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Effective Protection Against *Refoulement* In Europe: Minimizing Exclusionism In Search Of A Common European Asylum Policy

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**EFFECTIVE PROTECTION AGAINST REFOULEMENT IN
EUROPE: MINIMIZING EXCLUSIONISM IN SEARCH OF A
COMMON EUROPEAN ASYLUM SYSTEM**

Michael Campagna*

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I. INTRODUCTION

Though ordinarily tolerated as an inexpensive source of labor,¹ undocumented migrants are often viewed as a threat to public welfare in turbulent and uncertain times.² In light of the recent global fixation on terrorist threats and economic recession, few would consider the increasing prevalence of exclusionary state practices and legislation unexpected. Indeed, it was in the name of national security that President George W. Bush, following the September 11, 2001, attacks, ordered the United States Coast Guard to “turn back any refugee that attempts to reach our shore.”³

Even though such acts may run contrary to the internationally recognized and mandated principle of *non-refoulement*,⁴ Americans are quite accustomed to touting the right of the sovereign to control movement across its borders⁵ – a right certainly recognized

¹ See generally Aristides Díaz-Pedrosa, Note, *A Tale of Competing Policies: The Creation of Havens for Illegal Immigrants and the Black Market Economy in the European Union*, 37 CORNELL INT'L L.J. 431, 433 (2004).

² See Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 190-91 (2007) (“The undocumented migrant is characterized as an economic migrant who takes jobs from U.S. residents, and drains welfare and other social services. This characterization can be seen in Supreme Court decisions from the 1970s onwards. ‘Illegal aliens’ are legally and culturally characterized as ‘uninvited guests, intruders, trespassers, law breakers.’ . . . During the early 1990s, undocumented migrants continued to be blamed for taking jobs from U.S. citizens, misusing public benefits, and failing to assimilate.” (citations omitted)).

³ See Lori A. Nessel, *Externalized Borders and the Invisible Refugee*, 40 COLUM. HUM. RTS. L. REV. 625, 642 (2009) (“Then-Attorney General John Ashcroft similarly characterized the Haitian boat arrivals as a threat to American national security, asserting that deterrence of all boat traffic, including genuine refugees, took clear priority over the interests of potential refugees.”).

⁴ Founded in the 1951 United Nations Convention Relating to the Statute of Refugees, as amended by the 1967 Protocol thereto, the principle of *non-refoulement* protects those seeking international protection from being returned to states where they are likely to face persecution. Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 19 U.S.T. 6260, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

⁵ See, e.g., Christopher Rudolph, *International Migration and Homeland Security: Coordination and Collaboration in North America*, 11 L. & BUS. REV. AM. 433, 447 (2005) (contrasting American foreign policy legislation, which focuses on security interests, against Canadian foreign policy legislation, which focuses on refugee protection).

throughout the world as “an important component of sovereignty.”⁶ In fact, exclusionist sentiments in the United States have rung loud since the nineteenth century, when the United States Supreme Court determined that the sovereign may deny re-admittance to even legally residing aliens.⁷ While support for such policy is not uncommon, and is, in fact, even expected in the United States, ultra-exclusionist state practices have received quite a contrary reception in the comparatively-socialistic European Union (“EU” or “Union”).⁸ Often considered the birthplace of the modern refugee movement,⁹ Europe, as loosely confederated through the Union, faces unique challenges in its approach to refugee and asylum policy, particularly, in guaranteeing respect for *non-refoulement*.

That *non-refoulement* is a principle binding upon the Member States of the European Union is not a contested issue;¹⁰ nor is it contested that recent exclusionary practices by certain Member States¹¹ violate the prohibition against *refoulement*.¹² To establish such is not

⁶ Nessel, *supra* note 3, at 687 (however, clarifying that “it is not an absolute right. It is a right that must be balanced against international human rights, such as the right to life and the right to seek and enjoy asylum”).

⁷ CHAE CHAN PING V. UNITED STATES, 130 U.S. 581, 609 (1889).

⁸ See, e.g., Stephen Zamora, *A Proposed North American Regional Development Fund: The Next Phase of North American Integration Under NAFTA*, 40 LOY. U. CHI. L.J. 93, 127-28 (2008) (demonstrating an “impetus for a social policy in the EEC” and “a resistance in the United States to any attempt to develop a welfare state”).

⁹ See, e.g., Kevin Walsh, Note, *Victims of a Growing Crisis: A Call for Reform of the United States Immigration Law and Policy Pertaining to Refugees of the Iraq War*, 53 VILL. L. REV. 421, 429 (2008).

¹⁰ See generally Nessel, *supra* note 3 (emphasizing that the “externalization of borders” does not do away with obligations to respect the principle of *non-refoulement*); Andreas Fischer-Lescano, Tillmann Löhr, & Timo Tohidipur, *Border Controls at Sea: Requirements Under International Human Rights and Refugee Law*, 21 INT’L J. REFUGEE L. 256 (2009) (demonstrating that the prohibition against *refoulement*, to which Member States are bound via various international and EU instruments, applies extraterritorially).

¹¹ See discussion *infra* Part II.

¹² See HUMAN RIGHTS WATCH, PUSHED BACK, PUSHED AROUND: ITALY’S FORCED RETURN OF BOAT MIGRANTS AND ASYLUM SEEKERS, LIBYA’S MISTREATMENT OF MIGRANTS AND ASYLUM SEEKERS 27, 28 (2009); see also Commission Staff Working Document Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the

the purpose of this article. Rather, this article seeks to discover the underlying reason for this unfortunate trend and to explore the feasibility of an integrated European asylum system that would better protect the right. The article first briefly explores in Section II the recent increase of exclusionary practices in Southern Europe – particularly, those of the Member State seeming to most aggressively embrace them – Italy. Section III then discusses the deficiencies in Europe's current asylum system (i.e., why Europe's current system fails at guaranteeing abidance to the *non-refoulement* principle) and demonstrates that, in light thereof, such exclusionism was inevitable. Section IV discusses the Union's attempt at stemming the recent tide of exclusionism via the implementation of a Common European Asylum System ("CEAS"). Finally, Section V concludes with a brief assessment of this new system's likely success.

II. EXCLUSIONIST TRENDS

Perhaps more so than anywhere in the world, this wave of exclusionism has permeated throughout the Member States of the European Union.¹³ Spain, for instance, in response to an influx of African migration, recently intercepted nearly 4,000 potential asylum seekers headed for the Canary Islands and repatriated another 5,000 that had previously arrived.¹⁴ Operación Hera II was carried out with

Committee of Regions – Policy Plan on Asylum: an Integrated Approach to Protection across the EU – Impact Assessment, § 2.1.2.1, COM (2008) 360 final (June 17, 2008) [hereinafter *Policy Plan on Asylum*].

¹³ See *id.* § 2.1.2.1 ("Recent times have seen significant year on year decreases in the number of persons seeking asylum in the EU. In 2006, however, the number of refugees worldwide rose for the first time in many years (to reach 9.9 million) while the number of asylum applications in the [EU] reached a 20 year low (197,150)."); Leigh Phillips, *Commission Proposes Coordinated Refugee Resettlement Across EU*, EU OBSERVER, September 9, 2009, <http://euobserver.com/24/28612> ("In 2008, countries offered to settle just 65,000 refugees, and European Union members were particularly unenthusiastic in its efforts in this regard, resettling 4,378, or 6.7 percent.").

¹⁴ Nessel, *supra* note 3, at 651-52.

the assistance of eight fellow Member States¹⁵ and coordinated by the Union's new border security agency, FRONTEX.¹⁶

Faced with its own recent influx of African migrants¹⁷ and backed by the anti-immigrant Northern League Party, Italy's Prime Minister Silvio Berlusconi easily garnered support in the legislature for a bill criminalizing illegal immigration.¹⁸ The new legislation, which passed in 2009, criminalizes unlawfully entering or staying in Italy by a €5,000 to €10,000 fine; it triples the detention period of illegal migrants to six months; it imposes criminal punishment – up to three years in prison – on landlords who rent to undocumented migrants; it requires parents registering a new birth to present documentation verifying legal status; and it authorizes citizen anti-crime patrols.¹⁹

These legislative exclusionary efforts have been accompanied by questionable state practices. In May 2009, and in accordance with its Treaty of Friendship, Partnership and Cooperation between the Italian Republic and Great Socialist People's Libyan Arab Jamahiriya (the "Friendship Pact," signed August 30, 2008), Italy began intercepting boats carrying African migrants and returning them to Libya before they could reach Italian territorial waters to petition for asylum.²⁰ On May 6, 2009, Italian authorities picked up 230 African

¹⁵ Austria, Greece, Finland, France, Holland, Italy, Portugal, and the United Kingdom. *Id.*

¹⁶ *Id.* FRONTEX's operation is authorized and regulated by Council Regulation 2007/2004/EC of October 26, 2004. Fischer-Lescano et al., *supra* note 10, at 257-58 ("The operational framework coordinated by FRONTEX includes the regulation establishing a mechanism to create Rapid Border Intervention Teams in order to secure the EU's external borders. This same instrument significantly extends the agency's executives powers. . . . In addition, the regulation gives interventionary [sic] powers to all forces deployed in joint FRONTEX operations, thus enabling them to support local border police . . .").

¹⁷ *Italy Adopts Law to Curb Migrants*, BBC NEWS, July 3, 2009, <http://news.bbc.co.uk/2/hi/europe/8132084.stm> ("More than 36,000 migrants landed on the shores of Italy last year – an increase of about 75% on the year before.").

¹⁸ *Id.*

¹⁹ Valentina Pop, *Italy Approves Harsh Anti-Immigration Bill*, EU OBSERVER, May 14, 2009, <http://euobserver.com/?aid=28124> [hereinafter Pop I]; BBC NEWS, *supra* note 17.

²⁰ HUMAN RIGHTS WATCH, *supra* note 12, at 7 ("The Friendship Pact called for 'intensifying' cooperation in 'fighting terrorism, organized crime, drug trafficking and illegal immigration.'").

migrants thirty-five miles off the southern shore of Lampedusa²¹ and returned them to Libya without any assessment of their possible need for international protection.²² On June 18, 2009, the Italian Coast Guard, in accordance with FRONTEX's Operation Nautilus IV, intercepted a boat twenty-nine miles south of Lampedusa.²³ The boat was carrying seventy-five migrants, whom the Italian Coast Guard handed over to a Libyan patrol boat, which purportedly turned the group over to a Libyan military unit.²⁴ Two weeks later, the Italian Navy intercepted a boat carrying eighty-two migrants and forcibly transferred them to a Libyan vessel, again, without any proper assessment of the need for protection.²⁵ And in August 2009, the Italian Coast Guard intercepted a boat carrying seventy-five Somali migrants and returned them to Libya, again without assessing their need for protection.²⁶ These are not all of the forced returns that have occurred since Italy started the practice,²⁷ but they are demonstrative examples of the growing trend.

Though these accounts may be discounted on the notion that many *not* in need of protection are among the groups of migrants, UNHCR reports: "[i]n 2008, an estimated 75 percent of sea arrivals in Italy applied for asylum and 50 percent of them were granted some form of protection."²⁸ Such figures clearly demonstrate that states participating in these practices are turning away many entitled to

²¹ Lampedusa is a small island located between Tripoli and Sicily in the Mediterranean. It is traditionally known as a stop-off for migrants making their way through to the European mainland but is now heavily patrolled by Italian naval forces and FRONTEX authorities. *Id.* at 28-29.

²² Press Release, UNHCR, UNHCR Deeply Concerned over Returns from Italy to Libya (May 7, 2009), available at <http://www.unhcr.org/print/4a02d4546.html>.

²³ HUMAN RIGHTS WATCH, *supra* note 12, at 37.

²⁴ *Id.*

²⁵ AFP, *Italy Denounces UN Complaint over Refugees*, July 14, 2009, <http://www.google.com/hostednews/afp/article/ALeqM5jeNUjj0WVNF1JGW0JdRGxJ2xS6Rw> (July 14, 2009).

²⁶ Earthtimes.org, *Italy Intercepts, Sends back 75 African Refugees*, Aug. 30, 2009, <http://www.earthtimes.org/articles/printstory.php?news=283442>.

²⁷ See, e.g., Valentina Pop, *Commission Dodges Stance on Italian Asylum*, EU OBSERVER, May 13, 2009, <http://euobserver.com/?aid=28116> [hereinafter Pop II] (reporting that, in the first week of Italy's forced-return program, more than 500 migrants were returned to Libya without proper screening for protection needs).

²⁸ UNHCR, *supra* note 22.

international protection. Concern arises over this practice in light of the fact that Libya is not a party to the Refugee Convention. Though Libya is technically bound to the principle of *non-refoulement* through other international instruments,²⁹ it has a non-existent asylum system. Libya's Brigadier General Mohamed Bashir Al Shabbani was quoted as stating: "[t]here are no refugees in Libya. . . . They are people who sneak into the country illegally and they cannot be described as refugees. . . . Anyone who enters the country without formal documents and permission is arrested."³⁰ Consequently, the migrants, if not detained as prisoners for years or dropped in the desert, are often repatriated to their respective states-of-origin, where they potentially face persecution and harsh punishment.³¹

Such dissidence against international obligations in the name of sovereign protectionism has received much criticism. Italian Democratic Party member Marco Minitti, in reacting to the Legislature's passing of the new immigration bill, stated: "[y]ou should listen to the voice of the United Nations, you should listen to the authoritative voice of the Church, people can not ignore this. This government seems to be made up of supermen who have no respect for the UN."³² In its report on the events, Human Rights Watch stated:

Italy violates the international legal principle of non-refoulement when it interdicts boats on the high seas and pushes them back to Libya with no screening whatsoever. . . . The principle of nonrefoulement is a binding obligation in international human rights law and international refugee law, as well as European and Italian law, which also forbid Italy from returning people to places where they would face inhuman and degrading treatment.³³

²⁹ HUMAN RIGHTS WATCH, *supra* note 12, at 49 ("[B]oth the Convention against Torture and the African Refugee Convention forbid Libya from sending individuals to countries where they face a serious risk of persecution or torture." (citations omitted)).

³⁰ *Id.* at 10.

³¹ See generally *id.* at 68-91.

³² Pop I, *supra* note 19.

³³ HUMAN RIGHTS WATCH, *supra* note 12, at 7-10; see also Nessel, *supra* note 3, at 628 ("[T]he global focus on securitization and enforcement has weakened the

Despite widespread criticism, the European Commission appears reluctant to sanction or otherwise rebuke Italy.³⁴ Aside from a simple request to readmit those turned away for processing to determine protection needs, and despite Berlusconi's politically-charged stance,³⁵ the Commission has yet to threaten legal proceedings.³⁶ To the contrary, thanks to the success of "racist and xenophobic" parties in the June 2009 European Parliamentary elections, the Commission has recently "backed efforts to strengthen the EU border-control agency Frontex to stop the influx of boat refugees" ³⁷

III. THE INHERENT SHORTCOMINGS OF EUROPE'S CURRENT ASYLUM SYSTEM

The exclusionism movement has undoubtedly had an impact on access to international protection in Europe.³⁸ This unfortunate trend can be attributed to a failure of the current European asylum system to guarantee that Member States respect the principle of *non-refoulement*. Though states worldwide have long been bound to respect the principle, nowhere save the EU are they bound to do so in

refugee protection regime, particularly the obligations of the 1951 United Nations Convention Relating to the Status of Refugees." Cf. Fischer-Lescano et al., *supra* note 10, at 262-63 (using as examples Australia's and France's recent provisions refusing to apply protections of the Refugee Convention to those arriving at off-shore territories and explaining that "[t]hese approaches have been unanimously criticized . . . as legally irrelevant attempts to circumvent international obligations").

³⁴ See Pop II, *supra* note 27.

³⁵ *Id.* ("Mr. Berlusconi made immigration and security his main platform in last year's general elections and seems to be repeating the strategy for the EU poll in June as well.").

³⁶ See Pop I, *supra* note 19.

³⁷ Shada Islam, *Fortress Europe: Solving Immigration by Outsourced Bouncers*, YALE GLOBAL ONLINE, Aug. 18, 2009, <http://yaleglobal.yale.edu/content/fortress-europe-solving-immigration-outsourced-bouncers>.

³⁸ Human Rights Watch reported that "[w]ith the support of Frontex, the number of irregular boat arrivals to the Canary Islands . . . dropped by 74 percent from 2006 to 2008." HUMAN RIGHTS WATCH, *supra* note 12, at 36. As to Italy, Human Rights Watch noted: "Irregular boat migrants to Sicily (including Lampedusa) and Sardinia fell by 55 percent in the first six months of 2009 compared to the same period the previous year. The migrant detention centers of Lampedusa . . . in January 2009 . . . were filled beyond capacity, holding nearly 2,000 people, and migrants were sleeping on the floors. For a time in early June, the Lampedusa detention centers were completely empty of migrants." *Id.* at 24.

accordance with the collective will of a supra-national organization capable of imposing it.³⁹ That the Union has such competency actually provides it an opportunity, via the strengthening of a Common European Asylum Policy, to more consistently and effectively guarantee the right than can sovereign states acting alone. This section, however, seeks to briefly analyze Europe's current asylum system and to demonstrate that the Union's failure to guarantee protection against *refoulement*, manifested in these current exclusionist trends, was inevitable.

A. *The 1951 United Nations Convention Relating to the Status of Refugees*

The principle of *non-refoulement*, found in Article 33 of the Refugee Convention, states that "[n]o 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 his race, religion, nationality, membership of a particular social group or political opinion."⁴⁰ The Convention defines a "refugee" as a person who:

[O]wing 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; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it.⁴¹

Though the Refugee Convention sets forth the basic substantive principle of *non-refoulment* to which its parties are bound, it

³⁹ See, e.g., Geoff Gilbert, *Is Europe Living Up to Its Obligations to Refugees?*, 15 EUR. J. INT'L L. 963, 969 (demonstrating that, and the extent to which, "[a]sylum and immigration issues were transferred to the European Union by the Member States in the 1997 Treaty of Amsterdam").

⁴⁰ Refugee Convention, *supra* note 4, art. 33.

⁴¹ *Id.* art. 1(A)(2)

suffers from two major fatal flaws: first, it fails to explicitly guarantee a right to asylum proceedings; second, it lacks procedural mandates to assure the protections it does explicitly guarantee (i.e., against *refoulement*) are received by all whom the drafters envisaged would be protected.⁴²

The Refugee Convention's prohibition against *refoulement* is unambiguous and explicit: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever. . . ."⁴³ However, it does not similarly grant a right to asylum, or even an explicit right to an opportunity to claim asylum.⁴⁴ In light of the Convention's provisional language ("to the frontiers of . . ."), which does not seem to preclude transfer to a willing third country, most scholars agree that a plain reading of the Convention itself, though prohibiting *refoulement*, does not necessarily obligate parties to grant asylum.⁴⁵ That fact notwithstanding, most also agree that the right to effective access to asylum proceedings is implicit in the Convention's *non-refoulement* principle. As one scholar has observed:

⁴² See Ellen F. D'Angelo, *Non-Refoulement: The Search for a Consistent Interpretation of Article 33*, 42 VAND. J. TRANSNAT'L L. 279, 285 (2009).

⁴³ Refugee Convention, *supra* note 4, art. 33 (emphasis added).

⁴⁴ An important note is in order at this juncture. The Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1 [hereinafter CFR] is binding upon all Member States and includes both a prohibition against torture and inhumane or degrading treatment or punishment. *Id.* art. 4. It also includes a right to asylum "with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community." *Id.* art. 18. Many correctly point out that this provision, in conjunction with Article 19 (which prohibits "remov[al], exp[ulsion] or extradit[ion] to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment") equally binds Member States to the principle of *non-refoulement*. See, e.g., Fischer-Lescano et al., *supra* note 10, at 281-82. Nevertheless, as the right to *non-refoulement* in the CFR only exists by reference to the Refugee Convention, its application necessarily depends upon the scope of the right under the Refugee Convention.

⁴⁵ See, e.g., Heather A Leary, *The Nature of Global Commitments and Obligations: Limits on State Sovereignty in the Area of Asylum*, 5 IND. J. GLOBAL LEGAL STUD. 297, 301 (1997) (demonstrating that the Refugee Convention does not "establish a right to asylum."). Cf. Fischer-Lescano et al., *supra* note 10, at 288 ("Worthy of note is the fact that Article 18 [Charter of Fundamental Rights of the European Union], unlike the Refugee Convention, provides a[n explicit] right to asylum.").

UNHCR and literature rightly state that *non-refoulement* from Article 33, paragraph 1, of the Refugee Convention is only guaranteed if the person concerned can claim effective legal protection. Here, too, the decisive factor ensuring effectiveness is for the person concerned to have the possibility of claiming legal protection on the contracting state's territory. Consequently, Article 33, paragraph 1, of the Refugee Convention contains the implicit right to effective legal remedy. . . . UNHCR, EXCOM and literature rightly say that at least temporary entry into state territory must be granted.⁴⁶

Nevertheless, absent an authority to lend binding interpretation to textual ambiguities, sovereign states face little consequence for interpreting voluntarily-entered international treaties in a way that does not recognize rights that are merely implied. Though an explicit right to asylum itself would have likely killed the Refugee Convention, its failure to include an explicit right to access asylum proceedings has served as fodder for exclusionist practices, thus endangering the guaranteed right against *refoulement*.

The Refugee Convention also fails to establish procedural guidelines for determining entitlement to protection. Because the Refugee Convention "lacks a supra-national enforcement mechanism with de facto power to compel state behavior . . .," divergence from its spirit is checked only by public opinion, national judicial interpretation, and international influence.⁴⁷ As protectionist trends in influential countries like the United States and Australia – which lack a supra-national overseer independent of sovereign self-interests to guarantee protection against *refoulement* – have a tendency to

⁴⁶ Fischer-Lescano et al., *supra* note 10, at 285, 287. Cf. Leary, *supra* note 45, at 300 (arguing that "one could easily read" a right to asylum in the language of Article 34 of the Refugee Convention, which states that "[t]he Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees.").

⁴⁷ See D'Angelo, *supra* note 42, at 288 (describing the importance of *opinio juris* and judicial decisions in implementing the provisions of the Refugee Convention).

legitimize similar actions in other states, they become problematic on a global scale.⁴⁸

Assuring protection against *refoulement* poses an entirely different and unique challenge in Europe because the principle has been embraced by a regional body representative of various constituent sovereign interests, but with a will independent of them. Cognizant of the above-mentioned shortcomings in the Refugee Convention and the accompanying inherent dangers, the European Union has attempted to harmonize its Member States' asylum practices by propagating various instruments regulating the field. The Council is obligated by the Treaty Establishing the European Community ("TEC") to adopt "measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties"⁴⁹

B. *Dublin II Regulation*

Pursuant to this obligation, the Council adopted in 2003 the Dublin II Regulation,⁵⁰ which was enacted to "determine rapidly the Member State responsible for examining an asylum application, so as to guarantee effective access to the asylum procedure and to prevent abuse in the form of multiple asylum applications."⁵¹ While Dublin II

⁴⁸ See Maria O'Sullivan, *Withdrawing Protection Under Article 1C(5) of the 1951 Convention: Lessons from Australia*, 20 INT'L J. REFUGEE L. 586, 610 (2008) (demonstrating that the manner in which Australia interprets the Refugee Convention may have influence beyond Australian law); Nessel, *supra* note 3, at 699 (noting that the manner in which the U.S. applies the Refugee Convention may reshape how other nations interpret it as well).

⁴⁹ Treaty Establishing the European Community art. 63(a), Nov. 10, 1997, 1997 O.J. (C 340) 3; see also Fischer-Lescano et al., *supra* note 10, at 281 (listing other relevant treaties that bind Member States to the prohibition against *refoulement*, including the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Punishment; the International Covenant on Civil and Political Rights; and the European Convention on Human Rights).

⁵⁰ Council Regulation 343/2003, 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, 2003 O.J. (L 50) 1 [hereinafter *Dublin II Regulation*].

⁵¹ U.N. High Comm'r for Refugees [UNHCR], *The Dublin II Regulation: A UNHCR Discussion Paper*, at 5 (Apr. 2006) (prepared by Laura Kok) (citing ¶ 4 of the Preamble of the Dublin II Regulation) [hereinafter *UNHCR Discussion Paper*].

successfully established a “hierarchy of criteria” to determine which Member State shall bear the responsibility of processing a given application for asylum,⁵² it did little to guarantee protection against *refoulement*.⁵³

As demonstrated by the UNHCR in its assessment of the Dublin system, Member States have utilized protection gaps and ambiguities therein to the detriment of asylum seekers. Greece, for instance, has instituted a procedure whereby the state may “interrupt” an asylum procedure if the applicant is “arbitrarily absent” and may deny the application without effective access to appeal or without substantive review of the claim.⁵⁴ Because of *refoulement* risks inherent in the policy, several European states have refrained from returning protection-seekers to Greece for application processing.⁵⁵

Both Ireland and Luxembourg have enacted ‘automatic-withdrawal’-type provisions that deem an application withdrawn, thus precluding substantive examination without effective access to appeal, if compliance with arbitrary or unreasonable time constraints is not satisfied.⁵⁶ Other states, though prohibiting denial of a claim without substantive review, allow substantive review to proceed in the absence of the applicant.⁵⁷ These summary procedures likewise create a very real risk of *refoulement*.

Despite the binding and directly applicable nature of the Dublin II Regulation, like the Refugee Convention, it lacked the tools necessary to guarantee effective protection against *refoulement* in Europe. Perhaps the most widely held criticism of the Dublin II Regulation is that it operated on the assumption that there already existed in Europe a common asylum policy that deters forum-shopping and, therefore, the need for exclusionist action.⁵⁸ Two additional Community instruments sought to fill the gap – the Qualifications Directive and the Asylum Procedures Directive.

⁵² See generally Dublin II Regulation, *supra* note 50, Ch. III.

⁵³ See UNHCR Discussion Paper, *supra* note 51, at 12 (arguing that Dublin II has not harmonized the field of asylum, which could lead to “direct and indirect *refoulement*”).

⁵⁴ *Id.* at 46-47.

⁵⁵ *Id.* at 47.

⁵⁶ *Id.* at 48-49.

⁵⁷ *Id.* at 49.

⁵⁸ See Gilbert, *supra* note 39, at 971; see also UNHCR Discussion Paper, *supra* note 51, at 12.

C. *The Qualifications Directive*

The Council adopted the Qualifications Directive⁵⁹ in 2004 so as to "ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States."⁶⁰ The Qualifications Directive represents a significant step forward in the Community's approach to asylum matters. As one scholar has noted:

The Directive represents a remarkable development in the field of international law for two reasons. It is the first supranational instrument binding on EU Member States to cover those in need of international protection but who fall outside the provisions of the 1951 Refugee Convention and its 1967 Protocol. . . . Secondly, it is the first supranational instrument binding on EU Member States that deals with refugee protection and subsidiary protection under the one umbrella. The Directive defines 'international protection' as encompassing both refugee protection and subsidiary protection and has important provisions dealing with both.⁶¹

In creating a specific legal framework for subsidiary protection, the Qualifications Directive extends legal entitlement to international protection to persons previously not guaranteed protection⁶² against *refoulement*.⁶³

⁵⁹ Council Directive 2004/83, On Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted, 2004 O.J. (L 304) 12 (EC) [hereinafter Qualifications Directive].

⁶⁰ *Id.* at pmb., ¶ 6.

⁶¹ Hugo Storey, *EU Refugee Qualification Directive: A Brave New World?*, 20 INT'L J. REFUGEE L. 1, 5 (2008) (citations omitted).

⁶² See *id.* at 5-8 (explaining that persons needing protection from human rights violations, but not qualifying as "refugees" under the Convention's definition, were previously limited to seeking protection under Art. 3 ECHR, which was subject to being "withdrawn or reintroduced at executive whim").

⁶³ See Qualifications Directive, *supra* note 59, arts. 20, 21.

Nevertheless, despite the commendation deserved for extending the right to international protection, the Qualifications Directive did little to secure *effective* protection against *refoulement*. While it clarified the right to entitlement to protected status, it did not do the same regarding the obligation of a Member State to permit access to the asylum process and, therefore, did nothing to cure the deficiencies inherent in the Refugee Convention and the Dublin II Regulation. In fact, given that the Qualifications Directive interprets one of the Convention's grounds for exclusion as an exception to *non-refoulement*, it arguably increases occurrences of *refoulement*.⁶⁴

D. *The Asylum Procedures Directive*

In 2005, the Council adopted the Asylum Procedures Directive,⁶⁵ with the primary objective to "introduce a minimum framework in the Community on procedures for granting and withdrawing refugee status."⁶⁶ Though the Directive does not guarantee a right to asylum, it is a move toward guaranteeing a right to access an asylum procedure, and therefore, protection against *refoulement*. Indeed, it appears that the drafters took notice of the shortcomings inherent in the Refugee Convention and previous Community instruments:

In the interests of a *correct recognition* of those persons in need of protection as refugees within the meaning of Article 1 of the Geneva Convention, *every applicant should*, subject to certain exceptions, have an *effective access to procedures* Moreover, the procedure in which the application for asylum is examined should

⁶⁴ See Hugo Storey, *supra* note 61, at 23-4. ("[The Qualifications Directive] 'continues to mix two different concepts of the 1951 Convention, the exclusion clauses of Article 1F and the exception to *non-refoulement* principle in Article 33(2) in a way which endangers the proper application of the 1951 Convention.'" (citations omitted)).

⁶⁵ Council Directive 2005/85, On Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 2005 O.J. (L. 326) 13 (EC) [hereinafter Asylum Procedures Directive].

⁶⁶ *Id.* at pmb1., ¶ 5.

normally provide an applicant at least with the right to stay pending a decision by the determining authority⁶⁷

Attempting to further strengthen protection against *refoulement*, the Asylum Procedures Directive guarantees substantive review of all asylum applications.⁶⁸ And though it provides two exceptions to this guarantee,⁶⁹ it subjects them to a caveat: "Member States should only proceed [to apply these exceptions] where this particular applicant would be safe in the third country concerned."⁷⁰ Unfortunately, it is this very "safe third country"⁷¹ concept that has undermined the Procedures Directive's protection against *refoulement*.

Article 25(2)(c) of the Procedures Directive permits a Member State to deem inadmissible an asylum application if "a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 27." Though Article 27(1)(b) forbids a Member State from applying the safe third country concept absent assurances that the applicant will be protected against *refoulement*, it leaves the determination entirely up to the state.⁷² One scholar has noted the significant inherent danger:

[That a Member State can remove an asylum seeker to a safe third country without substantive review of the application through national legislation complying with Article 25] is premised on the notion that, according to a destination country's own country information,

⁶⁷ *Id.* at pmbL., ¶ 13 (emphasis added). The right to access to asylum procedures is elaborated upon in Article 6; the right to stay pending review of the application in Article 7.

⁶⁸ *Id.* at pmbL., ¶ 22, art. 8.

⁶⁹ *Id.* at pmbL., ¶ 22, ("Member States should examine all applications on the substance . . . except where . . . it can be reasonably assumed that another country would do the examination or provide sufficient protection."), and pmbL., ¶ 23, (" . . . Member States should also not be obliged to assess the substance of an asylum application where the applicant, due to a connection to a third country as defined by national law, can reasonably be expected to seek protection in that third country.").

⁷⁰ *Id.* at pmbL., ¶ 23.

⁷¹ Elaborated upon at *id.*, art. 27.

⁷² *Id.* art. 27(2) ("The application of the safe third country concept shall be subject to rules laid down in national legislation, including . . .") (emphasis added).

determining authorities can reliably presume that even without a substantive examination, any applicant from a designated safe third country will have no grounds for fearing a real risk of treatment contrary to Article 3 of the European Convention on Human Rights (ECHR). Hence, removing such applicants to that country will presumptively involve no breach of the destination country's international legal obligations.⁷³

However, it is abundantly clear that no such "reliable presumption" can be made under Article 27(2)(b). The provision provides that a finding of "safe third country" status in a particular case be based on methodology that includes "case-by-case consideration of the safety of the country for a particular applicant *and/or* national designation of countries considered to be generally safe."⁷⁴ As suggested:

[T]he term of art 'and/or' substantially weakens this safeguard because it grants broad executive discretion to subsume individual applications entirely within Member States' own generic assessments concerning the 'general safety' of third countries. Such a formulation does not specifically require an empirical inquiry into the safety of a third country for an individual asylum seeker. . . . Article 25 grants determining authorities wide latitude to use the preliminary examination stage inappropriately for determining applications substantively unmeritorious so as to facilitate the speedy removal of asylum seekers to non-EU third countries. A foreseeable practice such as this creates a palpable risk of secondary movements and *refoulement* due to the increased possibility of erroneous admissibility decisions.⁷⁵

⁷³ Michael John-Hopkins, *The Emperor's New Safe Country Concepts: A UK Perspective on Sacrificing Fairness on the Altar of Efficiency*, 21 INT'L J. REFUGEE L. 218, 222 (2009).

⁷⁴ Asylum Procedures Directive, *supra* note 65, art. 27(2)(b) (emphasis added).

⁷⁵ John-Hopkins, *supra* note 73, at 222-23.

Similarly, Article 27(2)(a) requires a determination of “safe third country” status to be determined by “rules requiring a connection between the person seeking asylum and the third country concerned on the basis of which it would be reasonable for that person to go to that country.”⁷⁶ However, the Directive fails to define that which qualifies as a connection “on the basis of which it would be reasonable for that person to go to that country.”⁷⁷ Lacking any such interpretational guidance, Member States have broadly expanded the safe third country concept in a manner that weakens protection against *refoulement*.⁷⁸

Though the Asylum Procedures Directive addressed the shortcomings inherent in previous Community instruments, it did nothing to “promote the approximation of fair procedural rules for granting or withdrawing refugee status.”⁷⁹ In fact:

[U]nlike within the fields of EC law and jurisprudence relating to social policy and the internal market, there are neither provisions within the Procedures Directive nor ECJ jurisprudence that restrict or rule out any national margin of appreciation in interpreting Article 27 paragraph (2)(a) so as to prevent differing treatment of comparable applicants seeking asylum across EU Member States.⁸⁰

Affording Member States such discretion in determining an applicant’s right to access the asylum process has proven quite hazardous to protection against *refoulment* in Europe. Faced with recent influxes of migrants – both legitimate asylum seekers and otherwise – the Southern Members in particular have taken advantage of such

⁷⁶ Asylum Procedures Directive, *supra* note 65, art. 27(2)(a).

⁷⁷ John-Hopkins, *supra* note 73, at 224.

⁷⁸ *Id.* (illustrating that such lack of direction has permitted the UK to construe what constitutes a reasonable connection “in such a circumscribed fashion under [its domestic] Immigration Rule 345(2) that it catches any asylum seeker who has had ‘an opportunity at the border or within the third country or territory to make contact with the authorities of that third country or territory in order to seek their protection.’”).

⁷⁹ *Id.*

⁸⁰ *Id.* at 224-25.

discretionary provisions by broadly interpreting the safe third country concept. Aside from the obvious detriment such practices can have on the individual asylum seeker, the wider implications are devastating. Rosemary Byrne and her colleagues observe that "there is a very real cost to embracing more progressive policies when one's neighbours are creating procedural and substantive barriers to protecting refugees."⁸¹ They explain that the "fear of becoming a targeted 'soft touch' or 'closed sack'" for asylum seekers turned away elsewhere leads to the "rippling of restrictive practices."⁸² "[I]t is predictable," they continue, "that a lateral spiraling of like policies will occur in neighboring jurisdictions."⁸³

It was all too predictable that the Asylum Procedures Directive, absent safeguards to assure proper application of the safe third country concept, would encourage exclusionist practices and, ultimately, decrease protection against *refoulement*. Community Directives, because they regulate fields in which the Member States retain significant competencies, generally check discriminatory application via stringent and clear equal treatment-type provisions.⁸⁴ The absence of such provisions in the Procedures Directive, considered together with the discretion afforded the Member States in determining safe third country status, essentially sealed the Directive's fate. As noted:

On the basis that the types of unconditional and directly effective anti-discrimination provisions manifest within other fields of EU law do not apply within the field of justice and home affairs, a literal and logical interpretation of Article 27 paragraph (2)(a) would appear to be that Member States have complete discretion to define the requisite connection between a person seeking asylum and a third country. Affording Member States such discretion, without there being any substantive safeguards in place . . .

⁸¹ Rosemary Byrne, et al., *Understanding Refugee Law in an Enlarged European Union*, 15 EUR. J. INT'L L. 355, 375 (2004).

⁸² *Id.*

⁸³ *Id.* at 376.

⁸⁴ John-Hopkins, *supra* note 73, at 225.

makes it easier to reject and return asylum seekers to third countries outside the EU, solely on the basis that asylum seekers can reasonably be expected to seek protection from another state.⁸⁵

Though aimed at assuring effective access to the asylum process, the Directive, in affording Member States such latitude in determining whether a given refugee was "safe" elsewhere, has sanctioned – via Community codification – the return of possible asylum seekers to territories where they risk discriminatory persecution.

The current European asylum system has endangered protections afforded by the Refugee Convention: first, by limiting responsibility for the processing of a given application lodged anywhere in Europe to a single one of its Member States (via the Dublin II Regulation); and subsequently, by allowing that one Member State, with wide discretion, to determine that application inadmissible – in all of Europe – on account of a state-determined "connection" with some "safe" third country (via the Asylum Procedure Directive). Fortunately, these failed instruments comprise but the first phase of the Union's transition to a Common European Asylum System (CEAS), and so hope for effective protection against *refoulement* in Europe still lives.

IV. STEMMING THE TIDE OF EXCLUSIONISM: A COMMON EUROPEAN ASYLUM SYSTEM ("CEAS")

A. *The Failure of the First Phase Instruments*

The notion of a CEAS was born of the 2004 Hague Programme and accompanying Action Plan, whose purpose it was to "help strengthen freedom, security and justice in the European Union" via, *inter alia*, the establishment of "an effective harmonized [asylum] procedure in accordance with the European Union's values and humanitarian traditions."⁸⁶ One means by which the Programme

⁸⁵ *Id.* at 225-26.

⁸⁶ *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Justice, Freedom and Security in Europe Since 2005 : An Evaluation of the Hague Programme and Action Plan – An Extended Report on the Evaluation of the Hague*

attempted to do so was through the formation of a CEAS, which itself was to be facilitated via implementation of the 'first phase' instruments expounded upon above.⁸⁷

The attendant shortcomings are clear; the European Commission itself, in its Policy Plan on Asylum,⁸⁸ acknowledged the extent to which ambiguities in the Union's current instruments hamper effective protection against *refoulement*:

[S]tates are implementing an increasing array of legitimate border control measures that may sometimes lack the necessary mechanisms to identify potential asylum seekers and allow their access to the territory and subsequently to an asylum procedure. It has been criticized that this could lead in exceptional cases to the violation of the principle of non-refoulement as enshrined in the 1951 Refugee Convention at Europe's borders.⁸⁹

In addressing the disparities between Member States in their recognition rates of those entitled to protection, the Commission noted:

[A]nalysis clearly shows that there are significant differences in recognition rates between Member States, mainly due to differences across [the] EU in terms of practices, procedures, diverse country of origin information sources and decision-making processes for granting protection and, therefore, a lack of harmonization of the national policies and procedures in the field of asylum. . . .⁹⁰

Programme §§ 1.1, 1.2, EU:SEC(2009) 766 finalOE (June 10, 2009) (hereinafter *Evaluation of the Hague Programme*).

⁸⁷ *Id.* § 3.2.1(I)

⁸⁸ The intent of the Policy Plan on Asylum was to "define a blueprint for the coming years and list the measures that the Commission intends to take in order to complete the second phase of the CEAS" *Policy Plan on Asylum*, *supra* note 12, § 1.

⁸⁹ *Id.* § 2.1.2.1.

⁹⁰ *Id.* § 2.1.2.6; *see also* *Evaluation of the Hague Programme*, *supra* note 86, § 3.2.1.

Finally, in addressing the danger of arbitrary detainment, the Commission points out that "[v]agueness in the definition of the cases when an asylum-seeker can be detained has led to some Member States systematically detaining all asylum-seekers while others never use detention."⁹¹

B. *The Second Phase of Establishing a Common European Asylum System*

The Commission determined that these ambiguities prevent even perfect implementation of the current instruments from guaranteeing equal protection against *refoulement* in the various Member States.⁹² In doing so, the Commission implemented a "second phase of the CEAS . . . to offer, through a comprehensive approach to protection across the EU, appropriate status, under equal conditions, to any third-country national requiring international protection in compliance with fundamental rights, in particular with the principle of non *refoulement*."⁹³ In its subsequent European Pact on Immigration and Asylum, the European Council likewise determined that "the time has come to take new initiatives to complete the establishment of a Common European Asylum System, provided for in the Hague programme, and thus to offer a higher degree of protection, as proposed by the Commission in its asylum action plan."⁹⁴

To this end, the Commission analyzed several approaches to future Community action so as to determine how to best effectuate uniform protection against *refoulement* in the EU.⁹⁵ The Commission rejected three policy options: "maintenance of the status quo"; an "overall comprehensive legal instrument on asylum and creation of a European Asylum Authority"; and "full scale harmonisation of EU legislation."⁹⁶ Alternatively, the Commission proposed that future action will best be realized via the combination of two less-extremist

⁹¹ *Policy Plan on Asylum*, *supra* note 12, § 2.2.

⁹² *Id.*

⁹³ *Id.* § 3.1.

⁹⁴ Council of the European Union, European Pact on Immigration and Asylum, at 11 (13440/08) (Sept. 24, 2008) (calling for Commission proposals for the establishment of "a single asylum procedure comprising common guarantees and for adopting a uniform status for refugees and the beneficiaries of subsidiary protection").

⁹⁵ *Policy Plan on Asylum*, *supra* note 12, § 4.

⁹⁶ *Id.* §§ 4, 5, 6.

options: “further harmonisation of EU legislation” and increased support of the “cooperation and exchange of best practices” between Member States.⁹⁷

In fact, initial actions taken by the Union in response to concerns over *refoulement* demonstrate its preference for facilitating cooperation among Member States rather than imposing additional restrictions on state sovereignty. For instance, in 2006, the Commission acknowledged the need for “[a]n objective, transparent and accurate [Country of Origin Information] system that delivers official, rapid and reliable information.”⁹⁸ In the interest of “levelling the asylum playing field,”⁹⁹ it proposed the establishment of a “‘common portal’ through which all Member States [sic] authorities could access, through one stop, all official COI databases”¹⁰⁰ This communication also proposed the strengthening of practical cooperation between Member States in asylum matters through “[s]ingle Procedure activities”¹⁰¹; addressing “particular pressures situations”¹⁰²; and training asylum service personal.¹⁰³

⁹⁷ *Id.* (reasoning that this combination offers nearly as many positive impacts as the ‘comprehensive legal instrument’ option while entailing “lower transposition difficulties and financial and implementation costs”; that the ‘further harmonisation’ option “imposes a slightly lower level of harmonisation in some areas” than the ‘full scale harmonisation’ option and therefore has “better chances of being successfully transposed and implemented”; and that the ‘comprehensive legal instrument’ option “has one main drawback [in that] the transfer of sovereignty from the Member States to the proposed European Asylum Authority does not have chances, at this stage, of being accepted by the majority of Member States”).

⁹⁸ *Communication from the Commission to the Council and the European Parliament on Strengthened Practical Cooperation*, at ¶ 12, COM (2006) 67 final (Feb. 17, 2006) (noting that such a COI system is “central to any assessment of whether a person should benefit from international protection”) [hereinafter *Strengthened Practical Cooperation*].

⁹⁹ *Id.*

¹⁰⁰ *Id.* at ¶ 13. For criteria reflecting “current best international judicial practice adopted when assessing how much weight can be attached to a particular COI source or reference,” see *Judicial Criteria for Assessing Country of Origin Information (COI): A Checklist*, Paper for the 7th Biennial IARLJ World Conference, Mexico City, 6-9 Nov. 2006 COI-CG Working Party, 21 INT’L J. REFUGEE L. 149, 154 *et seq.*

¹⁰¹ *Strengthened Practical Cooperation*, *supra* note 98, § 3.1 (citation omitted).

¹⁰² *Id.* § 3.3.

¹⁰³ *Id.* § 3.4.

The Commission's Communication on the Establishment of a Joint EU Resettlement Programme¹⁰⁴ also seeks to increase protection against *refoulement* by facilitating cooperation in asylum matters while minimizing intrusions on state sovereignty.¹⁰⁵ The Commission took note of Europe's underrepresentation in refugee resettlement¹⁰⁶ and, accordingly, sought to "involve more Member States in resettlement activities"¹⁰⁷ Specifically, the Commission sought, through the Programme:

(1) to increase the humanitarian impact of the EU by ensuring that it gives greater and better targeted support to the international protection of refugees through resettlement, (2) to enhance the strategic use of resettlement by ensuring that it is properly integrated into the Union's external and humanitarian policies generally, and (3) to better streamline the EU's resettlement efforts so as to ensure that the benefits are delivered in the most cost-effective manner.¹⁰⁸

And though the Commission was quick to list as the Programme's first guiding principle, "Participation by Member States in resettlement should remain voluntary,"¹⁰⁹ it was nevertheless sure to promote Member State participation by incentivizing cooperation.¹¹⁰

¹⁰⁴ *Communication from the Commission to the European Parliament and the Council on the Establishment of a Joint EU Resettlement Programme*, COM (2009) 447 (Sept. 2, 2009).

¹⁰⁵ *Id.* § 2.2 ("[S]tructures and procedures for coordinating resettlement policy in the EU should [] be adopted to enable closer cooperation among Member States and more effective coordination of resettlement activities at the EU level.").

¹⁰⁶ *Id.* § 2.1 (observing that Europe only took in 6.7% of refugees resettled worldwide in 2008, less than half of what Canada accepts annually).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* § 3.

¹⁰⁹ *Id.* § 3.1 (noting "[t]here are currently considerable differences between Member States with respect to the numerical targets and specific caseloads they wish to resettle, the legal criteria which are used for deciding who to resettle, and the partners through which resettlement is carried out").

¹¹⁰ The Communication includes a proposal by the Commission to amend the European Refugee Fund III Decision so as to provide cooperating Member States a

Finally, like the “common portal for COI” and the Joint EU Resettlement Programme, the Commission’s February 18, 2009 *Proposal for a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office*¹¹¹ similarly demonstrates the EU’s promotion of a more effective CEAS via the enhancement of cooperation among Member States¹¹² as opposed to the further restriction of state sovereignty. Cautious of intruding upon state sovereignty, the Proposal itself provides that “[t]he agency will not have decision-making powers and will engage in support activities that act as an incentive to practical cooperation on asylum, such as recommendations, referral to scientific authority, networking and pooling of good practice, evaluation of the application and implementation of rules, etc.”¹¹³

C. *European Asylum Policy under the Treaty on the Functioning of the European Union*

These early assurances of respect for sovereign discretion in the effectuation of a CEAS notwithstanding, it appears that the future of asylum policy in the European Union will, in fact, more closely resemble the “full scale harmonization” approach, and possibly even near the “European Asylum Authority” approach, expounded above.¹¹⁴

In light of Ireland’s recent approval of the Lisbon Treaty in its second referendum held October 2, 2009,¹¹⁵ the current legal base for

one time, lump sum payment of €4,000 per resettled refugee under the Programme. *Id.* § 3.2.1.

¹¹¹ *Proposal for a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office*, COM (2009) 66 final (February 18, 2009). Developed to provide the necessary structural support, coordination and funding for these measures, and “whose task will cover all practical cooperation activities [and which] will also help Member States faced with particular pressures on their asylum systems by coordinating asylum expert teams, and possibly assisting overburdened Member States.” Evaluation of the Hague Programme, *supra* note 86, § 3.2.1.II.

¹¹² See *Proposal for a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office*, *supra* note 111.

¹¹³ *Id.* at Explanatory Memorandum, ¶ 3.

¹¹⁴ See explanation *supra*, pp. 26-27.

¹¹⁵ Honor Mahoney, *Irish Vote Unleashes Flurry of EU Activity*, EU OBSERVER, Oct. 3, 2009, <http://euobserver.com/9/28773?print=1> (“The final vote showed that 67.1

Europe's asylum policy is almost certain to soon be replaced by the new consolidated version of the Treaty on the Functioning of the European Union ("TFEU").¹¹⁶ The TFEU will establish "uniform statuses for asylum and subsidiary protection" and "common asylum procedures" as "objectives of primary community law" and will create "a legal obligation . . . to consider proposals for achieving those objectives through secondary legislation."¹¹⁷ Recognizing the need for "a systematic approach to the asylum acquis . . . [which] leav[es] no space for gaps and inconsistencies," and for a "reconsideration of the wide discretion currently enabling Member States to derogate from the agreed minimum standards,"¹¹⁸ the Commission has decided to await ratification of the Lisbon Treaty before amending the Qualifications Directive and the Asylum Procedures Directive.¹¹⁹

In addition to curbing dangers of *refoulement* caused by inconsistent and unfaithful interpretations of the secondary Community instruments, the TFEU will discourage, and possibly preempt, bilateral agreements between individual Member States and third countries tending to violate the right. Article 78(2)(g) lists as an element of the CEAS "partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection."¹²⁰ In explaining the attendant preemptive effect and justifying EU action in the field, the Commission notes:

percent voted in favour of the new rules while 32.9 percent voted against, a 20 percent swing to the Yes side, when compared to the country's rejection of the EU Treaty last year.").

¹¹⁶ *Policy Plan on Asylum*, *supra* note 12, § 2.3. The Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU] envisions a drastic restructuring of the current treaty system. For a brief but comprehensive review of the various changes instituted by the Treaty of Lisbon, see generally Stephen C. Sieberson, *The Treaty of Lisbon and its Impact on the European Union's Democratic Deficit*, 14 COLUM. J. EUR. L. 445 (2008).

¹¹⁷ *Policy Plan on Asylum*, *supra* note 12, § 2.3.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ TFEU, *supra*, note 116, art. 78(2)(g)

First, . . . it would not make sense to deal with third countries on asylum issues on a national basis. It stems from the fulfilment [sic] of the CEAS at the internal EU level that common external action is necessary.

Second, from the point of view of effectiveness, it is clear that aggregated EU action instead of 27 differentiated programmes can have more positive impact

Third, the external impacts of the EU asylum policy must be seen in the wider context of the EU's external relations. . . .

Finally, from the point of view of protection, third countries need to meet their own obligations to safeguard international protection and the rights of refugees, asylum seekers and migrants, stemming from the international human rights instruments they are party to. . . .¹²¹

These considerations played a role in the Union's decision to engage in discussions with Libya, which resulted in a "Council Conclusion on cooperation with Libya on migration issues," and eventually, an "EU-Libya Framework Agreement" calling for "political dialogue and cooperation on foreign policy, human rights, security issues and migration."¹²² The EU's assumption of migration matters in the Mediterranean, by separating asylum policy from sovereign self interests, would certainly offer more effective protection against *refoulement*. Whether these negotiations will supersede Member States' agreements with third countries depends upon the competence the Union assumes in the field under the TFEU, and also on any potential conflict between the Union's and the interested state's agreements with the third country.¹²³

¹²¹ *Policy Plan on Asylum*, *supra* note 12, § 2.3.

¹²² HUMAN RIGHTS WATCH, *supra* note 12, at 31-32.

¹²³ See, e.g., Rafeal Leal-Arcas, *Is EC Trade Policy up to Par?: A Legal Analysis over Time – Rome, Marrakesh, Amsterdam, Nice, and the Constitutional Treaty*, 13 COLUM. J. EUR. L. 305, 352-53

In September 2009, the Council met to discuss a new multi-annual program for an area of Freedom, Security and Justice serving the citizen – the Stockholm Program.¹²⁴ Reaffirming its commitment to a 2012 deadline for the establishment of a CEAS, the Council Presidency acknowledged the need for consistent policy among Member States in determining entitlement to protection status.¹²⁵ To this end, and with the expectation that the Treaty of Lisbon will soon be ratified and the TFEU soon in effect, the Presidency suggested that the EU itself seek accession to the Refugee Convention.¹²⁶ The significance is simple: rather than each of the Member States being individually bound to the principle of *non-refoulement*, the Union itself would be bound, further justifying centrist action in matters traditionally sovereign.

As additional evidence that European asylum policy is embracing “full scale harmonisation” of Member States’ legislation, the Stockholm Program calls for the EU assumption of agreements with third countries regarding asylum matters.¹²⁷ Although such action leaves implementation of what may come of those agreements to the Member States (which would not be the case were the Union to endorse the “European Asylum Agency” approach), the Council intends to enforce equal and obligatory application through institutional oversight.¹²⁸ This supervisory power will assure that sovereign self interests do not impede protections against *refoulement*, including access to asylum proceedings.

V. CONCLUSION

Though couched in terms of “practical cooperation” and “mutual trust,”¹²⁹ the Council’s Presidency Note on the Stockholm Program demonstrates the Union’s divergence from deference

¹²⁴ Council of the European Union, Presidency Note, The Stockholm Programme: An Open and Secure Europe Serving the Citizen, § 5 (14449/09) (Oct. 16, 2009) [hereinafter the Stockholm Programme] (Oct. 16, 2009).

¹²⁵ *Id.* § 5.2 (“It is crucial that individuals, regardless of the Member State in which their application for asylum is lodged, are offered the same level of treatment as regards reception conditions, procedural arrangements and status determination.”)

¹²⁶ *Id.* § 5.2.1.

¹²⁷ The Stockholm Programme, *supra* note 124, § 5.2.1.

¹²⁸ *Id.*

¹²⁹ *Id.* §§ 5.1.5, 5.2.1.

traditionally granted to its sovereign members in asylum policy and to a policy of a fully harmonized, institutionally coordinated system. While some progress regarding coordination of Member State legislation in the field of asylum was realized under the first phase instruments, they proved incapable of guaranteeing effective protection against *refoulement*. Despite an explicit guarantee under the Asylum Procedures Directive to access to an asylum procedure, Member States took advantage of the lack of procedural safeguards. In doing so, they disadvantaged thousands potentially entitled to international protection by applying the “safe third country” concept in a manner contrary to its actual intent.

Fortunately, the enactment of the second phase of a Common European Asylum System, aimed at rectifying the shortcomings of the first phase instruments, is well under way. While early second phase actions appeared to demonstrate a reluctance to intrude upon the sovereign domain, the Union’s most recent expressions suggest the opposite. The subtle but very real shift is a reaction to the questionable practices of some Member States in the Mediterranean.

If implemented correctly, the second phase of the CEAS has the potential to guarantee effective protection against *refoulement* short of the need for full scale integration. It appears much could be accomplished simply by limiting sovereign discretion in designating “safe third country” status under Article 27 in the same manner it is limited in designating “safe country of origin” status under Article 31.¹³⁰ Under Art. 31(2) of the Asylum Procedures Directive, subject to certain safeguards, a Member State “shall . . . consider the application for asylum as unfounded where the third country is designated safe pursuant to Article 29.”¹³¹ Article 29, in turn, provides that only countries approved and designated as such by the Council in a “minimum common list of third countries” may be deemed “safe” by the Member States.¹³² Article 29 thus eliminates Member State discretion (and thereby abuses wrought in self-interests) in determining whether a given application is unfounded.¹³³ Furthermore, Article

¹³⁰ Asylum Procedures Directive, *supra* note 65, arts. 27, 31.

¹³¹ *Id.* art. 31(2)

¹³² *Id.* art. 29.

¹³³ While Article 30 arguably nullifies this protection by allowing Member States, without prejudice to Article 29, to likewise make “safe country of origin” designa-

31(1) provides that the “safe country of origin” designation, whether under Article 29 or 30, may only be made “after an individual examination of the application,” thereby assuring, at a minimum, access to the asylum procedure and some level of substantive review of a given application.¹³⁴

Adopting a “minimum common list” regarding safe third country designation and allowing its utilization only after individual examination of an application (a feat more feasible once the TFEU has come into effect) – and thereby limiting sovereign discretion in determining whether a given Member State is obligated to review a given application – would offer better and more effective protection against *refoulement* than is realized under the current European asylum system. As explained, “the CEAS has a chance to emancipate itself from the heritage of sub-regional norms and move from a state-centrist perspective towards an institutionalist-unionist one only when it has shifted into the second phase.”¹³⁵ While it is clear that achieving such results will require additional relinquishment of closely-cherished sovereign rights, a Europe operational under the new TFEU is obligated to such a commitment. Fortunately, this second phase is under way. If properly implemented, Europe may very well assume its appropriate place as an international model for effective protection against *refoulement*.

tions, it checks Member State abuse by obligating them to notify the Commission when making such designations, thereby providing the Union potential recourse prior to abusive application. *Id.* at art. 30(6). Though Member States are similarly obligated to notify the Commission of the countries to which it applies the “safe third country” concept, it is only required to do so “periodically,” and, therefore, potential exists for abusive application before the Union can challenge arbitrary designation.

¹³⁴ *Id.* art. 31(1).

¹³⁵ Byrne, et al., *supra* note 81, at 367.