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Understanding Refugee Law in an Enlarged European Union

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Rosemary Byrne
Trinity College Dublin

Gregor Noll
Lund University, Sweden

Jens Vedsted-Hansen
University of Aarhus Law School, Denmark



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Rosemary Byrne

Gregor Noll

Jens Vedsted-Hansen

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Understanding Refugee Law in an Enlarged European Union

Dr. Rosemary Byrne, Lecturer in Law, Law School and Institute for International Integration Studies, Trinity College Dublin, Ireland

Dr. Gregor Noll, Assistant Professor, Faculty of Law, Lund University, Sweden

Professor Jens Vedsted-Hansen, University of Aarhus Law School, Århus, Denmark

Abstract

The present article seeks to explore how asylum law is formed, transformed and reformed in Europe, what its effects are on state practice and refugee protection in the Baltic and Central European candidate countries, and what this process reveals about the framework used by scholars to understand the dynamics of international refugee law. Arguably, an exclusive focus on EU institutions and their dissemination of regional and international norms among candidate countries through the *acquis communautaire* is misleading. Looking at the sub-regional interplay between Vienna and Budapest, Berlin and Warsaw, Copenhagen and Vilnius provides a richer understanding of the emergence of norms than the standard narrative of a Brussels dictate. Hence, to capture these dynamics, we will attempt to expand the framework of analysis by incorporating sub-regional settings, cutting across the divide between old and new Members, and by analysing the repercussions sent out by domestic legislation within these settings. While acknowledging that bilateral and multilateral relations are continuously interwoven, we conclude that bilateralism accounts for a greater degree of normative development and proliferation than multilateralism at EU level, and that domestic legislation as formed by sub-regional dynamics will remain the ultimate object of study for scholars of international refugee law.

Understanding Refugee Law in an Enlarged European Union

1. Introduction

With the political and legal fora of the European Union, Europe emerges as the only region in the world capable of launching binding legal instruments with explicit substantive and procedural interpretations of the broadly framed obligations under the 1951 Convention relating to the Status of Refugees.¹ In the past decade considerable attention has been paid to how European policy makers were translating international obligations under the 1951 Convention into a range of innovative and controversial regional asylum practices.

International lawyers are trained to think in normative and institutional hierarchies. Hence, there is a strong temptation to analyse EU enlargement in general, and the export of refugee and migration policies to the East in particular, as Brussels-driven and anchored in the existing *acquis communautaire*. In the evolving narrative, the new Member States are all too easily depicted as being at the receiving end of an *octroi*. Generally, the implementation of, and interplay between, international, regional and domestic law is the dominant focus of discourse on asylum law and policy in Europe.² Considering asylum against the backdrop of the process of European expansion, this article argues for a broader analytical framework to understand the development of state practice in international refugee law.³ We believe that an exclusive focus on EU institutions and their dissemination of regional and international

¹ Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137 [hereinafter 1951 Convention]. In the following, reference to the 1951 Convention covers the Convention as modified by the Protocol relating to the Status of Refugees, 31 Jan. 1967, 606 UNTS 267.

² See e.g. Simpson, 'Asylum and Immigration in the European Union After the Treaty of Amsterdam', 5 *European Journal of Public Law* (1999) 91; Lambert, 'Building a European Asylum Policy Under the "First Pillar" of the Consolidated Treaty Establishing the European Community', 11 *International Journal of Refugee Law* (1999) 329; Hailbronner, 'European Immigration and Asylum Law Under the Amsterdam Treaty', 35 *Common Market Law Review* (1998) 1047; S. Peers, *Mind the Gap! Ineffective Member State Implementation of European Union Asylum Measure* (1998); van der Klaauw, 'Refugee Protection in Western Europe: A UNHCR Perspective' in J.-Y. Carlier and D. Vanheule (eds.), *Europe and Refugees: A Challenge?* (1997) 235-7; Marx, 'Non-Refoulement, Access to Procedures, and Responsibility for Determining Refugee Claims', 7 *International Journal of Refugee Law* (1995) 383.

³ This article is developed from the methodology adopted for a collaborative study on asylum in Europe and the Baltic and CEEC states. The study has been published in its entirety in R. Byrne, G. Noll, and J. Vedsted-Hansen (eds.), *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union* (2002).

norms is misleading. The interplay between Vienna and Budapest, Berlin and Warsaw, Copenhagen and Vilnius, rather than between Brussels and the candidates' capitals has led to many critical developments in asylum law in an expanded European Union. Hence, to capture these dynamics, we will attempt to expand the framework of analysis by incorporating sub-regional settings, cutting across the divide between old and new Members.

The role of the EU institutions in the development of the asylum *acquis* is undoubtedly a driving force in the later stages of the accession process. Measures to be undertaken by candidate countries in the fields of migration and asylum have been a dominant feature in their criteria for membership, requiring that the entire asylum *acquis* be transposed into their respective legal systems.⁴ With formal criteria and programmes to facilitate their implementation in the Associated States, it is these regional multi-lateral instruments and measures through which the emerging asylum systems in future Member States have been examined in international refugee scholarship.⁵ Yet by shifting the analytical focus downward to the *sub-regional* level, a more complex process of the legal development of European asylum law emerges. The sub-regional level comprises state-state interaction typically between two or three neighbouring states, as for example Austria and Hungary. Interaction at this level is embedded into the regional context of EU enlargement, but not necessarily identical in its goals. Sub-regional pressures and influences on the asylum regimes in the candidate countries preceded, and later, accompanied, the asylum agenda of the European Union for new Member States that was formalized in the accession process. In

⁴ See European Commission, 'Acquis of the European Union under Title IV of the TEC and title VI of the TEU. Consolidated version 2002', available at <http://europa.eu.int/comm/justice_home/doc_centre/asylum/acquis/doc_asylum_acquis_en.htm> (accessed on 18 August 2003).

⁵ See Anagnost, 'Meeting the Needs in Central European and the Baltics: Some Preliminary Lessons Learned from the Successes and Failures of Three Years of Asylum System Development Work in Europe', in 3 *European Law Reform* (2001) 29-49; Anagnost, 'Challenges Facing Asylum System and Asylum Policy Development in Europe: Preliminary Lessons Learned from the Central European and Baltic States (CEBS)', 12 *International Journal of Refugee Law* (2000) 380-400; Lavenex, "'Passing the Buck": European Union Refugee Policies towards Central and Eastern Europe' 11 *Journal of Refugee Studies* (1998) 2; Lavenex, 'Asylum, Immigration, and Central-Eastern Europe: Challenges to Enlargement', 3 *European Foreign Affairs Review* (1998) 275-294; P. Nyiri, J. Toth, M. Fullerton, *Diasporas and Politics* (2001); F. Laczko, I. Stacher and A. Klekowski von Koppenfels, *New Challenges for Migration Policy in Central and Eastern Europe* (2002). For contributions from institutional actors, see e.g. ECRE, *Position on the Enlargement of the European Union in Relation to Asylum*, (1998); UNHCR, *3rd International Symposium on the Protection of Refugees in Central Europe, 23-25 April 1997* (1997); IOM & ICMPD, *Migration in Central and Eastern Europe 1999 Review* (1999).

reality, norms are transformed in a constant interplay between domestic, sub-regional and regional forces, rather than replicated from the *acquis* into domestic legislation

While these sub-regional effects on asylum policy within the candidate countries offer a more nuanced understanding of the role of the asylum *acquis* in the development of domestic asylum regimes in the East, its import extends much farther. By focussing on the factors that shape asylum law and practice in sub-regions, valuable insight is gained into the actual development of state practice in international refugee law. For the consideration of multi-lateral arrangements within a region, such as those that exist between the European Union institutions and the candidate countries, fails to illuminate the indirect effects on practices in contiguous jurisdictions. Multilateralism impacts not only states that are formal participants in the multi-lateral relationship, but neighbouring jurisdictions as well.

Within this expanded framework, the evolution of asylum norms and practices can be seen to occur on three distinct, yet highly interdependent tiers of law and policy. On the domestic level, the shape of asylum law and policy is formally determined by the electorate, legislature and executives of a specific state.⁶ Although its direct effects are on asylum seekers, the impact this has on their migration patterns triggers repercussions with other states. The consequences of rechannelled migration flows extend beyond individual states, directing sub-regional policy. On the sub-regional level, the development of asylum policy centres upon the interplay of national asylum practices between neighbouring countries, as, for instance, Austria and Hungary or Germany and Poland. Finally, on the regional level the central role in the evolution of asylum is played by the European Union, which orchestrates the interplay of sub-regional norms. While acknowledging that bilateral and multilateral relations are continuously interwoven, we conclude that bilateralism accounts for a greater degree of normative development and proliferation than multilateralism at EU level.

⁶ Guiraudon argues that “certain domestic actors bypass the process of interest aggregation by mobilizing in international venues” and supports this contention with examples from European harmonisation in the migration field. Guiraudon, ‘European Integration and Migration Policy: Vertical Policy-Making as Venue Shopping’, 38 *Journal of Common Market Studies* (2000) 251-71, at p. 268.

Against this backdrop, the present article seeks to explore how asylum law is formed, transformed and reformed in Europe, what its effects are on state practice and refugee protection in the Baltic and Central European candidate countries, and lastly, what this process reveals about the framework used by scholars to understand the dynamics of international refugee law. Part Two provides an overview of the development of asylum law in the current Member State that occurs from the 1980s to the present and divides into three distinct stages: formation, transformation and reform. While the dominant interaction is between national and regional norms and practices, sub-regional factors are identified which play an important role in shaping regional standards. In Parts Three and Four, the vertical and lateral proliferation of norms is considered respectively. Part Three contrasts the development of asylum law between the current and future Member States, a process which is most visibly governed by the Accession Partnership agreements that orchestrate the transfer of asylum *acquis* to applicant states. In Part Four, the implications of sub-regional factors that influence law and policy prior, and parallel, to the accession process are identified and considered. The conclusion will consider what the focus on sub-regional practice suggested here could mean for the future analysis of international refugee law.

2. Refugee Law in Europe: The Three Stages of Normative Development

Mandated by the Amsterdam Treaty, the European Union is steadily advancing towards creating a Common European Asylum System (CEAS), based on a range of first pillar instruments to ensure a minimum level of harmonization.⁷ This is the culmination of a fractured process occurring from 1985 onwards, attempting to reform asylum laws nationally and harmonize standards regionally. This development of asylum law in Western Europe occurred in three stages. First, in the formative stage, central norms, notions and principles were conceived on a domestic level. This was followed by the transformative stage, where these domestic norms were then regionalised within Europe. Currently, in this period of reform, central components of these regionalised legal instruments are being

⁷ For an overview of progress made so far, see Commission of the European Communities, 'Communication from the Commission to the Council and the European Parliament. Biannual Update of the Scoreboard to Review Progress on the Creation of an Area Of "Freedom, Security and Justice" in the European Union (First Half of 2003)', COM(2003) 291 final, Brussels, 22 May 2003.

reconsidered for the construction of a Common European Asylum System for the European Union.⁸

A. Formation: The Advent of Restrictive Asylum Policy in Europe

In the formative phase, the foundation stones of the current regional asylum system in Western Europe were set in place by domestic legislatures. National lawmakers developed a number of restrictive approaches to refugee law in order to grapple with what was considered primarily to be a domestic problem – the perceived overburdening of national asylum systems. Abbreviated procedures for asylum seekers submitting claims at border points, or for claims deemed to be manifestly unfounded, and provisions that allowed for the denial of asylum claims based on notions such as the safe country of origin and safe third country entered into domestic laws.⁹ Together with “flanking” measures moving migration control beyond state territory, Member States later attempted to regionalise these legal innovations in the harmonization instruments of the early 1990's.

While harmonization appears to be a direct vertical transfer of national state practices into regional norms and standards over time, this simplified perspective of the process masks the underlying dynamics of asylum policy formation in Europe at the time. For invariably, innovations undertaken by individual states that aimed at preventing asylum seekers from entering or remaining in the territory, set a lateral spiral movement of like policies sub-regionally, in neighboring countries.

⁸ See European Commission, “Towards common standards on asylum procedures,” Working Document, (SEC 1999) 271 Final. Conclusions of the Presidency (Tampere Summit Conclusions) 15 and 16 October 1999.

⁹ For an example of an early introduction of the notion of a Safe Country of Origin in Europe, see the 1990 Swiss asylum law. Bundesbeschluss über das Asylverfahren [Federal Decision on Asylum Procedure], June 22, 1990. The notion of safe third countries was introduced in a number of jurisdictions in the early 1990s. See, e.g., Austria: Bundesgesetz über die Gewährung von Asyl [Federal Law on Granting of Asylum] (Asylgesetz 1991), reported in Bundesgesetzblatt für die Republik Österreich [Federal Gazette for the Republic of Austria] (Jan. 7, 1992), pt. 2, ch. 1, sec. 2(3); Canada: Immigration Act, sec. 46.01(1)(b); Denmark: Udlændingeloven [Aliens Act], Art. 48, para. 2; France: Arts. 31 and 31 bis, Ordinance No. 45-2658, Nov. 2, 1945, in the version of Law No. 93-1027, Aug. 24, 1993; Germany: Law to amend the Basic Law (Grundgesetz; arts. 16 and 18), June 28, 1993: Bundesgesetzblatt 1993, 1002; United Kingdom: Asylum and Immigration Appeals Act 1993, HC para. 180K, 180M.

Contemporary political debates on asylum, in the West and East, echo the fears of earlier governments to be targeted by asylum seekers as a “soft touch” unless they introduce the restrictive policies of their neighbours.¹⁰ This inspired domestic legislatures in neighboring states to incorporate restrictive practices into their own asylum laws. Specifically, frontier states as Austria anticipated that with the permeability of their Eastern borders combined with the introduction of safe third country policies in neighboring Western European states, they would be confronted with high numbers of asylum seekers.¹¹ They would risk becoming a “closed sack” for asylum migration unless they themselves, in turn, could return asylum seekers to a third “host state.” These fears were precipitated by the potential sub-regional effects on migration patterns perceived to result from the national asylum practices of neighboring states. They remain an underlying theme throughout the period where restrictive asylum policies rippled across Europe. From this vantage point, the transmission of restrictive policies and practices, and of the apprehensions that inspired them, was lateral.

The formative stage started in 1986 with the introduction of the safe third country notion into Danish legislation (known as the *Danish clause*)¹². The idea that states could remove an asylum seeker to another jurisdiction on the grounds that protection could be sought elsewhere, quickly gained ground. Its implementation by one state within a sub-region, gave impetus for neighboring jurisdictions to follow suit, inspiring the fear within states of

¹⁰ Not long ago, the Austrian Minister Strasser told media that Austria would not accept becoming the primary goal country of “economic refugees” just because other EU Members are legislating in a more restrictive manner. Frankfurter Allgemeine Zeitung, ‘Verschärftes Asylrecht in Österreich’ [“Increasingly restrictive asylum legislation in Austria”], 12 June 2003, 5. While the rhetoric of states being a “soft touch” draws on projections of asylum seekers as rational actors maximizing procedural and welfare advantages, such a simple nexus cannot be shown in a quantitative analysis. Against the backdrop of a quantitative study of determinants affecting the choice of country by asylum seekers, Thielemann has convincingly argued that legislative policies of deterrence (such as safe third country schemes) have often proved ineffective. See E. Thielemann, “Does Policy Matter? On Governments’ Attempts to Control Unwanted Migration”, EI Working Paper 2003-02, available at <<http://www.lse.ac.uk/collections/europeanInstitute/workingpaperindex.htm>> (accessed on 25 August 2003).

¹¹ Austria is a particularly instructive example, where both the Eastern and Western dimensions crystallised into distinct legislative waves. In 1990, Austria responded to the abolishment of the Iron Curtain with extremely harsh legislation (justified as an emergency measure), to then launch a new legislative package in 1997 reacting to EU Membership, the adoption of the Schengen *acquis* and the 1998 entry into force of the Dublin Convention in Austria. Brandl, ‘Austria’, in R. Byrne et al., *supra* note 3, 100.

¹² The Danish legislature launched this radically formalistic solution in 1986, reacting on what it perceived as an uncontrolled inflow of applicants transiting through the then German Democratic Republic and, consecutively, the Federal Republic of Germany. By virtue of the Danish clause, asylum seekers could be sent back to safe third countries, and appeals had no suspensive effect. The safety of countries was identified in administrative practice.

becoming a “closed sack” from which asylum seekers and migrants could not be removed. By the end of the 1990's, virtually every Western European state implemented a safe third country policy to transfer responsibility for receiving an asylum seeker and assessing their claim. Although the European Court of Human Rights¹³ and national courts¹⁴ acknowledge that its implementation potentially may breach the prohibitions of *refoulement* in international law, limited powers of judicial review and a reticent and delayed stand on the issue by UNHCR has rendered the safe third country practice one of the most successful of the controversial practices adopted in the formative stage.¹⁵ Some 20 years after its inception, it is about to enter the domain of supranational hard law¹⁶, illustrative of how the proliferation of core asylum notions spread from the bottom-up, rather than from the top-down. The London Resolution of 1992 on Host Third Countries is conveniently thought of as the starting point for the notion of safe third country, thus moving the focus on a regional level dominated by “soft” policy making. The Danish clause demonstrates that its story starts six years earlier and demonstrates the need for an expanded method of inquiry. Although the adaptation of legislation was often motivated with a reference to the *acquis* – and thus to the regional process – in national policy debates, the dire necessity to adapt domestic law then and there was rather a result of concrete sub-regional pressures.

¹³ In *T.I. vs the UK*, the Third Chamber of the European Court of Human Rights found “that the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims”. Given the specifics of the case, and assurances by Germany that it would look into the merits of the claim by T.I. once he were returned by the U.K. under the Dublin Convention, the Court found the application to be inadmissible. *Decision as to the Admissibility of Application No. 43844/98 by T.I. against the U.K.*, ECtHR (Third Chamber), 7 March 2000 (unpublished), 16.

¹⁴ In the landmark case of *Adan and Aitseguer*, the U.K. House of Lords held that the true interpretation of the 1951 Convention must be taken as a standard for assessing the legality of removal under the Dublin Convention. *Regina v. Secretary of State For The Home Department, Ex Parte Adan. Regina v. Secretary of State For The Home Department, Ex Parte Aitseguer*, U.K. House of Lords, Judgments of 19 December 2000, available at <<http://www.parliament.the-stationery-office.co.uk/pa/ld200001/ldjudgmt/jd001219/adan-1.htm>> (accessed on 1 January 2001).

¹⁵ For an overview how far the notion of safe third country had spread already by the end of the 1990s, see N. Lassen, *Safe Third Country Policies in European Countries* (Copenhagen: Danish Refugee Council) (1997). For a more recent overview, see S. Egan, K. Costello, *Refugee Law. A Comparative Study. Report Commissioned by the Department of Justice, Equality and Law Reform* (1999).

¹⁶ See Commission Of the European Communities, ‘Amended proposal for a Council directive on minimum standards on procedures in Member States for granting and withdrawing refugee status’, Brussels, 18.6.2002, COM(2002) 326 final, arts. 27-8 and Annex I.

The impact of German legislative changes on its neighbours provides a powerful illustration of this point. In Germany, the formative stage peaked in 1993 with the comprehensive limitation of the right to asylum in the German Constitution¹⁷, incorporating a “hard” version of the safe third country concept lacking suspensive effect, introducing the notion of safe country of origin and launching an accelerated airport determination procedure. The repercussions of these amendments and their 1996 affirmation by the Federal Constitutional Court¹⁸ were again amplified sub-regionally and rippled through a number of neighboring states in the following years. In Poland, the parliament incorporated safe country notions into the 1997 Aliens Act. Notably, the Polish safe third country criteria directly mirror those employed by the German legislature and the German Federal Constitutional Court.¹⁹ In Hungary, the German moves were closely followed and “seen as a confirmatory licence to introduce safe country rules”.²⁰ By contrast, “[t]he Union as such (as distinct from its Member States) had little direct impact on the Hungarian refugee policy. No serious negotiations on Justice and Home Affairs were held until 1996, and even afterwards attention was focused on prevention of illegal border crossings, cooperation against organized crime and harmonization of visa policies.”²¹ Most strikingly, the Hungarian regulation of the safe third country notion cannot be explained merely with resort to the London Resolution on Host Third Countries of 1992, which does not list accession to the ECHR as a criterion for safety. The Hungarian regulation does, and is emulating German and Austrian practice rather than the abstract and imprecise formulations in the *acquis*.²²

Since 1993, there have been no radically new norms or practices conceived by domestic lawmakers. A testament, perhaps, to the fact that the development of new restrictive concepts had reached a point of saturation. The current practice is for states to amend their

¹⁷ For a brief presentation, see Noll, ‘The Non-admission and Return of Protection Seekers in Germany’ 9 *International Journal of Refugee Law* (1997) 415, with further references in note 128.

¹⁸ BVerfGE 94, 49. See also Noll, *ibid.* For an extensive commentary on the judgement: R. Marx, *Urteile des BVerfG vom 14. Mai 1996 mit Erläuterungen. Ergänzungsband zum Kommentar zum Asylverfahrensgesetz*, (1996).

¹⁹ Micolajczyk, ‘Poland’, in Byrne et al. *supra* note 3, 68-71.

²⁰ Nagy, ‘Hungary’, in R. Byrne et al., *supra* note 3, 138-99, at p. 165.

²¹ Nagy, *ibid.*, at 165.

²² For details, see Nagy, *ibid.*, at 182.

asylum practices by experimenting with various formulations of existing concepts²³, or by simply importing those already implemented by their neighbours.

B. Transformation: From Bilateral Proliferation to Regional Harmonization

Attempts by European immigration ministers to harmonize asylum law ushered in the transformative phase in regional asylum policy. The product of this was the range of piecemeal agreements, and instruments, most of them soft law, that comprised the asylum *acquis communautaire* that candidate countries are compelled to implement in order to fulfil the criteria for admission to the European Union.²⁴ It is this period that transformed controversial state practices, as well as important minimum guarantees, from national refugee law into a regionalised body of instruments. The initial developments of the transformative stage overlapped in time with the formative stage and significantly, with the pre-accession process.

From the signing of the Dublin and Schengen Conventions in 1990²⁵, until 1999, when the Treaty of Amsterdam entered into force, the creation of regional instruments was carried out in intergovernmental fora and largely behind closed doors. The bulk of this regional framework was constructed as “soft law”. It encompassed a substratum of widely implemented European practices which seek to deter and deflect the arrival of asylum seekers, provide guidelines for minimum guarantees for those asylum claimants who actually succeed in entering Western Europe, and establish mechanisms for expediting the processing of their applications. While progress towards a harmonized asylum policy was slow, staggered and widely critiqued, a hard core of the European asylum *acquis* started to

²³ The so-called Pacific Solution, implemented by Australia, is an extreme form of migration control through proxy states, sharing the ideology of “remote control” described in this article. It aims at the redirection of all boat arrivals from Australian mainland to offshore processing locations. The UK proposals of Spring 2003 represent an attempt to import this model into the European theatre. With the political support of Denmark and the Netherlands, the UK aim at launching offshore Transit Processing Centres and Protection Zones, and to redirect spontaneously arriving asylum seekers there.

²⁴ *Supra* note 4.

²⁵ Convention applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, 19 June 1990. Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the Community, Dublin, 15 June 1990. [hereinafter Dublin Convention]. Entered into force 1 September 1997. OJ 1997 C 254/1.

emerge. By means of Chapter VII of the Schengen Convention, later to be replaced by the Dublin Convention, binding legal obligations were assumed by Member States in order to create an effective system for allocating responsibility among Member States for determining a claim for refugee status. These two treaties established systems that operated upon the assumption that all Member States offered equivalent levels of protection from *refoulement* under the 1951 Convention; an assumption left largely unchallenged until court decisions from the House of Lords and the European Court of Human Rights.²⁶

In the transformative stage, the objective of harmonization was to bring about a convergence of national asylum practices. The European Commission and the Council of Ministers recognized that by the late 1990's effective harmonization to create a common asylum system had not been successful.²⁷ The greatest obstacle to the effectiveness of the rudimentary steps undertaken towards harmonization in this period was the fact that both binding and non-binding norms were fraught with idiosyncrasies²⁸ and thus invited application in a different manner and to a varying degree by Member States.²⁹ The failure to effectively standardize practices to ensure equitable treatment of asylum seekers throughout the current membership of the European Union has created one of the most significant challenges to refugee protection in the region.

The intergovernmental efforts at harmonizing European asylum law failed to produce the legal norms and mechanisms to ensure a comprehensive and coherent regional approach to asylum. Yet during this period the restrictive notions and devices reflected in the non-binding instruments of the *acquis* became entrenched into state practice across Europe. The

²⁶ See note 13 and 14 respectively.

²⁷ This has been explicitly acknowledged by the European Commission in 2000: 'Substantive asylum law and asylum procedures have not yet been approximated and the recognition rates for certain nationalities can vary significantly from one Member State to another, so it is understandable that people in need of international protection may find one Member State a more attractive destination than another'. European Commission, Commission staff working paper. Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States, SEC (2000) 522, 21 March 2000, para. 30.

²⁸ See, e.g., Bank, 'The Emergent EU Policy on Asylum and Refugees. The New Framework Set by the Treaty of Amsterdam: Landmark or Standstill?', 68 *NJIL* (1999) 8.

²⁹ The most striking example is perhaps the persistent variation in domestic legislation on the notion of safe third country, acknowledged in a study carried out by the Council of Ministers. These differences remained, although two soft law instruments had embarked on "harmonisation". See Council of the European Union, 'Monitoring the implementation of instruments adopted concerning asylum—Summary report of the Member

steady wave of national legislative reforms may be attributed to the adoption of instruments which attempted to harmonize these practices within the European Community, and later, the European Union. As indicated above, it is tempting to credit the spread of safe third country practices during this period to the abstract and non-binding 1992 London Resolution on Host Third Countries. The tangibility of the Brussels dictate offered by the London Resolution make it a ready point of reference for analysts tracing regional asylum policy, and an attractive justification for politicians introducing national safe third country practices.³⁰

Although the political justifications for asylum reforms during this period pointed to the need to bring domestic policy in line with European initiatives, this overt reference to the emerging *acquis* deceptively masks the role of sub-regional dynamics in shaping state practice. As policy analysts examining asylum in Europe in this period observe, restrictive policies were legitimated in public political discourse by the need to participate in the EU asylum and migration regime, creating “strange bedfellows” in political terms.³¹ Ministers and civil servants were able to draft instruments that reflected their own domestic immigration and asylum agendas behind closed doors. They then were able to utilize these instruments as a tool in advancing their positions in domestic political fora.³² In Hungary, “the shadows of the Union and its *acquis* loomed large after prospects for accession became realistic”³³, with government officials and MPs referring to “EU practice” as if it contained a

States’ replies to the questionnaire launched in 1997’, 17 July 1998, Doc. No. 8886/98, ASIM 139, pp. 23–31.

³⁰ According to Thielemann, the “emerging EU migration regime was useful to those in the Kohl government who had long sought domestic reform and who now started to justify their restrictive policy proposal by arguing that Germany’s participation in the European regime required constitutional amendment. This argument was repeatedly made by respective Ministers of the Interior from Friedrich Zimmermann (CSU) to Wolfgang Schäuble and Rudolf Seiters in the late 1980s and early 1990s.” E. Thielemann, “The “Soft” Europeanisation of Migration Policy: European Integration and Domestic Policy Change”, Paper presented at the 2002 ECPR Joint Session of Workshops, Turin, 22-27 March, available at <http://www.essex.ac.uk/ecpr/events/jointsessions/paperarchive/turin/ws3/3_thielemann.pdf> (accessed on 25 August 2003), p. 20.

³¹ As Guiraudon observes against the backdrop of specific examples from the early 1990s, liberal pro-EU politicians could not disapprove of calls for European migration control harmonization coming from anti-EU restrictionist politicians. Guiraudon, *supra* note 6, at 261.

³² For a theoretically informed analysis of this form of “venue shopping” and its manipulative use by interior and justice ministries, see Guiraudon, *supra* note 6. See also E. Thielemann, *forthcoming* “The Europeanisation of Asylum Policy: Overcoming International and Domestic Institutional Constraints” *Journal of Ethnic and Migration Studies*; Lavenex (1998), *supra* note 5.

³³ Nagy, *supra* note 20, at 165, quoting an example from parliamentary proceedings.

tangible and precise standard with which Hungarian legislation must conform. Reflective of the general perception in the Baltics, the adoption of the *acquis* was perceived as an entry ticket writ large to Western integration and a new security framework.³⁴ Faced with such existential arguments, who would argue that the country engaged in an excessively zealous adaptation of European practice, the costs of which were to be paid by refugees?

Looking beneath the level of the multi-lateral agreements that emerged from Brussels during the transformation stage, there were two overlapping legal processes underway in Europe. Sub-regional transformation which was most marked since 1993 onwards, and regional transformation, which started to gain momentum in the mid-nineties with the successive entry into force of the Schengen and Dublin Conventions in 1995 and 1997 respectively.³⁵ Yet in spite of these two separate processes, analysis remained focussed on regional instruments, mistakenly collapsing the two processes into one. The consequence is that the EU multi-lateral agreements and resolutions are identified as the cause of the transformation of asylum in Europe. In reality, they are merely the symptoms of a broader sub-regional spread phenomenon which generated the dissemination of policies such as “safe third country” and procedures for “manifestly unfounded claims”.

There are two casualties resulting from a perspective that is focussed on the vertical interaction between national and regional law. The first casualty is academic discourse whereby the development of regional state practice is misunderstood. The second casualty is democratic process, whereby the perception of a Brussels dictate, when it may not yet exist in fact, serves as a mechanism for domestic policy makers to legitimate asylum practices that were inspired by sub-regional incentives and pressures, rather than by claimed regional principles.

C. Reform: Re-Constructing the Framework for Asylum in Europe

The transformative period produced a first *acquis*, still leaving much leeway for policy divergences amongst Member States. A second *acquis* is now in the making, said to create a Common European Asylum System throughout the European Union. This will be the first body of asylum instruments of its kind, and create binding and enforceable obligations for

³⁴ Potisepp, ‘Estonia’, in Byrne et al., *supra* note 3, at 282.

states, that may some day number 27, in the European Union. Its preparation has been mainly undertaken by the European Commission, which was equipped with the right to initiative under the Amsterdam Treaty.³⁶ The proposals originally tabled by the Commission generally reflect a more protection-minded approach than the first Maastricht *acquis*. Some of the more robust safeguards of the Commission's proposal have already been amended and diluted; hence, the protection concerns in the East created by the weaknesses of the first *acquis* may remain with the introduction of its successor under the Amsterdam Treaty.³⁷ Ironically, the current misperception of a binding Brussels dictate may very well be an adequate framework of analysis once the second Amsterdam *acquis* is negotiated and in force. At present, domestic legislation is sending norms to, rather than receiving them from, the asylum *acquis*. With the Common European Asylum System moving into a more ambitious phase, the opposite may be the case.

However, the creation of the Common European Asylum System does not stop with the battery of instruments to be adopted until 2004. Already before all building blocks are in place, thinking on reconstructing the whole edifice has started. With a "second phase" of the CEAS now envisaged there will be a further intrusion on the residual competency of Member States. A number of factors will affect the negotiations of "second phase"-instruments; the most prominent of which will be the outcome of the 2003/2004 IGC. Since the Treaty of Nice, the spectre of transition to Qualified Majority Voting and the codecision procedure under Article 251 TEC also looms large. However, an automatic transition will take place only in limited areas, and further political decisions by an unanimous Council are required to subject core competencies for the development of the CEAS to the codecision

³⁵ See the impact on Austria, note 11 above.

³⁶ For the time being, this right is shared with the Member States, as stipulated in Art. 67 TEC. As a notable exception from the standard practice of Commission initiatives, France proposed four controversial measures building further on the Schengen *acquis* during its 2000 presidency (carrier sanctions, mutual recognition of expulsion decisions, the criminalisation of facilitating illegal entry, residence and movement, and the exploitation of persons).

³⁷ The most striking example is the dilution of procedural safeguards for protection seekers by the Commission. See 'Amended Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status', COM (2002) 326. This proposal replaced a more protection-minded one presented in 2000. At time of writing, further dilution had taken place in the legislative process in the Council of Ministers.

procedure.³⁸ In particular, a transition in core areas would presuppose that “the common rules and basic principles governing these issues”³⁹ have been defined, which can arguably be understood to imply that the first phase of the CEAS has to be complete. At the time of writing, this is not the case. To the extent that the codecision procedure is activated in the future, the European Parliament will rise from a mere consultative body to an actor with considerable power, with the voting behaviour of the new MEPs remaining an open question. No matter what the precise outcome of this transition process is going to be, the new Members will be on board when it takes effect. Forging a qualified majority in an enlarged club may prove as difficult as reaching consensus in the circle of old Members. Reasonably, 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. If, and only if, that stage is reached, lateral proliferation will turn into a vertical legislative process in the proper sense of the term, and the current misperception of the “Brussels dictate” will become an accurate metaphor. Not necessarily for long, however. To the extent the European Parliament is allowed to engage in legislation, there will be a need for a new conceptual framework for understanding the development of regional asylum policy.

³⁸ Only one subject matter is certain to move from consensus to Qualified Majority Voting: on 1 May 2004, administrative cooperation according to art. 66 TEC will be decided through Qualified Majority Voting after consultation of the European Parliament (Protocol on Article 67 of the Treaty Establishing the European Community, 24 December 2002, OJ C 325/184). As provided in Article 67 (4), measures on the issuing of visas under art. 62 (2) (b) (ii) and (iv) shall be automatically transferred to the co-decision procedure, as already stipulated in the Treaty of Amsterdam. With all respect due to the importance of visas and administrative cooperation, neither area is at the heart of the Common European Asylum System and changes in decision-taking will have marginal effect. The transition of the important competencies to Qualified Majority Voting or codecision is, however, contingent on political agreement on several levels:

- Regarding all measures under art. 63 (1) and (2) (a) TEC, a precondition for transition to the codecision procedure is that the Council has previously adopted Community legislation “defining the common rules and basic principles governing these issues” (art. 67 (5), 1st indent TEC). Obviously, it is open to argument when the *acquis* has reached that qualitative threshold.
- Regarding measures relating to external border control under art. 62 (2) (a) TEC, the codecision procedure shall be triggered by a Council decision from the date on which agreement is reached on the scope of the measures concerning the crossing by persons of the external borders of the Member States (art. 67 (2) TEC; Declaration on Article 67 of the Treaty Establishing the European Community, 10 March 2001, OJ C 80/78).
- According to a rather vague statement of intent, the Council will, moreover, “endeavour to make the procedure referred to in Article 251 applicable from 1 May 2004 or as soon as possible thereafter to the other areas covered by Title IV or to parts of them”. It should be noted that the more committing statement of intent in the first indent of the declaration does not relate to core areas of asylum harmonization. (Declaration on Article 67 of the Treaty Establishing the European Community, 10 March 2001, OJ C 80/78).

³⁹ Art. 67 (5) 1st indent TEC.

3. Accession and Asylum

The pre-eminence of the *acquis* in this transformation phase, is highlighted in the parallel process of accession. The candidate countries were anticipating, and then formally applying for membership to the EU in the aftermath of the fall of the Berlin Wall. Of the Visegrad Group,⁴⁰ Hungary and Poland applied for membership in 1994, followed by Slovakia in 1995 and the Czech Republic in 1996.⁴¹ Each of the states of the Baltic Sea Region, Estonia, Latvia and Lithuania, submitted their applications in 1995.⁴² Admission criteria require that the Associated States engage in extensive political, judicial, legislative and institutional reforms. Even prior to their formal applications for membership into the European Union, applicant states undertook to approximate their legislation to that of the European Union in the bi-lateral European Agreement (EA) with the European Communities as part of the pre-accession process.

Although the body of the asylum *acquis* was predominantly composed of “soft law” and therefore largely non-binding for the current Members, admission criteria transformed the content of the collection of resolutions and conclusions into *de facto* obligations for the applicant states.⁴³ In the early 1990's the newly democratized states were confronted with having to provide legal and policy responses to the growing transit migration of asylum seekers aiming to enter Western Europe. Yet while current Member States in Western Europe engaged in this process during the formative stage of asylum developments from the middle of the 1980's and onwards, the accession process trumped the potential for applicant states to progress through an independent formative stage. With an eye to membership, their

⁴⁰ The Visegrad Group consists of Hungary, Poland and the Czech and Slovak Republics. Previously known as the Visegrad Triangle, prior to the break-up of Czechoslovakia, it derives its name from a meeting of its member states to co-ordinate their positions with respect to the then, European Community, held in 1991 in Visegrad, Hungary.

⁴¹ BULL. EUR. COMMUNITIES, Apr. 1994, point 1.3.18; point 1.3.19; BULL. EUR. UNION, June 1995, point 1.4.58; BULL. EUR. UNION, Jan.-Feb. 1996, point 1.4.75.

⁴² BULL. EUR. UNION, Nov. 1995, point 1.4.60; BULL. EUR. UNION, Oct. 1995, point 1.4.42; BULL. EUR. UNION, Dec. 1995, point 1.4.60.

⁴³ This is a standard observation by researchers looking at the enlargement process. See, e.g., Potisepp, *supra* note 34, at 300, observing that the *acquis* does not oblige the current Members to “do much”, yet it is a “take it or leave it”-condition for aspiring Members.

respective asylum legislation was to be designed in line with the blue print of the first *acquis*. Soon into the accession process, refugee policy emerged as an increasingly significant area for co-operation given its links to broader issues of external border control and security issues. Regional acknowledgment of the need to have a coherent strategy with respect to asylum and the accession process was recognized by the 1994 European Council in Essen.⁴⁴ This call was met by limited exchanges between EU Ministers of Justice and Home Affairs with their counterparts in applicant states which dealt with a range of issues such as visa policies, cross border crime, human trafficking, as well as asylum.⁴⁵

Explicit criteria for applicant states in asylum and refugee matters were set forth by the European Commission in its 1997 communication, Agenda 2000: For a Stronger and Wider Europe⁴⁶. These are:

1. adoption in new Member States of the Geneva Convention and its necessary implementing machinery;
2. adoption of the Dublin Convention;
3. adoption of related measures in the EU *acquis* to approximate asylum measures.⁴⁷

While this transfer of the regional asylum system to the East has centred upon the first *acquis*, fulfilling the ‘obligations of membership’ entails the implementation of the entire EU *acquis* as it evolves. This is particularly relevant in the area of asylum policy as in the absence of a full-fledged *acquis* in the area of asylum, narrowly, and justice and home affairs, more generally, applicant states are committed in principle to implementing a yet to be constructed comprehensive framework for refugee protection. The applicant states have played no formal role in the creation of the second *acquis* which is likely to be in force by the time of the admission of the first round of states in 2004. Unlike their Western European

⁴⁴ Conclusions of the Presidency (Essen Summit Conclusions) reprinted in BULL. EUR. COMMUNITIES, Dec. 1994, point I.13.

⁴⁵ See Lavenex, “‘Passing the Buck’: European Union Refugee Policies towards Central and Eastern Europe”, 11 J. Ref. Studies (1998) 134-137.

⁴⁶ COM (97) 2000 final/1.

⁴⁷ *Ibid.*

counterparts, candidate countries had no opportunity to inscribe their own domestic norms on refugees and migration into the first and second *acquis*.

Most clearly expressed in the EU accession process, the development of asylum policy in the applicant countries occurred with significant constraints upon their sovereignty as they underwent the process of democratic transition. The quest for membership in the European Union entails a dependency on Western neighbours and requires that applicant states adopt and implement the asylum *acquis*. This dependency is channelled into specific organisational structures for asylum system development. Central is a process known as Phare Horizontal Asylum (PHA), consisting of five phases of round tables, and bringing together seven Member States, ten candidates, the Commission and UNHCR.⁴⁸

The accession process largely has been underway during the transformative stage, which has a significant impact on refugee protection in the East. The period is characterized by the failure to produce a comprehensive and coherent common asylum system. In spite of the endemic shortcomings of existing soft law that made it particularly unsuitable for export to candidate countries, both the Commission and a group of engaged Member States exercised considerable efforts for its wholesale transfer to the candidate states.⁴⁹ This situation gives rise to the current paradox, where one Directorate of the European Commission is addressing the weaknesses of the asylum *acquis* in the process of reconstructing Europe's refugee protection framework, while another Directorate is mandating the comprehensive adoption of the very same *acquis* by Eastern candidate states in the process of accession.

The accession process, however, has encouraged significant advances in refugee protection in the frontier states to the European Union. There have undoubtedly been protection benefits derived from converging the process of accession with that of harmonization.⁵⁰ By

⁴⁸ For a detailed description, see Anagnost (2001), *supra* note 5; Petersen, 'Recent Developments in Central Europe and the Baltic States in the Asylum Field: A View from UNHCR and the Strategies of the High Commissioner for Enhancing the Asylum Systems of the Region', in Byrne et al., *supra* note 3, 351-372.

⁴⁹ The PHA was funded by the Community budget and cost EUR 3 Million. The German Federal Office for the Recognition of Refugees acted as a lead agency, which reflects the interest by threshold countries as Germany. For further details on the PHA, see Anagnost (2001), *supra* note 5, at 31.

⁵⁰ The accession to the 1951 Convention and the introduction of domestic asylum legislation are tangible advantages, on which all further developments will come to rest. Consider the 1998 revocation of the

transferring elements of the EU asylum *acquis communautaire* to applicant states asylum determination systems have been introduced in these jurisdictions which are accompanied by some of the fundamental safeguards common to aspects of Western European practices.

Yet there the transfer of minimum standards from the regional instruments in Western Europe has highlighted the challenge to protecting refugee rights under treaties and instruments when they are transposed across divergent legal systems. In the newly democratized states the asylum *acquis* is implemented in a different legal and political environment than in Member States, where it was created. The negotiations for accession themselves reveal an official recognition of sharp divides between East and West in the advancement of legal and administrative systems, infrastructure and resources, experience of civil society in monitoring state practice and advocacy efforts for reform, and the social services and political stability to cope with the added pressures of integrating an increasing population of non-nationals.

Implementing the asylum *acquis* in the less developed asylum systems of the candidate countries raises protection problems. The integrity of border procedures, and the quality of first and second instance decision-taking are cases in point. The most serious issue with respect to transferring the *acquis* during the transformative stage rests with the assessment of the gaps in protection that it allows. The reformative stage provided the EU institutions, the United Nations High Commissioner for Refugees (UNHCR), commentators and advocates, the opportunity to acknowledge officially that there are fault lines in the regional protection system constructed through the process of harmonizing asylum law in Western Europe.⁵¹

This recognition has greater significance when considering that the *acquis* is transferred from the advanced asylum systems in the West, to the nascent structures in the East. The risk of compromised protection standards undoubtedly increases when the *acquis* is applied

geographical limitation to the 1951 Convention by Hungary, which can be read as a response to mainly Western European pressures.

⁵¹Although there is a considerable range of views about the nature of the short-comings of the current *acquis* and their significance with respect to protection, official statements and publications from all of these parties reflect agreement on the need for the current weaknesses in harmonized asylum system of the European Union

in the applicant states. This is illustrated by looking at three types of practices set forth in the *acquis*, safe third country practices and procedures for claims submitted at borders, and those for claims deemed to be “manifestly unfounded.”

First, it is difficult within the near future to envisage Belarus, Russia or Ukraine as safe third countries in the formal sense. Hence, for candidate countries, the enactment of safe third country norms would seem a useless exercise at best. Yet, they invite abuse. The conclusion of readmission agreements between candidate states and their Eastern neighbours opens “windows of opportunity”, with no attendant safeguards for protection seekers. Border claims appear to represent a grey zone in many of the emergent asylum systems, with border guards enjoying considerable margins for rejecting persons. This replicates lacunae in the *acquis*, which does not propose safeguards in readmission agreements, and cannot compensate lacking legal infrastructure and training of border guards.

Second, admission to territory does not necessarily mean admissibility to the asylum procedure. By way of example, persons could be denied access to the asylum procedure on grounds related to excludability, public security or lacking credibility under the Lithuanian legislation and practice of the late Nineties.⁵² Writing in his personal capacity, Michael Petersen has voiced concerns on the “channelling of asylum applications into admissibility procedures on formal grounds” such as “lack of documentation” and “exceeding of time limits for filing claims.”⁵³ UNHCR has formally voiced concern about the collapsing of safe third country cases into a category of abusive or manifestly unfounded claims, mixing formal aspects of admissibility with material issues of protection need.⁵⁴

The emerging European system requires confidence that it is capable of imposing uniform standards of protection across the varied legal systems of Western Europe. This is a prerequisite for implementing the migration policies of the collective and individual Member

to be remedied through the process of reform mandated under the Amsterdam Treaty.

⁵² Sesickas, Siniovas, Urbelis and Vysockiene, ‘Lithuania’, in Byrne et al., *supra* note 3, at 236.

⁵³ Petersen, *supra* note 48, at 370.

⁵⁴ UNHCR, ‘Background Paper nr. 2. The Application of the “safe third country” notion and its impact on the

States. As stated above, the European Court of Human Rights and the British House of Lords have both cast doubt on the sustainability of that assumption which is the bedrock of the Dublin Convention and its successor regulation. This does not even consider the diversity of standards that is a feature of the asylum systems in the new asylum states, the very states that are compelled to become part of the Dublin regime as a condition of membership of the European Union. The Commission identifies one of the primary objectives in requiring the implementation of the first *acquis* for candidate states seeking membership as the enlargement of the pool of potential third countries to which asylum seekers can be returned to have their claims considered. If the Members of the European Union are to benefit from this expanded pool of host third countries that are the new asylum states, and avoid responsibility for breaches of the 1951 Convention, one would have to accept that the first *acquis* and sub-regional policies have already succeeded in constructing a regional refugee system that can guarantee protection in the West and East.

When this regime from the West is transferred to the transitional legal and administrative infrastructures in the newly democratized states in the East, the strains on the fault lines of this transposed regional asylum system further widen the gaps in protection, creating genuine risks in certain circumstances that refugees may be directly, or indirectly, subject to *refoulement*. The asylum agenda for the applicant countries under the formal accession process is directed by a tunnel vision which is focussed on the transfer of the asylum *acquis*. There is a notable absence in any official communications from the European Union concerning accession offering consideration of the shortcomings of the asylum *acquis*. Yet it is these deficiencies that are so pronounced as to have mandated that the system be reconstructed by the European Commission pursuant to the Amsterdam Treaty.

As a Common European Asylum System is about to be introduced the outcome of the reformative stage will have ramifications for the newly joined members of the European Union. Different from the older Member States, they will have implemented the first version of the *acquis* in the course of the accession process. This will invariably make them unwilling to remodel their domestic legislation again. This process will take place when enlargement has begun, and the complexity of decision-making will grow exponentially,

unless qualified majority voting has been introduced. Thus, after enlargement, any attempts to develop the *acquis* in a more liberal direction will need to overcome the new Member States' affinity to the first version of the *acquis*. To be sure, the present Member States will lose much of their bargaining power vis-à-vis the candidate states, once they have been admitted to the club.

The regional focus on the development of state practice in applicant states centres on formal instruments and programmes of the European Union. It demonstrates the dynamics of refugee policy formation between the European Union and its future members, revealing differences between the West and East in the *means* by which asylum systems have been created, and the *effects* that this has on refugee protection in the new asylum states. This, in and of itself, raises interesting issues about the advancement of democracy and the value of the political process in the formulation of human rights related policies. It also challenges deeper assumptions about the capacity of certain norms and standards to guarantee fundamental human rights when applied across a varied range of jurisdictions.

4: The Implications of Sub-Regional Transformation

So far, we have identified different processes impacting on how asylum and migration norms were conceived in Central and Eastern Europe as well as the Baltics. We claim that these processes at times pushed in the same direction, yet also brought about incoherence and contradiction. The following section tracks the implications of sub-regional factors that influence law and policy prior, and parallel, to the accession process, and argues that the outcomes in some areas, by necessity, were incoherent and even contradictory to the stated motive of “harmonisation”.

Unlike the vertical interactions between regional and domestic asylum law that characterizes the analysis above, the transformation of asylum law sub-regionally centres upon the transfer of policies –and the influence of their implementation – laterally. A feature of the formative and transformative stages in Western Europe, it nonetheless has been overshadowed by the vertical interactions between domestic and regional norms. This

analysis is not only circumscribed by its vertical perspective, but limits our view to the states within the formal European Union framework of Member and Associated States.

An examination of the sub-regional transformation of asylum policy requires a review of policy development that is less easily identifiable than that offered by the harmonizing instruments on the European level. By 2000, all of the states in the Southern, the Central and the Northern sub-regions either introduced or amended laws and policies affecting asylum seekers and refugees.⁵⁵ Independent of the formal criteria laid down by the accession process, there were three sub-regional factors that were strong determinants in shaping the emerging asylum regimes in the newly democratized states. These are the dialectical process of restrictive measures and counter measures, the conditionalities imposed by individual Member States, and the contagious and politically persuasive imagery of the “soft touch” and the “closed sack”.

The dialectical process of restrictive measures and counter-measures is a prevailing dynamic in the evolution of asylum policies in all of the three sub-regions. Yet the distinctive features within a sub-region explain different directions in state practice aimed at deterring and deflecting asylum seekers. While a regional analysis would trace the selected mechanisms for non-arrival policies and pre-procedure exclusions to the instruments of the *acquis*, it is unable to explain why in Germany, Poland and Czechoslovakia, in the Central link, and Austria and Hungary in the Southern link, the pull was towards pre-procedure exclusions, while in Scandinavia and the Baltics, in the Northern link, state practice moved towards non-arrival policies,

As argued above, the candidates in the Central and the Southern sub-regions, - including, at an earlier stage of history, Austria - were significantly affected by restrictive policy changes in neighbouring destination countries, and particularly by those introduced by Germany. Such restrictions almost inevitably inspired policy changes in the Eastern transit countries, as in Western states, inspired by the fear of a *closed-sack* effect. This fear was caused by the

⁵⁵ The Northern sub-region comprises the Nordic and Baltic states, the central sub-region includes Germany, Poland and the Czech Republic, and the Southern subregion is composed of Austria and Hungary. For details on legislative developments, see the chapters on the Czech Republic, Estonia, Latvia, Lithuania, Poland and Hungary in Byrne et al, *supra* note 3, for details on legislation and reform.

increasing difficulty for asylum seekers to move on westwards, combined with the inability for these states to return third country nationals eastwards upon readmission from Western neighbours.

This was further complicated by parallel mechanisms of *counter-strategies* adopted by individual asylum seekers. When primary destination states in the West erected new barriers, asylum seekers responded by adapting their own migration patterns and practices in order to evade these new obstacles to entry. Take, for instance, the dynamics between Germany and Poland and Czechoslovakia in the Central Link. Here the strategies of host states, as well as the responding counter-strategies adopted by asylum seekers, proliferated eastward, and the circumvention strategies by applicants followed them. In particular, persons readmitted from Germany registered as asylum seekers in Poland, to then “defect” from the procedure, apparently to make new attempts to “go west”. This explains the high numbers of cases closed due to the absence of the applicant in Poland (89% of all filed cases in 1997).⁵⁶

There are refugee protection ramifications to all of the deflective measures that have been implemented by Western European states. Additionally, they have had repercussions on the application of the Refugee Convention in Central European countries acceding to the Convention. The counter-strategies operated by asylum seekers against pre-procedure returns, have often been inappropriately utilised by authorities in the new asylum states to discredit the credibility of their claims for protection against return to the country of origin.

The scenario was quite different for the Northern Link, between the Baltic and Scandinavian states. Distinguished from the dynamics of the Central Link by the variables of geography and legal principle, the counter-strategies evolved differently. Without the green borders of the Central and Southern links, and the barrier of the Baltic Sea, it is difficult and risky for asylum seekers to cross borders illegally. Consequently, the Nordic countries were able to implement successfully alternative deflection measures, such as

⁵⁶ Mikolajczyk, ‘Poland’, *supra* note 19, 53-4; Noll, ‘Protection in a Spirit of Solidarity?’, in Byrne et al, *supra* note 3, 323. *Accord*: UNHCR, ‘Background Paper nr. 2. The Application of the “safe third country” notion and its impact on the management of flows and on the protection of refugees’, (2001), at 1.

donating equipment for sea border control, in order to prevent asylum seekers from moving westwards from the three Baltic States.⁵⁷ Geographical constraints were abetted by the lack of protection structures in these states in the early 1990s, as this alternative became more attractive because it was legally impossible to return asylum seekers to a Baltic transit country should they arrive irregularly at the borders of Nordic countries. Hence, the strategy of deflection from the West in this sub-region gave priority to *non-arrival* policies, rather than the pre-procedure returns on safe third country grounds that were practised along the Central and Southern Links. It also led to various *containment* mechanisms in the Baltic states, implemented through assistance programmes and other forms of dependency at the bilateral level, yet coordinated multilaterally within the group of Nordic states.

As in the Central and Southern links, there are less direct ramifications of the restrictive measures adopted by the Scandinavian states. With *non-arrival* policies implemented in the Northern Link there may have been a contributing force to reducing the effective operation of the Convention. For these policies adopted by the Nordic States affirm the perception held by officials in the Baltic States that asylum seekers are essentially illegal migrants.

Another determining force for the asylum systems in the candidate states is the imposition of *conditionalities* by the old Member States in the Northern, Central and Southern sub-regions. These bilateral mechanisms are likely to have been at least as effective as other factors in motivating Baltic and Central European states to establish migration control systems and arrangements for dealing with asylum seekers and refugees. As illustrated by the Northern and the Central link, this kind of dependency may have been less transparent, primarily because it was often based on a mixture of conditionalities from donor states that were providing assistance to the new democracies for capacity building in a variety of areas. In the interaction between Nordic Member States and the Baltic candidates, there was a clear emphasis on exit control by the latter, and visa-free travel for citizens of the Baltics was bartered against readmission agreements covering both nationals and non-nationals.⁵⁸

⁵⁷ Vedsted-Hansen, 'Nordic Policy Responses to the Baltic Asylum Challenge', in Byrne et al., *supra* note 3, at 221.

⁵⁸ See the chapters on Estonia, Latvia and Lithuania in Byrne et al, *supra* note 3, all indicating that visa-free travel was an extraordinarily attractive element in the barter trade on asylum and migration between the Nordics and the Baltics.

By contrast, Germany put the emphasis on entry control by Poland and the Czech Republic, reflecting the fact that no sea border would stop onward migration, once persons had entered its Eastern neighbours.⁵⁹ For the candidate states, much was at stake, and the leverage of the EU at large, as well as of its single Members was considerable. After all, to deliver on the demands of their Western neighbour could create benevolence not only towards an early admission to the EU, but as well towards membership in NATO.⁶⁰

The lateral spiralling of asylum policies that occurred during the formative stage in Western Europe appears to also be a feature in the development of asylum policy in the Baltics and CEEC states. Legislators in applicant states are as inclined to transport the restrictive innovations in the principles and procedures in the Member States, as the Member States were to mimic each other's policies. For as was the case with Western asylum policy prior to the formal criteria set by the Council of Ministers in the area of asylum, Eastern states were already replicating policies and transferring concepts. For instance, as early as 1993 the Czech Republic introduced 'manifestly unfounded procedures' into their asylum determination procedure, at a time where on average there were roughly 800 applications submitted for refugee status per year.⁶¹ The Latvian Government Working Group argued that asylum legislation should be introduced in anticipation of EU pre-conditions for membership, but also "because similar directions can be seen in the other Baltic Countries."⁶²

The rippling of restrictive policies in the new asylum states is motivated in part by the political persuasion of the fear of becoming a targeted "soft touch" or a "closed sack" for the returned asylum seekers from Western Europe. As the figures on European asylum flows in the West indicate, there is a very real cost to embracing more progressive policies when one's neighbours are creating procedural and substantive barriers to protecting

⁵⁹ Noll, 'Germany', in R. Byrne et al., *supra* note 3, 41-6.

⁶⁰ NATO membership was a factor particularly prominent in the Baltic debates.

⁶¹ From 1990 through 1994, according to statistics from the Department of Refugees and Integration of Foreigners, 3,295 applications were submitted for Convention Status. These procedures, however, were reportedly seldom used. F. Liebaut, *Legal and Social Conditions for Asylum Seekers and Refugees in Central and Eastern European Countries* (1999) at 58.

⁶² Ose and Zumente-Steele, 'Latvia', in Byrne et al, *supra* note 3, p. 268.

refugees.⁶³ Among the neighbouring applicant states, there also is a domino effect whereby legislative and policy models for implementing aspects of the asylum *acquis* are borrowed. As is evident, for example, in how the upholding of the safe third country concept by the German Federal Constitutional Court in 1996 inspired the amendment to the Hungarian Constitution in 1997 in order to deny protection to those asylum seekers from safe third countries or safe countries of origin.⁶⁴ In part, this is a reflection of the rippling of restrictive practices, whereby states which attempt to legitimately provide access to determination systems and ensure an adequate provision of procedural safeguards consequently are exposed to increased migration and asylum flows which have been deterred and diverted from more restrictive jurisdictions. Enhanced border controls, which may bar genuine asylum seekers and illegal migrants alike, have an equivalent effect. It is no coincidence that in 1998, with the tightening of controls on the Polish borders, the Czech and Slovak Republics became the preferred transit route to Western Europe, with German authorities readmitting only 2,700 persons to Poland, in contrast to 16,000 to the Czech Republic.⁶⁵ Furthermore, those measures adopted by members of the ‘first group’ states that stand at the head of the queue for admission to the European Union, will be noted and potentially imitated by those states currently in the ‘second group’ of Associated States whose membership will be considered at a later stage.⁶⁶

The phenomenon of lateral spiralling of restrictive policies throughout sub-regions means that the dialectical process of restrictive measures and counter measures, along with incentives to replicate the restrictive policies of neighbouring states, expands the scope of

⁶³ Authorities in states experiencing rising applications commonly attribute this to the fact that they have less restrictive legislation than their European neighbours and hence are targeted by asylum seekers because the jurisdiction is reputed to be a ‘soft touch’ for asylum seekers. This was the justification the introduction of manifestly unfounded procedures, and ‘white lists’ for safe countries of origin along with other restrictive practices in the 1995 Asylum and Immigration Bill: “We receive more asylum claims than any other western European country except Germany. We are the only target country in which claims are growing rather than falling. Our neighbours have improved their legislation and we must do likewise as quickly as possible.” Ms. A. Widdecombe, Minister of State, Home Office, House of Commons, Committee D, Official Report, Dec. 19, 1995, c.4.

⁶⁴ See text accompanying notes 20 and 21 above.

⁶⁵ Noll, ‘Germany’, in R. Byrne et al., *supra* note 3, 44-6.

⁶⁶ Negotiations were concluded with a first group of applicants in December 2002 and the Treaty of Accession signed in Athens on 16 April 2003 (Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia). Negotiations continue with a second group comprising Romania and Bulgaria. Additionally, Turkey has applied for EU membership. Beyond that group of prospective EU Members,

the European asylum practices, to sub-regions where they will be implemented without minimal protection safeguards. At the very least, the transfer of problematic sections of the *acquis* should have been accompanied with systematic transfer of training and staffing resources.⁶⁷ When analysis allows for an examination of sub-regional asylum transformation, it is predictable that a lateral spiralling of like policies will occur in neighbouring jurisdictions. These jurisdictions will not have the attendant obligation to enhance minimum standards to meet European norms, and where those norms are woefully low, they will not have the pressure upon them, or resources and training that the candidate countries have when implementing these practices. In the absence of significant countervailing support from the European Union, there is little to lessen the threat that the restrictive practices pose to the protections under the 1951 Convention well beyond the current and future frontiers of the European Union. In effect, the Commission and Council of Ministers, and the United Nations High Commissioner for Refugees have not only failed to address their policy recommendations for the future Common Asylum System to carefully include the distinctive challenges to protection in the future Member States, but to recognize that these policies will also laterally spiral to the sub-regions falling outside of the future European Union.

By complementing regional analysis with a scrutiny of sub-regional forces, many of the policies of individual Member States appear to converge with the wider efforts of the European Union to harmonize asylum policy between the current and future Member States. There are also practices which serve conflicting agendas. An examination of some of the features of sub-regional migration demonstrate incongruities between regional policies of the European Union towards applicant states and the bi-lateral initiatives of its individual Member States towards applicants states in their respective sub-regions. To wit, Austrian pressures led to a harsher detention regime by Hungarian authorities by 1998, enabling authorities to lock away asylum-seekers for an unlimited period of time.⁶⁸ While the Austrian agenda of migration control is shining through, there is a clear conflict with the

a further lateral spread of restrictive policies is conceivable.

⁶⁷ Consider the example of accelerated procedures at border points lacking the right to an appeal with suspensive effect, allowed under the present *acquis*. It is obvious that the rigidity of such procedures requires a quality in decision-taking which cannot be presumed in the transitory systems of the East.

⁶⁸ Nagy, *supra* note 20, at 191.

requirement to implement the ECHR, which is, after all, part of the asylum *acquis*. Bilateralism collides with multilateralism, and the sub-regional policy is out of step with stated regional goals.

Western European domestic refugee agendas seek to advance the standards of protection afforded across their Eastern frontiers through the transfer of funds, training and technical assistance. At the same time, by example, they offer their newly democratized neighbours deficient policy models which aim to deter and deflect asylum seekers. Moreover, through incentives, such as the promise of visa free travel in the West, they even promote their implementation in aspiring member states, undermining their alternative policy objective of advancing refugee protection standards.

5. Conclusions on the Role of State Practice in the Formation of International Refugee Law

In this article, we have argued that the traditional pattern of explaining legislative tendencies in Europe through the regional standards set in the *acquis communautaire* is inadequate, and that the framework of analysis must be expanded. To understand the development of European asylum law in context, one needs to acknowledge that refugee law forms at the domestic level. This article looks at how sub-regional repercussions are sent out by domestic legislation beyond jurisdictional borders. These may entice neighbouring states to import the underlying ideas and concepts of these asylum laws, and adapt them to respond to pressures of national politics and sub-regional migration. In reality, asylum norms are transformed in a constant interplay between domestic, sub-regional and regional forces, rather than replicated from the *acquis* into domestic legislation. Hence, domestic legislation in neighbouring countries can very well vary at the level of specific legal rules into which the imported ideas are translated.

The normative patterns forming at the sub-regional level are driven by the dynamics of the power relationship between the states and the impact of domestic policies in a sub-regional grouping. This lateral process of formation and transformation is critical for the formulation of refugee law, and its study should be prioritized by refugee law scholars.

Instead, a parallel process at the regional level seems to capture our imagination. This regional process allowed Western European states to lift up their substantive domestic norms and practices to the policy level of the EC, and, later, of the EU. In addition, norms and mechanisms of coordination, such as the Schengen and Dublin Conventions, were negotiated. For a long time, this regional process produced a host of instruments replicating substantive domestic solutions without having the clout to impact on practices of other Member States. A consensus requirement ensured that any Member State could object to any formulation threatening the persistence of their own domestic legislation. With the exception of the Dublin and Schengen Conventions, moulded into the form of a treaty under international law, most instruments remained dead letter, unable to impact domestic law and practice. Sub-regional transformation continued the actual work, while the unwitting credited the regional process and compounded the myth of a Brussels dictate.

This changed with enlargement, bringing the regional *acquis* into a barter trade of membership traded against norm compliance. Suddenly, the soft *acquis* hardened, and an institutional framework was set up to control its implementation. Interestingly, the “twinning” employed in this transfer of knowledge and norms emulated the dynamics of normative transformation at the sub-regional level.⁶⁹ The EU sought to copy what had developed in the free interplay of forces between neighbouring states. While the idea of vertical transformation made sense when exporting basic structures of migration and asylum law into the candidate countries, sub-regional transformation between neighbours still provided the critical clout in instituting precise norms.

Parallel to enlargement, the old Members set out to reform the *acquis*, essentially replicating the transfer of their domestic norms into the “minimum standards” of regional instruments. While much of the actual negotiations of the reform *acquis* paid heed to the egalitarian principle of not harming each other’s domestic legislation, the institutional set-up had been changed with the Commission being given a right to initiative. Only at this stage, the myth of vertical transformation started to make sense within the group of old

⁶⁹ The practice of “twinning” implied a closer collaboration between a Member State and a Candidate, and can

Members. Its full potential will be felt when the Common European Asylum System enters its second phase of development, with further moves from a state-centrist to an institutionalist-unionist form of norm creation and proliferation.

Does this mean that we may discard the analytical model which focuses on sub-regional dynamics after 2004? Not so. Ironically, enlargement itself provided a major drawback: the likelihood is strong that new Member States will not welcome yet additional and continued re-engineering of domestic asylum and migration law and opt for the protection of status quo in this area. They might form a conservative faction in the Council, ensuring that protectionist policies will prevail over integrationist ones in spite of Qualified Majority Voting. This, again, will leave the development of asylum and migration law in the hands of sub-regional transformation, both within and beyond the future Union.

What does this mean for the analysis of international refugee and migration law?

International lawyers need to reconsider the standard framework for examining asylum law, as state practice cannot be understood from an exclusive examination of regional instruments, as those adopted by EU institutions. Rather, such instruments should be seen merely as transmission belts, leading us back to the study of refugee law and policy in domestic systems. This creates a challenge for scholars to engage in a more comprehensive collaborative work across borders. We shall then find that the solutions chosen are heterogeneous, shunning the myths of harmony or unity. This is a problem which scholars of customary international law are well acquainted with: the quest for the normative leads to the quagmire of the explicative.



Institute for International Integration Studies

The Sutherland Centre, Trinity College Dublin, Dublin 2, Ireland

