⁹ The challenge now is to move beyond rhetoric and provide human rights guarantees for refugees, both in the common legislation and in practice. Above all, this demands the eradication of the trans-governmental security frame, which continues to undermine the common approach to asylum in the EU.

This is a critical moment for the global institution of refugee protection. Although the absolute numbers of asylum seekers remain stable, there are fewer and fewer avenues to asylum for those seeking international protection.⁵³⁰ A failure to resolve the global refugee crisis will have far reaching global implications for human security, economic security and political security on a global scale.⁵³¹ The EU's policies of deflection and deterrence, which seek to externalise the responsibility to protect, have badly damaged its image on the world stage, and weakened the global system of protection. Yet, the EU has the potential to lead the world in developing innovative protection tools, which ensure that refugees have access to human rights protection. The Treaty of Lisbon offers a chance for the EU to put its fundamental human rights principles into practice, and ensure that its common approach to asylum

⁵²⁸ Levy, "Refugees, Europe, Camps/States of Exception: "Into the Zone," the European Union and Extraterritorial Processing of Migration (Theories and Practices), 108.

⁵²⁹ Guild and Carrera, "Introduction" in *The Area of Freedom, Security and Justice Ten Years On: Successes and Future Challenges Under the Stockholm Programme*, 2.

⁵³⁰ UNCHR, Press Release: "Upsurge in asylum seekers in industrialised world a myth says UNHCR Chief," 23 March 2010, accessed 3 December 2010, www.unhcr.org/4ba880059.html.

⁵³¹ Helton, *The Price of Indifference*, 301.

reflects the liberal universal values contained in the Refugee Convention. It is essential that the EU use this occasion to reclaim its historical legacy, and develop a rights-based supranational protection regime, which substantially contributes to an equitable global system of refugee protection.

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Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation particularly in combating terrorism, cross-border crime and illegal migration, Prüm (Germany), 27 May 2005, Council Secretariat, 10900/05, (Brussels, 7 July 2005).

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