A COMPARATIVE STUDY OF ASYLUM LAWS AND POLICIES IN THE EUROPEAN UNION AND UNITED STATES: SIMILARITIES, DIVERGENCES AND COMMON TRENDS

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by

Lital Ladsteiner
Faculty of Law
University of Leicester

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Abstract

'A COMPARATIVE STUDY OF ASYLUM LAWS AND POLICIES IN THE EUROPEAN UNION AND UNITED STATES: SIMILARITIES, DIVERGENCES AND COMMON TRENDS'

Lital Ladsteiner

This research aims at identifying mutual goals, common trends, and policy divergences in the asylum law and policies of the European Union (EU) and United States. The study commences with a cross-Atlantic overview of the legal framework of asylum. It then turns, using an issue-based analysis, to examine how the definition of the term 'refugee' and exclusion from protection, provided for by the Geneva Convention 1951, are interpreted on either side of the Atlantic. Next, the socio-economic rights to be granted to individuals seeking asylum have resulted in an extensive debate. As the Geneva Convention does not fully cover mere asylum applicants in its socio-economic provisions, assessment of the treatment bestowed is therefore essential. Finally, since both EU and US temporary protection policies can and do in fact include genuine asylum seekers, there exists a real risk that asylum claims will be overshadowed by the grant of temporary protection, thereby resulting in an inadequate protection for those escaping persecution.

More than ever, the asylum debate is taking place amid a highly charged political environment, examples of which can be seen in the immediate US response to the 11 September 2001 terror attacks, and the deadline for the adoption of the first-stage of EU asylum legislation. As principles of asylum law emphasise open borders and access to the territory, the risk that human rights obligations will be traded-off against higher security standards subsists. Given the fact that the Geneva Convention is not subject to any scrutiny by any international tribunal, the interpretation provided by the EU and the United States of the above substantive law issues is undoubtedly significant as it may affect refugee standards worldwide.

In finding no current official co-ordination between the EU and the United States in asylum legislation, the question that is considered is whether the consensus over security measures, as seen, for example, in the recently adopted US-EU Passenger Name Record Agreement, is merely the first step, leading to a common understanding of asylum laws and exchange of policies, thereby creating a cross-Atlantic policy convergence.
To my parents, Leopold and Carmit Ladsteiner
'No one leave their home willingly or gladly. When people leave their earth, the place of their birth, the place where they live, it means that there is something very deeply wrong with the circumstances in their country. And we should never take lightly this plight of refugees fleeing across borders. They are signs, they are symptoms, they are proof that something is very wrong somewhere on the international scene. When the moment comes to leave your home, it is a painful choice... It can be a costly choice...

And I like to think that I stand here today as a survivor who speaks for all those who died by the roadside- some buried by their families and others not. And for all those millions across the world today who do not have a voice, who cannot be heard. They are also human beings, they also suffer, they also have their hopes, their dreams and aspirations. Most of all, they dream of a normal life...

I entreat you... when you think about the problem of refugees to think of them not in the abstract... I entreat you, think of the human beings who are touched by your decision. Think of the lives who wait on your help.'

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Finally, I am extremely grateful to my sisters, Shirley and Keren, my niece, Lihi, and my partner, Samuel, for their tireless support and smile when needed.

Lital Ladsteiner
Leicester.
Summer 2004
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<td>BIA-</td>
<td>Board of Immigration Appeals</td>
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<td>CFR-</td>
<td>Code of Federal Regulations</td>
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<td>CFSP-</td>
<td>Common Foreign and Security Policy</td>
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<td>DED-</td>
<td>Deferred Enforced Departure</td>
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<td>EC-</td>
<td>Treaty of the European Community</td>
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<td>ECHR-</td>
<td>European Convention on Human Rights and Fundamental Freedoms</td>
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<td>ECRE-</td>
<td>European Council for Refugees and Exile</td>
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<td>EOIR-</td>
<td>Executive Office for Immigration Review</td>
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<td>ESCR-</td>
<td>Committee on Economic, Social and Cultural Rights</td>
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<td>EU-</td>
<td>European Union</td>
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<td>EVD-</td>
<td>Extended Voluntary Departure</td>
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<td>Federal Register</td>
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<td>HSD-</td>
<td>Homeland Security Department</td>
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<td>ICCPR-</td>
<td>Covenant on Civil and Political Rights</td>
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<td>ICESCR-</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>IGC-</td>
<td>Intergovernmental Consultations on Asylum, Refugee and Migration Policies</td>
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<td>IIRIRA-</td>
<td>Illegal Immigration Reform and Immigrant Responsibility Act</td>
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<td>INA-</td>
<td>Immigration and Nationality Act</td>
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<td>INS-</td>
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RPB- Refugee Protection Bill
TEU- Treaty of European Union
TPS- Temporary Protected Status
UDHR- Universal Declaration of Human Rights
UK- United Kingdom
UNHCR- United Nations High Commissioner for Refugees
US- United States
USA PATRIOT- Unitising and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act
USC- United States Code
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European Union Legislation

Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the EU and Measures for its Implementation. OJ 1997 C254/1.


Treaty of Nice. OJ 2001 C80/1.

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United States Legislation


Refugee Protection Act, HR 4074, 107th Congress (2002).


Introduction

It has been argued that ‘Refugee problems are by definition transnational problems, which cannot be resolved by means of uncoordinated activities in separate countries.’\(^1\) This statement surfaces as particularly relevant through the consequences seen from the recent war on terror. Around the world, governments use the threat of terrorism, both actual and exaggerated, for re-evaluating their immigration systems in light of other governments tightening their immigration controls.\(^2\)

In July 1951, an international conference of Plenipotentiaries adopted a treaty that included a shared refugee definition and the scope of the protection attached to refugee status. Under the Geneva Convention Relating to the Status of Refugees of 1951 and its New York Protocol of 1967,\(^3\) contracting States have committed themselves to guarantee rights for refugees despite their status as non-nationals. The mandate provided by the Geneva Convention includes any person who:

‘...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country...’\(^4\)

This definition is one of the widely accepted international norms and remains the ‘sole legally binding international instrument that provides specific protection

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4 Geneva Convention, Article 1(A)(2).
to refugees.' While there have been some significant definitional moves to promote a more expansive notion of the term refugee at the regional level, the Geneva Convention still sets the basic framework against which any regional asylum policies are examined by the international community, mainly, concerning the respect of the norm of *non-refoulement* and adherence to the above definition. It is worth noting at this stage that any regional developments supplementing the Geneva Convention will not be scrutinised in this thesis as they carry little relevance for the comparison undertaken by this study, concerning the European Union (EU) developing policies and the United States asylum reforms since both the EU and United States have not yet made any real attempt to expand the refugee definition and grounds beyond what is provided by the Geneva Convention.

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7 The African Convention explicitly recognises the Geneva Convention 'as the basic and universal instrument relating to the status of refugees' and defines itself as 'the effective regional complement in Africa of the [Geneva] Convention...' (Article VIII(2)), thus, not superseding but supplementing the Geneva Convention.

8 Yet, both the EU and the United States provide for subsidiary protection or humanitarian asylum, respectively. In essence, the latter policies cover individuals who do not fall within the definition of the Geneva Convention, but who nevertheless deserve protection as upon return to the country of origin they may face serious harm. An examination of these principles will not take place since individuals protected by such legislation are determined not to be persecuted, as defined by the Geneva Convention, thereby falling outside the scope of this thesis. For further definitions see: EU- 'Proposal for a Council Directive on Minimum Standards for the Qualification of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection', ASILE 23, 8043/04, 27 April 2004; US- 8 CFR §208(13)(b)(1)(iii).
1. Thesis's Objectives and the Need for Analysis

'Immigration has emerged as a powerful political issue... Hardly a day passes without some new revelation of an act of violence, an electoral change, the emergence of a new political party, or the debate of some policy initiative... Indeed, in ways that were wholly unexpected just a few years ago, every aspect of political life has been touched by the issue of immigration. In every country new movements have emerged, anti-immigrant political parties have gained electoral strength and have altered the balance of political forces. This new balance has influenced policy changes as governments have attempted to deal with challenges that threaten understandings and agreements which have existed for decades...'

This thesis is constructed upon an examination of refugee laws in the EU and the United States, questioning whether there is any convergence in asylum policies between the two, given the interconnected refugee flows around the globe. More specifically, the question to be pursued is whether, in striking the balance between maintaining immigration controls on the one hand, and providing a sufficient respect for human rights considerations on the other, have common elements emerged between the EU and United States in providing international protection? To answer this, the research comprises the most controversial substantive law issues in the current asylum debate, namely, who is an asylum seeker and what are the rights to be granted to such individuals? The inquiry is built in a way which identifies mutual goals, common trends, interaction as well as divergences in policies through an issue-based analysis. Such a comparative observation leads to the evaluation of the extent to which the different systems influence each other, and their respect for the Geneva Convention, given the fact that the latter is not subject to any scrutiny by any international tribunal. Thus, the interpretation afforded in the EU and in the United States of the Geneva Convention and other international obligations described in the thesis is undoubtedly significant as these may affect refugee standards worldwide. Apart from this, six other factors were identified as indicating the profound need for an


11 'Increased refugee flows into Europe, will prompt calls from allies for the United States to accept its fair share of new refugees... at a time when the United States most needs strong bonds with allied nations...' Pistone and Schrag, *supra* note 2, at 6.
extensive study concerning asylum applicants' treatment and definition of the term 'refugee' in the EU and United States.

First, a partnership between the EU and United States is vital to an improved management of asylum and a permanent solution to refugee flows. Given the fact that refugee affairs are universal, while at the same time considering the common fight against terrorism, the question to be addressed is whether there is any official co-operation between the two regarding the adoption of asylum legislation in practice. As the United States is pursuing a new global mission, that is, the war on terror, it would need improved transatlantic relations where close intelligence sharing, anti-terrorist collaboration and equal EU-US partnership are at its basis. An already enhanced EU-US security alliance was observed in the instant response to the 11 September 2001 terror attacks where intensified co-operation in intelligence was readily provided by US allies. Consequently, as security emerges as a bonding measure, the examination that is required is whether the fight against terrorism has resulted in some common themes that could be directly linked to the current, on-going asylum debate. Collaboration between the EU and the United States is unquestionably necessary in order to reduce calamities which result in individuals seeking sanctuary such as global poverty, human rights abuses and misgovernment in countries of origin. Hence, based on the extensive, and sometimes competitive influences both the EU and the United States have on the international field, it is paramount to examine whether there is any political assent on refugee policies or whether now, after the EU has gained a collective Community weight, the international arena will be divided among two leading and conflicting interpretations of the Geneva Convention and State interests in three


13 Due to the nature of this research, which concentrates on the policy developments affecting individuals who cross borders and are present in a potential host State in the EU and the United States, the ‘root causes approach’, despite its obvious importance in the asylum debate, will not be addressed in any detail in this study. For a thorough discussion of the root causes approach, see: Lindstrom, C, Addressing the Root Causes of Forced Migration: A European Union Policy of Containment?, Refugee Studies Centre, Working Paper No.11, September 2003.

14 Generally see: Kovacs, supra note 12.
key areas: the refugee definition; socio-economic rights; and the temporary protection regime.

Second, the unwillingness to bestow a Geneva Convention status on individuals arises from the fact that only in theory this refugee status continues for the duration of risk in the state of origin; in practice, however, as repatriation is either legally or practically untenable, thus requiring permanent integration, asylum policies are increasingly viewed as ‘carefully managed immigrant selection programmes.’¹⁵ Such protection seekers seem to generate most concerns and receive most attention by the Western world’s politicians and public. Therefore, the question of asylum and refugees provides ‘a good example of interplay of foreign policy and domestic pressure’¹⁶ which is extremely sensitive to changes in public opinion. Based on this somewhat precarious starting point, the significance of this current research into the ever-evolving definition of the term ‘refugee’,¹⁷ asylum seekers’ rights, and any hurdles when seeking protection, is considerable.

Third, despite the increased recognition of human rights abuse, there does not exist adequate support for the proposition that the grant of asylum is the right of the individual. In granting asylum, States emphasise that this is done as a State privilege and not as a right the individual enjoys. Hence, ‘asylum’ tends to be conceived as a humanitarian exercise rather than an act motivated by a legal duty imposed by the existence of a person’s legal right to be granted asylum. Therefore, as the law stands today, if any right exists, it is the right to seek asylum.¹⁸ The Geneva Convention, except for providing a universal definition to the concept of a

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¹⁸ The Universal Declaration of Human Rights 1948 (UDHR), Article 14(1) states that ‘Everyone has the right to seek and enjoy in other countries asylum from persecution.’ (Emphasis added). Yet, the UDHR is a non-binding instrument. UN Doc. A810 (1948). See, however, Article 18 of
‘refugee’, does not really encompass asylum seekers. Most of the rights discussed in the Geneva Convention are granted to recognised refugees, not to those whose applications are being processed or remain pending. The only right guaranteed regardless of an individual status is the right of non-refoulement. However, as highlighted, even this last privilege is somewhat limited due to rigid State interpretations. Accordingly, asylum claimants do not actually have any internationally recognised convention that unconditionally offers protection while their applications are examined. Thus, this thesis attempts to clarify the actual legal status of asylum seekers.

Fourth, one has to bear in mind that EU asylum policies have developed to support a collective Community weight with a goal of transforming the EU into a ‘stabilising factor and a model in the new world order.’ Given the fact that asylum legislation is managed by Community law rather than being subject to a strict national governance, this thesis examines crucial developments of the first stage in EU integration as they take place. Accordingly, research into the developing EU structure rather than individual EU Member States asylum rules is paramount as EU policies and legislation represent a political consensus of a significant number of States within the European continent, thereby making it more likely to be noted by the United States and possibly have a greater impact on the understanding of asylum law and policies worldwide.

Fifth, notwithstanding this, no recent comprehensive study has yet compared in detail EU-US measures and their interaction concerning asylum legislation,
despite the increasingly interconnected refugee movements and security issues.\textsuperscript{22} Although much attention has been devoted to interpreting and comparing different asylum laws and the way these have changed in recent years, such studies are merely country specific when compared with the United States.\textsuperscript{23} No expansive research regarding possible EU and US asylum policy convergence exists among any of the latest literature reviewed. Hence, despite the EU-US inter-related policies in the security domain, the gap in the existing body of literature requires an extensive research between EU-US asylum relations as the interpretation of security issues may impact upon asylum principles.

Finally, currently, more than ever, the asylum debate is taking place amid a highly charged political environment, examples of which can be seen in the 11 September 2001 terror attacks, the Amsterdam five-year commitment to a Common European Asylum System\textsuperscript{24} and subsequent political instruments such as the Tampere Conclusions,\textsuperscript{25} persistent sovereignty arguments, as well as policy and legislative reforms. In a reality of constant security alerts, it is not surprising to see the growing transatlantic exchange of policies and information, observed, for instance, through the recent conclusion of the Passenger Name Record Agreement.\textsuperscript{26} This Agreement, of course, is not directly related to asylum seeking, but must be viewed in the broader context of immigration. Yet, in light of such co-operation, it is essential to examine asylum legislation since in this charged atmosphere, in which immigration is a priority to both EU and US politicians, it is

\textsuperscript{22} See Pistone and Schrag, as quoted in note 11, supra.


\textsuperscript{26} OJ L183/83, 17 May 2004.
likely that countries will opt for prioritising border controls and sovereign considerations rather than honouring human rights interests when negotiating common policies.\textsuperscript{27}

2. How Are the Aims Being Achieved?

2.1 Methodology

This thesis is produced through library-based research,\textsuperscript{28} examining existing literature, legislation and official documents. The work relies heavily on the review of secondary sources, such as books and articles. Non-Governmental Organisations (NGOs), for instance, the United Nations High Commissioner for Refugees (UNHCR), the American Immigration Law Association, the US based Centre for Immigration Studies, the Immigration Law Practitioners’ Association (ILPA), Statewatch, the European Commission for Refugees and Exiles (ECRE), and Amnesty International have all provided invaluable critiques, publications and policy papers against which US and EU standards have been examined.

As a Law thesis, each Chapter commences with an examination of the relevant primary sources, such as case-law, international instruments and domestic legislation. EU official documents, which reveal the decision-making process of the developing EU asylum laws, are heavily scrutinised and relied upon as indicating the difficulties in reaching unified positions in this area of law among EU delegations, thus questioning the likelihood of ever reaching an international understanding of the term ‘refugee’ and the rights to be granted to asylum applicants. It is paramount to note at this stage, however, that on some occasions, noticeably with regard to the refugee definition in Chapter III, it was difficult to obtain a clear idea on how EU Member States reached an agreement in respect of

\textsuperscript{27} See, for example, European Parliament’s criticism regarding the Passenger Name Record Agreement, claiming that the latter breaches EU data protection legislation and Article 8(2) of the European Convention of Human Rights. European Parliament, Draft Report C5-0162/2004-2004/0064(CNS), PE 339.636/1-1, 31 March 2004.

\textsuperscript{28} The thesis is indebted to the following libraries: University of Leicester, UK; Birmingham University, UK; De Montford University, UK; Nottingham University, UK; University College London, UK; the British Library, UK; The Institute of Advanced Legal Studies, UK; and the Los-Angeles County Law Library, USA.
the final terms of the proposed Refugee Definition Directive,29 as most commentary and documents concerning this matter were not made public at time of writing. Repeated requests to the EU Council’s General Secretariat to release some of the documents for public inspection, were answered with the grant of partial access, in most instances deleting the delegations’ country of origin in the proceedings (so as ‘to allow the delegations to enjoy an undisturbed and honest debate’),30 thereby making it difficult to understand which State’s motives and policies were taken on board. Yet, very close to the submission date of this thesis the Refugee Definition Directive, after over a one-year delay, was finally adopted. Therefore, based on the finalised draft Directive posted in the Council register,31 Chapter III acknowledges the changes brought about by this new piece of legislation and incorporates them into the comparative discussion of US laws and the proposed draft of the EU Refugee Definition Directive.

2.2 Summary of Chapters

Chapters I and II build on the historical analysis of EU and US policies, respectively. These Chapters provide an overview of the context in which asylum law operates. They serve the reader with an indication of the atmosphere within which the framework of asylum legislation has been negotiated. By doing this, the Chapters highlight important events that have influenced past decisions and that may still affect current and future policies. The evolution of US and EU policies contribute to understanding the objectives of the laws which are analysed by the rest of the thesis.

Chapter III strikes at the heart of refugee law by questioning how the definition of the term ‘refugee’, as provided by the Geneva Convention, is interpreted by US and EU legislation and case-law. As the EU prepares for a common policy


30 Private Correspondence with the EU Council’s General Secretariat, 9 December 2003, on file with the author.

31 See: ASILE 23, supra note 9. At time of re-writing, the final text of the Directive had not yet been published in the EU Official Journal.
concerning asylum and immigration, and as the United States deals with issues of national security, administrative re-organisation and border safety resulting from the 11 September 2001 terror attacks, as discussed in Chapters I and II, it is crucial to examine whether the humanitarian commitment of providing safety to asylum seekers has not been overridden on either side of the Atlantic. As mentioned earlier, this thesis does not analyse recognised refugees. Hence, it must be emphasised that the discussion and comparison submitted in Chapter III only focuses on definitions and principles asylum claimants have to satisfy in the EU and United States while applying for asylum. Consequently, a study regarding the actual grant and possible withdrawal of refugee status from recognised refugees is omitted from this thesis altogether.

The discussion surrounding social rights is crucial, as the growing number of asylum applicants in recent years indicates. In Chapter IV, policy makers are confronted with a balancing exercise; on the one hand safeguarding one's country from ill-founded asylum applications and abuse of the welfare system, while on the other hand, understanding that there are genuine asylum applicants in need of protection. The debate in Chapter IV arises directly from the previous Chapter as even where one has successfully overcome all complex entry barriers and has been given the chance to apply for asylum, the fact that he or she may not be supplied with the essential tools for a dignified survival, while his or her asylum application is under an examination, is a matter that truly results in a conflict of interest and potentially life threatening consequences.

Finally, Chapter V deals with the somewhat new phenomenon in the EU known as temporary protection policies as compared with the more settled notion of temporary protected status in the United States. The research deals with temporary protection legislation despite the inherent differences in the 'individual' asylum examinations, as provided by the Geneva Convention, compared with the 'blanket protection' provided in mass influx situations under the temporary protection scheme. This scrutiny, however, is essential; previous Chapters, as indicated above, submit a detailed examination of the historical motives that influenced the adoption of current asylum laws, scrutinise who is a refugee, and
debate the socio-economic rights States grant while an asylum application is determined. However, one question remains: What would happen in a situation of a mass influx as was seen in the crises arising from the break-up of the former Yugoslavia? The importance of Chapter V arises from the fact that both the emerging EU temporary protection framework as compared with US temporary protected status can and does in fact include genuine asylum seekers who could possibly have a strong claim under the Geneva Convention definition. Yet, as debated in Chapter V, there is a real risk that such ‘individual claims’ will be ignored under the pretext of a temporary protection policy in a situation of mass influx. Hence, since genuine refugees may be included under the umbrella of the temporary protection framework, examination of temporary protection is necessary in terms of the rights bestowed under these regimes, its duration and adequacy. Finally, despite the grant of temporary protection, the query to be pursued is whether EU laws and US legislation observe the very basic right to seek asylum, as guaranteed by Article 14 UDHR?

Due to the nature of this study, which scrutinises the current policies of the United States and contrasts them with those of the EU, it is only the substantive law that has been researched and compared in this thesis as a detailed study of procedural laws would have demanded a great discussion space that could not have been spared from the substantive law issues. Nevertheless, in some instances, an integral link exists between the substantive law and procedures that cannot be ignored. As indicated in some parts of the study, for instance, Chapter IV-- Social Conditions-- only by discussing the procedures of some policies, drawing upon different States practices, can the impact of substantive law be understood, and any divergences, similarities, influences and possible convergence of policies emphasised.

32 Given the size of the topic, it is not surprising to find an entire book which is solely devoted to the issue of immigration procedures. See, for instance, Boeles, P, *Fair Immigration Procedures in Europe?*, Kluwer Law International, 1997.

Finally, as the purpose of this thesis is to explore possible interaction across the Atlantic that might influence international developments, the study concludes by examining the possibility of whether we are witnessing the gradual development of co-operation in asylum matters between the EU and the United States, which is evolving directly from the current mutual fight against terrorism, resulting in intensified border controls, just as was seen in the initial goal of integrating EU immigration policies? Clearly, no exhaustive answer can be offered at this stage. However, the discussion of such a possibility, in light of the conclusions submitted throughout the thesis, attempts to provide an answer to this query, thereby bringing this study to its completion.
Chapter I

The Legal Framework of European Union Asylum Law

Introduction

This Chapter deals with the legal framework of asylum policies in the European Union (EU) arena. It tracks the first significant development concerning free movement to the 1980s and examines such policy's evolution until current law, that is, 2004. For the purpose of this Chapter, however, reciting every single historical development occurring throughout this time-period is not fundamental in gaining a beneficial insight into how past events influenced present policies and perhaps will affect future legislation. Hence, only the landmark developments concluded during this timeframe within the EU are addressed in detail in this Chapter.

The EU asylum regime, as discussed below, introduces a new level of cooperation among the EU Member States' executives. 'Intergovernmentalism' has evolved outside an already existing framework for international co-operation, as Bunyan reflected, '...not only are traditional international actors excluded, but this co-operation also occurs outside the traditional domestic framework of political deliberations.' The structure of inter-governmental co-operation in asylum and immigration matters has its root, as this Chapter shows, in informal forums outside the Community framework which operated screened out from public scrutiny and free from domestic control. As the EU framework evolved, it seems

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1 The 1980s mark the beginning of closer co-operation related to freedom of movement than ever before. Reaching back to earlier developments would not necessarily facilitate the analysis or alter its outcomes.


4 Ibid.
that these framework policies still influence some of the recently concluded EU asylum legislation.

It is important to remember that all EU Member States are parties to the Geneva Convention Relating to the Status of Refugees of 1951 and its New York Protocol of 1967.\(^5\) It has been argued that despite harmonisation, the Geneva Convention remains ‘the most important instrument of refugees’ protection.’\(^6\) Thus, it must be emphasised that the framework agreed upon under EU asylum legislation as discussed in this thesis, is not aimed at replacing the Geneva Convention with a regional scheme. The goal is, however, to transpose the Geneva Convention, as appropriate, into a binding and unified Community law.\(^7\)

1. The Need of EU Asylum Legislation

About 30,000 people annually sought asylum in western Europe during the 1970s.\(^8\) However, in the decade that followed, both the scale and character of asylum applications in the EU began to change. Asylum seekers from the developing world, rather than Europe, began to form majorities in the asylum caseload of western Europe. For a variety of reasons-- including restrictions on the legal channels of entry, improved communications and growing ease in air travel--the number of people applying for asylum rose substantially, nearing 100,000 in 1984 and surpassing 300,000 in 1989.\(^9\) A slowdown in the growth of western

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\(^8\) UNHCR Statistical Yearbook 2001: Refugees, Asylum seekers and Other Persons of Concern--Trends in Displacement, Protection and Solution, October 2002. The statistical information introduced in this Chapter is reproduced in the UNHCR Statistical Report annexed to this Thesis- See Annexes I, II.

\(^9\) Ibid.
European economies and rising unemployment during the 1980s coincided with these changes, leading to more unwelcome responses toward the newcomers.\textsuperscript{10}

Plans for EU integration forced the issue of asylum onto the common agenda. In 1986, the EU Member States ratified the Single European Act, committing themselves not only to the free movement of goods and capital, as agreed upon by the 1957 Treaty Establishing the European Economic Community, but also to the free movement of people throughout the EU territory.\textsuperscript{11} Mounting migratory pressures, coupled with the realisation that all foreigners would be free to travel unchecked from one Member State to another, heightened Member States' interests in regulating the EU's periphery.\textsuperscript{12} Asylum, the only remaining avenue for many individuals to obtain legal status in the EU, came largely as an afterthought, 'not as a right to be protected, but as an irritating loophole.'\textsuperscript{13}

By 1992, nearly 700,000 protection seekers sought asylum in western Europe, resulting from the conflicts in the former Yugoslavia and the Caucasus.\textsuperscript{14} This fresh reality fundamentally altered EU attitudes and responses toward asylum applicants. In this new environment, 'western European governments increasingly viewed the very institution of asylum as a threat both to their own domestic order and to the plans of European harmony.'\textsuperscript{15}

\textbf{2. Initial Harmonisation of EU Asylum Laws}

\textbf{2.1 Partial Harmonisation: Schengen, Ad Hoc Group on Immigration and Dublin, 1984-1990}

The justification behind the emerging co-operation was the perception that the abolition of internal border controls would lead to 'a loss of control over the entry

\begin{thebibliography}{9}
\bibitem{12} Edminster, \textit{supra} note 10.
\bibitem{13} \textit{Ibid}.
\bibitem{14} UNHCR Statistical Report, \textit{supra} note 8.
\bibitem{15} Edminster, \textit{supra} note 10, at 2.
\end{thebibliography}
of persons to the territory, thereby opening up the way for illegal immigration of undesired persons such as criminals, terrorists, drug traffickers as well as economic migrants and asylum seekers.\textsuperscript{16} With regard to asylum applicants, it was feared that freedom of movement would be accompanied by an ‘increased abuse of domestic asylum procedures through the simultaneous or repetitive allocation of multiple asylum claims in several Member States, what is known as ‘asylum shopping’.'\textsuperscript{17} The rising pressure of immigration on most Member States during the 1980s and 1990s, lead to the conclusion that a strictly national policy could not provide an adequate response to this mutual problem.\textsuperscript{18} Thus, unified co-operation in asylum and immigration matters emerged to counteract the prospect of the abolition of internal borders and was presented as a necessary flanking measure to safeguard internal stability and security.

2.1.1 The Schengen Agreement 1985

In 1984, Germany and France agreed on the gradual abolition of controls at the common borders.\textsuperscript{19} Shortly afterwards, Belgium, the Netherlands and Luxembourg decided to join the initiative, which led to the adoption of the First Schengen Agreement on the Gradual Abolition of Checks at the Common Borders of July 1985.\textsuperscript{20} This Agreement, which was primarily composed of representatives of the national interior ministers, that is, in an inter-governmental forum, provided a framework for future actions on the relaxation of border controls between the signatory Member States with the target of abolishing them. However, the 1990 deadline provided for by the First Schengen Agreement was recognised as impractical and thus the participating Member States sought the adoption of the

\begin{thebibliography}{99}
\bibitem{17} \textit{Ibid.}
\bibitem{18} Lavenex, \textit{supra} note 2, at 105.
\bibitem{19} See: The Saarbrücken Agreement of 13 July 1984.
\bibitem{20} Schengen Agreement of 14 June 1985. OJ L239/1, 22 September 2000.
\end{thebibliography}
Second Schengen Agreement implementing the First Schengen Agreement in 1990.21

Accession to Schengen was subjected to assurance that the external borders were secured through intensified control mechanisms and tighter restrictions on immigration and asylum. With the exception of the UK and Ireland, all EU Member States joined the Schengen initiative by 1995.22 It is worth noting, however, that although Member States may have formally joined Schengen by 1995, the removal of border controls was delayed on the ground that Member States’ external borders were not sufficiently protected, and consequently, the application of the Schengen Agreement occurred in a series of stages with the most recent being in 2001.23

2.1.2 Ad Hoc Group on Immigration 1986

Free movement was a fundamental EU aspiration, however, it gave birth to forms of co-operation that excluded the supranational institutions.24 Immigration and asylum policies were perceived as jeopardising the free movement idea introduced by the Single European Act of 1986.25 Consequently, EU Member States, fearing a loss of control over immigration into their territories after the abolition of internal borders, decided to establish a formally independent Ad Hoc Group on Immigration, with an aim of formulating compensatory measures in the fields of asylum and immigration to ‘safeguard internal security.’26

21 19 June 1990. Both Agreements are subsequently referred to as the ‘Schengen Agreement.’ The Second Schengen Agreement provides the necessary details to give effect to the objective of the First Schengen Agreement. Ibid.


23 Delays occurred in the participation of Austria, Greece and Italy, for instance, as well as in the recent lifting of borders in Nordic States.


25 Article 14(2) EC (Article 8a of the Single European Act 1986), commits Member States to ‘an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.’ (Emphasis added).

26 Lavenex, supra note 16, at 37.
In contrast to the Schengen initiative, which started among a limited number of countries, the *Ad Hoc* Group on Immigration was composed of high level immigration policy officials from the Member States. The Commission was allowed an observer standing at the *Ad Hoc* Group on Immigration whenever EC powers were involved but had no powers of initiative. Bureaucratic support for the *Ad Hoc* Group on Immigration was provided by the Council Secretariat. Yet, there was no room for any judicial control by the European Court of Justice. Similarly, the European Parliament as well as national Parliaments received no formal rights in these processes.\(^27\)

The *Ad Hoc* Group on Immigration turned its attention to asylum policy and external frontier controls at the end of the Cold War. Due to intra-European movements resulting from the conflict in former Yugoslavia, Germany demanded a unified EU response.\(^28\) Co-operation in asylum matters evolved rapidly and resulted in the adoption of two inter-governmental agreements: the Dublin Convention\(^29\) and the draft Convention on the Crossing of External Borders.\(^30\)

The Dublin Convention sought to remove all possibilities, in a frontier-free EU, of asylum seekers making applications in more than one Member State, the so-called elimination of ‘asylum shopping’.\(^31\) One should note that the Dublin Convention only dealt with the issue of Member State responsibility for asylum

\(^27\) Bunyan, *supra* note 3.

\(^28\) Geddes, *supra* note 24, at 76.

\(^29\) ‘Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the EU and Measures for its Implementation’, OJ 1997 C254/1, as replaced by ‘Council Regulation (EC) No.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 L50/1, 25 February 2003. (Dublin II). Dublin II only applies to asylum applications lodged on or after 1 September 2003, see Article 29. Dublin II will not apply between Denmark and other Member States, therefore, the original Dublin Convention still stays in force until such time Denmark agrees to participate in the Dublin II Regulation, at Point 19.

\(^30\) This Agreement has been held up since 1991 by a dispute between the UK and Spain over the status of the Gibraltar. See: Bunyan, *supra* note 3. Furthermore, this Convention is currently redundant as a consequence of the Schengen *aquis* as well as the allocation of the border provisions to the Community pillar.
applications and did not apply to other matters such as the refugee definition or receptions conditions. Consequently, the question of asylum was pushed to Member States bordering with third countries. It is interesting to observe that while Dublin II elaborates and somewhat broadens the hierarchical criteria provided for by the original Dublin Convention for determining the responsibility for an asylum application examination, it does not solve the dilemma of achieving a more equitable and logical distribution of asylum applicants among the Member States.

Theoretically, the original Dublin Convention meant to counter the phenomenon of 'refugees in orbit' by fixing a responsibility on particular Member States, thereby ensuring the examination of each individual claim. In practice, however, in a scenario where an individual arrives in one Member State without any documents indicating the route taken and without having any of his or her previous presence recorded, Dublin II is rendered powerless and is ineffective.

As discussed earlier, co-operation in asylum and immigration matters evolved outside the Community framework. To preserve this order, in the case of Germany v. Commission, Germany disputed the Commission's migration initiatives on grounds of sovereignty considerations, arguing that migration policy regarding third country nationals exceeded the Commission's competence. The Court of Justice, in denying the Commission's competence to influence the contents of

31 See, for example, the detailed criteria for State responsibility for the examination of asylum applications set out in Articles 3-8, as replaced by Dublin II, Articles 5-14. Also see: Geddes, supra note 24, at 77.

32 Dublin Convention, Articles 1 and 3, as replaced by Dublin II, Article 1.

33 Dublin II, Articles 5-14.


35 Bunyan, supra note 3, at 49.

36 Brandl, supra note 34.

national policies and consultations, held that it nevertheless accepted the
Commission’s authority to set up the framework for such consultations.38 Despite
this judgement, however, in 1988, a proposal by the European Commission for a
Directive on the harmonisation of asylum law and the status of refugees was
nevertheless rejected by the Member States.39 Faced with this opposition, the
Commission ‘decided to leave the field of asylum and immigration to the
discretion of the Member States instead of getting bogged down in quarrels over
sovereignty and lengthy procedures requiring the participation of both European
and national Parliaments.40

2.1.3 Schengen and the Ad Hoc Group on Immigration Instruments

Communication between the Schengen States and the Ad Hoc Group on
Immigration was ensured by their parallel organisational structures and the fact
that members of the Schengen group were also represented in the Ad Hoc Group
on Immigration.41 Given this overlap, and the fact that both groups operated
screened from public scrutiny, it is inevitable to conclude that the Schengen
Member States were thus able to transmit their proposals to the agenda of the rest
of the EU.

The Schengen Agreement deals not only with applications for asylum, but also
with external borders and harmonisation of visa policies, and co-operation in
police, customs and justice matters. Moreover, it provides for the establishment of
a computerised register of persons to be refused entry to the EU, or whose
movement within the EU is to be restricted.42 The Schengen Agreement, however,
corresponds in its asylum provisions to the Dublin Convention;43 it has been

38 Ibid., at 3204, Paragraph 3; and at 3254-3255, Paragraphs 30, 34.
39 European Commission, ‘Harmonisation of Asylum Law and the Status of Refugees’,
40 Lavenex, supra note 16, at 35.
41 Lavenex, supra note 16, at 37.
42 Known as the Schengen Information System (SIS).
43 For a detailed comparison between the Dublin Convention and the Schengen Agreement, see:
Hailbronner, K, and Thiery, K, ‘Schengen II and Dublin: Responsibility for Asylum
argued that 'the fact that the Dublin Convention was concluded before an agreement on substantive asylum issues was reached, illustrates the priority given to this field by the Member States."44 This is reinforced by the Schengen Agreement, where detailed provisions were drawn up with regard to asylum seekers, whereas the clauses dealing with the original focal points remained 'as mere expression of a general desire for future co-operation than any legal basis for current operations."45

These agreements, although commencing from quite different positions, led to a common set of rules concerning asylum applicants and the entry of third country nationals within the framework of free movement and abolition of border controls.46 Whereas the Schengen process was designed to promote the implementation of the single market, co-operation in the Ad Hoc Group on Immigration concluded measures aimed at avoiding the security deficit following the abolition of border controls. Such a target was predominantly seen in the adoption of the (two) London Resolutions47-- the first being on manifestly unfounded applications for asylum48 and the second Resolution concerning the

45 Ibid., discussing provisions relating to police and judicial co-operation and the fight against drug trafficking.
46 For further comparison, see: Lavenex, supra note 16, at 38-39.
48 This Resolution was aimed at the adoption of efficient procedures designed to prevent and reduce unfounded asylum applications.
issue of safe third countries — in a meeting of the Ad Hoc Group on Immigration in 1992. Thus, it is not surprising that this attempted policies convergence was described as:

‘...the abolition of internal borders controls was traded off against the restriction of entry to the territory and an affirmation of States’ sovereignty to control immigration from outside the Community.’

3. The EU Founding Treaties: A Step Closer Toward Harmonisation

3.1 The Treaty on the European Union 1993— Maastricht Treaty

The possible effect of the Single European Act of 1986 gave rise to considerable discussions, and consequently, the European Council decided to hold an inter-governmental conference on the subject. On the basis of that inter-governmental negotiation, a draft Treaty was presented by the Luxembourg Presidency in 1991. After various revisions, the Treaty on the European Union (TEU) was agreed upon and signed. The purpose of the TEU was to establish an institutional framework through which the adoption of common standards was a real possibility.

3.1.1 The Harmonisation Process Between 1993-1997

Since 1993, when the TEU which was signed at Maastricht came into force, the European Community has been one of three ‘pillars’ which form the EU entity. Under the terms of the TEU, the two newly created ‘pillars’ on the Common

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49 This measure was based on the rationale that asylum seekers shall be examined by the first country with which the applicant has had contact, applying to all claimants arriving from a country considered ‘safe’.

50 Lavenex, supra note 16, at 38.


52 Ibid., at 29.


54 Craig and de Búrca, supra note 51, at 5.
Foreign and Security Policy (CFSP) and on Justice and Home Affairs (JHA) remained, as described by Craig and de Búrca:

‘...more like familiar creations of international law, not sharing the institutional structure, law making process, or legal instruments of the Community pillar, largely beyond the jurisdiction of the European Court of Justice and lacking the key Community law characteristics of supremacy and direct effect.’

Under the TEU, co-operation in JHA was institutionalised. The purpose of JHA co-operation was to fulfil the EU’s objective of attaining free mobility of persons, while safeguarding citizens’ security and safety. Although the TEU was intended as a ‘stage in the process towards further integration,’ nevertheless, most of the measures agreed to by the JHA Council were recommendations, resolutions and conclusions. Given the non-binding nature of these ‘soft-law’ instruments, compliance with their standards is less frequently reviewed in a systematic way and a conclusive assessment is sometimes not possible. Therefore, the desire to achieve a more concrete harmonisation of rules resulted in the adoption of ‘hard-law’ instruments, as discussed below.

The TEU left co-operation in asylum matters, again, to the inter-governmental level. The third pillar of TEU only provided for a limited institutional innovation by merely formalising the existing structures. The Council of Ministers retained

55 Craig and de Búrca, *supra* note 51, at 5-6.
59 For a full text of the ‘soft-law’ measures adopted on asylum and migration see: Guild and Niessen, *supra* note 47.

Regarding the issue of asylum, for example, in 1996 the Council adopted a Joint Position for the harmonisation of the term ‘refugee’. The aim of the Joint Position was to settle controversies concerning the interpretation of the Geneva Convention. It related exclusively to the examination of the criteria as defined in Article 1A of the Geneva Convention. The Joint Position supported the assumption that the Geneva Convention leaves the Contracting States a considerable margin of appreciation in determining the term ‘refugee’. Additionally, the impact of the Joint Position on the interpretation of the Geneva Convention was limited due to its legal nature; it lacked any legally binding effect for the legislature and the judiciary of the Member States. See: Goodwin-Gill, G. S, ‘The Individual Refugee, the 1951 Convention, and the Treaty
an exclusive competence to take decisions in this area. It could adopt joint
positions and actions and draw up conventions. The European Commission was
given the right of initiative, yet, ‘its influence remained limited’ due to the
continuous closure of the inter-governmental structure. Finally, the European
Parliament was allowed limited involvement through its consultation process. In
practice, however, these ‘supranational bodies were ignored.’

Indication of the mixed feelings concerning the TEU were highlighted through
the adoption of Article N2 and Article 2 of the TEU for further inter-
governmental conference to take place in 1996—only four years after its signature
and three years after its coming into force— in order to consider ‘to what extent
the policies and forms of co-operation introduced by this Treaty may need to be
revised.’ By the time the conference was opened, therefore, it was clear that its
purpose was to remedy the inadequacies of the TEU, to reduce dissatisfaction with
the functioning of the third pillar and to ensure that the EU could continue to
function with considerably more than 15 Member States. The result of the inter-
governmental conference, which was launched in 1996, was the negotiations and
eventual signing of the Treaty of Amsterdam in October 1997.

of Amsterdam’, in Guild, E, and Harlow, C, Implementing Amsterdam, Hart Publishing, 2001,
at 153.
60 Lavenex, supra note 2, at 140.
62 Now repealed. This Article stated that ‘A conference of the representatives of the Member States
shall be convened in 1996 to examine those provisions of the Treaty for which revision is
provided.’
63 Previous Article B, which called for the policies and forms of co-operation to be revised ‘with
the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community.’
64 Craig and de Búrca, supra note 51, at 25.
3.2 The Amsterdam Treaty 1997

The Treaty of Amsterdam intended to revise the Treaties in order to prepare the EU for future changes, such as enlargement. The Amsterdam Treaty modified the Treaty of the European Community (EC) and the TEU, discussed above. A new Title was included: Title IV (in Part III of the EC Treaty) on ‘Visa, asylum, immigration and other policies related to the free movement of persons.’ The Amsterdam Treaty transferred important substantive areas from Title VI of the TEU, to Title IV in the EC Treaty-- in other words, from the third to the first pillar of the Union. The area of freedom, security and justice is therefore based on ‘legal provisions to be found in both the TEU-- Title VI on police and judicial cooperation in criminal matters-- and Title IV of the EC Treaty... there is an interplay between the two treaties as regards new common concepts.’ The transfer to the first pillar is a fundamental change; co-operation of Member States within the inter-governmental framework has been replaced by Community action by means of supranational legislation.

3.2.1 Title IV: ‘Visa, Asylum, Immigration and Other Policies Related to the Free Movement of Persons’

The ultimate goal of this new Title IV, comprising Articles 61-69 EC, was the adoption, within five years, of measures to ensure the free movement of persons-- an objective set down in Article 14 EC by the Single European Act of 1986. Measures removing internal frontier controls are accompanied by ‘flanking

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66 Currently, the issue of enlargement of the Union is governed by the Treaty of Nice, OJ C80/01, 10 March 2003. However, note the discussion regarding the draft Constitutional Treaty, OJ C169/1, 18 July 2003. Both measures are discussed in Section 5, infra.


68 Hailbronner, supra note 22, at 1047.


70 Hailbronner, supra note 22, at 1047.

71 See adjoining text of note 25, supra.
measures’, which aim to strengthen controls at the external borders of the Union and set rules on asylum, immigration and crime prevention.72

The Amsterdam Treaty established that within five years from its coming into force the EU had to adopt measures on the control of internal borders, asylum, refugees, immigration and third country nationals. During this five-year transition period, the Commission and Member States shared the right of initiative.73 For the first time in the Community history of free movement of persons, the Commission’s exclusive right of initiative was violated— albeit with the view to retake it at a later stage.74 It has been argued that the appearance of the five-year temporal clauses clearly points to the fact that in the area of asylum, Member States wished to ‘achieve progress relatively quickly while in other [areas] the process of complete Communitarisation is expected to be more difficult.’75

Article 67 EC set out the legislative procedure. During the first five years following the entry into force of the Amsterdam Treaty, the Council acted unanimously on a proposal from the Commission or an initiative of a Member State, after consulting the European Parliament. When this five-year period was completed on 1 May 2004, the Commission regained the sole right of initiative and the Council currently may, acting unanimously upon consulting the Parliament, decide that all or part of the areas covered by Title IV shall be governed by the procedure referred to in Article 251 EC, that is, ‘co-decision’.76 It is important to note that while unanimity allows one Member State to block a certain restrictive measure, at the same time it presents a potential risk that agreements will be set at the lowest common denominator.77 Yet, under Article

73 Article 67 EC.
75 O’Keeffe, supra note 69, at 257.
76 Article 67(2) EC.
77 Consider the UK Refugee Council web site at: http://www.refugeecouncil.org.uk/. See also: van Selm-Thorburn, supra note 11, at 623.
64(2) EC, in case of an emergency, characterised by a sudden inflow of nationals from a third country, the Council could, acting by qualified majority on a proposal from the Commission, adopt a provisional measure of a duration not exceeding six months. Only such provisional measures could have been adopted without formally consulting the European Parliament.

The Amsterdam Treaty has re-organised the position of EU institutions. Hence, the 'first-stage' of asylum law harmonisation, as examined by this thesis, was to be carried out under this institutional structure. First, the Commission has a restored right of initiative, yet, this privilege was shared in the initial five-year period. Secondly, the European Court of Justice has a new preliminary ruling jurisdiction which is crucial for a unified interpretation of Community law. However, this right was and still is subject to numerous limitations: first, only a national court of last instance may refer a case; secondly, the jurisdiction of the Court of Justice does not apply to judgements of national courts which have become res judicata. Individuals, therefore, are not able to benefit retroactively from rulings of the Court under this provision; thirdly, the Court of Justice is denied jurisdiction with regard to movement across internal borders where it relates to 'the maintenance of law and order and the safeguarding of internal security.' Hence, it has been argued that the European Court is treated 'as somehow suspect, unappreciative of security needs as identified by States, and as impediment to the effective exercise of state functions.' Thirdly, by virtue of Article 67 EC, the European Parliament, during the transitional period of five years, needed merely to be consulted on measures adopted in all areas transferred to Title IV. Fourth and last, decisions in the Council, as mentioned above, were taken by a unanimity vote.

Finally, Article 69 EC deals with the special arrangements for the UK, Ireland and Denmark, by providing that the application of Title IV shall be subject to

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78 That is, until 1 May 2004, when the five-year deadline expired.
79 See: Article 68 EC.
three Protocols. The first is Protocol B.3 on the application of certain aspects of Article 14 EC. This Protocol states that notwithstanding Article 14 EC or any other provision of the Treaties or any measures adopted thereunder, the UK may exercise such controls at its frontiers on persons seeking to enter the UK, as it may consider necessary. The second is Protocol B.4 on the position of the UK and Ireland, which provides that the UK and Ireland are not bound by measures adopted under the new Title IV, however, this Protocol provides that they have the option to ‘opt-in’ to any measure. The third is Protocol B.5 on the position of Denmark. Article 5 of Protocol B.5 states that Denmark has six months to decide whether it will implement any Council decision building on the Schengen acquis. According to this Protocol, Denmark will not take part in the adoption by the Council of proposed measures pursuant to the new Title. Such measures will neither be binding upon nor applicable in Denmark. Ultimately, if Denmark chooses to ‘opt-in’ into any measures building on the Schengen acquis, it will merely implement the measures in its national law. This will create an obligation between Denmark and the other Member States in international law. Denmark, consequently, will not be subject to the jurisdiction of the European Court of Justice.

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86 Hailbronner, supra note 22, at 1058.
87 Langrish, supra note 72, at 9-10.
3.2.2 Integration of the Schengen *acquis* into the Framework of the EU

With the conclusion of the Amsterdam Treaty, the Schengen *acquis* was introduced into the EU framework. According to Article 1 of the Protocol, the signatories of the Schengen Agreement are authorised to continue closer cooperation. This, though, will have to be conducted within the institutional and legal framework of the EU. Thus, important practical steps concerning internal border controls can no longer be taken outside the Community framework and consequently, they are subject to parliamentary and judicial control by Community institutions. Nonetheless, the integration of Schengen into the Community framework also means that rules, which have been previously developed outside the Union’s framework, by inter-governmental bodies and without public or parliamentary scrutiny, will become Community law. The result is that those rules will have precedence over national law and may have direct effect.

3.2.3 Protocol C.6 on Asylum From Nationals of Union Member States

This Protocol stands alone from any other provisions of the Treaties. It responds to a specific concern that terrorist suspects may take advantage of asylum procedures in the Member States to avoid extradition. Since the Member States regard themselves as providing the same level of protection of fundamental rights throughout the Union, consequently, they believe that they should hold each other as safe countries of origin for all legal and practical purposes relating to asylum applications. The final paragraph of this Protocol allows Member States to give full consideration to any such application as they must be able to meet their obligations under the Geneva Convention, but it requires the Member States

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89 Hailbronner, *supra* note 22, at 1062.


to deal with the application on the basis of the presumption that it is manifestly unfounded. 92

Protocol C.6 was substantially criticised by both academics and the United Nations High Commissioner for Refugees (UNHCR) as incompatible with the Geneva Convention. 93 The European Council on Refugees and Exiles (ECRE) and the UNHCR have both stated that the Protocol '...violates the objectives and purposes and some of the basic provisions of the Refugee Convention...'. 94 Finally, it has been argued that:

'While it is acceptable that in the United States a resident of one US State should not be able to seek asylum in another US State... the European Union has not reached the same level of integration, nor indeed is it clear that it will ever do so.' 95

Summary

The key feature of the Amsterdam Treaty, for asylum purposes, was the creation of 'an area of freedom, security and justice', covering free movement, immigration and asylum, and the incorporation of the Schengen acquis into the EU. As a result, decisions made by Schengen's secretive and largely unaccountable Executive Committee would become Community law within the provisions of Title IV. 96

EU Member States, motivated by an apparent loss of control over the movement of third country nationals within the EU's territory, underlined the

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92 Note that Belgium has attached a declaration to the Treaty stating that it will continue to carry out an individual examination of any asylum request made by a national of another Member State despite this Protocol. OJ 1997 C340/144.

93 Especially Article 3 of the Geneva Convention: 'The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.' (Emphasis added) See: Guild, supra note 83, at 309. Peers, for instance, has claimed that the Protocol is 'an extradition measure in disguise' (Peers, S, EU Justice and Home Affairs, Longman, Harlow, 2000, at 129), while Da Lomba has argued that it is unquestionable that the Protocol is in breach of international standards. Da Lomba, supra note 34, at 100-102.


95 Guild, supra note 83, at 309.

96 Geddes, supra note 24, at 125-126.
policy of safeguarding internal security in negotiating common policies with each other. In this perspective, the claims of refugees and human rights protection are secondary to the primary objective of reducing uncontrolled immigration.\footnote{Hailbronner, supra note 6, at 353-370.}

Ultimately, by adopting the Treaty of Amsterdam, Member States did introduce immigration and asylum into the first pillar. Unfortunately, as highlighted above, Member States also brought with them inter-governmental decision-making with the emphasis on unanimity, arrangements of ‘opt-outs’ and ‘opt-ins’ and a complex institutional framework in an area where, ‘given its importance for the rights of the individual, simplicity and transparency are essential.’\footnote{O’Keeffe, supra note 69, at 286.} Given these imperfections, the discussion that follows allows at times the assessment of whether the Amsterdam Treaty permitted the adoption of reasonable measures in the area covered by Title IV within the five-year time framework.\footnote{See also: O’Keeffe, supra note 69, at 287.}

4. Implementing Amsterdam

4.1 The Vienna Action Plan 1998

At the European Council meeting in Vienna in December 1998, the Head of States and Governments adopted an Action Plan for the optimal implementation of the provisions in the Amsterdam Treaty on the establishment of an area of freedom, security and justice.\footnote{Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, adopted by the Justice and Home Affairs Council on 3 December 1998, OJ 1999 C19/1.} The Commission made an initial contribution in its communication of 14 July 1998,\footnote{Communication from the Commission, ‘Towards an Area of Freedom, Security and Justice’, COM(98) 459 Final.} which dealt with the concept of freedom, security and justice and outlined the approaches to be followed. The Vienna Action Plan gave substance to these concepts by defining the priority objectives for the next five years and setting out a timetable of measures necessary for achieving the area of freedom, security and justice envisaged by the Treaty of
As regards asylum, within two years it was planned to: examine the criteria and conditions of the Dublin Convention for improving the implementation of the Convention and of the possible transformation of the legal basis to the system of Amsterdam, to examine the implementation of the Eurodac, to adopt minimum standards on procedures in Member States for granting or withdrawing refugee status; to define minimum standards on the reception of asylum seekers; and to undertake a study with a view to establishing the merits of a single EU asylum procedure. Measures to be adopted within five years related to the adoption of minimum standards with respect to the qualification of nationals of third countries as refugees, and defining minimum standards for subsidiary protection to persons in need of international protection.

4.2 Tampere Conclusions 1999

Following the agenda laid out in the 1997 Amsterdam Treaty and the 1998 Vienna Action Plan, the Tampere Conclusions set out the goal of establishing a 'Common European Asylum System', based on the 'full and inclusive application of the principles of subsidiarity and proportionality'.

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102 Action Plan, supra note 100, at 19/8-19/10 in relation to immigration and asylum matters.
103 Paragraph 36(b)(i), at C19/8.
104 Paragraph 36(b)(ii). The Eurodac is a database for the collection of fingerprints of persons apprehended in connection with irregular crossing of an external border, individuals found illegally present within the territory of a Member State and of asylum applicants. It allows asylum seekers' fingerprints to be compared, with a view to limiting secondary movement (paragraph 36(b)(iv)), and implementing the first country of arrival principle provided for by Dublin II. See: 'Regulation (EC) No.2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention.' OJ L62/01, 5 March 2002, at Articles 6, 8 and 9. Finally, note the Commission's recent report on Eurodac's operation where it considers the system to be a success: http://www.europa.eu.int/comm/justice_home/doc_centre/asylum/fingerprints/doc/annual_report_en.pdf.
105 Paragraph 36(b)(iii).
106 Paragraph 36(b)(v).
107 Paragraph 36(b)(vi).
108 Paragraph 38(b)(i), at C19/9.
109 Paragraph 38(b)(ii).
of the Geneva Convention.'\textsuperscript{111} Although the Conclusions asserted the need to
prevent illegal migration in Paragraphs 22-27, they also emphasised the EU’s
commitment to honouring the Geneva Convention and reaffirmed the Member
States’ ‘absolute respect for the right to seek asylum... thereby ensuring that
nobody is sent back to persecution, that is, maintaining the principle of non-
refoulement.'\textsuperscript{112} Paragraph 3 of the Conclusions summarises the liberal tone that
runs through the document:

>'The challenge of the Amsterdam Treaty is now to ensure that freedom, which includes the
right to move freely throughout the Union, can be enjoyed in conditions of security and
justice accessible to all. This freedom should not, however, be regarded as the exclusive
preserve of the Union’s own citizens. Its very existence acts as a draw to many others
worldwide who cannot enjoy the freedom Union citizens take for granted. It would be in
contradiction with Europe’s traditions to deny such freedoms to those whose circumstances
lead them to justifiably seek access to our territory.'

With respect to a common asylum policy, the Tampere Conclusions, like the
Vienna Action Plan, identify short and long-term goals. Tampere’s short-term
goals include establishing: workable criteria for determining standards for a fair
and efficient asylum procedure; common minimum reception standards for
asylum seekers; rules on the recognition and content of refugee status; and rules
on subsidiary forms of protection for those who do not meet the ‘refugee’
definition, but nevertheless are still in need of protection. To that end, Tampere
submits that the Council is urged to adopt the necessary decisions based on the
timetable set in the Amsterdam Treaty and the Vienna Action Plan.\textsuperscript{113} The long-
term goals cover the establishment of a ‘common asylum procedure and a uniform
status for those who are granted asylum’, giving the European Commission one
year to outline a position on the subject.\textsuperscript{114}

The UNHCR, ECRE and other non-governmental organisations (NGOs)
generally welcomed the Conclusions adopted at the Tampere Summit. The

\textsuperscript{111} Ibid., Paragraph 13, at 9.
\textsuperscript{112} Ibid.
\textsuperscript{113} Paragraph 14, at 9.
\textsuperscript{114} Paragraph 15, at 9.
positive tone of the Tampere Conclusions appeared to acknowledge the protection needs of refugees. However, both the UNHCR and ECRE stressed that the real test of the EU’s commitment to a protection-oriented asylum policy would come with the implementation of the Tampere Conclusions. The UNHCR questioned whether the EU’s proposed ‘Common Asylum System’ would actually result in high standards for refugee protection. There is a risk, the UNHCR observed, ‘...that the minimum standards will develop into the maximum standards, particularly if the rule of unanimity voting is to be maintained during the next five years of negotiations on draft instruments.’ Consequently, the UNHCR called on the EU to move quickly to a system of qualified majority voting on matters of asylum.


Following the ‘Common European Asylum System’ goal, the European Commission set out a Communication which purpose is to ‘launch a debate in the Community on the longer-term prospects.’ This Communication sets the Commission’s intention to take:

'an ambitious approach to all the questions and certain possible scenarios so that the Council, Parliament and the organisations concerned by asylum policy, can engage in a full discussion and come up with precise guidelines.'

115 Edminster, supra note 10, at 4.
116 Edminster, supra note 10, at 6.
117 Ibid.
118 As complemented by the ‘Communication from the Commission to the Council and the European Parliament on the Common Asylum Policy and the Agenda for Protection’, COM(2003) 152 Final, 26 March 2003, which deals in detail with the ‘second-stage’ of harmonisation as well as providing a general assessment on the effectiveness and progress of EU initiatives thus far.
119 European Commission, supra note 7. This proposal is for the ‘second-stage’ of harmonisation which is not the subject of this thesis. However, it is important to bear in mind that the asylum policies, as discussed here and in the Chapters that follow, are only part of a long-term project of harmonisation.
120 European Commission, supra note 7, at 2.
To achieve this goal, the Commission builds on the Tampere Conclusions, to adopt clear principles which would offer guarantees to those who are legitimately seeking protection in the EU. These principles include: absolute respect for the right to seek asylum; application of the Geneva Convention in full; maintenance of the principle of *non-refoulement* and preservation of the specificity of humanitarian admission and asylum as against all other grounds of admission.\(^\text{121}\) Accordingly, refugees and persons seeking protection must be eligible overall for the same conditions as to examination of their request and for the same conditions in protection and residence whichever Member State is concerned. Those who do not need protection any longer must also receive equivalent treatment.\(^\text{122}\)

The need to harmonise reception conditions is tied up with two main objectives: offering asylum seekers an equivalent level of conditions throughout the Community\(^\text{123}\) and avoiding secondary movements resulting from the different conditions in the Member States.\(^\text{124}\) The adoption of a common procedure and uniform asylum determination system would reduce the impact of ‘asylum shopping’ and consequently may result in a decrease in the secondary movements of asylum seekers.\(^\text{125}\)

Finally, the Communication deals with partnerships involving the UNHCR and other NGOs. It states that the UNHCR will have to be consulted on EU proposals for a common procedure and uniform status.\(^\text{126}\) This initiative is to be welcomed since the development of policy relating to a common procedure and uniform status regarding asylum is indeed the appropriate occasion for reconsidering the

\(^{121}\) European Commission, *supra* note 7, at 6.

\(^{122}\) European Commission, *supra* note 7, at 7.

\(^{123}\) These include access to employment; conditions for acquisition of a work permit; access to social rights such as education, health care and family reunification. European Commission, *supra* note 7, at 12. Also see: European Commission, *supra* note 118, at 7, requiring ‘minimum standards for the receptions of asylum seekers’.

\(^{124}\) European Commission, *supra* note 118, at 7, discussing the need for a ‘more harmonised, integrated and comprehensive application of the Geneva Convention’.

\(^{125}\) European Commission, *supra* note 7, at 10.

relationship between the Community, the Geneva Convention and other international organisations as well as being the place for examining how Community laws integrate with the accepted international law.

It is important to note that alongside the deliberations discussed thus far establishing the ground rules, there has been an active legislative process implementing the debates' outcome, thereby confirming to the five-year deadline creating the first-stage of asylum laws. Consequently, the examination that follows allows the scrutiny of the framework of rules concluded, mainly, the unified definition of the term ‘refugee’,\textsuperscript{127} common minimum reception standards for asylum seekers,\textsuperscript{128} and the substantive laws of the temporary protection legislation.\textsuperscript{129}

5. In View of Enlargement: Recent and Future Developments

5.1 Treaty of Nice 2001

At Tampere, the EU Head of States and Governments called for the establishment of a ‘Common European Asylum System’. However, in Nice,\textsuperscript{130} the European Council failed to agree on one of the basic requirements for establishing such a system, that is, the introduction of qualified majority voting in the Council of Ministers.


\textsuperscript{130} Treaty of Nice, supra note 66.
The Treaty of Nice attempts to outline a new perspective in light of an enlarged EU. Therefore, the main focus of the Treaty is institutional reform. This section discusses only the most radical and relevant changes introduced by the Treaty of Nice.

Under the Treaty of Nice, the European Parliament is granted additional powers. An important change is the proposed amendment to Article 230 EC, which gives the European Parliament an equal status with the Council, Commission and Member States to challenge the legality of an act in the Court of Justice. Under the amendments made to Article 7(1) TEU, the European Parliament may take the initiative in charging a Member State with a breach of fundamental rights. This power hands the European Parliament an important scrutiny role over the Member States concerning fundamental rights.

The Nice Treaty makes no amendment to the co-decision procedure, which was made more efficient and transparent by the Amsterdam Treaty. The co-decision procedure is proposed to be extended to an additional seven areas, including the new Article 65 EC, concerning judicial co-operation in civil matters. For the provisions of Title IV of the EC Treaty, it was agreed on a partial and deferred switch to qualified majority.

However, the decision of the Council in Nice against the introduction of qualified majority voting in asylum matters confirms the enduring reluctance of

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131 Any changes agreed upon as a result of EU enlargement in the composition of the Parliament, Commission, Council and European Court of Justice, are not discussed in this Chapter.


132 Articles 62 EC and 63 EC on visas, asylum and immigration.

133 For a list of the required process see: ‘Memorandum to the Members of the Commission, Summary of the Treaty of Nice’, SEC(2001)99, 18 January 2001, at Annexes 23 and 24. The process of qualified majority voting has been amended by the draft Constitutional Treaty, at Title IV, Chapter I, Article 24, supra note 66.
Member States to transfer sovereignty powers to EU bodies. Rather than promoting qualified majority voting, the Treaty of Nice has made its introduction even more difficult by adding a new clause in Article 67 EC, which makes qualified majority voting conditional on the prior, unanimous, adoption of 'Community legislation defining the common rules and basic principles governing these issues.'

Finally, a Declaration attached to the Treaty of Nice, places the status of the Charter of Fundamental Rights in the EU on the agenda for an inter-governmental conference to amend EU Treaties to be held in 2004, thereby attempting to transform its autonomous standards of rights (which often reflect the influence of existing national and international understandings, for example, the European Convention on Human Rights (ECHR)) into a binding EU law. The Charter provides that the right of asylum is guaranteed in compliance with the rules of the Geneva Convention and in accordance with the EC Treaty. Article 19(2) of the Charter states that 'No one may be removed, expelled or extradited to a State where there is a serious risk that he... would be subject to the death penalty torture or other inhuman or degrading treatment or punishment.' Although the Charter is currently not legally binding, it has been argued that the potential weight of the Charter should not be dismissed 'since the Court of Justice [and the Union’s legislative bodies] might take account of it as a further source of human rights forming part of the general principals of Community law.'


137 This, in effect, is a codification of Article 3 European Convention on Human Rights' principle into Community laws.

138 Peers, S, ‘Immigration, Asylum and the European Charter of Fundamental Rights’, European Journal of Migration and Law, Vol.3 (2001), at 144. Thus far, the Charter was mentioned in an EU judicial decision of the Court of First Instance (Case T-54/99, max mobile Telekommunikation Service GmbH v. Commission, ruling of 30 January 2002, at Paragraphs 48 and 57) and in numerous Opinions addressed by various Advocates General, for instance,
It is important to emphasise that one needs to accept Nice with some caution as its role depends on the final agreement and ultimate adoption of the pending draft Constitutional Treaty.

5.2 Draft Constitutional Treaty 2003

Following the Treaty of Nice, the Laeken European Council had decided to convene a Convention, establishing a structure and broadening the public debate on the future of the EU.\textsuperscript{139} Based on this recommendation, the European Council meeting in Thessaloniki was presented with a text constituting the foundation of the draft Constitutional Treaty.\textsuperscript{140} In its current form, the draft Treaty establishing the European Constitution (draft Constitutional Treaty)\textsuperscript{141} is designed to achieve three aims. First, its goal is to bring Union\textsuperscript{142} citizens closer to the European institutions. Secondly, it targets to organise the enlarged Union politics. Finally, it wishes to ‘develop the Union into a stabilising factor in the new world order.’\textsuperscript{143}

For the purpose of this Chapter, it is important to discuss the changes brought about to the Union institutions and to the area of freedom, security and justice by the draft Constitutional Treaty, as these will affect the second-stage of harmonisation, that is, the establishment of a Common European Asylum System as required by Tampere.

The notion of an area of freedom, security and justice is not a new one. Yet, unlike previous treaties featuring this concept, the draft Constitutional Treaty bestows the appropriate tools for reaching solutions in an enlarged Union by

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\textsuperscript{139} Laeken European Council, 14-15 December 2001, Presidency Conclusions. Council Document SN 300/1/01 REV 1, at Point I(3).
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\textsuperscript{141} Draft Constitutional Treaty, supra note 66.
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\textsuperscript{142} The draft Constitutional Treaty removes any EC/EU designations, and adopts the terminology of ‘Union [law]’ throughout its text.
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\textsuperscript{143} Draft Constitutional Treaty, at ‘Preface’.
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shifting the procedures applicable into more effective, democratic and transparent mechanisms.

The draft Constitutional Treaty reiterates the idea of establishing internal borders free from any frontier controls. To achieve this end, the Union must frame a common policy on asylum and immigration based on solidarity.144 Such an asylum system, according to the draft Constitutional Treaty, must be in compliance with the principle of non-refoulement and the Geneva Convention.145 The Common European Asylum System does not discuss the establishment of mere minimum standards as provided for by the Treaty of Amsterdam146 but rather provides for a detailed harmonisation. While some areas discussed by the draft Constitutional Treaty have already been adopted under the process of Amsterdam’s five-year timeframe, the draft Constitutional Treaty reaches out further, requiring a firm transition toward a Common European Asylum Policy.147

The draft Constitutional Treaty achieves two important victories in its present form. First, the draft Constitutional Treaty re-organises the powers of the institutions. Within this, it allocates to the Council the power of a qualified majority voting rather than unanimity which was favoured in Nice. This will allow an enlarged EU to effectively achieve adoption of asylum measures. Unanimity would have meant that each Member State in the enlarged Union would have had the right to veto legislation.

The draft Constitutional Treaty strengthens the democratic legitimacy of the Union. To this end, the draft Constitutional Treaty provides that the European Parliament as well as national Parliaments shall be kept informed of all the proceedings regarding the area of freedom, security and justice.148 More

144 Draft Constitutional Treaty, at Part III, Chapter IV, Article III-158.
145 Ibid., Article III-167.
146 Article 63 EC.
147 Draft Constitutional Treaty, at Part III, Chapter IV, Article III-167, requiring Union laws or framework laws to set down common measures for the establishment of European asylum system, not minimum standards.
148 Ibid., Article III-162.
importantly, the European Parliament is granted a key role in the legislative procedure, as the scope of application of the co-decision legislative procedure is now extended to become the norm.\textsuperscript{149} The draft Constitutional Treaty, like Nice, empowers the European Parliament to take the initiative in charging a Member State with a breach of Community law.\textsuperscript{150} Again, this power hands the European Parliament an important scrutiny role over the Member States with regard to infringements of human rights. The draft Constitutional Treaty, unlike the Amsterdam process, authorises the European Court of Justice to exercise judicial control over all acts adopted.\textsuperscript{151} Finally, the Commission will return to be the only source of legislative initiative.\textsuperscript{152}

The second significant achievement of the draft Constitutional Treaty is the incorporation of the Charter of Fundamental Rights, which was discussed at Nice, into Community law.\textsuperscript{153} Consequently, the Charter’s provisions will have a binding legal force once the Constitution enters into force. The Union’s institutions, bodies and agencies must respect the rights written into the Charter when deciding legislation. This obligation is similar on Member States when they implement Union measures. Part of the Court of Justice’s role will be to ensure that the Charter is adhered to. As discussed above, the importance of the Charter is due to the fact that it unconditionally respects the right to seek asylum, honouring the Geneva Convention and the principle of non-refoulement.\textsuperscript{154} Thus, the Charter of Fundamental Rights represents a new approach in the nature of future Community legislation by permanently adding a human rights dimension to its previous economic and security-oriented policies.

\textsuperscript{149} See: Draft Constitutional Treaty, at Title VI, Chapter I, Article III-302.

\textsuperscript{150} Draft Constitutional Treaty, at Title VI, Chapter VII, Article III-270(2).

\textsuperscript{151} Draft Constitutional Treaty, at Title IV, Chapter I, Article 28(3).

\textsuperscript{152} Ibid., Article 25(2).

\textsuperscript{153} Draft Constitutional Treaty, Part II.

\textsuperscript{154} Charter of Fundamental Rights, Articles 18-19.
Finally, the aim was to have the Constitution signed soon after 1 May 2004, the date of accession of the 10 new Member States. Consequently, as a result of an understanding that the integration project can only truly develop if Member States reach an agreement establishing a sounder institutional framework, considering the Union’s enlargement, the Constitution was promptly adopted under the Irish Presidency in the June 2004 Brussels European Council.

6. Post 11 September 2001 EU Developments

The terror attacks of 11 September 2001 have triggered a universal concern. The EU visions of free movement of persons and liberal economic borders were now being seen through the spectacles of not only a potentially overburdening economic migration, but also through the eyes of an even more threatening issue—terrorism. Hence, the emphasis on border security in the post 11 September world became essential. It is crucial to bear in mind that any immediate legislation developments in the EU arena were based purely on the ‘perceived threat in the United States, as no terror attacks took place in Europe.’

EU competence in the field of terrorism is found in Article 29 TEU, which specifically refers to terrorism as one of the serious forms of crimes to be prevented and combated by undertaking a common approach. The balancing exercise to be carried out therefore is between ‘commercial interests and human rights obligations in a border-free Europe on the one hand, and the construction of

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158 Guild, E, ‘Introduction’ in Brouwer, E, Catz, P, and Guild, E, Immigration, Asylum and Terrorism: A Changing Dynamic in European Law, Recht en Samenleving 19, 2003, at 2. This, of course, has now changed with the recent terror attacks in Turkey and Spain.
the foreigner as a threat that justifies border closure and expulsion of possible security threats on the other.'  

In a letter dated 16 October 2001, President Bush requested action to be undertaken by the EU in relation to securing the borders as regards the movement of persons to and from the United States. Consequently, the focus of EU security measures primarily took the form of protecting the external borders. Aside from stricter border controls, and harsher visa measures, however, EU policies also seek to exclude protection seekers from any sort of status or even a determination of their status on the basis that they are terrorists or are linked to terrorism. Yet, the central problem with such an approach is that refusing to determine an asylum application does not relieve Member States from their protection duties under human rights obligations, such as Article 3 ECHR. In essence, Member States are left to deal with individuals against whom expulsion cannot be executed. Derogation from inconvenient human rights, such as the approach taken in the UK, 'cannot set any good example for the rest of the world.'

Therefore, the question to be addressed is how would the terrorism measures interact with the proposed asylum policies? It has been argued that:

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161 Note the Laeken European Presidency, supra note 139, at Point 42, stating that 'Better management of the Union's external border controls will help in the fight against terrorism.'
...little actually overlaps with the European Commission's proposals in the field of immigration and asylum law currently on the table... [however the terrorism measures] will need to be taken into account when the Commission proposes new legislation in respect of residence permits, visas and expulsion.  

Indeed, a Commission's analysis of the impact of 'internal security' measures on EU adopted asylum legislation has concluded that 'all the legislation in the field of asylum and immigration contains sufficient standard provisions to allow for the exclusion of any third country national who may be perceived as a threat to national/public security.' However, measures not yet adopted in this area, will be amended 'in light of the new circumstances, without prejudice to the relevant international obligations... Examination of these measures takes place in the Chapters that follow.

As discussed above, ever since asylum matters were brought into the common EU agenda, it was perceived as an issue that needs to be adopted as part of a larger project of facilitating free movement of persons in an area free from internal border controls. The Single European Act of 1986, the Schengen Agreement, the Ad Hoc Group on Immigration instruments, Dublin II and Title IV's 'flanking measures', all realise the freedom of movement aspiration through the adoption of 'appropriate measures with respect to external border controls, immigration, asylum and the prevention and combating of crime.' Consequently, as the general tone of EU policy has always been restrictive on immigration, aimed at preventing a large influx of immigrants and seen as an inevitable part of a policy created to control the internal borders, it appears that the events of 11 September 2001 and US response to them, discussed in Chapter II, have not changed the EU agenda, but merely articulated it better and rushed its adoption.

165 Guild, supra note 159, at 342.
167 Commission Working Document, supra note 163, at Chapter 4, Point 4.1.
168 Ibid. For the proposed changes see: Commission Working Document, supra note 163, at Chapter 4, Points 4.2-4.3.
169 Article 61 EC. See also: TEU, Article 2. (Emphasis added).
Concluding Remarks

The establishment of unimpeded freedom of movement for persons through the abolition of border controls calls for an unconditional harmonisation. As Hailbronner notes:

"In an area of free movement without border controls, in which third country nationals can move freely, uniform standards for the admission of refugees and asylum seekers must be adopted to ensure equal chances of an alien seeking protection regardless of the country in which the application for protection is filed. Flight into a European Union of open borders, is no longer a flight into one single Member State, but flight into a common area of justice and social security. Different systems between the Member States would lead to an unequal and unjust distribution of asylum seekers and refugees among the Union’s Member States." 170

As considered in this Chapter, the EU asylum regime was initiated as a counter response to the dream of a border-free EU. Yet, the fear that third-country nationals would be able to travel from one Member State to another without being monitored lead to the adoption of security-oriented measures, such as the Schengen Agreement and the Dublin Convention. Unfortunately, the anxiety of losing State sovereignty and border controls still directs the decision-making process; this is especially seen in the discussions surrounding the 11 September 2001 terror events, as highlighted above. In such an atmosphere, human rights concerns are secondary to the primary aim of controlling immigration. 171

In relation to asylum, the Amsterdam Treaty proposes the creation of ‘an area of freedom, security and justice’, covering free movement, immigration and asylum, and the incorporation of the Schengen acquis into the EU. However, as argued above, decisions made by Schengen’s secretive and largely accountable Executive Committee would become Community law within the provisions of Title IV. 172 While Member States did introduce immigration and asylum into the first pillar, as debated above, the Treaty of Amsterdam is also comprised of inter-

170 Hailbronner, supra note 6, at 357.
171 Hailbronner, supra note 6, at 353-370.
172 Geddes, supra note 24, at 125-126.
governmental decision-making with the emphasis on unanimity, arrangements of ‘opt-ins’ and ‘opt-outs’ and a complex institutional framework.

The fight over sovereignty powers and the ability to influence Community level decision-making still, after twenty years of negotiations, subsists and was explicitly seen in the lack of consensus on the introduction of a qualified majority voting in the Council at the Treaty of Nice in 2001. Nevertheless, recent developments indicate that Member States have recognised that compromises must be made in return for ultimate harmonisation. Unanimity would be difficult in a Union that may have more than 25 Member States. Thus, the draft Constitutional Treaty realises that in order to truly develop comprehensive and workable common policies, the transfer to a qualified majority voting is inevitable. Where Member States indicated their will to hold a stabilising role in the new world order, it is clear that a Community weight will be more robust in influencing the international arena.

Finally, it is important to remember that the five-year deadline as set out by the Treaty of Amsterdam and Tampere is merely for the ‘first-stage’ of negotiations leading to integration in one of the ‘flanking measures’ to free movement, namely, asylum policies. This stage would lead to a more coherent institutional framework, which will solely be based on Commission proposals. It is left to be assessed by the rest of this thesis whether the emerging EU asylum system, as discussed by Tampere’s ‘short-term’ objectives and as compared with US asylum policies, has been successful in striking the balance between security concerns and fears of asylum abuse, while maintaining full respect to the Geneva Convention and other human rights instruments. Yet, before embarking upon such comparative examination, Chapter II discusses the evolution of US asylum legislation. Such a debate contributes to understanding the objectives of US laws which are analysed by the rest of this thesis.
Special Note

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Chapter II

The Legal Framework of Asylum in the United States

Introduction

The United States has always been perceived as a traditional country of immigration. As such, it is accustomed to planning the arrival of newcomers and to integrate them into its society. In the United States, asylum law involves two essential components: on the one hand, protection from immediate punitive action and on the other hand, there is the need for a careful and objective determination of the necessity of a longer-term protection. The American system proclaims its objectives as: ‘achieving a balance between the need for compassion in assessing the claims of asylum seekers and the need for adequate controls to deter fraud and abuse.’

Currently, US law provides for four different forms of relief for persons fleeing persecution or related serious harm in their home countries, and who are physically present or arriving in the United States. These are: refugee status,

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2 This Month in Immigration History: January 1995. Available at: http://www.uscis.gov/graphics/absoutins/history/jan95.htm, at 1.
4 Immigration and Nationality Act 1952 (INA) §207, 8 USC §1157. The Overseas Refugee Programme is only available to persons applying from outside the United States. Each year, refugee admissions- limited by number, region and a system of priorities- are determined through a statutory consultation process between the President and Congress that identifies refugee groups ‘of special humanitarian concern to the United States.’ Additionally, each refugee must be sponsored by a responsible person and/or an organisation which will assist the refugee in becoming settled in the United States. 8 CFR §207(2)(d)(2003). Refugee status could lead to permanent residency after one year, and consequently to citizenship, 8 CFR §209(1)(2003).


US refugee status is not addressed in this thesis.
asylum status,\(^5\) withholding of removal protection,\(^6\) and finally, protection under the Torture Convention.\(^7\) However, section 208(a) of the Immigration and Nationality Act 1952 (INA), asylum, and section 241(b)(3) INA, withholding of removal, are the two most substantial forms of relief that have been interpreted in the case-law and regulations since the Refugee Act 1980 came into force.\(^8\)

While the United States did not sign the 1951 Geneva Convention Relating to the Status of Refugees,\(^9\) it did subscribe to the 1967 New York Protocol.\(^10\) The 1968 accession committed the United States to follow certain elements of international law in the treatment of refugees, as well as the definition of ‘refugee’. Consequently, the United States is bound by Articles 1-34 of the New York Protocol, most significantly, Article 33, which sets forth the norm of non-refoulement, or the prohibition against returning refugees to persecution.\(^11\)

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\(^5\) INA §208(b), 8 USC §1158(b). Asylum, in contrast to the above refugee status, is available to persons seeking protection in the United States or at its borders. The main criteria for obtaining asylum are contained in the basic refugee definition, INA §101(a)(42), and it requires no prior designation that the person is a refugee ‘of special humanitarian concern.’ Generally, there are no numerical or categorical limitations to asylum status. Persons granted asylum may apply for permanent residency after one year, however, this process, known as ‘adjustment of status’ has numerical limits of 10,000 asylees per year. INA §209(b), 8 CFR §209(2)(2003).

It is asylum status that is the main concern of this thesis.

\(^6\) INA §241(b)(3), 8 USC §1231(b)(3).


\(^11\) Article IV, Section 2 of the United States’ Constitution expressly provides that international treaties are on equal footing with federal statutes: ‘This Constitution, and the laws of the United States, which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be supreme Law of the Land.’

Notwithstanding this, there are two principles which may limit the impact of treaties under US law. The first is the principle of ‘self execution’; only self-executing treaties are deemed to create judicially enforceable rights. Human Rights treaties are considered as non-self executing. Hence, Congress must pass implementing legislation. Example of a non-self executing human right treaty is the International Covenant of Civil and Political Rights (16 December 1966, 999 UNTS 171). The second limiting policy is the ‘last in time’ rule by which treaty obligations may be repealed through subsequent inconsistent domestic legislation. This in essence means that US domestic laws allow derogation from treaty-based standards, in breach, however, of
The basic domestic immigration legislation in force in the United States is the INA.\[^{12}\] The INA initially did not contain provisions to handle the resettlement of refugees or displaced persons.\[^{13}\] Asylum, therefore, is a 'relatively new addition to the immigration laws of the United States.'\[^{14}\]

Although the United States ratified the New York Protocol in 1968, prior to the passage of the Refugee Act in 1980, the term 'refugee' was defined in geographical and political terms, as persons fleeing communist, communist-dominated countries or the Middle East.\[^{15}\] Thus, the Congressional intent of the Refugee Act was to establish a politically and geographically neutral adjudication standard for both asylum and refugee status. This standard is to be applied equally to all applicants regardless of their country of origin.\[^{16}\] This new, yet somewhat delayed legislation, attempted to bring US law into compliance with US obligations under international law:

'If one thing is clear from the legislative history of the definition of 'refugee', and indeed the entire 1980 Act, it is that one of Congress's primary purposes was to bring the United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees.'\[^{17}\]

This Chapter aims to provide an historical analysis of US asylum legislation which is examined in considerable detail in the Chapters that follow. Such an


\[^{14}\] Anker, supra note 3, at 1.

\[^{15}\] INA §203(a)(7), 8 USC §1153(a)(7) (1952) (Repealed 1980).


inquiry will promote an understanding into the background and consequently, the motives, behind US asylum thinking on current policies.

1. The Push Toward Asylum Reforms

The Refugee Act explicitly incorporated the UN definition of 'refugee' into US law, and for the first time provided a clear legal foundation for the grant of asylum in the United States.\textsuperscript{18} Section 101(a)(42) of the INA, as amended by the Refugee Act states that:

\begin{quote}
'The term 'refugee' means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion or; (B) Any such person as the President, after the appropriate consultation may specify...'
\end{quote}

Despite this universal 'refugee' definition, during the 1980s, the US government rejected the asylum claims of the overwhelming majority of asylum seekers from El Salvador and Guatemala. Refugee advocates suggested that the denial of asylum to that group was due to the fact that these refugees were fleeing from governments supported by the United States.\textsuperscript{19} Similar allegations of bias have been raised regarding the different treatment of Haitian and Cuban asylum seekers. For the first two decades after Castro came to power in Cuba, the United States had an 'open door' policy towards Cuban asylum seekers.\textsuperscript{20} In 1980, this policy was tested, when Castro authorised over 124,000 Cubans\textsuperscript{21} to head towards Florida. Despite considerable ambivalence, most Cubans were allowed to remain, privileged by the Cuban Adjustment Act 1966.\textsuperscript{22} However, at the same time,

\textsuperscript{18} 'Prior to the 1980 amendments there was no statutory basis for granting asylum to aliens who have applied from within the United States.' Cardoza-Fonseca, \textit{ibid.}, at 433.


\textsuperscript{20} UNHCR, \textit{supra} note 1, at 174.

\textsuperscript{21} Including some 8,000 criminals and psychiatric patients, see: UNHCR, \textit{ibid.}

Haitians were interdicted at sea,\textsuperscript{23} denied asylum in the United States and sent back to Haiti.\textsuperscript{24} Many advocates and academics related this partiality to the fact that the Refugee Act did not remove the refugee policy entirely from presidential control, and thus political factors were influencing refugee policies.\textsuperscript{25} Indeed, it has been argued that:

‘...the vivid contrast in the treatment of Haitians, who were being turned away from the shores of south Florida, and Cubans, who were being greeted with open arms, reaffirmed that the nation’s refugee policy would continue to be used in a selective manner... from a particular political perspective.’\textsuperscript{26}

The pressure to reform the Refugee Act grew stronger for a number of reasons. First, as highlighted, the allegation of discrimination in a system, which supposes to give equal protection to all, had to be resolved. Secondly, in Fiscal Year 1992 asylum seekers filed approximately 104,000 applications. By 1993, the rate of receipt jumped to 143,118, while in 1994 there were 425,000 applications pending.\textsuperscript{27} As the backlog grew, it was suspected that the asylum system became more vulnerable to fraud and abuse; individuals could file fraudulent claims and obtain work authorisations while their requests remained pending.\textsuperscript{28} At the same time, genuine refugees were deprived of expeditious adjudication of their requests. Thirdly, in early 1993, events such as the shooting of the Central

\textsuperscript{23} In \textit{Sale v. Haitian Centres Council Inc.}, 509 US 155; 113 S.Ct 2549 (1993), the Supreme Court held that the United States' obligation under Article 33 of the Geneva Convention did not apply extraterritorially, where the Haitians were interdicted. Also note the discussion in Chapter III.

\textsuperscript{24} US statistics show that between 1981-1991, over 22,000 Haitians were interdicted at sea, and that only 28 were allowed to enter the United States to pursue their asylum claims. UNHCR, \textit{supra} note 1, at 176.

\textsuperscript{25} ‘The Cuban case illustrates... the prominence of foreign policy considerations in the making of refugee policy...' Zolberg, \textit{supra} note 19, at 110.


\textsuperscript{27} UNHCR Statistical Yearbook 2001: Refugees, Asylum Seekers and Other Persons of Concern-Trends in Displacement, Protection and Solution, October 2002. The statistical information used in this Chapter is reproduced in the UNHCR Statistical Reports annexed to this Thesis-See: Annexes I, II.

\textsuperscript{28} This Month in Immigration History, \textit{supra} note 2, at 5. Also see Joppke, who discusses that ‘... the asylum option was rational in several respects, such as legalising clandestinely or bypassing the rigid quotas and long lines for regular immigration.' Joppke, C, ‘Asylum and State
Intelligence Agency's employees and the bombing of the World Trade Centre were linked to asylum seekers. Finally, the Golden Venture ship, which ran aground, discharging its human cargo of smuggled Chinese, resulted in an increased concern among US citizens that the United States had 'lost control of its borders'.

In the early 1990s, anti-immigrant sentiment spread throughout the United States. This was specifically reflected through a 1994 debate in California over a measure known as 'Proposition 187', which sought to make undocumented migrants ineligible for most social services and bar their children from public education. Although Proposition 187 dealt with undocumented migrants rather than asylum seekers, it sparked 'a nation-wide debate on immigration.' While the Proposition was passed, local courts later declared most of its provisions unconstitutional.

As a result of the above factors, the clamour mounted for asylum reform. In this atmosphere, asylum laws became a priority for both President Bush and President Clinton who mandated the Department of Justice to undertake any necessary amendments. With the aim of trying to prevent any type of abuse, reform regulations were implemented in 1990 and in 1995.

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30 This Month in Immigration History, supra note 2, at 5.


32 This Month in Immigration History, supra note 2, at 5.

33 UNHCR, supra note 1, at 178.


35 Ibid.

36 UNHCR, supra note 1, at 178. See discussion in Chapter IV.
2. Reforms to the American Asylum System

2.1 The 1990 and 1995 Reforms to the Refugee Act

2.1.1 The 1990 Reforms

In 1990 the Department of Justice issued a final asylum rule fully implementing the Refugee Act.\(^\text{37}\) This rule ordered the establishment of a new US Asylum Officer Corps that would be specially trained to determine asylum eligibility. The reform system gave most asylum applicants two chances to have their asylum claims heard; one by an Immigration and Naturalisation Service (INS) official and the other by an immigration judge. Under this system, most asylum applicants would be interviewed in a non-adversarial setting by an INS official. The asylum officer would hear the case, and if not approved, the applicant would have time to rebut the proposed decision by presenting their asylum case for a second, de novo, hearing before an immigration judge. The hearing would include evidence and arguments from the applicant as well as from the INS. Yet, despite the reforms, it has been debated that the overall decision process was slow, cumbersome and inadequately staffed.\(^\text{38}\) Consequently it could have taken many months, if not several years, for an asylum applicant to go through the complete system to exhaust his or her full rights and therefore the system was subject to a serious backlog.\(^\text{39}\)

2.1.2 The 1995 Reforms

In order to resolve the difficulties presented by the 1990 amendments, in 1995 additional asylum reforms were presented. These reforms were a comprehensive package integrated into a programme that modified the Refugee Act. The reforms kept the best of the previous 1990 system, as well as reforming procedures that had not been working. Most notably, the reform programme retained the 'non-

\(^{37}\) 27 July 1990. See: This Month in Immigration History, \textit{supra} note 2, at 3.


\(^{39}\) Indeed, see the UNHCR's Statistical Reports, \textit{supra} note 27 (Annex II), indicating the rising blockage in the US asylum adjudication system between the years of 1990-1996.
adversarial' interview by an asylum officer, and final denials, in most cases, are
only made by immigration judges.\textsuperscript{40} As discussed above, under the 1990 reform
programme, asylum officers are to make the final and complete decision, that is,
approval or denial, for asylum applicants in the United States.\textsuperscript{41} Yet, applicants
whose claims are denied, retain the possibility of presenting a second asylum
claim before an immigration judge. Under the 1995 reform system, however, these
two processes are linked into one continuous process with short timeframes.
Theoretically therefore, denials in most asylum cases should come only from
immigration judges, and usually within 180 days from the first filing of an asylum
application.

In addition, the revised regulations de-coupled employment authorisation from
asylum to the extent that asylum applicants can no longer apply for employment
authorisation at the same time they apply for asylum. Presently, an asylum
applicant must wait 150 days after the INS receives his or her complete
application\textsuperscript{42} before he or she can apply for employment authorisation.\textsuperscript{43}

These reforms were implemented in 1996 by the Illegal Immigration Reform
and Immigrant Responsibility Act.\textsuperscript{44}

2.2 Illegal Immigration Reform and Immigrant Responsibility Act 1996

2.2.1 A Better System for Whom?

In 1996 President Clinton signed the Illegal Immigration Reform and
Immigrant Responsibility Act (IIRIRA). Primarily aimed at limiting illegal
immigration and abuse of the asylum procedures, the IIRIRA not only

\textsuperscript{40} 'The retention of the so-called 'two bits of the apple' was an essential feature of the 1990
reforms.' See: This Month in Immigration History, \textit{supra} note 2, at 3. To achieve this, the US
doubled the size of the asylum officer corps and the ranks of the immigration judges. See:
Martin, \textit{supra} note 38, at 5.

\textsuperscript{41} 8 CFR §208(14)(b)(2003).

\textsuperscript{42} Incomplete applications will be returned and the employment authorisation 'clock' will not begin
to run until a completed application is subsequently filed. If the INS does not return an
application within thirty days of filing, it is deemed complete. 8 CFR §208(3)(c)(3)(2003).

\textsuperscript{43} 8 CFR §208(7)(2003), the Service has thirty days to either grant or deny the request.
fundamentally altered the way in which the US government responded to asylum claimants, but it also changed the rights asylum applicants were accorded.45

The Act expanded the INA to codify a number of provisions that previously were regulatory as well as adding new requirements.46 The most positive and significant changes include the expansion of the definition of ‘political opinion’ to embody resistance to a coercive population control programme.47

Before the IIRIRA, there were separate ‘deportation’ and ‘exclusion’ proceedings, rather than, as under current law, one process of removal proceedings. ‘Deportable’ were individuals who secured entry into the United States, either lawfully or illegally, without detection. Even if consigned to an illegal and undocumented status, the mere fact of their unimpeded physical arrival in the United States would require that any expulsion be prescribed by some form of deportation proceedings. ‘Excludable’ aliens, on the other hand, never actually secured entry into the United States, legally or not.48 Excludable aliens would therefore face summary or even immediate removal, without the procedural safeguard afforded under the deportation procedure:

‘Our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission... and those who are within the United States after entry, irrespective of its illegality. Ironically, this dichotomy conferred greater legal protection

45 According to Human Rights Watch’s World Report 1999, United States: Human Rights Developments, the enactment and subsequent enforcement of IIRIRA has led to widespread violations of international human rights standards applicable to asylum seekers. Much of that concern centred on the INS’s treatment and incarceration of refugees: ‘More than half of the immigrants held in INS custody in 1998... were sent to local jails to await immigration proceedings. Faced with an overwhelming, immediate demand for detention space, the agency handed over control of its detainees to local sheriffs and other jails‘ officials without ensuring that basic international and national standards requiring humane treatment and adequate conditions were met.’ See: http://www.hrw.org/worldreport99/usa/index.html, at 8. See also: Coffey, K, ‘The Due Process Right to Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy’, Yale and Policy Review, Vol.19 (2001), at 305.
47 See: INA §101(a)(42)(B). See: Chapter III.
48 Coffey, supra note 45, at 309.
upon aliens who entered the United States illegally and secretly than those who attempted to seek refuge by presenting themselves unsuccessfully to the official at ports of entry.\textsuperscript{49}

This regime, consequently, 'rewarded those illegal and undocumented aliens who successfully avoided US laws by evading interception.'\textsuperscript{50} To simplify the system, under the IIRIRA, there is a single ground known as 'inadmissibility', which is roughly equivalent to the former ground of 'excludability'.\textsuperscript{51}

Despite this, however, one of the most controversial areas in US asylum legislation was left untouched by the IIRIRA. Under international law, asylum applicants are entitled to protection from forced return to a country of feared persecution.\textsuperscript{52} In contrast, under US law, only those asylum seekers who can meet a 'higher evidentiary burden for 'restriction on removal' are entitled to the equivalent of \textit{non-refoulement}.\textsuperscript{53} To establish eligibility under Section 241(b)(3)-- the withholding provision-- a person must demonstrate that, if returned to his or her country of origin or last habitual residence, his or her 'life or freedom would be threatened' based on one of the five grounds established in Section 101(a)(42)(A) of the INA.

The obligation of \textit{non-refoulement}, codified in the United States as a withholding provision, is central to international refugee law; few, if any states parties to the Geneva Convention, other than the United States, distinguish, in terms of the critical issue of the standard of proof, between asylum status and the withholding/\textit{non-refoulement} obligation. Indeed, it was in the context of this distinction that the Supreme Court first elaborated and provided direction for interpretation of the 'well-founded fear' standard.\textsuperscript{54} Thus, those asylum applicants

\textsuperscript{49}Augustin v. Sava, 735 F.2d 32 (2nd Cir. 1984), at 36 note 11.
\textsuperscript{50}Coffey, supra note 45, at 309.
\textsuperscript{51}Anker, supra note 3, at 539.
\textsuperscript{52}Geneva Convention, Article 33.
\textsuperscript{54}INS v. Predrag Stevic, 467 US 407 (1984). The standard of proof for \textit{non-refoulement}-- One has to show 'clear probability', which means that it is 'more likely than not' that the asylum seeker would be subject to persecution. A successful candidate, therefore, has to show a 51 per cent
who are unable to meet the higher US threshold, face return to the country of feared persecution, in violation of the norm of non-refoulement.55

2.2.2 Bleak Standards

Despite some of the positive amendments brought to the system, the IIRIRA has, nonetheless, created three new bars on applying for asylum. First, there are restrictions on those who have been in the United States for more than a year,56 without filing an application and who cannot show the existence of changed circumstances that materially affect eligibility for asylum or extraordinary circumstances relating to the delay in filing the application. Secondly, it added a restriction on those who have been denied asylum in the past and who cannot show the existence of changed circumstances that materially affect their eligibility for asylum.57 Thirdly, the IIRIRA initiated restrictions on those who can be returned to a ‘safe’ country with which the United States has an agreement for such returns.58 A state is deemed ‘safe’ if an asylum seeker can be removed to that

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chance of risk to their life or freedom. Consequently, not all asylum applicants are entitled to the protection of non-refoulement.

INS v. Cardoza-Foseca, supra note 17- The standard of proof for a refugee status- One has to establish a ‘well founded fear’ of persecution. However, asylum is a discretionary remedy, unlike withholding, which is mandatory.

For an extensive debate of these standards see: Chapter III.

55 Professor Fitzpatrick contended that this is an ‘unnecessary and potentially harmful gap between US and international refugee law.’ Accordingly, the duty of non-refoulement applies to all persons who meet the refugee definition. She argued that the Court in Stevic chose to interpret the withholding provision solely in light of pre-1968 domestic laws, which stood contrary to international obligations. Fitzpatrick, J, ‘The International Dimension of US Refugee Law’, Berkeley International Law, Vol.15 (1997), at 7-8.

56 INA §208(a)(2)(B), 8 USC §1158. The one-year deadline is calculated from the date of the alien’s last arrival in the US or 1 April 1997, whichever is later. See: http://www.ins.usdoj.gov/graphics/services/asylum/overview.htm, at 3.

57 INA §208(a)(2)(C) and (D), 8 USC §1158.


On 3 December 2001, Attorney General Ashcroft signed an accord with senior Canadian officials, agreeing ‘to begin discussion on a safe third country exception to the right to apply for asylum’ after such an agreement was initially abandoned back in 1997. See: Ms. K. Ryan, Testimony on US-Canada 'Safe Third Country' Agreement before the Committee on Judiciary, House of Representatives, 16 October 2002.

In October 2002, the United States was still re-negotiating the ‘smart border plan’ Agreement with Canada. This Agreement would allow Canada to return to the United States (and vice
country and his ‘life or freedom would not be threatened’ on account of one of the five grounds mentioned in the INA. In addition, this country must provide ‘access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection.’

Not only did the IIRIRA create new bars, it also introduced a new way of thinking into US asylum policies. The IIRIRA has codified a process known as ‘expedited removal’. This regime affects individuals arriving at a port of entry with fraudulent documents or even no documents at all. Under the process of expedited removal, a person who has arrived without the proper documents will be removed without further hearing or review by an immigration officer. An exception to that is an individual who indicates that he or she has an intention to apply for asylum or a person who claims to have a fear of returning to his or her country of nationality or last habitual residence if stateless. In such a case, the individual is referred to an asylum officer for a credible fear check. If the asylum officer finds the applicant to have a credible fear of persecution under the Geneva Convention, then the alien will be permitted to present a proper claim for asylum before an immigration judge. A person who is not found to have a credible fear of persecution is given the opportunity to request a review of the decision by an immigration judge. If the immigration judge believes that there is a credible fear

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Finally, on 5 December 2002, a Canadian-US Accord on the treatment of refugees was signed. The deal is aimed at ensuring that people seeking asylum will apply for protection in the first of the two countries which they reach. Campbell, C, and Kim, D, ‘Canada and US sign Accord strengthening security at border’, The Globe and Mail (Canada), 6 December 2002, at A13.

60 INA §235(b)(1); 8 CFR §208(3)(2003).
61 Ibid.
63 INA §240.
of persecution, the asylum seeker will then be permitted to present a proper claim for asylum. If no request to review is made, the asylum applicant will be subject to an immediate removal.

Generally, it is interesting to note that the question of an accelerated procedure in the European Union (EU) will not arise in an asylum determination unless there is reason to believe that a person can be returned to a country deemed to be safe, where his or her application will be considered on its merits. In contrast, in the United States the term 'expedited removal' presents a completely separate and unrelated provision to the safe country notion. Any person arriving at a border without valid travelling documents is subject to expedited removal, regardless of where he or she came from. It has been argued that the US expedited removal is more concerned with the 'punishment' of individuals who come without proper travelling documents than anything else and consequently, expedited removal in the United States has been subject to extensive criticisms, as Senator Leahy stated:

"As we now criticise Macedonians and others for not living up to international norms on the treatment of refugees, it is time we recognise that our law is unfair and unworkable. Under our law, if... refugees reach our shores to escape persecution, they would quite possibly find themselves on the next plane home... They could be expelled summarily without a hearing, if they come here without proper documents, which the 1996 law made conditional for admission. How many... refugees have a valid visa or passport?... How likely would it be for refugees, not fluent in English and distrustful of authority, to utter the magic words 'political asylum' upon their first meeting with American Immigration Authorities?"

65 INA §240.
68 See: INA §235(b)(1).
Likewise, the process of expedited removal was described as: '... a system designed to fail those we most want to protect.'^{71}

As well as creating the expedited removal process, the IIRIRA has also barred some categories of people from the asylum procedure; individuals with 'aggravated felonies' as well as those with minor offences, committed years earlier, such as shoplifting, may be barred from accessing the asylum process.^{72}

Finally, the new law provides that, while asylum applicants are being screened for admission to the asylum procedure, they will be kept in detention facilities.\textsuperscript{73} Where INS facilities are overloaded, many asylum seekers are held in prison alongside criminal offenders.\textsuperscript{74} Amnesty International has condemned this policy mainly because:

'There is no coherent national data provided by the INS on asylum seekers in its custody. Basic information such as country of origin, gender, length of detention... and most importantly, transfer records are not available. There is no effective system for tracking the whereabouts of asylum seekers in detention and refugee advocates have reported that their clients were 'lost' in the system.'\textsuperscript{75}

\textbf{Summary}

It appears that the IIRIRA is a complex piece of legislation, which is basically 'anti-immigration'.\textsuperscript{76} As one court has noted: 'With only a small degree of hyperbole, the migration laws have been termed, 'second only to the Internal Revenue Code in complexity.' A lawyer is often the only person who could thread the labyrinth.'\textsuperscript{77}

\begin{thebibliography}{99}
\bibitem{note72} INA §101(a)(43), 8 USC §1101(a)(43).
\bibitem{note73} IIRIRA §302. Detention policies will be discussed in greater depth in Chapter IV.
\bibitem{note74} UNHCR, \textit{supra} note 1, at 179.
\bibitem{note75} Amnesty International Report, \textit{supra} note 1.
\bibitem{note77} \textit{US v. Ahumada-Aguilar}, 295 F.3d 943 (9th Cir. 2002), at 950-951.
\end{thebibliography}
As noted above, asylum in US law is a discretionary relief; the Attorney
General has extensive discretionary powers over the issue of asylum.\(^{78}\) By
possessing this power, the institution of asylum in the United States is bound to be
influenced by political motives and considerations in addition to placing United
States' international obligations in danger of becoming insignificant. Therefore,
the criticisms laid down in relation to the Refugee Act, stating that US
immigration policy was a reflection of its political choices, remain real.\(^{79}\) The
IIRIRA has, undoubtedly, sealed many doors to those trying to seek protection in
the United States.

2.3 Regulations Implementing US Obligations Under the United
Nations Convention Against Torture

2.3.1 The Last Resort

As a result of the 1996 legislation's harsh provisions, many asylum seekers in
the US increasingly rely on the provisions of the Convention against Torture and
other Cruel, Inhumane or Degrading Treatment or Punishment 1984.\(^{80}\) For many
persons, the Torture Convention fills protection lacunae in the refugee law regime.

In 1998, President Clinton signed legislation that required the Department of
Justice to promulgate regulations to implement US obligations under Article 3 of
the Torture Convention.\(^{81}\) The regulations adopted were subject to 'any

\(^{78}\) The Attorney General heads the Department of Justice. He or she oversees the promulgation of
the Code of Federal Regulations (CFRs) relating to immigration matters since the Executive
Office for Immigration Review (EOIR), which is comprised of the Immigration Courts and the
Board of Immigration Appeals, is regulated by the Department of Justice, and not by the
Department of Homeland Security, despite recent administrative re-organisation. See infra,
Section 3.3.

The finer points for implementing Federal laws are contained in the CFRs, and each federal
agency head is responsible for circulating them in accordance with the governing law. Again, in
immigration cases the Attorney General oversees the implementation of these:

\(^{79}\) Ong-Hing, supra note 26. Also note the discussion in Chapter III regarding Haitian refugees and
US policy of interdiction on high seas.


227, 112 Stat. 2681, §2242(b).
reservations, understandings, declarations and provisions contained in the United States Senate resolution to ratify the Convention.'

The Torture Convention creates some legally binding duties on the United States, as a state party, including a duty not to return potential torture victims. This non-refoulement, contained in Article 3, provides an alternative protection for many asylum claimants. Nonetheless, the INS will only act on a request under Article 3 after a final order of removal has been issued and the person has exhausted all avenues for seeking review.

In 1999 the Department of Justice published an interim regulation that allows individuals to seek withholding of removal or deferral of removal under the Torture Convention. A person will be entitled to withholding of removal if he or she can establish that it is 'more likely than not' that he or she would be tortured in a country to which the person would be removed to. Ultimately, the regulations expanded the scope of the credible fear determination in expedited removal to include 'credible fear of torture' as well as 'credible fear of persecution.' Nonetheless, both withholding of removal and deferral of removal

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82 Ibid.

83 Article 3 of the Torture Convention prohibits the return of an individual to a country where there are substantial grounds for believing that a person would be in danger of being subjected to torture. It acts as an absolute prohibition.

84 Anker, supra note 3, at 466.

85 Ibid., at 570.


87 65 Fed.Reg. 7615, 6 December 2000; 8 CFR §208(16)(c), 208(30)(g)(a), 208(31) (2003). See also: Anker, supra note 3, at 469:

'In order to claim protection under Article 3, Torture Convention, a person must show that there are 'substantial grounds' for believing that he would be 'tortured', which means the intentional infliction of severe physical or mental pain or suffering, for an illicit purpose and at the instigation or with the consent or acquiescence of a public official.'

are country specific. This means that the person could be removed to a third
country if he or she would not be tortured there.  

3. Recent and Pending Developments

3.1 Refugee Protection Bill 1999

The IIRIRA fundamentally changed US laws concerning asylum protection. In
particular, the IIRIRA imposed, for the first time, a deadline for filing applications
for asylum protection and mandatory detentions. Furthermore, as discussed above,
it established expedited removal procedures, which authorise the removal of an
arriving non-citizen from the United States without even seeing a judge. Due to
considerable criticisms the Senate revisited the IIRIRA in 1999. As a result of
this, the Senate proposed the introduction of the Refugee Protection Bill of 1999
(RPB).

The purpose of the proposed RPB is to ‘reduce the likelihood that a bona fide
refugee will be returned to persecution by US authorities because of the expedited
removal procedure or a lack of due process in the US asylum system.’ The RPB
set its goal as to ‘ensure that those who arrive in the United States fleeing
persecution have a fair and adequate opportunity to present their claims for
protection.’ To that end, the RPB is concerned with the expedited removal
procedure. The RPB suggests limiting the use of the expedited removal concept
by holding that it would no longer apply at all ports of entry. Instead, the INS
could invoke it only in the event of an ‘extraordinary migration situation’. This
would exist in the case of ‘the arrival or imminent arrival in the United States... of

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89 For a detailed analysis of the Torture Convention, see: Musalo, Moore and Boswell, supra note 53, at 325.
90 In the United States this is referred to as the ‘Refugee Protection Act.’ However, for sake of
clarity, since this legislation is yet to become law, this Chapter refers to it as a ‘Bill’.
91 INA §235.
92 Pistone, supra note 64, at 815.
94 RPB1999, §2(a)(5).
aliens who by their numbers or circumstances substantially exceed the capacity for inspection and examination of such aliens. Accordingly, expedited removal proceedings could not be applied to individuals who have fled countries that engage in serious human rights violations. Moreover, the RPB would limit the application of expedited removal to those with no documents or documents that on their face appear to be invalid. Under current laws, expedited removal applies to any arriving aliens who the INS’s inspector suspects to have acquired a visa or other travel document by using fraud or wilfully misrepresenting a material fact.

Thus, inspectors at the border may conclude, that even though an individual has valid entry documents, he or she is nevertheless inadmissible because, in the inspector’s judgement, the document was procured through fraud or misrepresentation. The RPB limits the inspector’s freedom by holding that expedited removal no longer applies to individuals who arrive at the border without proper travel documents and visas which are considered to have been obtained through fraud.

Perhaps the most important change that the RPB suggests is to allow immigration judges to review all removal orders de novo and in person. Individuals will also be allowed to have legal representation.

To conclude, it appears that in some aspects, the RPB offers some important modifications to the existing system and is, thus, welcomed. However, the RPB carries a significant flaw, as noted by Pistone:

'While the RPB’s underlying motives may be to reduce the use of detention of individuals who pose neither a security risk nor the risk of absconding, and to suppress the arbitrary powers the INS possess, the argument remains the same: if decisions are left to the

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97 RPB 1999, §3(c).
98 INA §235.
99 62 Fed.Reg 10318 (1997)- gives the officers authority to re-evaluate whether a visa was properly granted by a US official abroad.
100 See: Pistone, supra note 64, at 832.
101 RPB 1999, §3(e)- At no expense of the Government.
discretion of the Attorney General, it is unlikely that any policy different than the one currently in force will prevail.102

3.2 Refugee Protection Bill 2001103

When a bill originates in the Senate, as did the RPB 1999, it is submitted to the appropriate House of Representatives committee for additional considerations or is held at the Speaker’s table for possible amendments. If the House of Representatives passes an amended version of the Senate bill, the bill is returned to the Senate for action on the House of Representatives amendments. The Senate may agree to the amendments, request a conference to resolve the disagreements or alternatively, it may further amend the House of Representatives’ amendments.104 In our instance, the RPB 1999 was referred to a second reading at the Committee on the Judiciary. In 2001, the Senate introduced an up-dated version of the RPB 1999.

The RPB 2001 is a detailed version of the RPB 1999. It is written in the same spirit of protection, bearing in mind that the ‘United States has a history of generosity to persons fleeing persecution, a history that has served as an inspiring example to other countries...’105 and that ‘...when the United States has restricted protection for refugees, other countries have followed that lead.’106 Finally, it recognises that current laws fail to ensure that ‘persons fleeing persecution who arrive in the United States have a fair and adequate opportunity to present a claim.’107

At the same time, however, the dilemma, which was part of the RPB 1999, was passed onto the RPB 2001, that is, the Attorney General’s extensive discretionary powers. In the RPB 2001 the problem was further magnified by allocating the

102 Pistone, supra note 64, at 840.
103 Again, in the United States this is referred to as the ‘Refugee Protection Act.’
104 For further information on how a bill becomes law see: the Senate’s home page at: http://www.senate.gov.
107 RPB 2001, §2(5).
Attorney General even greater discretionary powers. The decisions regarding the
detention of asylum seekers, entering into contracts of programmes authorised
for use of funds, co-ordination of housing between non-governmental
organisations, co-ordination of legal, medical, social and educational services and
the establishment of a 'National Legal Support and Training Centre' for the
purpose of ensuring quality and consistent implementation of legal orientation
programmes nation-wide are all solely at the discretion of the Attorney General.
Finally, the rephrasing of the language of numerous provisions, changing 'shall'
into 'may' results in the distribution of even further discretion.

RPB 2001 was referred to the House of Representatives, where it has passed to
the Committee on the Judiciary. To date, the Bill has been re-introduced in the
House of Representatives and it is now known as the Refugee Protection Bill
2002. However, the RPB 2002 is still likely to be subject to much discussions
and possible alterations in the present post 11 September 2001 terror attacks
somewhat anti-immigration climate before it can receive the President's signature,
which will be the final act giving this Bill the ultimate authorisation to become the
Law of the Land.

3.3 Post 11 September 2001 Developments Affecting Asylum Claims

'On September 11, the American definition of national security... changed
forever...' As a result of the terror attacks on the World Trade Centre's Twin
Towers in New York City and on the Pentagon in Washington DC, the Bush

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109 RPB 2001, §210(e) and (f).
110 HR 4074, 107th Congress (2002) (RPB 2002). The official text of the RPB 2002 is not yet
publicly available, however, the Bill was acknowledged by US Senate to be identical to the
RPB 2001, see: http://www.thomas.loc.gov/cgi-bin/query.
111 Indeed, the last major action taken to promote the adoption of the RPB 2002 was a referral to
the House of Representatives' Subcommittee on Immigration and Claims on 6 May 2002. As
mentioned, the text of this Bill is not yet available.
Available at: http://migration.ucdavis.edu/.
Administration pushed for a governmental re-organisation, the largest since 1947.\textsuperscript{113}

The Homeland Security Act 2002\textsuperscript{114} was introduced as the answer to the ‘emerging threats of terrorism in the 21st Century.’\textsuperscript{115} It aims to eliminate any immigration that could jeopardise the security of the United States through advocating the need for tighter immigration enforcement and border controls.\textsuperscript{116} The Act brings under one organisation— the Homeland Security Department (HSD)— an array of agencies, such as the Coast Guard, Customs Services, INS and Border Patrol.

The Homeland Security Act results in far-reaching implications for the INS, which is now split into three agencies: first, the Bureau of Customs and Border Protection, which guards US borders from illegal entry and investigates potential immigrants. Second, the Bureau of Citizenship and Immigration Services, which processes applications for asylum, work permits, citizenship and other immigration benefits. Third, the Bureau of Immigration and Customs Enforcement, which deals with issues like the detention and removal of aliens. The dissolution of the INS means that border officials report to one department, while those involved in services, benefits and detention report to others. While the division appears clear-cut on paper, this could create at least two questionable scenarios when it comes down to asylum claims. The main query to address is how much co-ordination will exist in practice between the different offices where, for example, the Bureau of Customs and Border Protection interdict Haitians on the high seas and then those Haitians apply for asylum which falls within the mandate of the Bureau of Citizenship and Immigration Services? Or where a

mandatory background security check is supposed to be carried out by the Border Protection agency, while the actual asylum claim and mandatory detention is to be considered by the Bureau of Citizenship and Immigration Services and the Bureau of Immigration and Customs Enforcement respectively? Despite the fact that the Homeland Security Act 2002 took effect on 23 January 2003, allowing a year’s time to implement its plan for creating the HSD, it has been argued that it will take years to create the ‘mammoth’ Department of Homeland Security\textsuperscript{117} and therefore, the answer to these concerns remains to be seen.\textsuperscript{118} Finally, it is paramount to note that despite all of this departmental re-organisation, the Executive Office for Immigration Review (EOIR), which is comprised of the Immigration Courts and the Board of Immigration Appeals remains subject to the Department of Justice.\textsuperscript{119} Consequently, this new governmental structure means that good relations as well as uninterrupted and constant communications between the two Departments and the different agencies within them are at the heart of successful asylum policies.

On top of this fundamental administration re-organisation, the terror attacks on the United States have provoked ‘searching examination of US current policies.’\textsuperscript{120} Consequently, in the atmosphere of terror threats, the Bush Administration has established some laws for the mandatory detention of any non-citizen who the Attorney General certifies as a terrorist suspect.\textsuperscript{121} It has been

\begin{itemize}
    \item \textsuperscript{117} Germain, \textit{supra} note 10, at ‘Homeland Security Blanket’.
    \item \textsuperscript{118} In a recent evaluation of the HSD performances, and in particular the operation of the Bureau of Citizenship and Immigration Services, Donovan concluded that thus far, the new HSD re-organisation has resulted in a bigger bureaucracy, an immense challenge to co-ordinate between HSD organisations and the different governmental offices, longer processing of applications, and an even greater difficulties in understanding the system and how it functions. Donovan, \textit{supra} note 115, at 110 and 113.
    \item \textsuperscript{119} Germain, \textit{supra} note 117. Also see explanatory text of note 78, \textit{supra}.
    \item \textsuperscript{121} See: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, 115 Stat. 272, 26 October 2001. (USA PATRIOT Act), \S 411 (Definition relating to terrorism), \S 412 (Mandatory detention of suspected terrorists-- allowing the Attorney General to indefinitely detain anyone he or she ‘certifies’ as a threat to national security).
\end{itemize}
questioned whether the USA PATRIOT Act 2001 was really necessary in the context of asylum, as previous laws clearly included an extensive terrorism bar for the grant of asylum or withholding of deportation. Furthermore, the Geneva Convention itself provides for comprehensive exclusion clauses, which arguably, incorporate any terrorist suspect. Given the nature of the Convention, it is appears that the latter achieves the best balance between State concerns and individual protection.

As the law stands today, however, the grounds for certifying an individual as a 'suspected terrorist' are broader than the bars to asylum. They include, along with a wide terminology of the term 'terrorism', mere membership in an organisation that engages in terrorist activity, without any requirements that the individual has engaged in a culpable conduct, as well as excluding a spouse or a

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122 INA §208(b)(2)(iv)-(v)-241(b); INA §241(b)(3)(B)(iv)- Any individual who is a threat to national security or who has engaged in, or is likely to engage in, or has incited terrorist activity, or is a representative of foreign organisation, is barred from asylum. See: Germain, R, 'Rushing to Judgement: The Unintended Consequences of the USA PATRIOT Act for Bona Fide Refugees', Georgetown Immigration Law Journal, Vol.16 (2002), at 508.

123 Geneva Convention, Articles 1(F) and 33(2). The substance of these provisions covers crimes against peace, war crimes and crimes against humanity, broadly defined 'non-political' crimes, and any actions contrary to UN principles, as well as excluding individuals who pose 'danger to the security of the country' from protection. See full discussion in Chapter III.


125 See discussion in Chapter III.

126 For example, the USA PATRIOT Act provides that a terrorist activity includes the use of 'any weapon or dangerous device', not just those previously listed (biological and chemical agents, nuclear weapons or device, explosives, or firearms). The use of weapons must not be for 'mere personal monetary gain' and the individual must have the 'intent to endanger, directly or indirectly, the safety of one or more individuals or cause substantial damage to property.' USA PATRIOT Act §411 (codified at INA §212(a)(3)(B)(iii)(V)(b)). Germain, supra note 122, at 518, has argued that an asylum seeker who participated in a demonstration and threw stones could fall within this definition; she argues that stones could be considered 'a weapon or other dangerous devise'; when thrown at police, the protestor could be found to have the intent to endanger the safety of others; and because the stones are being thrown in a demonstration, it is unlikely that the protestor would be gaining any personal monetary benefit.

127 Under current laws, the provider of 'material support' is barred from asylum if his or her material support is given to a terrorist organisation, regardless of whether he or she knew that its members have committed or plan to commit a terrorist activity. The only two exceptions to this ground is, first, where the group has not been officially designated as a terrorist organisation and the individual can demonstrate that he or she did not know and should not reasonably have known that his or her act would further the organisation terrorist activity; and
child of individual who engages in terrorist activity. Moreover, certification of a ‘terrorist suspect’ only requires the Attorney General to have ‘reasonable grounds to believe’ that the individual falls within any of the category of security related bars. As those individuals granted asylum or withholding of deportation were already determined not to be a threat to national security or otherwise barred on security grounds, the necessity of the broad terrorism bar as well as indefinite detention provisos, as provided for by the USA PATRIOT Act, is clearly debatable. Indeed, it has been contested that: ‘...the USA PATRIOT Act... along with its many excesses, contains a few needed changes in the law.’

Concluding Remarks

The most recent reforms brought to US asylum policies by the IIRIRA can indeed be characterised as anti-immigration. They point to a different, new and restrictive way of thinking by the US legislature when negotiating and deciding law. From a country that welcomes immigration, one can say with some confidence that those days are long gone, and that a modern regime, which is security-oriented, restrictive and suspicious in accepting and integrating those in need, has emerged. Indeed, under the reformed system, new claims for asylum have decreased by seventy-five percent. Additionally, calamities such as 11 September 2001 have positioned security considerations back onto the front page, allowing broadly worded terrorism definition, indefinite detention, and further granting extensive discretionary powers to the Attorney General. Most importantly, the new structure of the HSD prioritised the total inclusion of the

secondly, if the Secretary of State and the Attorney General, in their unreviewable discretion, determine that the clause should not apply. USA PATRIOT Act §412.


129 See, for instance, IIRIRA §101- the number of border patrol agents was increased from approximately 5,700 in 1996 by at least 1,000 each year until 2001. Furthermore, ‘the INS [was] required to build a triple steel fence south of San Diego, and impos[e] stiff penalties on the flourishing business of smuggling aliens to the United States.’ Joppke, C, Immigration and the Nation State: The United States, Germany and Great Britain, Oxford University Press, 1999, at 58.

INS. Thus, the INS, which dealt with asylum claims, has been subsumed into the ‘new defence-against-terrorism first department’ \(^\text{131}\) thereby revealing the challenges in balancing domestic concerns with humanitarian commitments.\(^\text{132}\)

Shortly before the 11 September 2001 terror attacks, President Bush had stated that: ‘immigration is not a problem to be solved, [but] a sign of a confident and successful nation... New arrivals should be greeted not with suspicion and resentment, but with openness and courtesy.’\(^\text{133}\) It is questionable why the 11 September 2001 terror attacks have changed the asylum agenda. Humanitarian protection, as must be afforded in asylum cases, is not about border controls and indefinite detentions, it is about international obligations.\(^\text{134}\) Nevertheless, as the institute of asylum in the United States is purely subjected to the discretionary relief of the Attorney General, there exists a real risk that US asylum laws will be conditional upon any political considerations rather than being conceived through humanitarian spectacles. Indeed, as discussed in the Chapters that follow, such an anxiety is clearly visible when examining the US treatment toward Haitian refugees, as well as being apparent in the debate regarding the general socio-economic attitude toward individuals who are awaiting examination of their asylum applications.

Essentially, the RPB 2001 is a step in the right direction. It expressly admits to the unfair laws that currently exist in the United States, acknowledges the need of reforms, as well as attempting to provide solutions, and therefore, it is an important piece of legislation that must not be overlooked when discussing US asylum policies. Unfortunately, the 11 September 2001 tragedy has pushed aside this somewhat positive legislation, and it is indeed unclear whether the Bill was

\(^\text{131}\) Ong-Hing, supra note 26, at 268-269.


abandoned altogether or whether it will be pushed forward for a vote at some point in the future. However, it is important to note that it is not uncommon to have a legislation held up for years before its final provisions are agreed. One part of the IIRIRA, for example, was negotiated for eight years.¹³⁵

After exploring the basic framework of laws, their evolution, and how the systems work in the present and earlier Chapter, the rest of this thesis examines in some detail concerns that were raised in the Chapters thus far, in an attempt to discover common trends, interaction and divergence in US and EU laws and policies, as established, in particular, by the IIRIRA and by Title IV of the EC Treaty, respectively. However, before doing so, one must conclude the discussion thus far by offering some preliminary observation regarding EU-US collaboration.

**EU-US Interaction: Preliminary Observations**

As correctly argued by Peers, broad anti-terrorist measures inevitably raise concerns about adequate protection for human rights, as the former often provides for special powers reducing the usual protection relating, for example, to detention and prosecution.¹ Theoretically, the principle that humanitarian protection should be afforded at all times has already been acknowledged in the European Union (EU), where it has been declared that ‘...in practice terrorists are not likely to use

¹³⁵ Concerning the outcome of coercive population control. See: Chapter III.
the asylum channel [as it is indiscreet]... Any security safeguard therefore needs to strike a proper balance with the refugee protection principles at stake.\textsuperscript{2} Yet, as highlighted in Chapters I and II, the focus of EU and US post 11 September 2001 security measures primarily took the form of harsher deterrence policies, which resulted in, for instance, indefinite detention in the law and practice of one of the EU Member States\textsuperscript{3} and in the US.\textsuperscript{4} Unfortunately, the fear expressed by Peers above has materialised across the Atlantic. Therefore, despite the common thread of security, both the EU and US must guarantee that human rights obligations toward asylum claimants are not traded off against the adoption of security-oriented measures; this, of course, is required by the Geneva Convention\textsuperscript{5} on which both systems are premised on implementing. In light of this, it must be ensured that one principle is not sacrificed in order to keep the other, but rather to safeguard a fair and balanced co-operation between the two procedures.

As discussed in Chapter I, the emerging EU legislation, which carries the collective weight of the Community, indicates that the EU would want to influence the international arena. To date, however, the influence of earlier EU harmonisation efforts on US asylum policy seem to have been modest, due to the limited nature of the pre-Amsterdam process and peculiarities of the asylum policy in the United States.\textsuperscript{6} It appears that the EU 'harmonisation boost' was motivated by individual State concerns that the aspiration of freedom of

\begin{itemize}
  \item \textsuperscript{1} Peers, S, 'EU Responses to Terrorism', \textit{International and Comparative Law Quarterly}, Vol.52 (2003) 227, especially, 235.
  \item See: Chapter IV.
\end{itemize}

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movement would result in the loss of border controls, considering the legal restrictions imposed by EU governments on the legal channels for entry, and intra-European conflicts, which produced a substantial amount of asylum applications. In the US, however, the need to reform US asylum legislation and the eventual signature of the Illegal Immigration Reform and Immigrant Responsibility Act 1996\(^7\) was purely a result of domestic events and interests, as discussed in Chapter II and not, as mentioned earlier, in consideration of any interaction which took place around the same time across the Atlantic. Furthermore, it has been recently observed that the EU-US mutual relationship suffers from 'some contradictory views'.\(^8\) Since 11 September 2001 took place, it appeared clear that EU Member States did not wish to be part of US policies, wanting to 'safeguard their independence in the decision-making'.\(^9\) Yet, pressure to collaborate by the United States resulted in the EU committing itself to co-operate with the United States by providing transit facilities for individuals rejected by the United States.\(^10\) However, notwithstanding this arrangement, one can easily argue that the EU has no desire to be perceived in the eyes of the international arena as dominated by US politics. This finding is strengthened by the draft Constitutional Treaty\(^11\) which states that one of its aims is to 'develop the Union into a stabilising factor and a model in the new world order'.\(^12\) Hence, whereas the United States chose to re-invent its internal security theme and to respond to the war on terror with a


\(^9\) Brouwer and Catz, ibid., at 141.

\(^10\) Ibid., at 104.

\(^11\) OJC169/1, 18 July 2003.

military action, the EU supported a 'prevention strategy'\(^\text{13}\) based on stricter laws with the aim of deterrence, which, arguably, were on the EU agenda originally.

The 11 September 2001 attacks and the resulting US military strikes, highlight the importance of a humane, rational and coherent policy toward asylum applicants involving co-operation between both sides of the Atlantic. It has been argued that a partnership between the United States and the EU will only occur in a system that involves taking refugees on the US’s part in return for EU support:

'Increased refugee flows into Europe, will prompt calls from allies for the United States to accept its fair share of new refugees, so fair refugee and asylum policies and procedures will reduce friction at a time when the United States most needs strong bonds with allied nations...'\(^\text{14}\)

Social policies affecting the treatment of asylum seekers and refugees in the EU and the United States were contemplated as being sometimes 'starkly divergent.'\(^\text{15}\) Domestic political factors may indeed drive policy in an idiosyncratic direction. However, the question to be addressed is whether there exists a possibility that where common problems are faced and existing domestic practices do not prove an adequate solution, there will be any influence of one policy over the other or even collaboration in negotiating new common framework policies? The mutual acceptance of the United Nations High Commissioner for Refugees' (UNHCR) supervisory role, the explicit incorporation of the Geneva Convention framework into both EU laws and US basic asylum legislation, and the mutual teamwork in the Intergovernmental Consultations on Asylum, Refugee and Migration Policies (IGC) on operational

\(^{13}\) von Schorlemer, S, 'Human Rights: Substantive and Institutional Implications of the War Against Terror', *European Journal of International Law*, Vol.14 (2003), at 267-268. It is undeniable that the EU lacks a clear military capacity, especially for proactive military interventions. This was especially apparent in the 1990s when the EU had to rely on the USA to tackle the Yugoslav crisis. However, in the round up for war, it seemed that EU Member States did not want to be associated with what emerged as 'punitive' actions. Generally see: Croci, O, 'A Closer Look at the Changing Transatlantic Relationship', *European Foreign Affairs Review*, Vol.8 (2003) 469.


\(^{15}\) Fitzpatrick, Brotman, and Brotman, *supra* note 6. See: Chapter IV.
policies\textsuperscript{16} point to the fact that, as a whole, the EU and the US have a shared aspiration and vision of democracy, security and asylum principles. Globalisation means cross-border connectivity. Tackling terrorism can result in a closer collaboration that gradually leads to a convergence in immigration and asylum policies.\textsuperscript{17} Indeed, the recently concluded US-EU Passenger Name Record Agreement\textsuperscript{18} points to the acceptance of such a possibility. Based on such common understandings, the rest of this study examines any EU-US possible cooperation, policy convergence and divergences in the field of asylum law.

\textsuperscript{16} It is important to note at this stage that the IGC is a confidential body that exists to support the needs of States for information and discussion about asylum matters. Consequently, most of the material produced by IGC is confidential. Private Correspondence with Mr. Gerry Van-Kessel (Co-ordinator), 21 May 2004, on file with author. Generally see: http://www.igc.ch/.

\textsuperscript{17} Indeed, this proposition has been recently advocated for by Martin, S, and Martin, P, 'International Migration and Terrorism: Prevention, Prosecution and Protection', \textit{Georgetown Immigration Law Journal}, Vol.18 (2004) 329.

\textsuperscript{18} OJ L183/83, 17 May 2004.
Chapter III

Asylum Seeking: Definitions, Limitations, and Practical
Consequences for Those in Need of Protection in the
European Union and the United States

Introduction

As discussed in the previous Chapters, the last two decades have seen
unprecedented changes in both the kind and scale of refugee movements and
policies. Following the preceding discussion, this Chapter addresses specific
changes that were made to asylum policies in recent years. Some of the points
examined in this forum were briefly raised earlier, however, due to their
importance and practical consequences to asylum seekers, they will be scrutinised
in some detail in this Chapter.

As the European Union (EU) drafts its common asylum policies, and as the
United States administer national security and border safety concerns resulting
from the 11 September 2001 terror attacks, it is paramount to examine whether the
humanitarian commitment of providing safety to asylum applicants has not been
neglected. In striking the balance between States’ right to security and asylum
seekers request for protection, it is crucial that the answer of protection for
individuals escaping persecution is internationally recognised.

To achieve this end, this Chapter commences with an examination of the key
elements of refugee status. In addressing who and what the meaning of ‘refugee’
and ‘persecution’ entails, the question to be clarified is whether the fundamental
principles of refugee law are equivalent on both sides of the Atlantic? Minor
differentiation in the interpretation of these significant basic starting points results
in the difference between life in safety or return to persecution. Secondly,
exclusion from asylum seeking provisions, as authorised by the Geneva
Convention, are addressed due to their controversial nature and the wide
discretion in interpretation given to States.

Unlike the approach taken previously, this Chapter undertakes an issue-based
analysis, as this is a practical way to emphasise any divergences or similarities in

As this thesis does not analyse the status of recognised refugees, it must be stressed that the comparison undertaken in this Chapter only focuses on the principles asylum claimants encounter while applying for asylum. Consequently, a discussion surrounding the actual grant and possible withdrawal of refugee status from recognised refugees is omitted from this thesis altogether.

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Ultimately, the UK has formally communicated its wishes to participate in the Refugee Definition Directive. ASILE 6, 5826/02, 31 October 2002. Similarly, Ireland has expressed its wishes to participate in the adoption of the Directive. ASILE 26, 8431/03, 15 April 2003, at Point 3.

3 As mentioned earlier, the final draft of the Refugee Definition Directive was adopted near submission of this thesis. At the time of writing, therefore, the final version of the Refugee Definition Directive has not yet been published in the EU Official Journal. The discussion in this Chapter is therefore based on the Directive posted in the Council Register, which is the agreed text. See: ASILE 23, 8043/04, 27 April 2004.


5 For some examples of the differentiation in treatment between recognised refugees and mere asylum seekers see Chapter IV.
1. Who is a Refugee?

The established definition of refugee status is that derived from the Geneva Convention.\(^6\) The mandate of the Geneva Convention includes any person who:

\[\ldots\text{owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country...}\]\(^7\)

This definition raises three points for comparison under this section: first, the position that ‘any person’ deserves protection has produced some objections among EU Member States, whose harmonisation procedures entitle them to treat asylum applications from other Member States’ nationals as manifestly unfounded. The second query relates to the grounds of persecution and its prevailing understanding. Finally, a review of the meaning of persecution takes place, in light of the adopted Refugee Definition Directive and US legislative amendments.

1.1 ‘Any Person’

In 1997, EU Member States signatories to the Treaty of Amsterdam agreed on Protocol C.6, which allows Member States to hold each other as non-asylum producing States, thus permitting asylum applications from other EU Member States to be treated as manifestly unfounded.\(^8\) This Protocol has been strongly criticised by the United Nations High Commissioner for Refugees (UNHCR) who

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\(^7\) Geneva Convention, Article 1(A)(2). (Emphasis added).

\(^8\) Essentially, ‘manifestly unfounded’ is a concept aimed at accelerating the procedures assessing asylum claims. Procedural safeguards generally applicable to the normal asylum process are reduced under the ‘manifestly unfounded’ procedure. See: van der Klaauw, J, ‘Towards a
voiced its objections to such wording by emphasising that no reservation can be
made from the scope of the Geneva Convention, by virtue of Article 42 of the
Geneva Convention. In addition, the UNHCR stressed that the Geneva
Convention cannot be restricted on grounds of nationality due to the non-
discrimination principle enshrined in Article 3 of the Geneva Convention.

The Justice and Home Affairs Commissioner Vitorino has stated that the
question of who is a refugee is the most fundamental query in the asylum field.
The adopted Refugee Definition Directive points to the Charter of Fundamental
Rights of the EU which reiterates the right to asylum in Article 18. Additionally,
the Directive reflects that the ‘cornerstone’ of the EU asylum system should be
‘the full and inclusive’ application of the Geneva Convention. Despite this
pledge, the Refugee Definition Directive defines ‘refugee’ as ‘a third country
national...’ In essence, this terminology reiterates the idea introduced in 1997,
with no regard to the criticisms presented at the time.

Once more this definition does not replicate the precise wording contained in
the Geneva Convention, and therefore risks removing the right of EU citizens to
claim asylum in neighbouring Member States. This has been described by the

Minimum Standards for the Qualification and Status of Third Country National and Stateless
Persons as Refugees or as Persons Who Otherwise Need International Protection', UNHCR,
Geneva, November 2001, at 4. As the adopted Directive reiterated many of the definitions
presented in its initial proposal, several concerns expressed by various organisations regarding
the proposed Refugee Definition Directive therefore remain relevant to the analysis presented
here.

10 Ibid.

11 Commissioner for Justice and Home Affairs, Vitorino, A, in Asylum: Commission Proposes a
Common Definition of Refuge and a Common Standard of Refugee Rights, Brussels 12
September 2001, IP/01/1262, at 1.


15 Immigration Law Practitioners’ Association (ILPA), ‘Submission on the Commission’s Proposal
for a Council Directive Laying Down Minimum Standards for the Qualification and Status of
Third Country National and Stateless Persons as Refugee, in Accordance with the 1951
European Council on Refugees and Exiles (ECRE) to have even greater repercussions ‘once the EU enlargement process has been completed...’ and as setting ‘a very bad precedent for other regions of the world.’ Indeed, ECRE, like the UNHCR, considered this Article as incompatible with Article 3 of the Geneva Convention, which prohibits discrimination of an asylum applicant on a ground of his or her country of origin.

The exclusion of EU nationals is somewhat ironic in view of the historical development of the refugee system: the Geneva Convention itself provided for a similar limitation clause for events occurring outside Europe, which States decided to eliminate with the acceptance of the New York Protocol. Finally, the current and future expansions of the EU to eastern European countries and possibly Turkey put this general exclusion clause into even greater question. Consequently, it appears that the criticisms put forward in relation to the draft Refugee Definition Directive stating that such legislation would be in clear breach of binding international law limiting once again the Geneva Convention, were completely disregarded, as the adopted Directive merely includes ‘third country nationals.’

Although the United States acceded to the 1967 New York Protocol in 1968, it was not until the passage of the Refugee Act in 1980, which changed domestic laws to allow ‘any person’ to claim asylum. Previously, only individuals fleeing from communist dominated areas or the Middle East were allowed to apply for

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17 ECRE, Analysis of the Treaty of Amsterdam in so far as it Relates to Asylum Policy, Brussels, 1997. Also see: Chapter 1.

18 Boutillon points out that minority groups, such as Kurds in Turkey or the Roma in Bulgaria, Romania and Hungary, are still the targets of persecution. Therefore, she warns that it is essential to maintain a refugee regime within the EU. Boutillon, S, ‘The Interpretation of Article 1 of the 1951 Convention Relating to the Status of Refugees by the European Union: Toward Harmonisation’, Georgetown Immigration Law Journal, Vol.18 (2003), at 141.

asylum. This twelve-year gap between international law norms and US laws was permitted under US domestic legislation which holds human rights treaties on a ‘non-self executing’ footing. This results in a system whereby Congress must pass implementing legislation to make such treaties legally binding under domestic law. Until this is done, any contrary domestic legislation is binding on national courts.

Currently, however, despite past practice and in contrast to the recent EU approach, the United States supports the view, as required by the Geneva Convention, that ‘any person’ may claim asylum in the United States.

1.2 Grounds of Asylum

The 1967 Protocol achieved formal harmonisation of the Convention definition of refugee status. The restriction that the claim must relate to pre-1951 events in Europe was removed by the Protocol. However, the Protocol did not promote a review of the content of the grounds for qualification as refugees. Consequently, only migration which is derived by persecution based on a risk to civil or political rights falls within the scope of the Convention. In practice, this means that most ‘Third World refugees remain de facto excluded, as their flight is more often prompted by natural disaster, war, or broadly based political and economic turmoil.’ Hence, much of current displacement crises fall outside the rights established by the Geneva Convention, and thus new policies, such as ‘temporary

\[\text{References}\]

21 For a detailed analysis see: Chapter II, especially note 11.
22 INA §101(a)(42), 8 USC §1101(a)(42).
23 Hathaway, J. C, The Law of Refugee Status, Butterworths, 1991, at 112-116. Note, however, Hathaway’s argument stating that where a government fails to ensure the non-discriminatory allocation of basic socio-economic needs, then refugee protection becomes relevant to vindicate the rights of everyone to attributes which are essential to human dignity. This is an unconventional standing, as most academics and States debate that ‘hundreds of millions of people, including the entire Third World suffer the deprivation of the ‘rights’ set forth in the ICESCR’, thus, asylum would be granted to everyone from economically backward societies, opening the floodgates to the kind of migration that immigration systems seek to exclude, at 116-117.
protection’ or ‘temporary protected status’ in the United States, had to emerge in order to complement this loophole.\textsuperscript{25}

The Geneva Convention allows its contracting States the choice of means as to implementation of grounds of persecution, and indeed the actual interpretation of ‘persecution’. This broad discretion has often resulted in differentiation in the interpretation of the Geneva Convention’s five grounds of persecution among the signatories. It is an examination of the harmonisation of these rules which takes place next.

The aim of this sub-section is to explore whether current policies are sensitive and liberal-- but still detailed enough-- to include the needs and lessons learned from recent years, regardless of which side of the Atlantic an individual applies for asylum. Such a design avoids leaving too much discretion at the hands of the individual States, which frequently results in anything but common standards, while at the same time taking into account fundamental humanitarian considerations.

\subsection*{1.2.1 Race}

Racial discrimination has been condemned as ‘one of the most striking violations of human rights.’\textsuperscript{26} Consequently, the UNHCR Handbook states that ‘race... has to be understood in its widest sense to include all kinds of ethnic groups that are referred to as ‘races’ in common usage.’\textsuperscript{27} Although the UNHCR Handbook is not binding, the EU proposed Refugee Definition Directive and US case-law make reference to this Handbook as an instrument designed to assist in

\textsuperscript{25} It must be noted, however, that temporary protection policies also cover persons who may have valid claims under the Geneva Convention as examined by this Chapter. Yet, due to their mass arrival, such individuals will first be granted temporary protection while having their refugee claims assessed at a later stage. See the discussion in Chapter V.


\textsuperscript{27} \textit{Ibid.}
interpreting the Geneva Convention definition. Both the EU and US approaches require broad construction of this ground, as understood by Article 1 of the Convention of the Elimination of All Forms of Racial Discrimination 1965, to include 'race, colour, descent, or national or ethnic origin.'

Article 10(1)(a) of the adopted Refugee Definition Directive states that 'the concept of race shall in particular include considerations of colour, descent, or membership of a particular ethnic group.' This is by far more detailed than the original Joint Position which held that race should merely be understood in the broad sense and includes membership of different ethnic groups.

The persecutory ground of 'race' has been described by prominent US academics as probably the most 'complex' ground of persecution and one which still carries an 'evolving meaning...'. The modern notion of 'race' in US law rejects traditional biological or scientific concepts, which concluded that human beings were divided into three racial categories: 'Negroid (Black)', 'Mongoloid (Asian)' and 'Caucasian (White)' and allows more 'subjective and dynamic attributes' as outlined by the UNHCR Handbook to be taken into consideration.
1.2.2 Religion

'Religion has long been the basis upon which governments and people have singled out others for persecution.'\(^\text{34}\) As a result of worldwide religious persecution, the international community has developed a framework for defining and protecting freedom of religion, encompassing both beliefs and actions. Article 18 of the Universal Declaration of Human Rights (UDHR) 1948 provides that 'Everyone has the right to freedom of thought, conscience and religion... The right includes freedom... to manifest his religion or belief in teaching, practice, worship and observance.'\(^\text{35}\) This right was elaborated by Article 18 of the International Covenant of Civil and Political Rights (ICCPR) 1966 to include the right to adopt a religion or belief of choice and the freedom to manifest such religion or belief.\(^\text{36}\)

In 1960 Arcot Krishnaswami, the United Nations (UN) Special Repporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, submitted a report interpreting Article 18 UDHR.\(^\text{37}\) Krishnaswami reaffirmed the principle that a government could only interfere with religious freedom when religious practices are obviously contrary to morality, public order, or the general welfare. In the absence of justified governmental interest,

\(^{34}\) Goodwin-Gill, *supra* note 30, at 44.

\(^{35}\) Universal Declaration of Human Rights, UN Doc. A810 (1948).

\(^{36}\) International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171. Article 18(3) ICCPR states that limitations on practice of a religion are only permitted when 'prescribed by law and... necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.' It has been claimed that this Article is to be strictly interpreted: 'restriction are not allowed on grounds not specified there even if they would be allowed as restriction to other rights protected in the covenant such as national security.' *General Comment adopted by the Human Rights Committee under Article 40, paragraph 4 of the International Covenant on the Civil and Political Rights*, UN Doc. CCPR/C/21/Rev.1/Add.4, 27 September 2003, at Paragraph 8. Furthermore, Article 4(2) ICCPR lists Article 18 as one of the seven Articles from which no derogation may be made. For further discussion see: Musalo, K, *Claim for Protection Based on Religion or Belief: Analysis and Proposed Conclusions*, UNHCR’s Legal and Protection Policy Research Series, Department for International Protection, PPLA/2002/02, December 2002. Yet, under the ICCPR, the right of individual petition is enshrined in an Optional Protocol to which the UK, The Netherlands, and the US are not parties. The US has ratified the ICCPR in 1992 but explicitly declared Articles 1-27 ICCPR to be 'non-self executing' in order to prevent the creation of a private cause of action under the Covenant. See: Chapter IV.

individuals should be free to comply with what is authorised by their religion or belief. This report has been acknowledged as a ‘landmark in the effort of the United Nations to eradicate prejudice and discrimination based on religion or belief.’\textsuperscript{38} While the UN has never embraced Krishnaswami’s recommendations in full,\textsuperscript{39} in 1962, the UN General Assembly initiated the preparation of a draft declaration and convention to eliminate all forms of religious intolerance. Although the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981 is not binding, it represents ‘the most comprehensive and unambiguous codification of the idea of religious liberty to date.’\textsuperscript{40}

Article 10(1)(b) of the adopted Refugee Definition Directive states that the concept of religion embodies theistic, non-theistic and atheistic beliefs including actions, or lack thereof, which manifest such beliefs. This terminology was actually first seen in Article 1 of the proposed Declaration on Elimination of Discrimination,\textsuperscript{41} and was later inserted to the EU arena by the Joint Position.\textsuperscript{42} Indeed, while commenting on the proposed Refugee Definition Directive, from which this final provision has been directly taken, none of the non-governmental organisations’ (NGOs) reports examined by this Chapter found any flaws with such wording, which basically replicates an old international consensus for the understanding of the meaning of ‘religion’.\textsuperscript{43}

\textsuperscript{38} Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief: Report by Special Rapporteur, UN ESCOR, Human Rights Committee, 39\textsuperscript{th} Session. UN Doc. E/CN.4/Sub.2/1987/26 (1986), at 1.


\textsuperscript{40} Musalo, Moore and Boswell, supra note 24, at 438.

\textsuperscript{41} Goodwin-Gill, supra note 30, at 45.

\textsuperscript{42} Joint Position, Article 7(2).

\textsuperscript{43} ILPA: ‘ILPA welcomes the fact that [the grounds] appear to be broadly interpreted...’ supra note 15, at 6; ECRE: ‘ECRE is in agreement with the description of the four first elements...’ supra note 16, at 7; UNHCR: ‘UNHCR welcomes this elucidation of the meaning of the reasons for being persecuted... and is in general agreement with the draft’s clarification of the meaning of these terms...’ supra note 9, at 10.
The First Amendment to the US Constitution protects the free exercise of religion. Section 101(a)(42) of the INA, echoes the definition set out in Article 1(A)(2) of the Geneva Convention. The Supreme Court has held that the First Amendment has two aspects--freedom to believe and freedom to act--the first being absolute but the second subject to regulations for the protection of society.\textsuperscript{44} In \textit{Matter of Liadakis}\textsuperscript{45} the Board of Immigration Appeal (BIA) concluded that in the United States proselytising activities are within the constitutional guarantees of freedom of religion, speech and press. Nevertheless, the BIA found that the statute does not contemplate that unless third country nationals enjoy within their own country the same degree and extent of religious freedom they enjoy in the United States, deportation may be withheld on the ground of impeding physical (religious) persecution.\textsuperscript{46}

In \textit{Matter of Liadakis} the respondent, a Jehovah Witness, indicated that his actions of interpreting the Bible and delivering literature would lead to his imprisonment, as it stood contrary to the Greek Constitution, which forbids interference with the Eastern Orthodox Church. Indeed, records proved that imprisonment in such incidents could last for up to five months. Nonetheless, the BIA found that the extent of sanctions imposed by the authorities could not be described as 'persecutory'. The Board ruled that the 'general freedom of religion in Greece is subject \textit{only} to the limitation that proselytise activity other than the Eastern Orthodox Church is forbidden.'\textsuperscript{47} However, assuming that the obligation to proselytise is central to one's religious practice, such limitation can surely be seen as persecutory rather than discriminatory.\textsuperscript{48} Indeed, the European Court of

\textsuperscript{44} \textit{Cantwell v. Connecticut}, 310 US 296 (1940), at 303-304.

\textsuperscript{45} 10 I.&N. Dec. 252 (BIA 1963). This decision is particularly important as decisions of the BIA are binding on all officers and employees of the INS including Immigration Judges. 8 CFR §3(l)(h).

\textsuperscript{46} \textit{Ibid.}, at 254-255. See also: \textit{Fatin v. INS}, 12 F.2d 1233 (3rd Cir. 1993) '[Persecution] does not include every kind of treatment our society regards as offensive', at 1234.

\textsuperscript{47} \textit{Matter of Liadakis, supra} note 45, at 253. (Emphasis added).

\textsuperscript{48} UNHCR Handbook, Paragraph 54 states that:
Human Rights has held that freedom of religion implied the right to try and convince one's neighbour.\(^{49}\) States are left to ensure peaceful enjoyment of freedom for all and to protect others from improper proselytising activities. Therefore, on similar facts to Matter of Liadakis, the European Court of Human Rights held that Greek laws have violated Article 9(1) of the European Convention on Human Right (ECHR)—freedom of thought, conscience and religion.\(^{50}\) Surely, this is the correct outcome.

More recently, after more than 'a year long battle over the language, intent and potential consequences',\(^{51}\) the International Religious Freedom Act of 1998 was signed into law in the United States.\(^{52}\) As the legislation was designed to heighten the awareness of religious persecution as a ground for refugee status,\(^{53}\) it successfully provided for the creation of the Office of International Religious Freedom which is responsible for assisting the Secretary of State in preparing an annual report for Congress on international religious freedom. The report describes the nature and extent of violations of religious freedoms committed or tolerated by foreign governments and it is incorporated into the initial and ongoing training of immigration judges, thereby ensuring that those with the decision-making authority are aware of specific country conditions, methods of persecution

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\(^{50}\) Ibid. See: European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221.


\(^{53}\) '[The Act was intended] to ensure that victims of religious persecution receive the same consideration given to refugees fleeing persecution on account of one of the other four grounds...' US Committee, supra note 51.
and difference in the treatment of religious group by persecuting entities. This is clearly an admirable practice. Ultimately, however, despite these recent positive legislative developments, the established US case-law discussed above does not reflect the acceptance of Krishnaswami's findings, let alone displays any respect for Article 18 UDHR.

1.2.3 Nationality

Nationality under Article 1(A)(2) of the Geneva Convention is to be interpreted widely. The UNHCR Handbook asserts that the concept is to include not just citizenship but also origin and membership of a particular ethnic, religious, cultural, geographical and linguistic community.

Both the EU and the United States recognise that this notion generally overlaps with other grounds articulated by the Geneva Convention. Article 12(c) of the proposed Refugee Definition Directive incorporates the UNHCR Handbook's understanding of the term into EU's policies, while the Explanatory Memorandum states that Member States should recognise the fact that the concept of nationality could 'overlap with the term of 'race''. Similarly, the adopted Refugee Definition Directive states that concept of nationality shall not be confined to citizenship, but shall also include 'membership in a group determined by its cultural, ethnic or linguistic identity, common geographical or political origins or its relationship with the population of another State.' Once more, this recognises the possible overlap with the concept of race alone, albeit emphasising the need for a broad interpretation. Such a description, nevertheless, could prove to be rather narrow since 'nationality' has been construed by US courts, as discussed below, to overlap with other grounds of persecution and not just 'race'.

55 UNHCR Handbook, Paragraphs 74-76.
57 At Article 10(1)(c). This definition is in accordance to Council Document 6733/03, ASILE 11, 28 February 2003, Article 12(c).
United States' practice indicates that 'nationality' is first to be understood to cover 'ethnicity'-- a category which 'falls somewhere between and within the protected grounds of 'race' and 'nationality.' However, in addition to this interpretation, US courts have proved to be largely lenient in accepting any other extension in definition. Currently, US case-law points to an expansion of this ground not only to persecution on account of 'race' but also to the Convention's premise of 'religion' and even to past persecution consisting of immediate family ties which generally fall under the persecutory ground of 'membership in a particular social group'.

1.2.4 Membership in a Particular Social Group

Individuals who are not targeted for persecution due to their political opinion, religion or ethnicity may still deserve refugee protection because they belong to a sector of society perceived to threaten the status quo. The inclusion of the 'social group' ground reflects this understanding. Unfortunately, there is no record discussing the purpose or the meaning of this term in the Geneva Convention’s drafting history.

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58 Mildred Yesenia Duarte de Guinac and Mauro Jose Quiej v. INS, 179 F.3d 1159 (9th Cir. 1999), at note 5— Mayan Indian in Guatemala singled out for persecution due to his indigenous Quiche ethnicity; See also: Nigist Shoafera v. INS, 228 F.3d 1070 (9th Cir. 2000).

59 Maiana Mgoian v. INS, 184 F.3d 1029 (9th Cir. 1999)— Ethnic Kurdish Moslem persecuted in Armenia on the basis of her Muslim religion as well as her Kurdish ethnic identity.

60 Tesfaye Aberra Gebremichael v. INS, 10 F.3d 28 (1st Cir. 1993)— Ethiopian of Amhara descent who left Ethiopia due to persecution based on his blood ties to his brother, as well as belonging to Amhara ethnicity, which was not tolerated by the ruling Tigray ethnic group.

61 The Swedish delegation to the 1951 Conference suggested that 'experience has shown that certain refugees have been persecuted because they belong to a particular social group. The draft Convention makes no provision for such cases, and one designed to cover them should be accordingly included.' UN Doc. A/CONF.2/SR.3 (1951), at 14.

62 'Delegations appeared far more concerned with restricting the geographical and time limits of the refugee definition than with discussing the categories of persecution.' Fullerton, M, 'A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group', Cornell International Law Journal, Vol.26 (1993), at 509-510.

It is worth noting that in addition to the Geneva Convention, Article 2 of the UDHR as well as Article 3 of the ICCPR recognise social factors as giving rise to arbitrary or repressive treatment.
Numerous scholars have tried to provide interpretation for the concept of social group, yet, there is still no academic consensus, let alone judicial agreement, as to the meaning of the term.\textsuperscript{63}

Goodwin-Gill has pointed out that in determining whether a particular group of people constitutes a ‘social group’, it is important to note any ‘ethnic, cultural, and linguistic origin; education, family background; economic activity; shared values, outlook, and aspirations.’\textsuperscript{64} Thus, his concept of social group includes groups that are based solely on factors attributed to birth, as well as groups defined by factors that may involve pure individual choice, such as economic activity, education or shared aspiration.

The UNCHR Handbook’s definition is noted for ‘its breadth and simplicity.’\textsuperscript{65} The Handbook defines a ‘social group’ as people from ‘similar backgrounds, habits or social status.’\textsuperscript{66} Hence, unlike Goodwin-Gill, it fails to explicitly distinguish between involuntary and voluntary membership. Yet, it has been argued that this simple definition is still broad enough to encompass both types of situations as individual’s background may include their family ties, while it may also refer, for example, to any chosen profession.\textsuperscript{67}

Lastly, Hathaway offers the most detailed definition, stating that three types of groups can give rise to claims of persecution based on membership in a particular social group:

‘(1) groups defined by an innate, unalterable characteristic; (2) groups defined by their past temporary or voluntary status, since their history or experience is not within their current power to change; and (3) existing groups defined by volition so long as the purpose of the association is so fundamental to their human dignity that they ought not to be required to abandon it. Excluded... are groups defined by a characteristic which is changeable or from which dissociation is possible... [This] standard is sufficiently open-ended to allow

\textsuperscript{63} See general discussion in Fullerton, \textit{ibid.}

\textsuperscript{64} Goodwin-Gill, \textit{supra} note 30, at 47.

\textsuperscript{65} Fullerton, \textit{supra} note 62, at 518.

\textsuperscript{66} UNHCR Handbook, Paragraph 77.

\textsuperscript{67} Fullerton, \textit{supra} note 62, at 519.
evolution... but not so vague as to admit persons without a serious basis for claim to international protection...

Article 12(d) of the proposed Refugee Definition Directive urges a broad interpretation from Member States of this ground, offering a combination of the above scholarly interpretations. It points to impenetrable fundamental characteristics, such as sexual orientation, age and gender, as well as to voluntary backgrounds that are so fundamental to a person that this individual should not be forced to renounce his or her membership. This concept, the Explanatory Memorandum states, is not confined to small groups of persons, there is no need for voluntary association and finally, an inquiry into the perceptions of others as to the existence of an undesirable group is taken into account. Domestic abuse, sexual violence and genital mutilations may fall within the understanding of the concept where the law of the country does not offer effective protection or discriminates against such groups based on gender or social status.

The adopted Refugee Definition Directive has embraced the above definition. While requiring an innate characteristic or a common background that cannot be changed or a belief that is so fundamental to the identity or conscience of a person, it also points to the perception of the surrounding society of the specific group. Yet, the recently adopted Refugee Definition Directive, despite

68 Hathaway, supra note 23, at 161.
70 'The interpretation should also allow for the inclusion of individuals who are treated as 'inferior' or as 'second class' in the eyes of the law, which thereby condones persecution...', Proposed Refugee Definition Directive, Explanatory Memorandum, Article 12(d).

The idea of the persecutor's views of the group was initially called for by the Joint Position, Article 7(5).

71 Adopted Refugee Definition Directive, Article 10(1)(d) states that: 'A group shall be considered to form a particular social group where in particular:

- members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it; and

- that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;

Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be
acknowledging that persecution may have a gender dimension and be gender-specific, has watered down the reasons of persecution, stating that ‘gender-related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article’,\(^7\) consequently leaving Member States with wide discretionary powers. This is in contrast to the proposed Directive examined above as the latter explicitly mentions gender as a part of the social group ground, stating that the concept was not to be confined to narrowly defined groups, which indeed was a reason to refuse recognition to the fact that females may form a particular social group.\(^7\)

In parts, the language of Article 10(1)(d) is already reflected in a number of Member States’ practices.\(^7\) Nonetheless, the concept of ‘particular social group’ has proved to be confusing and hard to interpret even within a State’s own jurisdiction.\(^7\) Indeed the European Parliament has suggested that certain groups should be explicitly referred to under the ‘social group membership’ ground, so as to avoid any possible confusion and to strengthen the standing of these groups.\(^7\)

understood to include acts considered to be criminal in accordance with national law of the Member States: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article.’ The Article, however, does not provide for any further discussion, in contrast to the proposed Directive.

\(^7\) *Ibid.* Again, this is an exact replication of the term offered by ASILE 11, *supra* note 57.


\(^7\) For example, note Fullerton’s discussion with regard to German case-law which takes two different approaches to the interpretation of the ground— one court focused on the internal structure of the group, whereas the other focused on external persecution, that is, society’s view of the group in question, *supra* note 62, at 531-535.

To this end, the adopted Refugee Definition Directive, Article 10(1)(d), merely specifies the common characteristic of sexual orientation as a ground giving rise to protection. Hence, although a broad interpretation is found in a number of Member States, the Directive has not promoted a unified solution to the uncertainties surrounding the different constructions of this ground.

It has proved rather complicated to bring a claim in the United States based on the ground of ‘membership in a particular social group’. A case that exhaustively discusses this term and is still crucial today is *Matter of Acosta*, where it was held that a particular social group is a group of individuals who share a ‘common immutable characteristic’:

> ‘The shared characteristic might be an innate one such as sex, colour, or kinship ties, or in some circumstances it might be a shared past experience... The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or conscience.’

A year later, the term was again considered in *Sanchez-Trujillo*. The court considered that only where people who are closely affiliated with each other and where there is the existence of a voluntary association relationship, this will impart on common characteristics which are fundamental to members’ identity. Hence, only a ‘small, readily identifiable group’ with common interests and ‘fundamental affiliational concerns’ will come within the definition of the term. In *Gomez*, the court took the view that ‘a particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor-- or in the eyes of the outside

78 *Ibid.*, at 233. This approach was specifically endorsed by the First, Third and Seventh Circuits. *See: Ananeh-Firempong v. INS*, 766 F.2d 621 (1st Cir. 1985), at 626; *Fatin v. INS*, supra note 46, at 1239-40; and *Lwin v. INS*, 144 F.3d 505, (7th Cir. 1998), at 512. As discussed, Hathaway advocated such an approach.
79 *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986).
81 *Gomez v. INS*, 947 F.2d 660 (2nd Cir. 1991).
This dictum, however, was not duplicated in the recent case of *Hernandez-Montiel*, which combines the *Sanchez-Trujillo* and *Matter of Acosta* principles: '[W]e thus hold that a 'particular social group' is one united by a voluntary association... or by an innate characteristic that is so fundamental to the identities or conscience of its members that the members either cannot or should not be required to change it.'

Hence, as clearly shown, the US approach to social group varies greatly within the different Circuits. The *Matter of Acosta* analysis, however, is similar to the one advocated for by the EU Refugee Definition Directive, with one important difference-- whereas *Matter of Acosta* calls for an immutable characteristic only, the EU's definition extends further, inquiring into society's perception of the group. While *Sanchez-Trujillo* demands a voluntary association relationship and common characteristic that are fundamental to the group's identity, the EU proposed Refugee Definition Directive explicitly rejects the former requirement, while the adopted Directive does not discuss the matter at all. Hence, as *Gomez* was not expressly rejected, it is left to be seen if the *Gomez* approach will prevail some day in US courts, thereby creating a common understanding between US case-law and the EU approach.

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83 *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000).


85 Due to the state of disarray US law is currently in, the INS has attempted to define the 'particular social group' ground. However, the proposed Regulations (Proposed 208(15)(c), 65 Fed.Reg. 76588-76598 (7 December 2001)) do not contain an effective date and 'it is not known when or if interim or final Regulations will be issued.' Germain, R, *AILA's Asylum Primer: A Practical Guide to US Asylum Law and Procedure*, American Immigration Lawyers Association Press, 3rd Edition, 2003, at 40.

It is interesting to note that Da Lomba has pointed out that the term 'immutable characteristic' itself raises a number of definitional, sociological and philosophical questions that can prove burdensome to certain categories of individuals. She gives the example of homosexuals, arguing that if the test of 'immutable characteristic' was to apply systematically, homosexuals may not be regarded as a particular social group in the presence of differing perceptions of sexual orientation, which do not view homosexuality as an immutable characteristic. Therefore, the EU and US requirement of society's perception is reassuring in the presence of such real concerns. Da Lomba, *supra* note 73, at 86.
It is indisputable that despite extensive academic and judicial debate, the Convention’s ground of ‘social group’ is difficult to rely on. While the refugee definition is gender neutral, the law has developed in a way which does not respond to the particular protection needs of women.\(^8\) Therefore, the urgency in providing a broad definition to the ‘social group’ ground, emphasising the need of protecting gender-based persecution, was initially acknowledged and advanced by the European Parliament which adopted a Resolution calling upon States to recognise that women refugees who ‘face harsh or inhuman treatment because they have infringed the social mores of the society in which they live constitute a ‘particular social group.’'\(^8\) Yet, it was not before 1987,\(^8\) when the UNHCR Executive Committee noted that refugee women have needs that necessitate special protection and assistance, while in 1988 it further urged the reinforcement of preventive measures to increase the physical security of women and requesting the UNHCR to provide a detailed progress report of action.\(^8\) Finally, in 1989 the UNHCR Executive Committee reiterated the concern regarding physical safety and sexual exploitation of women and requested the UNHCR to prepare comprehensive guidelines on the international protection of refugee women.\(^9\) Promptly, the UNHCR has published its Guidelines on the Protection of Refugee Women which describe the possible gender-based persecution claims that States may recognise.\(^9\) Nonetheless, the UNHCR Refugee Women Guidelines recognise that although it is the UNHCR’s ‘responsibility, as part of its protection function, to ensure the non-discriminatory access for all refugees to its assistance’, it is the

\(^8\) Before that, the UNHCR Executive Committee left the matter of interpretation of the ‘social group’ ground for the States. Executive Committee Conclusion No.39 (XXXVI), *Refugee Women and International Protection*, 1985.
\(^8\) See: Executive Committee Conclusion No.54 (XXXIX), *Conclusion on Refugee Women*, 1988.
\(^9\) Executive Committee Conclusion No.60 (XL), *Refugee Women*, 1989.
State's responsibility to guarantee a fair interpretation of the Geneva Convention.92

Such a positive development in the international arena is also observed domestically in the United States through the adoption of the INS Gender Guidelines, which aim to serve as a tool in ensuring uniformity in gender-related asylum decisions.93 The INS Gender Guidelines announce the principle that 'women's rights are human rights, and women's rights are universal.'94 Furthermore, 'rape... sexual abuse and domestic violence, infanticide and genital mutilation are forms of mistreatment primarily directed at... women and they may serve as evidence of past persecution...'.95 Finally, the INS Gender Guidelines recommend that such asylum claims should be analysed against the background of the fundamental purpose of refugee law-- to provide surrogate international protection where there is a fundamental breakdown in the state of origin.96 Indeed, since the adoption of these Guidelines, persecution based on female genital mutilation,97 spousal abuse and domestic violence98 as well as sexual orientation99 have been more favourably recognised as persecution based on a particular social group membership. Unlike the United States, however, it has been contended that there is a prevailing fear in the EU that the insertion of a specific gender protection ground will increase the number of asylum claims.100 To that end, it is

92 UNHCR Women Guidelines, ibid., at 47.
95 INS Gender Guidelines, supra note 93, at 4.
96 'This principle becomes crucial where the application alleges private actions-- such as domestic violence-- that the state will not protect against. In such situations, the officer must explore the extent to which the government can or does offer protection or redress resulting in serious human rights violations tied to civil and political status.' Ibid, at 16.
97 In re Kasinga, Int. Dec. 3278 (BIA 1996); Abankwah v. INS, 185 F.3d 18 (2nd Cir. 1999).
99 For example, gay men with female sexual identities- Hernandez-Montiel, supra note 83.
100 Da Lomba, supra note 73, at 98.
interesting to note that Canada, who opened its borders to gender-specific claims in 1993, did not experience any significant increase in asylum applications.\textsuperscript{101} Hence, fears of uncontrollable numbers of asylum applications are clearly unfounded as current State practice proves that there is no genuine risk of increased asylum claims.

To conclude, ‘particular social group’ does not carry any standard definition.\textsuperscript{102} Consequently, individuals trying to claim membership in a particular social group are likely to find this ground as lying on exceptionally shaky foundations. To rectify this, the UNHCR has recommended that States develop guidelines for gender claims.\textsuperscript{103} Clearly, in light of common EU goals, it would be most sensible to introduce such integrative guidelines. To achieve this end, the US Gender Guidelines might be a good starting-point, which could be further developed, using both national and international understandings, to suit EU policy goals for the protection ground of gender persecution, thereby limiting competing interpretations.\textsuperscript{104} At the moment, however, despite the recognition that a common concept to the particular social group ground needs to be introduced,\textsuperscript{105} gender persecution can be described as weak and uncertain in the EU as the adopted Directive merely holds that gender related aspects might be considered, without by themselves creating a presumption for the applicability of the social group ground.

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\textsuperscript{101} Ibid.
\textsuperscript{104} Within the EU Member States, the UK produced similar gender guidelines in 2000. See: Immigration Appellate Authority, Asylum Gender Guidelines, Government of the UK, November 2000.
\textsuperscript{105} Adopted Refugee Directive, Point 21.
\end{flushright}
1.2.5 Political Opinion

Article 19 UDHR advocates that ‘Everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas’.

Following this, the Geneva Convention ground of ‘political opinion’ includes any person who is persecuted on account of his or her opinions, which are generally regarded as a threat to the ruling government or other political entity. As judicial developments discussed below demonstrate, it is not only those who actively hold political opinions who may be included in the category of political refugees. An individual who decides to remain neutral in the midst of a conflict may be (falsely) accused of holding a political opinion. The latter principle is known as ‘imputed political opinion’, which could also result in the grant of the Geneva Convention refugee status in both the EU and United States. Indeed, this approach is advocated for by the UNHCR Handbook, which states that persecution based on political opinion shall arise when an applicant ‘holds opinions not tolerated by the authorities. This also presupposes that such opinions have come to the notice of the authorities or are attributed by them to the applicant’.

Similar to the above UNHCR proposition, the EU Joint Position discusses ‘political opinion’ as one which is not tolerated by the authorities. The applicant must show that the authorities knew or attributed any opinion to him or her. Account is to be given to the situation in the country of origin when deciding

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106 The principle is also seen in ICCPR, Article 19 and in Article 10 ECHR. However, both of these Articles provide that some opinions may be unacceptable. For example, Article 19(3) ICCPR states that the exercise of the rights under this Article carries with it ‘special duties and responsibilities’. Therefore Article 19 may be subjected to certain restrictions, as provided by law and are necessary for respect of the rights or reputations of others; and for the protection of national security or of public order, health or morals. Similarly, in Handyside v. UK, (1979-80) 1 EHRR 737, the European Court of Human Rights held that while freedom of expression constitutes an essential foundation of a democratic society, it is subjected to Article 10(2) ECHR, protection of morals. Any restriction, however, has to be proportionate to the aim pursued, at 738. Also see: Goodwin-Gill, *supra* note 30, at 49.

107 Adopted Refugee Definition Directive, Article 10(2); Aguilera-Cota v. INS, 914 F.2d 1375 (9th Cir. 1990), respectively.
whether an individual will be persecuted for holding an opinion. In effect, this terminology is repeated in Article 12(e) of the proposed Refugee Definition Directive. A considerable difference, however, is the fact that the proposed Refugee Definition Directive further supplements the term, stating that it does not matter whether the individual himself or herself characterises the opinion as political. The newly adopted Refugee Definition Directive, however, has partly moved away from this interpretation. While the adopted Directive looks at whether the applicant’s opinion is critical of the potential persecutor so as not to be tolerated, it disregards the provision stating that it is irrelevant whether the individual himself characterises the opinion as political, and instead adds that it does not matter whether the opinion has been acted upon by the individual.

Taken together, the standing offered by the EU can be argued to cover similar scenarios as offered by the US interpretation of the ‘political opinion’ ground. In Aguilera-Cota, it was held that:

‘Even though Aguilera did not express a ‘political opinion’ in the typical fashion, he fits within the statutory definition of that term under the doctrine of imputed political opinion... The threats were based on his employment and presumed support for the government.... In deciding whether anyone has a well-founded fear of persecution or is in danger of losing life or liberty because of a political opinion, one must continue to look at the person from the perspective of the persecutor. If the persecutor thinks the person is guilty of a political opinion, then the person is at risk.'

Yet, it is interesting to note that in Osorio, the US court affirmed the notion that a strongly held opinion on broader issues of democracy and justice may also constitute political opinion. From the examination above it appears that this

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109 Joint Position, Article 7(4).
110 See: Article 10(1)(e), stating that: ‘the concept of political opinion shall in particular include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution... and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant.’ This is similar to the definition provided by the UNHCR Handbook, Paragraph 82: ‘There may, however, also be situations in which the applicant has not given any expressions to his opinions.’
111 Aguilera-Cota, supra note 107.
112 Ibid., at 1379-1380.
113 Vicente Osorio v. INS, 18 F.3d 1017 (2nd Cir. 1994).
interpretation is comparable to the terminology offered by the proposed Refugee Definition Directive, which states that it is immaterial whether the individual himself characterises the opinion as political. As indicated earlier, however, the adopted Directive has moved away from this common understanding.

The European Parliament has argued that the ‘political opinion’ concept as provided by the proposed Refugee Definition Directive was still narrow, as it did not include a thought or belief on a matter related to the state, thereby criticising the proposal as not reflecting the true ambit of political opinion. Consequently, it is welcomed that the final text of the Refugee Definition Directive essentially expanded the concept of political opinion to embrace these provisions. In keeping with recent EU developments, the United States has long recognised the fact that an asylum claimant’s beliefs may constitute political opinion, even though they are not expressed.

The only problematic issue under US law, which is also not explicitly dealt with by the EU Refugee Definition Directive, is the concept of coercive population control and whether the objection to such policy can be understood as an expression of a political opinion.

In Matter of Chang, it was held that ‘an asylum claim based solely on the fact that the applicant is subject to [forced sterilisation] must fail.’ This decision ‘fuelled the dispute regarding the deposition of claims arising from China’s coercive population control policy.’ What came next was eight years of

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114 European Parliament, supra note 76, at Amendment 42.
115 Adopted Refugee Definition Directive, Article 10(1)(c).
116 As required by Paragraph 83 of the UNHCR Handbook; In Matter of Mogharrabi, 19 I.&N. Dec. 439 (BIA 1987), the Board has noted that an applicant’s fear may be well founded if the persecutor ‘could’ become aware of the applicant’s belief, at 446.
117 Interesting enough, in the EU this is likely to be dealt with under the ground of a ‘particular social group’. See: Da Lomba, supra note 73, at 94.
119 Ibid., at 44.
120 Musalo, Moore and Boswell, supra note 24, at 423.
controversy over the adjudication of such claims.\textsuperscript{121} Eventually, the IIRIRA 1996 amended the INA, whereby Congress added the following paragraph to the INA:

'A person who has been forced to abort a pregnancy or to undergo involuntary sterilisation, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control programme, shall be deemed to have been persecuted on account of political opinion...'.\textsuperscript{122}

Essentially, this amendment has legislated a persecutory intent for an entire category of claims, thus loosening the nexus requirement by creating an exception from existing jurisprudence for this class of persons.\textsuperscript{123} Hence, an applicant who had violated China’s one child policy and as a result was subject to abortion and/or forced sterilisation is statutorily eligible for asylum.\textsuperscript{124} It is left to be seen how this issue will be handled by the EU Member States in light of the recently adopted Refugee Definition Directive.

\textbf{1.3 Meaning of ‘Persecution’: Non-State Agent Persecution}

There is a lack of consensus regarding the meaning of the term ‘persecution’, mainly, whether the phrase includes persecution carried out by non-state agents. The international definition of the term ‘refugee’, that is, Article 1(A)(2) of the Geneva Convention, is neutral with regard to the agents of persecution. In contrast, the ICCPR prohibits any ‘state, group or person... to engage in any activity... aimed at the destruction of any rights and freedoms recognised herein...’,\textsuperscript{125} while the UN Torture Convention defines torture specifically in terms

\begin{footnotesize}
\textsuperscript{121} Ibid., at 423-430.

\textsuperscript{122} INA §101(a)(42)(A) (Emphasis added). Note, however, that the coercive population control ground is limited to 1,000 claims per year. INA §207(a)(5), 8 USC §1157(a)(5).

\textsuperscript{123} INS v. Jairo Jonathan Elian Zacarias, 502 US 478 (1992) (Zacarias II). In Zacarias II, the US Supreme Court stated that ‘on account of’ requires proof of the persecutor’s motivations, while the IIRIRA amendment of section 101(a)(42)(A) holds that coercive population control is ‘deemed to be on account of political opinion.’

See: Musalo, Moore and Boswell, supra note 24, at 300-313, 431.


\textsuperscript{125} ICCPR, Article 5(1).
\end{footnotesize}
of the infliction of severe pain or suffering by the state.\textsuperscript{126} As the Geneva Convention and its \textit{travaux preparatoires} are not explicit on this point, the general rule of interpretation is that codified in the Vienna Convention stating that a 'treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'\textsuperscript{127} Despite this, the international community has developed two radically different theories: the 'accountability-view' theory and the 'protection' theory.

A refugee is a person who has left his or her country and is unable or unwilling to avail himself to the protection of that state. According to the accountability view, the 'power to protect is also the power to persecute.'\textsuperscript{128} Where a state loses the latter, obviously, it cannot carry out the former. Consequently, where a state has no means to protect at its disposal, it cannot be perceived to be accountable for any acts of private parties. The accountability theory further asserts that no state is able to accord its citizens absolute protection. Hence, a state cannot be accountable where it is willing to take the necessary safeguards to protect against persecutory private acts, but where such measures prove to be insufficient.\textsuperscript{129} A minority of states within the EU favour this view,\textsuperscript{130} which has been described as seeking to 'narrow the scope of the protection [states] provide to victims of human rights violations,'\textsuperscript{131} as accountability under international law is difficult to substantiate in countries without governmental or \textit{de facto} governmental structure. In essence, the accountability theory presupposes a violation of basic duties by the

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\textsuperscript{126} 'Public official or other person acting in an official capacity.' Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85 (1984), at Article 1(1).
\textsuperscript{127} Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (1969), Article 31(1). The United States has failed to sign or ratify this Convention.
\textsuperscript{129} \textit{Ibid.}, at 450.
\textsuperscript{130} Notably Germany, France, Italy and the Netherlands.
\end{flushleft}
state of origin, turning every grant of asylum into an implicit accusation against that country.\textsuperscript{132}

This position is to be distinguished from the one offered by the protection theory, which supports the view that:

'A state fails to fulfil a basic duty not only where its authorities are unwilling to provide protection against persecution by non-state actors, but also where it is so disorganised that it is no longer in a position to provide security to some of its citizens against the acts of violence by other citizen.'\textsuperscript{133}

Initial stages of EU harmonisation expressed through the Joint Position acknowledge that persecution carried out by third parties constitutes persecution as defined in Article 1(A)(2) of the Geneva Convention if it is 'encouraged or permitted by the authorities.'\textsuperscript{134} According to the Joint Position, cases in which the 'authorities fail to act'\textsuperscript{135} shall be decided in accordance with national judicial practice. Article 6 of the Joint Position holds that persecution may also stem from \textit{de facto} authorities in control of part of the territory in cases of civil war or internal armed conflict. The wording of the Joint Position excludes persecution by non-state agents who only concur with the state authorities or act subversively but without having established \textit{de facto} control over a part of a territory. Thus, the Joint Position suggests that persons fleeing persecution from a civil war or other

\textsuperscript{132} 'The purpose of the 1951 Geneva Convention is not to establish liabilities under international law. Indeed, that would be inconsistent with its humanitarian and non-political nature. The granting of asylum should not be understood either as an unfriendly act against the county of origin or necessarily as criticism.' ECRE Research Paper on Non-State Agent of Persecution, September 2000, at 5.


In fact, Paragraph 65 of the UNHCR Handbook promotes the view that:

'[Persecution is] normally related to actions by the authorities of the state... [persecution] may also enumerate from sections of the population that do not respect the standards established by the laws of the country concerned... where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.'

\textsuperscript{134} Joint Position, Article 5(2).

\textsuperscript{135} \textit{Ibid.}
uprisings will not fall under the Geneva Convention refugee status, except where the national authorities enforce or permit such an attack, have deliberately failed to act, or where the blame could be placed on a specific group in control. In essence, this reaffirms the position of the accountability theory that persecution must be imputable, either directly or indirectly, to the state. The European Parliament in its Resolution on harmonisation of refugee status noted that the main effect of the Joint Position is to validate a restrictive interpretation of the Geneva Convention. The European Parliament reaffirmed that 'the Geneva Convention must apply also to persons who are persecuted by non-state agents in cases where the state itself is incapable of protecting its own citizens.'

As the Joint Position has a non-binding status, EU Member States as well as the European Court of Human Rights continued to develop their own jurisprudence. Article 3 ECHR provides that ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment.’ The European Court of Human Rights has held that the responsibility of a Contracting State party under Article 3 ECHR arises when another State fails to provide adequate protection or expels persons who have been persecuted by non-state agents. Given the fact that the ECHR continued to provide for this gap in interpretation, the Tampere European Council Summit agreed that the aim of the EU harmonisation system should be ‘an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments.’

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137 Ibid., at Point 5.


The proposed Refugee Definition Directive reflects the dominance of the protection theory and is therefore a significant improvement from previous policies, truly reflecting prevailing opinions, both of the international and EU communities. Nonetheless, it appears that what the proposed Refugee Definition Directive gives with one hand it grabs back with the other: when EU Member States are to decide whether the state of origin has failed to provide effective protection, 'state' will also include any:

140 International organisations and stable quasi-state authorities who control a clearly defined territory... who are able and willing to give effect to rights and to protect an individual from harm in a manner similar to an internationally recognised state.140

Clearly, state-like authorities cannot be parties to any international human rights instruments and therefore cannot be held accountable for non-compliance with international refugee and human rights obligations. Furthermore, quasi-state authorities tend to be unstable, vulnerable to attacks and their control may not necessarily be accepted.141 Therefore, it was rightly suggested by the European Parliament as well as numerous NGOs that this provision be deleted.142

Despite the heavy criticisms put forward, the adopted Refugee Definition Directive takes a similar position, stating that persecution will only exist where the state; parties or organisations controlling the state or a substantial part of the territory; or international organisations, are unable or unwilling to provide protection.143 It has been argued that if this protection alternative was to remain, it ought at least to be subjected to some criteria which helps to assess whether, for example, an international organisation controls a substantial part of the territory

140 Proposed Refugee Definition Directive, Article 9(3).
141 For example, this proviso would suggest that regimes like the one currently operating in Iraq could be considered capable of offering effective protection. Clearly, daily events, including deaths and country-wide instability, indicate the contrary.
142 European Parliament, supra note 76, at Amendment 30. Note also: UNHCR, supra note 9, at 8-9 and ILPA, supra note 15, at 6.
143 Adopted Refugee Definition Directive, Articles 6(a)-(c) and 7(1)(a);(b).
and provides an effective protection. To that end, the Directive qualifies the protection afforded by international organisations or other parties or organisations besides the state by first stating that the above actors must take reasonable steps to prevent persecution by operating an effective and accessible legal system for the detection, prosecution and punishment of acts constituting persecution; and secondly, in deciding whether such bodies control a state or a substantial part of its territory, Member States shall take into account any guidance from the Council. Again, this ‘qualification provision’ constitutes a ground for concern. Whereas Article 7 refers to both ‘reasonable steps’ to be taken by the state and to the availability of ‘effective protection’, the Directive does not indicate whether these constitute the same standard. The question is therefore if a state takes reasonable steps to prevent persecution and the applicant has a reasonable access to such protection, would that amount to an effective protection? The Directive does not provide a solution to a scenario where non-state authorities provide for the required legal system to detect and prosecute, however, such exercise of control is not widely approved, and thus it does not necessarily mean that persecution will effectively stop. Similarly, the argument presented above against the protection provided by state-like authorities, stating that the latter cannot be members to any international human rights obligations and therefore cannot unconditionally guarantee adequate protection, remains strong.

Since the passage of the Refugee Act in 1980, US courts continue to hold with consistency that the non-state character of the persecutor is not a barrier to asylum. Thus, the United States, similar to recent EU developments, has upheld


145 Adopted Refugee Definition Directive, Articles 7(2), (3). It is interesting to note that in communications predating the final text of the Directive, this provision was further elaborated, stating that in providing such guidance, the Council will consider information from relevant international organisations. See: ASILE 21, 7944/04, 31 March 2004, at Annex II, Article 9A. The adopted Directive, however, takes a more general approach stating that consultations with the UNHCR may take place, without providing for a specific connection to the above proviso. See: Adopted Refugee Directive, Point 15.
the protection view— as long as the state is ‘unwilling or unable to provide protection’ and as long as one (or more) of the Convention’s grounds of persecution exist— victims of non-state persecutors will be eligible for protection.\textsuperscript{146}

Nonetheless, it has been argued that the US Supreme Court’s current standard of proof, which requires proof that the persecutor’s motives relate to a Convention ground,\textsuperscript{147} disfavours individuals fearing persecution by non-state agents.\textsuperscript{148} A strict standard of causation tends to burden claims of persecution at the hands of non-state agents whose motivations are often uncertain, thus resulting in a difficulty to link persecution to the Convention’s grounds.

Thus, the ‘elasticity of the definition of persecution depends on the political will of the Member States implementing the Convention.’\textsuperscript{149} Therefore, it is left to hope that EU Member States who until now favoured the accountability theory will not adopt this US practice, thereby circumventing the application of the protection theory. Such a policy results in indirect discrimination against victims of non-state agents, as adjudicators ‘will almost always know less about the motives of non-state persecutors than they would about the political goals of an official government.’\textsuperscript{150} As it will be harder to link persecution between the former and one of the grounds enumerated by the Geneva Convention, such practices should be avoided at all costs. In fact, in the spirit of humanitarian protection, States should concede to a policy which allows victims of non-state persecution to benefit from protection in case of any doubts.

\textsuperscript{146}McMullen \textit{v.} INS, 658 F.2d 1312 (9th Cir. 1981), at 1315; Bartesaghi-Lay \textit{v.} INS, 9 F.3d 819 (10th Cir. 1993), at 822; Vera Korablina \textit{v.} INS, 158 F.3d 1038 (9th Cir. 1998); Avetova-Elisseva \textit{v.} INS, 213 F.3d 1192 (9th Cir. 2000).

\textsuperscript{147}Cardoza-Fonseca, supra note 28.

\textsuperscript{148}Moore, \textit{supra} note 131, at 110-115.

To conclude, as a result of frequent internal conflicts and state dysfunction of the previous decade, governmental repression is no longer the primary context for human rights abuses. As attested earlier, under international human rights norms, intention to harm on part of the state is irrelevant. The outcome of both state persecution as well as private persecution is identical: people are denied access to basic guarantees of human dignity and therefore should be offered protection. The protection theory, now widely accepted by the EU and a long lasting part of US jurisdiction, clearly promotes this idea. However, current limitations presented in both the EU and United States as discussed above should be reviewed in light of the Geneva Convention’s liberal and generous aim of providing protection which holds that the risk of persecution, rather than the identity of the persecutor, should be the primary criterion for evaluating asylum claims.151

2. Non-Refoulement: Meaning and Restrictive Interpretation

‘No contracting State shall expel or return (’refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.’152

Article 33(1) of the Geneva Convention embodies the core of the Geneva Convention regime. This provision imposes a clear and binding obligation upon State parties to the Geneva Convention not to return those who request protection at their borders. However, it appears that one of the greatest controversies revolves around what the non-refoulement norm prohibits States from doing as well as the extension of applicability of this principle.

Article 33(1) of the Geneva Convention affirms the principle on prohibition of refoulement. Broadly, it could be described as the prohibition on returning refugees to countries where they are likely to face persecution. This principle was

150 Moore, supra note 131, at 110-115.


152 Geneva Convention, Article 33(1).
generally interpreted by EU Member States as ‘covering all people seeking protection and present in the territory of a Contracting State, regardless of whether they had been recognised as refugees.’\textsuperscript{153}

The prevailing agreement in the EU is that a wide understanding of the \textit{non-refoulement} provision is to be permitted, so as to allow large numbers of asylum seekers to remain on their territories until a solution to their plight can be found. In essence, most individuals who cross the border into the EU territory have received a complementary form of protection, such as ‘exceptional leave to remain’ in the UK, ‘\textit{duldung}’ status in Germany or may be covered by ‘temporary protected status’ policies throughout the EU.\textsuperscript{154} However, despite the fact that these different statuses bestow beneficiaries less rights than guaranteed by the Geneva Convention, the core objectives of these principles is the full respect of the obligation of \textit{non-refoulement} by the Member States.

Again, Article 19 of the proposed Refugee Definition Directive reiterates Member States’ obligation not to expel refugees and to respect the principle of \textit{non-refoulement}. Furthermore, the proposed Refugee Definition Directive confirms the unquestionable obligation of the EU Member States to the norm of \textit{non-refoulement} by emphasising that the principle must be observed in relation to all forms of protection.\textsuperscript{155} Yet, the recent tone of the adopted Refugee Definition Directive seem to have softened. While requiring Member States to respect the principle of \textit{non-refoulement}, at the same breath the Directive reminds Member States the exceptions to the latter principle, as provided for by the Geneva Convention, explicitly entitling Member States to \textit{refoule} a refugee.\textsuperscript{156}


\textsuperscript{154} See: Chapter V.

\textsuperscript{155} Proposed Refugee Definition Directive, Article 19.

\textsuperscript{156} Where this is not prohibited under international obligations. See: Adopted Refugee Definition Directive, Article 21. The Geneva Convention exceptions to \textit{non-refoulement} are discussed below.
Although a similar obligation of non-return is presented in US laws, the United States has developed two limiting principles on the obligation of non-refoulement: first, the lack of extraterritorial application of the principle, and secondly, a high standard of proof of the likelihood of persecution is placed on the victim. Both of these policies will be briefly addressed below.

On 23 May 1992, Executive Order 12,807 (Kennebunkport Order) authorised the US Coast Guard to summarily return Haitians interdicted at sea without a hearing to determine whether they had a valid refugee claim. In *Sale*, the US Supreme Court tested whether this policy was in breach of Article 33 of the Geneva Convention’s principle of non-refoulement, currently codified into US domestic law as Section 241(b)(3) INA. The Supreme Court accepted the argument presented by the US Government that Section 241 INA only applies to actions taken by the United States within its own borders. The logic was, therefore, that nothing in domestic or international law prevented the United States from involuntarily repatriating undocumented aliens interdicted at sea even though some may have a valid claim for asylum. In essence, the *Sale* judgement

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157 See: INA §241(b)(3).
159 At the time this case was adjudicated, this provision was known as INA §243(h)(1).
160 In *Sale, supra* note 158, the Supreme Court addressed the question of whether the interdicted Haitians had any cognisable legal rights under US domestic law or international law. Section 241(b)(3) INA states that:

>'The Attorney General shall not deport or return any aliens... to a country if the Attorney General determines that such alien’s life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group or political opinion.'

The respondents contended that the removal of the words ‘within the United States’ and the addition of the word ‘return’ to this Section reflected the Congressional intent to conform US law with Article 33(1) of the Geneva Convention, assuring that the benefits of the Section applied extraterritorially to those intercepted at high seas. The Government in return rejected this assertion, arguing that Section 241(b)(3) INA does not apply to actions of the President and Coast Guard on the high seas. (*Sale*, at 2558). The Court accepted this argument, reasoning that in the absence of a clear Congressional intent to the contrary, the Court will presume that the Act does not apply outside US borders. (*Sale*, at 2560). The Supreme Court therefore concluded that Article 33(1) prohibition applies only after a refugee successfully entered the United States’ territory. Neither the treaty nor the statute therefore, prevents the United States
affirms the sacrifice of the most fundamental principles of refugee protection: the right to flee one's country; the right to seek asylum from persecution in other countries; and finally, the right not to be returned into the hands of one's persecutor.\textsuperscript{161}

The second limitation on the norm of \textit{non-refoulement} arose in relation to the issue of whether the standard of proof applicable to the discretionary asylum provision ("well founded fear") is the same as the standard of proof required in the mandatory withholding/non-refoulement provision ("life or freedom would be threatened").\textsuperscript{162} In \textit{Stevie}, the Supreme Court concluded that the two provisos require different standards of proof. After analysing the text and legislative from reaching outside its territory to exercise jurisdiction over refugees in international or territorial waters. (\textit{Sale}, at 2565-67).

\textsuperscript{161} For criticisms of the \textit{Sale} decision see: Sole dissenting opinion of Blackmun Justice in \textit{Sale}, \textit{supra} note 158, at 2567, emphasising that the majority was able to conclude that the forced repatriation of Haitian refugees is perfectly legal only because it found that 'the word 'return' does not mean return, that the opposite of the phrase 'within the United States' does not mean outside the United States, and because the official charged with controlling immigration has no role in enforcing an order to control immigration.' (\textit{Ibid.}, at 2567-68), in Rosenberg, L. D, 'The Courts and Interception: The United States' Interdiction Experience and its Impact on Refugees and Asylum Seekers', \textit{Georgetown Immigration Law Journal}, Vol.17 (2003), at 214; Hackley, S. L, 'Sea Interdictions: Are Aliens Apprehended on the High Seas Entitled to Protection Afforded by the Immigration and Nationality Act?' \textit{ILSA Journal of International and Comparative Law}, Vol.6 (1999) 143; Griffith, E, 'Problems of Interpretation in Asylum and Withholding of Deportation Proceedings Under the Immigration and Nationality Act', \textit{Loyola of Los Angeles International and Comparative Law}, Vol.18 (1996) 225; and Frelick, B, 'Haitian Boat Interdiction and Return: First Asylum and First Principles of Refugee Protection', \textit{Cornell International Law Journal}, Vol.26 (1993) 675.

Still today there is no coherent rule for screening of asylum seekers nor for ensuring that the United States does not \textit{refoule} interdicted refugees. See: US Committee for Refugees, \textit{World Wide Refugee Information: Expedited Removal: Three Years Later}, 2000, at 'US Interdiction Policy' section. Available at: http://www.refugees.org/world/articles/expedite_rr00_5.htm. See also: Rosenberg, \textit{ibid.} Finally, in its recent World Refugee Survey 2003, the US Committee for Refugees highlighted that interdicted migrants are not entitled to asylum screening. The INS, however, provides a minimal level of screening on an \textit{ad hoc} basis, particularly to Chinese and Cubans but not to Haitians. Those who make it to landfall are immediately detained. See: US Committee for Refugees, \textit{World Refugee Survey 2003 Country Report: USA}, at 'Interdictions and Apprehensions' section.

\textsuperscript{162} Generally, an applicant for asylum who has been previously removed, deported or excluded from the United States and illegally re-entered US territory, may, upon filing for asylum, be only eligible for withholding of removal. Similarly, an individual who was denied asylum may claim withholding of removal. Germain, \textit{supra} note 85, at 104.
history, the Court held that the withholding clause invites the claimant to show that he or she is ‘more likely than not’ to be subjected to persecution.\(^{163}\)

Prior to the 1980 amendment, an applicant for withholding of deportation had to show that he or she would be subjected to persecution. This ‘would be subject’ standard was interpreted to require a clear probability of persecution. In *Stevic*, the Court focused on the fact that the Convention itself requires an individual to show that his or her life too ‘would be threatened’. Thus, the Court concluded that the withholding provision, as it stood prior to 1968, was consistent with the Protocol and therefore still relevant.\(^{164}\) Hence, a successful claim for withholding of deportation (*non-refoulement*) would have to show that there is a 51 per cent chance or greater degree of risk to life or freedom.

*Stevic* was approved two years later by *Cardoza-Fonseca*,\(^{165}\) where the Supreme Court considered that an individual may establish eligibility for asylum upon a showing of a lesser likelihood of harm than is required for withholding of deportation. Hence, the US Supreme Court interpreted Article 33 of the Geneva Convention as ‘self-standing while it should really be read in the context of the entire Protocol and mainly Article 1 which defines refugees.’\(^{166}\)

It has been argued that in contrast to US law, under international law ‘all refugees... are at least entitled to *non-refoulement*...’\(^{167}\) Given that asylum cannot


\(^{164}\) Professor Fitzpatrick has argued that ‘In resolving the *Stevic* case, the Supreme Court relied upon the misleading assurance of executive branch witnesses in 1968 that no formal changes in domestic law were necessary to implement the Protocol... *Stevic* permits prior non-conforming domestic law to operate as an unstated reservation to the Protocol...’ See: Fitzpatrick, J, ‘The International Dimension of US Refugee Law’, *Berkeley Journal of International Law*, Vol.15 (1997), at 7.

\(^{165}\) *Cardoza-Fonseca*, supra note 28.


\(^{167}\) Musalo, Moore, and Boswell, supra note 24, at 80. See also: Kagugube, S. M. S, ‘*Cardoza-Fonseca* and the ‘Well-Founded Dear of Persecution Standard’’, *ILSA Journal of International Law*, Vol.12 (1988) 85, arguing (at 90) that ‘There is no evidence... to suggest that some people who qualify for refugee status... are nevertheless ineligible for the benefits of *non-refoulement* if they fail to meet a higher standard regarding the degree of certainty that their lives or freedom would be threatened upon return.’
be guaranteed to all individuals fleeing human rights abuses, the norm of non-refoulement is the only reliable claim for any protection. If this guarantee is not confirmed for all persons, it is questionable whether international refugee protection would have any real meaning.\textsuperscript{168}

To conclude, it is hoped that despite the somewhat submissive language offered by the adopted Refugee Definition Directive as compared with its proposal, EU Member States will not unconditionally embrace these two refugee restrictive US measures.\textsuperscript{169} The fact that the Geneva Convention Article 33(1) prohibition against expulsion or return is articulated to include 'in any manner whatsoever' suggests that the Convention's draftsmen intended to accord full protection to all refugees. Hence, US interpretation is in clear breach of international law norms.\textsuperscript{170} It should be pointed out, however, that the fact that the EU has not duplicated US understandings thus far may indicate (a silent) resistance to this US interpretation.\textsuperscript{171}


\textsuperscript{169} It is interesting to note that in the Roma Rights Centre, the English Court of Appeal has declined to follow the reasoning of the US Supreme Court in Sale, stating that when an act is done abroad that results in harm to an asylum claimant, that will engage the human rights responsibilities of the State concerned. (Although it was held that the mere fact that an individual applies for an entry clearance abroad does not of itself engages the responsibility of a Contracting State for the consequences of a visa refusal). See: \textit{R(on the application of European Roma Rights Centre) v. Immigration officer, Prague Airport, [2003] 4 All ER 247, at Paragraphs 33 and 34.}

Yet, similar to interdiction at high seas, in 1996 EU Member States have suggested 'non-arrival' policies, for example, by posting immigration officers in third countries in order to prevent exit movements. (Byrne, R, Noll, G, and Vedsted-Hansen, J, \textit{New Asylum Countries? Migration Controls and Refugee Protection in an Enlarged European Union}, Kluwer Law International, 2002, at 14). Worryingly enough, such a move was recently developed by the EU, through the conclusion of a Council Regulation (EC) No.377/2004 on the creation of an immigration liaison officers network, OJ L64/1, 19 February 2004.

\textsuperscript{170} 'Non-refoulement has always been, and remains, indispensable to international protection. It is expressed as an obligation of States in the 1951 Convention, and has gained universal recognition through regional refugee instruments and as part of customary international law.' UNHCR, \textit{The State of the World's Refugees: The Challenge of Protection}, Penguin Books, 1993, at 10. Clearly, the US construction of non-refoulement underestimates this statement which claims 'universal recognition' of non-refoulement.

\textsuperscript{171} As seen in the judgement of the Roma Rights Centre, \textit{supra} note 169.
3. Convention Exclusion Grounds from Refugee Status: Exceptions to Non-Refoulement

The protection against refoulement is by no means absolute. Article 33(2) of the Geneva Convention admits that a refugee, 'whom there are reasonable grounds for regarding as a danger to the security of the country... or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country', may be exempt from the protection of the Convention. This exception clause, addressed in some detail later, is part of the wider context of exclusion clauses to the granting of refugee status established by Article 1(C)-(F) of the Geneva Convention.172

Article 1(F)(b) excludes from refugee protection an individual believed to have committed 'a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee,' and was intended to prevent persons who had committed grave crimes from escaping prosecution.173 This Article has raised most difficulties in its interpretation. First, it was not clear whether such non-political crimes were to be a permanent bar to claiming asylum. Secondly, the wording 'serious' and 'non-political' was inevitably open to different interpretations. The French delegation advocated the view that each State was entitled to weigh the seriousness of the crime in question against its own standards. The majority of States seemed to agree that 'serious crimes, above all, are those against physical integrity, life and liberty.'174 In sum, State practice indicates a case-by-case approach with considerable margins of discretion in the

172 Article 1(C), 'cessation clause', and Articles 1(D)-(E) 'exclusion clauses' will not be addressed in this dissertation as they present little controversy, as well as being irrelevant to the nature of this thesis. Generally, these provisions allow Contracting States to exclude individuals from refugee determination where, for instance, the circumstances which lead to persecution have ceased to exist, or where refugees are already assisted by United Nations agencies. The discussion regarding the legislative history and meaning of Article 1(F)(a)- 'crimes against peace, war crimes, and crimes against humanity' and Article 1(F)(c)- 'acts contrary to the purposes and principles of the United Nations' will too be omitted as they fall outside the scope of this thesis. Generally see: Articles 11 and 12 of the Refugee Definition Directive.

173 Goodwin-Gill, supra note 30, at 102.

174 Ibid., at 105.
definition of what was to be considered ‘non-political’ and ‘serious’, resulting in an inconsistent application of the term.175

The EU Joint Position requires the balancing of the severity of the persecution against the nature of the criminal offence. Particularly cruel crimes, even if committed with an alleged political objective can be categorised as serious non-political crimes.176 The Joint Position states that its definition shall apply to the participants and to the instigators of the crime alike. The proposed Refugee Definition Directive reproduces a similar definition.177 Yet, it allowed Member States some room for manoeuvre by the mere fact that it precluded from its Articles an indication of whom the term shall apply to. Therefore, it was rather ambiguous whether the exclusion from the protection of the Convention due to serious non-political offence was to include the instigators of the crime or also to mere participants, and it was left to the individual State, according to its own national practice, to decide this question.178 Nevertheless, more recently, it was advocated that the EU position should be unequivocal on this matter, and therefore, in the negotiation leading to the final draft of the Directive, it was argued that this provision should apply to the instigators as well as participants of the crime in question.179 As a result, the adopted Refugee Definition Directive, explicitly states that the exclusion provision, as provided for by the Geneva

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175 Exception to the case-by-case approach was seen in 1980 when 125,000 Cuban asylum seekers arrived in the United States. The size of the influx made it impossible to examine cases on an individual basis. Therefore, the UNHCR proposed that in ‘the absence of any political factors, a presumption of serious crime might be considered as raised by evidence of commission of... homicide, rape, child molesting, wounding, arson, drug trafficking, and armed robbery.’ This list is non-exhaustive. See: Goodwin-Gill, supra note 30, at 107.

176 Joint Position, Article 13(2).


179 See: ASILE 11, supra note 57, Article 14(3).
Convention, shall apply to ‘persons who instigate or otherwise participate in the
commission of the crimes or acts.’\textsuperscript{180}

In the United States statutory bars were introduced to domestic laws by the
IIRIRA amendments in 1996. Section 241(b)(3) INA states that ‘the Attorney
General may not remove an alien to a country if the Attorney General decides that
the alien’s life or freedom would be threatened.’\textsuperscript{181} However, an individual may be
excluded from the protection of asylum under six grounds. First, where the
Attorney General decides that the alien incited, ordered, assisted, or otherwise
participated in the persecution of another. Second, where the individual has been
convicted by a final judgement of a particular serious crime and is a danger to the
community. Third, where there are reasons to believe that the alien committed a
serious non-political crime. Fourth, where there are reasonable grounds to believe
that the alien is a danger to national security. Fifth, where an individual
participated in a terrorist activity. Finally, where it can be shown that the alien was
firmly settled elsewhere prior to arriving in the United States.\textsuperscript{181} Hence, like the
position in the EU, courts are to define the nature of ‘non-political’ crimes under
the third exception. In contrast to the EU approach, however, the statutory bar is
even more comprehensive in terms of whom it incorporates: any individual ‘who
assisted, ordered, incited or otherwise participated’ in the commission of an
offence.

With regard to Article 33(2) of the Geneva Convention, mentioned earlier, it is
worth pointing out that whereas the adopted Refugee Definition Directive
disregards any discussion concerning a uniform interpretation that is to be given to
the ‘particularly serious offence’ terminology, the United States has expressly
clarified the term through a statutory instrument.\textsuperscript{182} In addition to specifying the
possible offences, among which are included murder, rape, sexual abuse,
trafficking in firearms, crimes of violence, and theft offences, the statute is also

\textsuperscript{180} Adopted Refugee Definition Directive, Article 12(3).

\textsuperscript{181} INA §208(b)(2)(i)-(vi); (Withholding provision: INA §241(b)(3)(B)(i)-(iv)).

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explicit about the punishment that must be attributed to each offence (varying from one year to five years, depending on the offence in question) as well as stating the exceptions to be taken into account when considering the nature of the ‘serious offence’. Generally, the statute requires a retrospective look at an individual’s criminal record over the past 15 years.

EU Member States should conclude a non-exhaustive list of what constitutes ‘non-political’ offences and what will amount to a ‘serious crime’ falling under the exclusion clauses stated in the Geneva Convention, Article 1(F) and Article 33(2), respectively. Examples can be drawn from the US statute discussed above, which sets the possible felonies, their required minimum punishment and any possible exceptions to the general rule. Such guidelines will promote convergence of policies and will help clarify the position for those seeking international protection, despite the fact they had committed some crime in their distant past. Most importantly, it must be emphasised that the offence carried out must always be balanced against the risk to life or freedom claimed by the individual asylum applicant. Only where one’s crime and danger to the community are very serious can States disregard the consequences of the alien’s return.

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182 Serious crime is defined in the United States as ‘Aggravated felonies’—INA §101(a)(43)(A)-(U), 8 USC §1101(a)(43).

183 For example, an offence which relates to smuggling will not be considered as an aggravated felony where an alien can show that he or she committed the offence for the purpose of assisting, abetting, or aiding his or her spouse, child or parent. The same exception applies to document fraud. INA §101(a)(43)(N),(P).

184 This is supported by the UNHCR Handbook, Paragraph 156. Yet, the European Legal Network on Asylum (ELENA) has noted that most States do not apply the balancing test (See: ELENA, International Course on the Application of Article 1F and Article 1F of the 1951 Convention Relating to the Status of Refugees, 17-19 January 2003, at 20), and therefore it can be argued that since Article 3 ECHR provides an absolute protection where there is a real risk of treatment contrary to its provision, it thereby supplements the safeguards in the Geneva Convention. See: Chahal v. United Kingdom (1997) 23 EHRR 413. Indeed, in Chahal, the European Court of Human Rights held that despite ‘being aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence... the Convention prohibits in absolute terms torture or inhuman or degrading treatment... The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the [Geneva Convention]...’ Paragraphs 79-80. Also see: Starmer, K, European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights, Legal Action Group, 1999, at 506-515. Finally, the Refugee Definition Directive provides that any third country national who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that if returned to his country of origin the individual
Asylum and refugee law is the ‘only form of border crossing which engages international human rights commitment directly.’ Following the 11 September 2001 terrorist attacks, the relationship between immigration principles and terrorism became a priority in the international arena. While the United States has been prompt in adopting extensive measures defining terrorism, the EU has been busy negotiating its own position on this matter.

It has been argued that the relationship between asylum seekers and terrorism is one which is essentially based on individuals crossing borders on the one hand, and legitimate border security considerations on the other hand. As movement across borders has been central to the execution of the 11 September 2001 terror attacks themselves, it is not surprising that the global response to these events would face a real risk of suffering serious harm, shall be granted ‘subsidiary protection’. Article 2(e);(f).


186 See: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, 115 Stat. 272; and Germain, R, ‘Rushing to Judgement: The Unintended Consequences of the USA PATRIOT Act for Bona Fide Refugees’, Georgetown Immigration Law Journal, Vol.16 (2002) 505. Note that the INA itself specifies that an alien who has engaged in a terrorist activity, or there are reasonable grounds to believe is engaged or likely to engage in such activity, is deportable from the United States. INA §208(b)(2)(v) (Terrorism acts as a bar to asylum); INA §237(4)(B) with reference to the grounds in §212(3)(B) (Definitions). Terrorist activity is defined to include, among other activities, hijacking or sabotage of conveyance, violently attacking protected persons, assassinations, and the use of biological, chemicals or nuclear weapons or device. For further discussion see: Chapter II.

187 Council Common Position of 27 December 2001 on the Application of Specific Measures to Combat Terrorism, OJ L344/93. Also see: Peers, S, ‘EU Response to Terrorism’, International and Comparative Law Quarterly, Vol.52 (2003) 227, discussing the EU’s Framework Decision (COM(2001) 522) which sets a three-part definition of terrorism. Indeed, an examination of the recently adopted Directive points out that Member States found it paramount to emphasise the risk of terrorism, stating that ‘Acts contrary to the purpose and principles of the UN... embodied in the UN Resolutions relating to measures combating terrorism, which declare that ‘acts, methods and practices of terrorism are contrary to the purpose and principles of the UN... knowingly financing, planning and inciting terrorist acts are also contrary to the purpose and principles of the UN’ and that ‘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.’ See: Adopted Refugee Directive, Points 22 and 28.

188 Guild, supra note 185.
emphasised security considerations, thereby affecting asylum applicants, as principles of asylum law place great importance on open borders and access to the territory. The question to be addressed, however, is whether fastening security concerns to asylum principles was a necessary step, sincerely concluded in the name of war on terror?

The Geneva Convention limits State sovereignty as regards the closure of borders through its principle of non-refoulement. Yet, as discussed above, the Convention’s provisions do not apply to individuals with respect to whom Article 1(F)(a)-(c) or Article 33(2) could apply. While Article 1(F) covers acts committed abroad before the flight to seek asylum, Article 33(2) is concerned with any conduct occurring after admission into the potential host State. Consequently, it can be legitimately argued that the substance of these two provisions, mainly, covering crimes against peace, war crimes and crimes against humanity, the broadly-defined ‘non-political’ crimes, and any actions contrary to UN principles, all included in Article 1(F), as well as the limitation on protection for individuals who pose ‘danger to the security of the country’ provided for by Article 33(2) of the Geneva Convention, already accommodate the needed State protection, which weighs security considerations against fundamental human rights principles.

It has been correctly argued that anti-terrorist legislation bears the risk that adequate protection for human rights will be disregarded. The designation of an

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189 For example, Guild highlights the 20 September 2001 Justice and Home Affairs Council meeting whose agenda was exclusively devoted to combating terrorism, including, for instance, agreements to strengthen the controls at the EU external borders, reinforced checks on identity documents, and requested the Commission to re-examine the relationship between safeguarding internal security and human rights obligations. Guild, supra note 185, at 332; while the United States focused on the transformation of US internal security by creating the new Homeland Security Department, and abolishing the INS which dealt with the applications and treatment of asylum seekers. See the discussion in Chapter II.

190 Indeed, the EU Refugee Definition Directive interprets the terminology in the exclusion clauses provided by the Geneva Convention as covering terrorism. See note 187, supra. For a similar line of argument see: Pretzell, A, Krushner, D, and Hruschka, C, ‘Terrorism and the 1951 UN Refugee Convention: The National and International Context’, Tolley’s Journal of Immigration, Asylum and Nationality Law, Vol.16 (2002) 148, highlighting that the Geneva Convention is premised at denying safe haven to those who engage in terror activities by allowing its provisions to be interpreted to bar terrorists from protection, at 150-151.

individual as a ‘terrorist’ allows States to conclude legislation permitting special powers which lower the usual protection standards relating, for instance, to detention and prosecution. Clearly, the right to apply for asylum should not be violated due to any terror attacks occurring around the globe and their political outcomes, however, at the same time, asylum should not become an avenue to gain access to the territory for those supporting terrorist acts. Arguably, the Geneva Convention, by providing the above exceptions to the non-refoulement principle, ideally achieves this balance.

Concluding Remarks

Ultimately, as the adopted Refugee Definition Directive does not provide for any new grounds of protection or definitions in the international arena, it is questionable whether this new EU legislation and United States policies interpreting the Geneva Convention will mutually influence one another. As shown, although similar at points, currently, the two systems work independently, each developing its own understanding of the protection to be granted by the Geneva Convention and its exclusion clauses when faced with fresh dilemmas. Although borrowing of case-law between domestic courts in the different Member States and among the different Circuits within the United States occurs, the

192 See, for example, the USA PATRIOT Act, §412 which authorises indefinite detentions of individuals who are suspects terrorist, as well as INA §501, which discusses special removal proceedings, permitting the introduction of classified information which may not be reviewed by the individual. Any asylum claim in such procedures will be disregarded.

193 Also see argument by Martin and Martin stating that ‘One group that is particularly in need of protection from overreactions to terrorism are refugees... international and domestic refugee law [already] excludes terrorists from refugee status even if they can demonstrate that they would face persecution if returned...’ Martin, S, and Martin, P, ‘International Migration and Terrorism: Prevention, Prosecution and Protection’, Georgetown Immigration Law Journal, Vol.18 (2004), at 343.

194 It has been debated that such practices can be asserted as resulting from long standing fundamental misunderstandings and disagreements regarding geopolitical, economic and social values issues between the US, individual EU Member States and the EU itself. See: Keohane, R. O, ‘Ironic of Sovereignty: The European Union and United States’, Journal of Common Market Studies, Vol.40 (2002) 743.

need to turn to ‘outside’ jurisprudence has been rather limited thus far, especially in the United States.\textsuperscript{196} Nevertheless, the principle that a judicial decision of another State party to disputed legislation can act as a guideline has at least been acknowledged.\textsuperscript{197}

The likelihood of such practices actually occurring in the distant future remains to be seen. However, since the emerging Community law shares, whether intentionally or not, some common elements with current US legislation, particularly seen in the discussion concerning the broad interpretation of the controversial areas of the social group, religion and political opinion grounds as well as non-state agent persecution, the chances of future co-operation when faced with similar dilemmas are not that far fetched. It is left to hope, though, that if any interaction is to take place, this would be in the nature of positive convergence of policies, rather than integration of some of the restrictive interpretations offered, for instance, the lack of extraterritorial application of non-refoulement, as discussed above.

It appears that the adopted Refugee Definition Directive has not been greatly improved since its initial proposal, despite extensive criticisms presented with regard to some of its measures. Despite this, the adopted Directive is generally well suited for the overall purpose of respecting and maintaining the primacy of the Geneva Convention. Yet, the Directive is far from being perfect concerning EU integration: while at points it urges Member States to construe the grounds of persecution in a broad sense, in others it risks a narrow construction. As Member States are encouraged to develop their own understanding of persecution and its consequences, the danger in such an approach is that Member States will produce


\textsuperscript{197} 'We must also consult the opinions of our sister signatories in searching for the meaning of [the disputed treaty term]...’ US Supreme Court in: Eastern Airlines Inc. v. Floyd, 111 S. Ct. 1489 (1991), at 1500.
a very different understanding of what persecution, its grounds and exclusion from Convention protection must include.\textsuperscript{198}

Despite this risk, the Commission has stated that it believes that EU interpretative guidelines are inappropriate at this stage of collaboration.\textsuperscript{199} Clearly, the future role of the European Court of Justice in interpreting any disputed legislation and providing such guidelines once the Directive is implemented cannot be ignored. However, this jurisdiction needs to be qualified in light of the restrictions presented by the Amsterdam Treaty.\textsuperscript{200} Therefore, it is argued that such guidelines, at the earliest possible stages of interaction, will only be beneficial in the long run; where Member States are bestowed with the right of interpretation, EU co-operation is deemed to be concluded differently. The setting of a broad and non-exhaustive list of possible scenarios and considerations based on best national and international practices, which Member States must respect when adjudicating an asylum claim, for instance, founded on coercive population control, sexual orientation, domestic abuse, gender-based persecution, as well as the exception to protection, must be prioritised. Clearly, it is recognised that the adoption of such standards would be a highly sensitive and politicised task. Nevertheless, since the need for such regulations is paramount in reducing conflicting interpretations around the EU, it is suggested that such guidelines should be based, for instance, on the already acceptable UN Executive Committee Conclusions as well as Member States predominating practices and present

\textsuperscript{198} Disparity of protection standards among the EU Member States was best seen in 1998 when Member States were faced with individuals seeking asylum from the former Yugoslavia: in Germany and the Netherlands, for instance, there was less than 10 per cent recognition rate while in Greece and the UK over 50 per cent of the asylum claimants were recognised. Byrne, Noll and Vedsted-Hansen, \textit{supra} note 169, at 20. It is questionable whether the Refugee Definition Directive can work by itself to ensure that such dissimilarities will not take place again.

\textsuperscript{199} Proposed Refugee Definition Directive, Explanatory Memorandum, Article 7(d)(d).

\textsuperscript{200} Article 68 EC. See discussion in Chapter I. Also note the debate in Craig, P, and de Búrca, G, \textit{EU Law: Text, Cases and Materials}, Oxford University Press, 3\textsuperscript{rd} Edition, 2003, at 363, stating that the European Court still has a long way to evolve in providing judgements within a humanitarian framework rather than a purely economic one.
guidelines, which could be modified to answer the varied needs and understandings of the different national legal approaches currently existing among the EU Member States. Such an admirable practice is observed in the United States through the many memorandums and the regularly updated guidelines which are circulated among all levels of personnel adjudicating asylum claims, thereby assuring a unified interpretation at its maximum extent possible.

Admittedly, attempting to provide a comprehensive definition of the term 'refugee' is impossible since the refugee definition is a live concept, regularly developed to address new urgencies as these may arise. However, as discussed above, if cross Atlantic interaction is to take place, it is hoped that such cooperation will not result in the EU assimilating some of the US restrictive interpretations, but rather promote the adoption of the positive aspects of the US domestic legislation such as the explicit recognition of coercive population control as a ground worthy of protection, the INS Gender Guidelines, the US guidelines describing serious crimes or even adhere to the US practice of persistently issuing memorandums describing conditions in the state of origin so as to ensure absolute uniformity in adjudicating asylum claims. Again, on both sides of the Atlantic, policy makers must remember that the key to a credible asylum system that protects refugees, discourages abuse and ensures that standards of international law are upheld, is a case-by-case approach, a broad definition for asylum, unrestricted adherence to the non-refoulement principle, quality decision-making and a fair hearing with enforceable results. Both systems must mutually work, as only such joint collaboration will be robust enough, to realise this universal goal.

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201 As seen, for example, in the Netherlands and the UK.
202 Generally see: Germain, supra note 85.
203 Feller, Türk, and Nicholson, supra note 6, at 37-38.
Chapter IV

The Social Rights and Treatment Towards Asylum Seekers in the European Union and the United States

Introduction

‘In principle, everyone is the beneficiary of human rights. In practice, however, two sets of issues must be addressed. First, some groups are more vulnerable than others or have traditionally been subject to discrimination... Second, who is the duty holder, or responsible, with regard to particular group of rights. The latter problem arises, in particular with regard to migrant workers and other aliens (non-nationals), where the decision of responsibility between the host country and the country of origin may sometimes create difficulties. Those who are stateless or who have lost their link to their country of origin, including asylum-seekers and refugees, may be in a particular predicament.’

The growing number of asylum applicants in recent years has moved the discussion regarding the access of asylum seekers to welfare state benefits to the top of the agenda. States are left to exercise a balancing act; on the one hand, safeguarding one’s country from ill-founded asylum claims which can lead to the abuse of the welfare system, while at the same time, bearing in mind that there are genuine and needy asylum applicants awaiting protection.

As critically examined in the previous Chapters, the obstacles faced by asylum seekers are numerous. The tools of restriction over entry cover all stages of an asylum seeker’s attempt to reach and remain in the territory. However, even where one has successfully overcome all entry barriers, the fact that he or she may not be supplied with the essential tools for a dignified survival, while his or her asylum application is under an examination, is an issue deserving extensive scrutiny:

‘Economic and social conditions faced by asylum seekers while awaiting the determination of their claims constitute an additional obstacle. Although recognised refugees can expect to be afforded adequate provisions in this area (such as work authorisation, access to health...

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2 These include: non-state agent persecution, visa restrictions, carrier sanctions and various exceptions to non-refoulement, among other limiting principles. For a discussion of selective issues see: Chapter III.
care or social assistance), asylum seekers are likely to find themselves in a far more uncertain situation.\textsuperscript{3}

This Chapter explores the social rights and conditions of asylum seekers while their asylum applications are being processed. As before, using an issue based analysis, the Chapter compares the precepts in the European Union (EU) with United States' accepted practices, in an attempt to discover whether common trends have emerged between the two systems regarding the treatment of asylum applicants. In addition, the social and economic rights granted are explored in order to determine whether EU and US policies and practices indeed follow the accepted international and human rights norms. As discussed below, the growing use of detention, which indirectly results from broad housing provisos or lack thereof, is examined so as to determine the objectives and rationales of detention policy, questioning whether detention should be the norm or the exception. It is suggested that lack of benefits coupled with the prohibition on employment and detention could result in a scenario where asylum applicants are forced to choose between destitution, incarceration, or return to their country of origin despite risk to life or freedom, a situation also known as indirect \textit{refoulement}, in breach of Article 33 of the Geneva Convention.\textsuperscript{4}

To achieve the above stated aims, the EU discussion is led by an examination of the recently adopted Reception Conditions Directive.\textsuperscript{5} Occasionally, reference is made to various Member States practices so as to emphasise the current diversity in social rights and economic conditions in key EU States.\textsuperscript{6}


\textsuperscript{5} Council Directive 2003/9/EC, 'Laying Down Minimum Standards for the Reception of Asylum Seekers', OJ L31/18, 27 January 2003. Again, it is paramount to note at this stage that this Directive only applies to third country nationals (Article 3(1)). This definition excludes asylum applicants who are Member States nationals, despite heavy criticisms surrounding this position. See: Chapters I and III.

\textsuperscript{6} The Reception Conditions Directive is to be implemented in the EU Member States by 6 February 2005. Reception Conditions Directive, Article 26(1). The UK gave notice of its wish to take part in the adoption and application of this Directive. Reception Conditions Directive, at
It is claimed that 'a restrictionist approach has not always been the norm in US policy':\(^7\)

'...American employers fuel the immigration, American foreign policy embraces it, and American family values maintain it... America thrives on its immigration heritage. Part history part ideology, immigration embodies the theme of national renewal, rebirth, hope. Uprooted abroad, newcomers have become transplants in a land that promises opportunity.'\(^8\)

Following the US immigration reforms which took place in 1996,\(^9\) it is essential to explore the Personal Responsibilities and Work Opportunity Reconciliation Act (Welfare Reform) 1996,\(^10\) and the Illegal Immigration Reform and Immigrant Responsibility Act 1996 (IIRIRA).\(^11\) By examining these reforms, this Chapter demonstrates that while those refugees who have been granted asylum are well treated, the United States has adopted harsh rules, effectively treating asylum applicants in the same way as illegal immigrants.\(^12\)

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Point 19. The Reception Condition Directive, however, does not apply to Denmark and Ireland, at Points 20 and 21.


\(^8\) Ford Foundation report as quoted in McBride, *ibid*.

\(^9\) For the history on reform, see Chapter II.


By the end of year 2002 the Welfare Reform law expired, and Congress began to re-authorise the Act. President George W. Bush has called on Congress to act quickly to sustain the success of this Welfare Reform Act, with a further goal of achieving more independence through work. The Welfare Reform Act's provisions were not substantially revised since the original reforms were already considered 'historic and bipartisan'. See: Office of the Press Secretary, *President Calls for Action on Welfare Reforms*, The White House, 14 January 2003, http://www.whitehouse.gov/news/releases/2003/01/20030114.html.


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1. Social and Economic Rights

"...The rights and entitlements enjoyed by refugees within the meaning of the Geneva Convention are prescribed by the Convention, and all the Member States are bound to respect them."\(^{13}\)

The Geneva Convention as a whole can be viewed ‘as an affirmative measure in favour of refugees,'\(^{14}\) as it affords a wide range of rights to refugees in the country where asylum is sought. These rights include wage-earning employment, housing, public education, and social security.\(^{15}\) However, the Geneva Convention provides for three different levels of standards. First, as a minimum standard, refugees should receive at least that treatment which is accorded to aliens generally.\(^{16}\) Secondly, ‘most favoured-alien’ treatment is required, for example, with respect to employment.\(^{17}\) Finally, ‘national treatment’ is to be granted in respect of elementary education, public relief and social security.\(^{18}\) Yet, the latter rights are further limited to those refugees ‘lawfully staying’ in the contracting State parties.\(^{19}\) Indeed, Goodwin-Gill has logically concluded that the drafters of the Geneva Convention meant that these Articles would ‘apply only to refugees lawfully resident in the contracting State, that is, those who are, as it were, enjoying asylum in the sense of residence and lasting protection.’\(^{20}\) Hence, these rights seem to relate only to those granted asylum by the host State, but not to


\(^{15}\) Geneva Convention, Articles 21-24, respectively.

\(^{16}\) For instance, Article 13 of the Geneva Convention with regard to moveable and immovable property, Article 18 of the Geneva Convention in respect of self-employment, Article 21 of the Geneva Convention concerning housing and Article 22(2) in connection to education above the elementary level.

\(^{17}\) Geneva Convention, Article 17(1).


\(^{19}\) With the exception of the right to public education.
mere asylum applicants. Arguably, if the drafters of the Geneva Convention meant the Articles to apply to all persons alike, there would be no use for the different terminology.

Consequently, the question to be addressed is what are the policies adopted by the US and the EU concerning mere asylum seekers? In an attempt to answer this query, this Chapter, as noted earlier, assumes an issue-based analysis comprised of the social and economic rights granted to asylum seekers under US laws and the EU’s Reception Conditions Directive. The social provisions to be scrutinised in this current Chapter (right to health care, right to education, employment rights, social assistance allowances and the right to adequate housing) have been selected since they are considered to be the most basic and crucial provisos required for a dignified survival.

While recognised refugees are not the principal subject of this thesis, the following sub-sections occasionally make brief references to such individuals in an attempt to demonstrate the extreme contrast in recognised refugees’ rights and entitlements and those of asylum seekers.

1.1 A Minimum Set of Rights?

While only a limited protection under the Geneva Convention is guaranteed to asylum applicants, an examination of human rights instruments, such as the Covenant on Civil and Political Rights (ICCPR),2 2 European Convention on Human Rights (ECHR)2 3 and the Covenant on Economic, Social and Cultural Rights (ICESCR)2 4 must take place in answering the question of whether asylum

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20 Goodwin-Gill, supra note 18, at 308.

21 Asylum seekers, in contrast, are considered to be with a ‘simple presence’ status, which does not provide the guarantees of many rights. Yet, the most important entitlement of asylum applicants is the protection of Article 33 of the Geneva Convention. Goodwin-Gill, supra note 18, at 307.

22 International Covenant of Civil and Political Rights 1966, 999 UNTS 171.


24 International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 933 UNTS 3. It has been questioned, however, whether the ICESCR contains any directly ‘binding standards of attainment’. This is because the ICESCR merely requires ‘States to take steps to the
seekers are guaranteed sufficient and adequate tools for a dignified survival by the Reception Conditions Directive and US legislation, as it has been contested that:

'Apart from the Refugee Convention, which is exclusively concerned with non-citizens in its application to refugees and asylum seekers, more powerful claims can be advanced on behalf of all asylum seekers under international human rights instruments, which are more universal in character going beyond the refugee-specific rights regime in the Refugee Convention. International human rights law does not generally distinguish between citizens and non-citizens or between groups of non-citizens. The clauses prohibiting discrimination are expansive and encompass distinctions based on nationality while provisions concerning individual rights' protection, with few exceptions, embrace all human beings.'

The non-discrimination provisions under these human rights instruments adopt an 'all-embracing' language which basically covers everyone regardless of race, sex, nationality, colour, language, religion, opinion, or social origin, arguably incorporating asylum claimants.

The United States, however, has not ratified the ICESCR, and indeed has also limited the application of the ICCPR. Its approach to the rights bestowed by


Yet, it has been suggested that the obligation of Article 2(1) ICESCR to ‘achieve progressively the full realisation of the rights’ means that:

‘while the concept of progressive realisation constitutes a recognition of the fact that full realisation of the economic, social and cultural rights will generally not be able to be achieved in a short period of time, the phrase must be seen in light of the overall objective, which is to establish clear obligations for States...’


The Committee on Economic, Social and Cultural Rights (ESCR) has underlined that each State party must comply at least to a basic level of enjoyment of the rights guaranteed under the ICESCR. See: General Comment 3, *The Nature of States Parties Obligations*, UN Doc. E/1991/23 (1991), at Paragraph 10.


26 Cholewinski, *supra* note 3, at 714-716.

these instruments, therefore, has been rather limited. Consequently, it is not surprising that the Welfare Reform Act 1996 the United States confirms the approach that 'self sufficiency has been a basic principle of United States immigration law...'

Moreover, Congress has affirmed that the 'availability of public benefits will not constitute incentives for [any] immigration' to the United States, and therefore, an alien within the United States will have to continue to rely on his or her own 'capabilities and the resources of their families, their sponsors, and private organisations.' Hence, the Welfare Reform Act cannot be relied on so much by asylum seekers. Nevertheless, despite such a policy, it is necessary to scrutinise the relevant provisions under the Welfare Reform Act since they are virtually the only ones asylum applicants are entitled to.

1.1.1 Right to Health Care

Protection of asylum seekers concerning this basic social right is rather weak under international law. There are no explicit provisions in the Geneva Convention which directly refer to health services for asylum applicants. Yet, Article 12(1) ICESCR acknowledges the fact that all persons have the right to enjoy the highest possible standard of health attainable for individuals. It has been suggested that this responsibility includes 'the obligation of Member States to afford to everybody medical treatment in case of illness... [and as] demanding medical care for acute cases but not for long-term promotion of health by routine checks and the like.' This understanding, however, can be questioned: first, the ESCR Committee in its General Comment 14 uses an instructive language stating

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28 Welfare Reform Act, a statement of national policy, §400(1).
29 Welfare Reform Act §400(2)(B).
30 Welfare Reform Act §400(2)(A).
31 This 'no-benefits' approach was recently confirmed in private correspondence between the author and the Bureau of Citizenship and Immigration Services (previously known as the INS, see Chapter II). Private correspondence, 12 May 2003, on file with the author.
32 Article 24(1)(b) Geneva Convention is the only Article in the Convention which relates to health services. This Article, however only relates to refugees who are lawfully staying in the country.
that health care is part of other socio-economic rights and therefore requires a system of health protection which provides equality of opportunity, entailing, at first, basic medical services, but imposing a duty to achieve a full realisation of the right to enjoy the highest attainable level of health without discrimination.\footnote{General Comment 14, The Right to the Highest Attainable Standard of Health, UN Doc. E/C.12/2000/4 (2000).} Secondly, it has been accurately observed that there is little sense in curtailing preventive health care eligibility where an individual remains qualified for the costly emergency care.\footnote{Boeri, T, Hanson, G, and McCormick, B, Immigration Policy and the Welfare System, Oxford University Press, 2002, at 238.}

The initially proposed Reception Conditions Directive suggested that Member States had to ‘guarantee \textit{medical and psychological care} at all procedures.’\footnote{‘Proposal for a Council Directive laying down minimum standard on the reception of applicant for asylum in Member States’, COM(2001) 181 Final, 5 June 2001, at Points 3(7) and 3(9). (Emphasis added). This position was generally approved by the European Parliament, see: ‘Report on the Proposal for a Council Directive Laying Down Minimum Standards on the Reception of Applicants for Asylum in Member State, Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs,’ FINAL A5-0112/2002, 15 April 2002, at Amendments 76-77, Article 20.} It is interesting to note that in communications predating the proposed Reception Conditions Directive, however, the language of this provision did not include the requirement to provide for psychological care, and the terminology used varied from mere access to health care to access to ‘essential’ health care and entitlement to the ‘appropriate’ medical treatment.\footnote{See: ASILE 43, 11585/00, 4 October 2000, at Article 15; ASILE 51, 12431/00, 20 October 2000, at Article 15; and ASILE 52, 13117/00, 9 November 2000, at Article 15.} Finally, as the Reception Conditions Directive indicates, the specific requirement to include psychological health care has remained solely wishful thinking and was ultimately deleted.\footnote{Article 15(2) of the Reception Conditions Directive provides that ‘Member States shall provide necessary medical or other assistance to applicants who have special needs.’ It is questionable whether ‘other assistance’ will include psychological treatment, as this is not further defined. Also, Article 17(1) of the Reception Conditions Directive relates to persons with ‘special needs’. It states that Member States shall take into account situations such as torture, rape or other serious forms of psychological violence, when implementing the provisions relating to health care. Yet, this Article does not guarantee any psychological help, it merely requires Member States to take certain factors into account when adopting national legislation.}
at a minimum, the necessary emergency health care and essential treatment of illness.

As a consequence of the Reception Conditions Directive’s broad terms, Member States are allowed to retain their various practices as they stand at the moment. In Germany, for example, access to medical and dental treatment during the first three years is restricted to cases of serious illness or acute pain, but recognised refugees are covered by the national health service on the same terms as German nationals, while in France, medical assistance depends on the status of the asylum seeker.

The Reception Conditions Directive does not aim at co-ordinating, for instance, a framework for a maximum time period after which access to health care services would become unlimited. Therefore, it is arguable that the Directive has marked a very low common ground for the Member States, as practices such as the one offered in Germany would comply with its health care provision. It is unreasonable that during three years of residency in Germany, asylum claimants are treated exclusively in a scenario of ‘serious illness or acute pain.’ It must be emphasised that the right to health care is a ‘basic social right, which should be safeguarded for all persons regardless of their nationality.’

Under the Welfare Reform Act, most non-nationals are barred from applying for benefits under federal, State or local means-tested programmes for their first five years in the United States. The Welfare Reform Act provides that ‘an alien

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39 The French Delegation insisted that asylum applicants’ access to health care should be ensured, and entirely paid for by the host Member State, in a manner which it determines.’ ASILE 28, 9703/00, 23 June 2000, at III(7) (Emphasis added).
41 ECRE Country Report, FRANCE, ibid., at ‘Health care/sickness’ section. See also: Bank, supra note 33, at 284.
42 Cholewinski, supra note 3, at 719.
43 Welfare Reform Act §403(a).
who is not a qualified alien... is not eligible for any federal public benefit.\textsuperscript{44} Similarly, a non-qualified alien is excluded from any State or local benefit.\textsuperscript{45} Section 341 of the Welfare Reform Act defines the term 'qualified alien' as 'any alien who is lawfully admitted for permanent residence... or an alien who is granted asylum... or a refugee who is admitted to the United States...'.\textsuperscript{46} Hence, mere asylum seekers, under the law, are not entitled to any federal, State or local benefits. 'Federal public benefits' as well as 'State and local benefits' are defined to include, for the purpose of this sub-section, health or disability benefits.\textsuperscript{47}

There is, however, an exception to this rule. The Welfare Reform Act does not apply to emergency medical assistance.\textsuperscript{48} Thus, the United States’ provisions with regard to health care, just like the EU’s, seem to have a common trend in that they both only adhere to the basic guarantees under international law obligations. Nonetheless, it has been argued that 'the prospect of going... without medical coverage (or of having to rely on one's family to pay for expensive private insurance during that time) may well dissuade many from coming to the United States...'.\textsuperscript{49} This criticism, as suggested above, could also be applied to the Reception Conditions Directive’s terms. Hence, the risk of such a proviso acting as deterrence policy persists.

1.1.2 Right to Education

Article 22(1) of the Geneva Convention obliges State parties to accord to refugees, as well as to asylum seekers, the same access to elementary education as

\textsuperscript{44} Welfare Reform Act, Title IV, §401(a) (Emphasis added).
\textsuperscript{45} Welfare Reform Act, §411 (Emphasis added).
\textsuperscript{46} As discussed in Chapter II, the United States operates an Overseas Refugee Programme, which means that those individuals coming under that programme from abroad have already been granted political asylum.
\textsuperscript{47} Welfare Reform Act §401(c)(B), §411(c)(B), respectively.
\textsuperscript{48} Emergency health care to asylum seekers, and in effect to any illegal alien, does not include any organ transplant procedure. See: Title XIX, Social Security Act §1903(v)(3), as reproduced in the Welfare Reform Act §401(b)(A), §411(b)(1).
to nationals. Treatment concerning 'education other than elementary education' shall be at least as favourable as that accorded to other aliens in the same situation. Similarly, Article 13 ICESCR stipulates that the right to education is to be enjoyed by 'everyone'. More specifically, Article 13(2)(a) states that compulsory primary education must be made available free to all. This duty has been argued to encompass non-nationals, including asylum seekers as:

'Education is both a human right in itself and an indispensable means of realising other human rights... education is the primary vehicle by which the economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities...' 

Article 10 of the Reception Conditions Directive requires Member States to grant minor asylum seekers and the minor children of asylum seekers access to the education system under 'similar conditions' as nationals. Education, however, may be provided in accommodation centres. Finally, access to education must not be postponed for more than three months from the date the application for asylum

50 Geneva Convention, Article 22(2).

51 The ESCR Committee stressed that 'the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of legal status.' General Comment 13, The Right to Education, UN ESCOR, Comm. on Econ., Soc. and Cult. Rts., 21st Sess., UN Doc. E/C.12/1999/10 (1999), at Paragraph 34.

52 ESCR Committee, General Comment 13, ibid., at Paragraph 1, as quoted in Cholewinski, supra note 3, at 723-724. Indeed, this argument is in line with the widely accepted UN Convention on the Rights of the Child. Article 28 of the Convention confirms the application of the right of education to the children of asylum seekers and minor asylum seekers. Article 28 must be read in light of Article 22(1) of the Convention which states that:

'State parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are parties.'

Although the United States has signed the UN Child Convention on 16 February 1995, it has not ratified it. Within the EU, the UK has placed a reservation on the application of Article 22, which permits differentiation between citizen and refugee children. See: Hunter, A, 'Between the Domestic and the International: The Role of the European Union in Providing Protection for Unaccompanied Refugee Children in the United Kingdom', European Journal of Migration and Law, Vol.3 (2001), at 389.

53 Furthermore, 'Member States shall not withdraw secondary education for the sole reason that the minor has reached the age of majority.' Reception Conditions Directive, Article 10(1).
was lodged, yet this time period can be extended to one year where specific education is provided. In essence, the Reception Conditions Directive reflects the various systems currently operating among the EU Member States. For instance, in the UK, the recent Nationality, Immigration and Asylum Act 2002 (Nationality and Immigration Act) states that asylum seekers are to be educated in their accommodation centres, thereby segregating them from the local community altogether. It must be noted that even prior to the passage of the Nationality and Immigration Act, the European Council on Refugees and Exiles (ECRE) voiced its uneasiness about separate education for refugee children within reception centres.

Again, Article 10 of the Reception Conditions Directive raises extensive concerns due to its weaknesses. First, it is questionable why the Reception Conditions Directive requires education to be on 'similar terms', and not on 'identical terms' as provided to nationals. After all, the Geneva Convention specifically requires State parties to confer the same education on all children, whether they are nationals, refugees or asylum applicants. Secondly, despite the numerous objections voiced concerning a system where asylum applicants are educated in reception centres as hindering a child's learning, the Reception

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54 Nationality and Immigration Act, Part II, Section 36(2).


55 'Where such separate provision occurs, this should be for a limited period and for reasons other than simply organisational convenience.' ECRE Position on the Reception of Asylum Seekers, at Paragraph 46. Available at: http://www.ecre.org/archive/recptio.html.

56 French laws, for instance, provide that school attendance is compulsory for all children, regardless of their administrative or legal status, on the same terms as French nationals. See: ECRE Country Report, FRANCE, supra note 40, at 'School attendance' section.

57 The Belgium delegation even offered to delete the words 'under similar conditions as nationals of the host Member State.' ASILE 19, 7802/02, 11 April 2002, at Article 10. In contrast, the French delegation suggested that minors should have access to public primary education under the same terms as nationals. ASILE 28, supra note 39, at Point 9. Likewise, the European Parliament advocated that asylum applicants should be covered by the rules on compulsory schooling under the same conditions as nationals. European Parliament Report, supra note 36, at Amendment 47, Article 12.

58 The UK Refugee Council has concluded that:
Conditions Directive allows for this unfortunate proviso of segregated education throughout the EU.\textsuperscript{59} Lastly, school attendance should not be postponed at any point. It should be among the first benefits conferred upon asylum applicants and their families, due to the fact that this can promote good relations with the local population by assisting in understanding its culture and history, develop new skills and help in furthering employment opportunities. It is therefore not clear what benefit the suspension of school attendance would bring to any of the parties involved.

In 1994, the State of California experienced economic hardships. A majority of California’s voters decided to address the allocation of available resources by voting on and passing what was known as ‘Proposition 187’. Although primarily directed at illegal immigration, Proposition 187 sparked a nation-wide debate concerning the rights that should be granted to asylum seekers, among other immigrants. Proposition 187 made undocumented immigrants ineligible for enrolment at public elementary or secondary schools.\textsuperscript{60}

\begin{quote}
‘...We feel that this sets a dangerous precedent. It is normal practice not to withdraw children from mainstream education provisions and it is discriminatory to do so. Children learn best in the mainstream systems... the long-term implications for children are worrying in terms of their development and ability to integrate... [Children are] the best ambassadors for building links with their community. Going to school is a vital and integral step in the integration process, even if children are only resident in the UK for a short period.’
\end{quote}

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59 Indeed, this provision was first seen at a rather late stage of the negotiation process, dated 27 March 2002. See: ASILE 17, 7439/02, 27 March 2002, at 10. Prior communications suggested that ‘...if necessary, other education arrangements might be proposed for a short initial period.’ ASILE 52, 13117/1/00, REV 1, 28 November 2000, at Point 9 (emphasis added), or that ‘asylum applicants should be offered opportunities for appropriate special instructions, particularly where a lack of knowledge of the language of the host State makes normal schooling impossible.’ ASILE 43, 11585/00, 4 October 2000, at Point 9.
\end{quote}

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Proposition 187 was subject to an extensive legal battle, and indeed most of its provisions were held unconstitutional.61 Only one day after Proposition 187 was passed, a State Court blocked the enforcement of Proposition 187’s provision pertaining to public education.62 As transpired soon after, the Supreme Court refused to change its previous ruling which found all children eligible for public education.63 Under the Fourteenth Amendment guarantee, no State is allowed to deprive any person within its jurisdiction of the equal protection of the laws. In Plyler, the Supreme Court concluded that the phrase ‘within its jurisdiction’ in the Fourteenth Amendment confirms the understanding that the protection of the latter extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State’s territory.64 Moving to the prohibition on education of children presented in that case, the Supreme Court confirmed the idea that:

‘Public education has a pivotal role in maintaining the fabric of our society and in sustaining our political and cultural heritage: the deprivation of education takes an inestimable toll on the social, economic, intellectual, and psychological well-being of the individual and poses an obstacle to individual achievement.’65

Indeed, the Supreme Court reasoned that past experience indicated that many of the children affected by a narrow terminology of education entitlement will remain in the United States, at a certain point gaining lawful residency. Therefore, the Supreme Court held that it is difficult to understand what States hope to achieve by promoting the creation of a subclass of illiterates, undoubtedly adding

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61 ‘California is powerless to enact its own legislative scheme to regulate immigration. It is likewise powerless to enact its own legislative scheme to regulate alien access to public benefit...’ US District Court Judge Mariana R. Pfaelzer, as quoted in ‘California: Proposition 187 is Unconstitutional’, Immigration News, Vol.4 (1997). This view was upheld by the California’s 9th Circuit Court in Gregorio T. v. Wilson, 59 F.3d 1002 (9th Cir. 1995).

62 Ibid. See also: Nesbet and Sellgren, supra note 60, at 168.


64 Ibid., at 215.

to the problems and costs of unemployment, welfare and crime. As *Plyler* is still the binding authority on educational provision, children of asylum applicants are entitled to attend compulsory public education on the same terms as US nationals.

Ultimately, it has been argued that asylum seekers should be entitled to basic training in the language of the host State, 'since this is an indispensable factor in living among and developing good relations with the local population.' Yet, as this is not explicitly required by international instruments, most contracting States do not offer any language tuition. Accordingly, it has been observed in the US context that:

'Many of the unique characteristics of US social welfare policy derive from the active involvement of the immigrant and refugee communities in addressing programmes, delivering services... Those private agencies and non-governmental organisations (NGOs) are a unique feature and have an extremely important role.'

The same conclusion is applicable for the EU. The Reception Conditions Directive does not contribute to the making of education and language training as one of Member States' primary obligations. In some EU countries, language classes are left solely for NGOs to subsidise. This is an unfortunate result, as language training and education, as argued above, are among the principal factors that would promote integration in the long-term.

1.1.3 Right to Employment

Under the Geneva Convention, refugees lawfully staying in States parties to the Convention are afforded the 'most-favoured-nation' treatment concerning employment. Goodwin-Gill has argued that this is a rather narrow approach; in order to gain the benefit of this Article the refugee has to show:

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68 Fredrikson, *supra* note 12, at 767.
69 For example, ECRE Country Report, GERMANY; FRANCE; and ITALY, *supra* note 40. It has been argued that 'the relation between the public and voluntary sectors should be one of cooperation based on partnership with responsibility for providing adequate support ultimately resting with the State.' Da Lomba, *supra* note 58, at 225.
70 Geneva Convention, Article 17(1).
'something more than mere lawful presence. Generalisations are difficult... but evidence of permanent, indefinite, unrestricted or other residence status, recognition as a refugee... will raise a strong presumption that the refugee should be considered as lawfully staying in the territory of the contracting State.'

The right to work is recognised by the ICESCR, which does not limit access to employment on any grounds. However, as obligations under the ICESCR are yet to be fully implemented by many State parties, most countries do limit the rights of non-nationals to acquire employment. Indeed, both the UK and France have modified their obligations under Article 6 ICESCR by way of reservation. In practice, access to the job market is not granted at all to asylum seekers in, for instance, France, Germany, and Italy.

Article 11(1) of the Reception Conditions Directive requires all Member States to determine a period of time during which an asylum applicant will not have any access to the labour market. Article 11(2) of the Directive directs Member States, which did not reach a decision regarding an asylum application within one year, to determine conditions for granting access to the employment market. These

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71 Goodwin-Gill, supra note 18, at 309.

72 Article 6(1) ICESCR states that 'The States parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.'

73 It has been argued that this is done 'in order to safeguard the employment and economic welfare of the host nation.' Cholewinski, supra note 3, at 729.

74 Ibid.

75 'In accordance with a ministerial circular of 26 September 1991, asylum seekers have no access to the labour market...' ECRE Country Report, FRANCE, supra note 40, at 'Work' section.

76 Those asylum applicants who arrived after 15 May 1997 are not entitled to undertake employment. In contrast, recognised refugees are entitled to access the employment market on the same terms as German and French nationals and work authorisation is not required.

77 ECRE Country Report, ITALY, supra note 40.

78 The proposed Reception Conditions Directive suggested that the time limit should be six months rather than one year. Proposal for Reception Conditions Directive, supra note 36, at Point 3(8), while the European Parliament submitted an opinion stating that access to the labour market should be made available as soon as possible and within four months of an asylum application being lodged. European Parliament Report, supra note 36, at Amendment 51, Article 13.

However, the general spirit of the Reception Conditions Directive itself seems to resemble suggestions predating the above proposals. In November 2000, for example, it was suggested that an asylum seeker 'should not be allowed to engage in an occupation, except under certain
provisions are objectionable on two main grounds. First, it is not clear why the Reception Conditions Directive imposes a negative obligation on Member States. Arguably, if a Member State chooses to allow an asylum applicant to undertake employment from day one, they should be permitted to do so. The Reception Conditions Directive, by requiring Member States to set a time framework within which an asylum applicant will not have access to the labour market, effectively prohibits Member States from using their discretion with regard to favourable access to their employment market. Secondly, it is rather unfortunate that only after one year, those Member States which did not set an earlier time limit, will consider the applicant’s entrance into the labour market. The reason is that one year is considered to be too long to prevent someone from integrating into the local society and becoming self-efficient.

Clearly, Member States can plead that asylum seekers are not intended to be integrated into society through the support of access to employment because of the temporary nature of their residency where an asylum application is rejected. Yet, in response, it can be argued that where an asylum seeker is permitted to work, Member States will be able to reduce the benefits granted to the individual in terms of social security. In addition, asylum seekers may boost the economy by either contributing some specialised skills or because they are likely to undertake positions which are unwanted by the local population. Hence, only minor risks in terms of competition to the employment market seem to exist, especially where Member States are allowed to introduce conditions on access to employment.\footnote{Reception Conditions Directive, Article 11(4). In Germany, for instance, a post must first be offered to German nationals or ‘privileged’ foreigners, such as EU citizens, as well as be advertised for a certain period without being filled, before it can be offered to an asylum seeker. ECRE Country Report, GERMANY, \textit{supra} note 40, at ‘Work’ section. The Netherlands, on the other hand, only grants a limited access to the agriculture market. ECRE Country Report, The NETHERLANDS, \textit{supra} note 40, at ‘Work’ section.}

Employment access may also facilitate, in the long run, reintegration into the conditions, in particular where no decision has been taken on their asylum application within a reasonable period...’ ASILE 52, 13117/00, 9 November 2000, at 6 (Emphasis added).
country of origin by allowing the asylum claimant to return home with a degree of financial independence or acquired work skills.\textsuperscript{80}

It is undeniable that for some Member States, the Reception Conditions Directive is an improvement in terms of setting an obligation on Member States to establish conditions concerning the entrance of an asylum seeker onto their employment market. However, it is argued that the way in which this process is to be achieved is clearly unwelcome for the reasons set out above.

The US approach to employment authorisation contrasts with the EU position. The emphasis in the United States is on ‘individualism and self help...’\textsuperscript{81} It used to be the case where as soon as an asylum applicant filed an asylum claim, he or she received an employment authorisation. However, suspicions of abuse of the asylum system led to the creation of revised regulations in 1995.\textsuperscript{82} Consequently, an asylum seeker can no longer apply for an employment authorisation at the same time he or she applies for asylum. Rather, an asylum applicant must wait 150 days after the Immigration and Naturalisation Service (INS) receives his or her complete application before the applicant can apply for an employment authorisation.\textsuperscript{83} In addition, the Attorney General may impose fees for the consideration of an employment authorisation.\textsuperscript{84}

The fact that asylum applicants are not entitled to engage in employment during the first six months of their asylum application being adjudicated does not seem unjustifiable. In fact, this position, currently applicable in the United States,
is more favourable than what is offered by the laws of some EU Member States. It is not being argued that States may need some time to ensure that an application for asylum is not fraudulent in order to protect public interests.\textsuperscript{85} However, a complete assessment of this provision (waiting period) must be done in conjunction with the funds granted or other in-kind benefits which are available to asylum applicants while awaiting the adjudication of their claim. An examination of these takes place below. A waiting period for an employment authorisation can only be justified when an asylum seeker receives some benefits for its duration so as to enable him or her to survive in a dignified way in the face of everyday hurdles.

1.1.4 Right to Social Assistance

This sub-section refers to social assistance as any cash or other in-kind benefits provided to an asylum applicant while his or her asylum application is being processed, prior to the grant of any work authorisation. This study is crucial for in practice, the combination of the lack of benefits and prohibition on work results in a situation where an asylum seeker is forced to choose between destitution away from persecution or returning back to the country of origin, thereby risking his or her life or freedom. Both choices are clearly untenable. In terms of States’ obligations under international treaties and laws, restrictive practices could lead to indirect \textit{refoulement}, in breach of Article 33 of the Geneva Convention.\textsuperscript{86}

Article 23 of the Geneva Convention requires ‘public relief’ to be granted to those refugees lawfully staying in a contracting State’s territory. Similarly, social

\textsuperscript{85} Again, the one-year limitation suggested by the Reception Conditions Directive is a rather long time period to merely determine if an application is fraudulent or not. Such an extensive timeframe has negative effects for the State as well as the asylum seeker; see the above argument.

\textsuperscript{86} It is interesting to note that in \textit{R v. Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants and ex parte B} [1996] 4 All ER 385, the argument of constructive \textit{refoulement} was rejected as being too narrow. \textit{Ibid.}, at 402. Nevertheless, the Court asserted that ‘Parliament cannot have intended a significant number of genuine asylum seekers to be impaled on the horns of so intolerable dilemma: the need to either abandon their claims... or alternatively to maintain them as best they can in a state of utter destitution’, consequently allowing the rejection of the government’s policy which removed social security benefits from in-county asylum claimants. \textit{Ibid.} This does not mean, however, that constructive or indirect \textit{refoulement} cannot be argued on the facts of each case.
security legislation, under Article 24 of the Geneva Convention, shall only be accorded to refugees lawfully staying in the territory. Thus, once more, asylum seekers are not eligible for any rights under these highly accepted principles. Under human rights instruments, it has been suggested that the right to an adequate standard of living under Article 11(1) ICESCR also incorporates ‘social assistance and other need-based forms of social benefits in cash or in kind to anyone without adequate support.’ Indeed, Member State practice follows this principle, although on a very basic level.

Article 13(1) of the Reception Conditions Directive holds that ‘Member States shall ensure that material reception conditions are available to applicants when they make their application for asylum.’ This must guarantee an adequate standard of living for the health of the applicant. Finally, material reception conditions may be provided in kind, or in the form of financial allowances or vouchers, the amount of which needs to be determined, again, in accordance with the assurance of an adequate standard of living and health. At first glance, the only real dilemma which seems to be introduced by this Article is the fact that it authorises the grant of assistance in the form of vouchers. The European Parliament has argued that the use of vouchers discriminates against the person required to use them. Indeed, the UK’s recent experience with the voucher system has proved unsuccessful.

The real concern of any possible abuse of Article 13, however, is presented in Article 16(2) of the Reception Conditions Directive, which provides that ‘Member States may refuse [reception] conditions in cases where an asylum seeker has

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88 ECRE Country Report, FRANCE and GERMANY, supra note 40, at ‘Financial assistance’ section. Also see: Bank, supra note 33, at 279.
89 Reception Conditions Directive, Article 13(2).
90 Reception Conditions Directive, Article 13(5).
91 European Parliament Report, supra note 36, at Amendment 59, Article 15.
failed to demonstrate that his claim was made as soon as reasonably practicable after arrival in that Member State.\textsuperscript{93} Ironically, this is the exact language used by the UK's Section 55 of the Nationality and Immigration Act. Under UK practice, the Act restricts an asylum claimant's access to benefits where the application for asylum was not made 'as soon as reasonably practicable' after arrival. This legislation had faced concrete opposition claiming that the application of such terminology would result in destitution, thereby risking a breach of Article 3 ECHR.\textsuperscript{94} It was cynical to note the presence of such a provision in EU legislation at the time the Reception Conditions Directive was adopted since such a proviso was still under considerable attack and judicial scrutiny in the UK. Consequently, it appears to be only a matter of time until the Directive itself will face legal challenges as breaching European law on human rights.\textsuperscript{95}

Undoubtedly, where Member States are given such a wide discretion to decide the interpretation of what the definition of 'as soon as reasonably practicable' entails, the result will be anything but policy convergence. Therefore, although the Reception Conditions Directive has provided a somewhat satisfactory common ground for material reception conditions, this has been overruled by the grant of a wide withdrawal power to individual Member States.

\textsuperscript{93} Emphasis added. This sub-section does not appear in any pervious ASILE documents examined by this Chapter.

\textsuperscript{94} \textit{R(Q) and others v. Secretary of State for the Home Department [2003] EWCA Civ.364, 18 March 2003.} The Court of Appeal has stated that destitution in itself is not in breach of Article 3 ECHR. Destitution, for example, will have to be combined with feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance or cause intense physical or mental suffering, to amount to a breach of Article 3 ECHR, at Paragraph 52. Additionally, the suffering which 'flows from naturally occurring illness, physical or mental, may be covered by Article 3 where it is, or risks being, exacerbated by treatment for which the authorities can be held responsible.' \textit{Ibid.} More recently, in \textit{R(T) v. Secretary of State for the Home Department [2003] EWCA Civ.1258, 23 September 2003,} with regard to the question of whether the degree of severity required by Article 3 has been reached, the Court has stated that 'each case has to be judged in relation to all the circumstances which are relevant to it.' \textit{Ibid.,} at Paragraph 16. For case details and further analysis see: Da Lomba, \textit{supra} note 58, at 224-225.

\textsuperscript{95} For the procedural framework for challenging EC legislation and the grounds for review that could be used in asylum cases see: Peers, S, 'Challenging the Validity of EC Immigration and Asylum Law', \textit{Tolley's Journal of Immigration, Asylum and Nationality Law,} Vol.17 (2003) 25.
In contrast, under US laws, asylum seekers are not entitled to any social welfare benefit, either at federal, State or local levels. Yet, those who have been victimised by torture are given funds for treatment, specialised counselling services and other social services by the Torture Victims Relief Act 1998. Nonetheless, it is unreasonable and contrary to all accepted norms to deny both the right to work (for the first six months) as well as the right to access social benefits. Such a policy threatens to deter bona fide asylum applicants. The United States government should not be allowed to rely on the in-kind assistance that might be provided by NGOs, relatives, friends, and the local community. As the law stands at the moment, ‘asylum applicants must survive on their own in the US... in terms of basic material support.’ It has been argued that the limitation on work authorisation, coupled with the fact that the US government does not provide any social benefits and legal representation, makes it extremely difficult to pursue an asylum claim in the United States. Again, this position was confirmed in a recent private communication between the author and the Bureau of Citizenship and Immigration Services verifying that except for emergency health care, public education and work authorisation, an asylum seeker is not entitled to any public benefits in the United States.

In the United States, an asylum seeker’s eligibility to social welfare should be prescribed by law, on the same terms as conferred upon recognised refugees. If not, the restriction on employment should be removed, so that an individual is...

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98 Hansen, Martin, Schoenholtz and Weil, *supra* note 81, at 810.


100 Private correspondence, *supra* note 31.
able to sustain a livelihood. Any other solution will lead to destitution, will promote access to the undocumented labour market, and could result in indirect *refoulement*, breaching Article 33 of the Geneva Convention.

1.1.5 Right to Adequate Accommodation (Or Detention?)

The right to adequate housing has been described as ‘of central importance for the enjoyment of all economic, social and cultural rights.’101 In fact, this right is very much associated with health care rights as the latter would be ‘meaningless if asylum seekers are not guaranteed a corresponding right to adequate housing.’102 The Geneva Convention, though, only grants this right to those ‘lawfully staying in the territory.’103

EU Member States seem to agree that accommodating asylum applicants confers the opportunity to monitor individuals at all times. Current practices highlight that providing accommodation is undertaken not for its humanitarian importance, but in order to keep track of applicants and therefore, the need of supplying adequate accommodation becomes secondary to the primary aim of control.104 Hence the pressing issues to discuss under this heading are adequate accommodation and the powers of detaining asylum applicants.

At first glance, Article 14 of the Receptions Conditions Directive seems to impose the most positive requirements by far on Member States to ensure the well-being of asylum applicants. The Article provides that accommodation must guarantee an adequate standard of living,105 protect family life and provide the possibility of communicating with relatives, legal advisers and United Nations High Commissioner for Refugees (UNHCR) representatives. The provision states that private housing, flats, hotels or accommodation centres may be provided to

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103 Geneva Convention, Article 21.
achieve the purpose of accommodating asylum applicants. Yet, it is arguable that there is an inherent difference, physically and mentally alike, in the living conditions offered by these various types of accommodations. Arguably, those living in the private sector, for instance, are able more easily to integrate, receive help and contact their legal representative at any point needed, than those living in prescribed accommodation centres. Furthermore, Article 7(2) of the Reception Conditions Directive, allows each Member State to retain control by stating that Member States shall decide on the residence of the asylum seeker ‘for the swift processing and effective monitoring of his or her application.’

Once more, as no real harmonisation is provided for by the Reception Conditions Directive, EU Member States are likely to continue with their current national practices concerning housing facilities and policies.\(^\text{106}\) The Directive should have set, for example, a minimum common standard which Member States should consider in assessing the type of accommodation which is most suitable for the individual and his or her specific needs\(^\text{107}\) or at least provide some time limit on collective housing.

It is necessary to read the housing proviso in conjunction with the rest of the Reception Conditions Directive, and the criticisms outlined above. As there is no explicit requirement for employing asylum seekers, no adequate facilities to provide more than mere emergency health care and the possibility of offering education within the centres, it is questionable how successful such an exercise may be in satisfying the right to private life, guaranteed by Article 8 ECHR.

\(^{105}\) As provided for by Article 25 of the Universal Declaration of Human Rights 1948. UN Doc. A810 (1948).

\(^{106}\) In Germany, residence in community housing is compulsory, regardless of whether an asylum applicant has a family member or friends living in Germany. (ECRE Country Report, GERMANY, supra note 40, at ‘Further accommodation’ section). In the UK, Section 17 of the Nationality and Immigration Act empowers the Secretary of State to allocate any asylum seeker and his or her dependants to an accommodation centre. (Finch, N, ‘Support Provisions Within the Nationality, Immigration and Asylum Act 2002’, Tolley's Journal of Immigration, Asylum and Nationality Law, Vol.17 (2003), at 34). In contrast, in France, accommodation in reception centres is neither compulsory nor automatic. (ECRE Country Report, FRANCE, supra note 40, at ‘Further accommodation’ section).
bearing in mind that some 750 applicants will be present at all times in some of these accommodation centres.\textsuperscript{108} Such reception centres can be seen as ‘disguised’ detention centres, as applicants will be monitored at all times and be subjected to the rules and conditions prescribed by the individual body running the centre.

One of the most fundamental principles which all UN States have agreed to respect is that ‘No one shall be subjected to arbitrary arrest, detention or exile.’\textsuperscript{109} State parties to the Geneva Convention are obliged not to unduly restrict the internal movement of individuals with irregular status in their territories.\textsuperscript{110} Article 31(2) of the Geneva Convention governs the free movement of those who are unlawfully in the territory of a contracting State, arguably, ‘encompassing asylum seekers whose status is not recognised.’\textsuperscript{111} It has been suggested that the most ‘comprehensive elaboration’\textsuperscript{112} of the conditions under which detention of refugees whose status has not been regularised may take place is provided by Executive Committee Conclusion No.44, which holds that detention should normally be avoided.\textsuperscript{113} The latter only allows detention where it is:

\begin{quote}
'on the grounds prescribed by law to verify identification; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents or have used
\end{quote}

\begin{itemize}
\item \textsuperscript{107} Considerations, for example, should take account of the special needs of families, female asylum seekers and children asylum seekers.
\item \textsuperscript{108} Preliminary Draft Reply to Written Question, 12579/02, PE-QE 331, 1 October 2002. Despite the lack of jurisprudence in this area, an asylum seeker may be able to argue a breach of Article 8 ECHR-- the right to private life outside detention with family and friends (‘Article 8 protects the right to personal development and the right to establish and develop relationships with other human beings and the outside world’, \textit{Bensaid v. UK} (2001) 33 EHRR 10, at Paragraph 47), as well as breach of Article 5(1) ECHR-- liberty to the person, which is discussed further below, while living in ‘accommodation’ centres.
\item \textsuperscript{109} Article 3 UDHR.
\item \textsuperscript{110} Article 31(1) of the Geneva Convention states that: ‘The Contracting States shall not impose penalties on account of their illegal entry or presence...’
\item \textsuperscript{112} Hathaway and Dent, \textit{ibid.}, at 19.
\item \textsuperscript{113} Executive Committee Conclusion No.44 (XXXVII), \textit{Detention of Refugees and Asylum Seekers}, 1986, Report of the 37th Session, UN Doc. A/AC.96/688, at Paragraph (b).
\end{itemize}
fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order.114

Article 9 ICCPR provides that everyone has the fundamental right to liberty and security of person. The nature of this crucial right cannot be forfeited for political or administrative purposes. More importantly, the ICCPR does not make a distinction between nationals and aliens regarding the right not to be arbitrarily detained.115 Nevertheless, a 1995 UNHCR survey on detention of asylum seekers in Europe confirms an increase in the number of those detained in recent years.116

Article 5(1)(f) ECHR permits the detention of a person ‘to prevent his effecting an unauthorised entry into the country.’ While Article 5 ECHR does not prohibit detention, it does subject it to strict conditions and requirements: Deprivation of liberty will only be justified for as long as deportation proceedings are in progress,117 requiring the balancing of proportionately and necessity as against the need for detention118 as well as the fact that the conditions of detention must comply with, for instance, Articles 2 and 3 ECHR which prohibit ill treatment and Article 8 ECHR, which guarantees the right to respect for family life thereby allowing one to contact family members to inform them of his or her situation.119

114 Ibid.
115 It must be noted, however, that under the ICCPR, the right of individual petition is enshrined in an Optional Protocol to which the UK and The Netherlands are not parties, despite the fact that all other EU Member States are parties. Again, although the US Senate has ratified the ICCPR in 1992, it explicitly declared Articles 1-27 ICCPR to be ‘non-self executing’ so as to prevent the creation of a private cause of action under the Covenant. See note 27, supra.
The Reception Conditions Directive permits the detention or the confinement of asylum seekers to border posts. The Directive, however, states that such detention should be limited to a 'reasonable period' and be as short as possible. Yet, as the Reception Conditions Directive does not provide any explicit maximum time limits, it could lead to the opening of a Pandora box: Member States are likely to introduce different understandings of what a 'reasonable' time limit is due to cultural and historical differences as well as existing diversities in their acceptance policies and considerations.

It is of concern that the Reception Conditions Directive only briefly discusses the freedom of movement of asylum seekers, which is subject to numerous restrictions. The most objectionable power granted to Member States by the Directive, however, is the right to 'decide on the residence of the asylum seeker... for the swift processing and effective monitoring of his or her application.' This, in practical terms, allows Member States to avoid and prohibit the integration of asylum seekers in the local society until a decision concerning the asylum application, which sometimes can take months or even years, has been reached. Thus, the Reception Conditions Directive fails to define, set and harmonise specific grounds and maximum time limits for the detention of asylum seekers.

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120 Reception Conditions Directive, Article 14(8). 'Detention' means the confinement of an asylum seeker within a particular place, where the applicant is deprived of his or her freedom of movement, Reception Conditions Directive, Article 2(k).
121 Ibid.
122 The European Parliament has suggested that detention should never exceed three weeks, arguing that: 'Detention must be an exceptional measure so as to guarantee social integration and respect for human dignity. [The] maximum period must be fixed.' European Parliament report, supra note 36, at 76, 79.
123 Reception Conditions Directive, Article 7(2). (Emphasis added).

The German delegation suggested clarification of the issue by adding the following: 'In order to enable asylum applications to be processed swiftly, Member States may limit the movement of an asylum seeker to an administrative subdivision or to parts of its territory.' However, this clarification is not part of the final draft of the Reception Conditions Directive, and therefore, it is not clear if Member States can confine an asylum seeker merely to a specific area, zone, or alternatively, to a detention centre. See: ASILE 52, 13117/00, 9 November 2000, at 5.
Current State practice varies greatly among various EU countries. In the UK, the prevalent practice permits the holding of asylum seekers in prison, although it has been suggested that detention centres are a more appropriate response than prisons. Yet, due to lack of space in detention centres around the UK, many, if not most, detained asylum seekers are being held in prisons. Additionally, some asylum seekers ‘may be transferred to prisons if they are seen as ‘trouble makers.” In Germany, the maximum length of pre-deportation detention is three months, which may be extended up to 18 months. Nonetheless, accommodation in Germany, for example, has been reported to be cramped and isolated, making it difficult to enjoy any visitation rights, including legal assistance. Accordingly, the question that begs to be answered is which of the current EU Member State’s legislation would come within the Reception Conditions Directive’s stipulation of a ‘reasonable’ time, considering the poor quality of detention? Would countries like France, which has a maximum period of 32 days for detention change its policies as a result of the Reception Conditions Directive provisions?

As with other EU instruments considered thus far, the Reception Conditions Directive states that all its provisions are minimum standards and that Member

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124 See: Bank, supra note 33, at 262.
129 Büren detention centre is situated eight km from the nearest village and there is no public transport. Similarly, in Germany, some Länder, such as, North Rhine-Westphalia have been criticised for having converted prisons into accommodation centres. See: Hughes and Fields, supra note 125, at 36.
States have the power to introduce or maintain more favourable conditions. Nonetheless, it must be emphasised that the purpose of this legislation, as proposed by Tampere, is to introduce harmonisation within EU Member States, and thus, as argued in previous Chapters, it is unlikely that Member States will retain more favourable practices, so as not to attract more asylum claims to their territory. Arguably, the result of the Reception Conditions Directive is to allow Member States whose policies at the moment do not allow for a prolonged detention to take place, to confine an asylum seeker for the entire duration of his or her asylum case determination. Indeed, the European Parliament unsuccessfully advocated for a standstill clause prohibiting the modification of any more favourable provisions existing in Member States' laws. Hence, although it was generally accepted that 'detention of asylum seekers simply because they are asylum seekers must not occur,' the Reception Conditions Directive does not prevent such a result in the individual Member States.

The position in the United States is inherently different to the approach taken by the EU's somewhat positive obligation of providing basic accommodation. Similar to the policy examined above concerning social benefits, the United States holds the view that since asylum applicants are able to obtain a work authorisation, they are thus able to secure the appropriate private residence that suits their individual needs. No assistance is therefore provided by federal, State

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130 Da Lomba, supra note 58, at 256-257.
133 'When one country puts up barriers, the one next door comes under more pressure.' The Economist, 'Asylum: A strange sort of sanctuary', 15-21 March 2003, at 47.
135 ASILE 52, 13117/1/00 REV 1, 28 November 2000, at 5.
or local authorities. Thus, as work authorisation is only granted after six months, as no social benefits are provided during the initial period of the asylum claim, and as there are no specifications for the grant of housing assistance, asylum seekers who are not detained are destined for destitution and for the charity of local NGOs, relatives and friends. In fact, it has been suggested that asylum applicants in the United States 'must survive on their own in terms of housing...' In reality, therefore, the law religiously follows, as mentioned earlier, the national policy statement that holds that 'self sufficiency has been a basic principle' in US law.

The above legislation seems to be a direct result from a common practice in the United States to detain asylum seekers:

'including those who have been found by government officials to have a significant possibility of establishing eligibility for asylum, in prison-like environments from the time they arrive at the US airport or border crossing until final adjudication of their claim.'

In the United States, asylum applications are decided in one of two procedural contexts. The affirmative application procedure operates when an individual, after entering US territory, applies for asylum prior to any removal proceedings. The defensive asylum application procedure, on the other hand, applies when the application for asylum is made after the INS has apprehended the applicant and begun removal proceedings. Mandatory detention policies will generally apply

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137 Non-qualified aliens are excluded from any federal, State and local public benefit, which includes any 'public or assisted housing.' Welfare Reform Act, §401(c)(1)(B), §411(c)(1)(B).

138 Hansen, Martin, Schoenholtz and Weil, supra note 81, at 810. See also: Musalo, Moore and Boswell, supra note 99.

139 Welfare Reform Act, §400.


142 Pistone, supra note 140, at 200.
to those in the defensive asylum application procedure. In such a situation the authorities are 'under no obligation to release the alien... and may prolong detention indefinitely.' Additionally, an individual has no recourse to judicial review of INS decisions concerning either the length of detention or the denial of bond or parole. Amnesty International has persistently argued that '...nowhere does the law give the power to one individual to imprison another with no effective review of his or her decision.'

It has been contested that asylum seekers who lack the necessary documentation should not be detained unless there is a clear intention to mislead the authorities. Likewise, detention for the purpose of verification of identity, as allowed by Executive Committee Conclusion No.44, cannot justify ongoing detention for the entire procedure of status determination. Consequently, detention ought not to be based on purely administrative convenience, as appears to be the case in the mandatory detention policies prescribed by US immigration laws.

The INS holds detained asylum seekers in one of three types of detention facility: government-owned Service Processing Centres; privately operated 'contracted facilities'; and State, local, and county jails from which the INS rents bed space and where asylum seekers are housed with convicted criminals. This

143 INA §235(b)(1)(B)(ii). Pistone has argued that '...people who are apprehended by the INS at an airport or border and are determined to be inadmissible comprise the largest group of detained asylum seekers.' Pistone, ibid.
145 INA §236(e).
147 Hathaway and Dent, supra note 111, at 20.
148 Ibid.
149 'The system of detention (whether in jail or in a privately contracted facility) is built merely on the availability of bed space.' Schuck, H. P, 'INS Detention and Removal: A 'White Paper'', Georgetown Immigration Law Journal, Vol.11 (1997) 667. A 2001 US Committee for Refugee report found that the INS detains more than 200,000 individuals annually (9,000 of which are
is so despite Executive Committee Conclusion No.44 which requires that ‘...Refugees and asylum seekers shall, whenever possible, not be accommodated with persons detained as common criminals...’  

On 13 November 2000, the INS released detailed standard Guidelines for facilities housing INS detainees. The Guidelines’ goal is to ensure a consistent treatment and care for detainees that are in INS custody anywhere in the country. The INS hoped at the time to phase in the new standards in its contracted facilities and in State and local prisons under Inter-governmental Service Agreements. Nonetheless, as the Guidelines have not been issued as federal regulations, they cannot be legally enforceable, and therefore, it is left to be seen what will be implemented from these standards. To date, it appears clear that the criticisms by Amnesty International, the US Committee for Refugees and Pistone, presented above, remain very much accurate and relevant.

Governments reason detention policies as preventing asylum applicants from absconding; protecting public safety; and deterring future applicants from attempting to enter the country illegally. First, with regard to absconding, it

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150 Executive Committee Conclusion No.44, supra note 113, at Paragraph (f).

151 The Guidelines include access to legal material, better food, correspondence and mail, visitation rights, telephone access, medical care etc. The Guidelines are available at: [http://www.ins.usdoj.gov/graphics/publicaffairs/newsrels/detainee.htm](http://www.ins.usdoj.gov/graphics/publicaffairs/newsrels/detainee.htm).

152 'Our continued goal is to provide safe, secure and humane conditions of detention for all aliens in INS custody... We are committed to ensuring that our detention standards are met by all facilities we use for detention, regardless of whether they are operated by INS, private contractors or state, local or federal government officials under Intergovernmental Service Agreements.' INS Commissioner, Meissner, D, *ibid*.


appears that there are no studies that show that asylum applicants, who are proved to have a credible fear, and therefore a good chance of being granted asylum, will fail to appear at any scheduled hearing regarding their asylum applications. Second, it is clear and acceptable that States may hold applicants for admission based on public safety grounds. However, this goal could be achieved by an individual, case-by-case examination, rather than by a blanket policy that covers all asylum seekers and their entire application process. Finally, under ‘expedited removal’ laws introduced by the IIRIRA, those sent to detention have already passed a credible fear interview with an INS border inspector as well as with an asylum officer and are just awaiting final adjudication of their claims by an immigration judge. Hence, since those individuals are found to have credible claims for asylum, the deterrence goals of detention become even more questionable. Mainly, the pressing queries are whether those applicants indeed must be detained and secondly, whether the stated aim, that of deterrence, achieves its purpose with those asylum claimants. The answers to both questions would be ‘no’. Thus, where detention is used as a deterrent to other asylum seekers, Article 9 ICCPR, which guarantees the right to liberty, can be interpreted as meaning that such detention policy would be ‘disproportional, unpredictable

155 For example, see: US Commission on Immigration Reform, US Refugee Policy: Taking Leadership, A Report to Congress, 5 June 1997. The report found that the risk of absconding by those deemed by asylum officers to have credible claims was minimal: ‘Asylum seekers whose claims meet the ‘credible fear’ of persecution standards are not likely to abscond during their removal proceedings, as were they to abscond, they would forfeit their reasonable chance to win asylum.’ The report is available at: http://www.utexas.edu/ibi/uscir/refugee/full-report.pdf, at 29-30. This Commission was dismantled in 1997, after it concluded its scrutiny of the 1996 immigration law amendments.

156 As a matter of fact, the incentives to appear for the interview are considerable: an asylum seeker who is granted asylum will receive work authorisation as well as a travel document. Most importantly, after one year of receiving asylum the applicant can apply to adjust his or her status to permanent residency, INA §209(b).

157 Indeed, Article 9 of the Geneva Convention permits contracting states to take ‘provisional measures’ against a person ‘pending determination that that person is in fact a refugee and that the continuance of such a measure is necessary in the interests of national security.’ Although the Geneva Convention does not limit the detention of such an individual nor does it limit the Contracting State’s discretion to detain, the words ‘provisional measures’ indicate that such detention should be as short as possible with the only aim of verifying the asylum applicant’s identity.

158 INA §235(b)(1); 8 CFR §208(30)(2003). See discussion in Chapter II.
and discriminatory since detention could be avoided simply by examining its necessity in each individual case. The same criticism is applicable regarding Article 5(1)(f) ECHR in the EU. Ultimately, there is no possible justification for a deterrence policy to operate because, arguably, those who are intending to abuse the system may be able to prepare better in advance in order to avoid prolonged detention, as they are not escaping from any life or freedom-threatening persecution.

As a result of the 11 September 2001 terror attacks, the Bush Administration has established mandatory detention laws applicable to any non-citizen who the Attorney General certifies as a terrorist suspect. In line with USA PATRIOT Act 2001, all individuals who sought asylum from counties with links to Al-Qaeda or other terrorist groups were mandatory detained. The UNHCR and Human Rights Watch have both expressed grave concerns in respect of mandatory detention based on nationality, stating that while they recognise and support the needs for heightened security measures, they hope that such measures will not target those persons who are fleeing persecution. In the same tone, the UNHCR has advocated for an individualised assessment of the security risk a person poses. Thus, the unfortunate consequence of the 11 September 2001 terrorist attacks is that detention in the United States has become the norm rather than the exception.

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158 Todell, A, Hughes, J, and Petrasek, D, 'Key UN Interments', in Hughes and Liebaut, supra note 116, at 189.


160 In all, 33 nationalities were affected by 'Operation Liberty Shield'. This policy, however, was discontinued about two months after it was unveiled, although the USA PATRIOT Act’s proviso requiring detention is still in force. See: US Committee for Refugees, World Refugee Survey 2004 Regional Summary: North America, at 'United States' section. Also see: 'Group Fault Rule on Automatic Detention', The New York Times, 31 March 2003; and 'Detention: New Obstacles for Asylum Seekers', Immigration Daily, 1 April 2003.


162 This statement is implicitly approved by the case of In re D-J, Int. Dec. No. 3488, 17 April 2003, which points to the fact that ever since 11 September 2001, the United States has used more frequently national security concerns to detain improperly documented immigrants.
Instead of applying an automatic detention policy, consideration of factors such as weight of evidence (risk of absconding, public safety), family ties, physical and mental conditions, and alternatives to detention\(^{163}\) should be taken into account when determining whether detention is the only solution in the particular case. As prescribed by internationally accepted policies, detention should be avoided at all times, unless the evidence clearly points to the contrary. Consequently, as the United States detention laws stand at the moment, it is argued that detention does not achieve its stated objectives, and therefore, rather than being the norm, it must be the exception. It should be remembered that much of this unnecessary detention is due to a lack of proper personnel whose task is to effectively enforce final deportation orders.\(^{164}\) Finally, to make detention policies credible, it must be ensured that decisions are subject to a regular review by an independent judicial body, which has the authority to criticise and overrule such crucial decisions.

**Concluding Remarks**

As this Chapter has discussed, when the social rights and conditions of asylum seekers are at stake, the Geneva Convention fails those who seek its help. As demonstrated, the Geneva Convention is an extremely weak instrument in terms of protecting the socio-economic rights of asylum applicants. Other international instruments have tried to fill-in the gaps created by the Geneva Convention but have proved not to be very successful in doing so. This seems to be a result of Member States' unwillingness to accept the universality of the standards relating to economic and social rights, therefore providing for a limited implementation of these, rather than a problem with the text of such instruments.

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\(^{163}\) Alternatives to detention may be once-a-week reporting or registration with the local police station or the local NGO, as seen in current practices in the Netherlands and Austria. In the Netherlands, for instance, maintenance allowance is conditional upon once a week registration (ECRE Country Report, The NETHERLANDS, *supra* note 40), while Austria makes it mandatory for some asylum applicants who are not detained to report every second day to the police (ECRE Country Report, AUSTRIA, *supra* note 40). Other tools, for example, the use of guarantors, deposits or bonds also achieve the primary aim of control. Moreover, they are proved to be cheaper than detention. See: Feller, E., Türk, V., and Nicholson, F., *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, 2003, at Chapter III.

\(^{164}\) Schuck, *supra* note 149, at 694-698.
The EU exercise of harmonisation led by the Reception Conditions Directive, arguably, disappoints in every area considered by this Chapter. Indeed, Peers has argued that ‘it is doubtful whether the Directive has raised the minimum standards in the Member States with the lowest standards...’\textsuperscript{165} For its part, the United States is reluctant to confer any rights, with a view to discouraging fraudulent asylum applicants, but at the same time, punishing genuine asylum seekers. Such an approach surely has deterrence, rather than protection, as its main objective.\textsuperscript{166} This policy disregards the obligations under the Geneva Convention to shelter those escaping persecution.

It is evident from this study that the emerging common element between the United States and the EU is best seen through the growing endorsement of detention policies on both sides of the Atlantic. Yet, the success of the latter is questionable; the fact that governments need to find more detention spaces, build new accommodation/detention centres and resort to jails for bed space highlight that there are people who truly are prepared to accept any form of ‘freedom’ away from persecution. As always, in every system there are some individuals who attempt to abuse it, seeking entry to the State and access to its benefits through filing unfounded asylum applications. Nevertheless, this must not result in policies which risk \textit{refoulement} or inhumane and degrading conditions for genuine refugees, contrary to international obligations.

Although the idea of detention itself is not objectionable, it is the way in which it has been executed that raises concerns and strong disapproval.\textsuperscript{167} It is reasonable that States would want to verify a person’s identity in order to safeguard national security and public safety as well as prevent an abuse of their asylum systems,


\textsuperscript{166} Indeed, as mentioned above, Congress has explicitly stated that the availability of benefits will not constitute incentives for immigration. Welfare Reform Act, §400.

\textsuperscript{167} ‘From an international law perspective, therefore, the issue is not whether the power [to detain] is recognised, but whether its exercise and duration are limited in the case of refugees and asylum seekers by operation of law or principle.’ Goodwin-Gill, \textit{supra} note 18, at 247. For a similar line of argument see: Da Lomba, \textit{supra} note 58, at 244-260.
especially in the post 11 September 2001 climate. However, there are no justifications for detention to continue once this exercise has been carried out, and where it has been found that the asylum applicant is of no threat to the State or its citizens. The growing reliance of EU Member States on incarceration\(^{168}\) and the central role it is playing in present US policies is troubling.

Sadly, as discussed above, it appears clear that the level of protection conceded both by the US and the EU is very limited and is a half-hearted attempt aimed at making the stay in the country of asylum as unattractive as possible thereby dissuading future asylum applicants. It hardly needs stating that ‘only with reception in acceptable conditions, which allow a refugee to develop as normal life as possible, can the terms of the Geneva Convention be considered as fulfilled by the host nation.’\(^ {169}\)

Uniformity in terms of standards of reception conditions is clearly desirable, especially as asylum applicants are not given the choice as to where their asylum applications are processed.\(^ {170}\) This, though, is only to be welcomed if the minimum standards include a sufficiently high obligation to ensure that asylum seekers are able to live in dignity whilst they await the outcome of their claims. Unfortunately, it is evident, both under EU policies and even more irrefutable under US practice, that there is an apparent lack of political will to provide help to asylum seekers. Hence, in a broad sense, the aim of deterrence presented on both sides of the Atlantic in treating asylum applicants is converging. However, where the goal is comparable, the means to achieving it are rather different. As extensively discussed above, diversity exists in the provisions concerning work

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authorisation and social assistance; where the United States strongly advocates for 'self-help', the EU still allows for some public benefits to be allocated to individual asylum applicants while their applications remain pending and where no work authorisation is granted. Similarly, where the United States calls for 'self-help' in terms of accommodation, the EU Reception Conditions Directive advocates for the allocation of this, despite its low standards. On the other hand, where the United States promotes the unconditional schooling of asylum applicants and their children on the same terms as US nationals, the EU fails to do so.

Ultimately, it appears that the Reception Conditions Directive is a result of a system whereby Member States project restrictive national policies to the EU level, which is later adopted by all Member States. This is transparent in the above discussion regarding the possible withdrawal of social assistance adopted from UK practice and restricting access to employment as seen in the Belgian, German, Italian and Swedish experiences.\textsuperscript{171} It is time that the international community shows some political will and drafts a universally accepted comprehensive instrument, which aims to protect asylum applicants. Such an instrument should take account of past experiences when conferring social and economic rights on asylum seekers. Finally, such a treaty should secure the same weight and respect that is given to the Geneva Convention by the international community.

Special Note

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Chapter V

‘Temporary Protection’ in the European Union versus ‘Temporary Protected Status’ in the United States

Introduction

'Discussions about temporary protection appear at regular intervals in national and international fora, wherever the question of refugees is on the agenda. Over the years temporary protection has been seen as one of the means available to a country facing a mass influx of refugees.'

The 1951 Geneva Convention, though drafted in the context of a mass displacement related to armed conflict, has been implemented by means of individualised status determination. The Convention was designed in an era when inter-continental travel was rare, difficult and expensive. More than fifty years on, new technology, global communication and cheap international travel have all contributed to a world where rapid, long distance and mass migration is a reality. In an urgent attempt to manage the overburdening of the asylum system, and driven by a desire to prevent its collapse, States have developed the concept of temporary protection.

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2 Convention Relating to the Status of Refugees 1951, 189 UNTS 137; New York Protocol Relating to the Status of Refugees 1967, 606 UNTS 267. However, Professor Spijkerboer has argued that, essentially, there is no indication that the Geneva Convention was intended to be through individual determination. He gives as an example the grounds of persecution: race, religion, nationality, membership of a particular social group or political opinion. He argues that with the exception of 'political opinion' where one must show that he or she holds such an opinion, all persons belonging to the other four categories must be protected collectively. Spijkerboer, T, 'The Determination of Persons to be Protected in the EU: European Interpretation of the Notion of Refugee', Lecture given to the 2nd European Congress for Jurists Specialised in European Immigration and Asylum Policy, The Emergence of an European Asylum Policy: Amsterdam, Tampere and Beyond, 15 and 16 November 2002, Lisbon, Portugal.

3 The official concept of temporary protection already came about in the 1970s with the Vietnamese Boat People crisis. The first mention of this concept in official documents is in Conclusion 15 of the UNHCR Executive Committee. See: Executive Committee Conclusion No.15 (XXX), Refugees Without an Asylum Country, 30th Session, 1979, which was concerned with the reception of the Boat People. Additionally, the Executive Committee concluded that 'in cases of large-scale influx, persons seeking asylum should always receive at least temporary refuge', Report on the 30th Session of the Executive Committee of the High Commissioner's Programme, UN Doc. A/AC.96/572, Paragraph 73(f) (1979). For a discussion on the historical
In theory, temporary protection proposes ‘a means of affording protection to persons involved in large-scale movements that could otherwise overwhelm established procedures of the determination of refugee status while privileging safe return as the most desirable solution to refugee problems.’ It allows practical assistance to war refugees without giving them any expectation of permanent settlement in the European Union (EU) or in the United States.

This final Chapter addresses the initiation and development of the notion of ‘temporary protection’ otherwise known with a number of considerable changes as ‘temporary protected status’ (TPS) in the United States. To achieve this end, the Chapter briefly explores the evolution of temporary protection policies while examining in some detail current legislation. In doing so, the Chapter scrutinises the pressing query of whether temporary protection, as currently agreed upon, is an appropriate response to mass influx. It examines whether common trends have emerged on both sides of the Atlantic, and if not, which of the policies, developed to address an identical dilemma in the EU and in the United States, encourages the ultimate goal of a temporary and humanitarian treatment.

1. ‘Mass Influxes’: The New Way of Thinking

Whether asylum should lead to integration, or whether it should be a means of providing protection until repatriation is possible, has become a particularly significant issue in relation to former Yugoslavia, where it was initially hoped to find a speedy solution to the war. Thus, in the context of a broader range of measures intended to address a regional humanitarian crisis, the concept of temporary protection was devised.

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Through temporary protection, EU governments have been spared the task of dealing with a potentially unmanageable number of individual applications. Temporary protection was recognised as a 'flexible and pragmatic means of affording needed protection to a large number of people fleeing human rights abuses and armed conflicts... who might otherwise have overwhelmed asylum procedures.' The United Nations High Commissioner for Refugees (UNHCR) argued that due to the large numbers of people involved, it would not be possible for each claim of asylum to be individually assessed and so, a different form of response, other than consideration under the usual asylum procedure, would be appropriate. Indeed, Executive Committee Conclusion No.19 had stressed the exceptional character of temporary refuge and affirmed that those who are granted such an amnesty must also enjoy a basic humanitarian standard of treatment as well as the protection of the non-refoulement principle.

Despite several regional responses, the crisis in former Yugoslavia produced 'large-scale movements of people forced from their homes in numbers which did not fit patterns with which Western Europe is familiar or equipped and which require a new and tailored response.'

To deal with a situation of mass influx, the United States has developed two different systems: the first is TPS, which deals with people who arrived within a designated period. TPS is not designed to 'handle an unfolding crisis abroad that

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9 See: UNHCR: The State of the World's Refugees 1997-1998: A Humanitarian Agenda, Oxford University Press, figure 5.6-- stating that as of March 1997, refugees from Bosnia-Herzegovina ranged in numbers from 345,000 in Germany; 80,012 in Austria; 63,530 in Sweden; 23,500 in the Netherlands; 15,000 in France; 12,000 in Norway; and 8,430 in Italy to 6,000 in the UK.
10 Executive Committee Conclusion No.19 (XXXI), Temporary Refuge, 1980.
forces people to leave.' By limiting TPS to those already present in the United States at a cut-off date, the programme ‘cannot act as a magnet.’ The second response to a situation of mass influx is the use of ‘external safe havens/zones’. The meaning of this practice is extremely important; it results in a different level of protection and rights granted to people who are in an identical situation, pending the date of their arrival to the United States. Those who claim protection after the designated period, will, if at all, be granted protection in ‘external safe zones’ provided by the United States, as seen for example in the US military base in Guantánamo Bay, Cuba or in Northern Iraq.

Bearing in mind that this thesis is concerned with the treatment of asylum seekers within the territory of the EU and the United States, those who are not allowed entry into the country, as is the case in safe havens, and the policies driven as a result of such solutions are not examined. This Chapter focuses only on those present within the United States and the EU, and the mechanisms available for their relief from deportation due to hazards, which are not covered by the Geneva Convention in its current interpretation. However, as the Chapter discusses, it must be noted that a blanket protection, such as the one offered by the temporary protection policies, will always cover some persons who have a credible asylum claim based on individual persecution. Consequently, the

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14 Ibid.
15 See: Fitzpatrick, J, ‘Flight From Asylum: Trends Toward Temporary ‘Refuge’ and Local Responses to Forced Migrations’, Virginia Journal of International Law, Vol.35 (1994) 14. Professor Fitzpatrick has argued that: ‘The duration of the safe zone is a matter of international negotiations. The actual security of the Kurdish safe zone... depends upon both the political will of the Allied forces to continue their air patrols... and the permission of Turkey for the use of airbases. While the zone is a temporary rather than a durable solution to the dangers... its duration depends not on the persistence of a threat, but on essentially unrelated political factors’, ibid., at 60. However, ibid., at 64, one needs to note the unique character of Guantánamo: ‘the safe zone in Guantánamo, unlike others... is the product of unilateral action by a major power... No formal intervention [of UN Security Council] was required for the United States to exercise territorial leverage over its smaller neighbour...’ Finally, ibid., at 63, she debated the fact that ‘the Guantánamo safe zone episode illustrates... that the primary animus for creating the safe zone was the insistence by politicians and segment of the public that large number of asylum seekers be kept from entering a pipeline that typically result in their permanent absorption into the community...’
necessity in examining the temporary protection legislation by this thesis arises
from the mere fact that at least some genuine asylum claimants might be affected
by such policies.

2. EU and US Temporary Protection Policies: Past and Present

'Temporary protection requires admission to safety without discrimination and guarantees
protection against *refoulement* for the duration of the crisis which has generated the mass
influx. Beneficiaries of temporary protection should be provided with a positive legal status
which allows them to remain and from which definite legal rights derive. Persons from the
country of origin concerned, who were already in the host country before the outbreak of
the crisis that generated the mass influx, should be allowed to remain, without prejudice to a
more favourable legal status which they may enjoy.16

Until the late 1980s, any major mass-displacement crisis which caused flight
towards Western Europe was handled as it arose by the individual sovereign
States. Ever since the mid 1980s, there was a shift toward EU policy co­
ordination, and consequently, EU governments have taken over the initiative as
regards the convergence of EU refugee policies.17 Nonetheless, steps toward
comprehensive codification of temporary protection have appeared to be modest
and slow.18

Temporary protection is 'not an established part of public international law but
a political instrument developed to cope with specific situations.'19 Temporary
protection suggests two key elements. First, it is not designed to be durable.

16 'Executive Committee of the High Commissioner's Programme, Progress Report on Informal
Consultation on the Provision of International Protection to All Who Need It', UN


18 See, for example, the legislative history of 'Proposal for a Council Joint Action based on ex­
Article K.3(2) of the TEU Concerning Temporary Protection of Displaced Persons',
COM(1997) 93 Final; and 'Amended Proposal for a Joint Action Concerning Temporary

International, 2000, at 426. However, it is interesting to note that it has been argued that the fact
that there are numerous examples of the adoption of *de facto* policies for non-return of aliens to
a homeland plagued by generalised violence in addition to the UNHCR expanding its mandate
to include persons fleeing their homes due to armed conflicts and internal turmoil, leads to the
conclusion that such practice reflects that the norm of temporary refuge falls under customary
Displaced persons ideally must be returned to their country of origin after the situation has improved to an extent that international protection is no longer needed. This return must be made in as much safety and dignity as possible.\(^{20}\) Secondly, protection comprises admission to the host country, the granting of basic rights while residing in that host State and it must embody compliance with the principle of *non-refoulement*.\(^{21}\)

The need to integrate temporary protection policies was, as noted above, first recognised in the EU context when a large number of persons came to seek protection during the conflict in the former Yugoslavia in the early 1990s. Proposals for a Joint Action on temporary protection based on Article K.3(2)(b) TEU were submitted in 1997 and in 1998.\(^{22}\) However, divergences of opinion among the Member States delayed the negotiations on the instruments, as a result of which they were never adopted by the Council.\(^{23}\) The Amsterdam Treaty brought this subject back to the agenda, permitting a five-year deadline to reach an agreement and execute a comprehensive plan for the EU temporary protection regime.\(^{24}\)

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\(^{20}\) The controversial issue of return will be discussed in some detail below.

\(^{21}\) Hailbronner, *supra* note 19.


The Commission finally agreed that instead of one comprehensive instrument covering temporary protection as well as burden sharing, there would be two instruments, one dealing with the issue of temporary protection and the other with solidarity measures. See: ‘Proposal for a Joint Action Concerning Solidarity in the Admission and Residence of Beneficiaries of the Temporary Protection of Displaced Persons’, OJ 1998 C268/22.

\(^{24}\) Article 61 EC. It is recalled that, in principle, the UK, Denmark and Ireland have opted out of Title IV. See: Chapter I. However, the UK has thus far continued to opt into all asylum proposals, including the temporary protection submission. A request by Ireland to participate in the Directive on Temporary Protection was favourably received by the Commission,
In order to implement the Amsterdam Treaty, the Vienna Action Plan and the Tampere Conclusions, the European Commission proposed a Council Directive on minimum standards for giving temporary protection in the event of a mass influx, promoting the balance of efforts between Member States. The proposal was based on the aforementioned attempts to reach an agreement among Member States on a temporary protection regime for the EU. The proposed Council Directive was adopted in July 2001 on the basis of Article 63 EC on minimum standards for giving temporary protection.

In the United States, TPS represents a legal mechanism which was introduced into the Immigration and Nationality Act (INA) of 1990. This procedure enables the US government to respond quickly to humanitarian crises and needs throughout the world. Being codified in the law, TPS indicates a shift in US refugee policies from ad hoc responses as discussed below, toward a more coherent and consistent set of policies.

TPS was created to provide a legislative remedy for individuals fleeing civil conflict, natural disasters, or other comparable extraordinary conditions in their country of origin rather than an individual risk or harm. The commendable impact

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of this practice is that the designation of countries allows for group determination and therefore provides a speedy solution when a political or natural crisis emerges abroad. Once TPS is invoked, it applies to all residents of an assigned country who arrived in the United States before a designated date. Yet, the American TPS still raises some concerns since it permits the deportation of individuals who entered after the cut-off date, even though they would face substantially similar circumstances in their home country as would be faced by those granted protection.

The following sub-sections seek to detect how temporary protection schemes in the EU and the United State currently operate. As suggested before, the remainder of this Chapter compares the two programmes in an attempt to provide an answer to three inter-related queries: First, whether any common elements have emerged across the Atlantic; second, whether the policies have improved based on past lessons; and finally, whether the individual temporary protection system fulfils its purported aim of humanitarian and temporary treatment.

2.1 Trends in Temporary Protection Legislation: For Better or Worse?

2.1.1 Scope and Application

According to Article 1, the EU adopted Directive applies to cases of mass influx of displaced persons from third countries who are unable to return to their country of origin. Temporary protection may not, however, be established only if

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30 TPS is granted through a process which focuses on nationality:

'During the past thirty-five years, the United States has experienced the influx of thousands of people leaving politically unstable countries. While some have proven themselves to be refugees and obtained permanent protection in the United States, many more, including a large number of people fleeing civil wars, natural disasters, or comparable forms of upheaval in their home countries, have failed to demonstrate that they would be targets of persecution. Yet, the very circumstances that led to their flights-- conflict, violence, and repression-- have complicated their return to their home countries.'


31 Martin, Schoenholtz, and Mayers, supra note 13, at 549.
the asylum system is overstrained due to a high number of asylum applications. The temporary protection procedure should not depend solely on the lack of functioning of the asylum system since it is: '...a procedure of exceptional character to provide... immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx... Clearly, this may prove to be a difficult balance to negotiate. However, Member States must ensure that their balancing exercise takes into account the fact that the asylum system is overburdened as a factor and not as the factor for initiating temporary protection policies.

The adopted Directive stipulates that a mass influx may be caused both by spontaneous arrivals in the EU and by evacuation programmes. This means, in particular, persons who flee from armed conflicts, endemic violence or persons at risk of or victims of human rights violations. Hence, the situations resulting in flight are purely political. The adopted Directive does not apply to those displaced by natural disasters.

The adopted Directive does not extend to persons who have been accepted under temporary protection schemes prior to its entry into force. This may result in two different levels of temporary protection policies accorded to individuals in the same situation with quite distinct and uneven rights being granted. Indeed, this provision could limit the true entitlement of individuals to benefit from a unified temporary protection regime that confers basic rights which can only be improved if Member States wish to do so.

Article 2(d) of the adopted Directive provides that the temporary protection regime is limited to ‘a specific country or geographical area.’ Yet, Member States

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32 Adopted Directive, Article 2.
33 Adopted Directive, Article 2(a) (Emphasis added).
34 Adopted Directive, Article 2(c), (d).
36 Adopted Directive, Article 3(4). For a similar provision see, for instance, Article 2 of the 1997 proposed Joint Action.
37 Adopted Directive, Article 3(5).
may extend temporary protection to additional categories of displaced persons, where they are displaced for the same reasons and are from the same country or region of origin. This provision replicates the wording put forward by the initial negotiations which resulted in the 1998 amended Joint Action. Unfortunately, the adopted Directive did not take any account of the risk that such terminology could imply that 'EU States have a primary obligation to shelter European refugees and thus, a lesser obligation... to groups displaced by crisis in other regions.' One must be reminded that crises are not necessarily regional, therefore, it is distressing that temporary protection was nonetheless associated with this characteristic.

In the United States, 'the purpose of [TPS] is to replace a practice known as Extended Voluntary Departure (EVD), under which aliens from countries experiencing turmoil are allowed to remain temporarily in the United States, with a more formal and orderly mechanism for the selection, processing and registration of such individuals.' EVD was granted as a blanket relief from deportation for nationals of certain countries who feared returning to their countries of origin. EVD was used to provide 'discretionary and temporary relief from deportation' as well as helping aliens from specific countries in order 'to respond to changing world events':

'...Recognising that in some circumstances an individual who cannot show persecution may nevertheless be subjected to great danger if forced to return home, every Administration since and including that of President Eisenhower has permitted one or more groups of

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38 Adopted Directive, Article 7(1). This can be the case for persons who came to a Member State shortly before the Council decided to establish a regime of temporary protection, and therefore the adopted Directive does not cover them.
39 Amended Joint Action, Article 1(c).
40 Fitzpatrick, supra note 30.
41 Ibid.

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otherwise deportable aliens to remain temporarily in the United States out of concern that forced repatriation of these individuals could endanger their lives or safety.\textsuperscript{45}

The need for codification of TPS became clear when the Executive Branch refused to suspend the deportation of Guatemalans and Salvadorans during the peak of internal armed conflicts in these countries: 'TPS was codified primarily to achieve greater transparency in Executive Branch decision-making to grant time-limited leave to remain to nationals of states undergoing crisis...'\textsuperscript{46}

Deferred Enforced Departure (DED) is another form of non-statutory blanket relief from deportation. DED is an administrative stay of deportation ordered by the President. DED was first used to suspend forced departure of Chinese nationals in 1989, as a response to the Tiananmen Square Massacre.\textsuperscript{47} The reason for this change of terminology was due to the fact that EVD was subject to considerable criticisms, such as an accusation of differentiated treatment for those in need of protection, depending on their country of origin.\textsuperscript{48} Yet, the INS General Counsel has confessed that between EVD and DED 'there is no distinction in practical effect...\textsuperscript{49} More recently, DED has been criticised as a 'purely cosmetic change of... name from EVD.'\textsuperscript{50} The most visible differentiation between the two procedures is that EVD is granted upon the Secretary of State's determination, subject to the Attorney General approval\textsuperscript{51} while DED is bestowed upon the

\textsuperscript{45} House Report, \emph{supra} note 42.
\textsuperscript{46} Fitzpatrick, \emph{supra} note 15, at 44.
\textsuperscript{48} Martin, Schoenholtz, and Mayers, \emph{supra} note 13, at 551.
\textsuperscript{49} As quoted in Frelick and Kohnen, \emph{supra} note 43, at 342.
\textsuperscript{50} Krikorian, \emph{supra} note 47, at 2.
\textsuperscript{51} 'The Secretary of State would send a letter to the Attorney General describing country conditions and stating why return to that country should be suspended... Although the Attorney General may have modified the time period for EVD, once a recommendation letter was sent by the State Department, EVD was usually granted.' Seltzer, S, 'Temporary Protected Status: A Good Foundation for Building', \emph{Georgetown Immigration Law Journal}, Vol.6 (1992), at 784,
President's judgements through Executive Orders, without the need to establish, for example, extraordinary circumstances or civil war.52

Oddly enough, it appears that the informality of EVD/DED in the United States resulted in a restrictive and discriminatory protection due to political considerations of friendly governments, which the United States sided with. As a result, the United States was perceived as having a 'tolerance policy' to the true needs of the population concerned. Moreover, the political considerations of humanitarian and immigration policy of each Administration influenced the decision-making process with regard to who genuinely deserved EVD/DED.

According to Section 244 INA, TPS is to be invoked when there is an ongoing armed conflict, and requiring return would pose a serious threat to personal safety; there has been an earthquake, flood, drought, epidemic, or other environmental disaster resulting in a substantial, but temporary, disruption of living conditions; the foreign state is unable, temporarily, to handle adequately the return of its nationals; and the foreign state officially has requested temporary protection for its nationals in the United States; or, there exist extraordinary and temporary conditions that prevent nationals from returning in safety, unless the Attorney General finds that permitting the aliens to remain temporarily is contrary to the national interest.53 In order for aliens to be eligible for TPS, they must be physically present within the United States at the date of designation.54 The decision to grant TPS is purely discretionary and for the Attorney General to decide.55

There are two significant differences between the EU temporary protection regime and the US TPS procedure to note at this stage. First, from the discussion

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52 As was the case in 1992 with Salvadorian refugees, see: Frelick and Kohnen, supra note 43, at 342.
53 See: INA §244(b)(1).
54 INA §244(c)(1)(A)(i), (ii).
55 'Except as otherwise specifically provided, this section shall constitute the exclusive authority of the Attorney General under law to permit aliens... to remain in the United State temporarily because of their particular nationality or region of foreign state of nationality.' INA §244(g). (Emphasis added).
above it appears clear that EU policy does not extend to individuals who had arrived before the initial grant of temporary protection. Such persons, as noted, will be governed by national provisions, unless the Member States choose to extend the EU temporary protection policy to those individuals. On the other hand, in the United States, once TPS is invoked, it applies to all residents of that specified country, as long as they were fortunate to be present in the United States before the cut-off date. This means, however, that while the EU temporary protection policy serves as an acceptance policy, under the American TPS protection seekers cannot be admitted into the United States for the sole purpose of applying for TPS benefits. Secondly, notwithstanding this, it appears that in the United States’ TPS is wider in scope for it covers not only civil unrest, but also natural disasters and ‘extraordinary and temporary conditions’. Since the latter are not further explained, it can be concluded that this leaves a generous discretion to the Attorney General to stretch the TPS policy to any harms and to any class of persons who do not meet the Geneva Convention’s definition but who are still in need of protection.

2.1.2 Procedure

Pursuant to Article 5 of the adopted Directive, the existence of a mass influx of displaced persons is established by a Council Decision adopted by a qualified majority on a proposal from the Commission. The Commission shall also examine any such requests by a Member State. This proposal has to include a description of the specific groups of persons who will benefit from temporary protection, the date on which the temporary protection will take effect, and an estimation of the scale of movements. This Council Decision will introduce temporary protection for all Member States.

56 INA §244(c)(5). 'This is considered a guard against the 'magnet effect'— influx of aliens from a designated state drawn to the United States in the hope of being granted refuge.' Seltzer, supra note 51, at 789.

57 Adopted Directive, Article 5(2).

58 See Article 5(3). ‘The decision shall include at least: description of the specified group; date on which the temporary protection will take effect; information received from Member States on
It is worrying that the European Parliament’s position has not been improved from merely being ‘informed’.\(^{59}\) The European Parliament proposed to increase its participation in the decision-making process.\(^{60}\) Suggestions such as making consultation with the European Parliament mandatory when the temporary protection regime had exceeded one year as well as proposing to include a provision that the Council had to give reasons when it wanted to depart from the Parliament’s view, were not favourably received.\(^{61}\) The European Parliament also established a time limit within which the Council had to reach a decision regarding temporary protection and by which the Commission has to submit a proposal to the Council.\(^{62}\) By examining the adopted Directive, it is clear that those recommendations have been rejected, for all the European Parliament is left with is the right to be informed, without even a time restriction clause, which could mean that the European Parliament can be informed even after a decision has been taken.

Article 3(3) states that the establishment, implementation and termination of temporary protection shall be the subject of regular consultations with the Office of the UNHCR and other relevant international organisations. However, according to Kerber, ‘it was made clear during the debates that consultations should not be a necessary condition for the establishment of a temporary protection regime.’\(^{63}\)

In the United States, the Attorney General has the sole and exclusive discretion to designate a foreign country’s eligibility for TPS benefits.\(^{64}\) Although section 244(b)(1) provides that ‘the Attorney General, after consultations with

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60 See: European Parliament’s Opinion, OJ 2001 C343/82.
62 Ibid., at Amendment 10.
64 INA §244(g). See text, *supra* note 55.
appropriate agencies of the Government, may designate...; the discretion of the Attorney General is exacerbated by the fact that there is a 'semblance of coherent standards, which in actuality are loosely defined and lack any substantive meaning.' Also, what are the 'appropriate agencies' needs urgent clarification. Ultimately, there are no provisions for a judicial review of decisions made or denied. Furthermore, the Attorney General may require a payment of a 'reasonable fee as a condition of registering an alien...' as well as an 'additional fee for providing an alien with documentation of work authorisation' under the TPS scheme. This provision is distasteful since it has been proved to act as a barrier from applying to the TPS scheme: 'Apparently, the fees required to apply were sufficiently high to dissuade women and children from applying for TPS.' This results in a further problem of proving arrival in the US in cases where such individuals were apprehended and put under deportation procedures. In such cases, even where those persons were actually eligible for TPS, they could not prove that they were present in the United States before the cut-off date, and therefore could face refoulement.

Section 244(h)(3)(B)(i)(1) provides that the Attorney General must submit an annual report to the appropriate Congress committees. According to the INA, this report must include a list of the designated countries for TPS, an estimate of the number of nationals in the United States who are eligible for TPS as well as their immigrant status prior to TPS being granted, and finally, the Attorney General needs to rationalise the decision to designate those countries, or alternatively, to

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65 Emphasis added.
66 Seltzer, supra note 51, at 792, criticising the INA §244(b)(1)(A),(B).
67 INA §244(b)(5)(A). According to subsection (B), 'The Attorney General shall establish an administrative procedure for the review of denial of benefits to aliens under this subsection...' (Emphasis added). Yet, subsection (B) indicates that a person will be given the opportunity to assert protection under TPS at the removal proceeding, if the 'alien demonstrates that the alien is a national of a state designated under Paragraph (1).'
68 INA §244(c)(1)(B). Current fees are: a $50 filing fee; a $120 employment authorisation fee (if such authorisation is requested) and a $50 fingerprinting fee per individual. Generally, a waiver of fee is available by filing a waiver request pursuant to 8 CFR §244(20).
justify the decision to terminate protection. At first glance, this detailed obligation seems an appropriate safeguard for the possible ill use of the Attorney General's discretion. However, writing back in 1994, Frelick and Kohnen have noted that in 1992, 1993 and 1994 reports were not submitted and that this indicates that the 'Attorney General does not want to make explicit the specific criteria that guide decisions regarding TPS designation...\textsuperscript{71} More recently, in 1999, it was suggested that the 'Executive Branch has been generally unable to provide accurate data, so the annual reports usually are not issued.'\textsuperscript{72} Finally, the section has been criticised as not requiring any 'specific details or factual findings' in the reports.\textsuperscript{73}

Again, the fact that the US TPS is subject to the discretion of one person along with the fact that the definition of the circumstances of the grant are extremely wide, clears the way to feelings of uneasiness as well as a fear of discrimination and a concern of irrelevant foreign policies and political influences dominating the decisions taken, which occurred with the EVD/DED policies. An example of these genuine anxieties was experienced in the cases of Burundi, Haiti, Guatemala and Angola:

\begin{quote}
'Between the months of October and November 1993, up to 50,000 Burundians were killed in political and ethnic violence... In Angola, more than 100,000 people have died since civil war broke out in October 1992 between the government and the formerly US backed UNITA guerrilla force... Other countries, such as Haiti and Guatemala, have experienced widespread human rights abuses that would seem to meet... the 'extraordinary and temporary protection' criteria... In the cases of Burundi, Guatemala, and Haiti, concerned efforts by refugee advocates have failed to result in TPS designations.'\textsuperscript{74}
\end{quote}

The term 'ongoing armed conflict' as well as 'extraordinary and temporary circumstances' must provide for a stricter definition. To serve this end, specific guidelines, the Code of Federal Regulations (CFR) or amendments to the legislation itself, need to allocate a more objective and universal standard to which

\textsuperscript{70} Ibid.

\textsuperscript{71} Frelick and Kohnen, \textit{supra} note 43, at 346.

\textsuperscript{72} Martin, Schoenholtz, and Mayers, \textit{supra} note 13, at 549.

\textsuperscript{73} Seltzer, \textit{supra} note 51, at 792.

\textsuperscript{74} Frelick and Kohnen, \textit{supra} note 43, at 345-346.
the Attorney General could account to in the exercise of his or her discretion.\textsuperscript{75} Finally, it should be included in the statute itself, that the appropriate agencies, rather than merely being ‘consulted’ by the Attorney General, would have an opportunity to submit reports and more importantly, to present formal recommendations of which the Attorney General must take notice.

The same criticisms are applicable to the EU, where the European and national Parliaments are excluded from consultations regarding the adoption of the temporary protection policy and where consultation with other bodies, most notably, the UNHCR, is not mandatory when establishing temporary protection policy. In this scenario, it is the Council which is left with too much discretionary power in its hands.

\textbf{2.1.3 Duration}

Unless terminated by another Council Decision, the normal duration of EU temporary protection is one year, with an automatic extension of two six monthly periods amounting to an additional year.\textsuperscript{76} Where the reasons for temporary protection persist, the Council may then decide to extend the regime for another year.\textsuperscript{77} The maximum possible duration of temporary protection is therefore three years, two years less than the original Joint Action proposal.\textsuperscript{78} The issue of duration was indeed a controversial topic. France, for instance, suggested that two years are an appropriate period of time for a temporary protection policy to operate.\textsuperscript{79} On the other hand, Finland was in favour of a term of one year or less, while the Netherlands at first suggested one year with the possibility of one

\textsuperscript{75} Seltzer, \textit{supra} note 51, at 792.
\textsuperscript{76} Adopted Directive, Article 4(1).
\textsuperscript{77} Adopted Directive, Article 4(2).
\textsuperscript{78} Article 13.
\textsuperscript{79} ASILE 24, 8510/00, 15 May 2000, at 4.
renewal for another year. Finally, the Austrian delegation and consequently the Dutch representatives, favoured eighteen months.

The fact that the finally agreed upon regime has been reduced from five years to three years is appreciated. This indeed is an important change, emphasising the temporary nature of the regime. However, the question to be addressed at this point is whether the agreed three years can be truly considered as 'temporary'? Article 2(d) of the adopted Directive defines 'mass influx' as the arrival in the Community of a 'large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided.' Kerber argues that this requires three elements: 'first, the persons coming into the EU must come from one country or area. Second, it must be a large number of persons... Thirdly, it must be a sudden influx in each case...' It is the last requirement which would answer the above query in the negative. This is because three years can hardly be held as 'sudden'. Therefore, Member States should grant temporary protection initially while re-organising existing policies to cope with and examine each individual application for protection as soon as possible. Where an individual is found to fall out of the refugee definition as provided by the Geneva Convention, only then should a 'temporary protection' of maximum three years be allowed to apply to him or her. Finally, it should be pointed out that three years can be held a long enough time for an individual to establish strong ties with the local community.

According to the INA, the duration of TPS is to be a minimum of six months and a maximum of eighteen months. The Act states that the period of designation of the foreign state can be extended, upon the Attorney General's discretion, for an additional six to eighteen months. However, there is no limitation on how many times the Attorney General can re-apply the period of

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81 ASILE 26, 7964/01, 18 April 2001, at 3.
82 Kerber, supra note 63, at 196 (Emphasis added).
83 INA §244(b)(2)(B).
protection. Consequently, this can result in an extended ‘temporary’ protection, which defeats the purpose of TPS; in the 1970s, thousands fled Indochina as a result of a communist take-over. Those persons were granted TPS until Congress mandated their status to permanent in 1977. More recently, many Nicaraguans who fled Hurricane Mitch in October 1998, received, after the expiry of their TPS, an extended TPS until 2005. Consequently, it has been argued that in the United States ‘there is nothing more permanent as a temporary refuge.’ Such practice is particularly questionable since, as discussed below, TPS beneficiaries in the United States are granted very minimal rights, if at all. It is argued that to leave individuals with such uncertain status, which does not, for instance, allow family reunification or any social assistance, is contradictory to human rights norms.

To conclude, both systems’ strategies regarding the duration of the temporary protection policy are unsatisfactory. There are two reasons for these findings. First, the stated duration of EU temporary protection policy, three years, seems very long, while in the United States, there is no restriction on the Attorney General expending a TPS regime. Secondly, neither of the policies provide for a longer-term protection in cases where the temporary situation is prolonged longer than was initially expected.

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84 Krikorian, supra note 47, at 4.
86 See, for example, Article 11(1) of the Covenant on Economic, Social and Cultural Rights which grants ‘social assistance and other need-based forms of social benefits in cash or in kind to anyone without adequate support.’ For a discussion on the universal application of numerous human rights instruments, see Chapter IV.
87 The European Parliament has proposed that Member States shall consider long-term solutions in specific cases where any compelling humanitarian reasons make return impossible or unrealistic. OJ 2001 C343/87, at Amended 18.
2.1.4 Grant of Social Rights

The UNHCR has argued that the basic rights to subsistence, housing, education, and family reunification should extend to beneficiaries of temporary protection as they do to those granted asylum.88

In the EU, Chapter III of the adopted Directive, Articles 8-16, discusses the ‘obligations of the Member States towards persons enjoying temporary protection’:

'It is important to note that Chapter III speaks of 'obligations' of the Member States and not of 'rights of persons enjoying temporary protection'. This implies that the Member States are internationally obliged to grant temporarily protected persons a certain minimum treatment...'89

Persons under temporary protection are granted a range of rights, which include a residence permit and appropriate documentation,90 suitable accommodation, necessary assistance in terms of social welfare, emergency medical care and essential treatment of illness.91 Yet, the adopted Directive does not specify how such objectives are to be achieved, and so, again, it appears that Member States are left with much discretion in defining a ‘suitable accommodation’ or ‘necessary assistance’ in social welfare. The adopted Directive, at least, should have provided Member States with minimum examples or guidelines outlining the scope of these standards.

Any person under the age of eighteen is entitled to access the education system,92 though it is up to each Member State to decide whether adults who are enjoying temporary protection be allowed access to the general education system.93 It is interesting to note that the latter basic requirement is a significant

88 Report of the Executive Committee, General Conclusion on International Protection, Executive Committee Conclusion No.22 (XXXII) 1981, 32nd Session, at IIB(2), UN Doc. A/12/Add.1, 21 October 1981.
89 Kerber, supra note 63, at 201.
90 Adopted Directive, Article 8 and 9, respectively.
92 Adopted Directive, Article 14(1).
93 Adopted Directive, Article 14(2).
improvement for at least one of the leading EU Member States; generally speaking, in Germany the compulsory school attendance rule does not apply to the children of persons granted 'duldung'. Access to schools is regulated at the level of the Ländere, and thus, much depends on the regulation and the 'goodwill of the Ländere'. Hence, by making school attendance mandatory for those under eighteen, the adopted Directive encourages integration of the temporary protection beneficiaries in the local community, which is essential to the promotion of good relations with the local population by facilitating understanding of its culture and history, the development of new skills and assistance in furthering employment opportunities.

The right to be employed or to have a self-employed business is also recognised. This right, however, is subject to the prevailing rights of other EU nationals or third country residents at the discretion of Member States. The present version of the provision is narrower than the original 1997 Commission proposal. The 1997 Joint Action contained the principle of 'equal treatment of the temporarily protected with recognised refugees regarding access to the labour market as well as work conditions.' This issue was highly controversial among the Member States; France, Portugal, Finland and the Netherlands expressed objections to the comparison with refugees. While Sweden generally supported access to the labour market, Austria had refused it. Consequently, the granting of access to the labour market and work conditions are subject to the laws of each

95 Subject to the rules applicable to the profession, Article 12.
96 Ibid.
97 Joint Action, Article 8.
98 ASILE 41, 11495/00, at 6.
99 'The Swedish delegation supported the case for people afforded temporary protection to be entitled to work and argued for them to be given the highest level of protection as possible.' ASILE 29, 10209/00, 17 July 2000, at 3.
100 Ibid.
Member State. In concluding any such legislation, Member States should note that beneficiaries under the temporary protection policy, just like asylum seekers, are likely to boost the economy by either contributing some specialised skills or because they are likely to undertake positions which are unwanted by the local population. In addition, while working, beneficiaries of temporary protection would require a reduced, if any, social security assistance. Employment access may facilitate, in the long run, reintegration into the country of origin by allowing an individual to return home with some degree of financial independence or acquired work skills. Finally, as the adopted Directive allows Member States to regulate access to the labour market, there seem to be little risk of conflict with the employment needs of its own nationals or other qualified aliens and those of the temporary protection beneficiaries.

According to Article 29 of the adopted Directive, ‘persons who have been excluded from family reunification by a Member State shall be entitled to mount a legal challenge in the Member State concerned.’ It is important to note that the provisions on family reunion only apply in cases where families already existed in the country of origin and were separated due to circumstances surrounding the mass influx. Some delegations suggested that the family reunion provision should only apply to the ‘core family’, while others favoured a more relaxed definition. As a result, Article 15(1)(a) discusses the ‘closer family’, which consists of the spouse of the sponsor, or his unmarried partner in a stable relationship, and the minor, unmarried children of the sponsor, or his spouse born in or out of wedlock, while Article 15(1)(b) refers to the ‘wider family’,
which comprises of other relatives who lived together at the time of the events leading to the mass influx, and who are wholly or mainly dependent on the sponsor at the time. The adopted Directive further distinguishes between two possible scenarios in family reunification. First, where the separated family enjoys protection in different Member States, the Member States shall reunite the family members, taking into account the wishes of the family where the Member State is satisfied that the ‘closer family’ members, as described above, are involved. Where the ‘wider family’ is affected, Member States must examine any extreme hardship the family members would face if not reunited. Secondly, where the sponsor enjoys protection in one Member State, and one or some family members are not yet in a Member State, the Member State shall reunite the family where the ‘closer family’ is involved. Where the ‘wider family’ is at stake, Member States shall take a case-by-case examination, seeking reunification on the basis of those who are in need as well as extreme hardship.

Despite the somewhat complicated requirements surrounding the family reunification provisions, it appears quite clear that in some of the leading EU countries, for example, France and Germany, the adopted Directive would present an improvement in the family reunification national clauses, as these Member States generally do not recognise the right to family reunification in such situations.

Hailbronner specifically argued against the provision of family reunification shortly before the adoption of the temporary protection Directive, claiming that family reunion would go against the provisional nature of temporary protection which is designed with a view to return. Family reunion ‘usually tends to intensify

\[105\] Where the Member States legislation allows it in its aliens’ law.

\[106\] Adopted Directive, Article 15(2).

\[107\] Adopted Directive, Article 15(3).

\[108\] France recognises the right to have family reunification with the ‘closer family’ which consists of the parents, children and spouses. In Germany, individuals with ‘duldung’ status have no right to family reunification. In exceptional cases, however, reunification might be granted on humanitarian grounds, based on individual examination. See: ECRE Country Reports, GERMANY; and FRANCE, supra note 94, at ‘Family reunification’ section.
a person’s bonds to a country and therefore prevents return. It is satisfactory to note that Member States were not influenced by any such argument since if one believes such an approach to be correct, then surely any right, whether it is the right to be employed, the right to suitable accommodation within the local community or the right to be educated, can be perceived as contradicting the nature of the temporary protection regime which consists of the Member States’ general goal of return. Taking such an approach would mean that temporary protection beneficiaries essentially would have to be excluded from the lives of the community altogether, in order to ensure that they do not develop any sort of attachment to the local environment. Consequently, the question posed would be ‘should people who are granted temporary protection be given any rights?’ Answering this query negatively would, undoubtedly, have challenged any norms of basic human rights. Thus, the agreement of Member States to guarantee minimum obligations towards the beneficiaries of temporary protection status must be welcomed.

In the United States, work authorisation has been favoured over public financing. Section 244(12) CFR, states that ‘upon approval of an application for TPS, the INS shall grant an employment authorisation document valid during the initial period of the foreign state’s designation (and any extensions of such period).’ Availability of work places is not subject to any restriction as presented in the EU, however, as mentioned earlier, the INA authorises the Attorney General to impose a ‘fee for providing an alien with documentation of work authorisation’ under the TPS programme. In practice, therefore, it is possible to find individuals who are covered by the TPS scheme, but who could not, however, pay the requisite fee for the employment authorisation. Hence, such TPS

109 Hailbronner, supra note 19, at 432-433.


111 8 CFR §244, amended on 16 November 1998; Federal Register 63593. See also INA §244(a)(1)(B), INA §244(a)(2).

112 INA §244(c)(1)(B). Fee total of: $220 per person. See text, supra note 68.
applicants are immune from deportation for the duration of the status only. Consequently, it is crucial to examine other entitlements, if any, under the TPS policy.

Before the Welfare Reforms of 1996, recipients of TPS were eligible for a limited range of benefits including: emergency health care, food, school lunch and breakfast programmes, unemployment insurance and job training, if eligible under the State’s job training and partnership programme. Under the new welfare law, existing restrictions, such as ineligibility for food stamps and Medicaid were retained, as well as new ones were added.

The Welfare Reform Act 1996 provides that 'an alien who is not a qualified alien... is not eligible for any federal public benefit.' Similarly, a non-qualified alien is excluded from 'any State or local benefit.' Section 341 of the Welfare Reform Act defines 'qualified aliens' as 'any alien who is lawfully admitted for permanent residence... The INA specifically maintains that TPS beneficiaries ‘shall not be considered to be permanently residing in the United States under colour of law.' Hence, TPS beneficiaries are not entitled to any federal, State or local benefit.

The Welfare Reform Act, however, does not apply to emergency medical assistance. Similarly, all children are eligible for public education. True to its

114 INA, Chapter 477, §244(f).
115 For example, there is no job training or federal share of unemployment insurance.
116 Welfare Reform Act, Title IV, §401(a) (Emphasis added).
117 Welfare Reform Act, §411 (Emphasis added).
118 Emphasis added.
119 INA §244(f)(1) (Emphasis added).
121 Emergency health care does not include any organ transplant procedure. See: Title XIX, Social Security Act §1903(v)(3), as reproduced in the Welfare Reform Act §401(b)(A), §411(b)(1).
policy of 'paycheque not welfare cheque', the United States holds the view that since TPS beneficiaries are able, if they wish, to obtain a work authorisation, they are thus able to secure the appropriate private residence that suits their individual needs. No help in terms of accommodation is provided by federal, State or local authorities. Finally, there are no family reunification rights under the US TPS programme, regardless of its duration. Only those who are within the United States at the day of TPS designation will be covered by the status.

To conclude, the INA explicitly confers three benefits on TPS holders. First, as discussed above, individuals have full employment rights. Secondly, persons with TPS have the right not to be deported as long as the Attorney General continues to designate the individual’s country of origin under a TPS scheme. Thirdly, persons have the right to travel abroad.

2.1.5 Right to Seek Asylum

'The right to seek and enjoy asylum is embraced in the international community's foundational post-war charter of fundamental human freedoms as Article 14 of the Universal Declaration of Human Rights.'

The granting of temporary protection does not prejudge recognition of refugee status under the Geneva Convention, and the adopted Directive states that

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122 Plyler v. Doe, 457 US 202 (1982). Generally, see the discussion in Chapter IV, concerning the social rights of asylum applicants as this debate is applicable to TPS beneficiaries as well.

123 Edwards, supra note 110.

124 Non-qualified aliens are excluded from any federal, State and local public benefit which includes any 'public or assisted housing.' Welfare Reform Act, §401(c)(1)(B), §411(c)(1)(B).


126 INA §244(a)(1)(A), 8 CFR §244(14), amended on 16 November 1998; Federal Register 63593.


129 Adopted Directive, Article 3(1).
persons enjoying temporary protection ‘must be able to lodge an application for asylum at any time.’ Nevertheless, the asylum applications of beneficiaries do not have to be processed immediately. They may be suspended during the temporary protection term, but must be completed after the end of the temporary protection period. Finally, Member States may provide that temporary protection may not be enjoyed concurrently with the status of asylum seeker while an application is under examination. The proposal of the UNHCR that the Member State granting temporary protection ought to examine an asylum application was not accepted. Again, this position raises immediate objections. Such legislation could result in the withdrawal or reduction of rights upon lodging an application for asylum and consequently, can act as a deterrent to applying for asylum. Hence, it is argued that the adopted Directive is rather restrictive: an individual who has a claim based on one of the five enumerated grounds of the Geneva Convention must have the basic right to present his or her claim, as refugee status bestows more social rights and is based on solid and long-established policies. Ultimately, refugee status enables one to permanently re-

130 Adopted Directive, Article 17(1).

131 Adopted Directive, Article 17(2).

This provision was criticised by Professor Laferrière, who argues that there is no rational for the suspension of the right to seek asylum, which can take up to three years. Laferrière, F. J, ‘The Status of Protected Forced Migrants’, Lecture given to the 2nd European Congress for Jurists Specialised in European Immigration and Asylum Policy, supra note 2.

The Immigration Law Practitioners’ Association (ILPA) has also acknowledged real concerns regarding Member States’ ability to suspend access until the end of the temporary protection period. The criticisms put forward relate to the proposed Directive, however, since the adopted Directive did not take a different approach on the right of asylum, these anxieties remain real. ILPA has stated that: ‘This, in fact, could lead to the nullification of the guarantee of access to the asylum procedure for in practice ILPA considers that most Member States will suspend access to the asylum procedure until the end of the temporary protection period.’ ILPA Response to the proposed EC Directive on minimum standards of temporary protection, March 2001, at ‘Access to the Asylum Procedure’ section.


The European Parliament has suggested that ‘Member States shall ensure that people enjoying temporary protection maintain the rights accorded to them under temporary protection while their application for asylum is being examined.’ OJ 2001 C343/87, at Amendment 17. However, this recommendation was not taken into account in sketching the final draft of the Directive.
build his or her life. Finally, the possible grant of asylum is unlikely to jeopardise the temporary and the somewhat simplified nature of the temporary protection programme since an asylum seeker, as seen in Chapter III, must have a specific individual claim based on risks to his or her life or freedom, while temporary protection is solely based on mass influx, regardless of individual peril. Therefore, not all persons covered by a temporary protection programme can submit a successful asylum claim in the first place.

In the United States the general practice is that individuals are usually expected to leave the US at the end of the designated period. Commentators have advanced the arguments for and against such a proviso:

'Immigration control argues for limited access [to asylum]: those offered temporary protection generally should be precluded from applying for any other form of protection or relief at the end of the temporary period. More expanded access might attract those who simply want to find a way to stay in the United States permanently. On the other hand, humanitarian interests require access to asylum proceedings, at least when there are changed circumstances in the home country... Domestic law should protect Convention refugees from return to a country of persecution whatever their prior status.'

In the United States, recipients of TPS may affirmatively apply for asylum while maintaining their TPS. Thus, individuals who are applying for asylum in the United States are still considered as TPS beneficiaries, not as asylum seekers, as is the case in the EU arena. However, it is also possible to file an asylum application after TPS has been terminated. Yet, this must be done within a 'reasonable period'. Such an approach is evident from the 'ABC Settlement',

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133 Summary observations of the UNHCR on the Commission proposal of 26 September 2000, ASILE 44, 11621/00, at 17.
134 8 CFR §244.14(b)(2): ‘withdrawal of the alien’s TPS... may subject the applicant to exclusion or deportation proceedings...’
137 8 CFR §208(4)(a)(5)(iv), providing that ‘extraordinary circumstances’ may include maintaining TPS ‘until a reasonable period before the filing of the asylum application’. The INS, however, maintains that waiting six months is ‘clearly’ not reasonable and that shorter periods of time should be considered on a case-by-case basis. See: ‘Supplementary Information’ to Final Rule, 65 Fed.Reg.76121, at 76123-24 (6 December 2000).
where Salvadorans with TPS were allowed to re-apply for asylum at the end of their TPS designation. Finally, it is worth noting that those denied asylum will return to hold their previous non-immigrant status, that is TPS, while in the EU the adopted Directive provides no clear rules regarding this issue.

2.1.6 Cessation and Return

The adopted Directive does not specify to what extent the conditions in the country of origin need to improve in order for temporary protection to cease. This is clearly unsatisfactory. The requirements for termination of status, consequently, could be set to a very low standard; for example, cessation of temporary protection can occur as soon as a peace agreement has been signed, with no notice of the fact that conditions are yet stable in the country of origin. However, the adopted Directive urges Member States to make possible the voluntary return of persons, and to ensure that return facilitates human dignity, which is a crucial requirement. Nonetheless, Article 20 of the adopted Directive declares that where temporary protection has ended, the general laws on protection of aliens in the individual Member State shall apply. Consequently, under the adopted Directive, there is no convergence of rules concerning return.

With regard to a return policy, the Commission issued a Green Paper, which aim is to 'call for reactions from interested parties and to launch a broad discussion among all relevant stakeholders.' Generally, the Green Paper holds that to all extents possible, priority should be given to voluntary returns,

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139 In the 'ABC Settlement', Salvadorans protected under TPS and DED were permitted to re-apply for asylum on the ground that their previous asylum applications had not been given proper examination due to political discrimination. Ibid.


141 Indeed, Professor Guild has pointed out that the issue of return was particularly questionable among the Member States: 'In the Netherlands, Belgium and Sweden, where enforced return was not planned as in Germany, the possibility of a rush of asylum application from Bosnians who had enjoyed temporary protection in Germany but were under the threat of expulsion was mostly unwelcome.' See: Guild, E, Immigration and Asylum Law in the European Community, Kluwer Law International, 2000, at 313.


143 Ibid., at 8.
however, forced returns may be necessary 'as a last resort.'\textsuperscript{144} Based on this Green Paper, a Council proposal for a Return Action Programme was concluded.\textsuperscript{145} The Return Action Programme is aimed at establishing 'a truly improved common return policy... leading to more effective, timely and sustainable returns.'\textsuperscript{146} To achieve this end, the Return Action Programme calls for the establishment of readmission agreements to be concluded at the EU level with third countries.\textsuperscript{147} The emphasis, unlike the one noted in the Green Paper however, is on the policy of \textit{forced} returns, which is seen as a 'pre-requisite for ensuring the rule of law.'\textsuperscript{148} Nevertheless, the most blatant disadvantage of the Return Action Programme is the omission of an acknowledgement, as seen in the Green Paper, that situations of a mass influx 'go together with reconstruction and development challenges, which may require... certain specific solutions...'.\textsuperscript{149} According to the Green Paper, such solutions include 'postponing the implementation of removal decisions, allowing exploratory visits or stays, drawing up assistance 'packages'\textsuperscript{150} and transit and transport agreements.'\textsuperscript{151} The Return Action Programme, only requests an assessment of whether a removal to third countries is feasible or not,\textsuperscript{152} yet, no guideline for such an assessment exists.\textsuperscript{153} Finally, instead of requiring a positive and mandatory assistance to returnees in terms of granting socio-economic help

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\textsuperscript{144} Green Paper, \textit{supra} note 142, at 8.
\textsuperscript{146} \textit{Ibid.}, at 5.
\textsuperscript{147} \textit{Ibid.}, at 6.
\textsuperscript{148} \textit{Ibid.}, at 9. However, forced returns are to be carried out in accordance with international and human rights obligations, such as the Geneva Convention and the Charter of Fundamental Rights. This seems to aspire to a somewhat high level of protection when carrying out forced returns, yet, it must be borne in mind that although the Charter is referred to, the latter is currently not legally binding, and therefore, cannot be relied upon by individuals as a source of enforceable rights (See: OJ C364/01, 18 December 2000).
\textsuperscript{149} \textit{Ibid.}.
\textsuperscript{150} Such packages may range from information, transport, financial allowances to training, incentives for the non-skilled and skilled etc. See Green Paper, \textit{supra} note 142, at 9.
\textsuperscript{151} Green Paper, \textit{supra} note 142, at 9.
\textsuperscript{152} Conditions need to be 'improved considerably'. Return Action Programme, \textit{supra} note 145, at 25.
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and tackling root causes, this is deliberated as a mere example for achieving a sustainable return.\textsuperscript{154}

Most recently, the Commission, responding to a UNHCR initiative, drafted an ‘Agenda for Protection’,\textsuperscript{155} which concerns durable solutions such as return policy, integration, resettlement policy and tackling the root causes, among, for example, shared responsibility with third countries. The Agenda for Protection undertakes a different approach from the Return Action Programme, more in line with the Green Paper, calling for the comprehensive establishment of a EU approach concerning ‘all stages of the return procedure, namely the stage of preceding \textit{voluntary} departure, return itself, reception and integration in the country of return.’\textsuperscript{156} Returns are to be judged with respect to international obligations, reflecting the needs of the specific situation, the number of people affected, and any necessity the country concerned might have. This is indeed a welcome starting point.

In the United States, the Attorney General must make a periodic review at least sixty days before the end of the initial period of designation.\textsuperscript{157} Where the Attorney General determines that a foreign state no longer continues to meet the conditions for designation of TPS as described above, the Attorney General shall terminate the TPS by publishing a notice in the Federal Register (FR) of the determination.\textsuperscript{158} Yet, termination of status does not necessarily lead to repatriation to the country of origin. In the 1960s, thousands of Cubans who fled Castro’s regime were given TPS until Congress passed the Cuban Protection Act in 1966, which granted them the right to remain permanently. In the 1970s,

\begin{footnotes}
\item[153] Ibid., at 21.
\item[154] Ibid., at 25.
\item[156] Ibid., at 10.
\item[157] INA §244(b)(3)(A).
\item[158] INA §244(b)(3)(B). ‘Such termination is effective no earlier than sixty days after the date the notice is published, or if later, the expiration of the most recent previous extension...’
\end{footnotes}
thousands fled Indochina as a result of a communist take-over. Those persons too were granted TPS until Congress mandated their status to permanent in 1977.\textsuperscript{159} Krikorian has argued that in some situations '...since what is labelled 'temporary' is rarely short-term, the US TPS in fact means granting an amnesty to... immigrants unable to return home... therefore, the administration should not call it TPS but call it amnesty.'\textsuperscript{160}

Although TPS is usually adjusted into permanent residence in the United States, this requires a 'super majority' in Congress, and can only happen after several years have elapsed.\textsuperscript{161} As such a majority is complex to muster, to overcome this difficulty, Congress usually legislates nationality based Acts, such as the Haitian Refugee Immigration Fairness Act 1998.\textsuperscript{162} EU Member States, like the United States, should realise that local integration can sometimes be the only humane solution resulting from prolonged stays. Consequently, both the EU and the United States should gradually increase the protection and benefits given to temporary protection beneficiaries as the years pass, especially if realistic assessment of return seems impossible, in order to enable human stability and a chance to re-build life following trauma.

Finally, providing financial incentives and aid to returnees may encourage some to return. Nevertheless, both the EU and the United States must act with regard to \textit{de facto} safety, such as the absence of conflict, de-mining and a police and justice system.\textsuperscript{163} If people believe that conditions at home will not permit them to provide for their basic needs, they are likely to opt to stay illegally in the

\textsuperscript{159} Krikorian, \textit{supra} note 47, at 4.

\textsuperscript{160} Krikorian, M, 'Here to Stay: There's Nothing as Permanent as Temporary Refugee', \url{http://www.cis.org/back899.pdf}, 17 August 1999.

\textsuperscript{161} Section 244(h) INA, in principle prohibits any adjustments in status, stating that the Senate 'will not consider any bill, resolution, or amendment that provides for adjustment to lawful temporary or permanent resident aliens status without a super majority of sixty per cent affirmative votes in Congress.'

Therefore, to achieve successful returns, States should, in addition to achieving a *de facto* safety as suggested above, actively invest, in the short and long-terms, in the country of origin's economy, promote reconstruction, help create work opportunities as well as promote and stabilise the principles of democracy. All of these factors will facilitate the way for a lasting peace and enduring returns.

**Concluding Remarks**

Ultimately, the examination presented above highlights that similar terms often carry dissimilar connotations. There seems to be an apparent lack of policy convergence, intentional or not, between the EU and US when addressing the issue of temporary protection policy. In every area examined by this Chapter, both sides of the Atlantic have established their own set of policies when discussing mass arrivals. The conclusion that such legislation does not carry many common themes is unequivocal: first, while the EU temporary protection laws act as acceptance policy, the United States' TPS stresses the need not to act as a magnet, and therefore, TPS only applies to all residents of an assigned country who are present in the United States before a designated date. Secondly, while the adopted Directive is solely concerned with providing protection to individuals escaping civil unrest and political situations, the US TPS is wider in nature and allows designation of TPS to those who are also fleeing natural disasters as well as 'extraordinary and temporary conditions'. Thirdly, where the adopted EU Directive pushes for some basic obligations concerning the minimum standards to be granted to individuals, such as limited access to the labour market, social assistance, housing and family reunification, the US TPS legislation does not entail any social rights, except for the unconditional work authorisation, to which

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164 Ibid.
an individual must pay the appropriate application fee.\textsuperscript{165} Fourthly, whereas the EU permits a maximum of three-year designation of temporary protection policies, the US statute provides for initial period of six to eighteen months, without, however, limiting the number of times TPS could be extended. Finally, where the United States unconditionally allows to apply for asylum, either during or after the expiration of TPS policy, the EU provides a rather unclear position on the matter, stating that while an individual may apply for asylum, Member States may suspend the examination of the asylum claim. Hence, it emerges from the discussion thus far that the only two similarities which the programmes share are that in essence there is little democratic accountability for the establishment of the temporary protection policy, and secondly, both policies do not provide for comprehensive return programmes, although subsequent developments in the EU arena address this matter.

In the EU arena, the Commission has stated that temporary protection in the event of a mass influx as proposed in the adopted Directive is not a third form of protection, alongside refugee status on the basis of the Geneva Convention and subsidiary protection, since if it were, the consequences would be to undermine the Member States’ international obligations.\textsuperscript{166} However, while this is a necessary and meaningful safeguard, the fact remains that the adopted Directive does not constitute a sufficient guarantee that the actual implementation of its provisions will not obstruct refugees from being adequately protected in practice.

\textsuperscript{165} As shown above, the right to emergency health care as well as the right to education are driven from other statutes and judicial principles, and are not discussed within the TPS legislation itself.

\textsuperscript{166} Adopted Directive, Point 10.

Similarly, it has been contested that: ‘temporary protection is not to be considered as a substitute for Convention status or other forms of protection, but is to be a measure taken in mass influx situations when individual determination is logically not possible.’ van Sehn, J, ‘Temporarily Protecting Displaced Persons or Offering the Possibility to Start a New Life in the European Union’, European Journal of Migration and Law, Vol.3 (2001), at 29.
ECRE's Information Note points out the deficiencies of the adopted Directive.\textsuperscript{167} It states that the adopted Directive lacks any comprehensive solution to deal with situations of \textit{sudden} mass influxes that would overburden national asylum systems. The authority for that comes directly from the text of the adopted Directive itself, which only indicates a situation of mass influx by way of an example for the exceptional character of temporary protection, but not as a prerequisite. Thus, there is a danger that temporary protection might be used in situations where the granting of refugee status or another form of international protection is the more appropriate response. Also, the adopted Directive does not ease admission to the territory of the EU for persons arriving outside evacuation programmes, nor does it prevent the imposition of non-entry measures on nationals from countries experiencing large refugee outflows. Many core measures, such as access to the labour market and the processing of asylum, have been left to national laws to decide, and therefore, there is no complete cooperation. Ultimately, while the adopted Directive stresses the general goal of return, it does not provide for any co-ordinated return scheme.\textsuperscript{168} One cannot simply overlook the fact that any temporary protection legislation would be unsuccessful unless the underlying affairs resulting in human suffering are tackled. North/south wealth disparities, continuing violence and instability mean that immigration is only likely to increase, if no solution is sought for these problems. Safeguarding human rights is critical in enabling individuals to return home. Any forced repatriations, which do not take true account of safety and living conditions in the country of origin would go against everything the adopted Directive aims and stands for, meaning, the well-being of those in need of international protection. As a crisis in one part of the globe affects in one form or another all of its other parts, only a unified, international effort at all levels--


\textsuperscript{168} See also: 'Opinion of the Committee of the Regions on the 'Proposal for a Council Directive 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 C357/7. But note the above discussion on cessation of status and return.
governments, civil societies, international organisations, the legal profession, and non-governmental organisations (NGOs)—can be described as the appropriate tool with the sufficient weight for truly pushing forward towards achieving and preserving such stabilisation.

Bearing in mind the possible influence this adopted Directive might have internationally, at various stages it has been pointed out that the EU has not been very successful in improving the final draft of the adopted Directive since its first initiative back in 1997. It seems that EU leaders did not realise the potential impact the adopted Directive could have worldwide, being the first uniform and comprehensive acceptance legislation of its kind for situations of a mass influx. The adopted Directive, unfortunately, fails to touch some of the core issues, as described by ECRE. Yet, the positive aspects of the adopted Directive are indeed praiseworthy. The fact that potential rights are granted, such as family reunion, employment, housing and social provisions, is already something to cherish. That too, might have considerable potential consequences in the international field, urging other countries to grant at the least those same rights. These entitlements, even at their minimum, are comprehensive, and thus they form an enormous improvement in policy than the ‘no guarantees’ approach afforded before.

In the United States, TPS creates an alternative relief to foreign nationals who do not meet the requirements for relief under established refugee law, but who nevertheless fear returning to their countries. ‘The TPS programme is a benefit programme, designed to encourage [foreign nationals]... to come forward and register with the INS. Thus, aliens granted TPS are given work authorisation and are not deportable for the effective period of the designations.’

The statute does not intervene with the Attorney General’s sole and non-reviewable discretion for granting TPS. Moreover, the legislation does not contain any provisions for re-examination of decisions made or denied. Hence, there are

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169 ECRE, supra note 167.
two possible hazards in such a system. First, the Attorney General’s office does not hold detailed information on the conditions of different countries whose citizens warrant the protection of TPS, it is the State Department that has this information, however, the INA does not stipulate any connection between the two departments. Therefore, there is a real danger that the Attorney General may not be aware of the prevailing conditions in some countries. Secondly, there is a risk that the decisions made will be judged on a ‘more political than anything else’ basis. This latter concern, as discussed above, indeed became a reality when foreigners fleeing Haiti or Burundi, for instance, were left with no relief. As a result, there is a need for more accountability and less discretion for the Attorney General’s role in the decision-making process, in order to avoid the same allegations advanced with regards to EVD and DED.

Moreover, the practice of eligibility for TPS is somewhat unfair. TPS does not provide an answer for those who flee their country of origin as the crisis unfolds. TPS will only be granted to persons who are within the United States. Those coming after the cut-off date, though facing the same risks and harms, could be deported. Hence, people may not be admitted into the United States for the sole purpose of applying for TPS benefits. As discussed, US officials reason this practice as deterring the ‘magnet effect’. Still, it is argued that any such considerations should take account of the fact that the current practice can result in persons, who arrived into the United States for purely economic reasons, being able to apply for TPS benefit since they were within the United States at the designated date, while those who are truly in need of protection will be denied entrance for they came after the cut-off date.

Finally, as debated earlier, there is no limit on how many times TPS can be conferred. Hence, the initial period of six to eighteen months appears reasonable;

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170 Seltzer, supra note 51, at 789.
171 Seltzer, supra note 51, at 798.
however, in practice people can possess this status for years.\textsuperscript{172} This is indeed questionable since, as shown above, TPS does not confer many basic social rights on individuals.

In conclusion, both sides of the Atlantic have thus far adopted distinct solutions for dealing with the identical dilemma of mass influx. However, since the United States does not have a comprehensive acceptance policy within its borders that deals with situations of mass influx, it is hoped that if it were to go ahead and legislate one, the adopted EU Directive, which carries a collective Community power, would have a considerable weight on the policy’s decision-making process, particularly where common problems are faced in the international arena. This indeed would be a welcome starting point. Nonetheless, it is crucial to note that in order for any such American system to succeed in establishing a coherent regime which consists of a humanitarian response and a truly TPS, it must address solutions to the points where the adopted Directive falls short of reasonable standards. For instance, such a procedure must be triggered not only through the commencement of civil wars, revolutions and crossfire between hostile factions, but also by natural disasters. Similarly, such a system must maintain the guarantees of an unconditional access to the asylum procedures as seen in the current US system, these practices being just two examples among some other commendable ideas of the current US TPS mentioned above.

Conclusions: Common Goals, Different Means

In December 2001 more than 140 countries gathered to celebrate the 50th anniversary of the Geneva Convention, thereby confirming its importance in providing protection for refugees. Nevertheless, during the 1990s, both the political agendas of the European Union (EU) and the US were forced into reforms resulting from the increase in numbers of asylum claimants. This growth in asylum applications transcribed into extensive and somewhat limiting alterations of the old asylum system, which seemed to be ill-equipped to handle our transnational, globalised world of 2004. It appears clear, however, that while civil wars, oppression, armed conflict as well as ethnic, religious and cultural antagonism are part of our history, they also present a permanent obstacle to our future. Thus, the question to be assessed for the areas examined by this research, is whether there is any evidence of a meaningful or official co-operation and exchange of policies between the United States and the EU in light of EU policy convergence and US security concerns?

Since refugee movements directly or indirectly affect every nation, it would be wise to seek a universally binding solution across the Atlantic. Yet, as constantly discussed in this thesis, while the end result-- that of reducing the numbers of asylum claimants through the operation of an effective and speedy asylum adjudication system which dissuades abuse-- is the same for both the EU and the United States, the means of achieving these objectives, as seen in each Chapter and as concluded below, are sometimes at completely different ends. Clearly, as argued thus far, it is critical to remember that the use of immigration tools, which emphasise border controls and the need to monitor migratory movements,

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2 Da Lomba has also noted that: ‘There is little doubt that cutting down the number of asylum seekers has become a priority...’ Da Lomba, S, The Right to Seek Asylum in the European Union, Intersentia, 2004, at 169.
overlooks the fundamental difference between immigration and asylum policies as the latter are concerned with the need to provide international and humanitarian protection rather than controlling migratory movements.4

1. An Overall Perspective: Deterrence Considerations and a Security-Oriented Approach

As examined by this study, the EU asylum regime was initiated as a counter response to the vision of a border-free EU. EU Member States, motivated by an apparent loss of control over the free movement of third country nationals within the EU’s territory, underlined the policy of safeguarding internal security in negotiating common policies. This approach was particularly observed in the conclusion of the Schengen Agreement, the Ad Hoc Group on Immigration instruments, Dublin II and Title IV’s ‘flanking measures’, all of which realise the freedom of movement aspiration through the adoption of ‘appropriate measures with respect to external border controls, immigration, asylum and the prevention and combating of crime’.5 Thus, asylum policies, which aim at providing international protection, are instead shaped by immigration objectives which highlight border controls.6 Unfortunately, the anxiety of losing State sovereignty and border controls still directs the decision-making process; this is especially seen in the recently adopted domestic legislation opening the door to (indefinite) detention of individuals7 as well as with the response to the 11 September 2001 terror attacks, where the ‘vision of territorial protection appears to be informing

3 'America and Europe share political and security interests... conflicts often revolve around means and do not concern goals...' Neuhold, N, ‘Transatlantic Turbulences: Rift or Ripples?’, European Foreign Affairs Review, Vol.8 (2003), at 460.
4 For a similar argument, see: Da Lomba, supra note 2, at 16, 106.
5 Article 61 EC; Article 2 TEU. OJ C340, 10 November 1997.
6 Da Lomba, supra note 2.
the relationship of terrorism, borders and movement of persons. As argued, in such an atmosphere, refugee claims and protection of human rights are secondary to the primary objective of reducing uncontrolled immigration.

The constant struggle over sovereignty powers and the ability to influence Community level decision-making after thirty years of negotiations still persists and was explicitly seen in the lack of consensus regarding the introduction of a qualified majority voting system in the European Council at the Treaty of Nice in 2001. Thus, the draft Constitutional Treaty points to the somewhat delayed logic that in order to truly develop comprehensive and workable common policies, the transfer to a qualified majority voting is inevitable. Indeed, the draft Constitutional Treaty was summarised as 'intending to take the Union forward', responding to the need for a 'sounder and better structured institutional framework.' The failure of achieving an agreement was alleged to bring the 'European integration project to a halt.' Consequently, the recent explicit recognition of the importance of the prompt adoption of the Constitutional Treaty and indeed the successful conclusion of the final Constitutional Treaty text is of central importance.

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10 Treaty of Nice, OJ C80/1, 10 March 2003.


13 Ibid., at 3.

14 Romano Prodi, supra note 12, at 4.

15 European Commission, 'Area of Freedom, Security and Justice: Assessment of the Tampere Programme and Future Orientation', COM(2004) 4002 Final, at 16; and Council Document, CIG 85/04, 18 June 2004. One of the Irish Presidency priorities was to push the Constitutional negotiations and final agreement forward. However, new decision-making procedures will not enter into force until the entire Constitution has been finalised and approved by national parliaments or referendum, which is likely to be in 2006 at the earliest. See: UK Refugee Council Briefing on the Common European Asylum System, March 2004, at 5.
It has been argued lately that the United States 'still favours immigration, but is less welcoming of immigrants.' This statement surfaces as particularly genuine through calamities such as 11 September 2001 attacks which not only positioned security considerations back onto the front page, and revealed the challenges in balancing domestic concerns with humanitarian commitments, but also resulted in the conclusion of strict legislation and obstructed favourable laws toward asylum applicants from being adopted. The newly adopted Homeland Security Act 2002 shifted the immigration debate toward better ways to prevent attacks within the United States, reduce vulnerability to terrorism and minimise the damage from potential attacks. The Homeland Security Department (HSD) included, as a top priority, the total unification of the Immigration and Naturalisation Service (INS). Thus, the INS, which dealt with asylum claims, has been listed as one of the three offices in the newly created security-oriented department. Despite the fact that the Homeland Security Act 2002 took effect on 23 January 2003, allowing a year's time to implement its plans for creating the HSD, it has been debated that it will take years to fully establish the latter. Consequently, the efficiency and sensitivity of the HSD in considering future asylum applications is left to be determined. Thus far, however, it has been argued that the new re-organisation has merely resulted in heavier bureaucracy, an immense challenge to co-ordinate between HSD organisations and the different


18 As was seen in the discussions concerning the USA PATRIOT Act 2001 (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, 115 Stat. 272) and the Refugee Protection Bill of 2001 (S.1311, 107th Congress (2001)), respectively.


governmental offices, longer processing of applications, and an even greater
difficulty in understanding the system and how it functions.22

On top of this fundamental administration re-organisation, the terror attacks on
the United States have provoked 'searching examination of US current policies.'23
Thus, in an atmosphere of constant terror threats, mandatory detention of any non-
citizen who the Attorney General certifies as a terrorist suspect have become the
common standard.24 Yet, as argued in this thesis, even prior to these atrocious
terror attacks, the seeds of a modern regime, which is security-oriented, restrictive
and suspicious in accepting and integrating those in need, had been planted.

While the development of narrow policies on both sides of the Atlantic have
been legitimated publicly by the desire to disentangle mixed flows and thus
preserve asylum for those in real need, in practice, any such legislation is
completely indiscriminate in its effects. Hence, such measures, namely, limited
application of non-refoulement, detention and limited social and economic rights,
are likely to prevent, deter or punish the entry of legitimate refugees as economic
migrants.

1.1 The Refugee Definition

As hinted in this thesis, the formal role of the United Nations High
Commissioner for Refugees (UNHCR) in the application, interpretation and
policy-making of refugee law is rather marginal. This is not to say, however, that
the EU nor the United States is out of step with international standards, since the
UNHCR's position around the developed world has always been that States have

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24 For instance, USA PATRIOT Act, §411 (Definition relating to terrorism), §412 (Mandatory
detention of suspected terrorists-- allowing the Attorney General to indefinitely detain anyone
he or she 'certifies' as a threat to national security).
the final responsibility toward refugee status determination. Yet, from the various (and limited) interpretations given to the Geneva Convention, it is apparent that the UNHCR must be allowed to monitor, analyse and intervene where negative developments are embraced by the developed countries. Unity of the term 'refugee' will only be promoted in the EU and US if States will be willing to accept the UNHCR's supervisory role and further strengthen it by taking note of any recommendations the UNHCR may have.

Whereas the Geneva Convention does not create a centralised body or prescribe binding guidelines for implementing refugee law by nation States, to promote greater uniformity and to ensure that fundamental principles are respected, the UNHCR issued a Handbook on Procedures and Criteria for Determining Refugee Status. Although the UNHCR Handbook is not binding, as discussed, both the EU and United States make occasional reference to this Handbook as an instrument designed to assist in interpreting the Geneva Convention definition. Such international collaboration, emphasising the importance of the Geneva Convention across the Atlantic, is indeed a welcome step.

As deliberated in this thesis, attempting to provide a clear-cut definition of the term 'refugee' is an impossible task since the refugee definition is a live concept,


regularly developed to address new urgencies as these may arise. Yet, what is evident from the discussion put forward is the fact that balancing States’ interests with asylum seekers’ protection is paramount on both sides of the Atlantic. On States behalf, the ‘politics of protection’ include considerations of time and monetary expenditures both in terms of processing asylum requests and repatriating failed asylum applicants. In addition, the fact that the process of asylum claims adjudication is a sensitive task due to peculiarities of assessing the credibility of stories set in different places and in different languages, makes the asylum system exceptionally vulnerable to fraud and abuse in both the EU and the US. As international refugee law stands, refugee protection is a limited exception to the general norm that States have the right to exclude non-nationals. Consequently, this thesis fully recognises that some individuals undeniably try to manipulate asylum claims to gain economic betterment. However, for genuine asylum claimants, ‘the stakes in refugee cases are grave; an incorrect decision can lead to a person’s detention, torture, execution, or other severe human rights violations.’ Therefore, in carrying such a balancing exercise on either EU or US territory, the standard of a case-by-case examination which embodies a liberal attitude to the refugee definition and a tolerant meaning of persecution is clearly significant. Equally, efficient decision-making, which consists of qualified and well-trained personnel who have the authority to enforce decisions, will bolster the confidence and public reliability of the asylum framework and result in a trustworthy balance of interests.

At present, the independence of the EU and US systems in interpreting the Geneva Convention is indisputable. While there is a mutual support for the proposition that asylum is a State privilege rather than a right an individual enjoys per se, the US promotes a somewhat relaxed interpretation of the grounds of

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29 Busby, supra note 25, at 33.

persecution, whereas only recently the EU was successful in achieving policy convergence.\textsuperscript{31} Likewise, where the EU advocates for a wide interpretation of the term ‘persecution’, US practice, despite the fact that the law itself provides for a similar broad interpretation, indicates to the contrary, imposing a high burden of proof on asylum applicants, and promoting the practice of interdiction on the high seas.\textsuperscript{32} However, there are two queries to be addressed. First, an assessment needs to be undertaken of whether the borrowing of case-law and arguments is a realistic option, by either side, when faced with similar dilemmas? Secondly, what the consequences of such policies might be, especially once the European Court of Justice becomes involved in adjudicating these matters?

Regarding the first question, based on past experience, it seems that borrowing of principles between domestic courts in the different Member States and among the different circuits within the United States occurs more frequently than the need to turn to ‘outside’ jurisprudence.\textsuperscript{33} The fact that none of the EU Member States

\textsuperscript{31} It is interesting to note that Article 18 of the EU Charter of Fundamental Rights recognises a right to asylum (see: Charter of Fundamental Right of the European Union, OJ 2000 C364/1). Article 18, however, stipulates that the right to asylum shall be guaranteed with due respect for the Geneva Convention, the 1967 New York Protocol and in accordance with the EC Treaty. Hence, the generous wording of the Charter must be read with its reference to the latter instruments thereby suggesting that Member States’ obligations do not go beyond those arising from the Geneva Convention. It is left to be seen, however, if the EU will depart from the current understanding, namely, that asylum is a humanitarian exercise rather than a legal duty imposed by an individual’s right to asylum, and adopt the permissive language incorporated into the Charter once the latter enters into force.


\textsuperscript{33} ‘The Courts of the United States provide an exception, relying almost exclusively on domestic cases.’ Feller, Türk, and Nicholson, \textit{supra} note 28, at 268. For a rare example of peering beyond US borders see the BIA’s mention of \textit{Islam and Shah (Islam v. Secretary of State for the Home Department} and \textit{R v. Immigration Appeal Tribunal} and \textit{Secretary of State for the
has exactly duplicated US policies thus far may indicate a small resistance to US understandings of refugee law. Therefore, it can be argued that if reading and analysing cases, for instance, is to take place by the Court of Justice in interpreting EU legislation, such practice will first scrutinise the EU arena itself, and only secondly refer to the international field.\(^{34}\) This argument is strengthened by the common practice which interprets the refugee definition based primarily on political considerations and public opinion, while human rights needs seem to be of secondary interest.\(^{35}\) Therefore, what seems to be right in the United States will not necessarily work in the EU due to different political and cultural considerations, especially where each Member State is left with wide margins to interpret its own understanding of the Geneva Convention and EU laws.\(^{36}\) To date, it appears that both sides of the Atlantic recognise this fact by not attempting to officially co-operate in terms of providing an internationally unified definition and practical guidelines. As a result, it is left to be observed how the collective Community legislation is to be defined and put into practice.

Nevertheless, the argument remains that the Opinions of Advocates General, especially those coming from common law countries, allow the examination of other jurisdictions when faced with a problematic interpretation of laws.\(^{37}\) Consequently, as Opinions are delivered under the Advocates General own responsibility, the latter seem to have more latitude ‘to take radical positions than

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\(^{35}\) Indeed, Professor Goulbourne argues that judges may be influenced by public concerns about the influx of refugees, thus changing the definition from one case to another. Goulbourne, S, ‘Refugees, State Sovereignty and the Geneva Convention’, \textit{Immigration and National Law and Practice}, Vol.14 (2000), at 214. Also see: Da Lomba’s argument in note 2, \textit{supra}.

\(^{36}\) In the US arena, for example, a recent House of Representatives Resolution expressly stated that ‘judicial determinations regarding the meaning of the laws of the United States should not be based on judgments, laws or pronouncements of foreign institutions.’ \textit{House Resolution 568, 108th Congress, 2nd Session, 17 March 2004}.

\(^{37}\) Tridimas, \textit{supra} note 34, at 1359.
judges, who must reach a compromise with their peers', and therefore, there is a chance that US jurisdiction will be noted by the Court of Justice. Ultimately, such an argument is strengthened through the recent example of the Charter of Fundamental Rights, which has slowly been inserted into EU jurisdiction by numerous Advocates General.\(^39\)

Finally, if the weight of Community decision-making, namely, the Court of Justice, is to appeal to the United States for guidance, there seems to be a real risk that, as constantly observed in the thesis, restrictive asylum policies, such as limited social rights, incarceration and interdiction on the high seas, will have a greater tendency to spread than any positive definitions and obligations towards asylum claimants.\(^40\) Thus, the fear is that if EU Member States were to look to the United States for assistance they will readily agree to accept some of the Supreme Court's objectionable decisions, scrutinised in this thesis, rather than acknowledge some of the admirable practices the US system has to offer. Unfortunately, an example of this genuine anxiety is already seen through the common practice both in the US and the EU to view asylum from a security-oriented approach, as well as from the shared goal of reducing asylum applications, through, for instance, reliance on incarceration and deterrence policies.


\(^{40}\) For example, as discussed in the thesis, interdiction on the high seas was initially developed as a response to the growing numbers of Haitian refugees coming to US shores. Worryingly enough, however, the extended use of such negative policies was recently observed in Australia, where the Australian government refused the entry of a Norwegian vessel, the *MV Tampa*, carrying some 433 asylum seekers in distress to its Christmas Island. See: Pallis, M, 'Obligations of States Towards Asylum at Sea: Interactions and Conflicts Between Legal Regimes', *International Journal of Refugee Law*, Vol.14 (2002) 329.
1.2 The Socio-Economic Rights

Deterrence policies commonly used worldwide have focused on reducing the privileges and entitlements available to individuals claiming asylum. The EU interaction did not escape unharmed and neither did the US welfare reforms which took place in 1996.41

The grant of material reception conditions is an area that bears a great deal of resemblance between the EU and United States asylum laws. Throughout this study, it became clear that on both sides of the Atlantic foreign policy and heavy domestic pressure, resulting from public aversion toward asylum claimants, contribute to framing the adopted legislation governing asylum. Accordingly, it appears that both sides attempt to legislate as narrow policies as possible, although the different understandings and weight given to various international human rights instruments prescribed somewhat dissimilar responses.

It has been contested that 'it is doubtful whether the [EU Reception Conditions] Directive has raised the minimum standards in the Member States with the lowest standards...'.42 As discussed, social assistance, education, housing and health care provisions are all a half-hearted attempt to satisfy existing international obligations and thus they are all granted at their bare minimum. For its part, the United States is reluctant to confer any rights, with a view to discouraging fraudulent asylum applicants. Hence, whereas the United States promotes a 'self-help' attitude, the EU still allows for some benefits to be bestowed on individuals while their asylum claims remain pending. Yet, both sides of the Atlantic seem to unofficially agree that deterrence, concluded in the form of lack of (US) or limited (EU) social benefits, is the best way forward in reducing asylum claims.


It is evident from the EU-US comparison undertaken by this research that the growing practice of detention is currently more acceptable than ever before. While most asylum seekers are already detained by the reformed statute in the United States, and therefore, the general lack of social benefits to asylum applicants can only be reasoned as the direct result of such practice, in the EU, prolonged detentions are still an experimental instrument for a deterrence policy, seen in a concealed form, either as reception or accommodation centres. Consequently, social benefits are more easily granted in EU Member States in the meantime.

The success of deterrence policies in the form of limited socio-economic rights (or lack thereof) and detention is questionable. As discussed, the fact that governments need to find more detention spaces, build new ‘accommodation’ centres and resort to prisons for additional beds, indicates that there are individuals who truly are prepared to accept any form of ‘freedom’ away from persecution. Similarly, the lower statistic of asylum applications in recent years does not necessarily point to the success of deterrence policies. It is probable that tough asylum policies have deflected potential asylum seekers into a life underground; by reducing the gap between the rights and benefits a State offers and the relative freedom of living outside the law as an illegal, States may have encouraged legitimate refugees to abandon the asylum system altogether. In sum, there is an overwhelming case for concluding that policy changes in the EU and United States have intentionally harmed the interests of refugees.

The question, however, is whether such a deterrence goal can be viewed as the influence of one policy over the other? In practice, there are no signs that attest to any such move, although there is a viable and regular cross Atlantic exchange of information and operational ideas relating to asylum policies seen through the Intergovernmental Consultations on Asylum, Refugee and Migration Policies


As the IGC process does not require participating members to reach common positions or be bound by resolution or decisions, it seems that the EU integration and its aim of restrictive policies is the pure result of Member States' experiences and answers to the problems presented by the large numbers of asylum claimants in their territory. Equally, in the United States, the 1996 welfare reforms and the Illegal Reform and Immigrant Responsibility Act 1996 were the direct response to a dysfunctional system involving an ever high blockage in the asylum application system combined with a public outcry concerning social benefit expenditure, not due to any limited policy co-ordination which took place across the Atlantic at that time.

1.3 The Temporary Protection Regime

Temporary protection legislation is where the clearest divergence in policies is observed. The essence of what a temporary protection regime should mean is interpreted inherently differently in the EU and in the United States. As discussed, the EU leaders negotiated the first uniform and comprehensive acceptance legislation of its kind for situations of mass influx. The approach of granting minimum and unified rights such as family reunion, education, housing and social provisions, as well as facilitating access to the employment market, which currently carries a Community weight might have considerable consequences in the international field, urging other countries to follow suit. As debated, these entitlements, even at their minimum, are extensive, and thus they form an enormous improvement in policy than the 'no guarantees' approach presented before.

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45 Among the IGC participants are: United States, Austria, Belgium, Denmark, Finland, Germany, Ireland, the Netherlands, Spain, Sweden and the UK, thereby creating a representative forum of EU Member States and the United States in exchange of asylum data.

46 Private Correspondence with Mr. Gerry Van-Kessel (Co-ordinator), 9 June 2004, on file with author.


48 Again, this is so despite the IGC’s existing dialogue where both EU Member States and the US explicitly discuss temporary protection legislation.
Unlike in the EU, the United States does not have any comprehensive acceptance policy within its borders that deals with situations of mass influx. Rather, its response to mass influx, known as temporary protected status (TPS), creates an alternative relief to individuals who do not meet the requirements for assistance under established refugee law, but who still fear return to their countries. TPS in the United States, in contrast to the EU approach, does not provide an answer for those who flee their country of origin as the crisis unfolds; it is only granted to persons who are already within the United States.

As demonstrated in great detail in this thesis, the response to the same predicament in the United States and in the EU carries a completely distinct resolution, neither of which is completely satisfactory in addressing the humanitarian concerns brought about with the commencement of a temporary protection regime, since as examined, both policies neglect the issue of return, which ideally must be prescribed clearly by law. Through the vast divergences that strike at the heart of a temporary protection definition and its understanding, however, it is transparent that both systems have a great amount to learn from one another in reaching the ultimate solution to mass influx situations. Commendable ideas from the current US legislation, such as the grant of temporary protection for those fleeing natural disasters as well as political disturbances, its unconditional respect for the right to apply for asylum without any limitations, and its open access to the labour market, need to be combined with the EU perspective of temporary protection, which views temporary protection as an acceptance policy encompassing access to numerous social and economical benefits, as well as addressing the core of temporary protection by providing a strict time limit clause for its application. Only such international interaction would ultimately result in the establishment of a coherent regime which consists of a humanitarian and truly temporary response.

For the moment, however, it must be borne in mind that the greatest difference between the two regimes is the fact that TPS in the United States has already been put into practice on numerous occasions, thereby allowing the discovery of the policy's imperfections, while the EU’s temporary protection procedure still
remains a mere theory of a possible workable solution. Consequently, it is logical
to argue that if and when the EU legislation would successfully be tested to
accomplish a quick and organised solution to a mass influx situation, only then
would the United States peek and examine the EU garden for seeds which might
rectify the shortcomings of its own system.

2. Looking Towards the Future: Is Partnership an Option?

What does the future hold for asylum seekers in terms of co-operation between
the EU and the United States? No strong explanatory or predictable theory can
chart the future co-ordination, if any, between the United States and the EU. The
emerging EU legislation, which carries the collective weight of the Community,
indicates that the EU wishes to influence the international arena. However, this
does not seem relevant for the United States as asylum policies, in the foreseeable
future, will continue to be governed at the national level. As found in various
parts of this thesis, to date, the influence of earlier EU co-ordination efforts on US
asylum policy appear to have been modest, both because of the limited nature of
the pre-Amsterdam process and peculiarities of the asylum policy in the United
States. Yet, the 11 September 2001 terror attacks and the resulting US military
strikes, highlighted the importance of a humane, rational and coherent policy
toward asylum applicants involving transatlantic collaboration. It has been argued
that co-operation between the United States and the EU will only occur in a
system that involves taking refugees on the US’s part in return for EU support:

\[\text{Increased refugee flows into Europe, will prompt calls from allies for the United States to accept its fair share of new refugees, so fair refugee and asylum policies and procedures}\]

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49 For instance, the draft Constitutional Treaty was designed with an aim to ‘develop the Union into a stabilising factor and a model in the new world order.’ Draft Constitutional Treaty, supra note 11, at ‘Preface’. Moreover, it must be remembered that the instruments examined by this thesis are merely for the first-stage of integration, leading to a more coherent institutional framework, which will be solely based on Commission proposals.

50 See accompanying text of note 33, supra.

will reduce friction at a time when the United States most needs strong bonds with allied nations... 52

Hence, the question to be addressed is whether it can be debated at all that we are witnessing the creation of a relationship concerning anti-terrorism measures and border controls which could evolve into a full debate regarding international convergence of asylum policies, as was initially seen in the EU co-ordination of border controls? Clearly, no answer can be offered at this stage. There are signs that attest to the existence of a common understanding of the need to mutually tackle the risk of terrorism in our globalised arena. 53 But, bearing in mind that over thirty years have passed since the initial integration of freedom of movement within the EU itself started, and still many altercations are left unresolved, combined with the fact that the European Common Asylum System is an ever developing instrument, not yet examined to its full effect, it therefore can be legitimately argued that much time will have to pass until one will see EU and US representatives around the asylum legislation negotiation table.

Ultimately, it is predicted that if we were ever to witness any policy convergence in terms of asylum legislation, this would be the pure consequence of long negotiations, resulting in great compromises and painful tolerance to asylum applicants' needs, and not the outcome of imitation of current policies of either side. The excessive jealousy to safeguard State sovereignty over borders and immigration issues is seen both in the EU and in the US interpretation of recent events and conclusion of legislation. Provided that both sides would accede to make concessions, it would be wise for any resultant dialogue to revolve around the existing international framework in developing any new immigration laws because this, at its best, will be least politically objectionable at home and impose the fewest administrative adjustment burdens. Indeed, as mentioned before, such a

52 Pistone and Schrag, supra note 23, at 6.

53 See: US-EU Passenger Name Record Agreement, OJ (2004) L183/83. Also note the EU Plan of Action on Combating Terrorism (Council Document, 10010/04, 1 June 2004), stating that there is a need to strengthen further co-operation with the US in countering the threats posed by terrorism, requiring a high level policy dialogue on Border and Transport Security, building on solidarity, at Points 1.5 and 1.5.1.
dialogue already takes place through the IGC. Hence, ever since the establishment of the IGC in 1985, issues such as temporary protection policies, asylum determination procedures, return, reception conditions and other operational matters are fully debated. Nonetheless, as the IGC does not require States to reach common positions, but merely forms an avenue for exchange of information and ideas, it is therefore not surprising to find different standpoints to comparable concerns.

It is doubtful, however, whether the refugee regime can survive another ‘race to the bottom’, now involving both the EU and the United States. This, of course, was observed in the EU integration, where no standstill clauses, which prohibit changes to favourable national legislation, were introduced at all. This thesis witnessed, in most instances, the formation of a EU regime whose measures were the direct product of restrictive national policies, projected into Community laws, thus binding on participating Member States.\textsuperscript{54} For its part, the United States was criticised for ‘gross violations of rights’\textsuperscript{55} which have:

‘...seriously damaged US moral authority and goodwill around the world, and delegitimised US efforts to continue promoting Human Rights... As one analyst put it, 'we used to set the standard; now we have lowered the bar...’\textsuperscript{56}

For the meantime, what can be argued with some degree of certainty, however, is the fact that while the EU is negotiating at least some minimum standards for asylum, the United States has chosen a much harsher way, which includes restrictive measures, such as limited application of non-refoulement, indefinite detention and no grant of social or economic benefits. Such a contrast in attitudes towards asylum seekers could place a greater weight on EU shoulders in managing refugee crises, resulting in bitter and tense transatlantic relations.

\textsuperscript{54} It must be borne in mind that EU integration must be qualified in light of British, Danish and Irish ability to opt-out from any undesired legislation.


\textsuperscript{56} Ibid.
Finally, at present, the EU and the United States cannot seem to agree on the need for solving refugee problems mutually, as no indication of any meaningful official co-ordination or any significant influences of one policy over the other in terms of asylum legislation were found by this research.\(^{57}\) This can be asserted as resulting from long standing fundamental misunderstandings and disagreements regarding geopolitical, economic and social values issues.\(^{58}\) More recently, the criticisms put forward by leading EU Member States and the EU itself concerning the necessary response to the war on terror have been described as ‘particularly divisive’\(^{59}\) which might result in both parties choosing parting of the ways for the meantime.\(^{60}\) Yet, in a scenario where domestic propositions do not prove an adequate solution, as seen for instance, in the recent EU discussion surrounding overseas transit centres, it remains to be examined whether the existing US Overseas Refugee Programme, which successfully allows for asylum applicants to be considered from outside the United States, thereby reducing the weight off inland asylum applications, without however, undermining the latter, would help,

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\(^{57}\) Indeed, this finding is further strengthened by the Commission, who stated that the balance that needs to be undertaken is between safeguarding *internal* security and complying with international obligations *within the EU Member States only*. See: Commission Working Document, ‘The Relationship Between Safeguarding Internal Security and Complying with International Protection Obligations and Instruments’, COM(2001) 743 Final, 5 December 2001.


\(^{59}\) Keohane, *ibid.*, at 746.

\(^{60}\) It has been argued that the recent tensions and disagreements between the EU, the US and EU individual Member States regarding issues of war and peace resulting from US’s declaration of war on terror, concluded a scenario where ‘divorce has earned its place in the transatlantic relationship.’ Winward, P, *Britain Between Two Continents? The UK, the EU and the US*, Lecture given to the London European Research Centre and the Institute for the Study of European Transformation, London Metropolitan University, 26-27 March 2004. Similarly, Kovacs has contested that ‘there is a profound transatlantic crisis of confidence... [Remedying it] is the most difficult task in politics, because even when governments are in apparent agreement, it is difficult for each not to suspect that the other is cheating.’ Kovacs, C, ‘US-
at the least, shape EU legislation. Regardless of what the future holds, both sides of the Atlantic must remember, as was observed in the EU context, that:

‘The aim is an open and secure European Union fully committed to the obligation of the Geneva Refugee Convention and other relevant human rights instruments and able to respond to humanitarian needs on the basis of solidarity. A common approach must also be developed to ensure the integration into our societies of those third country nationals who are lawfully resident in the Union’.61

As suggested earlier, this fine objective is something to aspire to not only throughout the EU, but internationally. Unfortunately, the examination thus far submits that things are largely ‘easier said than done’. The future is impossible to predict without the knowledge of the past submitted above. And yet, one thing can be said with a great degree of certainty: ‘freedom through control’62 is a paradox running through the recent history of asylum laws on either side of the Atlantic. The exceptional need for considering the unique balance between ‘freedom’ and ‘control’ is now more evident than ever before with the war on terror being at its peak. As the EU and United States currently rationalise restrictive immigration policies as being the direct response to the fight against terrorism and abuse of the institute of asylum, it must be borne in mind that refugees are not the perpetrators of harm, but mostly its victims and therefore, asylum seekers should not be confused with threats to internal security. Disregarding such momentous facts can result in the EU and United States conveniently forgetting their human rights obligations. Hence, asylum law is unquestionably a work in progress that requires constant advocating, reminder and a detailed scrutiny.63 Both sides of the Atlantic

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‘Throughout history, the refugee regime has reflected the evolution of the international system and its complex interplay of ideology, economics and balance of powers of politics—remains to be seen where such considerations will lead the refugee regime in the turbulent years to come.’
are urged to mutually re-examine their approach to international protection policies in the light of a humanitarian spirit of solidarity and the need for policy interaction in resolving current difficulties associated with the asylum system. Considering that both systems are founded on the full respect for the Geneva Convention, mutually accept the UNHCR advisory role, have an existing forum for exchange and imparting of immigration and asylum ideas and policies, as well as explicitly recognise the need for common security measures in the war against terror, may indicate, that where the political will exists, reaching the goal of framework policies collaboration should not prove to be an immensely complicated task.
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Special Note

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### Annex I

**New Asylum Applications Submitted in Industrialised Countries, 1982-2001**

*Source: UNHCR Statistical Yearbook 2001.*

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  - 92,410 | 69,535 | 96,044 | 157,717 | 199,938 | 162,613 | 205,114 | 265,741 | 400,315 | 509,489 | 2,172,200

- **Western Europe**
  - 90,645 | 77,571 | 103,719 | 153,248 | 207,206 | 182,140 | 232,442 | 314,369 | 440,773 | 535,691 | 2,375,405

- **Central Europe**
  - 100,431 | 78,880 | 105,917 | 169,250 | 221,207 | 185,400 | 237,979 | 317,333 | 447,597 | 570,727 | 2,414,681

- **Europe**
  - 100,431 | 78,880 | 105,917 | 169,250 | 221,207 | 185,400 | 237,979 | 317,333 | 447,597 | 570,727 | 2,414,681

- **North America**

- **Australia/New Zealand**
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*Source: UNHCR Statistical Yearbook 2001.*
### Annex I, continued


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  - **Central Europe**
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- **Central Europe**
- **South America**
- **North America**
- **Australia/New Zealand**

[252]
# Annex II

## Cases Pending at the End of the Year in Industrialised Countries, 1982-2001 (First Instance)

*Source: UNHCR Statistical Yearbook 2001.*

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- Europe: 558,400 372,200 185,910 188,711 129,704 121,769 163,680 238,407 235,307 236,999
- North America: 234,013 553,599 441,538 450,440 475,383 427,126 381,548 387,211 358,998 370,524
- Australia/New Zealand: 15,699 10,545 4,615 3,164 4,772 7,039 7,117

Total: 729,571 723,983 627,504 598,941 516,258 553,677 584,677 611,886 901,823 914,663