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Deflecting international protection by treaty: bilateral and multilateral accords on extradition, readmission and the inadmissibility of asylum requests

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I. Introduction

For as long as it has existed, the Office of the United Nations High Commissioner for Refugees (UNHCR) has voiced concerns about threats to refugee protection. In the 1990s, many of these concerns reflect declining Western hospitality towards refugees. Without their Cold War propaganda value as tangible evidence of the evils of communism, refugees' selling points have been reduced, and replaced by appeals to humanitarianism and to states' international obligations. Industrialized countries had already begun to close their doors in the early 1980s, in response to dramatically higher numbers of asylum applicants in Western Europe.

States with the capacity to patrol their borders and to maintain sophisticated refugee status determination systems have decimated the number of asylum seekers coming in. For those who nonetheless manage to enter, the possibilities for recognition of refugee status are reduced.¹ Measures states have taken include the imposition of visa requirements, carrier sanctions against transportation companies bringing illegal aliens to their territory, interdiction at sea, and re-interpretations of refugee law to arrive at a finding of non-responsibility. The latter category includes the notion of "safe third country", under which the asylum seeker is obliged to seek asylum in another country, and the assertion that persecution can be administered only through agents of the state. These measures have varying degrees of legitimacy in international law, and have received extensive scholarly review.

In the past decade, Western Europe has seen unprecedented political action on refugee-related issues, through the European Union and bilateral initiatives.² This activity goes ever farther upstream in heading off the ability of individuals to realize their human rights. The many measures being taken "test the minimum threshold of protection required by the 1951 Geneva Convention [relating to the Status of Refugees]".³

This paper will examine a particular category of measures which present serious risks to refugee protection: several current or evolving international treaties and agreements which contravene existing obligations to protect refugees. Not all are directed towards refugees or asylum seekers. As international treaties, however, they have greater significance than unilateral state actions, and arguably the same standing in international law as the 1951 Refugee Convention itself.

¹ Professor Joan Fitzpatrick has noted that "the states of traditional asylum have pursued two types of structural revisions in their asylum systems, driven by the challenge posed by the backlogs and by dramatic attitudinal shifts among policy makers and large segments of the public. The first approach involves streamlining the refugee determination process. The second involves erection of deterrence, exclusion, and diversion barriers to stem the flow of asylum-seekers. These measures have resulted in startling reductions in asylum application rates since 1992. Between 1992 and 1994, applications in Europe plummeted by two-thirds, while combined applications in Western Europe, North America and Australia fell from approximately 825,000 in 1992 to an estimated 425,000 in 1994. Despite these precipitous drops, pressure remains to tighten access to asylum even further." Fitzpatrick, J., "Flight from Asylum", *Virginia Journal of International Law*, Vol. 35, No.1 (Fall 1994), p. 31.

² Marx, Reinhard, "Non-Refoulement, Access to Procedures, and Responsibility for Determining Refugee Claims", *International Journal of Refugee Law*, Vol. 7, No. 3 (July 1995), p. 385.

³ Shacknove, Andrew, and Byrne, Rosemary, "The Safe Country Notion in European Asylum Law", *Harvard Human Rights Journal*, Vol. 9, (Spring 1996), p. 185.

Where international protection is denied to refugees or asylum seekers, states parties are, or are likely to be placed, in a state of illegality *vis-à-vis* their international obligations. The refugee's right to seek asylum and to have access to procedures and to protection imposes a correlative duty on states to make this possible. The rights of *non-refoulement*, of seeking asylum, of access to procedures, and of non-discrimination are at issue in the cases examined below, as is the universal nature of the system founded on the 1951 Refugee Convention.

The relationship between domestic legislation and practice, and international law, will not form part of this paper. But what happens when states defy their refugee and human rights obligations under international law as a consequence of another treaty obligation? This arises with the growing network of international law which itself challenges the legal basis of international protection. For better or worse, new law will replace old law. While this reflects the living nature of international law, it can also mean that, as Sir Hersch Lauterpacht said, "today's rule reflects in part yesterday's deviance".⁴ Influencing this process to a greater degree should be the task of UNHCR.

UNHCR has commented on the treaties examined in this paper, namely the revised Treaty on European Union (Treaty of Amsterdam), the draft Italian and Austrian treaties on illegal migration, readmission agreements, and the new European Union Treaty on Extradition. In addition to addressing treaty challenges as they arise, however, UNHCR could take more extensive measures to ensure the survival and the authoritative interpretation of the refugee conventions. At present, UNHCR exercises limited supervision over the application by states of the 1951 Refugee Convention and 1967 Protocol, and a similarly limited role in the progressive development of international law. This paper presents a strategy for a more streamlined, effective and consistent approach to UNHCR's supervisory responsibility, which would in addition enhance the role of the organization in the development of international human rights law.

a. *Non-refoulement* and Other Treaty Obligations⁵

All the treaty undertakings explored in this review have negative implications for refugee protection. Some threaten the fundamental refugee protection principle of *non-refoulement*. As well as reflecting competing international norms, this situation reopens the debate as to the standing of the norm of *non-refoulement* in international law.

There is no doubt that *non-refoulement* is a legal concept, and "not simply a means by which States can devise political solutions in the refugee field".⁶ More than a legal principle, however, *non-refoulement* has acquired the status of a norm of customary

⁴ Cited in Villiger, Mark E., *Customary International Law and Treaties*, Second Edition, Kluwer Law International, The Hague, 1997, p. 212.

⁵ In general, see Reuter, Paul, *Introduction to the Law of Treaties*, Pinter, London, 1989.

⁶ Marx, "Responsibility for Determining Refugee Claims", p. 392.

international law, that is, a general practice which states accept as law. In addition to forming part of customary international law, many states have expressly agreed to be bound by this standard through the 1951 Refugee Convention, the 1984 Convention against Torture and other instruments.

Some authoritative sources attribute to this principle a higher standing, deeming it a peremptory norm of international law, or *jus cogens*. Peremptory norms of international law are those which cannot be set aside, derogated from or limited in any way, whether by another treaty or by agreement between states. Thus, "State A and State B cannot agree that, *inter se*, they will allow prisoners of war that they hold to be freely killed".⁷ *Jus cogens* norms apply to all states, even those which have not consented to the rule. The 1984 Cartagena Declaration states that *non-refoulement* should be acknowledged and observed as a rule of *jus cogens*. Conclusion No. 25 (1982) of UNHCR's Executive Committee refers to the principle of *non-refoulement* as "progressively acquiring the character of a peremptory rule of international law". Any treaty provision incompatible with *jus cogens* is void.

Whether *non-refoulement* is a norm *jus cogens* remains under debate. There is no argument but that non-refoulement forms part of customary international law, however, as well as being a treaty obligation for Member States of the European Union. There are therefore at least two sources of legal obligation for the rule of *non-refoulement*. Therefore, if the agreements discussed below cause the return of persons to frontiers of territories where their lives or liberty would be endangered, states parties to those agreements will have violated their obligation to respect the principle of *non-refoulement*.

b. Treaty Interpretation in International Law

The sources of international law are set out in Article 38(1) of the Statute of the International Court of Justice as the law which the Court is to apply in deciding disputes. International conventions ("whether general or particular") are the primary source of international law, followed by international custom. Although treaties are interpreted primarily by the states parties, interpretation is also undertaken by international courts, arbitral bodies, and international organizations "which, although not a party, [have] to apply a treaty or control its application".⁸ Treaty interpretation is governed by numerous rules, in particular the 1969 Vienna Convention on the Law of Treaties, which entered into force in 1980. These rules of treaty interpretation bind the parties; other bodies responsible for treaty interpretation must of necessity apply the same rules. This is also the case for UNHCR in interpreting the refugee conventions.

Under the Vienna Convention, treaties are binding upon the parties. As Reuter writes: "[T]he effect of a treaty is essentially to create legal rules, to generate rights and

⁷ Higgins, R., *Problems and Process: International Law and How We Use It*, Clarendon Press, Oxford, 1994, p. 21.

⁸ Reuter, *Introduction to the Law of Treaties*, p. 74.

obligations."⁹ According to Article 31(1) they are to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty, in their context and in light of its object and purpose". Reuter continues:

The requirement of good faith is essential in all actions governed by international law and in the performance of any obligations... Treaties must be interpreted in good faith... [G]ood faith implies the requirement to remain faithful to the intention of the parties without defeating it by a literal interpretation or destroying the object and purpose of the treaty.¹⁰

The object and purpose of the 1951 Refugee Convention is to protect refugees and assure to them the widest possible exercise of fundamental rights and freedoms.¹¹ Any human rights treaty must be interpreted in the light of protecting human rights. A treaty's object and purpose is taken as stated, at face value; in reality, the parties may not share a common intention, and their underlying intentions may not be those that are stated. In 1995, the Executive Committee stressed the importance of interpreting and applying international instruments for the protection of refugees "in a manner consistent with their spirit and purpose".¹²

c. Competing or Conflicting Treaties

In interpreting treaties, any subsequent agreement between the parties regarding interpretation or application of the treaty, any subsequent practice in its application, and other relevant and applicable rules of international law are also to be taken into account.

All treaties have equal standing in international law, with the exception of the Charter of the United Nations, which takes precedence, and agreements which are explicitly subsidiary in nature. As between all other treaties, the issue may arise of how to establish precedence among conflicting treaties, and of the consequences of treaty-based conflicts.

The Conventions [on the Law of Treaties, 1969, and on the Law of Treaties between States and International Organizations or Between International Organizations, 1986] did not fail to take into account the fact that the breach of a treaty by the conclusion of another treaty, while being largely a matter of State responsibility, should also be seen from the point of view of its effects on the breached treaty.¹³

The consequence of conflicting obligations is illustrated very simply:

⁹ *Ibid*, p. 73.

¹⁰ *Ibid*, p. 114.

¹¹ Goodwin-Gill, Guy S., *The Refugee in International Law*, 2nd edn., Clarendon Press, Oxford, 1996, citing Preamble to the 1951 Convention, p. 367.

¹² Executive Committee, Conclusion No. 77 (XLVI), *General conclusion on international protection*, para. (e).

¹³ Reuter, *Introduction to the Law of Treaties*, p. 101.

The most straightforward example is a treaty between A and C violating A's obligations under another treaty with B. From the point of view purely of the law of treaties, both agreements are valid; but as they conflict with each other, only one of them can be performed. Performance of this treaty will constitute a breach of the undertaking assumed by the other treaty and will entail an obligation to make reparation.¹⁴

Normally, later treaties prevail over earlier ones.¹⁵ The Vienna Convention provides that the earlier treaty will apply only to the extent that its provisions are compatible with those of the later treaty. However, where a treaty "specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, *the provisions of that other treaty prevail*".¹⁶ In addition, peremptory norms of international law "prevail over treaties which conflict with them [and] strip them of any legal validity".¹⁷ This is also true in regard to the UN Charter.

The treaties examined here are concluded between a small subset of states parties to the 1951 Refugee Convention and to other relevant instruments, including the Charter of the United Nations. Article 41(1) of the Vienna Convention provides:

Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

- by
- (a) the possibility of such a modification is provided for the treaty; or
 - (b) the modification in question is not prohibited by the treaty and:
 - (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
 - (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

Unless the modification in question is provided for by the treaty, the parties which intend to conclude the agreement are to notify all other parties to the original treaty of their intention.¹⁸ Where agreements concluded between UN Member States conflict with provisions of the UN Charter, the situation is even clearer. Under Article 103 of the UN Charter:

¹⁴ *Ibid.*, p. 83.

¹⁵ Generally, specialized treaties will also prevail over more general treaties.

¹⁶ Article 30(2), (emphasis added).

¹⁷ Reuter, *Introduction to the Law of Treaties*, p. 111.

¹⁸ Treaties may also be modified in other ways, but those are less relevant here.

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Although "the invalidity of any treaty clause and obligation incompatible with the Charter is beyond question",¹⁹ the consequences for the incompatible treaty or treaty provision are not spelled out. Inevitably, there will be disagreements as to whether particular modifications are permissible or not, and whether or not any conflict of obligations exists. As has been acknowledged, "the relationship between treaties, especially in the case of contradictory provisions in different treaties, is a difficult problem under general international law".²⁰

d. Treaties which Establish an "Objective Regime"

As is discussed more extensively below, the European Union, in attaching a Protocol on asylum for EU nationals to its revised Treaty on European Union, argued that it did not impinge on rights enjoyed by other states parties to the 1951 Refugee Convention. The rights and obligations of other states are normally central to treaty interpretation and to dispute settlement. They are scarcely relevant to human rights treaties, where those affected are principally individuals. Nor are responsibilities towards refugees helped by treating these issues "as a problem of relations and obligations among States... An exclusive focus on inter-State relations would deprive refugees of their human rights. In view of the growing importance which governments have accorded to human rights since 1990, this is not acceptable."²¹

This is consistent with contemporary treaty law, which regards certain types of treaties not as establishing rights and obligations *vis-à-vis* other states, but as creating so-called objective regimes. Human rights treaties, including the international refugee protection instruments, establish a situation where the impact of the treaty is "felt beyond the parties",²² and does not simply establish "a web of inter-State exchanges of mutual obligation".²³ The UN Office of Legal Counsel has held that the humanitarian provisions of the 1951 Refugee Convention and 1967 Protocol

are of an *erga omnes* effect, and could not, therefore, be varied by a successive agreement binding only some of the parties to the earlier instruments *inter se*. [A]s the right to seek and enjoy asylum from persecution is a fundamental human right ... a

¹⁹ Simma, Bruno (ed.), *The Charter of the United Nations: A Commentary*, Oxford University Press, 1995, p. 1122.

²⁰ *Ibid.*, p. 1118. See footnotes for further reading.

²¹ Marx, "Responsibility for Determining Refugee Claims", p. 389.

²² Reuter, *Introduction to the Law of Treaties*, p. 96.

²³ General Comment No. 24 of the Human Rights Committee, CCPR/C/21/Rev.1/Add.6, 2 November 1994, cited in Steiner, Henry J., and Alston, Philip, (eds.), *International Human Rights in Context*, Clarendon Press, Oxford, 1996, p. 776.

successive treaty derogating from the Refugee Convention *inter se* may not, for this reason too, be permissible under Article 30(4) of the Vienna Convention.²⁴

e. UNHCR and the Interpretation of International Agreements relating to Refugees

UNHCR's role with respect to states' obligations under the 1951 Refugee Convention and Protocol resides in Article 35 of the Convention, which provides that

The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees ... in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention...

Under this provision, contracting states also undertake to provide to UNHCR information and statistical data requested concerning the condition of refugees, the implementation of the Convention, and laws, regulations and decrees relating to refugees. This information is intended to enable UNHCR to report to the competent organs of the United Nations.

Supervision is colloquially understood as "having oversight and direction".²⁵ UNHCR undoubtedly acts within its authority in reviewing and commenting on the manner in which states apply the Convention, and in reporting thereon to the UN. The organization's performance of these duties cannot raise issues of *ultra vires* on UNHCR's part. The manner in which UNHCR is to give effect to its supervision is left unstated, however; arguably, the organization may select the mechanisms it finds most appropriate, in the absence of well-founded objections by states. Regarding the standing in international law of UNHCR, a subsidiary organ under Article 22 of the UN Charter, one scholar has commented that "its Statute shows that the Office was intended by the General Assembly to act on the international plane".²⁶ He suggests that the very nature of the principles supervised by UNHCR enhance its function and that "the peremptory character of the principle of *non-refoulement* puts it in a higher class than the 'intangible and almost nominal' obligation to consider in good faith a recommendation of a supervisory body".²⁷ Put differently, the fact that a peremptory norm of international law is at the centre of UNHCR's supervisory functions places a particular onus on UNHCR to exercise these functions, and on states to take them seriously.

²⁴ Internal memorandum from Paul Szasz, Acting Director and Deputy to the Under-Secretary-General of the UN, Office of the Legal Counsel, 21 May 1997.

²⁵ Random House Dictionary of the English Language, Unabridged Edition, New York, 1966.

²⁶ Goodwin-Gill, *The Refugee in International Law*, p. 216.

²⁷ *Ibid.*, p. 217.

II. Recent Treaties

a. Protocol to the Revised Treaty on European Union

The European Council adopted the Revised Treaty on European Union Treaty (the Treaty of Amsterdam)²⁸ on 17 June 1997, and it was signed by EU Heads of State and Government on 2 October 1997. As ratification and in some cases referenda are required, it was not expected to enter into force before 1999. The Protocol on asylum for nationals of Member States of the EU,²⁹ which is discussed in this section, originated in December 1996 at the Dublin Summit of the European Council. At that meeting, the Council called upon the Intergovernmental Conference (charged with the preparatory work for the revision of the 1992 Maastricht Treaty on European Union)

[t]o develop the important proposal to amend the Treaties in order to establish the clear principle that no citizen of a Union Member account international treaties.

Prior to this, the EU had adopted a number of measures aiming both to limit entry to the EU, and the ability of entrants to claim asylum. The 1990 Dublin Convention, which entered into force on 1 September 1997, establishes responsibility for the examination of an asylum request. The 1990 Schengen Convention, which entered into force on September 1993 but began to be implemented only in March 1995, establishes an external border with a view to eliminating internal border controls. Under the Dublin Convention, states will send asylum applicants to third states where possible. Only when the Member State cannot send the claimant to any non-EU state will responsibility be attributed within the Union for the examination of an asylum request. Dublin and Schengen have been accompanied by a tightening of control at the external frontiers of the EU.

The so-called "principle" of eliminating asylum within the Union for its own nationals was a political response by Spain to the protection extended by some European countries, notably Belgium and France, to members of the Basque nationalist organization *Euzkadi ta Askatasuna* (ETA). These countries had also refused to extradite ETA members to Spain, the consequences of which are reflected in the 1996 European Convention on Extradition, discussed later in this paper. Spain proposed that removing the right of EU nationals to seek asylum within the EU be formulated thus:

Every citizen of the Union shall be regarded, *for all legal and judicial purposes connected with the granting of refugee status and matters relating to asylum*, as a national of the Member State in which he is seeking asylum. Consequently, no State of the

²⁸ Official Journal of the European Communities (OJ), 10 November 1997, C340/1.

²⁹ OJ, 10 November 1997, C340/103.

Union shall agree to process an application for asylum submitted by a national of another State of the Union.³⁰

In early February 1997 UNHCR described these developments as a "cause for concern", advising the EU Presidency "against such an amendment, which would be at variance with international obligations that all Member States of the Union have undertaken".³¹ While taking due note of Spain's anger at the shelter given to Basque extremists elsewhere in Europe, and sharing its condemnation of terrorism, UNHCR underlined that terrorists are not protected as refugees under the 1951 Refugee Convention. The international instruments for the protection of refugees are worded so as to deny refugee protection, or immunity from prosecution, to terrorists. UNHCR emphasized that

the proper application of the relevant international instruments *and their effective enforcement at the national level* is therefore what is required to ensure that terrorists are not protected under national law, not ... amendments to the refugee instruments.³²

The text ultimately adopted – *Protocol on asylum for nationals of Member States of the European Union* (Protocol 29) – contains significant changes from the original Spanish proposal. Nonetheless, most of its provisions are worded so as effectively to deny asylum within the EU to Union nationals. Only its final substantive paragraph leaves open a possibility for such applications to be accepted by states acting unilaterally. From the perspective of international law, the Protocol gives states the right to refuse to accept an asylum request from an EU national. By legalizing the non-acceptance of such applications, the Protocol fulfils its objective of restricting the possibilities for asylum.

The Protocol recalls a number of salient points in its preambular paragraphs. It reiterates that the Union shall respect fundamental rights as guaranteed by the 1950 European Convention on for the Protection of Human Rights and Fundamental Freedoms, as must any European state which applies to become a member of the Union; that the extradition of nationals is covered by the two conventions of 1957 and 1996; that the parties wish "to prevent the institution of asylum being resorted to for purposes alien to those for which it is intended"; and, finally, that the Protocol "respects the finality and the objectives of the Geneva Convention of 28 July 1951 relating to the status of refugees".³³ The Protocol's sole substantive article reads:

³⁰ Conference of the Representatives of the Governments of the Member States, Discussion Paper, Brussels, 4 February 1997. SN/507/97 (C 8), para. 1 (emphasis added).

³¹ UNHCR, *Position on the Proposal of the European Council Concerning the Treatment of Asylum Applications from Citizens of European Union Member States*, appended to letter of 3 February 1997 from Director, UNHCR Division of International Protection to Michiel Patijn, Secretary of State, Ministry of Foreign Affairs of the Netherlands, para. 8.

³² UNHCR Division of International Protection, *Briefing Note*, 28 February 1997.

³³ *Protocol on Asylum for Nationals of Member States of the European Union*, Treaty of Amsterdam, 2 October 1997, OJ, 10 November 1997, C340/103, preambular paras. 1, 3, 7, 8 and 9 (not numbered in original).

Given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting *safe countries of origin* in respect of each other for all legal and practical purposes in relation to asylum matters. Accordingly, *any application for asylum made by a national of a Member State may be taken into consideration or declared admissible for processing by another Member State only in the following cases:*

- (a) if the Member State of which the applicant is a national proceeds after the entry into force of the Treaty of Amsterdam, *availing itself of the provisions of Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms, to take measures derogating in its territory from its obligations* under the Convention;
- (b) if the procedure referred to in Article F.1(1) of the Treaty on European Union has been initiated and until the Council takes a decision in respect thereof;³⁴
- (c) if the Council, acting on the basis of Article F.1(1) of the Treaty on European Union, has determined, in respect of the Member State [of] which the applicant is a national, the existence of a serious and persistent breach by that Member State of principles mentioned in Article F(1);
- (d) if a Member State should so decide unilaterally in respect of the application of a national of another Member State; in that case the Council shall be immediately informed; the application shall be dealt with on the basis of the presumption that it is manifestly unfounded without affecting in any way, whatever the cases may be, the decision-making power of the Member State.

In sum, the country of origin of the asylum seeker must formally have derogated from its human rights obligations, or must be determined, through a political process, to be a serious and persistent violator of human rights, in order for an asylum application to be received. In any other circumstances, the decision to receive an asylum request is a "unilateral" Member State decision. That decision must also be communicated to a political organ of the EU, the Council.

³⁴ The procedure in question relates to the suspension of certain rights of Member States, where the Council has determined the existence of a *serious and persistent breach* by a Member State of the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. This determination can be made only after the Council has invited the government of the Member State in question to submit its observations, requires *unanimity* on a proposal by one-third of the Member States or by the Commission, *and* the assent of the European Parliament. The suspension of certain rights of that Member State is a separate step in the process and requires a qualified majority within the Council.

A "Declaration relating to the Protocol on asylum for nationals of Member States of the European Union" adds:

The Protocol on asylum for nationals of Member States of the European Union does not prejudice the right of each Member State to take the *organisational* measures it deems necessary to fulfil its obligations under the Geneva Convention of 28 July 1951 relating to the status of refugees.³⁵

The equally bland "Declaration on Article 63 of the Treaty establishing the European Community" provides: "Consultations shall be established with the United Nations High Commissioner for Refugees and other relevant international organisations on matters relating to asylum policy." Neither provides any additional guarantees that refugee rights will be respected.

The proposal which led to the Protocol was originally linked to the EU's stated aim of establishing, through respect for human rights, an area of freedom, security and justice throughout the Union,³⁶ as guaranteed by the European Convention on Human Rights as well as by "constitutional traditions common to the Member States".³⁷ This aim was also to be attained through the free movement of persons within the Union, and by measures of judicial, administrative and police cooperation. In Spain's view, it was "illogical" to think that nationals of one Member State might need to seek asylum in another, when all the states adhere to the rule of law, are democratic, and are committed to the observance of human rights. If persecution or violations were to occur, the Spanish Government reasoned, all Member States have both internal and external legal means for ensuring the restoration of the legal order. Therefore, asylum is "depassé parce que sans objet".³⁸

Additionally, the very purpose of asylum requests by EU nationals was a nefarious one, according to Spain, aimed at creating maximum delay in the processing of extradition requests, as well as sowing mistrust between Member States and causing the institution of asylum to become "distorted and manipulated". Spain suggested, citing Article 1E of the 1951 Refugee Convention, that it "made no sense" to grant refuge to a person already benefiting from a legal status in the other country; nor did it "make sense" to add asylum to the rights already enjoyed by citizens of the Union. Asylum, in other words, was redundant.

³⁵ At a meeting of 20 June 1995, the EU Council of Ministers of Justice and Home Affairs adopted a Resolution "on minimum guarantees for asylum procedures" (OJ, 1996, C274/13). This non-binding Resolution agreed that a rapid or simplified procedure will apply for asylum applications by nationals of an EU Member State, but that "the Member States continue to be obliged to examine individually every application for asylum, as provided by the Geneva Convention to which the Treaty on European Union refers", para. 20 (emphasis added in citation).

³⁶ Treaty of Amsterdam, Title IV, Article 61.

³⁷ Treaty of Amsterdam, Article 6(2).

³⁸ *Memorandum espagnol sur la non-reconnaissance du droit d'asile pour les citoyens de l'Union*, CONF/3826/97 ANNEXE, Brussels, 24 February 1997.

Responding to suggestions that any unfounded claims could be addressed through expedited processing, such as that recommended by the 1995 EU Resolution on minimum guarantees, Spain said this was totally unsatisfactory:

Experience shows that as a result of delaying tactics in various proceedings and appeals, this accelerated procedure can in fact take several years. It therefore serves no useful purpose. The only valid solution is for the application to be rejected at the outset and not accepted for processing.³⁹

The EU Council had called for any amendment to take into account international treaties. Spain concurred that their proposal amounted to a *de facto* amendment of those treaties through an *inter se* amendment – a change applicable as between some of the parties. Although their proposed amendment would amend the 1951 Refugee Convention and 1967 Protocol as far as EU Member States were concerned, in Spain's view it did not go against the object and purpose of the Convention, but on the contrary updated its application, respecting its authentic and profound meaning.⁴⁰

UNHCR's concerns that an EU example would be imitated by other regional groupings were roundly dismissed by Spain, which stated:

The European Union is at present a group with a state of development qualitatively superior to that of other groupings of States that exist in other parts of the world. Its institutions, in particular its Court of Justice, provide to citizens guarantees that are not matched elsewhere.⁴¹

Some EU delegations reportedly took offence at the UNHCR argument that developments within their region could be projected onto any other part of the globe. Echoing Spain, they insisted that the stage of development and the level of respect for human rights were clearly different in the European Union states from states in other regional organizations, and therefore no other region could make the same case for doing away with asylum.⁴² As far as "making a case" is concerned, however, the only persons to convince were fellow EU ministers: the Protocol was not put to democratic vote, nor was it drafted or shared in a transparent manner. As far as UNHCR, human rights lawyers and refugee advocates are concerned, no convincing "case" has been made. Moreover, in the light these developments, other regional groupings might feel even less obliged to "make a case" for restricting the right to seek and enjoy asylum. According to one group of experts, Russia is considering a similar move in relation to

³⁹ *Ibid.*

⁴⁰ "En conclusion, on peut dire que la modification proposée par l'Espagne non seulement ne porte pas atteinte à l'objet et au but de la convention de Genève, mais en resitue l'application sans porter atteinte à la finalité véritable et fondamentale de cette convention." *Memorandum espagnol*, p. 5.

⁴¹ "A l'heure actuelle, l'Union européenne constitue un ensemble caractérisé par un développement qualitativement supérieur à celui d'autres groupes existant dans d'autres parties du monde. Ses institutions, en particulier la Cour de justice, offrent aux citoyens des garanties qui n'ont pas d'équivalent dans d'autres régions." *Memorandum espagnol*, p. 7, para. 6.

⁴² Internal UNHCR Note, meeting of 13 February 1997.

nationals of other Commonwealth of Independent States (CIS) countries, citing the EU action as a precedent.⁴³

International Law and the Protocol

Following a meeting with the Spanish Prime Minister, José Maria Aznar López, on 12 May 1997, the Netherlands Prime Minister, Wim Kok, stated that the Spanish amendment was "contrary to international treaties. It therefore cannot be accepted and a new formula has to be found in order to meet the Spanish desire for an amendment."⁴⁴ The revised language lacks the blunt edge prohibiting any State of the Union from processing requests for asylum or refugee status submitted by Union nationals. It nonetheless erects ponderous political obstacles to the processing of such requests. States are proffered many bases on which to refuse to process these requests; they retain an option to decide unilaterally to do so.

The purpose of the Protocol is radically to reduce, or to remove, asylum possibilities within the EU for Union nationals. It violates the letter and the spirit of the 1951 Refugee Convention, as well as other human rights instruments and principles, in five broad areas. It makes asylum decisions subject to a political process which includes the alleged violator state; it does not (as a general principle) examine the individual grounds for fear of persecution; it restricts access to any form of status determination procedures; it discriminates on the basis of nationality, and it evades international obligations through reliance on the obligations of another state.

Politicizing Asylum Decisions

The mere receiving of an asylum application is made subject to, and reportable to, a political process. In order for requests from any given EU nationality to be *generally* receivable within the Union, two of its three political organs (the Council, the Commission, and the Parliament) must officially have declared an unsatisfactory human rights situation in the country of origin.⁴⁵ This politicization of an asylum process confuses the individual's need for protection with the attribution of responsibility for persecution. It also detracts from the nature of protection as a humanitarian and non-political act, contrary to the strenuous efforts of all international refugee instruments.⁴⁶ There is, of course, implicit political commentary in any asylum decision. The intention of this form of human rights protection is precisely to depoliticize it, in order to ease the ability of states to grant asylum.

⁴³ JUSTICE Standing Committee of Experts on International Immigration, Refugee and Criminal Law, Briefing on *The Treaty of Amsterdam: Key Issues on Ratification*, January 1998, p. 5.

⁴⁴ Internal UNHCR Memorandum.

⁴⁵ The Protocol's final provision, which permits states "unilaterally" to receive an asylum request from a national of a Member State if certain ancillary measures are also taken is discussed further below. This provision was added as a last-minute compromise.

⁴⁶ This confusion is also evident in the position of some EU states on "agents of persecution."

The preambular language of the 1951 Refugee Convention (and to an even greater degree, the substantive text of the 1969 Organization of African Unity (OAU) Convention governing the Specific Aspects of Refugee Problems in Africa)⁴⁷ distances the grant of international protection from any implied condemnation of those responsible for the persecution. As conceived, refugee law does not engage those responsible for the wrong, and therefore implies no prospect of redress or reparation. This would be at odds with the emphasis on the social and humanitarian nature of the problem of refugees, as well as the sensitivity to national sovereignty, which prevailed at the drafting of the 1951 Refugee Convention.

The politicization of asylum requests inherent in the Protocol to the Amsterdam Treaty, troubling in and of itself, also creates a practical barrier to the individual's right to seek asylum. Political bodies are reluctant to antagonize members, even over severe human rights breaches. Examples from the UN include the slowness of the Security Council to take the 1994 killings in Rwanda seriously, and the length of time for which the government of Pol Pot continued to represent Cambodia in the General Assembly.

The EU Protocol on asylum is itself the product of a political decision-making process in which Foreign Ministers necessarily "engage in trading off outstanding demands".⁴⁸ For instance, Austria was acknowledged as unable strongly to oppose the Spanish proposal because it needed Spanish support in negotiations on the implementation of the Schengen Convention in Austria.⁴⁹ For the EU, concerns for the stability of the single European currency, the euro, are likely to be another factor impeding decisions by political organs on the existence of human rights breaches. All in all, findings by the EU that a Member State is in breach of its human rights obligations are unlikely. Even then, the Protocol expresses no obligation to accept asylum obligations, but merely concedes that states may do so. Unless the country of origin is in a state of emergency and has formally derogated from its responsibilities, states accepting an asylum application do so "unilaterally".

Substituting "Macro" Assessments for an Examination of Individual Fear

The Preamble to the Protocol emphasizes that Member and aspirant Member States must respect human rights, in accordance with the European Convention on Human Rights. In asserting that EU nationals were already amply protected, the Spanish Government relied heavily on these obligations, on the availability of European

⁴⁷ Preambular para. 3 of the OAU Refugee Convention reads: "Aware ... that refugee problems are a source of friction among many Member States, and desirous of eliminating the source of such discord." Article 2(2) reads: "The grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State."

⁴⁸ Observation by UNHCR staff member close to the process.

⁴⁹ Austria signed the Schengen Convention in April 1995 but its actual implementation in Austria was delayed because of other Schengen countries' fears that Austria would not be able to stop illegal immigrants entering the Schengen area via its 1,300 km border with eastern Europe. Agreement was eventually reached in July 1997 (i.e. shortly after the discussions mentioned above on the Spanish Protocol on asylum) that the Convention should be fully implemented in Austria from 1 April 1998.

human rights treaty mechanisms, and on the existence of national systems for upholding the rule of law within the EU.

Notwithstanding the "level of protection of fundamental rights and freedoms by the Member States", several thousand complaints to the European human rights mechanism are deemed admissible every year. These complaints of human rights abuses are judged neither manifestly unfounded nor susceptible of viable remedies at the national level. In many cases, the authorities are found in breach of their human rights obligations. It can be concluded that individual rights are breached in EU Member States, without ready redress and regardless of whether or not there are serious and persistent breaches *overall*. UNHCR pointed out:

It is impossible, realistically speaking, to exclude the possibility that an individual could have a well-founded fear of persecution in any particular country, however great its attachment to human rights and the rule of law. While a highly sophisticated democratic order and an elaborate system of legal safeguards, as well as of judicial and administrative remedies, allow for a general presumption of safety, the need for international protection cannot be excluded absolutely and categorically in every case. Nor, regrettably, can fundamental changes in the political system or in the human rights situation of any State.⁵⁰

In other words, the Protocol confuses situations of a *pattern* of grave and continuing abuses by the state with the essentially individualistic protection of the 1951 Refugee Convention, which requires a review of both the objective situation and the existence of a subjective fear (and therefore of the individual's own experience). In a meeting with UNHCR in mid-February 1997, a senior European Council official acknowledged that any suspension procedures would be long and cumbersome, and would not take into account subjective fears or individual persecution.⁵¹

Restricting Access to Status Determination Procedures

The conditions imposed on EU nationals to access the asylum procedure restrict the individual's possibility of seeking asylum. The hurdles imposed by the Protocol, quite apart from their political nature, constitute an impediment. As UNHCR pointed out, access for asylum seekers to fair and efficient procedures for determination of refugee status is a basic prerequisite of international refugee protection, and its importance has been affirmed repeatedly by the UNHCR Executive Committee and by the UN General Assembly. UNHCR wrote:

Unless asylum-seekers are afforded access to determination procedures, it is impossible for States to know who is a refugee requiring international protection, and for a refugee to enjoy the

⁵⁰ UNHCR, *Position on the Proposal of the European Council*, para. 3.

⁵¹ Internal UNHCR Note, meeting of 13 February 1997.

minimum guarantees of safety and security to which such person is entitled.⁵²

One author notes that the duty of states to identify their international obligations requires effective case-by-case consideration of claims:

Neither the 1951 Convention nor the 1967 Protocol lay down an obligation to establish machinery for the determination of refugee status, nor do they specify guidelines for recommended procedures in such machinery. However, if a State is to implement its obligations towards refugees effectively and in good faith, it is evident that some sort of procedure is required. States retain choice as to the means for doing this, ... [but] the necessity to establish procedures is inherent in the *non-refoulement* principle: refugees will only be protected against *refoulement* if identified by proper processing of their claim.⁵³

Paragraph (d) of the Protocol was introduced as a late compromise, and provides for unilateral action by a Member State in deciding to consider an asylum application. (The reference to the 1951 Refugee Convention was inserted later still.) The provision retains prejudicially differential treatment of Union citizens, by making acceptance of consideration of their claims optional. It also violates the confidential nature of applications for asylum, as the decision to receive a claim must be communicated immediately to the Council. Through this communication, the fact that an application has been made becomes known to the authorities of the country of origin. This carries inherent risks for the security of the asylum seeker. This communication, putting the state's "unilateral" action into a multilateral political forum, increases the likelihood that political pressure will be brought to bear on the receiving state not to recognize the applicant as a refugee.

Those who claim the Protocol is consistent with international law have seized on paragraph (d) as the provision which enables states to meet their Convention obligations. Belgium, to its credit, appended to the Protocol a Declaration stating that in accordance with its obligations under the 1951 Refugee Convention and the 1967 Protocol, it would carry out an individual examination of any asylum request made by a national of another Member State.⁵⁴ Several other states have made statements to this effect.⁵⁵

⁵² *Ibid.*, para. 2.

⁵³ Marx, "Responsibility for Determining Refugee Claims", p. 401.

⁵⁴ Declaration by Belgium on the Protocol on Asylum for Nationals of Member States of the European Union (emphasis added).

⁵⁵ The UK Government has stated: "The 1951 United Nations Convention requires that we consider applications for asylum individually, irrespective of where they come from and we will comply with that obligation." The UK has also said that the Protocol means that Member States must treat applications from EU nationals as either inadmissible or against a presumption that they are manifestly unfounded. Belgium's declaration "to the effect that it will apply the latter approach" was not, in the view of the UK, an exemption to the Protocol, and the United Kingdom "will continue to give individual consideration to asylum applications from European Union nationals". [House of Commons, Written Answers, 26 and 27 November 1997, on EU (Immigration and Asylum) and on Amsterdam Treaty (Asylum Seekers), respectively, Hansard, Vol. 301, Cols 547 and 608]. The Swedish Minister for International Development Cooperation, Pierre Schori, has also stated that Sweden will

Discrimination on the Basis of Nationality

Under the Protocol, States may refuse to recognize EU nationals as refugees, thus discriminating against them on the basis of their nationality. Non-discrimination is a cornerstone of the 1948 Universal Declaration of Human Rights and of every international human rights treaty. Human rights are an entitlement without any arbitrary distinction, and the Universal Declaration of Human Rights, the 1966 International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the 1950 European Convention on Human Rights all cite "national origin" as an impermissible basis for discrimination.

Discrimination on the basis of nationality is also inconsistent with the 1951 Refugee Convention (and 1967 Protocol), to which all EU Member States are party. This states in Article 3: "The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin." This Article may not be the subject of any reservations by contracting states. The refugee definition in Article 1 is to apply "to any person" who fulfills the criteria.⁵⁶

As UNHCR observed to the EU:

Such an automatic bar to refugee status determination, introduced by a provision in another legally binding treaty [the EU Protocol on asylum], could result in a partial but essential modification of Article 1 of the 1951 Convention, as revised by the 1967 Protocol. The proposed modification would, in effect, introduce *a posteriori* a geographical limitation to the application of the refugee definition ...[which] is incompatible with the 1967 Protocol and the fact that any such previously existing limitation has been removed by the Member States of the Union.

... [These] concerns can, however, not be remedied by mere reference to the need to take international treaties into account. In short, the modification of the Treaties as proposed would affect the very essence of international refugee law since the provision to be adopted in a subsequent international convention between fifteen Contracting States alone would restrict the definition of its beneficiaries. Any such partial derogation from the refugee definition ... would be incompatible with the object and purpose of these instruments as a whole. The essential purpose of these two international conventions is to provide for a

consider asylum requests regardless of where [the individuals] come from. [Letter from Minister Schori to the Swedish Red Cross, 21 July 1997]. The Netherlands authorities indicated to UNHCR that they would continue to treat applications for asylum from nationals of EU Member States in the normal asylum procedure but on the presumption that the applicant originated from a safe country [Internal communication from UNHCR's Regional Liaison Office, Brussels, 3 October 1997].

⁵⁶ The only possibility of introducing a limitation is through the geographic reservation to the 1951 Refugee Convention. This would not respond to EU concerns.

universally applicable legal regime that ensures protection to an internationally defined group of persons who are in a particularly vulnerable situation. The universal and unconditional application of the international refugee instruments has repeatedly been emphasised by the international community.⁵⁷

UNHCR, acting within its supervisory authority, deemed the Protocol on asylum to be incompatible with the object and purpose of the 1951 Refugee Convention and 1967 Protocol.

Safe Country of Origin

Writing in early 1996, prescient writers noted:

The safe country of origin notion was adopted by the EU Immigration Ministers in their London Resolutions [of 1992], and is therefore likely to serve as a basis for regional harmonization throughout the European Union.⁵⁸

The particular application of the safe country of origin notion in the Protocol on asylum goes further than this, in directing Member States to regard each other as safe countries of origin for all legal and practical purposes in relation to asylum matters. Thus, states are to presume that applications by EU nationals are manifestly unfounded. The notion of "safe country of origin" is not a principle of international refugee law. UNHCR does not oppose the use of the notion "as a procedural tool to channel certain applications into accelerated procedures, or where its use has an evidentiary function", provided always that the underlying presumption of safety is rebuttable in a fair procedure. However, UNHCR has consistently objected to its being an automatic bar to access to asylum procedures.⁵⁹ With regard to the Spanish protocol, UNHCR wrote that it "would, in effect, detract substantively from this position and codify the opposite view in an international treaty".⁶⁰

The "safe country of origin" notion is somewhat analogous to the "safe country of asylum" notion, discussed under the heading "Readmission agreements" below. That notion is justified by states on the grounds that the applicant's claim will receive responsible consideration in another country. Sending claimants elsewhere through

⁵⁷ UNHCR, *Position on the Proposal of the European Council*, paras. 4 and 5.

⁵⁸ Shacknove and Byrne write: "The EU Immigration Ministers defined a safe country of origin as a country 'which can clearly be shown, in an objective and verifiable way, normally not to generate refugees or where it can be clearly shown, in an objective and verifiable way, that circumstances which might in the past have justified recourse to the 1951 Convention have ceased to exist.' ... The Conclusions of the EU Immigration Ministers provide that a safe country of origin determination by a Member State should not be an automatic bar to all asylum applications from that State, but may be used instead as justification for directing applicants into expedited procedures with sharply curtailed legal safeguards." Shacknove and Byrne, "The Safe Country Notion", pp. 193-4.

⁵⁹ See UNHCR, "An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR", *European Series*, Vol. 1, No. 3 (September 1995), pp. 1-14.

⁶⁰ UNHCR, *Position on the Proposal of the European Council*, para. 7.

reliance on the "safe third country" notion is regarded by many as inherently flawed, mainly because it relies on the international obligations of another state to justify non-fulfilment of a state's own obligations. In the present case, the "safe country of origin" position of the Protocol relies on the human rights obligations of EU Member States to limit the right of EU nationals to seek asylum within the Union. While the individual's right to seek asylum *might* be met by a third state, it cannot be met by reference to the obligations of the individual's own state. For states to meet their obligations of refugee protection, it must provisionally be assumed that the country of origin may be in breach of its human rights obligations *vis-à-vis* the claimant.

The Protocol on Asylum as an Amendment or Modification of the 1951 Refugee Convention and 1967 Protocol

The Legal Service of the European Commission considered that an amendment to the Treaty on European Union would take precedence over a provision in the 1951 Refugee Convention. They expressed concern, however, that Article 103 of the Charter of the United Nations⁶¹ might prove an obstacle, since the first article of the UN Charter states one of the purposes of the UN to be "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion".⁶² Ultimately, however, the Legal Service largely endorsed the arguments presented by Spain. Considering whether the fifteen Member States could among themselves modify the application of the 1951 Refugee Convention,⁶³ the Legal Service reasoned:

The EC Treaty Amendment proposed by the Spanish Government is *not prohibited* by the Geneva Convention. Nor does it appear to affect the rights of third countries party to the Geneva Convention. The question as to whether it would be

⁶¹ "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

⁶² That the EU Legal Service harboured concerns as to the international law implications of the Spanish proposal is evident from their informal and strictly confidential request, in March 1997, for UNHCR's views on the following:

- based on Article 30 of the Vienna Convention on the Law of Treaties, whether the proposed Spanish amendment would violate Article 103 of the Charter of the United Nations;
- whether Article 53 of the Vienna Convention on the Law of Treaties concerning *jus cogens* would pose a problem;
- whether Article 41 of the Vienna Convention on the Law of Treaties prevails over Article 30(4) of the same Convention in this specific case;
- whether the proposed Spanish amendment affects the enjoyment by other Contracting States to the 1951 Convention/1967 Protocol relating to the Status of Refugees of their rights under these two instruments;
- whether the EU Convention relating to Extradition between the Member States of the EU contains sufficient guarantees against violations of the principle of *non-refoulement*;
- whether the EU can be considered a single entity based on the respect for human rights and fundamental freedoms (as stipulated in Article F of the Maastricht Treaty) and guaranteeing freedom of movement so that citizens of EU Member States do not need to seek asylum in another Member State.

⁶³ For the applicable Vienna Convention rules, see Section I(b) above.

incompatible with the object and purpose of the Geneva Convention depends on an assessment of the greatest political significance. In other words, what is the risk, if any, of citizens of the Union being persecuted in a Member State on account of their race, religion, nationality, membership of a particular social group or political opinion? Are sufficient guarantees provided for the protection of human rights in the Member States, whether at present or in the future? ...

Insofar as an EC Treaty amendment would amount to a modification for the EC Member States only of certain provisions of the Geneva Convention as cited above, in particular Article 3 (non-discrimination as to country of origin), then the Member States should notify the other parties to the Geneva Convention in accordance with Article 41, paragraph 2 of the Vienna Convention, i.e. in advance of concluding any such EC Treaty amendment, even if it could be argued that once it had been ratified by the fifteen Member States, the EC Treaty amendment would be valid in any event as between the Member States.⁶⁴

This reasoning betrays a political decision to proceed with the Protocol. The EU is not believed to have notified other parties to the 1951 Refugee Convention of its modification.

Responding to a question from a Member of the European Parliament, the European Commissioner responsible for immigration and home and judicial affairs, Anita Gradin, said that she personally regretted the Protocol, but welcomed "the fact that the preamble expressly lays down that the spirit and letter of the Geneva Convention must be respected when it comes to granting refugee status". She stated repeatedly that the Protocol *implied that the obligations of Member States under the Geneva Convention remained unchanged*.⁶⁵

On plain reading, it is not evident that the Preamble to the Protocol establishes an obligation to respect the 1951 Refugee Convention. Rather, it asserts that the Protocol respects the "finality and objectives" of the Convention, a factual statement which is disputed by both UNHCR and the United Nations' Office of Legal Counsel. If Gradin is correct, however, it confirms that the provisions of the 1951 Refugee Convention

⁶⁴ Conference of the Representatives of the Governments of the Member States, *Discussion Paper*, SN/507/97 (C 8), Brussels, 4 February 1997, paras. 2, 3 and 4.

⁶⁵ Answer to Question 30, 600/97 from the Member of the European Parliament (MEP) Jonas Sjøstedt, Minutes of European Parliament session, 16 September 1997. UNHCR had asked for a text which stated that in applying the Protocol Member States would act in full accordance with the 1951 Convention and would respect their obligations thereunder. In response, Sjøstedt pointed out that there was, nonetheless, an attempt [through this protocol] to put pressure on Member States to change their practice [of accepting applications from Member State nationals], and that these provisions had been sharply criticized by UNHCR, among others. He noted that this gave a bad example, not least if it were to be followed in other parts of the world where countries might use such a provision in order to reduce/narrow the right to seek asylum and to have one's asylum request considered. After one further intervention in Swedish, the floor was taken by a Spanish-speaking MEP seeking confirmation that at this time, no other part of the world has the degree of political integration attained by the EU Member States.

are to prevail over the Protocol. As stated above, under Article 30(2) of the Vienna Convention, when a treaty "specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail". As such, EU states cannot refuse to accept applications from Union nationals, nor act in any way contrary to the protection of their rights as asylum seekers.

General Observations

The Protocol's effort to subvert international law is essentially a reflection of a Spanish domestic political issue. No other state is concerned about asylum requests from EU nationals, which peaked in 1990 at around eighty. In 1996, there were fewer than thirty. Only two EU nationals have ever been recognised as refugees, both in the Netherlands. Manifestly, this Protocol was not designed to address a refugee problem.

Non-governmental organizations such as Human Rights Watch, the European Council on Refugee and Exiles (ECRE), Amnesty International, the Churches' Committee for Migrants in Europe, and the International Federation of Human Rights Leagues all condemned the Protocol as a violation of Member States' international treaty obligations. Human Rights Watch said that it sent a "dangerous signal to the rest of the world that the EU condones such derogations"; if the EU decided to exempt itself from the 1951 Refugee Convention, nothing would stop other groups of countries from taking similar steps.⁶⁶ ECRE noted diplomatically that it failed to take account of situations which could arise under an enlarged Union.⁶⁷ Writing in the *International Herald Tribune*, William Shawcross described it as disgraceful.⁶⁸ He declared that the argument that human rights are so well protected in Europe that no citizen should want, or be able, to apply for asylum elsewhere "reeks of complacency", and asked:

What if one of these ideal states becomes, in the future, less than ideal? What if, for example, one of the new democracies in Eastern Europe that will soon accede to the EU reverts to dictatorship?

On 20 June 1997, UNHCR issued a press release sharply critical of the Protocol, warning that:

if the EU applies limitations to the Convention, others can follow and could weaken the universality of the instrument for the international protection of refugees... While recognizing the high standards of human rights achieved in EU member countries and States' legitimate preoccupation that asylum procedures should not be abused, especially by presumed terrorists, UNHCR maintains that those issues can be addressed through the proper

⁶⁶ Human Rights Watch Press Release, 12 June 1997.

⁶⁷ Agence Europe, Brussels, 21 February 1997.

⁶⁸ Shawcross, William, "A Disgraceful EU Asylum Proposal", *International Herald Tribune*, 14-15 June 1997.

application of the Refugee Convention or through state legislation.⁶⁹

The "Declaration on Article 63" cited above which provides for consultations to be established with UNHCR and other relevant international organizations on matters relating to asylum policy is ironic, in retrospect. Throughout the process, UNHCR relied on informal channels in order to obtain copies of proposals under discussion, and Spain took extreme exception to the UNHCR position, challenging its standing to comment⁷⁰ and making veiled threats to close the UNHCR office in Madrid.

While Dublin, Schengen, and readmission agreements seek to exclude non-Europeans from claiming protection in Europe, the Protocol rounds things out by seeking to exclude European refugees, as well. Notwithstanding European promotion of "protection in the region", whereby asylum seekers are encouraged to stay close to home, this will be impracticable within its own borders. Ironically, any European refugee recognized elsewhere in the world would be recognized as a refugee within the EU under the principle of the extraterritorial effect of the determination of refugee status, if he or she were to take up residence there.⁷¹

b. Readmission Agreements

All readmission agreements provide for the return of nationals to their own country. Most also provide for the return of third country nationals and stateless persons, according to a 1993 UNHCR survey covering Central Europe.⁷² They are not a new phenomenon – an Austro-Swiss readmission agreement dates from 1965 – but their use has burgeoned since 1990. As one UNHCR official remarked,

recently, central and eastern European states have been concluding an ever increasing number of readmission agreements. The picture that emerges ... is one of a "cobweb" of readmission agreements, a reality which we have to live with.⁷³

⁶⁹ UNHCR, Press Release, 20 June 1997.

⁷⁰ On 28 May 1997, the Spanish Ambassador to the United Nations, New York, met the UN Secretary-General's chief aide, Iqbal Riza, to complain that UNHCR had written letters opposing the Spanish proposal, and had said that it could create a dangerous precedent. UNHCR's position was "too orthodox", and "not very sensitive to the specificities of the EU", according to the Ambassador, who also complained that UNHCR's position had created an obstacle to the support of other EU members, which would otherwise have been forthcoming. The Spanish Ambassador announced his intention of asking the UN Secretary-General, the following day, whether the UN High Commissioner for Refugees, Sadako Ogata, could be asked to consider this matter in a broader political context and drop her opposition to the Spanish initiative. The Secretary-General's Chef de Cabinet responded politely, but noted that he understood the High Commissioner was discharging her mandate; the Secretary-General's policy was not to interfere. UN Secretary-General, *Note for the File, Meeting with Ambassador Westendorp, Permanent Representative of Spain to the United Nations*, 28 May 1997.

⁷¹ See Executive Committee Conclusion No. 12 (XXIX) (1978), *Extraterritorial effect of the determination of refugee status*.

⁷² This lists twenty-six such agreements in central Europe, with others under discussion.

⁷³ Hasim Utkan, Deputy Director, Regional Bureau for Europe, UNHCR, October 1997.

Readmission agreements were not originally conceived as a way of returning asylum seekers across a common border. Now, however, they have become assimilated to the "safe third country" notion in use throughout Western Europe, a notion which has become an integral part of abbreviated eligibility procedures:

In most European States, a safe country of asylum policy is used to bar applicants who have travelled through countries believed to respect human rights from entering refugee status determinations in other countries.⁷⁴

The UNHCR Executive Committee took the view that the "irregular" movement of refugees and asylum seekers from countries in which they had already found protection destabilized structured international efforts to provide appropriate solutions. As a result, the Committee adopted Conclusion No. 58 in 1989.⁷⁵ That Conclusion was directed largely at the situation of so-called irregular movers who left asylum countries for want of long-term durable solutions, and it called for this problem to be remedied at source. Irregular movers can be returned to a country where they have found protection, according to the Conclusion, as long as they would be protected against *refoulement* and treated in accordance with "recognized basic human standards".⁷⁶

Subsequently, the issue has undergone a subtle shift. The emphasis is now placed more on the hypothetical availability of protection which could have been sought, than on the irregular movement of persons who had already found protection. To a lesser degree, the issue as currently framed also emphasizes identification of the state putatively responsible for examining the asylum claim.

*International Law and the Return of Asylum Seekers to Third Countries*⁷⁷

Readmission agreements raise two key issues in international law. One issue is whether such agreements are consistent with the obligation of *non-refoulement*, which under Article 33 of the 1951 Refugee Convention prohibits return "in any manner whatsoever" to a place where persecution is feared, whether it is the country of origin or not. The second issue is the extent to which any and every state is obliged to examine an asylum request.

It is evident that the receiving state must assume responsibility for the *non-refoulement* of the asylum seeker in any action it takes. If the receiving state refuses

⁷⁴ Shacknove and Byrne, "The Safe Country Notion", p. 188.

⁷⁵ Executive Committee, Conclusion No. 58, *Problem of refugees and asylum-seekers who move in an irregular manner from a country in which they had already found protection* (1989).

⁷⁶ Para. f (i and ii).

⁷⁷ The issue of the "safe third country" notion in Europe is discussed in detail in, among others, US Committee for Refugees, *At Fortress Europe's Moat: The "Safe Third Country" Concept*, Washington, D.C., July 1997; European Council on Refugees and Exiles, *"Safe Third Countries": Myths and Realities*, London, February 1995; Amnesty International, *Playing Human Pinball: The Home Office Practice in 'Safe Third Country' Asylum Cases*, London, 29 June 1995; Shacknove and Byrne, "The Safe Country Notion", p. 185.

the asylum application, or causes the applicant's removal to a third state, it is at fault in the event of a subsequent *refoulement*. UNHCR has noted:

The responsibility of a State under the 1951 Convention and 1967 Protocol is engaged whenever that State is presented with a request for asylum involving a claim to refugee status by a person either at its borders or within its territory or jurisdiction... The fact that a refugee has found or could find protection in one country does not remove the obligation of other States to respect the principle of *non-refoulement* in dealing with the refugee, even though it may be agreed that the primary responsibility for providing international protection, including asylum, lies with another State.⁷⁸

There is no explicit international legal prohibition against sending an asylum seeker to a state where no persecution is feared, and readmission agreements suppose this to be the case. At the same time, there has never been any positive obligation on the asylum seeker to apply for asylum in the first country where this was possible. The practice of European states may be to create such an obligation.⁷⁹ To the extent that they exempt states from considering certain asylum claims altogether, readmission agreements may be regarded as modifying the obligations established by the 1951 Refugee Convention and 1967 Protocol.

While states may not legally be barred from sending asylum seekers elsewhere, the standards to be applied in reaching such decisions are less clear. In principle, even a decision to send away or return to a third country should be preceded by an examination of the claim.⁸⁰ Without this, the sending state is unlikely to be sure of the applicant's safety *in light of his or her specific circumstances*. Strictly speaking, the responsibility of the sending state should also entail follow-up to verify that it has not acted in breach of its obligations.

So far as States have accepted returned asylum seekers, either unilaterally or on the strength of readmission agreements, this process is flawed from the refugee protection perspective, because it is not indissolubly linked to the obligation of the receiving State to proceed to a substantive evaluation of the asylum claim, if any, and to provide protection in appropriate cases.⁸¹

The question as to whether the shifting of obligations entailed by readmission agreements is lawful *per se* may have a clear answer only in the context of *non-refoulement*. We have noted that there is no explicit prohibition in international law

⁷⁸ UNHCR, *Position on Readmission Agreements, "Protection Elsewhere" and Asylum Policy*, August 1994, published in *European Series*, Vol. 3, No. 2 (December 1997), p. 465 at p. 467.

⁷⁹ Notwithstanding the fact that this will exacerbate the unequal distribution of refugees throughout the world.

⁸⁰ Marx, "Responsibility for Determining Refugee Claims", p. 391.

⁸¹ Goodwin-Gill, *The Refugee in International Law*, p. 342.

against sending an individual to a country where he or she does not risk persecution or other serious human rights abuses. One author, describing readmission agreements as a major tool of bilateral or multilateral inter-state relations in the field of asylum, notes that

It is not clear ... whether and under what circumstances, it is permissible to shift State responsibility by means of such agreements, nor is it clear what kind of minimum standards these intergovernmental initiatives must satisfy if they are to avoid breaching the principle of *non-refoulement*. The application of such agreements is likely to jeopardize clear-cut obligations in refugee law, since most bilateral or multilateral agreements do not ensure that, on the asylum seeker's arrival in the third State, there will be an examination of the merits of his or her asylum claim. Rather, a subsequent transfer to further "third" States may follow.⁸²

Following this logic, another concludes:

If conditions in the third country do not meet these criteria [with regard to *non-refoulement*], a transfer of responsibility may not take place no matter what agreement has been made between the two States regarding the individual case or more generally...

[G]eneral readmission agreements relating to aliens do not provide a sufficient basis for the intended aim of transferring State responsibility for protection of asylum seekers ... [and] the growing variety of readmission agreements makes it more difficult to ensure that they all fully comply with international obligations ... International law allows such a transfer only if both States take all appropriate precautions to ensure scrupulous adherence to the obligation of *non-refoulement*.⁸³

The European Community Resolution on manifestly unfounded applications for asylum (approved by EC immigration ministers in late 1992) reaffirms in its preamble that all asylum applicants at the border or on the territory of a Member State will have their claim for asylum examined, as guaranteed by the Dublin Convention. Operative paragraph 1(b), however, states:

Without prejudice to the Dublin Convention, an application for asylum may not be subject to determination [of refugee status] by a Member State ... when it falls within the provisions of the Resolution on host third countries.

According to paragraph 1(c) this latter Resolution, which was approved at the same time, "if there is a host third country, the application for refugee status may not be

⁸² Marx, "Responsibility for Determining Refugee Claims", p. 386.

⁸³ *Ibid.*, pp. 394, 396-7.

examined and the asylum applicant may be sent to that country". The Resolution goes on to define a host third country as one where the life or freedom of the applicant must not be threatened, nor must the applicant be exposed to torture or inhuman or degrading treatment or punishment. The country must be one where the applicant is afforded effective protection against *refoulement*. As to the applicant's links with that country, paragraph 2(c) reads:

It must *either* be the case that the asylum applicant has already been granted protection in the third country or has had an opportunity, at the border or within the territory of the third country, to make contact with that country's authorities in order to seek their protection, before approaching the Member State in which he is applying for asylum, *or* that there is clear evidence of his admissibility to a third country.

These texts give clear evidence of the shift from actual to presumptive protection. One author notes that

Only established links in the third country can be a basis for a presumption of adequate protection there and ensure that the refugee will be readmitted... Nonetheless, the EU resolution on host third countries makes a radical departure from this traditional protection... [A] few days after this resolution was adopted the German government initiated the widely-known "Asylum Compromise" in order to amend the Constitution; since July 1993, the mere transiting through EU States or other specified neighbouring States excludes the claimant from the Constitutional asylum remedy and deprives him or her of any procedural safeguards.⁸⁴

UNHCR's longstanding position has been that the return of asylum seekers can only take place after the sending state had affirmatively established that the receiving state would admit the asylum seeker to its territory; would observe the principle of *non-refoulement* and would generally treat the asylum seeker in accordance with accepted international standards; would consider his or her claim and, if appropriate, allow the asylum seeker to remain as a refugee.⁸⁵ Some experts regard even this position as inconsistent with states' international legal obligations to undertake refugee protection. Even so, these protection minima are not always respected by readmission agreements. Cases of expulsion of asylum seekers without any prior adjudication of their claims by "safe third countries" – including Member States of the EU – are reportedly well documented.⁸⁶ It is evident from the 1993 UNHCR survey that return procedures under readmission agreements are frequently informal, requiring only notification of a planned return.⁸⁷ In practice, notification may not occur, much less a

⁸⁴ *Ibid.*, pp. 398-9.

⁸⁵ UNHCR, *The Safe Third Country Policy in the Light of the International Obligations of Countries vis-à-vis Refugees and Asylum-Seekers*, London, 1993.

⁸⁶ Human Rights Watch, *Swedish Asylum Policy in Global Human Rights Perspective*, September 1996.

⁸⁷ UNHCR, *The Safe Third Country Policy*.

clear indication to the authorities of the receiving state that the individual is an asylum seeker requiring access to procedures.

In 1993, the UNHCR Executive Committee stressed the usefulness of measures promoting prompt determination of refugee status in fair procedures. It recognized

the advisability of concluding agreements among States directly concerned, in consultation with UNHCR, to provide for the protection of refugees through the adoption of common criteria and related arrangements to determine which State shall be responsible for considering an application for asylum and refugee status and for granting the protection required, and thus avoiding orbit situations;

and emphasized

that such procedures, measures and agreements must include safeguards adequate to ensure in practice that persons in need of international protection are identified and that refugees are not subject to *refoulement*.⁸⁸

Accordingly, UNHCR commended the Dublin Convention for providing for division of responsibility while taking into account the special needs of individual asylum seekers, and for referring to states' obligations under the 1951 Refugee Convention and 1967 Protocol.⁸⁹ Underlining the need for a thorough assessment of the situation in the receiving country before an asylum applicant is sent back, UNHCR had in 1992 welcomed the fact that the EC Member States undertook to assess in each individual case whether the fundamental requirements of a "host third country" were met.⁹⁰

That formal requirement is met where a readmission agreement exists, in that there is evidence of admissibility to the third country. The nature of readmission agreements raise several concerns about refugee protection, however. UNHCR notes that they

have not traditionally been drafted to respect the particular situation of asylum-seekers and as such will usually be inadequate vehicles through which to effect their return. Most important, they have not been framed to ensure protection against *refoulement*, by, for example, including guarantees of access to asylum procedures in the third country. In UNHCR's view, these classical bilateral readmission agreements should not be used to return asylum-seekers, even where this is technically possible.⁹¹

⁸⁸ Executive Committee, Conclusion No. 71(XLIV), *General*, paras. k and l.

⁸⁹ UNHCR, *Readmission Agreements, "Protection Elsewhere", and Asylum Policy*.

⁹⁰ UNHCR Division of International Protection, *UNHCR Observations Regarding the Relation Between Readmission Agreements and Asylum Policy*, non-paper, August 1994.

⁹¹ UNHCR, Division of International Protection, *Note for the Standing Committee of the Executive Committee, Composite Flows and the Relationship to Refugee Outflows*, EC/48/SC/CRP.29, 25 May 1998, para. 19.

Their utility in returning asylum seekers to supposedly safe third countries is precisely what makes readmission agreements so appealing to European states, "even though they contain no provision obliging the receiving State to consider any [asylum] claims on their merits, let alone to provide protection".⁹²

EU States have concluded readmission agreements with a number of countries where respect for *non-refoulement*, and the examination of an asylum claim in fair procedures, is uncertain. In 1991, the Schengen states signed a readmission agreement with Poland. Other states which have signed readmission agreement with European Union states include Hungary, the Czech and Slovak Federal Republics, Poland, Romania, Slovenia, Bulgaria, Croatia, and Ukraine, reflecting the "apparent objective of the standards being developed among EU Member States to exclude non-European refugees from the scope of applicable refugee law in Europe".⁹³ This objective was not lost on the "safe" countries themselves: Russia angrily suggested that in encouraging it to sign the 1951 Refugee Convention, UNHCR had been fronting for Western Europe, creating the legal conditions which would allow those states to return to Russia the thousands of asylum seekers who transit it every year. In some cases, readmission agreements, such Germany's with Romania and with the Czech Republic, have been accompanied by a one-off payment – DM 120 million to Poland, and DM 60 million to the Czech Republic – for refugee-related expenditure.

An internal UNHCR communication observes:

It is evident that Western European States generally concur that shifting the burden of asylum seekers [towards the] East satisfies their international obligations. To date, Western European countries have shown an increasing tendency to return asylum seekers to "safe" border states such as Poland under readmission agreements. Designation of "safety" is highly formalistic; while signature of international agreements is generally required, there is no examination of implementation. If UNHCR believes that there are significant deficiencies in procedures in Central Europe, and that real safeguards for asylum seekers have not reached a satisfactory level despite UNHCR attempts at input and intervention, it seems unconscionable that this burden shifting is accepted as a viable option for provision of protection.⁹⁴

In 1996, the US Committee for Refugees conducted site visits to several countries to review the effects of returns under safe third country provisions. Their report documents chain deportations from and through Germany, Austria, Greece, Slovenia, Denmark, Italy and Turkey; often, the receiving "safe" country had already made arrangements for the asylum seeker's return to the country of origin or to another unsafe country en route.⁹⁵ In 1994, UNHCR recommended that Austria not be

⁹² Goodwin-Gill, *The Refugee in International Law*, pp. 338-9.

⁹³ Marx, "Responsibility for Determining Refugee Claims", pp. 399-400.

⁹⁴ Fax to UNHCR Headquarters from UNHCR Office Poland, UNHCR Protection Officer Hy Shelow, 22 May 1996.

⁹⁵ US Committee for Refugees, *At Fortress Europe's Moat*.

regarded as a safe third country as access to asylum procedures there was not guaranteed. Under existing readmission arrangements, the sending state will not necessarily make clear to the receiving state that the individual is an asylum seeker, or that the application has been refused on purely formal grounds. The state to which such asylum seekers are sent may itself have formal grounds for refusing them. A classic example concerns refugees from Iran and Iraq who reach Germany via Turkey and Greece. Although Germany may then wish to return them to Greece, it cannot do so, as Greece will admit only those asylum seekers arriving directly from their country of origin.

In most cases, the US Committee for Refugees report suggests, it is difficult to document what happens to asylum seekers who are returned or readmitted. One UNHCR officer indicated that the problematic cases coming to the Office's attention are probably only the tip of the iceberg.⁹⁶

The Executive Committee has recommended that agreements on the return of persons who have entered in an unlawful manner from another state should be applied in respect of asylum seekers with due regard to their special situation.⁹⁷ "Due regard" is reflected neither in the EC Resolution on host third countries, nor in practice. State practice illustrates a lack of accountability for refugee protection, despite the fact that accountability is central to transferring responsibility for asylum seekers. UNHCR has stated that where protection conditions cannot be met,

or a receiving country is not prepared to offer guarantees in the individual case, the possibility of return should be excluded. In situations where it is clear from the outset that one or other of the Parties to a bilateral readmission agreement would not be in a position to meet such stipulations – because for example the State does not adhere to relevant international refugee protection principles or because procedures to implement refugee responsibilities are still developing – then UNHCR would recommend that the readmission contain a provision expressly excluding asylum seekers and refugees, as a category, from the operation of the agreement.⁹⁸

Texts of readmission agreements – even the model readmission agreement drawn up by the EU⁹⁹ – fail to specify guaranteed access to status determination procedures, nor do they reiterate the obligation of *non-refoulement*. At a very minimum, these are essential to refugee protection.

c. The European Union Convention on Extradition

⁹⁶ *Ibid*, p. 21.

⁹⁷ UNHCR Executive Committee, Conclusion No. 15 (XX) (1979), *Refugees Without an Asylum Country*.

⁹⁸ Note, *Composite Flows and the Relationship to Refugee Outflows*, para. 21.

⁹⁹ Council Recommendation concerning a specimen bilateral readmission agreement between all Member States and a third country, 30 November 1994, OJ, 1996, C274/20.

Extradition treaties and agreements are among the instruments which regulate the return of an alien to the country of origin or to another country. They are not directed at refugees or asylum seekers, but at alleged criminals outside the territory of the country which seeks to bring them to justice. Such agreements take different forms – bilateral, multilateral, permanent, *ad hoc* – and raise issues of great complexity.

The 1996 Convention relating to Extradition between the Member States of the European Union is significant in that it restricts two types of protection which have traditionally been provided by extradition treaties.¹⁰⁰ These situations, in which persons were normally not extraditable, concern perpetrators of serious political offences, on the one hand, and on the other, of persons whose extradition has been requested with persecutory intent or will result in prejudice to the individual due to his or her race, religion or nationality. They parallel provisions of refugee law whereby protection is not normally refused for the perpetrators of political crimes, nor, of course, to persons who fear persecution if returned. Abandoning these protective provisions in the extradition context may have unfortunate consequences in the refugee context.

Article 5 of the EU Convention on Extradition, entitled "Political Offences", reads:

For the purposes of applying this Convention, no offence may be regarded by the requested Member State as a political offence, as an offence connected with a political offence or an offence inspired by political motives.

States may make a declaration, in acceding to the Convention, that they limit this article to terrorist acts, including offences of conspiracy or association ("behaviour") to commit such acts.

The text of the EU Convention on Extradition was not shared with UNHCR during the drafting process. Once it had been finalized, UNHCR obtained a copy only through confidential channels, and for this reason was not able to make its views known officially either. In an internal note, UNHCR observed:

This Convention, although limited to Member States, will likely set a precedent that is followed by the international community... UNHCR is concerned that the distinction between a political offence and persecution will become confused. A person requesting asylum may be fleeing arrest and detention for a political offence and thus persecution as provided [for] in the definition of a refugee, since a person in need of international protection may be someone who has committed a political offence in the country of origin.¹⁰¹

¹⁰⁰ OJ, 23 October 1996, C313/12. Individual Member States must ratify the Convention before it can come into force.

¹⁰¹ In addition to concerns at the disappearance of the political offence exception, UNHCR noted that the Convention broadens the scope of crimes which can be considered as extraditable offences, notably in (a) requiring only that the offence be punishable by detention for at least six months; and (b) expanding extraditable crimes to include *conspiracy and association to commit* offences indicated in Articles 1 and 2 of

Concern with a blurring of the distinction between a terrorist and other political offenders is heightened by the inclusion, in this Convention, of the crimes of "conspiracy and association to commit" crimes enumerated in Articles 1 and 2 of the European Convention on the Suppression of Terrorism, and

any other offence punishable by deprivation of liberty or a detention order of a maximum of at least 12 months in the field of drug trafficking and other forms of organized crime or other acts of violence against the life, physical integrity or liberty of a person, or creating a collective danger for persons.

However, the offence in question only has to be a crime under the laws of the Member State requesting the extradition. Should Member States enter a reservation to these provisions, they are required under Article 3(4) to make extraditable

the *behaviour* of any person which contributes to the commission by a group of persons acting with a common purpose of one or more offences in the field of terrorism as in Articles 1 and 2 of the European Convention on the Suppression of Terrorism, drug trafficking and other forms of organized crime or other acts of violence against the life, physical integrity or liberty of a person, or creating a collective danger for persons, punishable by deprivation of liberty or a detention order of a maximum of at least [*sic*] 12 months, even where that person does not take part in the actual execution of the offence or offences concerned; such contribution shall be intentional and made having the knowledge either of the purpose and the general criminal activity of the group or of the intention of the group to commit the offence or offences concerned [emphasis added].

While conspiracy and intent are common criminal concepts, "behaviour" as an extraditable crime is not.

Under the Treaty of Amsterdam, facilitating extradition between Member States forms part of their common action on judicial cooperation in criminal matters.¹⁰² In January

the 1977 European Convention on the Suppression of Terrorism and other offences punishable by at least twelve months' deprivation of liberty "in the field of drug trafficking and other forms of organized crime or other acts of violence against the life, physical integrity or liberty of a person, or creating a collective danger for persons". With regard to these offences, Member States are required to make extraditable "the *behaviour* of any person which contributes to the commission by a group of persons acting with a common purpose" (emphasis added). (The Explanatory Report to the Convention, see note 122 below, remarks that this "contribution may be of any nature and it will be a matter of objective evaluation in a given case whether the behaviour contributes to the commission of one or more offences", and quotes the paragraph of the Convention to the effect that "contribution shall be intentional and made having knowledge either of the purpose and the general criminal activity of the group or of the intention of the group to commit the offence or offences concerned.") Lewis, C., UNHCR Brussels, *Note on the EU Convention on Extradition*, 17 September 1996 (unpublished), and Türk, Volker, UNHCR Headquarters, *Note on the EU Draft Convention on Extradition*, 17 July 1996 (unpublished).

¹⁰² Treaty of Amsterdam, Title VI, Provisions on Police and Judicial Cooperation in Criminal Matters, Article 31(b).

1997, the European Parliament adopted a report and resolution on combatting terrorism in the European Union, amongst other things "calling on the Council to adopt the necessary agreements and measures to prevent any national of a Member State *accused of terrorism or collaboration with an armed group* within the meaning of this resolution from obtaining political asylum or refugee status in another Member State".¹⁰³ The attempt to eliminate asylum within the EU for Union nationals was explicitly linked to difficulties in extraditing such persons.

The Political Offence Exemption

In denying the existence of such a thing as a political offence, the 1996 EU Convention on Extradition overturns an important principle. As a longstanding tradition, multilateral instruments which make provision for extradition have included an exemption to the extradition of persons whose offence is of a political nature.¹⁰⁴ For example, the 1957 European Convention on Extradition, which was drawn up under the auspices of the Council of Europe, provides in Article 3(1):

Extradition shall not be granted if the offence in respect of which is it requested is regarded by the requested Party as a political offence or as an offence connected with a political offence.

Moving back in time, the preamble of the 1948 Universal Declaration of Human Rights deemed it essential that human rights be protected by the rule of law, "if man is not compelled to have recourse, as a last resort, to rebellion against tyranny and oppression". The logic that rebellion is sanctioned where rights are abused also lay behind the development of an exemption to the extradition of persons whose extradition was requested by their country of origin. "The United States and other burgeoning democracies sought to protect the unsuccessful revolutionary, who was presumed to be fighting for democracy, from extradition for humanitarian reasons and out of self-interest."¹⁰⁵ Similarly, the French Constitution of 1793 prohibited the extradition of persons persecuted "for the cause of liberty".¹⁰⁶ This development took place at a time when, in the words of an eminent legal scholar, "concern for individual human welfare seeped into the international system".¹⁰⁷ Prior to the nineteenth

¹⁰³ European Parliament, *Resolution on Terrorism and Preclusion of Access to Asylum Procedures*, 31 January 1997, para. 20.

¹⁰⁴ "Every extradition treaty currently in force with respect to the United States...provides that extradition will not be granted where the offence for which it is sought is a political offence or one of a political character." Helton, Arthur, "Harmonizing Political Asylum and International Extradition: Avoiding Cacophony", *Georgetown Immigration Law Journal*, Vol. 1, No. 3 (1986), p. 457, and see generally Gilbert, G., *Aspects of Extradition Law*, Martinus Nijhoff Publishers, 1991, especially chapter six, "The Political Offence Exemption".

¹⁰⁵ Littenberg, Michael R., "The Political Offence Exception: An Historical Analysis and Model for the Future", *Tulane Law Review*, Vol. 64, No. 5 (May 1990), p. 1196. This article traces the development of the political offence exception in French, Swiss, and Anglo-American jurisprudence.

¹⁰⁶ Cited in Larschan, Bradley, "Extradition, the Political Offence Exception and Terrorism: An Overview of the Three Principal Theories of Law", *Boston University International Law Journal*, Vol. 4, No. 2 (1986), p. 246.

¹⁰⁷ Henkin, Louis, "International Law: Politics, Values and Functions", 216 *Collected Courses of Hague Academy of International Law* 13, Vol. IV (1989) at p. 208, cited in Steiner and Alston, *International Human Rights in Context*, p. 114.

century, however, formal bilateral agreements commonly provided for persons wanted for political reasons to be handed over. "Only in the early- to mid-nineteenth century do the concept of asylum and the principle of non-extradition of political offenders begin to concretize, in the sense of that protection which the territorial sovereign can, and perhaps should, accord."¹⁰⁸

In recent years, states have been less willing to extend this waiver so as to shelter persons from the consequences of political crimes. Goodwin-Gill describes the notion of political offence as "shrinking".¹⁰⁹ Courts, traditionally the arbiters of whether or not a particular crime falls within the scope of the "political", have raised the threshold for the offence. In Western Europe, different tests are applied to assess the political character of a crime, which may include the proportionality of the act to its aim, and the absence of predominantly personal, economic or criminal motivation. In general, particularly heinous crimes, or crimes involving loss of civilian life¹¹⁰ will not be regarded as political, regardless of their motivation: there is little disagreement that there should be no impunity for those who commit severe or large-scale violations of human rights.

Judge Sofaer, former Legal Adviser to the United States State Department, has said that "if civilised society is to defend itself against terrorist violence, some offences must fall outside the scope of the exception, even though they are politically motivated".¹¹¹ Some offences have long fallen outside the scope of the exception: agreement to depoliticize certain crimes for extradition purposes dates back at least as far as the 1948 Genocide Convention.¹¹² Subsequently, other international crimes including hostage-taking and hijacking have been similarly depoliticized. The 1957 European Convention on Extradition cited above, for example, provides that the taking or attempted taking of the life of a Head of State or a member of his family shall not be deemed a political offence for the purposes of that Convention.

Refusals to extradite persons regarded in their countries of origin as terrorists, or grants of asylum to them, are a perennial sore point between governments. France has refused to extradite some ETA members to Spain, placing their crimes in the context of the struggle for political autonomy;¹¹³ so has Belgium, arousing Spanish ire and

¹⁰⁸ Goodwin-Gill, *The Refugee in International Law*, p. 118.

¹⁰⁹ Goodwin-Gill, *The Refugee in International Law*, at p. 319.

¹¹⁰ What makes a crime "political"? Past practice in regard to extradition has left determination of the political nature of the act in question to the authorities of the host state, which had to decide whether or not it would give up the fugitive to his or her own authorities. "In legal theory ... a political offence is generally characterized as either a 'pure' political offence or a 'relative' political offence. A pure political offence is an act that is 'directed against the state [but which] contains none of the elements of ordinary crime, such as sedition, treason and espionage. A relative political offence is one in which 'a common crime is so connected with a political act that the entire offence is regarded as political.'" Acts of violence which are random or anarchic in nature have been deemed to fall outside the political crime exception (Eain, 1981, cited in Helton, "Harmonizing Political Asylum and International Extradition", p. 463). "In addition, Swiss tribunals maintain that actions cannot have a predominantly political character where peaceful and democratic means of protest are realistically available." (Helton, *ibid.*, at pp. 468-9). The exception has been deemed inapplicable where the offence was "inexcusable" so as to "shock the universal consciousness" (Littenberg, "The Political Offence Exception", p. 1204).

¹¹¹ Cited in Gilbert, *Aspects of Extradition Law*, p. 134.

¹¹² *Ibid.*, at p. 65.

¹¹³ Littenberg, "The Political Offence Exception", at p. 1205.

leading to the Spanish Protocol to the revised Treaty on European Union. Belgium was for many years at the receiving end of criticism from President Mobutu of Zaire for harbouring Zairean dissidents. In the *Quinn v. Robinson* and *McMullen*¹¹⁴ cases, both 1986, the United States initially refused British extradition requests for Quinn and McMullen, who were alleged to be members of the Provisional Irish Republican Army (IRA) and were accused of assassinations. In November 1997, Egyptian President Hosni Mubarak accused Britain of protecting terrorists, following an attack in Luxor which killed 58 tourists.¹¹⁵ It is no wonder that the political offence exemption

comes to the fore most controversially in requests for alleged terrorists ... [and] judges' decisions often seem to owe more to foreign policy than to legal reasoning. In the past, political offence decisions have been based upon whether the fugitive is from the Eastern bloc, whether the requesting state is an ally, [on] support for the fugitive or his group in the asylum state, even economic interests. "Terrorists" are hard cases within the exemption, and hard cases make bad law.¹¹⁶

Current pressures to abolish the notion of the political offence in extradition is linked closely to the fact that the extradition cases being handled by courts, and which contribute to shaping international practice in this area, tend to concern rebellion in democratic societies rather than tyrannical ones. The function of the political offence exemption, however, responds to

a desire to protect *bona fide* political dissenters from being treated as ordinary and, usually, as extraordinary criminals. The political offence exception, therefore, has a humanitarian function, and its effect is comparable to a right of asylum.¹¹⁷

In practice, however, the disparate interpretations of the political offence exemption,

¹¹⁴ In *McMullen*, where M. was accused of involvement in the bombing of an army barracks in which thirteen people were killed, the magistrate initially found McMullen's crimes to be nonextraditable and political. The Board of Immigration Appeals subsequently categorized it as a serious non-political crime, as it was randomly directed against civilians, atrocious, and out of proportion to the political goal of a united Ireland. *McMullen v. Immigration and Naturalization Service (INS)*, 788 F.2d 591 (9th Cir. 1986). In *Quinn* there was found to be no direct link between the bombings and the goal of forcing British withdrawal from Northern Ireland. *Quinn v. Robinson* (783 F.2d 776 (9th Cir. 1986).

¹¹⁵ "The London *Times* reports the [UK] government yesterday denied Mubarak's accusation that Britain was a haven for Islamic terrorism. However, the government is urgently seeking ways to tighten the law to prevent Islamic exiles and asylum-seekers from using Britain to promote actions against friendly governments. *AFP [Agence France Presse]* also quotes a Home Office official, responding to criticism from Mubarak that Britain's asylum laws were too weak, as saying: Our legislation is already tough, one of the toughest in the world. We intend to strengthen it further." UNHCR's daily summary of press reports, *Refugees Daily*, 24 November 1997.

¹¹⁶ Gilbert, *Aspects of Extradition Law*, p. 114.

¹¹⁷ Helton, "Harmonizing Political Asylum and International Extradition", p. 458.

and its tendency to become dominated by political considerations, emphasize how, in the absence of directly applicable international standards, States' discretion can remain paramount.¹¹⁸

Protection for Persons Prosecuted or Likely to be Prejudiced for Reasons of Race, Religion or Nationality

While the principal concern with the 1996 Convention lies in the abolition of the notion of the political offence, a second concern is that it also appears to dispense with the traditional protection for persons who are being persecuted for reasons of their race, religion or nationality or whose situation might be prejudiced for those reasons. Under Article 3 of the 1957 European Convention on Extradition, for example, extradition is not permitted

if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of those reasons.

In some treaties which provide this protection, the notion of "prejudiced" is explained more fully, as for example where a person would be "prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of race, religion, nationality, or political opinion".¹¹⁹

This form of protection requires an examination of possibly improper motives of the requesting state, or of the likelihood that the individual whose extradition is sought will receive a fair and unbiased trial on return. US courts have not, however, been willing to review the motivation behind extradition requests. One author remarks:

Extradition arrangements presuppose that the process by which an individual is charged is fair and that the resulting indictment is legitimate. This is frequently not the case, however, and refugees are sometimes extradited to face persecution in their home countries. This danger has not been fully appreciated by the advocates of recent measures that would eliminate the political offence exception or prevent the federal courts from reviewing the background of extradition requests.¹²⁰

The EU Convention on Extradition contains no explicit protection for those whose prosecution may be sought for reasons of race, religion, or nationality. The commentary to the Convention acknowledges that the requested state may continue to refuse extradition if it has been requested for the purpose of prosecuting or punishing

¹¹⁸ Goodwin-Gill, *The Refugee in International Law*, p. 169.

¹¹⁹ US Supplementary Extradition Treaty with the UK (1986), Article 3.

¹²⁰ Helton, "Harmonizing Political Asylum and International Extradition", p. 493.

a person on account of his race, religion, nationality or political opinion. At the same time, it characterizes such a probability as "probably academic". The very revision of the extradition provisions were justified by Member States' "mutual confidence in the proper functioning of national justice systems and, in particular, in the ability of Member States to ensure that criminal trials respect the obligations stemming from the Convention for the Protection of Human Rights and Fundamental Freedoms".¹²¹ This is cause for concern, although the 1957 Convention on the same subject remains in force.

International Law and the Return of Political Offenders or Persons at Risk

Any new definition of the ambit of the exemption is likely to favour the state rather than the individual, at least as regards western industrialised society. Realistically, it must be conceded that within western industrialised society the idea of terroristic offences being regarded as political in character is not acceptable. In fact, the exemption may be redundant *in toto* in western industrialised society.¹²²

This view is an accurate reading of the current political climate in its association of "political offences" entirely with "terroristic" or violent offences. The loose reference to "western industrialised society" also demands scrutiny. At present, formal negotiations are taking place for admission to the European Union of up to ten former communist countries (the Czech Republic, Estonia, Hungary, Poland, Slovenia in the first tier, and Bulgaria, Latvia, Lithuania, Romania and Slovakia in the second), and Cyprus.¹²³ It would appear open to challenge, at the very least, to say that the degree of democracy in all these countries make a legitimate political crime inconceivable. It is important to note that the author cited above does not support a global abolition of the exemption, but appears to favour it for the West, which

regards its adherence to liberal-democratic principles, including the right to a fair trial, and to treaties such as the European Convention on Human Rights as obviating the need for political violence to effect change.¹²⁴

The logic of doing away with protection for political offenders or persons at risk from within the EU is similar to that used for the Spanish Protocol; namely, that the institutions which exist there – democracy, regional human rights treaties and mechanisms, and the rule of law at the national level – obviate additional human rights protection, and that retaining such superfluous protection provisions can only result in their abuse. In fact, by 1991, over forty applications to the European

¹²¹ Convention relating to Extradition between the Member States of the European Union, Explanatory Report, OJ, 23 June 1997, C 191/13.

¹²² Gilbert, *Aspects of Extradition Law*, p. 134.

¹²³ "EU Opens Talks on Expansion", *International Herald Tribune*, 31 March 1998. p.1.

¹²⁴ Gilbert, *Aspects of Extradition Law*, p. 139.

Commission of Human Rights had cited violations in relation to extradition.¹²⁵ Some alleged breaches of the Convention's Article 3 prohibition on torture or inhuman or degrading treatment or punishment. Two of the most celebrated extradition cases before the European Commission and Court of Human Rights concerned extradition from Germany to Turkey (*Altun*), and from the UK to the USA (*Soering*). The Commission's admissibility decision in *Altun* held that

if there are reasons to fear that extradition, although requested exclusively for common crimes, has been sought in order to proceed against the individual, in violation of the principle of specialty, for political offences or even for just his political views, then the Commission cannot altogether set aside the possibility of a violation of Article 3 of the Convention.¹²⁶

Under the principle of specialty, the requesting state must stick to the grounds for prosecution stated in its extradition request. At issue in *Soering* was the US use of the death penalty and the sequestration on "death row" of those convicted of capital crimes. The European Court of Human Rights found that the decision by a contracting state to extradite a fugitive

may give rise to an issue under Article 3 and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.¹²⁷

An extradition order can demonstrably be challenged and may give rise to issues under the European Convention on Human Rights, making safeguards essential in respect of extraditions to countries within the Council of Europe as well as elsewhere in the West. The fact that a degree of protection is available through these human rights mechanisms is insufficient reason to do away with other longstanding protections in the extradition context. The European human rights procedures are lengthy and fairly cumbersome, and can provide only limited interim relief.

Several conventions have been concluded in respect of gross violations of international norms, including those on hijacking, hostage-taking, genocide, the Geneva Conventions, the draft Statute of the International Criminal Court and the draft Code of Crimes against the Peace and Security of Mankind. Most, but not all, of the crimes covered are already regarded as international crimes.

An obligation to prosecute or extradite appears in various forms in a number of multilateral conventions and other instruments

¹²⁵ *Ibid.*, p. 83.

¹²⁶ *Altun v. Federal Republic of Germany*, No. 10308/83, 36 D&R 209 (1983); *European Human Rights Reports*, Vol. 5, (1983), p. 611, cited in Gilbert, *Aspects of Extradition Law*, at p. 85. Kemal Altun later committed suicide, and was posthumously granted asylum by a Berlin court in 1984.

¹²⁷ *Soering v. UK*, Series A, No. 161, cited in Gilbert, *Aspects of Extradition Law*, pp. 87-8.

dealing with the suppression of particular international offences. The imposition of that obligation with respect to these offences bespeaks widespread (and increasing) recognition of the principle that states are bound to act, either through prosecution or through extradition, to ensure that individuals who perpetrate harms inimical to fundamental interests of the international community are brought to justice.¹²⁸

International practice has taken a piecemeal approach to defining extraditable crimes. While mandating states either to extradite or to prosecute,

a few treaties have tried to disallow use of the political offence exception through a clause which provides that the offence covered by the treaty shall not be regarded as a political offence for the purpose of extradition... A "depoliticizing formula" appears in the Optional Protocol to the Counterfeiting Convention of 1929, the Genocide Convention, the Apartheid Convention, the Torture Convention, and the European Convention on Terrorism. But, by and large, use of this formula has been rejected in the string of recent international conventions dealing, like the 1970 Hague Convention, with particular aspects of terrorism. *It has generally proved more acceptable to allow for the possibility that the political offence exception will be invoked to bar extradition, and to require instead that any state which refuses extradition must then undertake to prosecute the offender itself.*¹²⁹

The conventions directed against terrorism can be used as extradition treaties where no other such treaty exists between the states concerned,¹³⁰ and do not dispense with any of the protection required by refugees and asylum seekers. Even those Conventions which oblige the parties to treat specified offences as extraditable leave extradition "subject to all of the other conditions imposed by the pertinent extradition treaty or by the extradition law of the requested state ... [which] may include the political offence exception".¹³¹ However,

in the absence of [a general convention governing transnational terrorism], extradition continues to be the principal international legal mechanism to control terrorism.¹³²

¹²⁸ Bassiouni, M.C. and Wise, E.M., *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, Martinus Nijhoff Publishers, 1995, Preface, p. xi.

¹²⁹ *Ibid.*, pp. 10-11 (emphasis added).

¹³⁰ Gilbert, *Aspects of Extradition Law*, p. 20.

¹³¹ Bassiouni and Wise, *The Duty to Extradite*, p. 10. The authors are of the view that the obligation to "extradite or prosecute" has attained the status of a rule of customary international law in respect of all international offences, broadly defined.

¹³² Larschan, "Extradition, the Political Offence Exception and Terrorism", pp. 239-40.

The EU Convention on Extradition is to be implemented without prejudice to the 1951 Refugee Convention. As such, in the event of a conflict, provisions of the latter Convention should prevail, and the EU Convention on Extradition would not amend or modify it in any way. Conclusion No. 17, adopted by the Executive Committee in 1980, confirms that protection from extradition applies to persons who fulfil the refugee definition and are not excluded. Where extradition treaties make no exception for "political crimes", or specify that *no* crime may be regarded as political, refugees who have been recognized after committing political crimes – within the Convention definition – should not become extraditable as a result.

Apart from the potential of a direct clash of treaty obligations, there is another, more subtle challenge to refugee protection as a result of changes to the notion of a political crime. This challenge arises through a possible reinterpretation of the exclusion clauses of the Refugee Convention.

The 1951 Refugee Convention is silent on the subject of extradition. The constitution of the International Refugee Organization (IRO), the predecessor to UNHCR, denied protection to "war criminals, quislings and traitors", and "ordinary criminals who are extraditable by treaty".¹³³ The 1951 Refugee Convention, under Article 1(F)(b), does not apply to a person who "has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee". The purpose of this provision is to protect persons fearing persecution, while also ensuring that common criminals are brought to justice, and that the community in the country of asylum be protected from the danger posed by criminal elements.¹³⁴

The link between the political offence exception to extradition, and refugee protection, is clearest in this exclusion clause. Article 1(F)(b) of the 1951 Refugee Convention is consistent with the Universal Declaration of Human Rights provision that asylum is not available to persons in the case of prosecutions "genuinely arising from non-political crimes".¹³⁵ Perpetrators of political crimes are thus not excluded from refugee protection, reflecting the "impressive fact that in the legislation of modern states there are few principles so universally adopted as that of non-extradition of political offenders".¹³⁶

The EU Convention on Extradition was viewed as closing a loophole in the extradition of terrorists. It is likely instead to remove a healthy margin of discretion between terrorism and other political offences, a discretion which also animates the Refugee Convention's exclusion clauses. As this discretion is nullified in the EU instrument and, it must be anticipated, in EU practice, there is a risk that the same denial of the existence of a political offence may be imported into interpretation of the

¹³³ Constitution of the International Refugee Organization, 1946, Annex 1, Part II.

¹³⁴ See UNHCR, *Note on the Applicability of Exclusion Clauses*, 2 December 1996, at p. 14.

¹³⁵ Universal Declaration of Human Rights, Article 14(2).

¹³⁶ Lauterpacht, H., "The Law of Nations and the Punishment of War Crimes", *British Yearbook of International Law*, Vol. 21 (1944), pp. 58-95. Writing over fifty years later, however, Goodwin-Gill states: "It remains doubtful whether the narrow principle of non-extradition [of political offenders] reflects a rule of international law..." *The Refugee in International Law*, p. 21.

1951 Refugee Convention. Were all serious crimes committed prior to entry deemed "non-political", political activists might be excluded from refugee status.

UNHCR has underlined that the primary question in determinations under Article 1F(b) is whether the criminal character of the refugee outweighs the need for international protection, or the asylum seeker's *bona fides* as a refugee.¹³⁷ This test is a nebulous one; elsewhere, UNHCR has stated that political motivation must predominate over personal reasons, or personal gain.

There should also be a close and direct causal link between the crime committed and its alleged political purpose and object. The political element of the crime should also outweigh its common-law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective. The political nature of the offence is also more difficult to accept if it involves acts of an atrocious nature.¹³⁸

In addition, UNHCR has specified that "a political goal which breaches fundamental human rights cannot form a justification".¹³⁹ In practice, assessments will inevitably rely heavily on the context in which the crime has been committed. In UNHCR's experience, asylum seekers who committed a serious crime in the course of their flight – including the crime of hijacking – have not always been excluded.¹⁴⁰ Even allowing for context, UNHCR's definitions of political and non-political offences appear imprecise. In internal papers, UNHCR has noted the need to define political offences more clearly,

if only to maintain the effectiveness of the political offence exemption in international law. The total abolition of the concept without appropriate safeguards could ... be detrimental to generally recognized principles of international law, by narrowing down the political elements of the refugee definition... In practice, the result could be that extradition would prevail over obligations under international refugee law, [and] this "defining away" of political crimes may migrate into interpretations of the exclusion clauses ... leading adjudicators to consider all serious crimes as "non-political".¹⁴¹

Refugees should retain protection against extradition in situations where the consequences are tantamount to further persecution. Although no human rights

¹³⁷ UNHCR, *Note on the Applicability of the Exclusion Clauses*, p. 14.

¹³⁸ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, September 1979, para. 152.

¹³⁹ UNHCR *Note on the Applicability of the Exclusion Clauses*, p. 15.

¹⁴⁰ See *R. v. Mustafa Shakir Abdul-Hussain, Saheb Sherif Aboud, Hasah Saheb Abdul Hasan, Meged Mehdy Naji, Mohammed Chamekh Muhssin, Adnan Hoshan, Sabah Nouri Nagi*, 17 December 1998 (*Times Law Report*, 26 January 1999) where the UK Court of Appeal ruled in favour of six Iraqis who hijacked a plane from Sudan to the UK to seek asylum there.

¹⁴¹ Türk, Volker, with Landgren, Karin, *Internal UNHCR Note*, 17 July 1996.

instrument prohibits extradition by name, one writer notes timidly that "it is not beyond the bounds of possibility that surrendering a fugitive to another state might lead to a violation of that person's rights".¹⁴² More robustly put:

In countries where human rights violations occur, political opponents of the government are often charged with criminal law violations. These charges serve as a pretext for arbitrary detention, sometimes without a proper trial or due process of law... Governments that wish to take reprisals against their political opponents living in exile [can] simply charge them with a violation of criminal law in order to secure their extradition.¹⁴³

Protection provided to refugees and asylum seekers should be overridden *only* by the exception to *non-refoulement* enunciated in Article 33(2) of the Convention, namely because the refugee is a danger to national security or, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community. All extradition provisions should include the appropriate safeguards.

The abrogation of the political offence concept by EU treaty is likely to be studied with interest in other regions. While the exception came about to protect what we might today call human rights defenders, any other group of states can choose to adopt the same language in an *inter se* treaty, regardless of their health as democracies. One author has noted that the general trend is to make extradition easier, with "[t]he balance between administrative convenience and the fugitive's rights ... coming down firmly in favour of the former".¹⁴⁴

d. Draft Convention against the Smuggling of Illegal Migrants

The 1948 Universal Declaration of Human Rights proclaims in Article 13(2) the right of everyone to leave and return to his or her own country, a right which has been repeated subsequently in other, binding, human rights instruments. This right, like the right to seek and enjoy asylum, may seem empty if one has nowhere to go. The right to leave one country and the right to enter another are nonetheless distinct.

Some of the European states' efforts to deter entry have already been described. A UK report lumps refugees with drug traffickers, terrorists and other criminals as undesirables who should not be permitted to "breach the perimeter fence":

The [European] Commission proposes that around the external borders of the Community there should be erected – by agreement between Member States – a *cordon sanitaire* to keep out drug traffickers, terrorists and other criminals, refugees together with unwanted immigrants. Greatly increased co-

¹⁴² Gilbert, *Aspects of Extradition Law*, p. 79.

¹⁴³ Helton, "Harmonizing Political Asylum and International Extradition", p. 492.

¹⁴⁴ Gilbert, *Aspects of Extradition Law*, p. 68.

operation between police and judicial authorities, shared intelligence and stricter internal controls would offset the consequences of permitting these undesirables – if they have breached the perimeter fence – to circulate freely around Europe.¹⁴⁵

Through a Council Regulation adopted in September 1995, the European Union identified the nationalities who require a visa to penetrate the Union's external border.¹⁴⁶ Visas are mandatory "for the nationals of ninety-eight countries, including several countries with records of well-documented human rights abuses such as China, Burma, Sudan and Rwanda".¹⁴⁷ Other methods of thwarting entry, such as readmission agreements and the "safe third country" notion, put a principled gloss on turning asylum seekers away, arguing that the claimants could have found asylum elsewhere. The EU has also promoted the notion that it is in the best interests of refugees to stay in their region of origin. At the Edinburgh summit meeting of the heads of state and government of the European Council in 1992, the then twelve EU Member States declared that "in line with the views of UNHCR, displaced persons should be encouraged to stay in the nearest safe areas to their homes, and [that] aid and assistance should be directed towards giving them the confidence and the means to do so".¹⁴⁸ Entry is further frustrated by carrier sanctions, and by interdiction at sea.¹⁴⁹

If entry is successful, the asylum seeker faces considerable obstacles in obtaining recognition as a refugee. The suppression of legal possibilities for asylum seekers to reach their destinations has, not surprisingly, resulted in an increased use of forged documents.¹⁵⁰ A US law which came into force in April 1997 establishes a summary removal procedure for persons arriving with false documents, or without documents.¹⁵¹ The use of fraudulent documents has also been a factor in the increased detention of asylum seekers. In addition, it contributes to negative assessments of credibility in the refugee status determination process. The illogical and disparaging

¹⁴⁵ UK Home Affairs Select Committee Report on Practical Police Cooperation in the European Community, para. 21, Vol. 1, HCP 363 (1990), cited in Gilbert, *Aspects of Extradition Law*, p. 196.

¹⁴⁶ OJ, 1995, L234/1.

¹⁴⁷ Cited in Human Rights Watch, *Swedish Asylum Policy*, p. 9.

¹⁴⁸ This position is contradicted by the EU's own action in the Treaty of Amsterdam, which restricts the possibilities for asylum seekers from an EU country from remaining in their region of origin, apart from Norway or Switzerland. The EU position is not, to the best knowledge of the author, an accurate reflection of the position of UNHCR.

¹⁴⁹ See, amongst others, Danish Refugee Council, *The Role of Airline Companies in the Asylum Procedure*, 1988, and also Danish Refugee Council and the Danish Centre of Human Rights, *The Effects of Carrier Sanctions on the Asylum System*, October 1991. The Expert Group whose deliberations lay behind these publications concluded that "legislation which has the effect, intended or otherwise, of hindering the access of refugees both to procedures for the determination of status and, as a result, asylum from persecution, is clearly inconsistent with the right of all persons to seek and enjoy asylum from persecution". (Danish Refugee Council and the Danish Centre of Human Rights, *Effects of Carrier Sanctions*, p. 3.) During the war in former Yugoslavia, EU countries were quick to impose visa requirements, with the exception of Italy, which found itself denigrated by some other states as a result.

¹⁵⁰ Danish Refugee Council and the Danish Centre of Human Rights, *Effects of Carrier Sanctions*, at p. 12.

¹⁵¹ Illegal Immigration Reform and Immigration Responsibility Act 1996.

inference that "bogus" travel documents equate to "bogus" refugees appears to have permeated the public at large.¹⁵² In a similar development:

The involvement of smugglers and the frequently devious practices necessary to ensure successful arrival in the traditional asylum states deepened suspicion about whether the claimants were truly deserving. Incidents involving mass arrivals by ship, with the assistance of organised smuggling rings, tended to evoke sharp reactions from officials and the public.¹⁵³

Clearly, states are frightened of illegal migration, which is believed to be increasing even as numbers of asylum-seekers decline.¹⁵⁴

Hitherto, sanctions have pertained mostly to the illegal *entry* aspects of migration, and have been unilateral in nature. In this respect, refugees enjoy some protection under Article 31 of the 1951 Refugee Convention which exempts refugees coming directly from territory where they feared persecution from being punished on account of their illegal entry or presence, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. The draft conventions considered here reflect efforts to make attempted travel itself illegal and punishable under certain circumstances – in other words, a move towards multilateral criminalization of illegal *departure*.

The very notion of an "illegal" departure runs counter to the right of every person to leave any country, including his own.¹⁵⁵ The notion is more perverse still when departure is effected, or abetted, for the purpose of seeking safety. The Treaty of Amsterdam singles out, with six other crimes, the importance of combatting trafficking in persons in pursuit of the objective of providing EU citizens "with a high level of safety within an area of freedom, security and justice".¹⁵⁶ The issues of trafficking and smuggling (distinguished by some states, including the USA) are therefore high on the European Union agenda.

Two draft conventions, and a third, consolidated version circulated since September 1997 represent moves towards making it harder for people to leave their own countries. The drafts – an Italian draft Convention to Combat Illegal Migration by Sea, and an Austrian (and later consolidated) draft Convention Against the Smuggling of Illegal Migrants – are not unmindful of the humanitarian aspects of illegal

¹⁵² "In light of the current debate in the United States about asylum-seekers without proper documents, I must note that those who managed to escape [persecution in the 1930s and 1940s] often did so by using fraudulent documents, issued and accepted by sympathetic officials... These episodes of personal courage are important..." Ogata, *Address at the Holocaust Memorial Museum*, Washington, D.C., 30 April 1997.

¹⁵³ Fitzpatrick, "Flight from Asylum", p. 29.

¹⁵⁴ In 1995, a total of 320,201 persons sought asylum in the fifteen main asylum countries of Western Europe, which is a return to levels of 1989.

¹⁵⁵ Universal Declaration of Human Rights, Article 13(2); International Covenant on Civil and Political Rights, Article 12(2). For further details see section below entitled "International law and the prevention of departure".

¹⁵⁶ Treaty of Amsterdam, Provisions on Police and Judicial Cooperation in Criminal Matters, Title VI, Article K.1.

departure. As the Conference of Ministers on the Prevention of Illegal Migration (Prague, 14-15 October 1997) noted,

trafficked persons often are in a particularly vulnerable situation, giving rise to humanitarian considerations, and ... consequently, a distinction should be made between the trafficker and the trafficked person with regard to the principles, types and levels of punishment.¹⁵⁷

While the recommendations of this Conference mention refugee protection and the screening of asylum seekers, the emphasis is on the nature of trafficking as organized crime, and sanctions are proposed for the production, provision *and use* of fraudulent documents.

In September 1997, the Italian Government floated a draft multilateral Convention to Combat Illegal Migration by Sea. Italy had intended to table this at the annual Assembly of the International Maritime Organization (IMO), and the IMO Legal Committee, represented by delegations of fifty states, considered the initiative in October. The Italian delegation stated that a similar proposal tabled to the European Union had been warmly received.¹⁵⁸ However, most speakers questioned the appropriateness of the IMO, whose work pertains to maritime safety and the protection of the marine environment, as a forum for this issue, noting also that "smuggling of illegal migrants has been considered by the UN Commission on Crime Prevention and Criminal Justice for a number of years where further work is progressing".¹⁵⁹

Italy ultimately withdrew its draft from that session, instead sponsoring a Resolution entitled *Combatting unsafe practices associated with the trafficking or transport of migrants by sea* at the Maritime Safety Committee in London in December 1997. In the language of that Resolution, overt concerns shifted to the health and well-being of the trafficked ones: focussing on the safety of life at sea (thereby also coming closer to the IMO's mandate), it cites trafficking as an unsafe practice. The Resolution invited governments

- to cooperate in the interest of safety of life at sea and to increase their efforts to suppress and prevent unsafe practices associated with the trafficking or transport of migrants by sea and to ensure that effective and prompt action is taken against such unsafe practices;

¹⁵⁷ In the context of the "Budapest Process" (follow-up to the Budapest Conference on Uncontrolled Migration in 1993), there have been over thirty meetings on issues relating to illegal migration, including the Conference of Ministers on the Prevention of Illegal Migration, Prague, 14-15 October 1997. This meeting was attended by thirty-one European countries, Canada and the United States.

¹⁵⁸ International Migration Organization, *Draft Report of the Legal Committee on the Work of its Seventy-Sixth Session*, LEG 76/WP.3, 16 October 1997, para. 129.

¹⁵⁹ *Ibid.*, para. 132.

- to develop agreements and procedures to facilitate co-operation in applying efficient and effective measures to prevent and suppress unsafe practices associated with the trafficking or transport of migrants by sea;

and requested them

- to take required action in accordance with international instruments to detain all unsafe ships including those used for the trafficking or transport of migrants by sea and to report promptly to the government whose flag such ships are entitled to fly, and supply to the Organization information on all incidents concerning unsafe practices associated with the trafficking or transport of migrants by sea, which come to their attention.

Italy asked that the Resolution be brought to the attention of the UN with a recommendation that an international convention be concluded aimed at combatting the trafficking or transport of migrants by sea.

Also in September 1997, Austria had circulated a draft International Convention against the Smuggling of Illegal Migrants.¹⁶⁰ The draft provided that its application be without prejudice to the obligations of states parties to the 1951 Refugee Convention. UNHCR understood this to include,

that States Parties would not apply sanctions to persons assisting the movement of asylum applicants primarily out of humanitarian motives, as long as the asylum application is not considered manifestly unfounded or the applicant is recognised as a refugee or granted stay on other humanitarian grounds.¹⁶¹

The draft Convention to Combat Illegal Migration by Sea had expressed concern about the danger to the lives of those attempting illegally to leave their own countries. Austria, in presenting its draft Convention, qualified the smuggling of illegal migrants as a particularly heinous form of transnational exploitation of individuals in distress. It went on to describe such smuggling as posing

a growing threat to the international community as a whole... On the basis of information received by Member States, the Commission on Crime Prevention and Criminal Justice is in a position to consider "devising an effective approach that criminal justice systems might adopt to combat the illegal smuggling of migrants, for example, [by] taking more compatible and better harmonized countermeasures, in terms of policy and practical operations, at the national, regional and international levels".¹⁶²

¹⁶⁰ UN Doc. A/52/357, 17 September 1997.

¹⁶¹ UNHCR Division of International Protection, Geneva, letter to the Permanent Mission of Austria, 10 November 1997 (unpublished).

¹⁶² Permanent Representative of Austria to the United Nations, letter to the UN Secretary-General, 16 September 1997, circulated as Doc. A/52/357 of 17 September 1997, and citing Doc. E/CN.15/1997/8, para. 44 regarding "devising an effective approach". Austria outlined the main features of a legal instrument as follows:

Similarly, the draft Convention on Illegal Migration by Sea stated that international cooperation was needed to devise effective and practical measures for the preemption and prevention of illegal migration flows by sea: this was described as a serious transnational crime, as were aiding and abetting such actions.¹⁶³ The draft included provisions for ordering ships to return to a port in the state of origin "if an on-board inspection reveals that unlawful activities are being committed".

UNHCR noted that the broad definition of "illegal migrants" in the Italian draft could encompass refugees and asylum seekers, and underlined that any preemptive and preventive measures must not "result in the involuntary return of refugees or asylum-seekers to their countries of origin or to a place where their lives would be endangered, nor jeopardise any opportunity for asylum-seekers to have access to refugee status determination process". Nor should it impinge on the individual's human right to leave his or her country. Citing experience where smugglers act out of humanitarian motives in assisting persons in need of international protection, UNHCR urged that sanctions not be applied in respect of persons who, for humanitarian reasons, use ships to transport illegal migrants, and where the "migrants" are refugees or asylum seekers whose claims are not abusive or manifestly unfounded.¹⁶⁴

The Austrian draft did not target the illegal migrants themselves, nor deem their action unlawful; its principle was that of punishing the perpetrators, not the "person whose illegal entry is procured or intended by such smuggling". The crime was defined as that of assisting illegal entry, and when such smuggling was undertaken "for ... profit, repeatedly and in an organised manner". Under both draft conventions, however, all who assist those hoping to enter another country without authorization risked being caught in the net. Under the Austrian draft, the crimes would be punishable by all contracting states, including countries of origin, who have jurisdiction "when the

establishing the smuggling of illegal migrants as a transnational crime;

establishing an obligation for the contracting States to render the smuggling of illegal migrants punishable under their domestic law;

establishing an obligation for the contracting States to provide for their jurisdiction over the abetting, assisting or otherwise participating in acts of smuggling of illegal migrants for personal profit;

establishing the principle of *aut dedere aut judicare*;

establishing an obligation for the contracting States to provide mutual judicial assistance;

establishing provisions concerning the extradition of alleged offenders;

establishing general principles of penal law to be observed;

- establishing a principle of penal sanctions against the perpetrators but not the victims.

Draft appended to General Assembly document A/52/357 of 17 September 1997.

¹⁶³ The draft Convention defined "illegal migrants" as "persons who are travelling illegally by sea bound for a country other than the one of which they are nationals". Commenting on the draft, UNHCR asked whether the concept of "travelling illegally" referred "to persons not paying a fare for their travel as passengers on board the vessel; to those travelling on a vessel not authorised to carry passengers; to persons who departed their country of origin illegally; or to persons who are seeking to enter a country illegally?"

¹⁶⁴ UNHCR, Division of International Protection, *Comments on the Italian Proposed Draft Multilateral Convention to Combat Illegal Migration by Sea*, September 1997 (unpublished).

alleged offender is a national of that state".¹⁶⁵ It also specified that the offences were to be deemed as extraditable offences in any extradition treaty between the states parties, and were not be considered political offences. The draft Convention did include the standard protection clause for extradition treaties, however.¹⁶⁶

These two drafts were subsequently consolidated in a joint Austrian-Italian initiative under which the issue of the illegal trafficking or transport of migrants by sea was considered by the UN Commission for the Prevention of Crime and Penal Justice during its session of 21-30 April 1998. UNHCR did not attend the meeting. The draft International Convention against the Smuggling of Illegal Migrants and its draft Protocol on combating the trafficking and transport of migrants by sea were circulated, with a draft resolution calling for their examination by a special intergovernmental working group.

The Austrian and Italian Governments presented their initiative in these terms:

The undersigned delegations are particularly concerned by the fact that the illegal trafficking and transport of migrants, usually carried out by criminal organizations operating in a transnational context, ordinarily takes place under inhuman conditions and that this resulted in a great number of accidents and casualties.

Confronted with this disturbing phenomenon, Austria and Italy have each elaborated a draft of an international instrument aiming at combating the illegal trafficking and transport of migrants with special emphasis on

(a) establishing an international delict and ensuring international co-operation in the fields of prosecution and extradition [Austrian proposal];

(b) providing for special measures and procedures of prevention against [*sic*] the illegal trafficking and transport of migrants by sea [Italian proposal].

[...]

Both delegations wish to stress that their initiatives are in no way directed against the victims of illegal trafficking and transport of migrants but *are designed to provide for repressive and preventive regulatory measures and procedures under international law.*

Furthermore, both delegations are conscious of the need that such

¹⁶⁵ Article 5(1)(b).

¹⁶⁶ Article 9.2 reads: "Extradition shall not be granted if the requested Party has substantial grounds for believing that a request for extradition has been made for the purpose of prosecuting or punishing a person on account of his or her race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons."

measures and procedures should be fully in line with the ongoing endeavours by the international community to address the issues of transnational organized crime in a comprehensive and effective manner.

In this context, both delegations emphasise the importance of measures to be taken against the illegal trafficking and transport of women and children, namely for the purpose of sexual exploitation.

The corresponding motives of the Austrian and the Italian move are the following: The illegal trafficking and transport of migrants, a particularly heinous form of transnational exploitation of individuals in distress, has considerably increased in recent time and poses a growing threat to the international community as a whole.¹⁶⁷

The draft Convention on the Smuggling of Illegal Migrants was the text originally presented by Austria in September 1997, while the draft Protocol Aiming at Combating the Trafficking and Transport of Migrants by Sea was a shortened and revised version of the original Italian draft Convention. Since then, the issue has moved into the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime. Austria and Italy have submitted a proposal entitled *Draft Elements for an International Legal Instrument against Illegal Trafficking and Transport of Migrants*,¹⁶⁸ which would constitute a Protocol to the Convention against Transnational Organized Crime. In its current form, this draft Protocol has not retained the earlier concerns that migration flows by sea undermine the legal order in the countries concerned, nor that they "jeopardise the safety of navigation and the security of human beings at sea, seriously affecting the operation of maritime services and undermining the confidence of the people of the world in maritime services".

Instead, the preamble emphasizes that the illegal trafficking and transport of migrants, especially by sea, poses a threat; that it is a particularly heinous form of transnational exploitation of individuals in distress; and that an increasing number of migrants are being smuggled for purposes of prostitution and sexual exploitation. The offence of "illegal trafficking and transport of migrants" is committed by "any person who intentionally procures, for his or her profit, repeatedly and in an organised manner, the illegal entry of a person into another State of which the latter person is not a national or not a permanent resident"; guilty, also, is "any person who attempts to commit or who commits an act constituting participation as an accomplice".¹⁶⁹ "Illegal entry" is

¹⁶⁷ Memorandum, undated, from the Austrian and Italian Governments presented to the UN Commission for the Prevention of Crime and Penal Justice, Vienna, 21-30 April 1998, and to UNHCR and the International Organization for Migration (IOM), Geneva, under cover of a *note verbale* dated 5 May 1998, that is, well after the Vienna Meeting had wound up (emphasis added).

¹⁶⁸ General Assembly document A/AC.254/4/Add.1, 15 December 1998.

¹⁶⁹ Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Draft elements for an international legal instrument against illegal trafficking and transport of migrants*, A/AC.254/4/Add.1, 15 December 1998, Articles A and B.

defined as the crossing of borders without disposing of the necessary requirements for legal entry into the receiving state. To the credit of the new draft, it proposes that any person whose illegal entry is procured or intended by such trafficking and transport shall not become punishable on account of such trafficking and transport, a provision which, to be effective, must also bind authorities in the country of origin.

This draft follows its predecessors in providing for extensive measures of control and diversion of vessels in international waters. It would legitimize interdiction at sea, which was always the intention, rather than the restoration of international confidence in maritime services, to which reference has now been dropped. Draft Article G (former draft Article V(1)) reads:

Each State Party which has reasonable grounds to believe that a ship flying the flag of or registered with another State Party, navigating freely in accordance with international law, is involved in the trafficking of migrants, may notify the State whose flag it flies, request a verification of the registration and, after receiving confirmation, may request authorisation to adopt the necessary measures to guarantee the control and containment of the flow of individuals bound for its territory, which may include verifying the ship's right to fly its flag, stopping the ship, boarding it and diverting it.

The vagueness of the text raises a number of questions: from whom does the receiving state "request authorisation" to take measures against the suspect ship? As measures may be taken only *after* receiving confirmation from the sending state, will the receiving state sit on its hands in the meantime? The bottom line, however, is that ships carrying illegal migrants may be diverted in international waters ("navigating freely").¹⁷⁰ Ships may also be ordered (and, if they fail to comply, escorted) back to the port of departure, and "the State of which the migrants are nationals shall be informed of the outcome of the on-board visit".¹⁷¹ Draft Article O (former Article VIII) provides for further unspecified measures of collaboration and state that "the States Parties that might be concerned for any reason shall co-operate and exchange any useful information, in accordance [with] their national legislation, and shall co-ordinate any other administrative measures among themselves".

The draft notes that the provisions of this Protocol shall be without prejudice to the obligations of states parties under the 1951 Refugee Convention and the 1967 Protocol. Despite explicit references to the safety of human life at sea, the safety of the vessel, and to the commercial and legal interests of states concerned, there is no explicit reference to the safety of the returned individuals or the fact that the returning state would be in breach of international obligations if it were to return refugees to

¹⁷⁰ Article M (former Article VI) confirms this, specifying that the Protocol shall apply when the ship "is entering" the territorial waters of a Contracting Party, but also when "there are reasonable grounds to *suspect* that this ship is *bound for entering* or otherwise procures the illegal entry of migrants into the territory of a Contracting Party" (emphasis added).

¹⁷¹ Article 5(2)(d).

their country of origin. There is no reference to the international law relating to human rights generally.

International Law and the Prevention of Departure

The Austro-Italian draft is a further shift in control measures upstream from a state's borders, by involving countries of origin. It seeks to legalize interdiction on the high seas, and interferes with the right of individuals to leave any country, including their own.

The right of individuals to leave their country is, in international law, subject to very few limitations. Article 12(2) of the International Covenant on Civil and Political Rights states: "Everyone shall be free to leave any country, including his own." Article 12(3) specifies that this

shall not be subject to any restrictions, except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

In order to seek asylum, people have to be able to leave their countries. Measures which interfere with departure interfere with this right. In a 1963 study on discrimination in the right to leave and to return, UN Special Rapporteur Judge Ingles warned of "the gradual and imperceptible erosion of the right until it is no more",¹⁷² and noted that it was under attack from many directions.

In the refugee context, Executive Committee Conclusions have referred repeatedly to the importance of procedures for dealing with asylum requests,¹⁷³ notably in order to ascertain which persons require international protection. Conclusion No. 74(XLV) (I) of 1994 reiterates in paragraph i,

the importance of ensuring access for all persons seeking international protection to fair and efficient procedures for the determination of refugee status or other mechanisms, as appropriate, to ensure that persons in need of international protection *are identified* and granted such protection. [emphasis added]

¹⁷² Cited in Hannum, Hurst, *The Right to Leave and Return in International Law and Practice*, Martinus Nijhoff Publishers, Dordrecht, 1987, p. 124.

¹⁷³ See, amongst others, Executive Committee, Conclusions Nos. 15 (c) (1979), 30 (1983), 33 (1984), 65(o) (1991), and 71(I) (1993).

In 1997, the Executive Committee reiterated the need for full respect to the institution of asylum, and drew attention to particular aspects, namely the principle of *non-refoulement* in the senses of the Refugee Convention and the Torture Convention, and

- (ii) access, consistent with the 1951 Convention and the 1967 Protocol, of asylum-seekers to fair and effective procedures for determining status and protection needs;
- (iii) the need to admit refugees into the territories of States, which includes no rejection at frontiers without fair and effective procedures for determining status and protection needs;
- (iv) the need for rapid, unimpeded and safe UNHCR access to persons of concern to the High Commissioner¹⁷⁴

As part of their obligation to protect refugees, in particular by not returning them in any manner whatsoever to the frontiers of territories where they risk persecution, states are obliged to identify them. It would be unlawful for states to return, or contribute to the return of, any group of "illegal migrants" without ascertaining the presence among them of asylum seekers or refugees. Alarming, the Draft UN Convention against Transnational Organized Crime, in its current incarnation, provides: "A State may adopt more strict or severe measures than those provided for by this Convention if, in its opinion, such measures are desirable or necessary for the prevention or suppression of organized crime."¹⁷⁵

Originally, the draft Convention and Protocol gave prominent voice to concerns for the well-being of those trafficked, and the "inhuman conditions ... resulting in a great number of accidents and casualties" among illegal migrants. Where conditions aboard a vessel are genuinely cause for concern, however, the state arguably is under a greater obligation to permit disembarkation. Executive Committee Conclusion No. 15 (XXX) (1979) on *Refugees without an asylum country* specifies:

It is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum.

A fundamental interpretative premise is that the rights "cannot be restricted based on activity that is itself protected by other provisions in the Covenant".¹⁷⁶ Restricting a person's right to leave (as set out in Article 12(2) of the International Covenant on Civil and Political Rights) on the grounds of threats to their health and safety would be equally unacceptable. The draft instrument makes no mention of the threats to survival and to liberty which compel many to flee their countries.

¹⁷⁴ Executive Committee, Conclusion No. 82 (XLVIII), *Conclusion on safeguarding asylum*.

¹⁷⁵ Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Draft United Nations Convention against Transnational Organized Crime*, UN GA Document A/AC.254/4, Draft Article 1. The Protocols are to form an integral part of this Convention.

¹⁷⁶ Hannum, *The Right to Leave and Return*, p. 132.

The sole reference to human rights law remains Draft Article R of the proposed Protocol, which states: "The provisions of this Protocol shall be without prejudice to the obligations of States Parties under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees." The Convention and Protocol are not a source of state obligations in respect of the right of all persons to leave their country, but measures which would prevent refugees reaching safety may contravene the Convention and Protocol, and clearly are contrary to the intentions of human rights law. UNHCR, in official comments on the early drafts, has expressed concern at the manner in which they undermine the right to seek asylum, and place refugees and asylum seekers at risk of *refoulement*. The draft still includes only a limited and general reference to the 1951 Refugee Convention, despite the fact that "the control regime ... impacts significantly on refugees and asylum seekers", and UNHCR has requested that a provision be added to the effect that any action "taken by States under this Convention shall not result in the return of a refugee or an asylum-seeker in any manner whatsoever" to a place where he or she is at risk of persecution.

In its comments, UNHCR also underlined that the sharing of information envisaged by the Protocol should not include information on any individual refugee or asylum seeker. Such information can obviously place the asylum seeker at risk, most particularly if he or she is subsequently returned to the country of origin.

With regard to the right of the individual in international law to leave and to seek asylum, one author has noted:

Given the protection orientation and objectives of refugee and human rights law, the limited notion of the right to leave to seek asylum from persecution may be the only aspect of the right to leave one's country in international law to impose any duty on other States. In this sense, the nearest correlative duty may be not to frustrate the exercise of that right in such a way as to leave individuals exposed to persecution or other violation of their human rights; and that correspondingly intentional policies and practices of containment *without protection* constitute an abuse of rights.¹⁷⁷

Human rights protections apply to persons not only within the territory of a state, but also to those subject to its jurisdiction. The actions envisaged under the draft protocol, such as diverting vessels or returning them to port, clearly subjects the migrants to the jurisdiction of another state. In exercising its jurisdiction in this way, the actions of states must be consistent with their human rights obligations. Draft Principles on the right to leave and to return posit: "Any limitation which may be imposed shall not be aimed at destroying the right [to leave] and shall be consistent with the purposes and principles of the United Nations."¹⁷⁸

¹⁷⁷ Goodwin-Gill, *The Refugee in International Law*, p. 289.

¹⁷⁸ UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Draft Principles on Freedom and Non-Discrimination in respect of the Right of Everyone to Leave Any Country, including His*

While the draft Protocol reflects some sign of concern at the implications for refugees and asylum seekers, it nonetheless encourages states – including the countries of origin - to be more vigilant in preventing people exercising a human right and to cooperate in frustrating such attempts. Such encouragement and cooperation would not be entirely new: in early 1998, the Turkish Government detained thousands of persons, at the instigation of the European Union, on suspicion that they were planning to leave illegally.¹⁷⁹ The right to leave one's own country is now – also at the instigation of European governments - being curtailed for fear that European states will be at the receiving end of that right. As one author has written:

The ... consideration [of] the possibility of entering another country – often is raised as a *de facto* excuse for limiting the right to leave. While the political and social reality that many traditional receiving countries are closing their doors to continued immigration should be borne in mind, the factual impossibility of exercising one's rights fully can never be used as an excuse for denying the legal possibility of exercising those rights. The right to leave cannot be made to depend on the ability to exercise the right immediately or even in the foreseeable future.¹⁸⁰

The Human Rights Committee (set up under the International Covenant on Civil and Political Rights) has found violations of Article 12 of the Covenant where a government has refused passports to their nationals living abroad, effectively denying them the opportunity to travel, and where a government has confiscated someone's passport and denied them the right to leave their country of their own free will.¹⁸¹ European governments have chosen to ignore factors which effectively deny individuals the right to leave their countries. Under these circumstances, is it possible for them to depart their countries legally? Can they obtain passports, without discrimination and without being impoverished by the payment of massive bribes?

Many have remarked on the irony of the very governments now seeking to restrict the right of individuals to leave being those which championed it for many years, condemned the Iron Curtain regime of Eastern Europe, the difficulties for Jews

Own, and to Return to His Country, Article 1(d), Res. 2B (XV), UN Doc. E/CN.4.1846 (1963). Cited in Hannum, *The Right to Leave and Return*, p. 147.

¹⁷⁹ "Urging Tougher Measures. Britain (as current European Union president) yesterday sent a senior diplomat to Turkey who will urge tougher measures by Ankara to prevent thousands of illegal immigrants from sailing to Europe, reports the London *Times*. Thousands of Kurds and refugees from other countries have sailed for Italy and Western ports from Istanbul in the past month, causing a humanitarian problem and almost wrecking Europe's border-free Schengen agreement. Several EU countries have accused Turkey of turning a blind eye to the exodus, suspecting that Turkey's present anger with the EU has encouraged officials to do little to stop it. The diplomat will take a conciliatory message to Turkish government and immigration officials. Britain believes Turkey has been caught off guard by the exodus and is now trying to control it, says the report." UNHCR, *Refugees Daily*, 20 January 1998.

¹⁸⁰ Hannum, *The Right to Leave and Return*, p. 6.

¹⁸¹ *Ibid.*, pp. 20-21, 47, 52-53 concerning Uruguay. See also more recently, Human Rights Committee, *OI Bahamonde v. Equatorial Guinea*, Communication No. 468/1991. UN Doc. CCPR/C/49/D/468/1991, para. 9.3.

seeking to leave the Soviet Union, and the punishment imposed by Vietnam on those attempting to leave illegally. A former European government minister once remarked in private to UNHCR that future asylum seekers would reach Europe only by parachute. Looking ahead, the consequence for asylum seekers of treaties seeking to criminalize illegal departure may not only make it all but impossible for asylum seekers to reach safety, but may then classify them as having committed – through their illegal departure – a serious non-political crime prior to entry. It also opens the issue of whether severe penalties for illegal travel, prescribed by international treaty, might themselves establish the basis of a claim for refugee status.¹⁸²

III. UNHCR and the "New Solidarity" of States

When frontline states openly abuse the rights of refugees, few other governments are able to call them to account. Realizing how hopelessly hollow and hypocritical such criticisms would sound, most have chosen silence. Consequently, the international community has begun to acquiesce in a new solidarity. Not a solidarity based on the principle of international burden-sharing and equity, but one that takes on more the character of an alliance against a common enemy: refugees and asylum-seekers.¹⁸³

This paper has reviewed European and European-sponsored inter-state treaties which challenge the scope of refugee protection: the Protocol to the Treaty of Amsterdam, an extensive network of readmission agreements, an EU-wide extradition convention, which removes protection for political offenders and persons whose treatment might be prejudiced for political reasons, and nascent efforts to criminalize the acts of people departing unofficially from their own countries. All illustrate the new solidarity of states against refugees and asylum seekers.

Beyond the invidious individual consequences which may flow from the emerging international law, the new treaty standards place at risk fundamentals of international legal protection. Provisions which are compromised include the right of non-discrimination, access to procedures for the determination of refugee status, and the refugee definition, through an altered interpretation of political crime and thereby of extradition and possibly also of exclusion. In addition, the notions of burden-sharing and "regional solutions" are being perverted by standards which strictly limit EU responsibility for receiving asylum seekers.

The examples discussed here also illustrate the comparative defencelessness of the refugee in international law. When deterrent or punitive measures do not breach the rights of any other state, traditional statist fora for dispute resolution are largely irrelevant. The diplomatic protection which allows states to intervene over the rights of their own nationals can not apply to refugees. Rights issues which in the past

¹⁸² "...where the sanctions for illicit travel abroad are so severe that they effectively negate the fundamental human right to leave and return to one's country, there is the basis for a claim to refugee status." Hathaway, J., *The Law of Refugee Status*, Butterworths, Toronto 1991, p. 40.

¹⁸³ Frelick, Bill, "Changing the Way We Think of Refugees", *The Christian Science Monitor*, 10 June 1997.

stirred third states to take violators to court – Ethiopia and Liberia against South Africa over South West Africa in the International Court of Justice, for example, or the Nordic countries against Greece in the European Court of Human Rights – now seem absent. It has been suggested that the current eager burden-shifting is occurring not only between states, but from states to UNHCR:

States often seek to restrict their obligations to displaced persons and may be imposing extra burdens on UNHCR in order to avoid their own duties. Moreover, where a State mistreats refugees, UNHCR is criticized for not preventing it, rather than the State being acknowledged as responsible under the 1951 Convention.¹⁸⁴

The fact that providing international protection to refugees is, above all, the responsibility of states needs to be re-emphasized. Meanwhile, UNHCR can do something with the ball that has been thrown into its court.

a. The Nature of Refugee Conventions

The 1951 Refugee Convention is a convention of result, not of means. Refugees have certain rights, and states must ensure these are respected through the workings of their domestic law and practice, but are not instructed as to how this shall come about. While conventions of result are "especially common in standard-setting treaties ... and in human rights instruments",

[i]n practice, however, major problems of interpretation and appreciation arise in view of, amongst others, the relative imprecision of the terminology employed in standard-setting conventions... [A] treaty-based standard of treatment may be expressed as an obligation of *conduct*... [T]he principle of *non-refoulement* of refugees, including non-rejection at the frontier, falls within this category of obligation.¹⁸⁵

It is recalled that a feature of human rights treaties in international law is that they create an objective regime rather than establishing reciprocal obligations *between and among* states, and that such treaties, concerning the rights of third parties or individuals, cannot be changed through a subsequent agreement between some of the states parties. A consequence of this, however, is that states parties to such regimes "lack the usual material incentives ... to act against a violator state".¹⁸⁶

The problems of compliance with human rights treaties is a well-documented one. As "external inducements to comply with international human rights law are remote and

¹⁸⁴ Gilbert, Geoff, "Rights, Legitimate Expectations, Needs and Responsibilities: UNHCR and the New World Order", *International Journal of Refugee Law*, Vol. 10, No. 3 (July 1998), pp. 349-88 at p. 351.

¹⁸⁵ Goodwin-Gill, *The Refugee in International Law*, pp. 238-9.

¹⁸⁶ Steiner and Alston, *International Human Rights in Context*, p. 335.

not readily felt",¹⁸⁷ "states create institutions that, to one or another degree, are meant to discipline them".¹⁸⁸ It is in this institutional context that a number of suggestions are presented below.

b. Mechanisms for Maintaining the Relevance and Utility of Refugee Conventions

A commentary on "enforcing" international law reflects:

International organizations ... have developed procedures that allow pressure to be brought against governments that do not comply with recognized standards of conduct. Noteworthy in this regard are the "mobilization of shame" and the application of pressure. Several important multilateral treaties, particularly in the human rights field, require states parties to report on their compliance and to send representatives to appear before treaty-monitoring bodies to explain how they have complied or why they have not. This procedure gives the monitoring bodies opportunities to apply pressure for compliance. Sometimes this is done informally, sometimes more formally in writing.

Many international organizations have a clublike atmosphere for the national representatives to them. If their governments behave in such a way as to hinder the attainment of the organization's goals, other members can make club membership uncomfortable for them in various ways.¹⁸⁹

Compliance, as this view indicates, is likely to result from pressure. There being no international tribunal to determine how far a state has complied with international refugee law, it is suggested that "the search for legal solutions in this field may be akin to trying to find the philosophers' stone".¹⁹⁰ Goodwin-Gill similarly emphasizes the absence of satisfactory legal measures, writing that

the refugee conventions lack effective investigation, adjudication, and enforcement procedures; they can hardly be considered to offer the same opportunity for judicial or quasi-judicial solutions... A cogent theory of responsibility remains to be developed to cover this situation, however, and the legal consequences that may flow from a breach of the international

¹⁸⁷ Henkin, Louis, "International Law: Politics, Values and Functions", 216 *Collected Courses of the Hague Academy of International Law* 13, cited in Steiner and Alston, *International Human Rights in Context*, pp. 350-1.

¹⁸⁸ Steiner and Alston, *International Human Rights in Context*, p. 336.

¹⁸⁹ Kirgis, Frederic L. Jr., "Enforcing International Law", *ASIL Commentary*, ASIL Insight No. 10, 1996.

¹⁹⁰ Gilbert, "Rights, Legitimate Expectations, Needs and Responsibilities", footnote 237.

obligations in question are still unclear.¹⁹¹

He points out, however, that all states have an interest in the protection of the rights in question, and "UNHCR, by express agreement of some States and by the acquiescence of others, is the qualified representative of the 'international public order' in such matters".¹⁹² UNHCR can therefore play a more active role in shaping and utilizing pressure as a counterweight to the denigration of international standards. This would require sustained commitment to certain clear, coherent procedures.

UNHCR's supervisory responsibility has been discussed in Section I of this paper. By analogy with existing human rights mechanisms (treaty bodies, special rapporteurs), the organization is empowered to interpret the law the implementation of which it supervises, but cannot compel states to comply. States are, while not bound by the work of the treaty bodies, obliged to reply to them. A key step for UNHCR in the defence of refugee law would lie in the establishment of a centralized and more authoritative international mechanism for the interpretation of refugee law.

Authoritative Interpretation of Treaty Standards

The Convention's reliance on good faith determination of refugee status by States parties contributes to its potential marginalization in an era of retrenchment... States presently retain the ability to undermine the Convention through intolerant implementation. Even more seriously, States are finding it possible to erect onerous barriers of access to asylum-seekers without breaching any specific duty under the Convention. This trend is the source of legitimate and grave concern to refugee advocates and the UNHCR.¹⁹³

In the absence of human rights institutions and processes,

only state governments and state institutions would be available to meet the need for development, monitoring and enforcement of norms. Of course one hopes that most states would take their obligations seriously, internally enforcing their treaty obligations through their own equivalent constitutional norms or through specific internalization of treaty norms. One also knows, however, that many states will not so act, and that some among them will engage in gross and systematic abuses. From the international perspective, human rights norms would be freely floating rather than anchored in any international regime, dependent for their effectiveness on the willingness of treaty parties to apply pressures to delinquent states.¹⁹⁴

¹⁹¹ Goodwin-Gill, *The Refugee in International Law*, p. 218.

¹⁹² *Ibid.*

¹⁹³ Fitzpatrick, J., "Revitalizing the 1951 Refugee Convention", *Harvard Human Rights Journal*, Vol. 9 (Spring 1996).

¹⁹⁴ Steiner and Alston, *International Human Rights in Context*, p. 335.

At present, the international legal regime for development, monitoring and enforcement of norms falls somewhere between amorphous and non-existent. UNHCR's unilateral efforts at persuading states find support in the activism of many international non-governmental organizations. These efforts are *ad hoc*, can appear selective, and lack structure as well as the distinctive stamp of authority. To some extent, the Executive Committee of UNHCR and its Conclusions, and their UN General Assembly avatars, contribute to the process of developing refugee law. Underutilized formal reporting processes, and the possibility of seeking an advisory opinion, wait in the wings.

UNHCR's interpretations of key provisions of the 1951 Refugee Convention and 1967 Protocol have been presented in individual cases, in its *Handbook on Procedures and Criteria for Determining Refugee Status*, to the Executive Committee, and, crucially, in rare *amicus* briefs for higher court cases. These interpretations have not always persuaded the courts, of course. In an eloquent and poignant commentary on the US Supreme Court decision in *Sale v. Haitian Centers Council, Inc.*, Professor Louis Henkin, who took part in the drafting of the 1951 Convention as a member of the US delegation, wrote that

The Court's interpretation of the treaty is difficult to understand. The UN High Commissioner for Refugees, charged with protecting refugees under the Convention, rejected the interpretation the Court adopted. It is incredible that states that had agreed not to force any human being back into the hands of his/her oppressors intended to leave themselves and each other free to reach out beyond their territory to seize a refugee and to return him/her to the country from which he/she sought to escape.

For the second time in two years the Supreme Court has adopted an eccentric, highly implausible interpretation of a treaty. It has interpreted those treaties, I am persuaded, not as other states parties would interpret them, not as an international tribunal would interpret them, not indeed as the US Supreme Court would have interpreted them earlier in our history when the judges took the law of nations seriously, when they appeared to recognize that in such cases US courts were sitting in effect as international tribunals. Is it not time for the US Supreme Court to think afresh about its role in determining and applying international law and obligations, and to assure that they are faithfully complied with?

Of course, the Supreme Court's interpretation of the Convention does not end the matter. That interpretation may now apply in the United States for purposes of domestic law but it is not necessarily what the Convention means as a matter of international law. The UN High Commissioner for Refugees has rejected that interpretation. Other states parties are entitled to object to it and to insist that the United States abandon it. Another party to the Convention may bring a dispute relating to

that interpretation to the International Court of Justice. The UN General Assembly may request an advisory opinion on the question from the ICJ or authorize another UN organ to request such an opinion.¹⁹⁵

Henkin perhaps unwittingly underlines that the current development of international refugee law relies largely on decisions of national courts or administrative authorities, and not on international interpretation, saying that the Supreme Court's decision "may now apply in the United States for purposes of domestic law *but it is not necessarily what the Convention means as a matter of international law*".

An international interpretative mechanism is essential both to the positive development of international refugee law, and to the effective supervision of states' application of the Convention and other instruments. Although UNHCR has always undertaken interpretation of the relevant instruments, the framework for doing so remains somewhat ambiguous, notably in respect of its authority *vis-à-vis* the international community and its standing within the organization itself. There is no doubt that "in-house" interpretation can play an important role in the development of international law:

The *travaux* have always made clear that "in the course of the operations from day to day of the various organs of the organisation [i.e. the United Nations] it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular function". The repeated practice of the organ, in interpreting the treaty, may establish a practice that, if the treaty deals with matters of general international law, can ultimately harden into custom.¹⁹⁶

Human rights institutions can thus take on

a life of their own... If in some major respects it depends on the states parties "will", in other major respects it possesses autonomy. Thus an institution or organ may become a significant participant in international relations, adding to the traditional system of sovereign states and qualitatively changing the nature of international life.¹⁹⁷

The direction in which UNHCR has evolved, however – towards being the pre-eminent emergency relief body of the United Nations, and away from its role in international law – may now make exclusive reliance on "in-house" interpretation problematic, for several reasons. UNHCR's institutional competence for the legal interpretation function will need firm reassertion. Even though UNHCR retains within its staff the legal competence for such interpretation, it is not perceived

¹⁹⁵ Henkin, Louis, "Notes from the President", *ASIL Newsletter*, September-October 1993.

¹⁹⁶ Higgins, *Problems and Process*, p. 25.

¹⁹⁷ Steiner and Alston, *International Human Rights in Context*, p. 331.

internationally as playing this role. Secondly, the interpretation of legal standards is inextricably bound up with standards applied in UNHCR's own operations: UNHCR is "an actor in the relevant field whose actions count in the process of law formation".¹⁹⁸ As such, UNHCR's operational activities should not only conform to, but should seek to enhance, international protection standards.

The pragmatist school argues that "UNHCR's actions are often severely constrained by the political realities of the context in which it is operating".¹⁹⁹ If the consequence is the organization's inability to live its principles, as is implicitly acknowledged, the dual functions of supervising standards and of heavy operational involvement, may be incompatible. On this basis,

[i]n extreme cases, principles and standards can seem almost academic in deciding action: the overriding considerations in providing such physical protection as is possible are practical and relative, not absolute.²⁰⁰

This reflects a genuine dilemma, which has also been described in terms of the need to choose the "least-worst option". It is suggested, however, that there have been many instances since the early 1990s where UNHCR's action has been decided without thorough consideration of the applicable principles and standards. A perceived political constraint to authoritative supervision of standards may be found in the organization's heavy donor dependence. This is also closely linked to the repositioning of UNHCR in a predominantly emergency relief role since the early 1990s.

A Committee on Refugee Protection?

In light of these constraints, a mechanism for the authoritative interpretation of international refugee law would benefit from some degree of independence from UNHCR. It also requires the participation or engagement of individuals with experience and high standing in international law, able to command the widespread respect of governments. The traditional mechanism is a human rights treaty body, of which six currently exist.²⁰¹

The existing treaty bodies require states parties to submit reports on measures taken to give effect to the provisions of the treaty in question, and to report progress achieved, as well as to signal any difficulties in implementation. The reports are studied by the treaty body (inevitably named the Committee), which also receives "parallel" reports

¹⁹⁸ Goodwin-Gill, *The Refugee in International Law*, p. 216.

¹⁹⁹ See, for example, Morris, Nicholas, "Protection Dilemmas and UNHCR's Response: A Personal Dilemma from within UNHCR", *International Journal of Refugee Law*, Vol. 9, No. 3 (July 1997), p. 492.

²⁰⁰ *Ibid.*, p. 494.

²⁰¹ The Human Rights Committee (for the Covenant on International Civil and Political Rights); the Committee on Economic, Social and Cultural Rights; the Committee against Torture; the Committee on the Rights of the Child; the Committee on the Elimination of Racial Discrimination; and the Committee on the Elimination of Discrimination against Women.

from independent sources, including NGOs. In public sessions, the Committee poses questions to state representatives, then writes up its findings, called General Comments. The General Comments are an important aid to treaty interpretation.²⁰²

By law, the treaty bodies are to be composed of experts serving in their personal capacities. They are, however, appointed by governments, a fact which has in some cases undermined the selection process. States are required to report every five years on average. Many criticisms can be levelled at the treaty bodies, including the "incomplete coverage, abstraction and formality that lead states to stress their unenforced constitutional or statutory provisions rather than to offer a realistic description of practices; [and] great delays in filing reports".²⁰³ Treaty bodies have taken innovative measures to address some of their shortcomings, however, including unilateral examination of countries which have failed to submit reports, and on-site missions. Referring to the Human Rights Committee, one author notes the

obvious need, confirmed by practice, to fill in many gaps created by the wording of the Covenant and the Optional Protocol. First, the question arises as to the Committee's "implied" or "inherent" powers. At the very least, the functions explicitly given to it may imply certain steps which are not expressly mentioned. On this basis, the Committee has often taken such action as has seemed useful for its work.²⁰⁴

Five of the six treaty bodies were established by the treaties themselves, while the sixth was set up by the UN's Economic and Social Committee (ECOSOC). The International Covenant on Economic, Social and Cultural Rights provides that states parties' reports, which "may indicate factors and difficulties affecting the degree of fulfilment of obligations", are to be submitted to the UN Secretary-General, who transmits them to ECOSOC for consideration. ECOSOC may seek additional reports from the UN specialized agencies, and is then to transmit the reports to the Commission on Human Rights "for study and general recommendation or ... for information", and may also submit to the General Assembly "reports with recommendations of a general nature and a summary of the information received".²⁰⁵ The decision not to place these responsibilities within ECOSOC itself, but to establish a specialized Committee, was made by ECOSOC.

The 1951 Refugee Convention predates the first human rights convention to establish a treaty body – the 1966 Convention on the Elimination of All Forms of Racial Discrimination – by fifteen years. Its reporting requirements are skeletal and inchoate, but unmistakable. States parties assume an obligation to cooperate with UNHCR and to facilitate its duty of supervising the application of the provisions of this

²⁰² See, for example, the UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (1998), p. 680.

²⁰³ Steiner and Alston, *International Human Rights in Context*, p. 506.

²⁰⁴ Opsahl, Torkel, "The Human Rights Committee" in Philip Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal*, Clarendon Press, Oxford, 1992, pp. 369-443; an extract is published in Steiner and Alston, *International Human Rights in Context*, p. 553.

²⁰⁵ International Covenant on Civil and Political Rights, Articles 19 and 21.

Convention. To enable the Office of the High Commissioner to make reports to the competent organs of the United Nations, States also undertake under Article 35(2)

to provide [it] in the appropriate form with information and statistical data requested concerning:

- (a) the condition of refugees,
- (b) the implementation of this Convention, and
- (c) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

UNHCR has approached this reporting requirement very tentatively. In 1989, the Executive Committee requested the High Commissioner to prepare a more detailed report on the implementation of the Convention and Protocol, calling on states parties to facilitate the task through timely provision of detailed information, when requested.²⁰⁶ UNHCR duly addressed a questionnaire to states parties, to which a minority responded. In 1991 the Executive Committee reminded states to reply, and, acknowledging the value of such reporting, requested UNHCR "to accord public access to States' replies to the above-mentioned questionnaire with the agreement of the States concerned".²⁰⁷

Such replies as were received did not form the basis of UNHCR's annual report to ECOSOC, and the questionnaire experiment has not been repeated. UNHCR's reports to ECOSOC cover the spectrum of Office activities, with a focus on operations. The protection chapter draws attention to current concerns in a comparatively brief and general way.

Nothing in the wording of Article 35 of the 1951 Refugee Convention would preclude the establishment of a special body to review states' reports. UNHCR could seek more vigorously to obtain reports from states, and transmit these with recommendations to ECOSOC. Alternatively, UNHCR could transform its own reporting to ECOSOC so as to shine a light on situations faced by refugees and asylum seekers. More profound reporting of this type could be undertaken either country by country, thematically, or both. If a more independent authoritative mechanism is regarded as desirable, as suggested above, ECOSOC could designate a competent and more specialized sub-group to review such reports, as it did in setting up the Committee on Economic, Social and Cultural Rights. UNHCR could itself propose the establishment of such a group.

In the interim, UNHCR could consider setting up an informal consultative group composed of eminent jurists and experts to assist the Office in the confidential process

²⁰⁶ Executive Committee, Conclusion No. 57 (XL) (1989), *Implementation of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*.

²⁰⁷ Executive Committee, Conclusion No. 65 (XLII), (1991), *General*.

of scrutinizing states' reports and preparing the comments which would accompany the transmission of those reports to ECOSOC.

Reporting Requirements

Under Article 35, states are required to present "information and statistical data" on their implementation of the refugee protection instruments. The obligation to report to the competent organs of the UN belongs to UNHCR, however.

In 1996-1998, consultations took place in Geneva between a small group of scholars and government experts under the auspices of UNHCR's Division of International Protection. The agenda included the issue of UNHCR supervision and Article 35 of the 1951 Refugee Convention. In general, government participants expressed reluctance to assume additional formal reporting requirements, of the type required by the treaty bodies. According to the report of the meeting,

[m]ost government participants felt that it would be more feasible to consider sharing UNHCR's annual protection reports and, on this basis, pursuing an institutionalized dialogue. It was felt that periodic meetings would undesirably politicize the process. There was some discussion about the relationship between UNHCR's humanitarian assistance function, its dependency on donor countries and its supervisory responsibility, with a suggestion that the supervisory role be exercised by an independent body or carried out in a way similar to the human rights treaty monitoring system of the United Nations. Others provided examples which indicated that donor dependence did not impinge on UNHCR's supervisory responsibility, however, and that in view of UNHCR's operability, there were clear advantages in keeping this function within UNHCR. Some participants pointed out that supervision by an international institution was in the interest of States, since a uniform eligibility practice would ensure equitable responsibility sharing and prevent secondary movements. While most government participants felt that UNHCR should proceed cautiously in this area, *they nevertheless encouraged UNHCR to use the existing legal framework and its own discretion to enhance its supervisory responsibility through dialogue with States, for instance, and/or in terms of reporting to the Executive Committee or to the General Assembly through the Economic and Social Council.*²⁰⁸

²⁰⁸ UNHCR, Division of International Protection, *Progress Report on Informal Consultations on the Provision of International Protection to All Who Need It*, Doc. EC/47/SC/CRP.27, 30 May 1997, paras. 7-9 (emphasis added).

States' preference to avoid additional international reporting requirements could be predicted; it is encouraging that they invited UNHCR to consider alternatives, including the use of UNHCR protection reports. At present, these are treated as internal to the Office. A variant on that formula is suggested in an internal UNHCR memorandum, which summarizes the main legal problems faced by refugees and asylum seekers in Germany, and UNHCR's interpretation of key Convention articles. Emphasizing the continued importance and relevance in Germany of the treaty standards of the 1951 Refugee Convention, the memorandum notes that "somewhat surprisingly, very little progress has been made concerning the interpretation of treaty standards since [Nehemiah] Robinson and Paul Weis have written their respective Commentaries on the Convention". This analysis by a UNHCR Branch Office (which does not, however, include Article 1 of the Convention defining a refugee) is just seven pages long and is a model of clarity, bringing out aspects of national law and practice which are inconsistent with Convention standards.²⁰⁹

This type of reporting would not place on governments the initial onus of preparing written material. If prepared with care, defended by the government concerned, commented on by acknowledged experts, and in due course made public, the body of human rights treaty interpretation would be augmented. A report review mechanism of this nature, with support provided by UNHCR, would have specific beneficial effects beyond its authoritative interpretation of the applicable law. It would:

- generate heightened scrutiny of country practices, as reports would at some stage become public;
- professionalize the standard of review and of comment, and make this a matter of record rather than an *ad hoc* practice;
- help prevent the effective atrophy of certain articles of the Convention, which are close to desuetude (arguably the case with provisions on labour and on naturalization and assimilation); and finally
- facilitate UNHCR's position *vis-à-vis* breaches of refugee law, which the organization has occasionally felt compelled to ignore or downplay.

As the consultations cited above suggest, it is open to UNHCR, to a considerable extent, to take the initiative in adopting creative measures in implementing its mandate for supervision. No additional legal standards or provisions would necessarily be called for to enable the setting up of an effective supervisory mechanism.²¹⁰

²⁰⁹ Walter Brill, UNHCR branch office, Bonn, *1951 Convention Standards and their Application in Germany*, ref. 532-97/1528, 28 May 1997.

²¹⁰ Summary reports of the "Gap" consultations have been published for UNHCR's Standing Committee of the Executive Committee as *Progress Report on Informal Consultations on the Provision of International Protection to All Who Need It*; see footnote 209 above.

Protest and Fact Finding

One author proposes "protest" and "a call for an enquiry" as useful mechanisms of international claims.²¹¹ For decades, UNHCR has utilized the mechanism of the formal protest, most often in the form of a *note verbale*, but also through personal visits by senior UNHCR officials and the handing-over of an *aide-mémoire*. At one time, this type of protest was a routine response to any incident of *refoulement* of which the agency became aware. Since the early 1990s, UNHCR has had recourse to high-profile public statements critical of actions which place refugees or asylum seekers in danger. Public statements have not necessarily been accompanied by formal diplomatic protests. Overall, the use of formal protest as a response to *refoulement* of refugees and asylum seekers appears to have decreased. UNHCR has frequently utilized formal communication which stops short of protest, including, for instance, on the Spanish proposal to revise the Treaty of European Union as cited above.

Where fact-finding is concerned, the organization conducts inquiries into its own practices, through its Inspection and Evaluation Unit. It has by and large not commissioned independent fact-finding in the manner of Special Rapporteurs appointed by the UN Human Rights Commission,²¹² although a few examples exist. However, a 1995 publication on the detention of asylum seekers in Europe included summary reports of state practice and of relevant human rights standards,²¹³ and a study on temporary protection, giving a relatively brief, authoritative, examination of this issue in light of applicable human rights standards,²¹⁴ provided key background documentation for the consultations of scholars, government experts and UNHCR mentioned above. There are no mandate-related reasons to prevent UNHCR from initiating fact-finding enquiries, which might then also form the subject of a thematic review by an independent Committee.

The International Court of Justice: Advisory Opinions and Dispute Settlement

Henkin raises the possibility of involving the International Court of Justice in regard to interpreting the 1951 Refugee Convention, through its dispute settlement mechanism or through a request for an advisory opinion. Under the UN Charter, the General Assembly or the Security Council may request the Court to give an advisory opinion on any legal question. The Charter states:

²¹¹ Goodwin-Gill, *The Refugee in International Law*, p. 218.

²¹² Steiner and Alston, *International Human Rights in Context*, write at p. 391: "The notion that the international community will seek to 'find facts' that may not accord with, or even flatly contradict, those provided officially by a sovereign government would have been virtually unthinkable not so many years ago. For example, when the 1907 Hague Convention relating to international commissions of inquiry was adopted, its scope was carefully limited so as to cover only 'disputes involving neither honour nor essential interests.' Today, international fact-finding is an accepted and relatively common activity. It is carried out not only by a large number of international organizations but also by individual states."

²¹³ "Detention of Asylum Seekers in Europe", *European Series*, Vol. 1, No. 4 (October 1995), pp. 1-231.

²¹⁴ Kälin, Walter, "Towards a concept of temporary protection" (Bern, November 1996).

Other organs of the United Nations and specialized agencies, *which may at any time be so authorized by the General Assembly*, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.²¹⁵

It has been suggested that in light of UNHCR's mandate to provide international refugee protection, and the fact that refugees do not have the diplomatic protection available to aliens abroad, "it is arguable (and no more) that UNHCR would have the right to seek an Advisory Opinion for their benefit".²¹⁶ It is nonetheless probable that UNHCR would require authorization through ECOSOC. There is no evident reason why authorization would be refused in respect of a well-formulated issue of law.

Dispute settlement (which should be distinguished from the issue of authoritative interpretation) may be required when the non-application of a treaty creates a dispute between two or more of the parties. One expert makes the point that "under the general rules of public international law, any State or international organization as a rule has the right to define legal situations of its concern; accordingly, a treaty may be held by some States or organizations to apply while others think it does not".²¹⁷ He notes encouragingly that "certain statements made at the Vienna Conference ... indicate that an international organization entitled to act on behalf of the international community might also be entitled to challenge the validity of a treaty."²¹⁸ Although the 1951 Refugee Convention provides for disputes to be settled by the Court, only states can be parties to contentious cases. It may be open to UNHCR, after the initiation of proceedings,

to make its views known to the ICJ in any relevant case, either of its own volition (e.g. in the *Legality of Nuclear Weapons Case*, Advisory Opinion, General List No. 95, 8 July 1996, the ICRC sent a letter direct to the President of the Court giving its views on the matter), or in response to a request by the ICJ under Article 66 to furnish it with information on the question.²¹⁹

The likelihood of disputes over the interpretation of the 1951 Refugee Convention – over the human rights of refugees – between parties to the refugee instruments appears remote. Unfortunately, only the resolution of inter-state disputes are provided for by those instruments. While states in Europe have taken each other to task, and to court, over the treatment by states of their own nationals using the machinery of the European Convention on Human Rights, no state has yet challenged another judicially on the treatment of third-country nationals.

²¹⁵ UN Charter, Article 96 (emphasis added).

²¹⁶ Gilbert, "Rights, Legitimate Expectations, Needs and Responsibilities". Quotation taken from a draft of this article shared with the author.

²¹⁷ Reuter, *Introduction to the Law of Treaties*, p. 132.

²¹⁸ *Ibid.*, p. 157.

²¹⁹ *Ibid.*

The Executive Committee

UNHCR has relied heavily on the annual Conclusions on International Protection endorsed by its Executive Committee. Since 1977, these Conclusions have contributed to formalizing non-binding consensus (albeit, until recently, of no more than fifty states) on international protection standards not addressed in the instruments themselves. Through the Conclusions, the Executive Committee has helped keep the legal standards up-to-date and relevant to current problems.

The non-binding Executive Committee Conclusions are often described as being "soft law", thus indicative of some degree of consensus. In the terms used to describe General Assembly resolutions, they are "manifestly not binding, [but] not without legal effect".²²⁰ The Executive Committee is clearly part of the process of the development of standards, and in some cases, the Conclusions reflect existing treaty provisions or customary international law. One author notes that they were formulated primarily with a view to reaching solutions.²²¹

Up until the early 1990s, only a few Conclusions (which are always drafted and circulated by UNHCR) generated prolonged and acrimonious debate.²²² The majority were adopted without demur. In recent years, obtaining agreement on draft Conclusions within the expanded Executive Committee membership has been fraught with difficulty. The closed sessions of the so-called Friends of the Rapporteur, at which members of government delegations agree on text, have seen heated dispute, with some members seeking significant retreats from previously accepted language, including efforts to delete calls for accession to the refugee instruments and to "local integration" as a durable solution; to deny that rejection at the frontier is a breach of *non-refoulement*; and to formulate Conclusions in the language of anti-refugee rhetoric. (In 1997, one government proposed that "ensuring international protection to those who need it" be modified to read "ensuring international protection *only* to those who need it".)

At times, states have sought to introduce wording inconsistent with human rights obligations. As their delegations do not, in the main, include international legal expertise, such observations fall to UNHCR, which naturally appears to be engaged in special pleading. Speaking of the Security Council, Higgins has argued the importance of authoritative pronouncements on international law being "made with care, upon proper legal advice, with an understanding of the issues – and not merely as an almost casual description for political purposes".²²³ The same should apply, *mutadis mutandis*, to the Executive Committee, which is at present unlikely to contribute to the positive development of international legal standards. Its role in this regard – and UNHCR's expectations – should be more modest.

²²⁰ Higgins, *Problems and Process*, p.21, discussing the International Court of Justice Advisory Opinion in the *Namibia* case.

²²¹ Goodwin-Gill, *The Refugee in International Law*, p. 234.

²²² See UNHCR Executive Committee *Conclusions on Military or Armed Attacks on Refugee Camps and Settlements*, 1982-87.

²²³ Higgins, *Problems and Process*, p. 181.

Linkage with the International Law of Human Rights

How can refugee law survive in Europe? For one thing, it is clear that the requisite link between refugee law and human rights law is anything but firm... [T]he necessary universal approach has been overridden by the dominant national interests of the West. From a conceptual, normative and strategic point of view, refugee law must therefore become again a part of human rights law.²²⁴

Although refugee law is a specialized field, it has to often come to be regarded as a separate set of rights – smaller and more limited – rather than representing as a set of *additional* protections for persons with increased vulnerability. Governments have maintained the notion that refugee rights are the full ration for refugees. Closer linkage between refugee law and human rights is needed, not least to underline that "certain types of international obligations in multilateral treaties cannot be suspended, such as ... obligations protecting individuals irrespective of their nationality".²²⁵

Over twenty years ago UNHCR's Director of International Protection wrote:

In addition to specific refugee instruments there are wide ramifications in a great variety of treaties which are not of specific concern to refugees but the provisions of which are nevertheless relevant to international protection. The safeguard of the legal position of refugees in such instruments is essential, lest the legal position of the refugee be allowed to deteriorate relatively speaking, because he would not share in the continual progress of treaty law and the improvement of legal standards.²²⁶

In view of the lack of judicial supervisory mechanism with respect to the 1951 Refugee Convention, it has been proposed that the interpretation of comparable *non-refoulement* principles by other treaty bodies be studied, notably the work done by the Committee Against Torture and by the European Commission and Court of Human Rights.²²⁷ Similarly, as the International Covenant on Civil and Political Rights is the instrument which guarantees the right to leave one's country and to return, this instrument "must be the focus of any attempt to analyze the contemporary content of the right [which] ... has been the subject of formal and informal interpretation by the Human Rights Committee".²²⁸

²²⁴ Marx, "Responsibility for Determining Refugee Claims", p. 384.

²²⁵ Reuter, *Introduction to the Law of Treaties*, p. 154.

²²⁶ Jaeger, Gilbert, *Status and International Protection of Refugees*, International Institute of Human Rights, Ninth Study Session, July 1978, para. 184.

²²⁷ Marx, "Responsibility for Determining Refugee Claims", p. 394.

²²⁸ Hannum, *The Right to Leave and Return*, p. 24.

The human rights approach must be based on the entire system of human rights and derive from States' binding obligations under human rights law for the protection of refugees. Thus it is stressed that the provisions of the 1951 Convention relating to *non-refoulement*, expulsion and illegal entry are in themselves sufficient to demonstrate the basic significance and the continuing relevance of the Convention as an international human rights instrument for the protection of refugees. *The concept of protection can be understood to mean the act of respecting and preserving basic human rights, such as the core rights set out in the 1966 Covenants.*²²⁹

Human rights can assist in providing answers to vexing issues of responsibility-sharing, including that of countries of origin, since the human rights instruments are founded in the concept of state responsibility. One author writes:

Placing refugee law into the system of human rights may, therefore, facilitate the development of a solution to the question of State responsibility, and also entail the development of more satisfactory principles and agreements relating to the question of third countries... [I]f an agreed solution can be found to the question of State responsibility, it would provide for a clear understanding of the relations among, and the respective responsibilities of, the State of origin, the State of asylum and any other third States.²³⁰

As such, there are numerous arguments in favour of strengthening an understanding of the place of refugee law within the broader field of human rights.

c. An International Legal Strategy

The international legal aspects of refugee protection have attracted significantly reduced attention since the early 1990s, not least due to the emphasis on and interest in humanitarian assistance aspects of massive population movements and of conflict, and political action which might contribute towards conflict prevention or resolution. One author notes that "undoubtedly, a transformation of an approach to a refugee strategy includes addressing the observance of international law, including refugee law".²³¹ He writes:

[I]t is necessary that States, individually and collectively, ensure that any interpretation of a strategy is based on principles and norms of international law, including refugee, human rights and

²²⁹ Marx, "Responsibility for Determining Refugee Claims", p. 387 (emphasis added).

²³⁰ *Ibid.*, p. 386.

²³¹ Kourula, Pirkko, *Broadening the Edges: Refugee Definition and International Protection Revisited*, Martinus Nijhoff Publishers, The Hague, 1997, p. 351.

humanitarian law. An agreed strategy for the 21st century could reinforce the role of law and clarify the responsibilities between States and UNHCR, including UNHCR's role as an "ombudsman" for refugees.²³²

It would be highly desirable for UNHCR to formulate an international legal strategy to enhance respect for the human rights of refugees. Key components could include the establishment of a Committee, or an advisory body of Friends, a revitalized use of existing reporting mechanisms both internally and to ECOSOC, the use of fact-finding procedures and a closer linkage with existing human rights law and mechanisms. At the same time, UNHCR should take care not to reinforce, through speeches and policy statements, the notion that the 1951 Refugee Convention is moribund and inflexible, a creation of the Cold War. Fitzpatrick writes:

[T]he Refugee Convention is not obsolete, but ... is incomplete, as it has been from the outset... Only by progressive interpretation of the Convention and by recognition of extra-conventional norms has the international community been able to patch together a minimally adequate regime for the protection of forced migrants... [T]he Refugee Convention is no more ill-suited to this age than to the one in which it was founded... A crisis exists not because the Convention fails to meet the needs of asylum-seekers, but because it meets them so well as to impose burdens that are no longer politically tolerable to the States parties involved.²³³

In approaching international law and states' fulfilment of their treaty obligations in a manner at once more formal and more open, UNHCR should seek, as do the treaty bodies, "a non-adversarial relationship with States parties based on the concept of a 'constructive dialogue'".²³⁴ Achieving this relationship, and acceptance of a more authoritative central body in respect of the interpretation and implementation of refugee law, will not come about overnight:

The current international human rights regime ... represents a politically acceptable international mechanism for the collective resolution of principally national problems. Because perception of the problem rests on a politically weak sense of *moral* interdependence, however, there is no powerful demand for a stronger regime: even policy coordination seems too demanding, and there is little reason for states to accept international monitoring, let alone authoritative international decision making... This is not to belittle the importance of international procedures – the more effective the monitoring and enforcement procedures, the stronger the regime and the more likely it is to

²³² *Ibid.*, p. 340.

²³³ Fitzpatrick, J., "Revitalizing the 1951 Refugee Convention", p. 231.

²³⁴ Steiner and Alston, *International Human Rights in Context*, p. 354.

achieve its objectives – but, rather, to stress the fact that regime procedures largely reflect underlying political perceptions of interest and interdependence. Compliance with regime norms rests primarily on authority and acceptance, not force or even enforcement.²³⁵

International law, including refugee law, has never been divorced from pragmatism, let alone from states' perceptions of their own interests. As one international legal expert has remarked, the law – any law – "is inevitably bound up with the accommodation of the different interests of states".²³⁶ While the notion of balancing refugee protection with states' legitimate interests has enjoyed recent vogue, UNHCR's primary role is to protect the interests of refugees, as part of the broader panoply of measures and actors in the field of human rights. To do so, it will need to reinforce the authority of applicable international law.

International refugee law rarely determines how governments respond to involuntary migration. States pay lip service to the importance of honouring the right to seek asylum, but in practice devote significant resources to keeping refugees away from their borders. Although the advocacy community invokes formal protection principles, it knows that governments are unlikely to live up to these supposedly minimum standards. The UNHCR shows similar ambivalence about the value of refugee law. It insists that refugees must always be able to access dignified protection, even as it gives tacit support to national and intergovernmental initiatives that undermine this principle. So long as there is equivocation about the real authority of international refugee law, many states will feel free to treat refugees as they wish, and even to engage in the outright denial of responsibility towards them.²³⁷

The High Commissioner has emphasized: "[R]esponses by first world countries to migratory pressures cannot be exclusively, or even mainly, based on measures of control and exclusion. This will not solve the problem and risks further undermining fundamental refugee protection standards."²³⁸ Unfortunately, the state interests which converged after the Second World War, when international politics and national labour markets welcomed a flow of refugees from East to West, now converge in preventing the arrival of asylum seekers and migrants, erecting mechanisms for their quick return, reducing their chances of being recognized as refugees, and even preventing their departure from their countries of origin. International law is pressed into service to suit the current convergence of interests, and it is a characteristic of

²³⁵ Donnelly, Jack, "International Human Rights: A Regime Analysis", *Int'l. Org.*, Vol. 40 (1986), p. 599, quoted in Steiner and Alston, *International Human Rights in Context*.

²³⁶ Brownlie, I., *Principles of Public International Law*, 5th edn., Clarendon Press, Oxford, 1998, p. 29.

²³⁷ Hathaway, J., "Can International Refugee Law be Made Relevant Again?", *World Refugee Survey 1996*, US Committee for Refugees, Washington, D.C., p. 14.

²³⁸ Ogata, *Statement at the Inter-Governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia*, Washington, 6 May 1997.

international law that "violations of law can lead to the formation of new law".²³⁹ One author notes the "growing popularity of evasive strategies by States seeking to avoid their obligations without committing direct breaches of Article 33", which is the element – *non-refoulement* – to which "traditional asylum States are reducing refugee law".²⁴⁰ As long as noncompliance is not substantial, however, there is scope for a UNHCR strategy which not only avoids the consolidation of bad law, but actively develops a body of protective and rights-consistent refugee law.

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²³⁹ Higgins, *Problems and Process*, p. 19.

²⁴⁰ Fitzpatrick, "Revitalizing the 1951 Refugee Convention", pp. 237-8.

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