

6-1-1998

European Union Policy on Asylum and Its Inherent Human Rights Violations

Sheldon Leader

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

Recommended Citation

Sheldon Leader, *European Union Policy on Asylum and Its Inherent Human Rights Violations*, 64 Brook. L. Rev. 1217 (1998).
Available at: <https://brooklynworks.brooklaw.edu/blr/vol64/iss4/3>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

NOTES

EUROPEAN UNION POLICY ON ASYLUM AND ITS INHERENT HUMAN RIGHTS VIOLATIONS

INTRODUCTION

Recent world events in Europe have triggered a massive influx of people into the European Union ("E.U." or "the Union", formerly "European Community" or "E.C.").¹ This immigration crisis has been augmented and perpetuated by the German reunification, the collapse of the Soviet Union, the Yugoslavian and Albanian civil wars, the unemployment crisis, and the unstable free-market economies resulting from the transition from communism to democracy.² Over the past year, several Member States of the European Union, including Germany, Italy, Britain, and the Netherlands, have experienced significant increases in asylum applications.³

¹ The European Union was established in 1992 with the signing of a treaty in Maastricht, the Netherlands. See TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, O.J. (C 224) art. A, 31 I.L.M. 247, 255 (1992) [hereinafter MAASTRICHT TREATY].

² In Europe, "immigration" often translates into "asylum," in part because more data is available on asylum applications than on illegal entries. See Resolution on the Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies, COM(94)23 at 5, para. 13.

³ See *EU Ministers Back Task Force To Coordinate Asylum Policy*, AP WORLDSTREAM, Dec. 4, 1998, available in LEXIS, News Library, Aprgrmn File. In 1998, asylum applications in Britain rose 30% compared to 1997, standing at 33,000 for the first 10 months of 1998. See *id.* Similarly, for the same time period, asylum applications in Belgium were up by 57%. See *id.* In November 1998 alone, Germany, the largest recipient nation with almost 30% of the European Union's asylum cases, registered 10,800 new demands. See *id.* Of the 12,208 asylum demands processed in November 1998 by the German immigration and border control authorities, only 423, or 3.5%, were accepted. See *id.*

Throughout the 1990s, Western Europe has been marked by an out-of-control asylum system.⁴ The flood of asylum applications required the European Union to develop an asylum policy, the timing of which coincided with the economic integration of the European Union. Therefore, the need to accomplish the political and economic goals of the European Union, which include the "free movement of persons, transparency of the labor market, and political unity," supported the decision to harmonize immigration and asylum policies.⁵ At the present time, however, while the progress of European integration is self-evident, the development of E.U. asylum policy continues to lack a "lowest common denominator"⁶ of restrictive measures and is shadowed by uncoordinated immigration and asylum policies.

Specifically, E.U. Member States have been unable to agree on how to implement the free movement of persons at the Union level, although progress has been achieved at the regional level in the form of intergovernmental agreements. Two such notable documents are the Schengen⁷ and Dublin⁸ Conventions, in which Member States have agreed to impose a series of restrictions and barriers on access to asylum seekers.⁹ Common mechanisms include the imposition of new visa requirements, carrier sanctions that impose fines on airlines that accept passengers with improper documentation, denial of entry at frontiers, arrangements to return asylum applicants to countries through which they initially travel, refusal to allow

⁴ See Joan Fitzpatrick, *Flight From Asylum: Trends Toward Temporary "Refuge" and Local Responses to Forced Migrations*, 35 VA. J. INT'L L. 13, 37 (1994).

⁵ Kenneth Regensburg, Note, *Refugee Law Reconsidered: Reconciling Humanitarian Objectives With The Protectionist Agendas Of Western Europe And The United States*, 29 CORNELL INT'L L.J. 225, 235-38 (1996).

⁶ Jacqueline Bhabha, *European Harmonization Of Asylum Policy: A Flawed Process*, 35 VA. J. INT'L L. 101, 101-02 (1994).

⁷ Schengen Agreement on the Gradual Abolition of Checks at Their Common Borders, June 14, 1985, Belg.-Fr.-F.R.G.-Lux.-Neth., 30 I.L.M. 68 (1991) (Convention applying the Agreement enacted June 19, 1990) [hereinafter Schengen Agreement and Convention].

⁸ Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, June 15, 1990, Fr.-F.R.G.-Port.-Spain-Belg.-Lux.-Neth., 30 I.L.M. 425 (1991) [hereinafter Dublin Convention].

⁹ See Schengen Agreement and Convention, *supra* note 7; see also Dublin Convention, *supra* note 8.

entry to asylum seekers who appeal the decision to remain in a given country, and narrow interpretation of refugee standards by restricting asylum to, for example, those who fear individual persecution by state agents only.¹⁰

This Note analyzes how some of the restrictive measures of the Schengen and Dublin Conventions directly conflict with and breach Member States' duties under both the Geneva Convention as well as other international human rights instruments. Part I of this Note sets forth important principles of refugee law and humanitarian rights. It also analyzes the "refugee" definition of the 1951 Convention Relating to the Status of Refugees¹¹ and discusses signatories' obligations under such Conventions.

Part II examines the Schengen and Dublin Conventions, which comprise a significant portion of the body of refugee law developed by the European Union. An important common principle of both the Schengen and Dublin Conventions is that States legitimately can rely upon each other's asylum decisions. This principle raises the following legal concerns as to the States' obligations under Article 33 of the Geneva Convention: Both the Schengen and Dublin Conventions encourage unfair immigration policies by forcing their signatories to stiffen their asylum policies. The Conventions further violate the Geneva Convention by prohibiting asylum applicants access to the forum of their choice. Finally, E.U. Member States demonstrate a reluctance to enter into far-reaching obligations to grant admission to, as opposed to non-return of, refugees, questioning, therefore, the well-established principle of nonrefoulement.

Part III of this Note offers a solution whereby a common authority would have the power to adjudicate and enforce the immigration and asylum laws within the entire Western European territory. This common authority could assign part of the regional funds, distributed by the European Monetary Union as a response to new members' accession, to new members

¹⁰ See Schengen Agreement and Convention, *supra* note 7; see also Dublin Convention, *supra* note 8.

¹¹ Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954) [hereinafter Geneva Convention].

such as Italy, Spain, and Portugal so that these poorer, less secure States could properly address their immigration problems.

I. PRINCIPLES OF REFUGEE LAW AND HUMANITARIAN RIGHTS

A. *Roadmap Of Various Charters*

The United Nations Charter, adopted on June 26, 1945, is the first multilateral treaty that sets forth the States' obligation to treat aliens humanely and respect human rights generally.¹² The preamble to the U.N. Charter provides that "[w]e the peoples of the United Nations determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person in the equal rights of men and women and of nations large and small . . . have resolved to combine our efforts to accomplish these aims"¹³ Article 1 proclaims that the purpose of the United Nations is to cooperate "in promoting respect for human rights and fundamental freedoms for all."¹⁴ Although the U.N. Charter does not specifically address aliens' rights *per se*, Article 55(c) of the Charter reaffirms that the United Nations shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."¹⁵ Moreover, under Article 56, "[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55."¹⁶ Thus, the U.N. Charter imposes obligations on each Member of the United Nations, as a matter of international law, to respect and observe human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.¹⁷

Similarly, the Universal Declaration of Human Rights ("UDHR") sets forth international standards that States should follow in their treatment of both citizens and foreigners.¹⁸ Ar-

¹² See U.N. CHARTER preamble.

¹³ *Id.*

¹⁴ *Id.* at art. 1.

¹⁵ *Id.* at art. 55.

¹⁶ *Id.* at art. 56.

¹⁷ See PAUL SIEGHART, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* 63 (1983).

¹⁸ *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d

ticle 1 of the UDHR provides that "[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood."¹⁹ Article 2 prohibits discrimination by stating that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."²⁰ The UDHR also provides that "[e]veryone has the right to freedom of movement and residence within the border of each state,"²¹ "[e]veryone has the right to seek and enjoy in other countries asylum from persecution,"²² and that "[n]o one shall be arbitrarily deprived of his nationality nor denied his right to change his nationality."²³ Thus, by using generally-defined terms such as "everyone," "no one," or "all human beings," the UDHR implicitly addresses the rights of aliens as well as nationals.

In addition to the above, the 1951 Convention Relating to the Status of Refugees²⁴ is considered the "center of the international legal framework for the protection of refugees."²⁵ The

Sess., at 71, 67th plen. mtg., U.N. Doc. A/810 (1948) [hereinafter UDHR]. Some argue that the UDHR is a document of international law to which every state should adhere. See A. H. ROBERTSON & J. G. MERRILLS, *HUMAN RIGHTS IN THE WORLD* 26 (3d ed. 1989). ("[T]he General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations" (citation omitted)) Others argue that because the UDHR is merely a declaration, it is not, by itself, legally binding. See Ahcene Boulesbaa, *A Comparative Study Between the International Law and the United States Supreme Court Standards for Equal and Human Rights in the Treatment of Aliens*, 4 GEO. IMMIGR. L.J. 445, 457 n.61 (quoting Professor H. Waldock, *General Course on Public International Law*, 106 RECUEIL DES COURS 1, 199 (1962-II)).

¹⁹ UDHR, *supra* note 18, at 71, art. 1.

²⁰ UDHR, *supra* note 18, at 71, art. 2.

²¹ UDHR, *supra* note 18, at 71, art. 13(1).

²² UDHR, *supra* note 18, at 71, art. 14(2).

²³ UDHR, *supra* note 18, at 71, art. 15(2).

²⁴ See Geneva Convention, *supra* note 11.

²⁵ *Report of the United Nations High Commissioner for the Refugees*, U.N. GAOR, 48th Sess., Addendum, Supp. No. 9, 12A, para. 19(c), U.N. Doc. A/48/12/Add.1 (1993). In 1998, 134 states have ratified either the Geneva Conven-

Geneva Convention definition of "refugee" has "dominated the regime of refugee law for the past three decades."²⁶ Specifically, a "refugee" is any person who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."²⁷

Under the Geneva Convention, and its later 1967 Protocol, the most important and fundamental right to be protected in international law is the right of the refugee not to be returned to the place of his or her home country to face persecution.²⁸ A cornerstone in the refugee's platform of rights, this concept, known as "nonrefoulement," proclaims that "[N]o Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."²⁹

B. *The Geneva Convention Under Attack*

While unarguably a staunch stalwart in the battle for aliens' rights, the text of the Geneva Convention is unclear on two issues: (1) whether Member States are obligated to allow the asylum seeker at the border to enter their territories while pending clarification and determination of refugee status and (2) whether Member States are allowed to exercise their right to return asylum seekers to a country where they would fear

tion or its 1967 Protocol.

²⁶ Kay Hailbronner, *Nonrefoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?*, in *THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980S* 123, 124 (1986).

²⁷ Geneva Convention, *supra* note 11, at 152, art. 1.

²⁸ See *id.* at 176, art. 33.

²⁹ *Id.* Additional instruments of states that affirm the principle of nonrefoulement for refugees seeking entry at international borders are the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, Comm. of Ministers, Eur. Consult. Ass., Rec. No. R(84)1, Jan 25, 1984 and Res. (67) 14, June 29, 1967; American Convention on Human Rights, done Nov. 22, 1969; and the Asian-African Legal Consult. Comm. Principles Concerning Treatment of Refugees, Art. VII(3), 1966, reprinted in UNHCR, *Collection of International Instruments Concerning Refugees* 201 (1979).

persecution.³⁰ Specifically, the Geneva Convention does not require Member States to grant admission to qualified asylum seekers, but merely to refrain from returning them.³¹ The 1967 United Nations Declaration on Territorial Asylum expanded upon the language of the Geneva Convention by explicitly including refusal of admission at the border as a part of the nonrefoulment process.³² This principle of nonrefoulment is commonly considered a norm of international law. In fact, some commentators support the view that, based on state practice as evidence of a rule of customary international law, Member States are unquestionably prohibited from returning humanitarian refugees to countries where they face persecution.³³

The traditional, legal right of individuals to claim asylum, a right held sacred by the Geneva Convention, currently is under attack in Western Europe. Before the onset of the new millennium, Europe is pressing for passage of a proposal drafted by Austria, the current holder of the European Union's presidency, which would to stop the incessant outflow of illegal immigrants.³⁴ Premised on the notion that the Geneva Convention now covers only a small minority of refugees and that the E.U.'s "fortress Europe" has failed in the past five years, the Austrian plan is designed to cope with sudden immigration influxes of those displaced by inter-ethnic conflicts, such as in the case of Bosnia, Kosovo or Kurdistan.³⁵

³⁰ See Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 HARV. HUM. RTS. J. 229, 246 (1996).

³¹ See Geneva Convention, *supra* note 11.

³² *Declaration on Territorial Asylum*, G.A. Res. 2312, U.N. GAOR, 22d Sess., Supp. No. 16, at 81, U.N. Doc. A/6716 (1967). The Declaration provides, in part, that no person "shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any state where he may be subjected to persecution." *Id.* at 81.

³³ See G. Goodwin-Gill, *THE REFUGEE IN INTERNATIONAL LAW* 74-75 (1983).

³⁴ See *Fortress Europe's Four Circles of Purgatory*, GUARDIAN (Manchester, Eng.), Oct. 20, 1998, available in LEXIS, News Library, Guardn File [hereinafter *Four Circles*].

³⁵ See *EU Proposals for Refugees "Will Wipe Out Asylum Rights"*, GUARDIAN (Manchester, Eng.), Sept. 4, 1998, available in LEXIS News, Guardn File. The first phase of the proposal addresses only the emergency cases on the ground, either by peacekeeping or "safe zones." *Id.* The second stage would try to keep the refugees in only one region, or "temporary camps," as those adopted for the Palestinians refugees from Israel in 1948. *Id.* The third stage would allow temporary

Instead of guaranteeing individuals their legal right to asylum, Austria suggests that the Geneva Convention be "supplemented, amended or replaced."³⁶ In its stead, the E.U. countries would make only a "political offer," refusing to confer legal status based on right to those defined as "refugees" under the Geneva Convention.³⁷ Thus, under the Austrian treatment, the denial to refugees of only the right to settle in the European Union will mean the death of the Geneva Convention.

II. ASYLUM POLICIES IN THE EUROPEAN UNION

A. *Harmonization and the Migration Policy*

Over the past twenty years, the Member States of the European Union increasingly have pondered the idea of European harmonization and integration. The main goal of this complex and fundamentally social concept is to increase the cohesiveness of society.³⁸ Indeed, as one commentator has asserted, "whereas a divided Europe represents a group of pawns on the chessboard of international politics, a united Europe would be more like a queen."³⁹

The achievement of a single internal market, an "ultimate purpose of the Union," depends in part upon the creation of a "common regime" on different issues addressing the entry into the Union of non-Europeans via asylum/immigration.⁴⁰ The ambitious goals of free movement of goods, persons, services, and capital along with political unity and "transparency" of the internal market⁴¹ requires a substantial coordination of non-

residence without the right to work in an E.U. State, with all Member States sharing the expenses. *See id.* Finally, the fourth phase would require refugees' repatriation to their homelands as soon as circumstances allow. *See id.*

³⁶ *Four Circles*, *supra* note 34.

³⁷ *Id.*

³⁸ *See* ANDREW W. AXLINE, EUROPEAN COMMUNITY LAW AND ORGANIZATIONAL DEVELOPMENT 2 (1968).

³⁹ GUNNAR SJOSTEDT, THE EXTERNAL ROLE OF THE EUROPEAN COMMUNITY 1 (1977).

⁴⁰ Marie-Claire S.F.G. Foblets, *Europe and Its Aliens After Maastricht: The Painful Move to Substantive Harmonization of Member-States' Policies Toward Third-Country Nationals*, 42 AM. J. COMP. L. 783, 787 (1994).

⁴¹ *See* Treaty on European Union, Feb. 7, 1992, Declaration on Asylum, 31 I.L.M. 247, 373 (identifying harmonization of asylum as an aim of the European

E.U. immigration.⁴² Thus, the harmonization of immigration and asylum policies in Europe is a necessary means of achieving the political and economic goals of the European Union. Specific measures undertaken to achieve the European harmonization of immigration and asylum policies include the 1990 Schengen⁴³ and Dublin⁴⁴ Conventions.

B. *The Schengen Convention of 1990*

The Schengen Convention ("Convention")⁴⁵ has its origins in the 1985 Schengen Agreement ("Agreement").⁴⁶ The Agreement encompasses main provisions and general goals relating to the movement of persons.⁴⁷ The Agreement provides for the abolition of all border controls within the area of the signatory States and the strengthening of the external borders of the Schengen nations.⁴⁸ In addition, Title II of the Agreement requires the Parties to "endeavor to abolish the controls at the common frontiers and transfer them to their external frontiers,"⁴⁹ favoring free trade and market harmonization.

The Schengen signatories were concerned, however, not only with the movement of goods and services, but also with the control of non-E.C. immigration.⁵⁰ Article 17 of the Agreement specifically provides that the Parties "shall endeavor to harmonize . . . the Laws and administrative provisions concerning the prohibitions and restrictions which form the basis for the controls and to take complementary measures to safe-

Conference).

⁴² See Kay Hailbronner & Jorg Polakiewicz, *Non-EC Nationals in the European Community: The Need for a Coordinated Approach*, 3 DUKE J. COMP. & INT'L L. 49, 77-79 (1992).

⁴³ Schengen Agreement and Convention, *supra* note 7.

⁴⁴ Dublin Convention, *supra* note 8.

⁴⁵ Schengen Agreement and Convention, *supra* note 7.

⁴⁶ *Id.* On June 14, 1985, France, the Federal Republic of Germany, and the Benelux Countries—Belgium, Netherlands, and Luxembourg—signed the Schengen Agreement.

⁴⁷ See Jaap W. de Zwaan, *Institutional Problems and Free Movement of Persons; The Legal and Political Framework for Cooperation*, in FREE MOVEMENT OF PERSONS IN EUROPE 335, 344 (Henry G. Schermers et al. eds., 1993).

⁴⁸ See Schengen Agreement and Convention, *supra* note 7, at 79, art. 17.

⁴⁹ *Id.*

⁵⁰ See Jean-Francois Bellis, *Introductory Note*, 30 I.L.M. 68 (1991).

guard security and combat illegal immigration by nationals of States that are not members of the European Communities.⁵¹ Imposing few obligations upon the parties, the Agreement did not require ratification, but only application on a provisional basis.⁵²

The Convention, signed by nine E.U. Member States⁵³ five years later, provides rules and key measures for achieving and implementing the goals defined in the 1985 Agreement. Indeed, the Convention abolishes border controls along the common frontiers of signatories by permitting the crossing of internal borders "without any checks on persons."⁵⁴ This "complete" freedom of movement, however, is restricted for non-E.C. nationals who must "declare" themselves "in accordance with the conditions imposed by each Contracting Party."⁵⁵ This obligation applies even to resident aliens when they travel within Schengen territory.⁵⁶ Thus, for example, a French citizen traveling to or from Germany has "complete" freedom of movement, whereas a Bulgarian citizen traveling from Germany to France will be required to present proper documentation, in accordance with the provisions of each E.U. country she or he crosses.

The abolition of border control, an important landmark in E.U. development, is only one aspect of the Schengen package. In recognizing that, by itself, the border control abolition would create a "security deficit," the Schengen signatories further agreed to introduce a "comprehensive security package" based upon common visa and asylum policies, identity cards throughout the Schengen territory, a "hot pursuit" agency for law enforcement agencies up to ten kilometers from neighboring borders, and a computer-based network called the Schengen Information System.⁵⁷

⁵¹ Schengen Agreement and Convention, *supra* note 7, at 79, art. 17.

⁵² *See id.* at 83, art. 32.

⁵³ The Schengen Group consists of the three Benelux countries, France, Germany, Italy, Portugal, Spain, and Greece. Austria has been granted observer status, and Denmark has requested observer status. *See* Schengen Agreement and Convention, *supra* note 7.

⁵⁴ Schengen Agreement and Convention, *supra* note 7, at 86, art. 2(1). In the interest of public or national security, limited internal border checks may be maintained so long as the party consults with the other parties. *Id.* at 86, art. 2(2).

⁵⁵ *Id.* at 93, art. 22(1).

⁵⁶ *See id.* at 93, art. 22(2).

⁵⁷ *See Repelling Borders; European Border Controls*, NEW STATESMAN AND SOC'Y

Despite the above security package, Article 23 of the Convention, which deals with the movement of aliens generally, restricts, by express reference to the Geneva Convention, the right of the contracting parties to expel an alien.⁵⁸ In addition, Article 28 reaffirms the commitment of the parties not only to the Geneva Convention but to cooperation with the United Nations High Commissioner for Refugees.⁵⁹ Parties to the Schengen Convention are required to "process any application for asylum lodged by an alien within the territory of any one of them."⁶⁰ Notwithstanding the above general commitment to the Geneva Convention, however, "[e]very Contracting Party . . . retain[s] the right to refuse entry or to expel any applicant for asylum to a Third State on the basis of its national provisions and in accordance with its international commitments."⁶¹

While this excerpt appears to be a reaffirmation of the State's right under the Geneva Convention to decide asylum claims, the retention of a right to expel remains a matter of concern under the nonrefoulement prohibitions found within Article 33 of the Geneva Convention.⁶² For example, in 1992 Germany announced an agreement with Romania under which Romania would accept the return of rejected asylum seekers in exchange for modest financial assistance.⁶³ Although Article

(UK), Feb. 17, 1995, *available in* LEXIS, News Library, Asapii File [hereinafter *Repelling Borders*]. The Schengen Information System, with its central computer based in Strasbourg, Germany, allows access to a database comprising between seven to eight million items. *See id.* Part of the items include entries on 700,000 individuals, including criminals, refugees, and asylum-seekers from both outside and inside the Schengen area. *See id.*

⁵⁸ Schengen Agreement and Convention, *supra* note 7, at 93, art. 23(5).

⁵⁹ *Id.* at 95, art. 28.

⁶⁰ *Id.* at 95, art. 29(1).

⁶¹ *Id.* at 95, art. 29(2).

⁶² Article 33 of the Geneva Convention provides:

(1) No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

(2) The benefit of the present provision may not, however, be claimed by a refugee when there are reasonable grounds for regarding him as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Geneva Convention, *supra* note 11, at 176, art. 33.

⁶³ *See* Marc Fisher, *Bonn, Bucharest Cement Accord to Repatriate Romanian*

28 of the Schengen Convention, expressly referring to the Geneva Convention, restricts the right of a state to expel an alien, Germany nevertheless violated such provision under world-wide scrutiny.

In addition to the above, Articles 29 through 38 of the Schengen Convention raise some concern as they relate directly to asylum seekers and refugees and impose measures dealing with responsibility for processing asylum applications.⁶⁴ Specifically, Article 30 of the Convention establishes criteria for determining which Schengen country should review an asylum application. If an asylum applicant enters the Schengen territory⁶⁵ with a visa, then the state that issued the visa will be responsible for processing his or her asylum claim.⁶⁶ The Schengen provisions impose responsibility on the state that has permitted the applicant to enter a Schengen territory, and, consequently, to gain access to the territory of all other Member States.

If the applicant enters a Schengen territory without a visa, for the purpose of applying for asylum soon after, the state across whose external borders the applicant entered the Schengen territory will be responsible for examining the claim.⁶⁷ In fact, the 1993 Agreement Implementing the Schengen Agreement contains the provision that an application for political asylum filed by an applicant in one state precludes that applicant from seeking asylum in the territories of the other parties.⁶⁸ Thus, if a refugee enters into Germany,

Gypsies, WASH. POST, Sept. 25, 1992, at A27.

⁶⁴ See Schengen Agreement and Convention, *supra* note 7, at 95-100, arts. 28-38.

⁶⁵ "Schengen territory" refers to the aggregate territory of all signatory States. Currently, this territory includes Germany, Belgium, The Netherlands, France, Luxembourg, Italy, Spain, and Portugal. See Gerald L. Neuman, *Buffer Zones Against Refugees: Dublin, Shengen, and the German Asylum*, 33 VA. J. INT'L L. 503, 507 (1993).

⁶⁶ See Schengen Agreement and Convention, *supra* note 7, at 96, art. 30(1)(a).

⁶⁷ See Schengen Agreement and Convention, *supra* note 7, at 97, art. 30(1)(e).

⁶⁸ See Agreement Implementing the Schengen Agreement of June 14, 1985, Between the Governments of the Countries of the Benelux Economic Union, Germany and France Regarding the Gradual Elimination of Passport and Custom Control at Their Common Borders, June 19, 1990, additionally signed by Italy Nov. 27, 1990, by Portugal and Spain June 25, 1991, and by Greece Nov. 6, 1992, Arts. 28-38, 1993 BGBI. II 1013, 1996 at 242.

applies there for asylum there, is subsequently denied, and then goes to France and applies again, the application will be transferred back to Germany.

This method, which establishes jurisdiction to adjudicate an asylum claim by merely assigning the application to the nation across whose external borders the applicant entered the Schengen territory, does not acknowledge other exceedingly relevant factors, such as country of origin or language fluency. For example, a refugee from a West African state, with or without proper documentation, might prefer to apply for asylum in France. Nevertheless, if, for various reasons, such as inability to pay or lack of transportation, the applicant is able to secure transportation only to Frankfurt and not France, the applicant will be deprived of the right to seek asylum in France. Under Article 30 of the Schengen Agreement, Germany is the only state that would have jurisdiction to adjudicate his or her claim.

As such, Article 30 of the Convention directly violates provisions of international law. One country's refusal of asylum status for the whole Schengen territory violates Article 14(1) of the Universal Declaration of Human Rights,⁶⁹ which guarantees a refugee the right to seek asylum in other countries. "By eliminating an alien's ability to repatriate in ten countries at once — practically all of Western Europe, this right is effectively stricken."⁷⁰ Article 30 also directly violates Article 55 and 56 of the U.N. Charter because "[I]nstead of cooperating to achieve the goals of the United Nations, the Schengen Convention is a cooperative effort to impede these goals."⁷¹ In addition, the Convention violates Article 15(2) of the Universal Declaration since a refugee arbitrarily is denied the right to change nationalities when the opportunity to solicit protection is automatically limited to one state.⁷²

⁶⁹ UDHR, *supra* note 18, at 71, art. 14(1).

⁷⁰ Kerry E. McCarron, *The Schengen Convention as a Violation of International Law and the Need for Centralized Adjudication on the Validity of National and Multilateral Asylum Policies for Members of the United Nations*, 18 B.C. INT'L & COMP. L. REV. 401, 422 (1995).

⁷¹ *Id.* at 423.

⁷² *See id.* at 425.

In all of the above cases, the Schengen country responsible for determining asylum eligibility will process the application in accordance with its own national law.⁷³ That country must either admit that person to residence or expel the applicant.⁷⁴ The Convention clearly provides, however, that no contracting party is obligated "to authorize every applicant for asylum to enter or to remain within its territory."⁷⁵ Although Article 29 of the Convention requires that the Schengen state's decision to admit or refuse entry be made in accordance with the principles of international law,⁷⁶ "[O]ut of fear of being less restrictive than the other Schengen countries, every state party carefully trie[s] to level down its regulations on entry and residence of aliens in order to avoid an unwanted influx of immigrants and asylum seekers, attracted by more favorable conditions."⁷⁷

In its endeavor to build a wall around itself, the European Union "is defining refugees out of existence" by employing new restrictive definitions for those who qualify for refugee status and returning asylum seekers to safe countries of origin, which are far from safe.⁷⁸ For example, the number of asylum seekers in Germany dropped from a record high of 438,191 in 1992 to 127,210 in 1994, not because fewer people were in flight

⁷³ See Schengen Agreement and Convention, *supra* note 7, at 97, art. 32.

⁷⁴ See *id.* at 97-98, arts. 33, 34.

⁷⁵ *Id.* at 95, art. 29(2).

⁷⁶ Article 29(2) of the Schengen Agreement and Convention, *supra* note 7, at 95, reads as follows:

This obligation shall not bind a Contracting Party to authorize every applicant for asylum to enter or remain within its territory. Every Contracting Party shall retain the right to refuse entry or to expel any applicant for asylum to a Third State on the basis of its national provisions and in accordance with its international commitments.

Id.

⁷⁷ Aleidus Woltjer, *Schengen: The Way of No Return?*, 2 MAASTRICHT J. COMP. L. 256, 273 (1995).

⁷⁸ U.S. Group: E.U. "Defining Refugees Out of Existence," DEUTSCHE PRESS-AGENTUR, Oct. 9, 1998, available in LEXIS, News Library, Dra File [hereinafter *Defining Refugees*]. The report mentions that both Germany and France define refugee as a person with reasonable fear of persecution from his or her government. See *id.* Nevertheless, in Algeria, where two-thirds of asylum applicants fear death or injury from radical Islamic groups, the German or French definition is of no help. See *id.* Because the Islamic groups are "non-state," the Algerian asylum-seekers cannot be considered refugees. See *id.* In 1996, for example, Germany granted refugee status to only 9 out of 2,400 Algerian asylum applicants. See *id.*

from persecution but because, in 1993, the German government amended its constitution and legislation to permit the removal of asylum seekers to "safe third countries" regardless of whether those countries provided access to asylum procedures.⁷⁹ In practice, all nine of Germany's neighbors have been declared "safe third countries."⁸⁰ Thus, after July 31, 1993, virtually no asylum seeker entering Germany by land is entitled to protection in Germany.⁸¹ These provisions violate Article 31(1) of the Geneva Convention which states, "[C]ontracting States shall not impose penalties, on account of their illegal entry or presence" Germany's amended legislation imposes "penalties" upon the asylum seekers at their borders.

In its effort to enact barriers against large influxes of foreigners, Germany also has enacted a constitutional amendment imposing restrictions upon applicants who enter Germany from other states, "safe countr[ies] of origin," where application of the Refugee Convention and the European Convention on Human Rights is assured.⁸² In other words, applicants who enter Germany from states that, at a minimum, comply with the Geneva Convention, will not be granted political asylum. This approach exploits the wording of the Geneva Convention, which does not preclude deportation to a country where the refugee will be safe from both persecution and refoulment. Although the concept of "safe country of origin" does not necessarily contravene international law, it disregards the spirit of the Geneva Convention. The German approach reflects the broader European attempts to structure a legal framework for refugee law that restricts access to asylum.

⁷⁹ See UNHCR, *Protection of, or Protection from, Refugees?*, in REFUGEES: ASYLUM IN EUROPE 13 (1995).

⁸⁰ "Safe zones" or "humanitarian centers" have been established by the European Union, and declared legal, in Kosovo and Albania. Although the U.S. Committee for Refugees considers these so-called "safe zones" either inadequate or non-existent (for example, Srebrenica, in Bosnia, was a safe zone, but since United Nations security was inadequate in that area, Srebrenica experienced one of the worst massacres of the Bosnian war), the E.U. States can now insist that the refugees from Kosovo and Albania return to those zones instead of remaining in western Europe. The new German constitutional amendment on "safe third country law" with regard to refugees, targets the Kosovar refugees by sending them back to Albania. See *Defining Refugees*, *supra* note 78.

⁸¹ See UNHCR, *supra* note 79, at 12-13.

⁸² GRUNDGESETZ [Constitution] art. 16a (F.R.G.).

Similarly, the Convention provides a detailed external border control mechanism meant to facilitate free movement across internal borders.⁸³ Any alien lacking complete and valid documents must be refused entry into the territories of the contracting parties.⁸⁴ The only exception is the admission of an alien "on humanitarian grounds or in the national interest or because of international obligations."⁸⁵

This external border control mechanism introduced the controversial notion of so-called "carrier's responsibility." Article 26 of the Schengen Convention imposes upon carriers the obligation "to take all necessary measures to ensure that an alien carried by air or by sea is in possession of travel documents required for entry into the territory of the Contracting Partners."⁸⁶ This provision introduces carrier sanctions into the legislation of the European countries by imposing "penalties on carriers who transport aliens who do not possess the necessary travel documents by air or sea from a Third State to their territories."⁸⁷ Article 26 also requires compliance "in accordance with their constitutional law."⁸⁸ Some Schengen States, including Belgium and the Netherlands, already have enacted statutory offenses as required by these Schengen provisions.

Article 26 of the Convention minimizes the purpose of Article 31 of the Geneva Convention, which addresses the issue of "refugees unlawfully in the country of refuge." Specifically, Paragraph 1 of the Geneva Convention states:

Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.⁸⁹

The purpose of Article 31 is to protect arriving refugees from "penalties" and to recognize in international law that

⁸³ See Schengen Agreement and Convention, *supra* note 7, at 86-88, arts. 3-5.

⁸⁴ See *id.* at 87, art. 4.

⁸⁵ *Id.* at 87, art. 5(2).

⁸⁶ *Id.* at 94, art. 26(1)(b).

⁸⁷ *Id.* at 95, art. 26(2).

⁸⁸ Schengen Agreement and Convention, *supra* note 7, at 95, art. 26(2).

⁸⁹ Geneva Convention, *supra* note 11, at 174, art. 31.

refugees may be unable to obtain normal immigration documents and may resort to extra-legal measures in order to flee persecution and seek asylum.⁹⁰ The more an asylum seeker conforms to the definition of refugee under Article 26 of the Schengen Convention, the less likely she or he is going to be able to obey the rules of immigration and control.

Based on the foregoing, the measures enacted in Article 26 with respect to the integration of "carrier's responsibility" in the struggle against illegal immigration might operate in some individual cases to prevent persons in need of international protection from leaving their country and reaching a Schengen state where they have access to procedures for the determination of their status. This restriction could make escape from persecution much more difficult for potential refugees. By penalizing the airlines and sealines for bringing asylum seekers to Europe without a visa, Article 26(2) makes it more difficult for refugees to obtain sanctuary. Moreover, it does not distinguish between asylum seekers and other aliens.⁹¹ As one commentator has noted, "[M]aking it more difficult for asylum seekers to actually present an application may constitute violations of the Geneva Convention."⁹²

C. *The Dublin Convention on Asylum*

The Dublin Convention, signed on June 15, 1990, by France, Germany, Portugal, Spain, and the three Benelux countries, is the first legal instrument of international law that defines concepts such as "asylum request" or "asylum claim" and "asylum seeker."⁹³ According to the Dublin Convention, an "Application for asylum means: a request whereby an alien seeks from a Member State protection under the Geneva Convention by claiming refugee status within the meaning of Article 1 of the Geneva Convention, as amended by the New York

⁹⁰ See *id.*

⁹¹ See UNHCR Position on Conventions Recently Concluded in Europe, Aug. 16, 1991, at 5.

⁹² David O'Keeffe, *The Emergence of a European Immigration Policy*, 20 EUR. L. REV. 20, 23 (1995).

⁹³ See ASYLUM IN EUROPE, AN INTRODUCTION 77 (Gilbert Jaeger et al. eds., 4th ed. 1993) [hereinafter ASYLUM IN EUROPE].

Protocol."⁹⁴ An applicant for asylum is defined as "an alien who has made an application for asylum in respect of which a final decision has not yet been taken."⁹⁵

As an extension to the Schengen Convention, the Dublin Convention exclusively addresses the issue of examination of asylum claims.⁹⁶ While lacking substantive rules for asylum harmonization,⁹⁷ the Dublin Convention sets out explicit rules that precisely determine which state shall be responsible for processing and deciding an asylum case.⁹⁸ Accordingly, the country that an asylum-seeker first enters is responsible for deciding that individual's asylum claim,⁹⁹ unless the asylum-seeker has close connections with a particular country.¹⁰⁰ The Dublin Convention, therefore, limits the responsibility for asylum applications to only one Member State.¹⁰¹ The asylum application must be examined "by that State in accordance with its national laws and its international obligations."¹⁰² If the asylum-seeker applies in another state, then that state has the right to send the refugee to the state identified by the rules as responsible, the "country of first asylum," which must then physically accept the refugee and process the asylum application.¹⁰³

The country of first asylum (also known as "safe third country" or "host third country" or "first asylum country") is a country in which the asylum seeker either found protection, or reasonably could have done so.¹⁰⁴ "Country of first asylum" agreements provide that an applicant who has traveled through a state in which the applicant could have sought asylum may be denied access to the asylum process there and instead returned to the "country of first asylum" to pursue their asylum claim.¹⁰⁵

⁹⁴ Dublin Convention, *supra* note 8, at 430, art. 1(b).

⁹⁵ *Id.* at 430, art. 1(c).

⁹⁶ *See id.* at 431-32, art. 3.

⁹⁷ *See* Neuman, *supra* note 65, at 506.

⁹⁸ *See* Dublin Convention, *supra* note 8, at 431-32, art. 3(1)-(7).

⁹⁹ *See id.* at 434, arts. 6-7; *see also id.* at 432, art. 3(6).

¹⁰⁰ *See id.* at 432, art. 4.

¹⁰¹ *See id.* at 431, art. 3(2).

¹⁰² *See id.* at 431, art. 3(3).

¹⁰³ *See* Dublin Convention, *supra* note 8, at 435-37, arts. 10-11.

¹⁰⁴ *See, e.g., id.* at 431-32, art. 3(2), 3(7); *see also id.* at 435-36, at arts. 10-11.

¹⁰⁵ *See id.* at 431-32, arts. 3(2), 3(7).

Not surprisingly, the principle of "country of first asylum" conflicts with important obligations under the Geneva Convention. The Geneva Convention recognizes that each asylum seeker has the right to be recognized in different countries, because, under the Geneva Convention, each signatory has the obligation to make its own judgment regarding recognition or refusal of an asylum application.¹⁰⁶ Thus, the Dublin Convention's attempt to identify a single "responsible" State for an asylum applicant conflicts with each state's obligation under the Geneva Convention requirements. These requirements mandate that each signatory state maintain the proper procedures to assure that, in refusing the applicant's request to remain, the state is not returning him or her to danger.

The "country of first asylum" rule is the Dublin Convention's mechanism of choice to end the "refugee in orbit" or "asylum-shopping" problem.¹⁰⁷ The "refugee in orbit" term refers to the circulation of refugees and asylum seekers among multiple countries in search of a State willing to determine their claim to refugee status.¹⁰⁸ The "orbit" practice would allegedly be suppressed only when a Member State would refer an asylum application to another state, if the latter is the "responsible" state.¹⁰⁹ However, a Member State responsible for examining the application, unwilling to be in charge, may decide to refer the asylum applicant to a third country that could be a non-E.U. country. For example, asylum seekers have entered Italy, Spain, Portugal, and Greece in transit to the United Kingdom, which has returned them to these "first asylum" states, which have then returned them to the United Kingdom.¹¹⁰ Also, a non-contracting country may, directly or indirectly, return a refugee in orbit to his or her country of origin, in violation of the nonrefoulment provision of Article 33

¹⁰⁶ See Geneva Convention, *supra* note 11.

¹⁰⁷ A refugee in orbit is an asylum-seeker who is sent back and forth among different states that consider each other primarily responsible for the refugee. See Dublin Convention, *supra* note 8, preamble (stating purpose "to ensure that applicants for asylum are not referred successively from one Member State to another without any of these States acknowledging itself to be competent to examine the application for asylum").

¹⁰⁸ Dublin Convention, *supra* note 8, at 432-35, arts. 4-8.

¹⁰⁹ See *id.*

¹¹⁰ See BRITISH SECTION, AMNESTY INT'L, PASSING THE BUCK: DEFICIENT HOME OFFICE PRACTICE IN 'SAFE THIRD COUNTRY' ASYLUM CASES 5 (1993).

of the Geneva Convention. Thus, in contrast to their intended effect, the Schengen and Dublin Conventions do not necessarily suppress the "refugee in orbit" problem which exists between Member States and approximately 170 Third States.¹¹¹ "Refugee in orbit" situations will not likely be avoided by this practice; on the contrary, they probably will increase in number.

Finally, in addition to the above drawbacks, the Schengen and Dublin Conventions, two key instruments in the immigration control of Western Europe, were devised largely behind closed doors. As a result, "the European states . . . approached the law-making task regarding refugees and asylum-seekers from an administrative and bureaucratic direction with little regard to the special human rights requirements."¹¹² In addition, "[B]ecause these measures are excluded from the scope of the Union's legal system, their legitimacy is not subject to review by the European Parliament or Commission"¹¹³

D. *The Treaty on European Union of February 7, 1992*
(*Maastricht Treaty*)

A third attempt to facilitate increased cooperation and harmonization among European parties includes the Treaty on European Union signed in Maastricht¹¹⁴ on February 7, 1992, which addresses different "protocols" on specific topics.¹¹⁵ Member States cooperate in areas such as Economic and Monetary Union, Foreign and Security Policy, and Justice and Home Affairs including immigration and asylum.¹¹⁶ Although

¹¹¹ See ASYLUM IN EUROPE, *supra* note 93, at 81.

¹¹² GIL LOESCHER, REFUGEES AND THE ASYLUM DILEMMA IN THE WEST 104 (1992).

¹¹³ O'Keeffe, *supra* note 92, at 22.

¹¹⁴ MAASTRICHT TREATY, *supra* note 1.

¹¹⁵ See *id.* at 353-62.

¹¹⁶ See *id.* For example, in September 1998, E.U. Home Affairs and Justice ministers met in Brussels to establish "Eurodac," a central fingerprint database for refugees who apply in more than one Schengen state. A computerized fingerprint recognition system, Eurodac, is intended to speed up the processing of asylum applications by identifying the first Schengen country to receive the individual's application. Even if the applicant uses false or different identity papers in different states, a fingerprint cross-check on the database will signal if the asylum-seeker has applied in another country. Once refugee status is granted or 10 years have passed, the individual's fingerprint record is erased from Eurodac. In con-

the twelve Member States established among themselves a European Union,¹¹⁷ the Maastricht treaty did not succeed in creating a European federal state.¹¹⁸

Specifically, the Maastricht Treaty expands the European Union's powers in areas of alien, refugee and immigration/asylum policy.¹¹⁹ Article G of the Maastricht Treaty, which amends the Treaty of Rome establishing the European Economic Community with a purpose of establishing the European Community, provides that the activities of the Community shall include, as provided in the Treaty and in accordance with the timetable set out therein, "(d) measures concerning the entry and moving of persons in the internal market as provided for in Article 100C."¹²⁰ According to Article 100C(1), the Council of Ministers of the European Communities, "acting unanimously on a proposal from the Commission and after consulting the European Parliament, shall determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States."¹²¹ The second paragraph of the same article states that, "in the event

trast, fingerprints of deported asylum-seekers remain on the database, so that immigration authorities at borders, ports, and airports may deny access to the deported individuals. See *Fingerprint Data to Curtail Asylum Options*, DAILY TELEGRAPH (UK), Oct. 1, 1998, available in LEXIS, Market Library, Prompt File.

¹¹⁷ See MAASTRICHT TREATY, *supra* note 1, at 255, art. A.

¹¹⁸ See Dr. Dieter Kugelmann, Mainz, *The Maastricht Treaty And The Design Of A European Federal State*, 8 TEMP. INT'L & COMP. L.J. 335, 354 (1994).

¹¹⁹ See MAASTRICHT TREATY, *supra* note 1, at 256, art. G(C)(23) (adding art. 100(c)(1) to The Treaty of Rome). For example, Title IV of the Maastricht Treaty gives the European Union a major role in European security, law enforcement, and immigration and asylum policy, referred to as the "third pillar." Article K facilitates this role through the newly created Council of Justice and Interior Ministers. One of its subgroups, the K4 Committee, oversees Europol, or the pan-European police organization. With its headquarters opened in the Hague, in February 1994, Europol is particularly concerned with organized crimes. For example, the European Drugs Unit, a subdivision of Europol, produces reports on organized drug crimes in Europe. K4 Committee is also empowered with the creation of the European Information System, a new E.U. computer system covering all aspects of immigration and related law enforcement activities, and with access to all Schengen and non-Schengen territories. As a non-Schengen country, Britain is extremely interested in the implementation of the computer network, because, regardless of the British government's position on Schengen immigration policy, British agencies will be able to be fully integrated in, and to benefit from, the E.U.-wide computer network. See *Repelling Borders*, *supra* note 57.

¹²⁰ MAASTRICHT TREATY, *supra* note 1, at 257, art. G(d).

¹²¹ *Id.* at 259, art. 6(B)(3)(d); *id.* at 264, art. 6(C)(23).

of an emergency situation in a third country posing a threat of a sudden inflow of nationals from that country into the Community, the Council, acting by a qualified majority on a recommendation of the Commission, may introduce, for a period not exceeding six months, a visa requirement for nationals for the country in question."¹²² According to paragraph 5, "This article shall be without prejudice to the exercise of the responsibilities incumbent upon the Member States with regard to the maintenance of law and order and the safeguarding of internal security."¹²³ Finally, Article 100C(3) provides that, "From 1 January 1996, the Council shall act by a qualified majority on the decisions referred to in paragraph 1."¹²⁴ Notwithstanding the above, the Schengen and Dublin provisions regarding common policy on visa in relation to third countries currently in force between Member States will remain in effect until the Community adopts new directives.¹²⁵

III. SOLUTION

Because the Schengen and Dublin Conventions are not part of Community law, and therefore are immune to adjudication by the Court of Justice, there is no common authority or court responsible for immigration and asylum law and policy within the entire Schengen territory. Without accountability to the E.U. legal system, judges cannot guarantee the uniform and correct application of the regulations. As a result, an alien denied entry into the Schengen territory by means of a negative finding in one state of the territory has no territory-wide recourse to claims of discrimination in violation of her or his human rights. Therefore, an international common authority in this field is needed to protect the rights of refugees with valid asylum claims who are kept out of the Schengen territory.

Today, Member States' attempts to cut back on immigration and asylum may be a reflection of their fear of losing control over economic and social matters. With the emergence of

¹²² *Id.*

¹²³ *Id.*

¹²⁴ MAASTRICHT TREATY, *supra* note 1, at 259, art. 6(B)(3)(d); *id.* at 264, art. 6(C)(23).

¹²⁵ *See id.*

the European Monetary Union and the accession of new members, Europe's political landscape has been fundamentally changed. The beginning of the third stage of the European Monetary Union, set for January 1, 1999, will be marked by the relocation of all economic and monetary policies to E.U. institutions and severe constraints on national budgets. Fearing loss of national sovereignty and being more concerned about national unemployment and depletion of social resources, Member States are less likely to tolerate changes in asylum policy. Currently, more liberal immigration and asylum policies are perceived as the cause for increased unemployment and crime.

The entry of countries from the East of the European Union should provide an excellent opportunity to return to real solutions, including reshaping the Schengen and Dublin Conventions. Specifically, the decision to enlarge the European Union, without addressing immigration and asylum issues, will only exacerbate the problem. The accession of Poland, Hungary and the Czech Republic will require the European Monetary Union to redistribute regional funds, which will, in turn, be received by these newcomers with lower levels of economic development. A common authority, ideally under the United Nations High Commissioner for Refugees' ("UNHCR") supervision, could tailor a certain percentage of the funding to these poorer States so that such E.U. States would independently address the problem of illegal immigrants and asylum seekers on their respective territories, while still fulfilling their obligations under the Schengen and Dublin Conventions.

Finally, although the Geneva Convention has been criticized for being vague in its "refugee" definition and ambiguous with regard to the right to receive asylum, the right of admission, and the right to temporary refuge, it is not the framework of the Refugee Convention that is in foremost need of revision. The focus instead should be on the E.U. politics, which are dictated by the European Monetary Union. Moreover, to consider the Geneva Convention as irrelevant or obsolete would be a mistake. Despite the growing implementation of hard-line asylum policies and the adoption of temporary measures in response to mass refugees, the Geneva Convention is still a cardinal element in refugee protection. In the complex European framework, characterized by tensions between sub-

stantive harmonization and national sovereignty, the Geneva Convention is a necessary buffer between incoherent immigration and asylum policies of affluent nations and inherent rights of asylum seekers.

CONCLUSION

With the implementation of the Schengen and Dublin Conventions, the rights of aliens became more limited. Instead of giving refugees an opportunity to choose a state in which they might like to gain asylum or one which has relatively permissive immigration and asylum laws, the Schengen Group decides under what nation's law a refugee's application is to be processed. This policy constitutes a violation of the Geneva Convention and Article 26 of the International Covenant on Civil and Political Rights. Moreover, with E.U. Member States undertaking a tightening of their national immigration and asylum laws, greater emphasis is placed on controlling illegal immigration, which inevitably restricts movement of non-European nationals. Implemented measures such as new visa regulations and identity checks impede, rather than promote, free movement within the European Union.

For the Western tradition of asylum to be maintained, an international common authority in this field must be established. Meeting behind closed doors has resulted in closing the doors of Europe on too many refugees.

Gabriela I. Coman