
Is Europe Living Up to Its Obligations to Refugees?

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Abstract

While Europe is somewhat indeterminate as a legal concept, with respect to refugee law the European Union is the major actor in the region, although the Council of Europe provides protection guarantees for many people who fail to obtain refugee status consequent on the restrictive approach taken in EU Member States. In 2004, the EU finally produced the harmonized policies on qualification for refugee status or subsidiary protection, and on minimum procedures throughout the 25, called for in the 1997 Treaty of Amsterdam. The principal criticism of the approach of the EU towards refugees is that it has combined asylum with immigration. Immigration law is about controlling entry, whereas refugee law is about providing international protection. The absence of a supervisory tribunal to oversee the application of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol has meant that states have developed their interpretations of refugee law independently; harmonization, on the other hand, inevitably leads to equalizing down at the expense of the refugee when it is attempted to attune those independent approaches. Taken together with the link to migration, particularly irregular migration, the focus within the EU is on numbers and on so-called 'bogus' asylum seekers. With an immigration control mentality driving refugee policy, it is little wonder that the approach of the European Union has consisted in part of measures designed to move decision-making to third states.

On one definition of Europe, it stretches from the Aleutian Islands to the Aleutian Islands, as the Organization for Security and Co-operation in Europe (OSCE) includes both the Russian Federation and the United States amongst its participating states.¹ It also includes the five Central Asian Republics. While geographers have never been

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¹ The OSCE is more usually said to stretch from Vancouver to Vladivostok, but that understates the case.

categorical, it is usually stated that the eastern border is the Ural Mountains in Russia; its southern border is formed by the Mediterranean in the west, but there may have been some dispute with respect to the Caucasus in the past.² The European Union in the twentieth century was seen as a Western European organization, but included Finland whose eastern border reached almost to 32°E. In the twenty-first century it is moving eastward and will include Turkey. The Council of Europe was also seen as western, but has included Turkey since its inception, a state that straddles both Europe and Asia; since the 1990s, the Council of Europe has moved eastward, too, and the Caucasian states of Georgia, Armenia and Azerbaijan are members.³ If nothing else is clear, Europe is not easy to define. On that basis, it is difficult to see how one can speak of a European stance on international law and that is particularly true in relation to refugee law – indeed, some European states are source states, transit states and states of destination.

Furthermore, the definition of Europe is so very appropriate for any discussion of the international protection of refugees, given that the wording of the 1951 Convention Relating to the Status of Refugees⁴ as originally drafted only applied to people fleeing persecution in Europe in the aftermath of World War II.

Article 1.B(1) For the purposes of this Convention, the words ‘events occurring before 1 January 1951’ in article 1, section A, shall be understood to mean either (a) ‘events occurring in Europe before 1 January 1951’; or (b) ‘events occurring in Europe or elsewhere before 1 January 1951’; and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

The 1967 Protocol removed the geographical and temporal limitations, but states that had limited the 1951 Convention to Europe could maintain that limitation – the most prominent example of such a continued limitation is Turkey.

For the purposes of this paper, while the Council of Europe and OSCE must be part of any analysis of a European approach to international law with respect to refugees, the main European actor at all levels is the European Union. Therefore, the focus will be upon an examination of the EU approach to the protection of refugees in international law, but it is not limited thereto.

Moreover, while this paper will focus on admission criteria and the procedures for those seeking refugee status, one cannot wholly ignore the fact that the European Union is one of the principal funders of UNHCR’s humanitarian operations. In 2000, the European Community Humanitarian Office (ECHO) was predicted to provide approximately \$1 billion to UNHCR, with individual EU states contributing a further \$1.2 billion; the United States, by way of comparison, planned to give \$1 billion, and

² If Europe is as much a concept as a geographical location, the adoption of the Roman script by Azerbaijan may reflect its decision to be seen conclusively as part of Europe. The western and northern borders of Europe are much easier to demarcate.

³ More whimsically, the Eurovision Song Contest has entries from Israel, but that could hardly be seen as definitive in legal terms.

⁴ 189 UNTS 150. As amended by the 1967 Protocol, 606 UNTS 267.

Japan \$500 million.⁵ Inevitably, funding at such a level – over \$2 billion when ECHO and individual EU state contributions are combined – provides the EU with a great degree of influence in its relationship with UNHCR. The EU's enlarged role as a humanitarian actor was brought to the fore as a result of the conflict in the former Yugoslavia, which conflict also brought home to the EU Member States the problem of mass influx. At the same time as it was providing increased funding to UNHCR for its humanitarian operation in the former Yugoslavia, the EU was drafting policies seeking to keep applicants for refugee status from accessing status determination procedures in Member States. As noted by Gil Loescher, the High Commissioner adopted a cautious approach: 'Having won the confidence of Western States by her active involvement in Bosnia, Ogata did not want to risk losing it again by upsetting governments.'⁶

The current Convention Plus⁷ programme favoured by Ruud Lubbers, the present High Commissioner, also has the potential to water down the legal commitments relating to international protection of states that enter into 'special agreements'. Thus, this analysis of the EU's admissions policies for individual refugees has to be seen in the context of its overall humanitarian programme.

1 The Protection of Refugees in International Law

Before examining the various EU policies, the true nature of protection provided to refugees under the 1951 Convention needs to be set out. The use of the word 'asylum' without any qualification can lead to misconceptions. International law provides for refugee status. There is no right to asylum in international law: if asylum means the grant of permanent residence in a state, that still lies in the discretion of the state.⁸

⁵ See A.C. Helton, *The Price of Indifference: Refugees and Humanitarian Action in the New Century* (2002), at 207–210. The main EU states providing individual funding are Sweden, The Netherlands, Denmark and the United Kingdom.

⁶ G. Loescher, *The UNHCR and World Politics: A Perilous Path* (2001) at 318. Madame Ogata was famously less than enthusiastic about the international legal protection of refugees – see Anonymous, 'The UNHCR Note on International Protection You Won't See', 9 *IJRL* (1997) 267.

⁷ See the fifty-third session of the Executive Committee in October 2002 (A/AC.96/973) at 28 *et seq.*, and later welcomed by the General Assembly (A/RES/57/187).

⁸ Art. 14 of the Universal Declaration of Human Rights, 1948 provides only a right to seek and to enjoy asylum, not a right to asylum. Furthermore, the UDHR is only a General Assembly Resolution and is not automatically legally binding. To be sure, some parts of the UDHR reflect customary international law or have been subsumed within rights in the International Covenant on Civil and Political Rights or International Covenant on Economic, Social and Cultural Rights, but Art. 14 was not included in either Covenant and state practice is not sufficiently consistent to suggest that Art. 14 has achieved customary status. The best that can be said is that aspects of Art. 14 are necessary for the proper implementation of *non-refoulement*. On the other hand, the draft Treaty Establishing a Constitution for Europe, adopted by consensus by the European Convention on 13 June and 10 July 2003 Submitted to the President of the European Council in Rome, 18 July 2003 (2003/C 169/01), provides for a right to asylum in Art. II-18 but continues that it shall be 'guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Constitution' – there is no right to asylum in the 1951 Convention.

Refugee status, therefore, is not necessarily permanent,⁹ although states can grant a right of permanent residence to recognized refugees. The right that Convention refugees do possess is *non-refoulement* under Article 33, the right not to be sent back to a state where the refugee's life or liberty would be threatened. However, if refugee status is accepted to be declaratory rather than constitutive, as is generally acknowledged,¹⁰ then preventing a refugee from accessing the status determination procedures within a state can be the equivalent of *refoulement*; as such, Article 14 of the Universal Declaration of Human Rights, with its right to seek asylum, is a necessary adjunct to *non-refoulement*. Additionally, *non-refoulement* is custom and protects anyone whose life or freedom would be threatened, not just Article 1A.2 refugees who are the beneficiaries of Article 33.¹¹ Customary *non-refoulement* draws on Article 3 of the UN's Convention against Torture¹² and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹³ Returning anyone to where they would face torture, inhuman or degrading treatment or punishment from within Europe would breach the state's international human rights law obligations. In sum, if Europe is to be in breach of international law in the field of refugee protection, it is the standards mentioned above that will be the measure of that breach.

2 Admissions Statistics

Before examining the legal framework pertaining to refugees established by the EU, it is worth noting the number of persons who seek protection annually.

⁹ See Art. 1C of the 1951 Convention, *supra* note 4, especially sub-para. (5).

1C. This Convention shall cease to apply to any person falling under the terms of section A if:

(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or

(2) Having lost his nationality, he has voluntarily reacquired it; or

(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

(5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality.

¹⁰ See para. 28 of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1, 1979 (re-edited 1992).

28. A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.

The best analogy is with going to the doctor with the 'flu – if the doctor tells you that you have the 'flu, that merely recognizes a pre-existing state (I am grateful to Eve Lester, Amnesty International, for this explanation).

¹¹ See Lauterpacht and Bethlehem, "The Scope and Content of the Principle of Non-refoulement: Opinion" in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law* (2003), at 87.

¹² 23 ILM (1984) 1027 and 24 ILM (1985) 535.

¹³ ETS 5 1950.

At the start of the year 2003, the number of people of concern to UNHCR was 20.6 million. They included 10.4 million refugees (51%), 1.0 million asylum seekers (5%), 2.4 million returned refugees (12%), 5.8 million internally displaced persons (28%) and 951,000 others of concern (4%). Asia hosted nearly half of all the people of concern to UNHCR, 9.4 million people or 46%, followed by Africa 4.6 million (22%), Europe 4.4 million (21%), North America and Latin America 1 million each (10%) and Oceania 69,200 (0.3%).¹⁴

More specifically, according to UNHCR,¹⁵ between 1990 and 2003 over 5.2 million asylum applications have been lodged in 14 of the 15 EU Member States.¹⁶ The total for 31 European states as a whole was only 6 million in the same period: Germany accounts for over 2.1 million and the UK over 850,000; Switzerland received 51.33 applications per 1,000 head of population, and Sweden 39.44, the highest in the EU – the average in the 36 most industrialized states in the world¹⁷ was 8.44 applications per 1,000 head of population. Thus, while European numbers pale into insignificance next to the numbers of persons of concern to UNHCR in Asia and Africa, the EU has, at least in the past, been relatively generous. Of deeper concern is the drop in the number of asylum applications in the first few years of the twenty-first century.

Asylum Applications to the EU 2001–2003

(data source: UNHCR, *Asylum Levels and Trends: Europe and non-European Industrialized Countries, 2003*, Table 1 - author's calculations)

	2001	2002	2003	% change 01–03
<i>Austria</i>	30140	39350	32340	7.30%
<i>Belgium</i>	24550	18810	16940	-31.55%
<i>Denmark</i>	12510	6070	4560	-64.08%
<i>Finland</i>	1650	3440	3080	86.67%
<i>France</i>	47290	51090	51360	8.61%
<i>Germany</i>	88290	71130	50450	-43.26%
<i>Greece</i>	5500	5660	8180	48.73%
<i>Ireland</i>	10330	11630	7900	-23.54%
<i>Italy</i>	9620	7280	–	
<i>Luxembourg</i>	690	1040	1550	124.64%
<i>The Netherlands</i>	32580	18670	13400	-59.72%
<i>Portugal</i>	230	250	110	-52.17%
<i>Spain</i>	9490	6310	5770	-39.86%
<i>Sweden</i>	23520	33020	31360	33.33%
<i>United Kingdom</i>	91600	103080	61050	-33.83%
<i>50 Asylum States*</i>	627680	587380	471610	-25.72%

* Forty-four European states plus Australia, Canada, Japan, Korea, New Zealand and the US.

¹⁴ See UNHCR, *Refugees by Numbers 2003*, at 14, available at <http://www.unhcr.ch>.

¹⁵ UNHCR, *Asylum Levels and Trends: Europe and non-European Industrialized Countries, 2003*, Table 2, available at <http://www.unhcr.ch>.

¹⁶ Italy's data for 2003 had not been filed.

¹⁷ The 31 European states plus the US, Canada, Australia, New Zealand and Japan.

While the numbers had dropped generally over the period, it is noticeable that, Sweden apart, the large percentage increases are in terms of hundreds in absolute numbers, while the dramatic reductions are in terms of tens of thousands. The only reassurance is that comparing 2001 only with 2003 masks several large increases in 2002 and such may be repeated in later years. However, nothing is guaranteed.

3 EU Approaches to Refugees

The fundamental criticism of the approach of the EU towards refugees is that it has combined asylum with immigration. Immigration law is about controlling entry, refugee law is about providing international protection.¹⁸ Nevertheless, since the 1980s refugee policy has been seen as a specialized branch of immigration policy. The EU's internal borders policy led to greater restrictions at the external borders, which inevitably impacted upon applicants for refugee status.¹⁹ However, such is hardly surprising. At one level, refugee law since 1945 has been a part of attempts by states to regulate the movements of people across borders.

Tout au long du Xxe siècle, et plus spécifiquement depuis la fin de la seconde guerre mondiale, les Etats ont déployé des efforts et des ressources notables pour fournir une protection internationale aux réfugiés. Leur objectif était double: d'une part préserver la vie et la liberté de personnes dont les droits fondamentaux étaient menacés dans leur pays d'origine; d'autre part, sauvegarder leurs propres intérêts en faisant en sorte que les mouvements de population de grande ampleur soient gérés de manière prévisible et conformément à des principes préétablis.²⁰

Nevertheless, refugee status ought to be about protection. Trying to deal with migration flows that include people claiming refugee status through resettlement programmes for a few would almost inevitably lead to Europe 'cherry-picking' the skilled workers from amongst those displaced, denying the country of origin their expertise if repatriation

¹⁸ NB. Even the European Union's own *Annual Report on Human Rights for 2003* lumps asylum and immigration together – (2003), at 21 *et seq.*

¹⁹ See Noll and Vedsted-Hansen, 'Non-Communitarians: Refugee and Asylum Policies', in P. Alston (ed.), *The EU and Human Rights* (1999) at 361.

If identifying the *demos* is already painstaking at the level of the nation State, these difficulties are amplified in a supranational setting. For all that is certain, the project of a European Union can be described as simultaneously extending and limiting protection. Seen from the perspective of the Member States, the Union is about sharing protection with the populations of the Member States. Seen from outside, the Union appears as a merger of mighty sovereigns promoting protection for its populations at the expense of others.

See also S. Peers, *EU Justice and Home Affairs Law* (2000), at 63–130, esp. 106 *et seq.*

²⁰ E. Barbe and H. Boullanger, *Justice et affaires intérieures dans l'Union européenne* (2002), at 64. 'All through the 20th century, and more specifically since the end of the Second World War, states have made great efforts and deployed more than adequate resources to provide international protection to refugees. There was a twofold objective: on the one hand, to preserve the life and liberty of persons whose fundamental rights were threatened in their country of origin; on the other, to safeguard their own interests in making sure that the mass population flows were carried out in a manner that was foreseeable and in conformity with pre-established principles.' (Author's translation) Arguably, a more coherent EU immigration policy would lead to fewer seeking entry through the backdoor of refugee status, but it could never wholly resolve the problem – the wealth of the EU will always be a lure.

became possible at some point in the future – Europe would take the doctors and engineers, not the unskilled manual labourers. Refugee status should be about protecting individuals regardless of their qualifications.

A EU Asylum Policies

Asylum and immigration issues were transferred to the European Union by the Member States in the 1997 Treaty of Amsterdam.²¹ Article 63 provides:

The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:

1. measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties, within the following areas:

(a) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States,

(b) minimum standards on the reception of asylum seekers in Member States,

(c) minimum standards with respect to the qualification of nationals of third countries as refugees,

(d) minimum standards on procedures in Member States for granting or withdrawing refugee status;

2. measures on refugees and displaced persons within the following areas:

(a) minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection,

(b) promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons;

3. measures on immigration policy within the following areas:

(a) conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion,

(b) illegal immigration and illegal residence, including repatriation of illegal residents;

4. measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States.

Measures adopted by the Council pursuant to points 3 and 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements.

Measures to be adopted pursuant to points 2(b), 3(a) and 4 shall not be subject to the five-year period referred to above.

Not only did the Treaty fuse asylum and immigration inextricably, it called on the European Union to come up with harmonized policies. The absence of a supervisory tribunal to oversee the application of the 1951 Convention Relating to the Status of Refugees²² and its 1967 Protocol has meant that states have developed their interpretations of refugee law independently; harmonization, on the other hand, inevitably leads to equalizing down at the expense of the refugee when it is attempted to attain

²¹ See now, the Consolidated Version of the Treaty Establishing the European Community, OJ 2002 C 325/33.

²² *Supra* note 4. Under Art. 35, UNHCR has overall responsibility for 'supervising the application of the provisions of the [1951] Convention'.

those independent approaches. Taken together with the link to migration, particularly irregular migration, the focus within the EU is on numbers and on so-called ‘bogus’ asylum seekers. With an immigration control mentality driving refugee policy, it is little wonder that the approach of the European Union, as will be seen below, has consisted in part of measures to move decision-making to third states: visa requirements, carrier sanctions and, lately, ‘offshore’ determination.

While the Treaty of Amsterdam marks the start of the current EU-driven policy, the Tampere European Council Meeting of October 1999 added some important parameters for any analysis of the European approach to international refugee law. The Presidency Conclusions provide that the European Council ‘reaffirms the importance the Union and Member States attach to absolute respect of the right to seek asylum’ and that the establishment of the Common Asylum Policy would be ‘based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement’; the Council also stressed ‘the importance of consulting UNHCR and other international organisations’.²³ However, it is the laws, not the statements, by which compliance is judged.²⁴

Furthermore, if one is having regard to how Europe complies with international law, the Treaty of Amsterdam acknowledges that not even all European Union states will necessarily adopt all the measures promulgated thereunder. Article 69 reads:

The application of this title [Visas, Asylum, Immigration and other Policies Related to Free Movement of Persons] shall be subject to the provisions of the Protocol on the position of the United Kingdom and Ireland and to the Protocol on the position of Denmark and without prejudice to the Protocol on the application of certain aspects of Article 14 of the Treaty establishing the European Community to the United Kingdom and to Ireland.

Article 69 reinforces the difficulty in assessing any so-called European-wide level of compliance.

B *Burden-sharing within the Union*

Burden-sharing has been in place in the European Union since the 1990 Dublin Convention.²⁵ More accurately, it should be referred to as a system of burden allocation, since the Dublin Convention provided for determination by the first Member State that the applicant entered. As such, the EU states at the southern and eastern edges

²³ Tampere European Council Presidency Conclusions, 15 and 16 October 1999, paras. 13 and 14.

²⁴ *Cf.* Post-Tampere, the policy seems to have been one of deterrence and keeping potential applicants at ‘an arm’s length’.

The knock on impact has been to drive standards down to ‘lowest common denominator’ policies, undermining access and guarantees of protection for asylum seekers and migrants.

S. Ruxton, *Separated Children and EU Asylum and Immigration Policy* (2003); Garry, ‘Harmonisation of Asylum Law and Policy Within the European Union: a Human Rights Perspective’, 20 *NQHR* (2002) 163.

²⁵ Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities, 30 *ILM* (1991) 425.

had more to lose and so made entry more difficult.²⁶ The first Dublin Convention was replaced by an EU Council Regulation²⁷ in 2003, inevitably known as Dublin II. Article 10 provides that where family reunification does not have priority under Articles 6 to 9, the state first entered from outside the EU shall have responsibility to determine refugee status. Dublin II assumes that there is a common asylum policy throughout the EU because otherwise it would encourage forum-shopping – that Denmark has opted out for the time being while Norway and Iceland, two non-EU Member States, will apply it, once again contradicts this idea of a common European approach. Nevertheless, Dublin II has to be seen alongside the other elements of the common policy, an agreed definition, standard reception conditions and standard procedures. In addition, however, there are other consequences of Dublin II that give rise to concern – visa requirements,²⁸ carrier sanctions, offshore processing, and Eurodac.

Visas and carrier sanctions should be viewed as working in combination to place decision-making about entry back with the state of departure. Articles 62 and 63 of the Treaty Establishing the European Community²⁹ provide that Member States shall have measures for short-term and long-term visas. The European Council at Tampere called for a common active policy on visas.³⁰ While there is nothing wrong with a visa regime so as to control immigration, that the EU ties it so closely to refugee issues in Article 63.3(a) is representative of the failure by EU Member States to acknowledge that refugee status ought to be about protection, not numbers. The impact of the visa regime is made more stark by carrier sanctions. Carrier sanctions are imposed on the airline or ferry company that brings undocumented aliens into the European Union. While applicants for refugee status are exempt, given that the definition of a refugee is not simple, it leaves the staff of the airline or ferry company in the country of departure having to make decisions that potentially leave individuals open to gross human rights violations. As Steve Peers has made clear, the visa regime has been set up in part to reduce the number of asylum seekers reaching the EU – if the potential refugee has no valid entry documentation, it is unlikely that s/he will be able to buy a ticket, let alone board a plane or ferry because the staff will not wish to leave the company open to sanctions.³¹ Europe is not alone in using visas and

²⁶ See, for example, Skordas, 'The New Refugee Legislation in Greece', 11 *IJRL* (1999) 678, at 679–681, and Noll and Vedsted-Hansen, *supra* note 19, at 392 *et seq.*

²⁷ Council Regulation 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ 2003 L 50/1. Denmark has opted out, but Norway and Iceland, non-EU Member States, will apply it.

²⁸ See also the deployment of UK immigration officers to states with which it would be politically inappropriate to impose a visa regime, but whence substantial numbers of applicants for refugee status have emanated. The immigration officers operate under an agreement between the UK and that state as if they were making decisions at a UK port of entry. See *European Roma Rights Centre v. The Immigration Officer at Prague Airport, the Secretary of State for the Home Department and the United Nations' High Commissioner for Refugees (Intervener)*, [2004] QB 811, Court of Appeal. N.B. The Czech Republic is now part of the EU.

²⁹ *Supra* note 21.

³⁰ *Supra* note 23, at para. 22.

³¹ Peers, *supra* note 19, at 107.

carrier sanctions, but it has the most comprehensive regime. Carrier sanctions coupled with visas, by limiting access to EU Member States, prevent refugees obtaining the benefit of *non-refoulement*.³² Given that states have the right to regulate entry through a visa regime, it cannot be seen as *per se* in breach of international law, but its use to reduce the number of applicants for refugee status certainly contravenes the spirit and intent of the 1951 Convention.

Offshore processing, that is, carrying out refugee status determination in a third state outside the EU, is still in its formative stages. Article 3.3 of Dublin II provides that:

Any Member State shall retain the right, pursuant to its national laws, to send an asylum seeker to a third country, in compliance with the provisions of the [1951] Convention.

As long as sending the asylum seeker to the third country would not put her/his life or liberty under threat, then *non-refoulement* is satisfied. Therefore, setting up refugee status determination centres outside the EU does not on its face leave any EU Member State in breach of international law. There is the prior practice of the United States in Guantanamo Bay with Cubans, and Australia in Nauru and Papua New Guinea with applicants for refugee status who arrive by boat.³³ On the other hand, given that refugee status is declaratory, not constitutive, and since the economic, social and cultural rights set out in the 1951 Convention, such as employment and education, presume that such will be met in the country where the application is made, then shipping applicants to remote processing centres may violate these obligations.³⁴

The United Kingdom was one of the prime movers for offshore processing in 2003,³⁵ but the European Commission in a Communication to the Council and European Parliament, whilst accepting the UK's analysis of the issues, held that there were several matters still to be resolved.³⁶ The Commission held there were 10 basic principles of any new EU asylum policy, the most relevant of which for present purposes is the fifth:

5. Any new approach should be built upon a genuine burden-sharing system both within the EU and with host third countries, rather than shifting the burden to them. Any new system should therefore be based upon full partnership with and between countries of origin, transit, first asylum and destination. The necessary involvement of host third countries implies a long lasting process of confidence building and planning.

³² See the judgment of Simon Brown LJ in the *Prague Airport* case, *supra* note 28, at paras. 31–50:

31. That article 33 of the Convention has no direct application to the Prague operation is plain: as Mr Howell QC for the respondents points out, it applies in terms only to refugees, and a refugee is defined by article 1A(2) as someone necessarily 'outside the country of his nationality' (or, in the case of a stateless person, 'former habitual residence'). For good measure article 33 forbids 'refoulement' to 'frontiers' and, whatever precise meaning is given to the former term, it cannot comprehend action which causes someone to remain on the same side of the frontier as they began; nor indeed could such a person be said to have been returned to any frontier.

Laws LJ, dissenting, still agreed with Simon Brown LJ on this point. The House of Lords accepted this analysis too. See [2004] UKHL55, 9 December 2004.

³³ See Magner, 'A Less than "Pacific" Solution for Asylum Seekers in Australia', 16 *IJRL* (2004) 53, at 82 *et seq.*

³⁴ I am grateful to Eve Lester, Amnesty International, for sharing her thoughts with me on this.

³⁵ See letter of the Prime Minister to the EU President, of 10 March 2003.

³⁶ Commission of the European Communities, Towards more accessible, equitable and managed asylum systems, COM(2003)315 final, 3 June 2003, esp. at 11–13.

On the other hand, the Conclusions of the Presidency at the Thessaloniki Council Meeting of 19–20 June 2003 noted that Austria, Denmark, The Netherlands and the United Kingdom in cooperation with UNHCR were investigating methods by which to enhance protection to refugees in their region of origin.³⁷ If offshore processing allows applicants for refugee status to make their claim without having had to travel as far, which journeys always contain some element of danger, then one can recognize some benefit, but if it denies them access to legal advice and to the judicial processes that would be theirs in the EU Member State, then there is a danger that offshore processing is simply a way of offloading a humanitarian crisis onto the poorer states neighbouring the European Union.³⁸ It is worth noting that Australia's offshore processing in Nauru and Papua New Guinea had cost Canberra US\$60 million as of April 2002, 'a cost three times higher than processing on the mainland'.³⁹

Eurodac is directly related to Dublin II. Established under a Regulation of the Council of the European Union, it provides for the 'comparison of fingerprints for the effective application of the Dublin Convention'.⁴⁰ Once more, Denmark has opted out, while Norway and Iceland have opted in, undermining yet again the elusive search for some common European approach in international law. There seems little in Eurodac that offends the Convention Relating to the Status of Refugees, but international human rights law as it pertains to privacy might call into question the 10-year storage period under Article 6 for Article 5.1 data.

While much of Dublin II is simply a question of burden allocation and not in violation of international refugee law, there is one aspect where the state in which the application for refugee status is currently lodged may be seen not to be fulfilling its 1951 Convention obligations in good faith. If the common asylum policy is ever fully established, then one could legitimately claim that a decision in one Member State would be the same as that in any other Member State. As such, returning someone to another Member State to have her/his application assessed would place the applicant in no worse situation. However, it may be that the applicant has already had their application determined in the Member State with responsibility to decide on refugee status under Dublin II – as such, any transfer back to the responsible state means that the state where the applicant is now to be found is putting the individual in a position where s/he potentially will be sent on again without the latter state ever determining her/his refugee status. The distinction may seem slight if not non-existent, but it means that the state where the applicant is now to be found is relying on another state's determination of refugee status and is not having any regard to its obligations under the 1951 Convention – that has already been determined. Only if there was

³⁷ Thessaloniki European Council 19 and 20 June 2003 Presidency Conclusions, at para. 26.

³⁸ Or even further afield; the United Kingdom was considering setting up a camp in Tanzania, but has now scrapped the idea – *The Guardian*, 22 April 2004, 11.

³⁹ Magner, *supra* note 33, at 82.

⁴⁰ Council Regulation 2725/2000 of 11 December 2000, concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, OJ 2000 L 316/1.

absolute harmony in the application of the 1951 Convention in all Member States could one be satisfied that states were satisfying *pacta sunt servanda*.⁴¹

C Reception Conditions⁴²

If one objective is to ensure that there are no pull-factors to draw applicants for refugee status to any one particular EU Member State, then common reception standards are an element of such a policy. Nevertheless, somewhat contrarily, the Council Directive⁴³ provides that Member States can grant more favourable treatment:

Article 4 – More favourable provisions

Member States may introduce or retain more favourable provisions in the field of reception conditions for asylum seekers and other close relatives of the applicant who are present in the same Member State when they are dependent on him or for humanitarian reasons insofar as these provisions are compatible with this Directive.

The Reception Conditions directive deals with information, documentation, residence, freedom of movement,⁴⁴ family unity,⁴⁵ education and schooling, vocational training, employment, medical screening and health care, and housing.⁴⁶ The danger here is that states will drive down the level of implementation.⁴⁷

D Refugee Definition

As stated, there is no international refugee tribunal providing definitive interpretations of the 1951 Convention. The Convention has been developed through domestic courts and tribunals. While those courts and tribunals refer to the decisions in other jurisdictions almost as a matter of course,⁴⁸ there have still been divergent interpretations of such fundamental matters as, for example, who can be a persecutor⁴⁹ and the scope of ‘member of a particular social group’.⁵⁰ Nevertheless, at the Brussels meeting

⁴¹ *Cf. R v. Secretary of State for the Home Department Ex p Adan*, [1999] 1 AC 293; and [2001] 2 AC 477, where the House of Lords held that the approaches of Germany and the United Kingdom were so different that the applicant could not be sent back to Germany.

⁴² See Art. 63.1(b) of the Treaty Establishing the European Community, *supra* note 21.

⁴³ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ 2003 L 31/18.

⁴⁴ In this regard, restrictions on the freedom of movement of applicants for refugee status may contravene Art. 5 and Art. 2, Protocol 4, of the ECHR.

⁴⁵ See also, Council of Europe Recommendation No. R (99) 23 of the Committee of Ministers to member States on family reunion for refugees and other persons in need of international protection, adopted by the Committee of Ministers on 15 December 1999.

⁴⁶ In one sense, it deals with all those aspects of the 1951 Convention that are routinely ignored by refugee lawyers who believe that the Convention only has two provisions, Arts. 1 and 33!

⁴⁷ Skordas and Sitaropoulos, ‘Why Greece is not a Safe Host Country for Refugees’, 16 *IJRL* (2004) 25.

⁴⁸ A state of affairs enhanced by the existence since 1997 of the International Association of Refugee Law Judges that brings together those involved in determination from many States, both common law and civil law – see <http://www.iarlj.nl>.

⁴⁹ See *Adan*, *supra* note 41.

⁵⁰ Compare, *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (1986) with *A-G of Canada v. Ward*, 103 DLR (4th) 1 (1993).

of the Council of the European Union,⁵¹ a draft Council Directive was concluded ‘on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted’.⁵² The Directive was adopted on 29 April 2004, but it is not part of this paper to analyse it in detail, simply to question whether it contravenes international refugee law.⁵³

The most obviously questionable aspect of the Qualifications Directive appears in the title and is expanded upon in Article 2(c): the definition of a refugee applies only to third country nationals. Given that the Brussels meeting included the 10 new EU Member States, it is not at all clear that Roma in some of those states are not subjected to persecution on racial grounds or as members of a particular social group and cannot avail themselves of the proper protection of the state. Furthermore, to exclude from the outset nationals of any other state from the remit of the 1951 Convention violates Article 3, which reads:

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or *country of origin*. (emphasis added)

The Member States of the European Union cannot redefine the application of the 1951 Convention in such a way as to restrict its scope based on country of origin.

The Directive also provides an attempt at setting out the meaning of persecution. Article 9 provides that persecution means acts that are ‘sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights’. The emphasis is placed on non-derogable rights under the ECHR.⁵⁴ However, Article 9.2 gives a non-exhaustive list of examples of persecution, including prosecution or punishment for selective conscientious objection where the military service would include crimes against peace, war crimes or crimes against humanity, and acts of a gender-specific or child-specific nature. If Article 9 is treated as guidance to those determining refugee status, its inclusion causes little concern, but if it is seen as setting out the limit of persecution, then it runs the risk of underestimating the human ability to devise new means to inflict harm on fellow humans. Article 10 expands upon the five grounds for persecution found in the 1951 Convention: race specifically includes ‘membership of a particular ethnic group’; nationality is not confined to citizenship and can again include ethnic identity, even that based on a relationship with a kin-state; political opinions can relate to the state or a non-state actor as persecutor. Where Article 10 may breach international law, though, is with respect to membership of a particular social group. While groups based on sexual orientation are

⁵¹ 25–26 March 2004.

⁵² See Annex 1 to Interinstitutional File: 2001/0207 (CNS), Asile 23 8043/04, 27 April 2004.

⁵³ The draft Directive is, in fact, broader than the 1951 Convention in some regards in that it deals with maintaining family unity in Art. 23. Art. 2(h) defines family members very much in terms of the nuclear family. Nevertheless, it is noteworthy that for once harmonization has not led to a wholesale reduction in rights. In addition, the Directive also provides economic, social and cultural rights for the recipients of either status as well as freedom of movement within the state of refuge – see Art. 32.

⁵⁴ See Art. 15.2 ECHR: the right to life, freedom from torture, inhuman or degrading treatment or punishment, freedom from slavery or servitude, and the non-retroactivity of criminal law.

expressly included as particular social groups, Article 10.1(d) goes on to provide that '[sexual] orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States'. A state cannot use its domestic laws to place limits on its international obligations.⁵⁵ Nor could it ever be asserted that sexual orientation could amount to a serious non-political crime so as to justify exclusion under Article 1F of the 1951 Convention.⁵⁶

Articles 6 and 7 deal with who can be a persecutor and who can protect. Article 6 is not controversial in holding that non-state actors can persecute, although it represents a major shift from previous practice for France and Germany.⁵⁷ Where there is an element of controversy is with respect to protection. Not only can rebel groups offer protection, if such are parties or organizations controlling a substantial part of the territory of the state and operate an 'effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection', but so can international organizations in a similar position of control. It would undoubtedly be seen to include, rightly or wrongly, those situations where the United Nations operates a transitional administration, such as Kosovo.⁵⁸ What it can never be seen to include is a safe haven within a state or, even less so, a refugee camp under the auspices of UNHCR or some other organ of the UN or international organization – such could never be adequate protection.⁵⁹ Associated with Article 7 is Article 8, dealing with internal protection, commonly known as the internal flight alternative but more properly called the internal protection alternative. Although Article 8.1 limits internal protection to those cases where the applicant would be able to go to part of her/his country of origin where 'there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country', paragraph 3 goes on to state that paragraph 1 'may apply notwithstanding technical obstacles to return'. The danger is that the applicant may be expected to return even where the only access to the allegedly safe part of her/his country of origin would be through a non-safe port of entry. The potential for improperly denying international protection through Article 8.3 is so serious that it ought to be removed from the Directive.

The Qualifications Directive also addresses exclusion and removal of *non-refoulement* protection under Articles 1F and 33.2, respectively, of the 1951 Convention.⁶⁰ Article 12 incorporates paragraphs D, E and F of Article 1 of the 1951 Convention. With respect

⁵⁵ Art. 27 Vienna Convention on the Law of Treaties, 1969, 8 ILM (1969) 679.

⁵⁶ Nor is a state permitted to anticipate application of Art. 33.2 even if a crime associated with sexual orientation could ever be described as particularly serious such that the refugee constitutes a danger to the community of the EU state.

⁵⁷ See *Adan*, *supra* note 41. The German Federal Constitutional Court had started this reversal of policy in 2000 – see the Decision of 10 August 2000, 2 BvR 260/98 and 2 BvR 1353/98.

⁵⁸ *Dyli v. Home Secretary*, [2000] INLR 372. NB. *De jure*, Kosovo is still part of Serbia and Montenegro.

⁵⁹ See Landgren, 'Safety Zones and International Protection: A Dark Grey Area', 7 *IJRL* (1995) 436; Mooney, 'Presence Ergo Protection? UNPROFOR, UNHCR and the ICRC in Croatia and Bosnia-Herzegovina', 7 *IJRL* (1995) 436; Oswald, 'The Creation and Control of Places of Protection during United Nations Peace Operations', 83 *IRRC* 1013 (2001).

⁶⁰ Arts. 14(4) and 21.2 dealing with Art. 33.2 of the 1951 Convention do not raise any major concerns.

to Article 1F, paragraphs 2 and 3 add text to the original, some of which may give rise to questions. While it is commendable to see that ‘particularly cruel actions’ committed with a political motive may be classified as serious non-political crimes, in practice this express statement will make little difference given that most European states use a proportionality test in their parallel extradition law when determining the political character of any crime for which a transnational fugitive offender is requested.⁶¹ It is also good that the purposes and principles of the United Nations are explicitly related to the Preamble and Articles 1 and 2 of the UN Charter.⁶² Furthermore, it will be interesting to see how Article 12.3 is used. On one reading, mere membership of an organization engaged in crimes against humanity or war crimes or serious non-political crimes may no longer be sufficient to justify exclusion: paragraph 2 is to apply to persons ‘who instigate or otherwise participate in the commission of the crimes or acts . . .’. Only for very senior members of the organization could one automatically attribute instigation through their membership.⁶³ The principal concern with Article 12.2, however, pertains to the time at which Article 1F should be applied. Under subparagraph (b) of Article 12.2, the commission of the serious non-political crime ‘prior to his or her admission as a refugee’ in Article 1F(b) ‘means the time of issuing a residence permit based on the granting of refugee status’. Refugee status is declaratory, not constitutive, as is explicitly stated in paragraph 14 of the Preamble, so when the applicant first applied s/he was a refugee, it was simply that the host state had not acknowledged this. The wording of Article 12.2(b), though, would allow the Member State to exclude an applicant for a serious non-political crime committed outside the country of refuge, but in between applying for refugee status and the residence permit being granted – such crimes should be dealt with under Article 33.2, not Article 1F of the 1951 Convention, and loss of *refoulement* protection should only arise if the applicant’s crime outside the Member State renders her/him a danger to the community of that country.

Article 11 of the Qualifications Directive deals with cessation under Article 1C of the 1951 Convention. Cessation under paragraph 1C(5), where the refugee ‘can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of nationality’, is exceedingly complex.⁶⁴ That there is no express reference to Member States having to consult with UNHCR is disconcerting,

⁶¹ See G. Gilbert, *Transnational Fugitive Offenders in International Law* (1998), Ch.6.

⁶² NB. Not all elements of the Preamble or Charter could give rise to acts of which the applicant could be ‘guilty’ – Art. 1F(c) still requires individual criminality before exclusion.

⁶³ Compare *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3 at para. 110; Refugee Appeal No.70405/97, New Zealand RSAA 29 May 1997; *Paez v. Sweden*, Application 29482/95, European Commission of Human Rights 18 April 1996 (struck out on 30 October 1997); *Mohamed Zrig v. The Minister of Citizenship and Immigration*, [2003] FCA 178, 7 April 2003; *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306 (CA). See also, UNHCR Guidelines on International Protection: Application of the Exclusion Clauses, HCR/GIP/03/05, 4 September 2003, with accompanying Background Note – paras. 106 and 109.

⁶⁴ See Fitzpatrick and Bonoan, ‘Cessation of Refugee Protection’, in Feller, Türk and Nicholson, *supra* note 11, at 491.

therefore; some EU Member States have proved very willing to return those receiving temporary protection very soon after a conflict has officially come to an end. It would also have been good to see the proviso to Article 1C(5) being incorporated. While it only expressly applies to Statute refugees under Article 1A(1), not Convention refugees under Article 1A(2), there is growing evidence that cessation in general should not occur where the refugee 'is able to invoke compelling reasons arising out of previous persecution for refusing to avail her/himself of the protection of the country of nationality'.⁶⁵

The 1951 Convention does not provide for how states are to determine refugee status, but as stated at paragraph 189 of the UNHCR Handbook:⁶⁶

It is... left to each Contracting State to establish the procedure that it considers the most appropriate, having regard to its particular constitutional and administrative structure.⁶⁷

Some aspects of Article 4 of the Directive leave something to be desired in terms of substance and, simultaneously, vagueness.⁶⁸ Substantively, Article 4.1 allows states to impose a duty on the applicant to submit all elements needed to substantiate the claim for international protection 'as soon as possible'. As those involved in status determination know, however, where the applicant is fleeing some personal traumatic event, almost a *sine qua non* for refugee status, then information comes out over a period of time as the applicant's sense of security strengthens.⁶⁹ This increase of information already calls into question credibility as it suggests that the applicant is trying to enhance her/his story.⁷⁰ Article 4.1 now adds to the vague issues surrounding credibility: a duty to act in a way that wholly ignores the effects of the very persecution that would justify refugee status.

The other problem with Article 4 is paragraph 4.

The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded

⁶⁵ See Milner, 'Exemption from Cessation of Refugee Status in the Second Sentence of Article 1C(5)/(6) of the 1951 Refugee Convention', 16 *IJRL* (2004) 91. Art. 11.2 provides as follows:

2. In considering points (e) and (f) of paragraph 1 [1C(5) and (6)], Member States shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded.

While that might seem to meet the criticism, it fails, in fact, to address the real concern. The proviso to Art. 1C(5) accepts that the fear may not be well-founded, but that past history has placed an unbridgeable gulf between the refugee and the country of nationality.

⁶⁶ *Supra* note 10.

⁶⁷ See, for example, *European Roma Rights Centre et al. v. Immigration Officer at Prague Airport and Secretary of State for the Home Department*, (Admin Ct) 8 October 2002, at para. 10. NB. Art. 32 of the 1951 Convention, dealing with expulsion, does provide some procedural guarantees.

⁶⁸ Art. 4 is a curate's egg, good in parts; para. 3(c) provides that states are to take into account: the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicants' personal circumstances, the acts to which he or she has been or could be exposed would amount to persecution or serious harm.

⁶⁹ See Herlihy, 'Evidentiary Assessment and Psychological Difficulties', in G. Noll and A. Popovic, *Evidentiary Assessment and Asylum* (expected later in 2004).

⁷⁰ See Art. 4.5(e) for how credibility can be central to success.

fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

While it is not objectionable in and of itself, if those responsible for status determination infer mistakenly that where an applicant has had no such prior experience then her/his fear is not well-founded, there is a danger that everything will turn on previous experience, not what will happen if s/he is returned.

As well as setting out the basics of refugee status, the Qualifications Directive also sets out the minimum standards for qualifying for subsidiary protection status. It has to be noted at the outset that this is a status and that there may be others who cannot be *refoulé* because of human rights considerations but who do not qualify for subsidiary protection status. Subsidiary protection is to be offered to those who do not qualify for refugee status, but where the applicant would, according to Article 2(e), 'face a real risk of suffering serious harm' if returned. Serious harm is defined in Article 15.

Serious harm consists of:

- (a) death penalty or execution; or
- (b) torture or inhuman or degrading treatment or punishment of an applicant in his or her country of origin; or
- (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. (footnote omitted)

As far as it goes, there is little with which to quibble, although one would have wanted to see, in addition, references to slavery or servitude, and that *incommunicado* detention can leave the detainee open to torture or other inhuman or degrading treatment or punishment. Furthermore, it has been held that racial discrimination can amount to degrading treatment for the purposes of Article 3 of the ECHR, although the same is not necessarily true of other forms of discrimination.⁷¹ However, the main problem with subsidiary protection status is to be found in Article 17. Article 17 allows for exclusion from subsidiary protection. Moreover, while much of it mirrors Article 1F or 33.2 of the 1951 Convention, there are some significant differences. Article 1F(b) speaks of there needing to be serious reasons for considering that the applicant for refugee status committed a serious non-political crime prior to entry to the country of refuge before s/he should be excluded, whereas Article 17.1(b) only

⁷¹ See *Cyprus v. Turkey*, Application 25781/94, European Commission of Human Rights, adopted on 4 June 1999, at para. 499; European Court of Human Rights (Grand Chamber), 10 May 2001, at paras. 310 and 311.

309. For the Court it is an inescapable conclusion that the interferences at issue were directed at the Karpas Greek-Cypriot community for the very reason that they belonged to this class of persons. The treatment to which they were subjected during the period under consideration can only be explained in terms of the features which distinguish them from the Turkish-Cypriot population, namely their ethnic origin, race and religion. The Court would further note that it is the policy of the respondent State to pursue discussions within the framework of the inter-communal talks on the basis of bi-zonal and bi-communal principles. . . . The respondent State's attachment to these principles must be considered to be reflected in the situation in which the Karpas Greek Cypriots live and are compelled to live: isolated, restricted in their movements, controlled and with no prospect of renewing or developing their community. The conditions under which that population is condemned to live are debasing and violate the very notion of respect for the human dignity of its members.

requires that there be serious reasons for considering that ‘he or she has committed a serious crime’. Equally, Article 33.2 of the 1951 Convention demands that the refugee has been convicted by a final court of a particularly serious crime and constitutes a danger to the community. Article 17.1(d) of the Directive only requires serious reasons for considering that ‘he or she constitutes a danger to the community’. Exclusion from subsidiary protection status is much less demanding than under the 1951 Convention. However, the worst aspect of Article 17 is that it undermines the absolute prohibition on surrender to face torture. While Article 17 deals with exclusion from subsidiary protection, a status under the Directive, paragraph 9 of the Preamble makes clear that such persons might still be allowed to remain, they just fall outside the remit of the Directive.

Those third country nationals or stateless persons, who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds, fall outside the scope of this Directive.

However, it would seem from the wording of the Preamble that Member States are acting on a compassionate or humanitarian basis in allowing someone who does not qualify for subsidiary protection status under the Directive to remain. In reality, the Member States are under a *legal* obligation not to *refoule* the applicant as a consequence of their international obligations under the ECHR, Article 3 of the Convention against Torture and customary international law.⁷² The Directive as drafted is seriously misleading about the scope of the Member States’ international legal obligations.

Finally on the Directive, in a document intended to create a harmonized and common approach, it is again made possible for national variations to emerge,⁷³ once more calling into question whether there is a so-called European approach to international law and the protection of refugees.

E Minimum Procedures

The most generous definition of refugee status would still fail to provide international protection if the standards for asylum procedures did not guarantee that the applicant could access her/his rights. The draft minimum standards for asylum procedures directive was subjected to heavy criticism⁷⁴ prior to the Brussels meeting of the Council of the European Union in March 2004 and was only finalized at the end of

⁷² See Lauterpacht and Bethlehem, *supra* note 11.

⁷³ See Art. 3, More Favourable Provisions

Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and in determining the content of international protection, in so far as those standards are compatible with this Directive.

⁷⁴ See the joint letter from ECRE, ILGA Europe, Amnesty International, Pax Christi International, Human Rights Watch, the Quaker Council for European Affairs, CARITAS Europe, Médecins Sans Frontières, the Churches’ Commission for Europe, and Save the Children to Antonio Vitorino of the European Commission, dated 22 March 2004, available at <http://www.ecre.org>, and UNHCR’s Notes on key issues of concern on the draft Asylum Procedures Directive, March 2004, along with the press release from High Commissioner Lubbers of 29 March 2004, available at <http://www.unhcr.ch>.

April 2004.⁷⁵ The principal concerns with respect to the March draft⁷⁶ related to safe third countries, safe countries of origin and removal before appeal. Given the definition of *non-refoulement*, there is nothing intrinsically wrong with returning anyone to a safe third country. However, the March proposal before the Brussels meeting of the Council of the European Union denied all applicants arriving from designated safe third countries access to the status determination process.⁷⁷ As such, it would have applied indiscriminately and would have denied a true refugee the opportunity to prove that the ordinarily safe third country was not safe in her/his case.⁷⁸ Given the very minimal criteria needed for a third country to be designated safe in terms of international refugee law and international human rights law, the draft Directive would have left Member States in breach of their obligations under the 1951 Convention.⁷⁹ The April Draft provides in Article 27.2(c) as follows:

27.2 The application of the safe third country concept shall be subject to rules laid down in national legislation, including:

(c) rules, in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment.

As long as the minimum does not become the norm, then this new concession is welcome.

The other aspect of the asylum procedures directive that has given serious cause for concern relates to the appeals procedure.⁸⁰ According to UNHCR, 'the vast majority of rejected asylum seekers who lodge an appeal will not be permitted to remain in the European Union until their appeals are decided'. The consequences would be

⁷⁵ Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, Interinstitutional File: 2000/0238 (CNS), 8771/04 Asile 33, Brussels 30 April 2004.

⁷⁶ March 2004 amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, Interinstitutional File: 2000/0238 (CNS), 7184/1/04 REV 1 Asile 13, Brussels, 17 March 2004.

⁷⁷ See Art. 28.1(c) and 28.2 – deleted from the April draft.

⁷⁸ Equally, the safe country of origin concept has been drafted so as to include not just the country of nationality, but any other country in which the applicant might reside. Given that Arts. 28A and 28B allow for the designation of a country of origin as safe without the procedural safeguards that apply to safe third countries, this is in some ways even more disconcerting.

⁷⁹ See Art. 27.3:

3. A third country can only be designated or considered as a safe third country where a Member State is satisfied that persons seeking asylum are generally treated in accordance with the following principles:

(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; and

(b) the principle of non-refoulement in accordance with the Geneva Convention is respected; and

(c) the prohibition on removal in breach of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law is respected; and

(d) the possibility exists to request and be granted recognition as a refugee in that third country.

⁸⁰ Art. 39.2 of the March draft allowed Member States to remove an applicant appealing against a refusal where the application for asylum was 'unfounded'. – Art. 39 has been deleted from the April draft.

that the applicant would potentially be denied an effective remedy,⁸¹ including access to legal advice, and, more seriously, that someone could be returned to a state where their life or freedom is threatened because the initial decision turns out to be erroneous.

F *Temporary Protection*

The final element of the EU's asylum policies to be considered concerns temporary protection – international protection, but not refugee status. The Temporary Protection Directive was adopted by the Council in July 2001.⁸² EU Member States developed temporary protection as a response to the mass influxes from the conflicts in the former Yugoslavia. However, rather than seeing it in a positive light and despite Article 3.2, that provides that 'Member States shall apply temporary protection with due respect for human rights and fundamental freedoms and their obligations regarding non-refoulement', it needs to be seen as a means by which refugee status could be denied. Temporary protection does not accord the rights attaching to refugee status and can be revoked when the state of refuge so decides:

Article 6

1. Temporary protection shall come to an end:

- (a) when the maximum duration has been reached;⁸³ or
- (b) at any time, by Council Decision adopted by a qualified majority on a proposal from the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council.

2. The Council Decision shall be based on the establishment of the fact that the situation in the country of origin is such as to permit the safe and durable return of those granted temporary protection with due respect for human rights and fundamental freedoms and Member States' obligations regarding non-refoulement. The European Parliament shall be informed of the Council Decision.

While it responds swiftly to mass influx, it could deny access to the refugee status determination process. Article 3.1 expressly provides that 'temporary protection shall not prejudice recognition of refugee status under the [1951] Convention', but it does not render those within its remit *prima facie* refugees. There is no incentive in the EU Member State to push any person with temporary protection through the refugee status

⁸¹ See Art. 13 ECHR and *Conka v. Belgium*, Application 51564/99, European Court of Human Rights (Third Section), 5 February 2002, as well as Art. II-47 of the EU Constitution, *supra* note 8. Cf. Art. 38.3 of the April draft Directive.

38.3 Member States shall, where appropriate, provide for rules in accordance with their international obligations dealing with:

(a) the question of whether the remedy pursuant to paragraph 1 shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome.

⁸² Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ 2001 L 212/12.

⁸³ Author's footnote – it is initially granted for one year under Art. 4.

determination process.⁸⁴ On the other hand, it does provide a positive list of rights for those requiring temporary protection.

Finally, like several other parts of the *common* asylum policy, the temporary protection directive has seen Ireland and Denmark opt out and Member States can retain or adopt more favourable conditions under Article 3.5.

G The European Court of Justice

Prior to the Treaty of Amsterdam,⁸⁵ the ECJ had no competence with respect to matters of refugee status. However, once it became part of the first pillar, cases could be referred. At one level, therefore, the European Union has established the first international refugee tribunal. However, refugee cases are still not treated like other European Union issues that can go before the ECJ.

Article 68

1. Article 234 shall apply to this title under the following circumstances and conditions: where a question on the interpretation of this title or on the validity or interpretation of acts of the institutions of the Community based on this title is raised in *a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law*, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

...

3. The Council, the Commission or a Member State may request the Court of Justice to give a ruling on a question of interpretation of this title or of acts of the institutions of the Community based on this title. The ruling given by the Court of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become *res judicata*. (emphasis added)

Article 234 of the Treaty Establishing the European Community⁸⁶ allows referral to the ECJ from any court or tribunal in the Member State, whereas Article 68 is limited to courts or tribunals ‘against whose decisions there is no judicial remedy under national law’. Furthermore, Article 234 provides lower courts with a discretion as to whether to refer, but a court or tribunal ‘against whose decisions there is no judicial remedy under national law, that court or tribunal *shall* bring the matter before the Court of Justice’; Article 68 gives such courts and tribunals a discretion to refer ‘if it considers that a decision on the question is necessary to enable it to give judgment’. As Noll and Vedsted-Hansen make clear, if national courts of final jurisdiction have a discretion in the area of asylum, then harmonization will be more difficult to achieve.⁸⁷

⁸⁴ Indeed, there may be a disincentive to apply for refugee status because Member States can provide that temporary protection status cannot be enjoyed concurrently with an application for refugee status – Art. 19.1.

⁸⁵ *Supra* note 21.

⁸⁶ *Ibid.*

⁸⁷ *Supra* note 19 at 373–374.

H Conclusion on the European Union and the Protection of Refugees in International Law

Although there are frequent references to the 1951 Convention and Brussels is now meant to consult with UNHCR, the overall effect of the move towards a common asylum policy has been to restrict access to the European Union by those who qualify as refugees. The intertwining of refugee and immigration policies makes protection subordinate to numbers. However, given that there are still the same number of people needing protection from persecution, the EU is simply pushing people further away and into dependency on states that have fewer resources with which to cope and where the guarantees provided to the refugee are weaker, a problem that will only worsen as the EU expands. Even where displaced persons make it to the European Union, the common reception standards are little more than minimal, they may well be given only temporary protection and, if rejected for refugee status, forced to appeal from outside the European Union. And to cap it all, the so-called common asylum policy has opt-outs for the United Kingdom, Ireland and Denmark, of which the last-mentioned state especially, has made use.

4 The OSCE and the Council of Europe

The Organization for Security and Co-operation in Europe (OSCE) is best known for its work with minorities and in post-conflict societies. In both areas, the displacement of persons is often the natural corollary. The OSCE has, therefore, developed policies relating thereto. In April 1993, a Human Dimension Seminar was held in Warsaw on Migration, Refugees and Displaced Persons.⁸⁸ This seminar was designed to build on the attention given to refugees and displaced persons at the Helsinki 1992 Follow-Up meeting.⁸⁹ The focus in Helsinki was on preventive action, but it did recognize the need for international cooperation, particularly with UNHCR, the ICRC and other organizations dealing with refugee flows. The Warsaw Seminar opened with an address by the Director General of the International Organization for Migration, which ranged from preventing root causes to repatriation.⁹⁰ Discussion Group 2, however, looked at issues surrounding mass influxes.⁹¹ The OSCE has not adopted a primary role with respect to refugee flows,⁹² recognizing the expertise and experience of other organizations and institutions; its main work will continue to be in preventive diplomacy. It has next to no role in dealing with individual applicants for refugee status.

The Council of Europe, on the other hand, has refugee-specific policies and the European Convention for the Protection of Human Rights and Fundamental Freedoms,

⁸⁸ See R. Brett and E. Eddison, *Migration, Refugees and Displaced Persons*, Papers in the Theory and Practice of Human Rights No.4, University of Essex Human Rights Centre (1993).

⁸⁹ The Helsinki Document 1992, *The Challenges of Change*, 13 HRLJ (1992) 284, §VI The Human Dimension, paras. 39–46.

⁹⁰ See Brett and Eddison, *supra* note 88, at 4–5.

⁹¹ *Ibid.* at 7–9.

⁹² Although it did appoint a Migration Adviser at ODIHR whose work has been commended at the 1996 Lisbon Summit – Lisbon Document 1996, DOC.S/1/96, 3 December 1996, I Declaration, para. 10.

although it does not refer to refugees, has provided the legal basis for protecting persons falling outside the 1951 Convention. The Committee of Ministers as far back as 1984 called on Member States of the Council of Europe never to refuse a person admission at their frontier, to reject, expel or subject her/him to 'any other measure' simply because they have not been formally recognized as a refugee which would have the result of returning them to a territory where they would have a well-founded fear of persecution – interdiction on the high seas may well fall within this exhortatory recommendation.⁹³ In 1997, the Committee of Ministers laid down criteria for designating a third country safe.⁹⁴ The contrast with Article 27 of the draft Asylum Procedures Directive of the European Union is stark.⁹⁵ Whereas the latter requires only that the applicant's life or liberty would not be threatened for one of the five 1951 Convention grounds, that s/he would be free from torture, inhuman or degrading treatment, that the principle of *non-refoulement* is respected, that refugee status can be granted in this third country, and that the Member State has regard to whether the third state has ratified the 1951 Convention, the Council of Europe document is much more extensive:

I. In order to assess whether a country is a safe third country to which an asylum-seeker can be sent, all the criteria indicated below should be met in each individual case:

- a) observance by the third country of international human rights standards relevant to asylum as established in universal and regional instruments including compliance with the prohibition of torture, inhuman or degrading treatment or punishment;
- b) observance by the third country of international principles relating to the protection of refugees as embodied in the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, with special regard to the principle of non-refoulement;
- c) the third country will provide effective protection against refoulement and the possibility to seek and enjoy asylum;
- d) the asylum-seeker has already been granted effective protection in the third country or has had the opportunity, at the border or within the territory of the third country, to make contact with that country's authorities in order to seek protection there before moving on to the member State where the asylum request is lodged or, that as a result of personal circumstances of the asylum-seeker, including his or her prior relations with the third country, there is clear evidence of the admissibility of the asylum-seeker to the third country.

While it is always easier to be more expansive in a mere recommendation than in a legally binding document, it is hard to understand why the EU document could not have provided the same criteria to be applied to a state before it was deemed safe to return someone. The minimalism of the EU draft Directive suggests it was deliberately drawn up to allow as many states as possible to be deemed safe third countries rather than giving the safety of the applicant for refugee status the higher priority.

⁹³ Recommendation No.R (1984) 1 of 25 January 1984 on the Protection of Persons Satisfying the Criteria in the Geneva Convention who are not Formally Recognised as Refugees.

⁹⁴ Council of Europe Committee of Ministers, Recommendation No. R (97) 22 Containing Guidelines on the Application of the Safe Third Country Concept, adopted by the Committee of Ministers on 25 November 1997.

⁹⁵ *Supra* note 75.

The Committee of Ministers of the Council of Europe has also addressed temporary protection.⁹⁶ Along with Australia and Antarctica, Europe is the only continent not to have put in place, at least in part, a broader regional definition of refugee status that recognizes those fleeing external aggression, occupation, or events seriously disturbing public order;⁹⁷ and the former two continents have not seen quite so much practical need therefore. This Recommendation goes some way to addressing the gap. Along with the Recommendation on Subsidiary Protection,⁹⁸ it addresses the narrowness of the 1951 Convention. It also reinforces ‘the absolute character of Article 3 of the ECHR’ (paragraph 3).

The final Council of Europe Recommendation to be noted concerns detention of asylum seekers.⁹⁹ Under paragraph 3, detention is permissible where the applicant has no documents or such documents as s/he possesses are false and identity still has to be verified, while elements of the asylum claim have to be determined which can only be determined while s/he is detained, when a decision on the right to enter is still pending, or when protection of national security and public order so requires. Even in these cases, however, the following criteria apply:

4. Measures of detention of asylum seekers should be applied only after a careful examination of their necessity in each individual case. These measures should be specific, temporary and non-arbitrary and should be applied for the shortest possible time. Such measures are to be implemented as prescribed by law and in conformity with standards established by the relevant international instruments and by the case-law of the European Court of Human Rights.

...

6. Alternative and non-custodial measures, feasible in the individual case, should be considered before resorting to measures of detention.

...

9. Measures of detention should be implemented in a humane manner, respecting the inherent dignity of the person and in accordance with applicable norms of international law and international standards.

...

16. Detained asylum seekers should have the right to contact a UNHCR office and the UNHCR should have unhindered access to asylum seekers in detention.

17. Detained asylum seekers should also have the right to contact a legal counsellor or a lawyer and to benefit from their assistance.

Such policies, if implemented, would go a long way to treating all applicants for refugee status humanely and with dignity.

⁹⁶ Recommendation No. R (2000) 9 of the Committee of Ministers to member States on temporary protection, adopted by the Committee of Ministers on 3 May 2000.

⁹⁷ See 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45; 1984 Cartagena Declaration on Refugees, OAS/Ser.L/V/II.66, doc.10, rev.1, 190; Asian-African Legal Consultative Organization, ‘Final Text of the AALCO’S 1966 Bangkok Principles on Status and Treatment of Refugees’ as adopted on 24 June 2001 at the AALCO’S 40th session, New Delhi, available at www.aalco.org - Australia and New Zealand have observer status at AALCO.

⁹⁸ Council of Europe, Recommendation Rec (2001)18 of the Committee of Ministers to member States on subsidiary protection, adopted by the Committee of Ministers on 27 November 2001.

⁹⁹ Recommendation Rec (2003)5E of the Committee of Ministers to member States on measures of detention of asylum seekers, adopted by the Committee of Ministers on 16 April 2003.

In conclusion on the Council of Europe, however, it is its general protection under the ECHR that has done most to protect the individual against the state and to ensure *non-refoulement*.¹⁰⁰ As the European Court of Human Rights has noted, Article 3 of the ECHR is broader than Article 33 of the 1951 Convention and for Member States of the Council of Europe, its absolute character is paramount. It has protected those accused of terrorism, those threatened by non-state actors and those fleeing armed conflict in fragmented states. In Europe, the ECHR provides much greater protection than the 1951 Convention . . . and therein lies a fundamental problem.

5 Conclusion

It is difficult to speak of a European approach to the protection of refugees in international law – there are so many ‘Europes’. Even where one is dealing with a very specific European body such as the European Union, some states can opt out and other non-EU states have opted in. The fusion of refugee protection with immigration control is now firmly established, despite the danger that it presents that EU states will choose who should be protected within the EU. What is clear is that the EU is seeking more and more to keep all those seeking refugee status outside the EU. Lack of access to status determination procedures denies the protection of the 1951 Convention. However, the ECHR does provide international protection to those who make it to the European Union. What is concerning, though, is that because the Member States of the European Union can always rely on the ECHR as the ultimate safety net, their attempts at watering down the level of obligation under the universal 1951 Convention will be applied outside the Council of Europe in states that do not have that same safety net. Minimalizing 1951 Convention commitments has consequences far beyond Europe.

¹⁰⁰ 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 — all available at <http://hudoc.echr.coe.int/hudoc/default.asp?Language=en&Advanced=1>.

