9

BETWEEN PERSECUTION AND PROTECTION
Refugees and the New European Asylum Policy

*Elspeth Guild**

I. Introduction

The admission, reception and treatment of asylum seekers in the European Union has been an issue of continuing political and legal concern throughout the 1990's. The rising numbers of persons seeking protection at the beginning of the period coupled with a rapidly developing regional jurisprudence on the right to protection from the European Court of Human Rights in particular, changed the nature of the debate. The Member States began to search for common policies and practices as regards asylum through intergovernmental measures. With the Amsterdam Treaty, the most important aspects of asylum have been transferred to the EC Treaty: criteria and mechanisms for determining which Member State is responsible for considering an application for asylum; minimum standards on reception of asylum seekers; minimum standards with respect to the qualification of nationals of third countries as refugees; minimum standards on procedures for granting and withdrawing refugee status amongst others.[1] In this article I will: (a) review briefly the Member States' commitments to protection, (b) consider the principles which have been established inter-governmentally by the Member States for their co-operation in the field; (c) examine the measures which have been adopted so far within the EC Treaty on asylum; (d) consider the challenges which recent decisions of the European Court of Human Rights and the House of Lords pose for the principles adopted by the Member States for co-ordination in asylum policy and inherited by the European Community.

It is important to note that Denmark, Ireland and the United Kingdom, under the terms of specific protocols to the EC and EU Treaties are not required to participate in the immigration and asylum chapter of the EC

* Professor of European Immigration Law, University of Nijmegen, Visiting Fellow at the LSE and Partner, Kingsley Napley, solicitors.

[1] Art. 63 EC.

Treaty. Denmark, under the terms of its protocol is only able to take a decision to opt in on one occasion.[2] The Ireland and United Kingdom protocols are more flexible and permit these states to decide on a case by case basis whether they will participate. So far the United Kingdom has indicated that it wishes to opt in on all the asylum related proposals of Community law.[3] Ireland has not yet made an indication. The United Kingdom has also stated that it will not participate in any measures which impinge on border controls thus it will not participate in any of the proposals which build on the Schengen borders acquis.[4]

II. International Obligations

The EU Member States have three principal international commitments regarding the protection of persons fleeing persecution or torture. First, the best known is that contained in the UN Convention relating to the status of refugees 1951 and its 1967 protocol (the Geneva Convention).[5] Article 1A of the Convention defines a refugee as a person who is outside his or her country of origin (or habitual residence) and has a well founded fear of persecution there on the grounds of race, religion, nationality, membership of a social group or political opinion.[6] The duty, contained in Articles 32 and 33 is not to return such a person to a country where he or she would be persecuted. Secondly, there is the obligation contained in Article 3 of the UN Convention against torture 1984 which prohibits the return or extradition of a person to a state where there are substantial grounds for believing that he or she would be in danger of being subject to torture.[7] Thirdly, there is the regional obligation contained in the European Convention on Human Rights (ECHR) Article 3 as interpreted by the European Court of Human Rights prohibiting return of a person to a country where there is a substantial risk that he or she would suffer torture, inhuman or degrading treatment.[8]

[2] As an exception, Denmark is covered by Title IV on two occasions (visa format and visa list) in respect of which it cannot opt out.

[3] Peers, S. "Legislative Update" No 2 (3) (2001) *European Journal of Migration and Law* (forthcoming).

[4] However, the United Kingdom is participating in the Schengen acquis as regards irregular migration, police and criminal co-operation. The Schengen acquis is defined in the Schengen Protocol to the EC Treaty and TEU; it has now been published in the OJ 2000 L 239/1.

[5] The protocol lifts the territorial and temporal limitation of the original convention.

[6] Goodwin-Gill, G. *The Refugee in International Law* (Oxford, OUP, 1978); Hathaway, J. *The Law of Refugee Status* (Toronto, Butterworths, 1991); Carlier, J-Y. *Who is a Refugee?* (Deventer, Kluwer Law International, 1997).

[7] There has been substantial interpretation of the Convention by the Committee established to adjudicate individual claims under it.

[8] *Les etrangers et la Convention europeéne de sauvegarde des droits de l'homme et des libertés fondamentales* (Librarie du Droit et de Jurisprudence, 1999).

The Geneva Convention protection is circumscribed by limitations related *inter alia* to criminal activity.[9] The Article 3 ECHR duty to give protection to persons fearing torture has been held to be absolute. States which are parties to the ECHR are not entitled to make their protection conditional on national security grounds.[10] The obligation to prevent inhuman or degrading treatment is generally considered to extend to a duty to support asylum seekers with some sort of accommodation and to maintain a system for the determination of their claims. The willingness to provide the resources needed to support and maintain the asylum system has increasingly been questioned.[11] Nonetheless, these international obligations are considered important in Europe both at official and societal levels. To no small extent, the international commitments arise from the European experience of refugees during and after WWII. Thus respect for these commitments has become a touchstone as to the kind of Europe which the EU is seeking to build.[12]

For states increasingly seeking to limit expenditure as the new prosperity results in shrinking revenues through the processes of globalisation,[13] asylum seekers are an increasingly unwelcome expense. Because of the international obligations of the Member States, the primary focus of attention has been on seeking ways to hinder asylum seekers' arrival at the border. Once they have arrived at the border and gained access to the territory, the Member States' international obligations clearly apply. The EU's engagement with refugees throughout the 1990s has been dominated by two contradictory perspectives. On the one hand there is the consistent avowal by Member States individually and jointly of their commitment to the Geneva Convention and on the other the increasingly severe efforts to find ways to avoid responsibility for asylum seekers arriving at the border, or to define them out of existence.[14]

III. The Principles of the European Asylum Policy

EU asylum policy, as developed through the 1990's, rests on three principles: first, there are countries which are by definition safe for their nationals. By determining which countries are safe, European states can refuse to admit those nationals into asylum procedures, or admit them only in the event that

[9] Art. 1F.

[10] *Chahal* [1997] 23 EHRR 413.

[11] Joly, D. "A new asylum regime in Europe" in Nicholson, F. and Twomey, P. (eds) *Refugee Rights and Realities* (Cambridge, CUP, 1999) 336.

[12] This commitment has now been incorporated both into the EC Treaty and the TEU.

[13] Beck, U. *What is Globalisation?* (Cambridge, Polity Press, 2000) 11.

[14] Guild, E. "The impetus to harmonise: asylum policy in the European Union" in Nicholson and Twomey above n 11, 313.

a presumption of safety is rebutted.[15] This principle allows the Member State to avoid costs both in administrative time and social benefits of caring for and determining the asylum applications of nationals of those countries. The policy found favour with justice and home affairs ministries. However, it creates headaches for foreign affairs ministries. By holding that one country is "safe" for its nationals while remaining silent about another state can be perceived as invidious by politicians in those states not designated "safe". Thus from the beginning the categorisation was limited to relatively small numbers of states from which substantial numbers of asylum seekers originate, for example Central and Eastern European countries in the case of Germany.[16] In the case of the United Kingdom, the designation of Pakistan as a "safe" country has been held to be irrational.[17]

The second principle is the concept of "safe third countries". This concept developed in the EU at the same time as the first.[18] It designates as safe those countries through which asylum seekers have passed on their way to travel to another state. The consequence of being designated a "safe third country" is that asylum seekers who can be shown to have passed through such a safe country before arriving in a Member State may similarly be returned to the safe country without a substantive consideration of their application by the host Member State because the country of passage is safe.

The characteristic of the two policies which ties them together is the creation of a right for the state to determine which asylum seekers are admitted to its asylum system irrespective of the individual's claim to asylum (or with a presumption in favour of the state's assessment). The policy is based on the state's assessment of other states without considering the merits of the individual's case.

The "safe countries" principle is implemented vigorously. Appeal of any decision declaring an asylum seeker to have originated in, or having passed through a "safe" country will not be suspended pending the outcome. Thus the individual is returned to the third country (or indeed country of origin)

[15] This policy finds its first EU wide expression in the 1992 Conclusions on countries in which there is generally no serious risk of persecution agreed by the Justice and Home Affairs (JHA) ministers of the Member States acting intergovernmentally: Guild, E and Niessen, J. *The Developing Immigration and Asylum Policies of the European Union* (Deventer, Kluwer Law International, 1996) 177.

[16] Appendix II to Article 29a Asyl VfG—besides the Member states, safe countries of origin include Bulgaria, Ghana, Poland, Romania, the Slovak Republic, the Czech Republic, and Hungary. Henkel, J. 'Germany' in Wallace, R. (ed.) *Asylum Practice and Procedure—Country by Country Handbook* (London, Trenton, 1999) 83; Noll, G. The Non-Admission and Return of Protection Seekers in Germany 9 (1997) *International Journal of Refugee Law* 415.

[17] *Asif Javad & Zulfiqar Ali & Abid Ali* v. *Secretary of State for the Home Department*, CA 17 May 2001.

[18] This policy was given form in the Resolution on a harmonised approach to questions concerning host third countries agreed again in 1992 by the Justice and Home Affairs (JHA) ministers of the Member States acting intergovernmentally: Guild and Niessen above n 15 at 161–165.

immediately, though he or she has a right of appeal against the decision. The individual is told that he or she may pursue the appeal from abroad.[19] The individual is excluded from applying for asylum in some states and required, if he or she wishes to continue to pursue his or her application for protection to do so in another country or return to the country of origin.

The third principle on which EU asylum policy is founded is that it is for the receiving state, together with other states, to determine in which state an asylum seeker may seek protection. By creating a presumption against an asylum seeker on the basis of his or her country of origin, the receiving state makes it difficult or impossible for the individual to seek asylum within its borders. By determining some countries as safe third countries, the receiving state determines that depending on his or her travel itinerary, an asylum seeker must return to another country to seek asylum. It is for the states concerned, among themselves to regulate where and under what circumstances an asylum seeker will be sent from one state to another. This principle is implemented within the EU in the Dublin Convention (1990) determining the state responsible for examining an application for asylum lodged in one of the Member States of the European Communities.[20] This Convention provides only for negative cross-recognition of decisions. A determination of an asylum application by one Member State, provided that decision is negative, is recognised by all the other Member States. Thus the rejection of an asylum application by one Member State relieves all the other Member States of their duty to consider the case of the individual.[21]

The Convention is based on two principles. First, the Member States are entitled to pool their responsibility for asylum seekers. Secondly, the Member States are entitled to determine which state is responsible for any application. Even though each Member State is separately a signatory to the Geneva Convention (and the other two relevant conventions) a decision on an asylum application by one of them absolves all the others from any duty to consider an asylum application by the same individual.[22] This position, particularly in the absence of a consistent interpretation of the term "refugee" among the Member States, has been challenged by the European Court of Human Rights[23] and the House of Lords,[24] but I shall return to these judgments later.

This Convention is intended to regulate, among the Member States, responsibility for asylum seekers. It is based on a hierarchy of principles of

[19] For a particularly lucid explanation of this see Henkel above n 16.

[20] Dublin Convention OJ 1997 C 254/1.

[21] Unfortunately, recognition of an individual as a refugee by one Member State is not binding on the others.

[22] Art. 3(2) Dublin Convention above n 18.

[23] *TI* v. *United Kingdom* European Court of Human Rights reports 2000–I.

[24] *R* v. *Secretary of State for the Home Department ex parte Adan & Aitseguer* Judgments 19 December 2000; www.parliament.the-stationery-office.co.United Kingdom/pa/ld200001/ldjudgmt/jd001219/adan-1.htm>

responsibility, all relating to the actions of the Member States *vis-à-vis* the asylum seeker. First, a state is responsible for an asylum seeker if it recognised as a refugee a first degree family member of the individual.[25] Secondly, if the state issued a residence permit or valid visa to the person, then it is responsible for the person in the capacity of asylum seeker. Thirdly, and with many qualifications, the Member State through which the asylum seeker gained access to the territory of the Union is responsible. In other words, the act of the Member State of failing to guard its borders against asylum seekers is a ground for responsibility.[26]

In the absence of unusual factors (such as the possession of a visa or residence permit or a first degree family member recognised as a refugee in one Member State) responsibility lies with the first Member State through which the asylum seeker arrived in the Union.[27] In the light of the increasingly stringent provisions regarding visas and carrier's sanctions, the idea was that asylum seekers would only be entering the Union over the land borders. Thus, at the time of the negotiation of the agreement, though less so at the time of its signature, the responsibility for caring for asylum seekers was intended to fall on the Southern European countries—Greece, Spain, Italy whose border controls were considered lax.[28] The 1990 changes in Central and Eastern Europe meant the opening up of Germany's Eastern border and a flood of asylum seekers appearing there, much to the chagrin of the German Government.[29] However, the Dublin Convention provisions do not prevent the application of the safe third country principle to all applications for asylum.[30]

Not surprisingly, the "safe third country" principle was thus considered critical to the overall policy. To make it work, the Member States agreed a standard readmission agreement with third countries on their borders. It regulates, between the states concerned, responsibility for taking charge of

[25] Art. 4 Dublin Convention above n 18.

[26] Arts. 5–6 Dublin Convention *ibid*. "The Dublin Convention establishes a link between the performance of controls on entry to the territory of the Member States and responsibility for subsequent applications for asylum. . . . The criteria set out in Articles 5–7 of the Dublin Convention are based on the premise that the Member State which is responsible for controlling a person's entry onto the territory of the Member States should also be responsible for considering any subsequent asylum application. The questions which arise are first whether this is an appropriate basis for allocating responsibility and second whether it can be achieved effectively." European Commission Staff Working Paper: *Revising the Dublin Convention,* SEC(2000)522 paras 24–25.

[27] Arts. 5–7 Dublin Convention, ibid.

[28] van der Klaauw, J. "The Dublin Convention: A Difficult Start" in den Boer, M. (ed) *Schengen's Final Days?* (Maastricht, EIPA,1998) 77.

[29] For a discussion of this see Noll above n 16.

[30] Art. 3(5) "Any Member State shall retain the right, pursuant to its national laws, to send an applicant for asylum to a Third State. . ."

an asylum seeker.[31] While readmission agreements do not formally result in the recognition by the Member States of the determination of the asylum application by the third country, the effect is similar as the responsibility for the individual will always rest with the third country. And the individual will be outside the territory of the Union.

These are the foundations of the asylum policy of the European Union which the European Community inherited under the provisions on asylum inserted into the EC Treaty by the Treaty of Amsterdam.[32] They are complemented and completed by the Schengen acquis, introduced into Community law by virtue of the protocol by that name attached to the treaties by the Amsterdam Treaty.[33] While asylum policy in theory is distinct from border policy, *inter alia* the subject matter of the Schengen acquis (a series of intergovernmental agreements between most of the Member States), the two are inextricably woven together. The measures adopted regarding visas, border crossing and movement within the Union affect asylum seekers with as great effect as other third country nationals. Thus the consequences of the incorporation of the Schengen acquis are critical to any consideration of the inheritance of the Community of the intergovernmental measures.

The EC Treaty treats Community nationals and third country nationals differently as regards movement of persons. The field of asylum is no exception. I shall start then with a consideration of the provisions relating to Community nationals before moving on to those on third country nationals.

IV. Implementing the Policy in EC Law

A. *Community Nationals and Asylum in the European Union*

As discussed above, the concept of a safe country of origin was developed in the 1990s at EU level and gradually included in the national law of an increasing number of Member States, particularly as regards the status of other Member States.[34] The Treaty of Amsterdam sought to formalise this position as regards the Member States in a Protocol on Asylum for Nationals of the Member States attached to the EC Treaty.[35] The Protocol provides that, taking into account the special status and protection which EU citizens have

[31] Recommendation concerning a specimen bilateral readmission agreement between a Member State of the European Union and a third country, Guild and Niessen above n 15 at 393–405.

[32] Art. 63 EC.

[33] For a discussion of the incorporation of the Schengen acquis see Peers, S. "*Caveat Emptor*? Integrating the Schengen *Acquis* into the European Union Legal Order" 2 (1999) *CYELS* 87.

[34] Wallace above n 16.

[35] Protocol 6 to that Treaty.

under the Treaty, and "respecting the finality and the objectives of the Geneva Convention" each Member State shall be regarded as a safe country of origin by the other Member States as regards applications for asylum made by their nationals. Thus admissibility of an asylum application made by a national of one EU state in another EU state will be the exception to the rule. According to the Protocol this may only occur where the Member State of origin is availing itself of the security exception in the ECHR (Article 15); the Member State of origin is the subject of a procedure for human rights violations commenced by the Council (i.e. all the other Member States unanimously) under Article F.1(1) TEU; or it chooses unilaterally to consider that application, in which case it must advise the Council. Thus the right of the Member State receiving the application to admit the individual to the procedure is intended to be dependent on the action of the Member State of origin not as regards the treatment of the individual but as reflected in international law: i.e. an express use of a provision of the ECHR or the invocation by the Council of provisions of the TEU. The reality for the asylum seeker is submerged under a cover of legal reality between States: a very different animal indeed.

The political history of this protocol, commonly known as the Aznar Protocol after the Spanish President who initiated and pressed for it, bears repeating. At the time of the negotiation of the Amsterdam Treaty, a number of claims for political asylum had been made by Basques of Spanish nationality to the authorities in Belgium. While the authorities had refused the applications, the Belgian courts were considering the cases and the claims by the individuals that they would be persecuted in Spain on the basis of their political beliefs if forced to return there. In view of the public and judicial concern being expressed in Spain at that time about the activities of the authorities in respect of Basques (which resulted in the condemnation of a number of political and police officials by the Spanish courts), the Belgian courts considered that a full review of the claims was appropriate.[36] The political response from Spain was to press for a protocol which would inhibit such applications being received or considered in any Member State.[37]

The Protocol is based on the principle of safe country of origin: the Member States are exercising a right to which they claim to be entitled to determine which other States are safe for their own nationals.

B. Third Country Nationals and Asylum in the European Union

The objective of the EU policy has been to reduce the numbers of asylum seekers arriving in the European Union. To this end a number of tools have

[36] Aretxaga, B, "A Fictional Reality. Paramilitary Death Squads and the construction of State terror in Spain", in Jeffrey, A. (ed.), *Death Squad. The Anthropology of State Terror* (Philadelphia, University of Pennsylvania Press, 1999) 61.

[37] Peers, S. *EU Justice and Home Affairs Law* (Harlow, Longman, 2000) 129.

been deployed to give effect in practice to the concepts of safe countries and the choice of the state to require the asylum seeker to look for protection elsewhere. The legitimacy of these mechanisms depends on the validity of the three principles: the right to designate safe countries both of origin and passage and the right to determine for an asylum seeker in which country he or she may (or more importantly may not) seek asylum. I will consider the mechanisms used by reference to where the asylum seeker is to be found: first, in his or her country of origin; secondly, at the border; third, within the state and finally, under threat of expulsion. This consideration is based on EC law and highlights the interwoven nature of the EU's asylum policy with its newly acquired laws on borders (made available by the Schengen acquis).

(i) Getting Out: The Obstacles of Visas and Carrier Sanctions

Elsewhere I have analysed the reasons given by the United Kingdom government for the imposition of visas on nationals of countries added to the national mandatory visa list over the past five years.[38] In all cases except one, the imposition of a visa requirement was justified in the official press releases on the grounds that there were rising numbers of asylum seekers arriving in the United Kingdom from that country.

By a virtue of a Regulation adopted in Community law, the list of countries whose nationals must have a visa in order to enter the territory of the Member States is common to all Member States (except the two which have opted out).[39] It similarly includes a standard list of those countries whose nationals do not require a visa to enter a Member State. According to the explanatory memorandum to the most recent Regulation, the reason for the inclusion and exclusion of certain countries from the list is as follows:

> "To determine whether nationals of a third country are subject to the visa requirement or exempted from it, regard should be had to a set of criteria that can be grouped under three main headings:
>
> —illegal immigration: the visas rules constitute an essential instrument for controlling migratory flows. Here, reference can be made to a number of relevant sources of statistical information and indicators to assess the risk of illegal migratory flows (such as information and/or statistics on illegal residence, cases of refusal of admission to the territory, expulsion measures, and clandestine immigration and labour networks), to assess the reliability of travel documents issued by the relevant third country and to consider the impact of readmission agreements with those countries;
>
> —public policy: conclusions reached in the police co-operation context among others may highlight specific salient features of certain types of crime. Depending

[38] Guild, E. "Entry into the United Kingdom: The Changing Nature of National Borders" No.4 14 (2000) *Immigration & Nationality Law & Practice* 227.

[39] I will refer here exclusively to the Regulation which is about to be adopted by the Community. Document 14191/00 in the EC Council's register of documents which is expected to be adopted at the March/April 2001 Council meeting.

on the seriousness, regularity and territorial extent of the relevant forms of crime, imposing the visa requirement could be a possible response worth considering. Threats to public order may in some cases be so serious as even to jeopardise domestic security in one or more Member States. If the visa requirement was imposed in a show of solidarity by the other Member States, this could again be an appropriate response;

—international relations: the option for or against imposing the visa requirement in respect of a given third country can be a means of underlining the type of relations which the Union is intending to establish or maintain with it. But the Union's relations with a single country in isolation are rarely at stake here. Most commonly it is the relationship with a group of countries, and the option in favour of a given visa regime also has implications in terms of regional coherence. The choice of visa regime can also reflect the specific position of a Member State in relation to a third country, to which the other Member States adhere in a spirit of solidarity. The reciprocity criterion, applied by States individually and separately in the traditional form of relations under public international law, now has to be used by reason of the constraints of the Union's external relations with third countries. Given the extreme diversity of situations in third countries and their relations with the European Union and the Member States, the criteria set out here cannot be applied automatically, by means of coefficients fixed in advance. They must be seen as decision-making instruments to be used flexibly and pragmatically, being weighted variably on a case-by-case basis".[40]

The justification of entry of some countries and not others on the lists does not refer specifically to asylum seekers. Rather the wording is nuanced—the reference is made to controlling migratory flows. However, all the top sending countries in respect of asylum seekers are on the black list of countries whose nationals have to get visas.[41]

In the Common Consular Instructions, part of the Schengen acquis designed for use by consular officials to determine the grounds on which the common short stay visa should be issued, the criteria for a visa for a short stay excludes the possibility that an asylum seeker might qualify not least as the person must intend to leave the territory before the end of his or her three month stay.[42] This will never be the case for an asylum seeker. The most important considerations according to the Common Consular Instructions (CCI) for issuing visas are the fight against illegal immigration and other aspects of international relations.

A second list of countries whose nationals are under an even more stringent visa regime appears to be even more closely associated with the list countries which produce asylum seekers. An even more restricted access to the territory is permitted to those who must get visas even if they are only

[40] Document 500PC0027: Commission Proposal—COM (2000) 027 final.

[41] For example, Afghanistan, Albania, Algeria, Angola, Bosnia, Cote d'Ivoire, Democratic Republic of Congo, Eritrea, Ethiopia, Ghana, Haiti, Iran, Iraq, Nigeria, Pakistan, Sri Lanka, Sudan, Turkey, and others.

[42] Chapter V Examination of applications and decisions taken, CCI OJ 2000 L 239/317.

transiting through a Member State en route to a third country. This list is short: in the proposal of the Finnish Presidency of the Union for a Regulation on airport transit arrangements (Autumn 1999) the countries included are those which were already on the common Schengen list: Afghanistan; Iran, Iraq, Democratic Republic of the Congo, Nigeria, Ethiopia, Eritrea, Somalia, Ghana and Sri Lanka. These are also among the principal countries of origin of the majority of asylum applicants in the European Union.

Thus the visa system has the effect, *inter alia*, of preventing asylum seekers from getting to the territory of the Member States lawfully so that they can apply for asylum. This is explicitly recognised by the Commission in its recent Communication towards a common asylum procedure and a uniform status, valid throughout the Union for persons granted asylum:

> "Certain common approaches could be adopted to policies on visas and external border controls to take account of the specific aspects of asylum. The questions to be looked at in depth include re-introducing the visa requirement for third country nationals who are normally exempt, in order to combat a sudden mass influx, facilitating the visa procedure in specific situations to be determined, and taking account of international protection needs in legitimate measures to combat illegal immigration and trafficking in human beings. . ."[43]

This system is enforced through the private sector. The Schengen Implementing Agreement provides at Article 26 that

> "if an alien is refused entry into the territory of one of the Contracting Parties the carrier which brought him to the external border by air, sea or land shall be obliged to assume responsibility for him again without delay. At the request of the border surveillance authorities the carrier must return the alien to the Third State from which he was transported. . ."

and

> "The carrier shall be obliged to take all necessary measures to ensure that an alien carried by air or sea is in possession of the travel documents required for entry into the territory of the Contracting parties . . .The Contracting parties undertake . . . to impose penalties on carriers who transport aliens who do not possess the necessary travel documents by air or sea from a Third State to their territories".[44]

This creates three mechanisms for preventing asylum seekers who, by definition will normally be visa nationals, from arriving: the air and sea carriers are first placed under an obligation to check that the individual has the necessary travel documents (including visas where required). If the carrier carries a person who has not got the right travel documents and visas it will be required to return the person to the country of origin (at its own cost) and it

[43] European Commission, *Communication Towards a common asylum procedure and a uniform status, Valid throughout the Union, for persons granted asylum*, COM(2000)755 final; 22.11.2000.

[44] Now part of the Schengen acquis—see Peers above n 37.

will be subject to penalties. During the French Presidency of the European Union in the second half of 2000 a proposal was put forward for harmonisation of the fines on carriers at a minimum of Euro 3,000 for transporting persons without documents.[45] It was adopted in June 2001.[46] As adopted, it builds explicitly on Article 26 incorporating the three mechanisms of responsibility of carriers into a Community law Directive.

Two further considerations arise as to refugees: first under the Geneva Convention, a refugee is a person already outside his or her country of origin or habitual residence. Thus someone who has not yet escaped is not covered by the Convention. This then means that there is no express international obligation arising from the Geneva Convention to provide for a system for issuing visas to asylum seekers so they can leave their country of origin to become refugees in the host State.[47] The only international obligation on the Member States which relates to seeking asylum is contained in Article 14(1) Universal Declaration of Human Rights.[48] As a Declaration its force is limited. Secondly, the duties in respect of asylum seekers are state duties. As yet there is no clear indication that they devolve on private parties. As most carriers are private parties they are not self evidently bound by the Geneva Convention or other international human rights instruments. Thus, the decision of an airline not to carry a passenger who does not have a visa where one is required is not by law influenced by the consideration whether the individual is seeking to flee persecution.

(ii) Getting In: At the Border

The legal mechanisms to avoid responsibility for asylum seekers at the border are nuanced. At the European level, the first substantial effort to limit responsibility for asylum seekers is found in the Dublin Convention which finally entered into force on 1 September 1997.[49]

[45] S. Peers, Legislative Update No 1 (3) *European Journal of Migration Law* (2001) 361. The United Kingdom's House of Lords Select Committee on the European Communities Sub-Committee F undertook an inquiry into this proposal in November/December 2000.

[46] Directive 2001/51 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 OJ 2001 L 187/45.

[47] The thrust of the United Kingdom's Home Secretary, Jack Straw's much publicised speech in Lisbon, September 2000, is that European states should develop a refugee protection system in which the issuing of visas (and hence the selection of individuals) to refugees resulting from turmoil in their region should be the key; the spontaneous arrival of persons seeking asylum in European States could then more legitimately be discouraged. See also his address 6.02.01 to the Institute of Public Policy Research (IPPR), London

[48] "Everyone has the right to seek and to enjoy in other countries asylum from persecution".

[49] For a review of the Dublin Convention see Blake QC, N. "The Dublin Convention" in Guild, E. and Harlow, C. (eds.) *Implementing Amsterdam: Immigration and Asylum Law in the European Union* (Oxford, Hart, 2000). Nicol QC, A. and Harrison, S. *The Law and Practice of the Dublin Convention in the United Kingdom* No 1 (2) (1999) *EJML* 465; Noll, G. "Formalism vs Empiricism: Some Reflections on the Dublin Convention on the Occasion of

The policy was refined with the adoption of a Resolution on manifestly unfounded applications for asylum[50] and a Resolution on a harmonised approach to questions concerning host third countries.[51] Together with the Conclusions on countries in which there is generally no serious risk of persecution (see above) these two Resolutions were interlocking. First, the Member States announced jointly their policy and interpretation of the Geneva Convention that an asylum seeker does not have a choice of which state to address his or her asylum claim. The Member States considered that the Geneva Convention only prohibits return to the country of persecution, not to any other country. Accordingly, the Member States took the view that there is a duty on an asylum seeker to seek protection in the *first* safe country through which he or she passes. In light of the obstacles placed in the way of an asylum seeker ever getting to a Member State in the first instance, the chances appeared fairly good that the person would have to travel through some other country on the way. Having thus placed the duty on an asylum seeker to seek protection in the first safe state he or she came to when in flight, the second policy could be introduced: any asylum seeker arriving in a Member State who had passed through such a safe third country would have his or her asylum application categorised as manifestly unfounded (as the person did not need asylum in the Member State but could seek it elsewhere) and no substantive determination of the case was required. Further the procedural guarantees could be truncated as in theory at least the individual would be returned to the safe third country and would have all the necessary guarantees there.[52]

The system for which the foundations were laid was one where arrival by air or sea was patrolled by the visa system and enforced by the carriers. Arrival by land was dealt with at the border by the immediate rejection of the asylum claim at the border itself without suspensive remedies and the return of the asylum seeker across the border to which ever country was on the other side. The problem however, which increasingly arose, was the appearance of asylum seekers within the territory of the Member States without records of travel routes.

(iii) Getting into (and staying in) the Asylum Determination Procedure

The responsibility for caring for asylum seekers did not go away with the regime which the Member States set into place in the early 1990s. Instead,

Recent European Case Law" No 1. 70 (2001) *Nordic Journal of International Law* 70; Hurwitz, A. "The 1990 Dublin Convention: A Comprehensive Assessment" 11 (1999)*International Journal of Refugee Law* 646.

[50] Guild and Niessen above n 15 at 141–147.

[51] *Ibid* at 161–165.

[52] Guild above n 14; Winterbourne, D., Shah, P. and Doebbler, C. "Refugees and safe countries of origin: appeals, judicial review and human rights" No. 4 10 (1996) *Immigration & Nationality Law & Practice* 23.

asylum seekers continued to arrive and make asylum applications, but increasingly this took place within the state itself. Some Member States sought to place limits on the period of time within which an asylum seeker had to make his or her claim after arriving in the Member State.[53] Other Member States adopted legislation which provides for a preliminary check on whether an asylum seeker has been staying in a safe third country before being admitted to the asylum determination procedure.[54] Access to social benefits for asylum seekers was the subject of public discussion and legislation in many Member States.[55] There was no longer a consensus that asylum seekers' physical needs should be treated in the same way as those of nationals of the state.

In the United Kingdom a series of measures were adopted which made seeking asylum increasingly difficult for the poor.[56] One rather pernicious example which gives an indication of the way in which poverty becomes a reason for rejection of an asylum claim is the procedure which was introduced whereby an asylum seeker has two weeks from making his or her claim to complete and return a standard form to the authorities. The asylum seeker must include with the form a statement explaining all the grounds and events on account of which he or she seeks asylum. The applicant is given the form and told to go away and complete it.[57] Underlined on the first page of the form it is stated that the form "*must be completed in English*". On the last page of the form the applicant is advised:

> "A number of private translator services are available within the United Kingdom and will usually advertise in telephone directories such as *Yellow Pages*. You should be aware that such translators will not provide their services freely and charges could be considerable. . ."

As support for destitute asylum seekers takes the form of accommodation and vouchers exchangeable for food with only a tiny sum of cash for travel expenses[58] the suggestion that the asylum seeker will have the wherewithal to pay for commercial translations of their statements is risible. However, failure to do so, as the applicant is warned in large print in bold on the front of the form, means that "his application may be refused in accordance with paragraphs [ ]. . .and his benefits may be stopped". In other words, the

[53] Wallace above n 16.

[54] For example, the Netherlands.

[55] Minderhoud, P. "Asylum seekers and access to social security: recent developments in the Netherlands, United Kingdom, Germany and Belgium" in Bloch, A. and Levy, C. (eds.) *Refugees, Citizenship and Social Policy in Europe* (Basingstoke, MacMillan, 1999) 132.

[56] For a full examination of the link see Geddes, A. "Denying access: asylum seekers and welfare benefits in the United Kingdom" in Bommes, M. and Geddes, A. (eds.) *Immigration and Welfare Challenging the Borders of the Welfare State* (London, Routledge, 2000) 134.

[57] Home Office form SEF.

[58] Indeed, it is not even enough to cover the bus costs for asylum seekers to attend their interviews.

asylum seeker's failure to find enough money in two weeks to pay for translation into English of his or her statement of persecution in itself constitutes a ground to cease providing the asylum seeker with any benefits at all.[59]

An increasing number of Member States reduced the benefits available to asylum seekers in order to dissuade them from coming to that Member State.[60] Germany and the United Kingdom in particular led the way. Even serious disquiet from the United Kingdom courts[61] about the plight of asylum seekers left without resources did not prevent additional legislation being adopted limiting asylum seekers access to benefits.[62] Since the entry into force of the Amsterdam Treaty, there is a duty to adopt a measure on reception conditions.[63] The Commission committed itself in its "scoreboard" to presenting a proposal on definition of common minimum conditions for reception of asylum seekers by April 2001.[64] The concerns of the Member States regarding reception standards is reflected in the unusual step taken by the French Government in June 2000 to propose a discussion paper on conditions for the reception of asylum seekers which was acknowledged by the Council as a basis for a Commission proposal.[65] The discussion paper states that the host Member State

> "should ensure decent living conditions throughout the procedure for asylum applicants and accompanying family members. To this end, either an allowance should be paid, supplemented if need be depending on the composition of the family, or accommodation should be provided by the competent authorities in the host Member State to include lodging, food and basic daily expenses".

However, the assessment of what is needed to achieve decent living conditions is left to each Member State

> "depending on the cost of living and minimum social standards, if any, applied in its territory. Similarly, determination of arrangements for housing asylum [seekers] must come within the competence of Member States".

The discussion paper very strongly objects to asylum seekers being given the right to work. Only if the asylum claim has been outstanding for more than

[59] Home Office form SEF.

[60] Bank, R. "Europeanising the reception of asylum seekers: the opposite of welfare state politics", in Bommes, M. and Geddes, A. (eds.) *Immigration and Welfare: Challenging the Borders of the Welfare State* (London, Routledge, 2000) 148.

[61] See Remedios, E. *Benefits, Immigrants and Asylum Seekers—a Review* No 1 12 (1998) *Immigration & Nationality Law & Practice* 19; In particular R v. *Secretary of State for the Home Department ex parte JCWI & Another The Times*, 27 June 1996.

[62] Geddes above n 56 at 134–147.

[63] Art. 63(1)(b) EC Treaty.

[64] European Commission, Communication: Scoreboard to Review Progress on the Creation of an Area of "Freedom, Security and Justice" in the European Union COM (2000) 167 final, 24.03.00.

[65] 9703100 Limite—Asile 28, 23 June 2000.

a year should this prohibition be reconsidered. However, these principles are specifically excluded as regards requests for asylum at border posts. Instead the document proposes a system like the French system of zones d'attente—confinement to former cheap hotel rooms near the airport/border post instead. When the Commission proposed a Directive on minimum standards of reception for those seeking asylum in the EU on 3 April 2001 all these issues were taken into account.[66]

One of the most fundamental aspects of making palatable the system of pooled responsibility of states in respect of asylum seekers is that the chance of success of an applicant must be similar irrespective of where the application is made. If the way in which the international obligations are interpreted differs, then the chances of success of an asylum seeker will be different in one Member State when compared with another. This problem was the subject matter of the court decisions which will be considered at the end of this article. However, a few statistics at this point regarding the fate of those who manage to get into the asylum systems in different Member States is illuminating.

Member States: Percentage of Asylum Seekers and Recognition Rates: Average between 1997—1999[67]

Country	Percentage of total number of applications in the EU	Percentage of applicants recognised as refugees under the Geneva Convention
Austria	5%	5%
Belgium	8%	5%
France	8%	15%
Germany	33%	39%
Netherlands	13%	11%
United Kingdom	17%	16%
EU total	892,381 (total number)	89,576 (total number)

It must be borne in mind that different measures to exclude potential applicants from the asylum system may have consequences for the success rates of those who do manage to get admitted. Further, these figures do not include those persons who are accorded other humanitarian statuses such as under Article 3 ECHR. Nonetheless, the sources of the majority of asylum

[66] European Commission, *Proposal for a directive on minimum standards for conditions for the reception of asylum-seekers* (COM(2001)181).

[67] Source: European Commission, *Communication: Towards a common asylum procedure, supra.*

seekers within the European Union are common. The difference of treatment is difficult to explain, particularly to an asylum seeker who is being advised that he or she only has one chance of seeking asylum in the European Union and the country where the application will be admitted is at the election of the Member States. Those asylum seekers getting the short straw of Austria or Belgium with five per cent recognition rates might well feel aggrieved.

(iv) The Consequences of the Threat of Expulsion

Once an asylum claim has been rejected the asylum seeker can be expelled. While the Member States have frequently confirmed their commitment to the expulsion of rejected asylum seekers the indications are that this does not take place on any particularly systematic scale. One of the main difficulties is that in view of the length of time which the asylum procedures can take (in the United Kingdom an amnesty had to be declared in 1999/2000 for asylum seekers whose applications had been pending for more than 7 years without even an initial decision being reached[68]) the carriers cannot reasonably be held liable for returning the asylum seeker to the country of origin, that is even if a carrier can be identified as responsible. Thus the cost of returning asylum seekers to countries of origin falls on the host Member State. There is evidence that Member States are particularly reluctant to undertake these costs and continue to push rejected asylum seekers across their land borders into one another's territory as a cheaper option.[69]

The numbers of persons involved is not insignificant. If the United Kingdom is taken as an example, in 1998, 22,315 asylum applications were refused and in 1999, 11,025. The rate of success on appeal was 27 per cent in 1999 and 17 per cent in 2000. However, the total number of asylum seekers leaving the United Kingdom as a result of enforcement action (i.e. removal/deportation etc.) was 3,430 in 1998 and for the first two quarters of 1999, 2,840.[70] What happens to the rest of them? They are no longer eligible for social assistance, most of them have no travel documents, nor means to obtain travel documents from their embassies. Least of all have they means to purchase tickets to travel elsewhere, even if they could get the travel documents necessary to be permitted to board a carrier moving across European borders. If the United Kingdom figures are indicative of the larger Member States at least,[71] well might one ask where are the rejected asylum seekers?

[68] In 1999, 11,140 persons benefited from the amnesty; in 2000 a further 10,330 received residence rights on the amnesty basis; Home Office, *Asylum Statistics: December 2000* United Kingdom.

[69] TV5 report on the French gendarme encouraging illegal immigrants to go to Belgium, November 2000.

[70] Home Office, *Control of Immigration: Statistics United Kingdom Second Half and Year 1998*.

[71] Comparable statistical information on asylum seekers is not available in most other Member States.

At Sangatte, France, the Red Cross is providing support for refugees seeking to get out of France and into the United Kingdom.[72] Hundreds of persons whose asylum claims are not accepted in France shelter in the centre near Calais near the Eurotunnel entrance trying to get out of France. According to the press "Calais has become the new destination of choice for thousands of refugees from Eastern Europe and the Middle East . . ."[73] The fact that over 3500 persons had registered there between the establishment of the Centre at the end of September 1999[74] and February 2000 but only 500 are present at any given time indicates that the camp is a staging post. By Christmas time 2000 there were over 1,000 persons passing through the Red Cross camp though in Feburary 2001 the numbers had dropped again to about 800 per night.[75] These are persons who have not been admitted to the asylum procedure or have been rejected in France. They are no longer eligible (if they ever were) to social benefits. They are required to leave the territory of France and the Schengen states (i.e. all the EU states with the exception of the United Kingdom and Ireland). However, they have no money and no documents. They are excluded from any form of legal transport.

The vulnerability of these people is hard to exaggerate. According to a BBC report, a 16 year old Sudanese girl was raped by a French border policeman while he was taking her to the Sangatte camp. According to the TV report the man said "it was a kind of agreement between them, in exchange for her crossing to Britain, in other words she was willing. . ."[76] The only chance for these people to leave France lawfully is to travel unlawfully to the United Kingdom. Their presence at a Red Cross camp in France is the result of the unwillingness or inability of the French authorities to return them to their countries of origin and the application by the United Kingdom authorities of the policy of keeping asylum seekers away from the territory.[77] The unwillingness or inability to carry out expulsion decisions is a characteristic of the EU policy. Rejected asylum seekers are expected to find their own way out of the country which has rejected them. If they are poor and cannot leave lawfully, which is the case for the vast majority, that is their problem—it appears that only the Red Cross is willing to accept responsibility.

[72] "Hundreds Queue for British 'Eldorado'" *Agence France Presse* 1 Feb. 2000; Refugees set their Sights on Britain *Independent* 21 Aug. 1999.

[73] Calais one step from Heaven for refugees *The Scotsman* 1 Apr. 2000.

[74] *Agence Press* 1 Feb. 2000 above n 70.

[75] BBC Radio 4 News Report 5 Feb. 2001.

[76] BBC Monitoring Service 22 July 2000. According to the report the French border policeman was arrested and held in custody. Charges were being brought.

[77] In the case of Sangatte this policy is reinforced by the Protocol between the United Kingdom and France concerning frontier controls and policing, co-operation in criminal justice, public safety and mutual assistance relating to the Channel fixed link 1991 and its Additional Protocol 2000 whereby the policing of the United Kingdom border is the duty of the French border guards.

(v) Adopting Asylum Measures under the EC Treaty

Since the entry into force of the Amsterdam Treaty two measures have been adopted under Article 63 EC on asylum, on 28 September 2000 a Council Decision establishing a European Refugee Fund[78] and on 11 December 2000 Regulation 2725/00 establishing Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention.[79] The two proposals strongly indicate a continuing commitment by the Union to the principle of one common determination of an asylum application: the pooling of Member States' international obligations.

Starting with the Refugee Fund, the Decision creates a fund which will last from 1 January 2000 to 31 December 2004 and during that period will parcel out 216 million Euro to the Member States, not an exceptional figure by EU standards. Under the provisions of the decision, it is for each Member State to put forward proposals for funding which will then be assessed and funded on the basis of the criteria. First, the groups which are to benefit from the action are divided into five, but within that division, the amount of money to be allocate is 35 per cent to the first two groups and 65 per cent to the remaining three groups.[80] The funds are to be allocated in proportion to the numbers of persons referred to who have entered the Member State in the previous three years.

The first two groups, then are: third country nationals recognised as refugees under the Geneva Convention; third country nationals enjoying a form of international protection (e.g. under Article 3 ECHR or Article 3 UNCAT). So, projects put forward by the Member States for asylum seekers whose applications have been determined and who have been granted protection get 35 per cent of the fund annually.

The second group consists of: third country nationals who have applied for protection under the Geneva Convention or other international obligations; third country nationals enjoying temporary protection or who are under consideration for temporary protection. Projects relating to these persons are to account for 65 per cent of the budget. The measures which may be supported are: reception conditions, integration where the person has a lasting or stable stay and repatriation.

There are two perspectives on the consequences of the objectives and allocation. Peers argues that the weighting of the fund in favour of asylum seekers constitutes an incentive not to grant a durable status.[81] By failing to determine asylum applications the Member State does not need to adjust its figures for three years and remains eligible for a share of the 65 per cent. I am not entirely convinced. It appears to me that the weighting in favour of

[78] OJ 2000 L 252/12

[79] OJ 2000 L 316/1.

[80] Arts. 3 and 10 Decision above n 73.

[81] Peers above n 33

asylum seekers where the funds are distributed on the basis of numbers of applicants over a three year period, in fact may operate towards stabilising the approaches to asylum seekers. By applying for funding, each Member State must base its proposal on the numbers of persons who sought protection over the preceding three years. In order to justify the expenditure at the end of the period, those administering the funds have an interest in ensuring that the numbers of asylum seekers do not fall substantially in comparison with the projection. In theory this could have a positive effect in reconciling officials with the numbers of asylum seekers they are likely to receive as there is for once a positive interest in seeing the numbers arrive. In practice the amount involved in the Fund is probably too small to have much effect.

As regards persons who have received a durable status either as refugees or otherwise in need of international protection, in most Member States there are well established programmes of assistance and integration. Additional funding from the Union is less pressing. Of greater concern is the potential use of the Fund for repatriation. Although it is qualified "as regards repatriation, the action may concern in particular information and advice about voluntary return programmes and the situation in the country of origin and/or general or vocational training and help in resettlement" it is not limited necessarily to voluntary return. The Parliamentary Assembly of the Council of Europe reported in 2000 its concerns regarding involuntary expulsion and the increasing number of incidents of violence against persons being expelled from Europe by officials and carrier staff.

The second measure, Eurodac, is more sinister. The proposal for a common database of the fingerprints of all persons who have ever applied for asylum in any of the Member States of the Union arose in the early 1990's as it became apparent that the Dublin Convention was not going to be the solution to allocating asylum seekers because increasingly asylum seekers had no documents to show how they arrived. The Member States determined that there needed to be a system for determining where and how asylum seekers arrived in the Union. To this end discussions about creating a database of fingerprints began. The principle chosen is that Member States will fingerprint asylum seekers, as soon as they appear, send the prints to the common database so that another Member State can check the prints of an asylum seeker appearing by an unknown route in its territory and send the individual back to the first state. The first difficulty of the system is that the authorities of the first state through which an asylum seeker passes will not know whether to fingerprint the individual unless he or she applies for asylum. If he or she waits to arrive in the country where he or she wishes to be before applying for asylum, that state will be no better off in determining the travel route after the adoption of Eurodac than it was before. The persons who will, however, be caught by the Eurodac system, in principle at least, are those who apply for asylum in one Member State and then move to another State and apply again for asylum there. There are no figures about

how frequently this happens though there is scepticism as to whether this is a wide spread phenomenon.

In light of the weakness of the Eurodac proposal, under the 1998 Austrian Presidency of the Union, the proposal was enlarged to include "persons apprehended in connection with the unlawful crossing of the external borders of the Community." The assumption here is that anyone caught trying to cross the border illegally is likely to become an asylum seeker in some Member State. Again the difficulty with this part of the proposal is that it assumes an interest on the part of the apprehending state in fingerprinting the individual. The consequence of fingerprinting such a person is not only a substantial amount of administrative paperwork but also that the state which does fingerprint will be responsible for taking back and determining the asylum application which any individual it fingerprinted first may make. These two facts make the taking of fingerprints of persons at the border rather unattractive.

As finally agreed, Article 1 of the Regulation states that the purpose of Eurodac

> "shall be to assist in determining which Member State is to be responsible pursuant to the Dublin Convention for examining an application for asylum lodged in a Member State, and otherwise to facilitate the application of the Dublin Convention. . ."

All asylum seekers and persons apprehended over the age of 14 must be fingerprinted promptly.[82] The prints must be recorded immediately and sent to the Central Unit with the following information: the Member State of origin; sex of the applicant; reference number; date of taking the prints; date of entry on the database; details of the recipients and transmission. The prints of asylum seekers are to be held for ten years[83] but will be removed early if the person becomes a citizen of the Member State. As regards persons apprehended in connection with the irregular crossing of an external border, the data are to be stored for two years but shall be erased if the individual obtains a residence permit; leaves the territory or acquires citizenship.[84]

When comparing fingerprints of a person found illegally on the territory of a Member State, the State should have one of three grounds: the individual states he or she has made an application elsewhere in the Union; he or she does not claim asylum but claims a need for international protection or he or she seeks to prevent removal by refusing to co-operate in establishing his or her identity.[85] But this fingerprint data is not to be stored in the Central Unit, it is for checking purposes only.[86]

[82] Art. 4 of the Regulation above n 79.
[83] Art. 6 of the Regulation *ibid.*
[84] Art. 9 of the Regulation *ibid.*
[85] Art. 11 of the Regulation *ibid.*
[86] Art. 11(3) of the Regulation *ibid.*

Eurodac is fundamentally attached to the Dublin Convention approach to the pooling of State responsibility for asylum seekers and the State's right to determine where an application may be received. It participates in the Dublin Convention fiction that there are borders between the Member States which apply only to some persons: asylum seekers but not to others: i.e. everyone else. For instance, an asylum seeker who is awaiting a determination of her asylum application in Belgium may travel as easily as anyone else to the Netherlands for the day. However, the provisions on abolition of checks on persons at borders do not provide for her to travel, as her permit to be in Belgium will not be a notified document as a residence document entitling the individual to travel for three month stays in any other Member State.[87] Thus, if she is stopped by the police in the Netherlands, she is a person to whom the Eurodac Regulation applies. She has been apprehended illegally on the territory of a Member State and states that she has applied for asylum in Belgium. She may be held in detention, fingerprinted, her fingerprints sent to the Central Unit for checking and the response that she is indeed an asylum seeker in Belgium. If she was so unlucky as to have chosen to visit friends and go shopping in Amsterdam over a weekend, she may end up spending the whole weekend in detention awaiting the re-opening of the Central Unit on Monday morning. In the end she will be sent back to Belgium where she intended to go in any event. After all this expense to the Netherlands authorities and humiliation to the asylum seeker, there is no mechanism to prevent the same or another individual taking the same trip the next day. The underlying conflict between the abolition of border controls on persons in general and the desire to retain them for one small class remains unresolved.

Nonetheless, the Eurodac Regulation indicates the participation of the Community in the way of thinking about asylum seekers and refugees which characterised the intergovernmental period. The twin principles of one single determination of an asylum claim made within the territory of the Union and the choice of the Member State which country will be responsible for that determination are intrinsic. Both of these principles have been examined recently by high judicial authorities and found wanting. A consideration of these decisions is the basis of the final section of this article.

[87] Annex 4 Common Consular Instructions, part of the Schengen acquis: Belgium has notified the following residence documents only as granting the right of visa free travel to third country nationals resident within the Union (English term): Identity Card for Foreigners; Certificate attesting to entry in foreigners register; Diplomats Identity Card; Consular Identity Card; Special Identity Card (blue in colour); Special Identity Card (red in colour) Identity card for children under the age of five of aliens who are holders of diplomatic identity cards, consular identity cards, blue special identity cards or red special identity cards; certificate of identity with photograph issued by Belgian communes to children under twelve; list of persons participating in a school trip within the European Union.

V. The European Court of Human Rights and the House of Lords: Adjudicating the Principles

One of the fundamental problems with the Dublin Convention system as extended by the Resolutions, readmission agreements and Eurodac, is that the chance of the success of an individual's asylum claim is not consistent among the Member States. Further, neither the interpretation of the Geneva Convention as regards the meaning of refugee nor the procedures and appeal rights are consistent within the EU let alone beyond its territory. Attempts to develop a common interpretation of the Convention and minimum procedures have not yet borne fruit.[88] UNHCR set out its shopping list for harmonisation before the principle of the Dublin Convention could be acceptable as follows:

> "UNHCR wishes to emphasise that the credibility of any mechanism for transfer of responsibility is contingent upon the existence of harmonised standards in several other substantive and procedural areas of asylum. These include: the interpretation of the 1951 Convention refugee definition and the scope of complementary forms of protection; fair and expeditious asylum procedures; conditions for the reception of asylum seekers; and the balance of effort among the Member States. . . . The disparity of national standards in these key areas challenges many of the assumptions on which the Dublin Convention is implicitly based".[89]

The problem was put somewhat more trenchantly by Lord Hobhouse of Woodborough in the House of Lords decision *Adan & Aitseguer*[90]:

> "So long as such differences [of interpretation of the Geneva Convention] continue to exist, the intention of the Convention to provide a uniformity of approach to the refugee problem will be frustrated . . . The evidence in the present case discloses that only 5% of would-be refugees from Algeria are granted asylum if they make their applications in France, whereas 80% of such applicants are successful if applying in the United Kingdom".

Non-governmental organisations including Amnesty International[91] became increasingly uneasy about the development of the new European policy on

[88] Intergovernmentally, the Member States within the Third Pillar agreed a Resolution on a minimum guarantees for asylum procedures (Brussels June 1995) and the Commission has proposed a Directive on Minimum Standards on procedures in Member States for granting and withdrawing refugee status COM(2000) SEC.

[89] UNHCR, Brussels Office: *Revisiting the Dublin Convention: Some Reflections by UNHCR in response to the Commission staff working paper*, Autumn, 2000, 6.

[90] *R* v. *Secretary of State for the Home Department ex parte Adan & Aitseguer* Judgments 19 December 2000; www.parliament.the-stationery-office.co.United Kingdom/pa/ld200001/ldjudgmt/jd001219/adan-1.htm>

[91] For a review of Amnesty's position see Amnesty International European Union Association "Amnesty International has called before that the adoption of EC measures in the

asylum. The right of an asylum seeker to determination of his or her claim without discrimination based on his or her country of origin was among the issues of concern.

This concern was shared by more than one supreme court in Europe—the French Conseil d'Etat in 1996 held that French law did not permit the Minister, when the applicant made his or her application and was held at the border, to decide that his or her application was a manifestly unfounded one.[92]

> "In addition, it was held that the Resolution on Manifestly Unfounded applications for asylum and the Resolution on a harmonised approach to questions concerning host third countries, adopted on 30 November 1992 and 1 December 1992 respectively, by the Council of Ministers and, a few days later by the European Council in Edinburgh were, 'devoid of normative value.'"[93]

In Germany, again in 1996, the Federal Constitutional Court held that exceptionally[94] the German courts could review the actual situation in a "safe third country" in cases where the asylum claim is based on circumstances which by their very nature the legislature could not have foreseen.[95] The United Kingdom courts were particularly suspicious of the Dublin Convention and the principle of shared responsibility without harmonisation of the underlying law. In a series of cases challenges to removal of asylum seekers were accepted, ultimately culminating in the case which will be considered below.[96]

Judicial disquiet about the "safe third country" concept both within the EU in the form of the Dublin Convention, and beyond its borders, is exemplified by the lack of consistency as regards the concept of agent of persecution. The German interpretation of the Geneva Convention has been that a person can qualify as a refugee only if he or she is the subject of persecution by state agents or with their consent. Thus failed states, like Somalia, cannot

field of asylum respect fully, this is not only formally but also in practice, the international obligations of Member States under international refugee law and international human rights law, so that they reflect the broad framework of existing and evolving international law and standards, including the relevant jurisprudence and interpretation. One such international obligation is that it is the country where a refugee applies for asylum which is obliged to consider the application substantively and to ensure that the refugee is not directly or indirectly returned to persecution." *Revision of the Dublin Convention: Comments on the Commission Staff Working Paper* October (2000) 2.

[92] *Ministre de l'interieur*, Rogers, H. C., 18 Dec 1996 (1997) *Journal de droit international* 509.

[93] Errera, R "France" in Wallace above n 16, 59.

[94] i.e. notwithstanding the legislation to the contrary establishing an irrebuttable presumption of safety: Henkel, J. above n 16, 84.

[95] BverfG Decision of 14 May 1996—2BvR 1938/93, 2315—BverfGE 94, 49 <99> as quoted in Henkel, J. *ibid.*

[96] For the history of the United Kingdom courts and the Dublin Convention see Nicol and Harrison above n 49 at 465 *et seq.*

give rise to Convention refugees, neither can situations like that in Sri Lanka where individuals claim persecution by the Tamil Tigers to whom the state is opposed. The situation in France is not dissimilar to that in Germany at least in respect of Algerian asylum seekers who fear persecution from the Group Islamique Armé which is fighting against the Government of Algeria. In the United Kingdom and the Netherlands there is no distinction between non-state agents and state agents as regards the definition of a refugee.[97] As Lord Steyn of the House of Lords put it:

> "There is a divergence in state practice concerning the interpretation of the word 'persecuted' in Article 1A(2) [of the Geneva Convention]. The majority of contracting states, including the United Kingdom, do not limit persecution to conduct which can be attributed to a state. A minority of contracting states, including Germany and France, do so limit it. The two different approaches have been referred to as the persecution theory and the accountability theory. The consequences of adopting one or other of these theories on the fate of refugees are vividly illustrated by the cases before the House."[98]

It was the situation of a Somali asylum seeker who arrived in the United Kingdom after having been refused asylum in Germany (Ms Adan) and of Mr Aitseguer, an Algerian national fearing persecution by the Groupe Islamique Armé (GIA) who passed through France without seeking asylum in order to apply for asylum in the United Kingdom in which the United Kingdom's House of Lords had to determine the validity of the Dublin Convention principle of pooled responsibility. Lord Slynn set the stage in the judgment, stating baldly

> "It is common ground that if each of the appellants were sent back to the countries from which immediately they came to the United Kingdom, Germany would probably send Adan to Somalia and France would probably send back Aitseguer to Algeria. Germany would do so because it considered that there was no state or government in Somalia which could carry out the persecution. France because it considered that the 'persecution' which he feared was not overrated or encouraged or threatened by the state itself. Thus in each case it was not conduct for which the state was accountable".[99]

The House of Lords was unanimous in dismissing the appeal of the Secretary of State and finding in favour of the two applicants. Lord Slynn most succinctly states the position of the Court:

> "The question thus narrows—may the Secretary of State say that he is satisfied that the other state will not send the applicant to another country 'otherwise than

[97] For a fuller analysis of the question see Noll, G. "Formalism v. Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law" (2001) *Nordic Journal of Human Rights* (forthcoming).

[98] *R v. Secretary of State for the Home Department ex parte Adan & Aitseguer* above n 90

[99] Judgment of Lord Slynn of Hadley in *Adan & Aitseguer ibid.*

> in accordance with the [Geneva] Convention' if the other state adopts an interpretation of the Convention which the Secretary of State rejects but which the Secretary of State accepts is a reasonably possible or legitimate or permissible or perhaps even arguable interpretation . . . In my view it is impossible for the Secretary of State to certify that . . . the other state would not send the applicant back 'in contravention of the Convention', if the interpretation of the other state and its application to particular facts would result in the Convention being applied in a way which the Secretary of State himself was satisfied was not in accordance with the Convention".[100]

The result of the judgment is that the United Kingdom authorities are not entitled to pool responsibility for asylum seekers and send them to other EU states so long as the underlying interpretation of the Geneva Convention by the other states provides less protection to the individual than that applied in the United Kingdom. In answer to the United Kingdom authorities complaint that such a decision by the House of Lords would cause major disruption to the application of EU asylum policy in the United Kingdom, Lord Steyn stated dryly "The sky will not fall in".[101]

The only issue before the House of Lords in the case of *Adan & Aitseguer* was the issue of the difference between Member States in respect of the interpretation of non-state agents of persecution. The UNHCR shopping list of measures which must be harmonised before there can be a satisfactory arrangement which would give legitimacy to the transfer of responsibility between Member States (or wider) is substantially longer. This one issue is subsumed in the first item: the need for a consistent interpretation of the Geneva Convention.

So far only the Geneva Convention duty of refugee protection has been under consideration. However, as mentioned above, there are two other sources of protection for persons seeking protection from torture, and the regional one has the benefit of a court responsible for considering allegations of violation. The European Court of Human Rights jurisprudence on Article 3 and the protection of persons at risk of torture developed consistently over the period 1990—2000. Despite argument on behalf of a number of States that there should be a reconsideration of the duty on states to asylum seekers under Article 3, the Court reiterated its constant jurisprudence. The same issue which was of concern to the House of Lords, the divergence of interpretation of provisions protecting persons at risk of torture arose before the European Court of Human Rights—additionally, the direct question of the acceptability of the pooling of responsibility had to be determined.

On 7 March 2000, the European Court of Human Rights handed down judgment on admissibility in the case of *TI* v. *United Kingdom*.[102] The facts were as follows: a Tamil national of Sri Lanka, arrived in the United

[100] Judgment of Lord Slynn of Hadley in *Adan & Aitseguer ibid.*

[101] Judgment of Lord Steyn in *Adan & Aitseguer ibid.*

[102] *TI* v. *United Kingdom* [2000] Immigration and Nationality Law Reports 211.

Kingdom in September 1997 and claimed asylum on the basis that he would be persecuted by non-state agents. He had previously unsuccessfully claimed asylum in Germany and unsuccessfully appealed to an administrative court there. His claim was rejected by the United Kingdom Secretary of State without consideration of the merits on the basis that following a request by the United Kingdom, Germany had accepted that it was the country responsible under the Dublin Convention 1990 for dealing with his claim. He exhausted domestic remedies as required under the ECHR and then petitioned the Strasbourg court. The case was declared inadmissible by the Court but the reasoning was of particular importance to the development of European Community asylum law.

The Court first dealt with its interpretation of Article 3 ECHR protection and the question of agent of persecution. It held:

> ". . . the fundamentally important prohibition against torture and inhuman and degrading treatment under Article 3 read in conjunction with Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention' imposes an obligation on Contracting States not to expel a person to a country where substantial grounds have been shown for believing that he would face a real risk of being subjected to treatment contrary to Article 3. . .the existence of this obligation is not dependent on whether the source of the risk of the treatment stems from factors which involve the responsibility, direct or indirect, of the authorities of the receiving country. Having regard to the absolute character of the rights guaranteed, Article 3 may extend to situations where the danger emanates from persons or groups who are not public officials, or from the consequences to health from the effects of serious illness . . . In any such contexts, the Court must subject all the circumstances surrounding the case to a rigorous scrutiny".

In theory, then, the problem of divergence in interpretation of the Geneva Convention between Germany and France on the one hand and the United Kingdom and others on the other which arose in *Adan & Aitseguer*[103] could be said to be superseded by the overriding duty of Article 3 ECHR to provide protection to anyone at risk of torture, irrespective of the source. However, the admission by the United Kingdom government in the later case that the two applicants would in all likelihood be returned to the countries where they feared torture by Germany and France respectively raises serious questions about the respect by those two states at least, of their duty of protection under Article 3 ECHR. It is unclear whether the European Court of Human Rights had in mind this problem of implementation when it went on to decide the next issue: the validity of pooling state responsibility.

The Court considered the more problematic issue of the Dublin Convention principle of pooled responsibility and the Resolutions' principle of devolved responsibility onto a host state. It held:

[103] Above n 90.

> "The indirect removal... 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. Where States establish international organisations, or *mutatis mutandis* international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and objective of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution".[104]

When the new European Union asylum policy is viewed from the other side of the impermeable shell of Community law, its compatibility with international human rights norms is suspect. The European Court of Human Rights is not willing to rubber stamp the arrangements as regards asylum seekers which the Member States establish among themselves. The principle of state responsibility under the ECHR cannot be evaded by mechanisms among one group of states to pool responsibility. In so far as they attempt to do so, rather than diminishing their responsibility, it would appear that their obligations are increased as the sending state becomes liable also for the actions of the safe third country and whether it has correctly carried out its responsibilities to the asylum seeker under the ECHR.

VI. Conclusions

The European Union has developed over a period in excess of ten years an asylum policy which is based on the pooling of responsibility for asylum seekers whereby the States decide among themselves, and with third countries, where an asylum seeker may make an application for asylum. Further, the determination by one State is sufficient to relieve the other States of consideration of the claim. This policy has been implemented through a series of agreements starting with the Dublin Convention 1990 and taking shape with measures adopted intergovernmentally in 1992 and thereafter.

The European Community is now responsible for drafting Community law on asylum. In the process, it has inherited (or adopted) a number of measures from the Schengen acquis which have grave consequences for asylum seekers—in particular in the form of visa requirements and sanctions against carriers for transporting persons without the correct documentation, which hinder their escape from persecution. The first measures which the Community has adopted since being given responsibility in the field by

[104] *TI* v. *United Kingdom ibid.*

the Amsterdam Treaty, indicate a continuation of the policy of exclusion and rejection. The Eurodac Regulation, adopted at the end of 2000, sets up a database of fingerprints of all asylum seekers over the age of 14 so that the Member States can check whether an asylum seeker has sought protection in another state, or indeed, whether he or she arrived irregularly in the Union. Leaving aside the question of efficacy of the system, the stigmatisation of asylum seekers as potential cheats in respect of whom such severe (and expensive) measures need to be taken is unfortunate and not supported by statistical evidence.

However, there is increasing disquiet from UNHCR, non-governmental organisations, the courts of some Member States and in particular the European Court of Human Rights about the direction of European harmonisation of asylum law. Effective protection for the individual is of fundamental concern. The attempt of the Member States to avoid responsibility for asylum seekers evidenced by the measures adopted so far appears likely to offend not only national law in some Member States but also Article 3 ECHR. Rather than permitting the Member States to avoid responsibility for the protection of persons at risk of torture by sending them to another country, the European Court of Human Rights has handed down a judgment which increases the protection for the individual. If a contracting party sends an asylum seeker to another contracting party which it determines safe, not only is the receiving contracting party under a duty to provide protection if there is a real risk that the person might suffer torture if returned to his or her country of origin, but the sending contracting party remains liable. If the receiving state sends the asylum seeker back to torture, the first state may also be liable for a breach of its duty of protection under Article 3 ECHR. This interpretation may not be particularly welcome among the Member States. However, it may be seen as the result of their too strenuous efforts to avoid responsibility for asylum seekers, who, nevertheless, are persons to whom the Member States have international obligations.

The heavy handed efforts of the Member States intergovernmentally to hinder access to their territory for asylum seekers and to sub-contract among themselves or to third countries their protection duties appears to have offended both national and international norms. The European Community would be wise to take note of these developments before following a path which has brought discredit to more than one Member State.