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Editorial Office
Janskerkhof 3
3512 BK Utrecht
The Netherlands
Telephone: (+31 30) 253 80 33
Telefax: (+31 30) 253 71 68
E-mail: sim@law.uu.nl
http://www.law.uu.nl/english/sim

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PART A: ARTICLES

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

HANNAH R. GARRY*

ABSTRACT

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

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

1 INTRODUCTION

1.1 *The Context of Forced Migration Flows in Europe*

Since the mid-1980s, the annual number of applications for asylum in the European Union dramatically rose from 200,000 in 1986 to 696,500 in 1992.[1] The numbers dropped to 227,000 by 1997 but began rising again to 334,000 in 2001.[2] The majority of the increased numbers has largely been generated within Europe itself from Romanian and Bulgarian asylum seekers in 1992 and from the Balkans throughout the

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* Juris Doctorate (JD), UC Berkeley, 2002; MIA, School of International and Public Affairs (SIPA), Columbia University 2001; Master's Certificate, Refugee Studies Programme, University of Oxford, 1996; B.A., Wheaton College, IL, USA, 1995. Many thanks to Dr. Marcos Martiniello, Maître de Recherches, F.N.R.S. Science Politique, Centre d'Etudes de L'Ethnicité et des Migrations, Universite de Liège, Belgique, for inspiring the writing of this paper and for his critique and insightful comments.

1 Kumin, Judith, 'An Uncertain Direction', *Refugees Magazine*, Vol. 113, 1999, p. 2, http://www.unhcr.ch/pubs/rm113/rm11302.htm.

2 Report on the Commission Working Document Entitled 'Towards Common Standards on Asylum Procedures' [hereinafter 'EP Report'], *European Parliamentary Document* (A5-0123 final) 10, 2000. PDU/UNHCR, 31 January 2002.

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1990s.[3] There has also been a growth in the number of applicants from former European colonies in Africa, Asia, and the Middle East. Before this time, refugee flows into Europe were relatively stable and controlled with fewer than 100,000 applicants annually.[4] 70 percent of these were coming from East Europe and were integrated fairly easily. At this time, 'the European countries acted as if it were their moral, as well as political, duty to help every victim of a totalitarian regime who came knocking at the door' in the context of the Cold War.[5] However, with the demise of the Cold War in Eastern and Central Europe, with increased forced migration of persons for reasons not solely related to individual persecution or abuse of civil and political rights, and with the increased mobility of persons as a result of greater ease in transcontinental travel, Europe began to witness an increase in the number of applications for asylum.[6]

Reacting to the influxes of the 1980s, European States began to implement and coordinate policies to control entry of asylum seekers such as the 'first country of asylum', 'manifestly unfounded claims', 'safe country of origin' and use of visa requirements as 'gradually a fear of invasion developed in Europe'.[7] Along with these restrictions, dubious policies of containment and 'safe havens' were also used to control the refugee flows from coming out of the Yugslav crisis and thus contributed to the decrease in asylum applications in 1993.[8] A 'demonisation' necessary for the legitimisation of questionable policies began in earnest in the late 1980s. Asylum seekers began to be constructed on the whole as 'bogus' seekers after better lives rather than 'genuine refugees'.[9] Also, the individual asylum seeker was seen to be 'a profiteer, a potential criminal, an outlaw, perhaps even a terrorist, who posed a menace to order, and to interior and European security'.[10] Thus, by 1992, several governments officially declared a 'zero immigration' policy.[11] Furthermore, steps were taken to deter asylum applications by reducing social benefits, detaining asylum seekers, and applying an increasingly narrow legal definition of who qualifies to be a refugee.[12] In fact, in 1999, it was provisionally estimated that only 5-10 percent of all applications for asylum were admitted within ten European Union (hereinafter 'EU') Member States.[13]

3 Kumin, *loc.cit.* (note 1), p. 3.
4 *Ibidem*, p. 2.
5 *Idem.* Martiniello, Marco and Rea, Andrea, 'The Effects of the Construction of Europe on National Immigration and Refugee Policies: the Case of Belgium', in: Geddes, A. and Favell, A. (eds.), *The Politics of Belonging: Migrants and Minorities in Contemporary Europe*, Ashgate, Aldershot, 1999, p. 166.
6 Geddes, Andrew, *Immigration and European Integration: Towards Fortress Europe?*, Manchester University Press, Manchester, 2000, p. 28.
7 Martiniello and Rea, *loc.cit.* (note 5), p. 168.
8 Levy, Carl, 'European Asylum and Refugee Policy After the Treaty of Amsterdam: the Birth of a New Regime?', in: Bloch, Alice and Levy, Carl (eds.), *Refugees, Citizenship, and Social Policy in Europe*, St. Martin's Press, New York, 1999, p. 17.
9 Harvey, C.J., 'The European Regulation of Asylum: Constructing a Model of Regional Solidarity?', *European Public Law Journal*, Vol. 4, No. 4, 1998, p. 571.
10 Martiniello and Rea, *loc.cit.* (note 5), p. 168.
11 Kumin, *loc.cit.* (note 1), p. 2.
12 *Ibidem*, p. 4.
13 EP Report, *loc.cit.* (note 2), p. 10.

1.2 Towards Regionalisation of Asylum Policy in Europe

Within this climate of control of forced migration within the individual States in Europe, the EU has moved towards harmonisation[14] of asylum policy and procedure as necessary for its pursuit of an 'area of freedom, security and justice' without internal borders for the purpose of greater economic and political integration.[15] On 19 April 2000, the European Parliament articulated several reasons for support of harmonisation including the elimination of disparity in treatment of asylum seekers among Member States and the need to promote burden sharing among Member States.[16] On 11 and 12 December 1998, the Vienna European Council adopted an action plan (hereinafter 'Vienna plan')[17] for implementation of the provisions of a harmonised asylum policy within the EU in accordance with the new Title IV of the EC Treaty as amended by the 1997 Treaty of Amsterdam (hereinafter 'Amsterdam Treaty'). Guidelines were stipulated in the Vienna plan for full implementation of measures on asylum within two to five years of the coming into force of the Amsterdam Treaty in 1999. Also, as the EU enlarges its membership, harmonisation will be promoted through the current stipulation that applicant States adopt basic standards on provision of asylum as agreed upon by the Member States.

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

14 The 1994 Communication from the European Commission, para. 33 defines harmonisation as 'the development of common rules and practices'. According to the 1991 Report from the Ministers responsible for immigration to the European Council, harmonisation is 'not (...) an end in itself but as a means of re-orienting policies where such action makes for efficiency and speed of intervention'. Selm-Thorburn, Joanne van, 'Asylum in the Amsterdam Treaty: A Harmonious Future?', *Journal of Ethnic and Migration Studies*, Vol. 24, No. 4, 1998, p. 630.
15 Art. 2 of the Treaty on European Union [hereinafter 'Maastricht Treaty'] states:

> The Union shall set itself the following objectives (...) to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

16 EP Report, *loc.cit.* (note 2), p. 5.
17 *Ibidem*, p. 4. *Official Journal of the European Communities*, C 19, 23 January 1999, p. 1.

Lodged in One of the Member States of the European Communities (hereinafter 'Dublin Convention') on harmonisation within the EU area.

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

Third, this paper will critique the development of various current policies and practice between the Member States both before and after Maastricht through intergovernmental development of 'soft law'.[18] Such policies include dealing with root causes and the 'right to remain'; deterrence through visas and carrier liability; manifestly unfounded claims and expedited removal; and safe third country lists.

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

2 The Development of Asylum Policy in EU Law

2.1 The Roots of Harmonisation and Burden Sharing

The harmonisation of asylum law in the EU stems from the goal to create an area within the borders of the Member States where full economic integration and freedom of

[18] In use of the term 'soft law' Bank defines it as 'texts adopted on the international level to declare the intention to take certain decisions or to behave in a certain way but without producing any legally binding effects (not ratified Conventions, decisions, resolutions, and recommendations adopted on international conferences or by institutions of international organizations)'. Bank, Roland, 'The Emergent EU Policy on Asylum and Refugees', *Nordic Journal of International Law*, Vol. 68, 1999, p. 1, note 1.

movement are realised.[19] Article 3(c) of the 1957 European Economic Treaty established that one of the intentions for European integration was the 'abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital'.[20] For the most part, States in Europe have preferred to keep asylum policy strictly as a matter of State sovereignty with each country responding in its own way to asylum seekers.[21] However, a 'new logic' has been evolving of 'Europeanisation' of asylum policy via 'elaboration of European resolutions and directives which are then adopted by the nation-states, whether within a Community framework (...) or within an intergovernmental framework (Schengen Agreement)'.[22] This harmonisation process began around the time of the adoption of the 1986 Single European Act (hereinafter 'SEA') in which there was a revival among the Member States to completely realise an internal market as specified by the founding treaties of the EU.[23] Of course, free movement of persons within this internal market has been one of the more problematic areas of implementation.

Around the same time as the adoption of the SEA, the Ad Hoc Group on Immigration met for the first time and recognised that 'lifting the frontiers between Member States to permit people to pass freely cannot take place to the detriment of the security of the population, of public order and of civil liberties'.[24] Thus, liberalisation and lifting of border restrictions for a free movement within a single market resulted in an additional emphasis on security and control[25] of third country nationals. Consequently, this led to the need for coordination of asylum policy due to the consensus that there were abuses of the asylum process for entry into this area of free movement.[26]

Subsequently, the question arose as to whether non-EU nationals such as asylum seekers should still be subject to individual States' border controls within this area.[27] For those countries answering yes, the result was the signing of the Dublin Convention in 1990 (which finally entered into force in 1997) addressing which State is responsible for hearing an asylum application through its own immigration laws.[28] A Member State may

[19] Simpson, Gerald, 'Asylum and Immigration in the European Union after the Treaty of Amsterdam', *European Public Law Journal*, Vol. 5, No. 1, 1999, p. 91.

[20] Wallace, Helen and Wallace, William, *Policy-Making in the European Union*, Oxford University Press, Oxford, 2000, p. 494.

[21] Martiniello and Rea, *loc.cit.* (note 5), p. 167.

[22] *Ibidem*, p. 159.

[23] Article 8(a) of the Single European Act states that the internal market is to be 'an area without internal frontiers in which the free movement of goods, persons, services and capital can be established'.

[24] Council of the European Union, 'Presentation of the Fields of JHA Cooperation: Is there a Need for Cooperation in the Field of Justice and Home Affairs?' (visited 18/04/02) http://ue.eu.int/jai/default.asp?lang=en.

[25] Geddes, *op.cit.* (note 6), p. 1.

[26] Martiniello, Marco, 'European Union Citizenship, Immigration and Asylum', in: Barbour, Philippe (ed.), *The European Union Handbook*, Fitzroy Dearborn, Chicago, 1996, p. 260. The Ad Hoc Group stated that coordination of asylum policy was in order 'to end the abuses of the asylum process in the EC'.

[27] Simpson, *loc.cit.* (note 19), p. 92.

[28] *Idem.*

legally request that another Member State process the application on certain grounds.[29] A major criticism has been that these criteria are inefficient for achieving a common body of rights and obligations with regard to status determination where there are still significant differences between States in applying them.[30] The clear purpose of the Dublin Convention is to 'eliminate abuse of member state asylum application processes through multiple application (asylum shopping)'.[31] For those countries answering no, the result was the signing of the 1990 Schengen agreement (entered into force in 1995) whereby the Member States designed a separate cooperative system of external border controls and procedural visa norms for entry of third country nationals into the Schengen area.[32] With regard to asylum, Schengen implemented the norms for status determination and procedure under the Refugee Convention and 1967 Protocol which were eventually superseded by Dublin. Schengen also established a system for tracking asylum seekers in the boundaries of the Schengen Group.[33]

As demonstrated by the Dublin and Schengen frameworks, the initial stages of harmonisation in Europe were intergovernmental in nature and were primarily 'motivated by the desire to limit numbers and to check fraud'.[34] From the late 1980s to the early 1990s, before the adoption of the Maastricht Treaty officially forming the 'EU', European States participated in a 'growing web of multilateral forums and an explosion of international conferences and meetings on migration in the European region' organised by groups such as the UNHCR, the International Organization for Migration, the Council of Europe, and the Organization for Economic Co-operation and Development (hereinafter 'OECD').[35] This multilateral approach allowed for the sovereign States in Europe to 'take the line of least resistance, adopting the lowest common denominator of agreement' as a basis for future negotiations.[36] Indeed, cooperation at the regional level allowed for Member States to 'slip domestic legal and political constraints' and international obligations for protection for asylum seekers because, at the regional level, 'the scope for political and judicial control is far weaker than at national level and within which the relation to international standards can appear tenuous'.[37]

29 Van Selm-Thorburn, *loc.cit.* (note 14), p. 629. Articles 4 - 8 of the Dublin Convention outline a series of criteria for determining which State shall hear an application including family re-unification; possession of a valid residence permit or visa; and initial lodging of an asylum application among others.

30 Simpson, *loc.cit.* (note 19), p. 92.

31 Koslowski, Rey, 'European Union Migration Regimes, Established and Emergent', in: Joppke, Christian (ed.), *Challenge to the Nation-State: Immigration in Western Europe and the United States*, Oxford University Press, Oxford, 1998, p. 169.

32 Simpson, *loc.cit.* (note 19), p. 92.

33 Dinan, Desmond, *Ever Closer Union: An Introduction to the European Community*, Lynne Rienner Publishers, Boulder, Colorado, 1999, p. 439.

34 Hansen, Randall, 'Asylum Policy in the European Union', *Georgetown Immigration Law Journal*, Vol. 14, 2000, p. 792.

35 Koslowski, *loc.cit.* (note 31), p. 172.

36 *Ibidem*, p. 172.

37 Geddes, *op.cit.* (note 6), p. 27.

2.2 *Intergovernmentalism and the Maastricht Treaty*

The issue of asylum was first explicitly addressed within EU law through the Justice and Home Affairs (hereinafter 'JHA') Council established under the Third Pillar of the Maastricht Treaty. That a coordinated asylum policy was first put under the JHA is worth noting given that cooperation in this area began in the mid-1970s as a response to rising terrorism in Europe.[38] Under Maastricht, asylum policy within Europe continued to be primarily of an 'intergovernmental' nature 'providing for different institutional arrangements and a variety of legal effects'.[39] Under the Third Pillar, almost all asylum policies were termed a 'matter of common interest' among the Member States, but were not governed by the institutions of the European Union via the Community framework.[40] It was possible under Article K.9 (the 'passerelle') of Maastricht for the Council to take unanimous action to move policies in the area of asylum to Pillar One thus 'communitarising' them, but this provision was largely not utilised.[41] The only exception was that of visa policy. Thus far, the Union has adopted binding regulations for a visa format and for a list of countries of origin requiring visas. The latter has a proviso that more countries may be added on a national basis or in compliance with the Schengen Group which demands visas from 129 countries versus the Union's 101 countries.[42]

Within the framework of Maastricht, little was achieved with regard to harmonisation of asylum policy among the Member States primarily because of the requirement of unanimity for passage of measures by the Council and due to the fact that they are not always legally binding. The lack of a clear timeframe for implementation of measures also proved problematic.[43] Under the Third Pillar, the Council had the power to take measures on initiative of the Commission by a unanimous vote through a joint position, joint action, or drafting a Convention. The joint position does not have legally binding effect.[44] The joint action may have legally binding affect if stipulated in the individual decision.[45] The conventions are binding only if ratified by the Member States.[46] The

38 Dinan, *op.cit.* (note 33), pp. 439-440. In December 1975, the Rome European Council agreed to organise a committee known as the 'Trevi Group' from leading officials in the national ministries of justice and the interior to share information with regard to security and terrorism.

39 Bank, *loc.cit.* (note 18), p. 4.

40 The Community Framework refers to the power of the institutions of the European Union, *i.e.* the Commission, the Council, the Parliament, and the Court of Justice, to issue binding measures which all of the Member States must follow. The normal procedure is that the Commission makes initiatives which the Council votes upon after having heard the Parliament. The Court of Justice ensures that the initiatives of the institutions and the Member States are in compliance generally with EU law.

41 Koslowski, *loc.cit.* (note 31), p. 176.

42 Bank, *loc.cit.* (note 18), p. 4.

43 *Ibidem*, p. 9.

44 Only one joint position was adopted entitled the Joint Position of 4 March 1996 on the harmonised application of the definition of the term 'refugee' in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees (96/196/JHA), *Official Journal* L 63 of 13 March 1996, p. 2, as cited in Bank, *loc.cit.* (note 18), p. 6.

45 Recently adopted joint actions include: burden sharing with regard to displaced persons (*Official Journal* C 262, p. 1); airport transit arrangements (96/197/JHA; OJL 63, p. 8); financing of

Parliament was not given a specific role in this process except for the right to be heard on the 'most important aspects' of the decisions. Implementation of the measures could be passed by a two-thirds majority vote in the Council. Finally, the European Court of Justice (hereinafter 'ECJ') had no jurisdiction for review or enforcement under the Third Pillar.

Thus, the Council continued to primarily generate non-legally binding soft law outside of the Third Pillar framework on various asylum issues through conclusions, recommendations and resolutions on matters such as minimum guarantees for asylum procedures.[47] In May 1998, a list of JHA *acquis* under the Third Pillar revealed that 130 legal instruments were adopted after 1992 with only nine being conventions and six being protocols.[48] Prior to this time, the Council had already made statements regarding issues of manifestly unfounded asylum applications; a harmonised approach to host third countries; and safe countries of origin.[49] This preferred approach after Maastricht was indicative of the continuing sensitive nature of border control. Asylum policy was clearly tied to the sovereignty of the Member States as matters of 'high politics'.

2.3 *Supranationalism and the Amsterdam Treaty*

The inefficiency, lack of impact, and increased public support for enhancement of security in the EU antagonised by far right political parties, led to reconsideration of intergovernmentalism as the best approach for implementation of asylum policies.[50] In addition, 'some domestic actors and member states were worried that without harmonization, a patchwork of national standards would lead to contradictory, arbitrary, and unequal treatment of asylum seekers and other migrants across the EU'.[51] The 1996 intergovernmental conference, in negotiating the 1997 Treaty of Amsterdam, created a new Title IV entitled 'Visa, Asylum, Immigration and Other Policies Related to the Free Movement of Persons' and shifted harmonisation of asylum policy from the Third Pillar to the First Pillar of the Maastricht Treaty. The effect of this shift was that it made possible the application of full Community methods of decision-making on asylum issues after five years of ratification of the Amsterdam Treaty. Thus, the formation of asylum policy in Europe was made more supranational and a specific timeframe was set

specific projects in favour of displaced persons and asylum-seekers/refugees (Joint Actions 97/477/JHA and 97/478/JHA; OJL 138, pp. 6 and 8); and a program for training, exchange and cooperation in the areas of asylum, immigration and crossing of external borders-ODYSSEUS (OJL 099, p. 2). The Commission also submitted a proposal for joint action concerning temporary protection of displaced persons (March 1997). As cited in Bank, *loc.cit.* (note 18), p. 6.

46 Two conventions were drafted and adopted by the Council but have not yet been ratified by the Member States: the Convention Establishing a European Information System (EIS) which is to improve border control by improving computerised access to information on persons entering the EU, and the Convention on Extradition. As cited in Bank, *loc.cit.* (note 18), p. 6.

47 OJC 274, p. 13 As cited in Bank, *loc.cit.* (note 18), p. 7.

48 Wallace, *op.cit.* (note 20), p. 511.

49 Bank, *loc.cit.* (note 18), p. 7 and note 21.

50 Dinan *op.cit.* (note 33), p. 9.

51 Hansen, *loc.cit.* (note 34), p. 795.

for implementation in the interests of the Union's aim to 'maintain and develop an area of freedom, security and justice'.[52]

Substantively, the new Title specifies that measures shall be taken to deal with internal and external border controls;[53] a uniform visa policy with a list of third countries requiring possession of visas;[54] minimum standards for reception of asylum seekers and processing of their status claims;[55] temporary protection of displaced persons not falling under the definition of a refugee in the Refugee Convention;[56] burden sharing among the Member States;[57] and travel of third country legal residents in a Member State who want to travel to another Member State.[58] Procedurally, Article 67 of Title IV establishes two different time periods for implementation. In the first five years after ratification of the Treaty of Amsterdam, there is to be a transition whereby the measures described above are to be passed and implemented under the old decision-making process of the Third Pillar. After the transition, the Commission will have sole right of initiative but will be obliged to consider the requests made by Member States. At this time, the Council will be able to decide by unanimity after consultation with the European Parliament which measures will be decided by co-decision with the Parliament and which measures will fall under the jurisdiction of the Court of Justice. It is worth noting that Article 11 of the First Pillar codifies the practice of variable geometry which affects decision-making under Title IV. Through this provision, the Council may act through cooperation by a majority of Member States when unable to obtain a unanimous vote.[59]

Various protocols accompany the text of the Amsterdam Treaty. The increased supranational nature of Title IV has led to the adoption of three Protocols having the force of the Treaty itself by the UK, Ireland, and Denmark 'which exempt the UK and Ireland from all the provisions of the new Title, that allow both the UK and Ireland to maintain their present controls at their border (...) with other Member States and which exempts Denmark from involvement in measures under the new Title'.[60] An additional Protocol was passed which provides for the integration of the Schengen *acquis* under the First Pillar.[61] All new members to the EU must accept Schengen in full. Finally, in order to prevent Basque separatists from using asylum applications for avoiding extradition to Spain, Spain initiated a protocol on asylum for EU nationals which was passed and

52 Article 2 of the Maastricht Treaty, *op.cit.* (note 15).

53 Articles 61and 62 of the Amsterdam Treaty.

54 Article 62 of the Amsterdam Treaty.

55 Article 63(1) of the Amsterdam Treaty.

56 Article 63(2)(a) of the Amsterdam Treaty. This provision was made to address mass arrivals of persons such as those which came from the war in the former Yugoslavia who did not fulfill the individual status determination criteria of the Refugee Convention but were nonetheless *de facto* refugees. Simpson, *loc.cit.* (note 19), p. 95.

57 Article 63(2)(b) of the Amsterdam Treaty.

58 Article 63(4) of the Amsterdam Treaty.

59 Simpson, *loc.cit.* (note 19), p. 97.

60 *Ibidem*, p. 99.

61 According to the annex to the protocol, the *acquis* includes the 1985 Agreement, the 1990 Convention, the eight Accession Protocols and Agreements of these documents, and the declarations and decisions of the Schengen Executive Committee. Simpson, *loc.cit.* (note 19), p. 106.

which stipulates that nationals in EU Member States may not considered for asylum in other EU Member States.[62]

3 Implications of the Harmonisation of Asylum Policy in the EU

3.1 Enhanced Protection for Refugees?

From a human rights perspective, supranationalisation of asylum policy in the EU through the Amsterdam Treaty may potentially be a significant victory. First, individual status determination procedure 'should be as independent as possible from national interests'.[63] Development of binding standards through the Community law framework makes the procedure more objective eliminating the democratic deficit under Maastricht. Prior to this time, a common criticism of harmonisation was that it lacked openness and transparency with the bulk of the work being done by centralised bureaucracies without 'democratic scrutiny or parliamentary control'.[64] Now,

> 'the increased transparency of legislative processes within the Community framework would work against epistemic communities imbued with the internal security ideology and in favour of epistemic communities focused on developing comprehensive immigration policies dealing with the root causes of migration while carefully protecting human rights.'[65]

Second, provisions formed under the First Pillar will be legally binding and the ECJ can provide judicial review through preliminary and interpretive rulings 'according to all procedures established under Community Law'.[66] Bringing asylum policy under the jurisdiction of the ECJ has been argued as a 'powerful' means for future enforcement.[67] This is particularly significant given that the ECJ has ruled that international human rights norms are a fundamental principle in the Union. The ECJ has the power to refer to the European Convention and EU Charter[68] in interpreting Community law. Both documents deal directly with issues of torture, extradition, expulsion, deportation, family reunification, and detention, all of which have bearing on asylum cases in Europe. Furthermore, the human rights protections within both documents apply to all

62 Bank, *loc.cit.* (note 18), p. 21.
63 *Ibidem*, p. 14.
64 Rudge, Philip, 'The Asylum Dilemma-Crisis in the Modern World: A European Perspective', in: Loescher, Gil, B. (ed.), *Refugees and the Asylum Dilemma in the West*, Pennsylvania State University Press, University Park, Pennsylvania, 1994, p. 104.
65 *Ibidem*, p. 181.
66 Bank, *loc.cit.* (note 18), p. 18.
67 Koslowski, *loc.cit.* (note 31), p. 181.
68 Please note that the ECJ does not yet have the power to enforce the EU Charter; in its present form, it is a declaratory document which is not fully binding until it is actually incorporated into EU law through a treaty amendment. Individuals are not yet able to claim their rights under the Charter before the ECJ.

persons within the Member States' borders regardless of citizenship.[69] Article 18 of the EU Charter explicitly provides for the right to asylum in accordance with the 1951 Refugee Convention, the 1967 Protocol, and the Treaty establishing the European Community. Also, as stipulated by the First Pillar, the ECJ may now interpret policies and actions taken by the EU and the Member States in certain areas according to their compliance with the 1951 Refugee Convention.

Third, the notion of refugee protection in the Refugee Convention is grounded in the principle of solidarity between States.[70] Thus, the goals of discussion and agreement in order to come to new measures of burden sharing[71] in Article 62(3)(b) of the Amsterdam Treaty will serve to meet the goal of effective protection of refugees. Promotion of burden-sharing should eliminate the tendencies of some States who have received the bulk of asylum seekers, such as Germany, to enact more restrictive laws and policies for deterring asylum seekers, also known as 'burden-shifting'. In the early 1990s, Germany was the preferred host country receiving more asylum applications than all the other EU Member States combined; by 1992, Germany hosted 438,000 asylum seekers or 65 percent of Europe's total.[72] Consequently, in 1993, Germany amended its liberal asylum laws to deport 'manifestly unfounded claims' and to recognise 'safe third countries' and 'safe countries of origin' for a fast track system of processing asylum applications and rejecting them.[73] 'Germany stood alone in the liberality of the protection it afforded refugees, a situation that Germany could not sustain in the face of the more restrictive approaches taken by its European neighbors'.[74]

3.2 Diminished Protection for Refugees?

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

69 It is important to note however, that both the European Convention and the EU Charter specifically preserve certain rights as available only for *citizens* of the Member States. See, *e.g.*, Art. 16 of the European Convention which allows Member States to restrict the political activity of aliens or Chapter V of the EU Charter which provides for 'Citizens Rights'. Chapter V, Art. 45 only explicitly allows for freedom of movement and residence for citizens of the Union or nationals of third countries legally resident in the territory of a Member State.
70 Bank, *loc.cit.* (note 18), p. 15.
71 Burden sharing refers to the sharing of physical protection and economic costs of various forced migration flows throughout the Union. Levy, Carl, 'Asylum Seekers, Refugees and the Future of Citizenship in the European Union', in: Bloch, Alice and Levy, Carl (eds.), *Refugees, Citizenship, and Social Policy in Europe*, St. Martin's Press, New York, 1999, p. 217.
72 Geddes, *op.cit.* (note 6), p. 29.
73 *Idem*.
74 Byrne, Rosemary and Shacknove, Andrew, 'The Safe Country Notion in European Asylum Law', *Harvard Human Rights Journal*, Vol. 9, 1996, p. 213.

transparency; and, the ability of Member States to bypass the Community structure thus weakening the process of integration. For example, refugees within Britain, Denmark or Ireland will not enjoy the same rights to free movement of persons due to these countries' opt-out from the Schengen Protocol.

Second, the achievements made in openness and transparency under the new Title IV are tempered by the fact that much of the harmonisation which is to occur in the five year time frame will not occur under the Community method but will require unanimity. Thus, 'the method of realizing these objectives were kept firmly in intergovernmental mode'.[75] 'After the five-year transitional period, full communitarization of asylum and migration policy under the co-decision-making procedure of the European Parliament will only happen by a unanimous vote of the Council of Ministers which is "unlikely" to happen'.[76] Also, the role of the ECJ for judicial review asylum policy in Europe is limited to cases coming from national courts where there is no domestic remedy available.[77] At the end of the five-year period, the Council will be able to decide the extent of expansion of the ECJ's jurisdiction in asylum policy, if any.[78] Furthermore, only national courts and EU institutions may seek interpretations and rulings from the ECJ on asylum policy. Individual citizens or asylum applicants do not have standing before the ECJ.

Third, there is the question of the status of the soft law developed before and after Maastricht resulting in policies such as the manifestly unfounded status determination procedure; the safe country notion; and the interpretation of the Geneva Convention refugee definition. All of these resolutions are problematic in terms of human rights protection and it is not clear as to whether they will be incorporated as legally binding under Amsterdam.[79] For example, in 1995, the JHA agreed to its first Joint Position on a common definition of a refugee under the Refugee Convention. UNHCR and human rights activists have criticised this position as 'contrary to the spirit of the 1951 Convention' in that it 'excludes those who flee civil wars, generalized armed conflict, and persecution by "non-state agents", such as armed militias and insurgent groups'.[80] It is argued that such soft law should be openly reconsidered before being transferred to the First Pillar due to the fact that they were adopted in secrecy without legal and democratic scrutiny under Community cooperation procedures.[81]

Fourth, the new Title IV jeopardises the individual's right to seek and enjoy asylum from persecution by incorporating the idea of the 1990 Dublin Convention on individual status determination by Member States as a method of burden sharing. The right to seek asylum under Article 14 of the UDHR and Article 18 of the EU Charter implies the right of an individual to choose which country she feels would provide her

75 Levy, *loc.cit.* (note 71), p. 39.
76 Van Selm-Thorburn, *loc.cit.* (note 14), p. 632.
77 Hansen, *loc.cit.* (note 34), p. 791.
78 *Idem.*
79 Bank, *loc.cit.* (note 18), p. 24.
80 Koslowski, *loc.cit.* (note 31), p. 171. It is important to note however, that the Joint Position is a non-binding minimum standards document; the Member States may do more than it suggests. For example, although Germany does not protect persons fleeing persecution from non-State actors, the UK has opted to do so.
81 Simpson, *loc.cit.* (note 19), p. 111.

the best protection and Title IV deprives her of this choice.[82] Thus, this emphasis in terms of which Member State is responsible to process a particular application, while it may deal more efficiently with forced migration crises, ignores the voice of the individual refugee in the process. Asylum is provided on a 'take it or leave it' basis giving her only one chance among all the Member States in the EU for seeking asylum. Furthermore, any benefits of burden-sharing are tempered by the fact that States are not given a timeframe for doing so; they are not obliged to implement such policies within the five year time-limit set for other policies under Title IV.[83]

Fifth, while Title IV stipulates that minimum standards and procedures are to be established for status determination in accordance with the Refugee Convention, lesser protection is provided for those who fail to meet the individual criteria of a 'well-founded fear of persecution'. Title IV allows for the notion of 'temporary protection' for 'displaced persons'. It has been acknowledged by refugee lawyers and academics that the definition of a refugee[84] in the Refugee Convention is increasingly narrow and anachronistic being based upon the Cold War notion of an individual fleeing from Communism.[85] Today, forced displaced persons within Europe are increasingly coming from situations of generalised violence such as in the Balkans and it is within this context that temporary protection first became an issue in Europe.[86] Others are forced to migrate due to economic marginalisation or environmental disasters. States in Europe have responded by restrictively applying the refugee definition and giving displaced persons lesser statuses. Such '*de facto* refugees' are settled without the full set of rights guaranteed under the Refugee Convention.[87] For example, in the UK, the category of 'refugees with exceptional leave to remain' is a type of *de facto* refugee status and such individuals 'are not allowed to be joined by their families for four years, while those with Convention status have an immediate right of family reunion'.[88]

While Title IV helps to address the reality of *de facto* refugees by stipulating that the Member States provide them temporary protection status, such status may fail to

82 Bank, *loc.cit.* (note 18), p. 15.
83 Art. 63(2)(b) of the Amsterdam Treaty reads:

> The Council (...) shall within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:(...)
> (2) measures on refugees and displaced persons within the following areas:(...)
> (b) promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons; (...)
> Measures to be adopted pursuant to points 2(b) (...) shall not be subject to the five-year period referred above.

84 Art. 1(A)(2) of the Refugee Convention defines a refugee as a 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'.
85 Harvey, *loc.cit.* (note 9), p. 564.
86 Hansen, *loc.cit.* (note 34), p. 784.
87 Klaauw, Johannes van der, 'The Challenges of the European Harmonisation Process' in: Muus, Philip, O. (ed.), *Exclusion & Inclusion of Refugees in Contemporary Europe,* European Research Centre on Migration and Ethnic Relations, Utrecht, Netherlands, 1999, p. 21.
88 Joly, Daniele, 'Refugees in Europe: The Hostile New Agenda', *Minority Rights Group International Report*, London, 1997, p. 9.

provide the displaced persons with the full benefit of rights they would enjoy as a refugee under the Refugee Convention. Such temporary status threatens to take away any individual choice as to voluntary repatriation or protection from *refoulement*[89] as its primary purpose is 'the sole prospect of their return as soon as the situation permits'.[90] As pointed out by Rudge, 'these persons inhabit a twilight world possessing only rudimentary rights'.[91] Also, learning from the Yugoslav crisis, it is imperative that discrepancies in the implementation of temporary protection be avoided. 'Differences were not only apparent in the country of reception but conditions of reception within the same country could also vary depending if the person or persons involved were admitted under the 'vulnerable group' quota or whether they had arrived spontaneously from the former Yugoslavia'.[92]

Sixth, incorporation of the Schengen *acquis* into the Community framework presents problems of potential violations of the right to privacy, due process, as well as discrimination between EU citizens and nationals of third countries with respect to freedom of movement. The right to privacy is jeopardised by the Schengen Information System (SIS) (now the 'EIS' or European Information Service under Article 213(b) of the Amsterdam Treaty) which is a shared databank between the Member States of undesirable foreigners. Although strict privacy and confidentiality laws have been implemented to govern its use, the danger remains, as there is no supranational judicial control for data protection and safeguarding individual rights.[93] With regard to due process, as pointed out by Martiniello and Rea, this system 'grants an important discretionary power to administrative and police authorities which no legal recourse can stop: registration in the SIS file means immediate expulsion'.[94] Finally, as for freedom of movement under Schengen, discrimination exists as there is limited freedom provided for refugees who are considered like nationals of third countries and must declare their presence to the appropriate authorities within three days of entry into another Member State.[95] Asylum seekers are not at all able to move out of the country where they have applied.[96] Implementation of the treaty will most likely lead to an increase in arbitrary and random border checks based upon physical appearance.[97]

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

89 Art. 33 of the Refugee Convention prohibits *refoulement* of refugees defined as expelling or returning 'a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.
90 Joly, *loc.cit.* (note 88), p. 9.
91 Rudge, *loc.cit.* (note 64), p. 108.
92 Levy, *loc.cit.* (note 8), p. 30.
93 *Ibidem*, p. 24.
94 Martiniello and Rea, *loc.cit.* (note 5), p. 165.
95 Levy, *loc.cit.* (note 8), p. 24.
96 Martiniello and Rea, *loc.cit.* (note 5), p. 165.
97 *Idem.*

seriously breaches human rights or where a host State specifically decides to examine an application anyway.[98] Even where a State examines an application, it must do so under the presumption of the application being 'manifestly unfounded' which requires a higher standard of proof for receiving asylum. So far, only Belgium has refused to uphold this Protocol but for all other Member States, it has legally binding effect. As argued by Harvey, 'this is an unnecessary element of restrictionism which simply adds a geographical limitation to what is a universal instrument of protection'.[99] Most importantly, this Protocol has been heavily criticised for undermining the principle under the Refugee Convention that each individual asylum application must be considered on its merits and not *a priori* barred because the individual comes from a Member State or belongs to some group.[100] The intention of this protocol in limiting access to asylum by 'Basque terrorists' 'fails to recognize that members of that group may have various associations from which a valid claim could emanate'.[101]

Eighth, the emphasis on creating an area in Europe which is 'secure' has led to the tendency towards 'criminalisation' of asylum and immigration issues.[102] The Schengen *acquis* was designed under a 'security logic' with emphasis on 'rules for crossing external borders and the nature of border controls, the conditions of entrance into the Schengen territory, the fight against clandestine immigration, sanctions against carriers, visa policy, [and] the conditions of free movement'.[103] Also, the new Title VI of the Third Pillar of Amsterdam addresses areas of police and judicial cooperation in criminal matters because 'the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice'.[104] Although the bulk of asylum issues has been transferred to the First Pillar of the Amsterdam Treaty, the Third Pillar may apply to asylum seekers because the data on third country nationals and control over external borders affects asylum seekers and may be linked to criminal matters.[105] The Third Pillar emphasises a 'freedom from' approach which 'focuses on the Union's citizen's right to be protected from specified dangers'.[106] The consequence is that:

> this not only fails to address the issue of integrating the legally present 18 million third country nationals on the Union's territory, but also fails to provide a conceptual basis that should deal with asylum and immigration claims, inextricably linked with human rights matters, separately from tenuous security concerns.[107]

This is especially serious considering that the ECJ has limited jurisdiction on matters falling under the Third Pillar where asylum seekers and refugees may suffer from

98 Bank, *loc.cit.* (note 18), p. 21.
99 Harvey, *loc.cit.* (note 9), pp. 570-571.
100 Levy, *loc.cit.* (note 8), p. 44.
101 Byrne and Shacknove, *loc.cit.* (note 73), p. 217.
102 Simpson, *loc.cit.* (note 19), p. 103.
103 Martiniello and Rea, *loc.cit.* (note 5), p. 164.
104 Article 29, Title VI of the Amsterdam Treaty. Simpson, *loc.cit.* (note 19), p. 120.
105 *Ibidem*, pp. 101-102.
106 *Ibidem*, p. 121.
107 *Idem.*

violation of their fundamental rights in the name of security. In fact, the ECJ has been explicitly barred from jurisdiction over matters regarding public order and security under Title IV.[108]

4 The Formation of Regional Asylum Policies among the EU Member States

Prior to and during the harmonisation of asylum policy in EU law, there has been the development of common asylum policies among the EU Member States outside of the EU framework. It is crucial to consider these in analysing the harmonisation process within the EU because they 'help to illustrate some distinct aspects of the contribution which Europe is making to legal developments in this area, and point to some of the norms that are gaining acceptance as a result'.[109] Not only are these norms having an impact on the EU Member States, but they are also being adopted by UNHCR; indeed 'the emerging body of law and policy is influential in an international community where other regions are sensitive to new themes in regulatory strategies'.[110]

4.1 *Addressing Root Causes and the 'Right to Remain'*

Within Europe, there has been a growing recognition that international refugee law is limited in that it deals only with protection of rights of individuals after persecution or abuse of human rights has taken place. Consequently, 'as part of its comprehensive migration policy, the EU has emphasized measures which address the root causes of flight'.[111] This has been accomplished by addressing human rights abuses in potential States of origin. For example, the Organization for Security and Cooperation in Europe (OSCE) has been active in conflict prevention and resolution in an attempt to prevent refugee flows. The problem with this approach is that, as Shacknove points out, this policy of prevention can quickly become one of containment.[112] The promotion of the notion of the 'right to remain' has been used to justify making it more difficult for refugees to seek asylum in Europe. The promotion of peacekeeping and respect for human rights in this context has been the flip side of more restrictive asylum policies in Europe and has jeopardised the right to seek asylum where European States have not guaranteed that such preventative and root policies approaches are in fact effective. Perhaps the best example of the dangers of such a 'right' was the formation of so-called 'safe areas' within Bosnia like Bihac, Tulza and Srebrenica for temporary protection and the subsequent ethnic cleansing which took place in them. As argued by Levy, 'in this case the concept of safe areas may have been the functional equivalent of *refoulement*

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108 Art. 68(2) states:

> In any event, the Court of Justice shall not have jurisdiction to rule on any measure or decision taken pursuant to Article 62(1) [regarding the absence of controls on persons crossing internal borders] relating to the maintenance of law and order and the safeguarding of internal security.

109 Harvey, *loc.cit.* (note 9), p. 577.

110 *Ibidem*, p. 592.

111 *Ibidem*, p. 578.

112 Shacknove, Andrew, 'From Asylum to Containment', *International Journal of Refugee Law*, Vol. 5, No. 4, 1993, p. 561 as cited in Harvey, *loc.cit.* (note 6), p. 571.

because these safe areas were used to prevent displaced persons from seeking protection'.[113]

4.2 *Visas, Carrier Liability, and Deterrence*

Coupled with promotion of a policy of containment have been increasingly restrictive requirements for entry in the Member States in order to deter asylum seekers. One way has been the imposition of visa requirements through Dublin and Schengen. For example, many European States imposed visa requirements on persons fleeing ethnic cleansing in the former Yugoslavia.[114] As a result there has been an increase in the number of asylum seekers carrying false identification papers and documents as they are often unable to obtain genuine papers from their governments when fleeing from human rights abuses in those countries.[115] Additionally, carrier sanctions have been imposed and affirmed by the Dublin and Schengen Accords whereby airlines are fined for bringing in undocumented or falsely documented asylum seekers into the Member States.[116] Some countries even revoke the licenses of some airlines to fly certain routes as punishment.[117] As Juss points out this often results in *refoulement* because,

> Forcing carriers to verify visas and other travel documentation helps to shift the burden of determining the need for protection to those whose motivation is to avoid monetary penalties on their corporate employer, rather than to provide protection to individuals.[118]

4.3 *Individual Status Determination, Manifestly Unfounded Claims and Expedited Removal Procedure*

At present, the Member States still vary considerably in their approach to processing individual asylum applications under the Refugee Convention. 'This is exacerbated by the fact that protection within States is often granted on a variety of levels, with a number of different types of protection employed'.[119] This reflects a 'culture of disbelief which pervades the asylum process'.[120] There is a prevailing sense within Europe that asylum seekers are 'bogus' and are seeking economic opportunities.[121] In 1995, a

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113 Levy, *loc.cit* (note 70), p. 217.

114 Joly, *loc.cit.* (note 87), p. 19.

115 Rudge, *loc.cit.* (note 64), p. 108.

116 For example, in just one week in February 1991, British Airways had to pay out 3 million pounds in fines under the Immigration (Carriers' Liability) Act 1987. Under that law, an air carrier had to pay one thousand pounds for each individual it brought in without a visa. Juss, Satvinder S., 'Sovereignty, Culture, and Community: Refugee Policy and Human Rights in Europe', *University of California at Los Angeles Journal of International Law and Foreign Affairs*, Vol. 3, 1998, p. 484.

117 Joly, *loc.cit.* (note 87), p. 19.

118 Juss, *loc.cit.* (note 116), pp. 484-485.

119 Harvey, *loc.cit.* (note 9), p. 582.

120 *Ibidem*, p. 582.

121 *Ibidem*, p. 583.

Resolution on Minimum Guarantees for Asylum Procedure was approved after the signing of Maastricht. While the resolution dealt with issues of protection of individual rights during status determination; the right to appeal and revision of one's application; and unaccompanied minors and women, it was criticised by Amnesty International for falling short of international standards due to its failure to protect from expulsion pending an appeal on a negative decision on status determination.[122] Additionally, in applying the definition of a refugee under the Refugee Convention several Member States fail to recognise persecution at the hands of third party, non-State actors from whom the State is unwilling or unable to protect.[123] This is contrary to the national legislation and case law in a number of Member States as well as the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status.*[124]

In the efforts to deal with the increased asylum applications in Europe within the 1980s, Member States resorted to methods for speeding up individual status determination through use of the category of 'manifestly unfounded claims'.[125] These applications require a higher standard of proof for credibility and those who are refused are subjected to 'expedited removal' effectively preventing their right to an appeal of the decision. The risks of denial of due process and *refoulement* of refugees are increased in the interests of efficiency and of curtailing abuse; such a policy is contrary to the spirit of international refugee law whose focus is on protection of the individual applicant.

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

In Europe, it is widely presumed that asylum seekers are obliged to seek asylum in the first safe area which they pass through. This policy rests in part on the assumption that protection is better obtained closer to one's home due to 'cultural affinities within regions of origin'.[126] The definition for the idea of 'a safe country of asylum (also known as a 'safe third country', 'host third country' or 'first asylum country') is a country in which the asylum-seeker either found protection, or 'reasonably could have done so'.[127] Its origin is traced to Article 31 of the Refugee Convention which refers to refugees as 'coming directly' from a territory where they fear persecution.[128] In the Edinburgh Council of 1992, EU Member States introduced the norm that asylum-seekers should 'be encouraged to stay in the nearest safe area to their homes'.[129] First, 'the presumption is that she [the asylum seeker] must always first seek the protection of her state of origin' known as the internal flight option.[130] However, UNHCR has warned that 'a decision concerning the existence of an internal flight alternative (...) should be based on a profound knowledge and evaluation of the prevailing security, political and social conditions in that part of the country' and 'should not be applied in the framework of accelerated procedures'.[131] Failing to find protection there, she is then expected to seek asylum to the first 'safe' country which she passes through. Thus, Member States in Europe have justified sending her back to these supposedly 'safe' countries which often do not have the institutional capabilities for processing her claim or giving her protection; also, they may not even be parties to the Refugee Convention.[132] Some countries such as Denmark have used even one hour in transit in a 'safe' country as sufficient for sending the individual back.[133]

Not only has this practice resulted in taking away the freedom to choose one's place of asylum, it has also resulted in cases of *refoulement* where asylum seekers have been sent back to countries where they are in danger of persecution or of being sent back to their countries of origin.[134] Neither the Dublin Convention, the Schengen Agreement, the London Resolutions nor the Council of Europe Resolution on Minimum Guarantees for Asylum Procedures requires States to investigate as to the 'safeness' of a country for each individual case. Rather, lists have been drawn up among the Member States of supposed safe countries but there is no common consensus on what constitutes 'safe'.[135] Countries have been deemed 'safe' by looking at factors such as the human rights record; the existence of democratic institutionalisation; stability; and past history of refugee flows.[136] While application of this concept has become common practice in Europe, it is crucial to note that nowhere are they found in international refugee law. Furthermore, constitutional courts within Germany, the UK, and France have questioned the legality of the notion of 'safe country' as it is found in Schengen, Dublin and Maastricht.[137] Also, evidence exists that 'cultural and political heterogeneity often mean that asylum-seekers receive less protection from persecution in neighboring states than in more distant ones'.[138] In sum, the safe country notion whether of origin or of asylum severely limits access to protection by the individual refugee acting as an

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122 Joly, *loc.cit.* (note 87), p. 25.

123 *Ibidem,* p. 26.

124 Van der Klaauw, *loc.cit.* (note 86), p. 24.

125 In 1992, a Resolution on Manifestly Unfounded Applications for Asylum was approved by the EU ministers stating in Art. 1a that:

> Applications for asylum will be considered as manifestly unfounded when they raise no substantive issue under the Geneva Convention and New York Protocol for one of the following reasons: 'There is clearly no substance to the applicant's claim to fear persecution in his own country' or, 'the claim is based on deliberate deception or is an abuse of asylum procedures.

126 Byrne and Shacknove, *loc.cit.* (note 73), p. 194.

127 *Ibidem,* p. 189.

128 Art. 31(1) of the 1951 Refugee Convention states that:

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

129 Koslowski, *loc.cit.* (note 31), pp. 169, 171.

130 Harvey, *loc.cit.* (note 9), p. 585.

131 Joly, *loc.cit.* (note 87), p. 19.

132 Harvey, *loc.cit.* (note 9), p. 586.

133 Joly, *loc.cit.* (note 87), p. 20.

134 Harvey, *loc.cit.* (note 9), p. 586. *See also* Byrne & Shacknove, *loc.cit.* (note 73), pp. 186, 202.

135 Byrne and Shacknove, *loc.cit.* (note 73), p. 188.

136 Joly, *loc.cit.* (note 87), p. 25.

137 Levy, *loc.cit.* (note 8), p. 32.

138 Byrne and Shacknove, *loc.cit.* (note 73), p. 194.

automatic 'bar' for individual asylum seekers obtaining protection (as in the Basque situation) or heightening the burden of proof for an individual applicant.[139]

A tragic result of this policy has been the existence of 'refugees in orbit' who are passed back and forth between States unwilling to process their applications. States have also sent refugees back to these safe countries through bi-lateral readmission agreements especially with countries in Central and Eastern Europe using them as a 'buffer zone'.[140] These policies of burden shifting often result in inhumane treatment as they are forced to live lives in airports as 'refugees in orbit' or find themselves in countries which are not bound to protect their rights under international refugee law.

5 Conclusion

Without doubt, the steps that have been taken in Europe towards harmonisation of asylum law and policy are unprecedented. In which direction the recent developments under Amsterdam will go remains uncertain. 'It could result in either very restrictive policies or reasonably liberal and at least humane ones'.[141] Unfortunately, as Joly points out, the transition in Europe on asylum policy since the 1980s has tended to move 'from uncoordinated liberalism to harmonized restrictionism'.[142] Unlike other regions in the world such as Africa and Central America, Europe has not devised a 'regional complement' to the Refugee Convention for refugee protection; thus, Goodwin-Gill argues that 'despite the relatively high level of unity and co-ordination, states, individually and collectively, have chosen to refuse the various regional institutions an effective role in refugee and migration matters (...) in short, Europe has been a leader in devising control and constraints in jurisdiction, and a failure in providing solutions'.[143] Overall, the development of coordinate asylum policy and practice in Europe to the present has been rooted in concerns for security, economic integration, and weeding out 'bogus' asylum claims. The approach has been one of an intergovernmental nature with Member States in the EU unwilling to give up their sovereign right to control entry and exit of outsiders. Protection of the human rights of refugees has not been at the forefront of the agenda. Thus, is it reasonable to think that Amsterdam represents a significant turning point from this general trend?

The positive gains made by the signing of the Amsterdam Treaty include the steps taken towards free movement of third country nationals among the Member States and the greater institutionalisation of asylum policy within the EU.[144] However, these gains are made less influential in light of the procedural realities which exist after Amsterdam. It is sobering to note that all of the topics for coordinated asylum policy, which have been shifted under the First Pillar, have previously been worked on and the

139 *Ibidem*, p. 227.
140 Harvey, *loc.cit.* (note 9), p. 581.
141 Juss, *loc.cit.* (note 115), p. 484.
142 *Ibidem*, p. 483.
143 Goodwin-Gill, Guy S., 'A Comprehensive Approach to Refugees and Migrants', in: Muus, Philip (ed.), *Exclusion & Inclusion of Refugees*, European Research Centre on Migration & Ethnic Relations, Utrecht, 1997, p. 11.
144 Van Selm-Thorburn, *loc.cit.* (note 14), p. 636.

'preliminary texts presented thus far have been significantly watered down by the adoption stage'.[145] The final texts to be passed by 2004 will only be negotiated under the old intergovernmental method of the Third Pillar and thus are less enforceable and transparent. 'All the indications are that this re-working will remain at an administrative level rather than the level of application and rights (...) there is no mention of coordination of implementation, let alone of a unified, single body for this purpose at the EU level'. Furthermore, it is likely that asylum policy will continue to remain fragmented as the Member States opt out of various provisions. 'The projected date for the establishment of an area of freedom, security and justice (2004) coincides with the likely date of the next enlargement'.[146] This enlargement may hinder the harmonisation process as new Member States may lack the administrative and financial capabilities and necessary legislative reform for complying with the new asylum standards in the EU.

Substantively, the gains made in protection of refugee rights under Amsterdam are limited. The policy coordination up to this point has focused merely on only *minimum* standards for status determination. Furthermore, 'alarming from a refugee rights' perspective is the limitation of 'measures on refugees and displaced persons' to only temporary protection and burden-sharing (relabeled as a 'balanced effort').[147] Most importantly, though future agreements on asylum policy may be coordinated through the Community method, 'new matters cannot be added to the agenda, except under the category of emergency situations said to be "characterised by a sudden inflow of national so third countries" (...) the EU's joint approach to asylum matters will be as ad hoc and reactive as ever, with everyone waiting for a crisis to occur (...) before creating policies to assist those people in need and their fellow member states'.[148]

In sum, 'at its root and in its evolution, the refugee question is fundamentally a human rights issue (...) it is logically impossible to separate the refugee question from the overall human rights context'.[149] In light of the continuing practice of the policies of safe country notion; manifestly unfounded claims; visa restrictions; carrier liability; decreased social benefits for *de facto* refugees; and arbitrary detention of asylum seekers among the Member States, it seems unlikely that policies made within the EU framework will not also reflect this current mood of restriction and control. If effective refugee protection is to be realised within the EU, 'feasible regulation is dependent (...) on opening spaces within the present regulatory framework for the voices of refugees and asylum seekers to be heard'.[150] Furthermore, rather than a unitary model of asylum policy which may be more restrictive than liberal, 'a more desirable approach is to create a strong procedural model, which places emphasis on standards of due process which national legal and administrative systems work towards and against which they might be evaluated (...) a well-regulated regional approach, which offers mechanisms for collective action between states and burden-sharing'.[151] There is great potential for

145 *Ibidem*, pp. 632-633.
146 Joly, *loc.cit.* (note 87), p. 13.
147 Van Selm-Thorburn, *loc.cit.* (note 14), pp. 635-636.
148 *Ibidem*, p. 634.
149 Rudge *loc.cit.* (note 51), pp. 102-103.
150 Harvey *loc.cit.* (note 9), p. 568.
151 *Ibidem*, pp. 568-569.

harmonisation of asylum policy among the Member States through the EU for eliminating 'internal political considerations' and 'foreign policy constraints' which have resulted in 'discrepancies between them in terms of rates of recognition of refugees (...) and rights and status granted to these specific categories of newcomers'.[152] However, at the center of this harmonisation must be respect for and not minimisation of the international obligations of the Member States to protect the rights of refugees. The current trends are not too promising, but the potential to change is. Europe has always played an important role in the development and interpretation of international refugee law; the question remains, will notions of human rights protection be at the core of this harmonisation process?

152 Martiniello, *loc.cit.* (note 26), pp. 259-260.