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Retuning the Harmonization of EU Asylum Law: Exploring the Need for an EU Asylum Appellate Court

Ariel Meyerstein†

As part of its continuing efforts toward integration, the European Union is harmonizing its Member States' asylum laws and procedures. This process began at the Tampere Summit in 1999, and its first stage ended May 1, 2004 at the Brussels Summit. Despite official EU rhetoric calling for “absolute respect of the right to seek asylum,” a lack of political will has hobbled the work thus far and has led to the enshrining of the lowest minimum standards for refugee protection. These minimum standards give Member States far too much room to continue the unnecessarily restrictive asylum policies they have pursued in the last decade, and in the opinion of many civil society and human rights organizations, the legislation adopted thus far is woefully unacceptable.

This Comment takes as its starting point the adoption of the first five pieces of harmonized legislation and proposes constructive solutions to compensate for the inadequate results of the May 2004 negotiations in Brussels. Specifically, an EU-wide asylum appellate court could assist the Member States in completing the work they started by creating a comprehensive harmonization that is consistent with international obligations to protect refugees.

Introduction and Scope

The European Union is completing a five-year process of harmonizing its asylum laws.1 Although the process began with bold proclamations...
about maximizing the protection of those seeking asylum within the European Union, regressive and restrictive trends have recently produced inadequate minimum standards within the harmonized common legislation. This Comment anticipates that these regressive trends will skew the interpretation of the European Union’s nascent common asylum law by producing definitional and normative gaps in the refugee definition.

These gaps can be filled with some innovation in the current legal apparatus by creating an EU-wide appellate procedure that could respond to decisions based upon the newly harmonized laws. An EU-wide appellate system would achieve the two-fold goal of (1) providing a court of last resort capable of taking appeals from the administrative courts of the various Member States, perhaps rendering more complete justice in individual cases; and, more importantly, (2) enshrining within the European Union’s harmonized laws, through the development and evolution of a body of appellate case law, a complete and robust interpretation of the 1951 Convention Relating to the Status of Refugees (“Refugee Convention”) and the 1967 Protocol. A harmonized uniform interpretation of the refugee definition would contribute directly to the objective of the harmonization process, namely, the Member States’ shared goal of creating a more consistent and comprehensive protection regime throughout the European Union. To clarify, this Comment does not focus on establishing harmonized minimum standards for appeals procedures within Member States; rather, it explores the need for establishing a supranational appellate mechanism.

Part I of this Comment briefly describes the issues of migration and asylum in Europe that have shaped the current asylum debate. Part II reviews the official EU rationale for harmonization and, specifically, for

eu.int/abc/12lessons/index10_en.htm (last visited Apr. 16, 2005). The first phase of the Common European Asylum System is aimed at creating four EU legislative “building blocks” relating to: (1) the determination of the state responsible for examining an asylum application and setting minimum standards on asylum procedures, (2) the conditions for the reception of asylum seekers, and (3) the qualification and content of refugee and subsidiary protection status. The second phase of the EU asylum policy harmonization process will lead to a common asylum procedure and a uniform status for those who are granted asylum that is valid throughout the Union. See Communication from the Commission to the Council and the European Parliament: Towards More Accessible, Equitable and Managed Asylum Systems, at 4, COM (2003) 315 final (June 3, 2003) [hereinafter Towards More Accessible, Equitable and Managed Asylum Systems].


constructing a uniform application of the refugee definition. Part II also demonstrates, on the basis of the European Union's own logic, the utility of an appellate mechanism. Although Member States have resisted such a mechanism, such resistance directly contradicts the stated aims of a harmonized policy. Further, an appellate mechanism actually advances and is consistent with the European Union's rationale for harmonization.

Part III provides an overview of the current status of the process of harmonization and describes what policy makers refer to as the "threat of the lowest common denominator": Member States will codify the barest forms of protection within EU law as each country continues to deflect unwanted migration to its neighbors or to countries outside the European Union.\(^4\) A comprehensive discussion of all of the reforms under discussion and various other policy proposals is beyond the scope of this Comment.\(^5\)

After exploring the current status of harmonization, Part III uses claims based on membership in a particular social group (particularly claims based on sexual orientation) to demonstrate the need for a reflexive appellate-level court capable of responding to emerging issues and addressing the difficulties of interpretation that will continue to confront courts in Member States.

Part IV explores the existing options for handling appeals supra-nationally, including the European Court of Justice (ECJ) and the European Court of Human Rights ("Human Rights Court"). These institutions offer insufficient remedies because the ECJ's jurisdictional powers are limited with regard to EU asylum claims, and the Human Rights Court, while capable of rendering justice on individual appeals based on the European Convention on Human Rights, is not capable of producing a body of binding precedent that will force Member States to conform to the most comprehensive, harmonized interpretation of the refugee definition.

Finally, Part V examines a possible (but unlikely) alternative to establishing an EU-wide appellate system that would integrate a robust interpretation of the refugee definition into the EU laws themselves, directly into the First Pillar. Ruling out this alternative, Part V considers the creation of an EU asylum appellate mechanism.

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I

ASYLUM TRENDS AND NATIONAL RESPONSES

Before discussing the intricacies of the harmonization process, it is important to sketch a brief history of the issues of migration and asylum in Europe that have shaped the evolving policies of the Member States and the European Union.

A. Increases in Asylum Applications, Xenophobia, and Restrictive Measures

In the 1970s, Europe saw only 30,000 asylum applications. Migration to Europe began to increase steadily in the 1980s, with asylum applications growing from 70,000 in 1983 to 670,000 in 1992. Because asylum had not been a major political concern before the 1990s, countries' policies varied. Certain countries, notably Germany, that had policies that were more welcoming than others were disproportionately affected by asylum migration. In fact, between 1982 and 2001, Germany received 2.9 million applications, nearly half of the European Union's 6.2 million, while Belgium, France, Sweden, the Netherlands and the United Kingdom dealt with another 2.7 million, leaving only 600,000 applications among the remaining eight Member States.

The influx of population and the inequitable distribution of asylum applications catalyzed a backlash from a growing far-right sentiment in various countries. At the height of this population explosion, unemployment in Western Europe approached twelve million people, and the continent witnessed a racist attack every three minutes, with asylum reception centers regularly targeted. Asylum seekers became entangled in larger debates about economic migrants and "illegal migrants"—those smuggled or trafficked into Europe. In response, governments that were previously disproportionately impacted began implementing more and more restrictive

8. See Randall Hansen, 14 Geo. Immigr. L.J. 779, 780 (2000). The extremes were quite palpable—in 1992, Germany received more than 400,000 applications while Luxembourg received none. Id. See also Vink & Meijerink, supra note 7, at 297-98 (discussing the great disparities in the number of asylum applications received by different countries as one of the driving forces behind asylum cooperation in the European Union).
10. See Berthiaume, supra note 4.
measures to stem the waves of immigration while leading EU-wide efforts for increased "burden sharing." The highly problematic Dublin Convention of 1990, implemented only in 1997, represented one step in this direction. Its primary purpose was to help determine the sole country (the first one an asylum seeker reaches) responsible for processing asylum requests.

Observing the rise of asylum seekers, governments employed several tactics to make themselves less hospitable destinations and to weed out "bogus" asylum claims from legitimate ones. Member States adopted highly controversial expedited procedures for quick processing and removal of applications deemed "manifestly unfounded," in some cases because the reception state considered some places within the country of origin to be safe for internal relocation. Other restrictive measures have included strict time limits for applications.

Governments have also manipulated the designation of countries (usually one that the applicants have passed through on their way to the country of destination where the asylum claim is submitted) as "safe third countries." If a Member State determines unilaterally that a country is a "safe third country," then the Member State does not violate the principle of non-refoulement articulated in the Refugee Convention and reiterated in article 3 of the European Convention on Human Rights by refusing asylum because the asylum seeker would not be returned to face persecution or harm.

Yet another tactic has been the externalization of reception centers to facilitate deportation of asylum seekers. If an asylum seeker does not actually reach national soil, then a country cannot refoul the asylum

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12. See Vink & Meijerink, supra note 7, at 299-300.
13. Id. at 300.
14. Vink and Meijerink's data show that there is, in fact, a significant correlation between restrictive policies and a drop in asylum applications. Id. at 313.
15. Hansen, supra note 8, at 782.
16. Id.; see also Vink & Meijerink, supra note 7, at 303 (arguing that the passage of the Dublin Convention along with some nonbinding resolutions can be seen as "legitimizing a restrictive policy changeover" in EU Member States).
The most alarming of measures, however, was the expansion by some countries (Finland, Ireland, Italy, and the Netherlands) of the grounds upon which expulsion can be carried out.\(^\text{20}\)

1. Increasing Use of Temporary Status

Equally problematic, however, were countries’ attempts to temporarily integrate individuals out of humanitarian concerns. In the wake of the Balkan crisis, more than 580,000 asylum seekers were granted temporary protection in Western Europe because their claims did not meet the traditional Refugee Convention definition of persecution for permanent asylum status. The continuation of the conflict prompted humanitarian concerns that the people should not be returned right away, which led to the granting of the temporary status.\(^\text{21}\) Germany granted subsidiary protection in nearly 60% of all applications, but then began to take steps to guarantee that the protection truly was temporary by repatriating Bosnians; in 1998 alone, 83,000 Bosnians were involuntarily returned, and 2,021 were forcibly removed.\(^\text{22}\) Temporary protection was preferred in many instances precisely because it was only temporary and did not require extending the full benefits of citizenship. This, among other factors, led to a decline in the number of admissions to refugee status as defined by the Refugee Convention in the latter half of the 1990s.\(^\text{23}\) In fact, in many states such as Germany and England, refugees with subsidiary forms of protection outnumber refugees with Refugee Convention status.\(^\text{24}\) According to the European Union’s statistics, in 1998 and 1999 the proportion of subsidiary statuses to Refugee Convention statuses at least doubled in the Netherlands, Greece, Finland, Sweden, Denmark, and Portugal, while increasing steadily in Austria, France, and Spain, all states that had recently introduced subsidiary protection.\(^\text{25}\)

2. Italy’s Bossi-Fini Amendment

Italy presents a particularly stark example of the overall story of asylum matters in the European Union, particularly the above-mentioned restrictive trends and some of the more abusive policies. The passage of the Schengen Convention and the erasure of internal borders within the

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19. Hansen provides a hypothetical example: “Arriving in Frankfurt but not making it to the passport desk does not constitute arriving in Germany, allowing the German government to return undocumented aliens without, legally speaking, having denied them a right to apply for asylum.” Hansen, supra note 8, at 783.
20. See id. at 783-84.
21. Id. at 785.
22. Id.
23. Id.
25. Id. at 6.
European Union led to criticism of Italy's lack of effective border security along its particularly long and naturally difficult-to-patrol stretch of coastline. As the country confronted the migration explosion, it passed relatively pro-asylum immigration legislation. This was followed by the Bossi-Fini amendment, which was sponsored by two highly controversial politicians on the far right. Umberto Bossi's Northern Italy succession movement had slowed in momentum after the start of EU integration and the introduction of the euro, and had shifted toward an anti-immigration agenda. Gianfranco Fini arrived on the political scene in 1994 after his "neo-Fascist" political party garnered five ministerial posts in the Berlusconi government.

Bossi-Fini reversed many of the more progressive trends of the previous immigration law. This prompted the United Nations High Commissioner for Refugees (UNHCR) and other human rights organizations to criticize Italy for being the only country in Europe without a comprehensive asylum law, to which the government replied that it was waiting for the common asylum law to be completed in 2004. Bossi-Fini created highly technical expulsion procedures and substantially restricted the process of appealing expulsion to the extent that an appeal became nearly impossible in practice. Bossi-Fini's criticized provisions also included mandatory fingerprinting of immigrants, which critics argued criminalizes an innocent population (including asylum seekers).

In addition, family reunification under Bossi-Fini was severely limited. Previously, an immigrant with a residence permit, or stay card, could bring his children, parents, siblings, and other family members into Italy to establish residence. In contrast, Bossi-Fini limited reunification to spouses, children under the age of eighteen, disabled children, parents who do not have other children living in the home country, and parents over sixty-five whose other children are unable to help due to serious health problems.

Another significant element of Bossi-Fini's restrictions dealt with Italy's already highly criticized detention centers, which are essentially prisons used to detain immigrants with a criminal record, undocumented immigrants, or those awaiting determination of their status. Before Bossi-Fini, 50% of immigrants remained in Italian detention centers for the maximum thirty-day period. Under Bossi-Fini, the period has been

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27. *Id.* at 1475-76.
28. *Id.* at 1492-93.
29. *See id.* at 1494-95.
30. *Id.* at 1497.
31. *Id.* at 1496-97.
doubled, despite the fact that several homicides have taken place in the detention centers and agents have been investigated on charges of brutality.32

Finally, Bossi-Fini, in accordance with the European Union’s hard-line response to Italy’s all-too-soft borders, empowered the Italian navy to use its police power to interdict a vessel if it believes the ship is being used for the illegal transport of migrants.33 One particularly unfortunate consequence of this policy was the interdiction of a vessel carrying passengers from North Africa, a voyage made by thousands of people each year.34 Having prepared only for the usual trip of a few hours, the passengers had little food or fresh water, and, as the days passed, the weaker among them began to die, at which point their bodies were dumped overboard.35 Two weeks later, by the time Italian authorities finally boarded the vessel off the coast of the resort island of Lampedusa (off the southern coast of Sicily), at least seventy bodies had been set afloat, thirteen corpses remained on the boat, and only fifteen individuals survived.36 Given this example, it is unsurprising that experts estimate that hundreds die each year while attempting this passage.37 With increasing normalization of relations with Libya, Italian officials fear an exponential increase in the number of people emigrating through Libya to Europe and, in response, have unveiled plans for “migrant reception centers” in Libya that human rights and asylum advocates have warned will be “‘concentration camps’ in the desert.”38

B. Impact of Restrictive Measures

The number of asylum applications has dropped from a high of nearly 700,000 in 1992 to 288,000 in 2004.39 The restrictive measures have also led to (1) a continuing decline in asylum recognitions throughout Europe,40 (2) a dramatic diminution in the degree of protection offered to those qualifying for subsidiary forms of protection, and (3) an array of abuses of the fundamental rights of refugees through various draconian procedural mechanisms put in place at borders and refugee processing centers, as well as within the administrative systems of various Member

32. Id. at 1497.
33. Id. at 1498.
36. Id. at 6.
37. Id.
38. Id.
40. See European Council on Refugees and Exiles, Synthesis of ECRE Country Reports for 2000, at xvi, http://www.ecre.org/country00/synthesis.pdf (last visited Apr. 18, 2005). Though exact statistics in this field are always unreliable and difficult to calculate, figures suggest that the rate of recognition measured across twenty-five European countries (including but not limited to EU Member States) dropped from approximately 11.2% in 1998 to 6.7% in 2001—a decline of approximately 40%. Id.
The drastic decline in overall asylum applications and recognition rates led Rudd Lubbers, then high commissioner for refugees, to chastise some European nations for their continuation of the hard-line policies they implemented more than a decade ago in response to the initial influx of refugees. According to Lubbers, "[t]here is no need to focus so single-mindedly on reducing standards (of refugee protection) and trying to deter or deny protection to as many people as possible." Other research at the time showed that fewer than 300,000 people from the ten newest members of the European Union moved to "old" Europe in the twelve months immediately following EU enlargement. This research contradicted media predictions that tens of millions of people would take advantage of the EU expansion by moving from periphery EU countries to Britain and other desirable West European countries. A year after the enlargement, the European Union itself has admitted that its calamitous predictions of a "great exodus" of "new Europe" citizens seeking work in "old Europe" countries have not come true.

The European Commission attributed this trend of declining asylum applications and recognitions to several factors. It pointed to restrictive measures deployed by Member States or the European Union itself to divert certain flows of refugees to other destinations or deter certain refugees from seeking asylum. The Commission also mentioned the problem of the widespread belief in "mixed" migratory flows—the notion that economic
migrants were attempting to pass themselves off as asylum seekers—as having helped raise the rejection rate. Finally, the Commission noted the disparity in the total number of asylum seekers from situations of armed conflict compared to those claiming protection under traditional criteria (i.e., persecution). According to the Commission,

it would be unreliable to try to explain the decline in admissions to refugee status as a proportion of total admissions in the Union by a more and more restrictive interpretation of the Refugee Convention in such situations. For one thing, requests emanating from countries where individual persecution comes in easily identifiable forms continue to correspond to high rates of admission to refugee status. For another, trends in decisions given by appellate courts suggest that new situations are being brought within the Refugee Convention.47

This explanation, however, is not conclusive. Just because countries continue to successfully identify the “easy” asylum claims at the same rate as before does not mean that restrictive measures or restrictive interpretations of the Refugee Convention are not taking their toll on either the numbers of asylum claims filed or the rates of admission. Indeed, the European Council on Refugees and Exiles (ECRE), an umbrella organization of several dozen human rights advocacy groups in Europe, has cautioned against overstating the extent of the problem of “hybrid migratory flows” and “using it as the central premise for the development of new approaches to the international protection regime.”48 ECRE has suggested—though it is impossible to prove definitively—that the various restrictive measures utilized by the Member States are behind the declining admission rates:

For years, NGOs have warned about pushing people into clandestine and often life-threatening channels if all legal entry channels are closed. It is the legitimate concern of States to control their borders, yet such control policies—if pursued in isolation—can be counterproductive. Thus any possible declining number of asylum applicants, may be explained not simply in terms of deterred fraudulent applicants, but also in terms of genuine refugees forced to remain in their country of origin, seek protection in other regions of the world, or forced to hide illegally and insecurely on European territory. It is impossible for ECRE to verify this alternative explanation, as it is impossible to estimate

47. Towards a Common Asylum Procedure, supra note 2, at 6.
how many victims of torture and persecution have been prevented from seeking asylum in recent years.\textsuperscript{49}

Regardless of the true source of the dwindling numbers of asylum recognition, one definite outcome of the rising reliance on subsidiary forms of protection has been "a divergence in case-law that [was] not conducive to the emergence of a European area."\textsuperscript{50} Along with the need for consistent procedures in evaluating asylum claims throughout EU Member States' shared borders, this divergence in the substantive determinations of asylum claims needed to be addressed. The response was harmonization.

II
EU INTEGRATION AND THE HARMONIZATION PROCESS

A. Early Steps

The process of EU asylum-law harmonization was a natural consequence of the ongoing integration in Europe over the past half century. When the 1956 Treaty of Rome established the European Economic Community, article 3 contained the sole mention of matters of migration, stating that the Community must take "measures concerning the entry and movement of persons."\textsuperscript{51} The Single European Act of 1986 also mentioned the free movement of persons as one of the fundamental elements of a European Market.\textsuperscript{52}

The real step forward came with the Schengen Agreement of 1985 and the resulting Schengen Convention implementing it in 1990, which abolished all checks on persons—regardless of nationality—at the common borders between Belgium, France, Germany, Luxembourg, and the Netherlands. The Schengen Convention also bound its signatories to harmonize controls at their borders with non-EU countries and to introduce a common policy on visas.\textsuperscript{53} The resulting territory, known as the Schengen Area, gradually expanded, and since March 2001, Iceland, Norway, and thirteen EU countries (the original five in addition to Austria, Denmark, Finland, Greece, Italy, Portugal, Spain, and Sweden) have implemented Schengen’s policies. "Schengenland" would later receive a more pejorative nickname—"Fortress Europe"—from its critics because of its emphasis on internal security and containment of migratory flows through often xenophobic policies.


\textsuperscript{50} Towards a Common Asylum Procedure, supra note 2, at 6.

\textsuperscript{51} Europe in Twelve Lessons, supra note 1.

\textsuperscript{52} Id.

\textsuperscript{53} Id.
The Maastricht Treaty of 1992, which formally established the European Union, addresses EU-wide issues under three distinct “pillars.” For policy areas falling under the First Pillar, Member States enact legislation through their shared sovereignty via the common European institutions. In contrast, policy areas relegated to the Third Pillar are governed through intergovernmental cooperation. Thus, Member States retain more individual sovereignty over Third Pillar issues than First Pillar issues. The Maastricht Treaty defined asylum and immigration as matters of common interest to Member States falling under the Third Pillar. The Treaty of Amsterdam of 1997 then moved asylum and immigration issues, which are categorized under the rubric of “Justice and Home Affairs,” from the Third Pillar to the First Pillar. This effectively amended the original Treaty Establishing the European Community to include a Title IV, “Visas, asylum, immigration and other policies related to freedom of movement of persons.” Amsterdam set the institutional stage for the most ambitious step in the evolution of the “area of freedom, justice and security”—the Conclusions of the European Council at Tampere in 1999.

B. The European Union’s Asylum Law Harmonization Agenda

The European Council at Tampere first proposed the ambitious agenda for asylum harmonization. These initial discussions resulted in the articulation of some sixty steps to be taken by 2004 to turn the European Union into “an area of freedom, security and justice.” The Council originally intended the process to proceed over a five-year period, beginning in May 1999 and ending in May 2004, but at this writing, the two most important pieces of legislation—on common procedures and a common definition of refugees—still remain to be adopted. The process of

56. Id.
57. As the body responsible for directing the agenda of the European Union (see supra note 46), the European Council set forth the asylum harmonization agenda in its meeting at Tampere. For a historical overview of the development of a common asylum system, see INGRID BOCCARDI, EUROPE AND REFUGEES: TOWARDS AN EU ASYLUM POLICY (2002).
59. Europe in Twelve Lessons, supra note 1.
60. In addition to the instruments already adopted, see infra note 72. For details on two instruments that have been “agreed upon,” (i.e., that have not yet been adopted by the Council, see supra note 43) see Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, (Apr. 30, 2004), http://www.ecre.org/ eu_developments/procedures/ASILE 33_30 April 2004.pdf; Qualification Directive, supra note 5.
HARMONIZING EU ASYLUM LAW

Harmonization as conceived would consist of two distinct stages with short-term and long-term goals. The goal of the first stage was to create a set of minimum standards to be implemented within Member States. These threshold standards would (1) establish the Member State responsible for examining an asylum claim, (2) determine minimum standards on the reception of asylum seekers, (3) establish standards for the qualification of refugees and beneficiaries of subsidiary protection, and (4) create procedures for granting and withdrawing refugee status and granting temporary protection. The second stage, for which there is no concrete time frame, will consist of communitarization—an effort to further harmonize and create a coordinated system of "burden sharing."

The creation of an "area of freedom, security and justice" implies the need for enhanced cooperation among EU Member States to ensure the effectiveness of their immigration policies. With an increase in the freedom of movement comes an increase in migration. Careful regulation is necessary to prevent certain Member States from being disproportionately affected by migration because of their proximity to third countries that are major transit sites for asylum seekers, or because of the comprehensiveness of the protections they might offer in contrast to their neighboring Member States. Thus, the purpose of the harmonization process is two-fold. First, it aims to strengthen internal security and control within the borders of the enlarged EU area of freedom, security, and justice by standardizing procedures, thereby neutralizing the threat to the more interior European countries posed by those Member States that historically have been more porous to immigration. Second, in the spirit of cooperation and "burden sharing," it is recognized that some countries, for various reasons, have been disproportionately affected by immigration. To the extent that this effect is a result of disparities in procedures and benefits among Member States, it is thought that a common procedure and a uniform status will

61. See Towards More Accessible, Equitable and Managed Asylum Systems, supra note 1, at 4.
62. Id.
64. See Towards a Common Asylum Procedure, supra note 1, at 6-7.
65. "Burden sharing," or, as the UNHCR prefers, "responsibility sharing," consists of sharing the task of accepting refugees into the area of "freedom, justice and security." See Hansen, supra note 8, at 785; see also Towards More Accessible, Equitable and Managed Asylum Systems, supra note 1 (describing the need to prioritize "burden- and responsibility-sharing"). This could be achieved by either establishing some quota system to divide the processing of refugees/asylum seekers among Member States or by obligating compensation to be paid by states accepting fewer refugees/asylum seekers (e.g., the United Kingdom and France) to those accepting more (e.g., Germany). Hansen, supra note 8, at 785.
66. Germany, as mentioned earlier, is exemplary in this regard. On the need for "responsibility sharing" and a quantitative analysis of the impact of various EU and domestic policies on responsibility sharing between 1982 and 2001, see Vink & Meijerink, supra note 7, at 299-300.
neutralize this disproportionate impact. Thus, as far as policy and procedure are concerned, every Member State could potentially be an equally attractive country of destination for an asylum seeker. Consequently, the disproportionate burden currently felt by some Member States should be spread more equitably in the future.

The official EU rationale for establishing minimum standards for the qualification of refugee status and for persons who otherwise need international protection closely parallels the reasoning for the overall harmonization process. Harmonized standards will help to limit secondary movement and host-country shopping. If all countries offer the same level of protection, and if comparable rights and benefits attach to that form of protection, asylum seekers should no longer have an incentive to choose their countries of destination based on disparities in Member States’ practices and legislation.

The European Union further supports harmonized qualification standards within a common asylum system because the continued absence of coordinated rules on the qualification and status of refugees and persons who otherwise need international protection would have a negative effect on the effectiveness of other instruments relating to asylum. The current lack of standardized rules on qualification and status would undermine other asylum laws because uniform procedures and common practices are useless if they cannot be applied consistently to a predictable population.

For example, the establishment of these standards will reinforce the justification for instituting a scheme that declares which Member State is responsible for considering an asylum application. In a system in which asylum seekers do not have complete freedom to choose where they will lodge their applications, fairness dictates that (1) their claims should be processed in the same way, and (2) if granted asylum, they should be afforded the same status and benefits irrespective of which country receives them. Thus, the standards for determining the status of refugees and others deserving protection are considered the heart of the common asylum policy, and this reinforces the urgency of ensuring that harmonization is fair and complete.

C. Recognition of the Need for More Perfect Harmony

By its own admission, the European Union’s progress at times has been slow and, in some instances, meeting deadlines has come at the price of “a reduction in the effectiveness of the harmonisation or a very low level

67. Note that asylum seekers are attracted to various countries for various reasons: family reunification, larger community of people of a similar origin, etc. However, procedure and benefit concerns will no longer serve as an impetus to choose one country over another.
68. See Vink & Meijerink, supra note 7, at 299-300;
70. Id. at 9.
of agreed standards." Nevertheless, five instruments have been adopted. However, despite these modest achievements, the Council missed its initial deadlines and, on some issues, seems to be failing miserably. Raymond Hall, director of UNCHR’s Europe Bureau, reflected on the work completed as “disappointing overall in terms of providing greater protection to bona fide refugees” and cautioned that “[a]s states transpose the Directives into national law over the next couple of years, we will need to make sure we don’t see further lowering of protection standards.”


73. On March 22, 2004, only weeks before the May deadline, human rights and refugee organizations throughout Europe joined together in calling for the total abandonment of one of the key proposed directives, the “Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status,” claiming it would violate EU commitments set out in the Charter of Fundamental Rights and would violate individual Member States’ legal obligations under international refugee and human rights law. See Joint Letter to Antonio Vitorino, European Commissioner for Justice and Home Affairs (Mar. 22, 2004), http://www.ecre.org/press/Vitorino_call_for_withdrawalpdf.pdf. The advocates also expressed complete dissatisfaction with the draft proposal’s designation of certain countries as “safe countries of origin” or “safe third countries.” Id. They also opposed the absence of a guaranteed right for all asylum seekers to remain in a country of asylum pending appeal. The absence of such a right could lead to the removal of applicants to countries where they may suffer torture or other human rights violations and, in some cases, could amount to refoulement contrary to the 1951 Refugee Convention and other international human rights instruments. Id. A month later, advocates again decried the fact that their protests had gone unheard as the European Commission prepared to finalize a version of several proposed instruments. See Press Release, Refugee and Human Rights Organizations Across Europe Express Their Deep Concern at the Expected Agreement on Asylum Measures in Breach of International Law (Apr. 28 2004), http://www.ecre.org/press/assembly_procedures.shtml.

74. United Nations High Commissioner for Refugees, supra note 11, at 7 (quoting Raymond Hall, director of UNHCR’s Europe Bureau); see also European Council on Refugees and Exiles, supra note 4 (expressing dissatisfaction with the progress made in EU asylum law harmonization).
of xenophobic fears relating to migration throughout the European Union and internal security concerns in the post-9/11 global landscape, attempts to reduce the cacophony of asylum policies and procedures in the Member States have thus far failed. Following the Treaty of Amsterdam and the Tampere Summit, the European Council reviewed its progress toward harmonizing EU asylum policies and procedures. At this stage, the Council found it necessary “to consider whether mechanisms can be developed to correct certain differences that might remain or to prevent the phenomenon of divergent interpretation of Community rules.” This statement implies a willingness to develop mechanisms to address disparities in policy and protection that stem from the former asylum regime (or lack thereof) and that survive the harmonization process. The European Commission later reiterated this commitment, noting that “[o]ne of the objectives of the main Community instrument is to narrow divergences of interpretation in the implementation of the convention’s rules on recognition of refugee status.”

Despite anticipating the need to eliminate persistent disparities in the implementation of harmonized rules within Member States, the Commission did not take a similar approach to the definitions of refugee status or subsidiary protection:

The Commission believes it is important to begin by clarifying one point in particular: the purpose of the common procedure and the uniform status is not to organize the recognition of Refugee Convention refugee status or subsidiary protection by means of individual positive or negative decisions taken by a Community body. This option would be utterly incompatible with the proportionality and subsidiarity principles. And it would entail the establishment of a specific judicial body to hear appeals against individual decisions.

Thus, as far as refugee status or subsidiary protection is concerned, the Commission appears to be seeking the easy way out. Its statement regarding the establishment of a specific judicial body to hear appeals seems to suggest that such a process would create an administrative nightmare.

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75. According to Refugees, the magazine of the United Nations High Commissioner for Refugees, European countries spent billions of dollars strengthening their own physical borders and toughening immigration and asylum systems, in addition to collectively channeling more than one billion dollars to new member states to upgrade the European Union’s new major frontier in the East. See United Nations High Commissioner for Refugees, supra note 11, at 8.

76. See generally European Council on Refugees and Exiles, supra note 4 (assessing the progress made in EU asylum and migration law since the Tampere Summit).

77. Towards a Common Asylum Procedure, supra note 2, at 11.

78. Communication on the Agenda for Protection, supra note 71, at 8 (emphasis removed).

79. See Towards a Common Asylum Procedure, supra note 2, at 7.

80. The principle of subsidiarity, stated in Article 5 of the Treaty Establishing the European Community, provides that the Community may take action only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of
The Commission mentions two founding principles of the Community, subsidiarity and proportionality, which seek to create a lean "federal" body that, while assuming substantial control over the affairs of its body politic and territory, nonetheless remains loyal to the sovereign Member States of Europe. But an argument for efficiency rings hollow in the absence of evidence of the likely or actual impact of an appellate body. Additionally, such efficiency arguments essentially base themselves on a "deluge" theory that often plays off populist fears without basis in fact.81

Despite the Commission's reliance upon the proportionality and subsidiarity principles, an appellate body or other mechanism would in fact further the goals of harmonized EU asylum policy. Thus, any resistance could perhaps be interpreted as (1) a lack of political will to find just and balanced solutions to what is now a jointly shared problem of offering protection to refugees, or (2) a misunderstanding of the contribution an appellate body could make toward a comprehensive asylum system, including its potential to more fairly distribute the impact of immigration among Member States. Indeed, as noted earlier, the European Union reasons that the continued absence of approximated rules on the qualification and status of refugees and persons who otherwise need internal protection would undermine the effectiveness of other instruments relating to asylum because uniform procedures and common practices are useless if they cannot be applied consistently to a predictable population.82 In other words, divergent and restrictive decisions made throughout various Member States would perpetuate, rather than fundamentally change, the current calculus of asylum in Europe and would undermine the new harmonized system.

In its review of the Tampere process, the European Commission observed the entrenched political problems that hampered the summit:

Despite the resolute line taken by the Tampere conclusions, it was not always possible to reach agreement at European level for the adoption of certain sensitive measures relating to policies which remain at the core of national sovereignty. The legal and institutional constraints of the current Treaties, where unanimity in the Council generally remains the rule, partly explain these difficulties. The Member States are sometimes reluctant to cooperate within this new European framework when their interests are at stake. Moreover, the right of initiative shared with the
Member States sometimes had the effect that national concerns were given priority over Tampere priorities. Furthermore, the Commission noted that implementation of the hard-fought compromises reached through the harmonized legislation would also be limited by the institutional constraints imposed by the structure of the European Union itself, namely, that of a confederation of sovereign states:

Once the instruments are adopted, the institutional limits regarding the real possibilities for verifying the implementation of policies by national authorities, given the limited role of the Court of Justice and the restricted powers of the Commission as regards police and judicial cooperation in criminal matters, are a real obstacle to ensuring that the instruments and decisions adopted are actually effective. In addition, Union action cannot be effective if it is not backed up, in the Member States, by a declared political determination to ensure that European decisions have effect in reality. It is up to the experts in the Member States to use the opportunities for cooperation that European integration offers.

Thus, the European Union finds itself in the eleventh hour of an interregnal period between what one hopes are very different asylum regimes. As this caesura draws to a close, politicians, diplomats, and policy makers are presented with a final opportunity to live up to their own rhetoric of responsibility by establishing comprehensive, fair, and efficient policy and protection measures within the framework of the nascent communityized asylum regime. In this transition from cacophony to true harmony, it is imperative to bring the diverging tones of EU asylum policy into tune with one another by developing standards that fully realize the Member States' obligations under the Refugee Convention and its 1967 Protocol, in addition to other international human rights instruments.


84. Id. at 3-4.

85. See, e.g., Towards a Common Asylum Procedure, supra note 2, at 18:

The adoption of a common asylum procedure and a uniform status, valid throughout the Union, for persons who are given asylum, is one of the most ambitious objectives set by the Heads of State or Government and is a core component of the area of freedom, security and justice. The aim is to give practical expression to the fundamental values that are so attractive to those who are deprived of them elsewhere in the world.

III
STATUS OF HARMONIZATION PROCESS AND THE THREAT OF THE LOWEST COMMON DENOMINATOR

This Part will explore what human rights and asylum advocates in Europe refer to as the fear of the "lowest common denominator." Given the political climate surrounding immigration issues, there are serious concerns that Member States will exploit the Treaty of Amsterdam to set common asylum standards—both procedural and definitional—that will fall woefully short of the norms articulated in the UNHCR guidelines and other applicable international and regional human rights conventions.

A. EU Rhetoric

Since the Council at Tampere, the European Commission has consistently espoused the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol as the relevant legal framework upon which it will base its asylum policies. The Member States further demonstrated their commitment to the highest standards of refugee protection by including a right to asylum in the new Charter of Fundamental Rights of the European Union.

The European Commission issued a proposal (the "Qualification due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community." Id. art. 18.


88. For example, The Refugee Council reports that Member States had reached agreement on the reception directive in April 2002. However, the United Kingdom pressed to reopen negotiations because, following the initial consensus, the British government introduced several restrictive provisions into its Nationality, Immigration and Asylum Act of 2002 and needed to lower the EU standards to enable it to continue with its new legislation. Of particular concern was the provision in Section 55 of the new legislation, which provided for removing support from asylum seekers who did not apply in good time without good reason. After renewed negotiations, the United Kingdom successfully persuaded the other Member States to include similar provisions within the Reception Directive, such as the Council Directive Laying Down Minimum Standards for the Reception of Asylum Seekers. See Minimum Standards on the Reception of Asylum Seekers, supra note 72. This allowed all Member States to introduce similarly punitive and inhumane policies into their domestic laws. See The Refugee Council, supra note 87, at 7. Another example is Germany’s restriction of the movement of asylum seekers to specific parts of the country. Germany convinced the other Member States to include similar provisions in the Reception Directive. Id.

89. Communication on the Agenda for Protection, supra note 71, at 4:

There was a particularly urgent need for solutions reaffirming the relevance and universality of the Convention at the dawn of the XXIst Century, and for clarification as regards the application of certain of its provisions and identification of what elements were missing from the Convention which would help to develop better protection and management of migratory flows and durable solutions.

Directive”) for a directive to establish “minimum standards for the qualification and status of third country nationals and stateless persons as refugees.” The European Commission stated that the Qualification Directive is based on “the full and inclusive application of the Refugee Convention, thus ensuring that nobody is sent back to persecution,” i.e., maintaining the principle of non-refoulement.91 Because it is essentially unworkable to create norms for policies and procedures if the group to which they will apply is undefined, the Qualification Directive will form the bedrock of the common asylum system.

Beyond their collective statements through the voice of the Commission, all Member States are parties to the 1951 Refugee Convention and its 1967 Protocol.92 It is interesting to note that fourteen of the twenty-five EU countries93 are members of the UNHCR’s Executive Committee (if candidate EU members Romania and Turkey are included, then sixteen of the twenty-seven EU countries are on the Executive Committee.)94 In fact, they collectively represent nearly one-quarter of the Executive Committee.95 In December 2001, each Member State signed the Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, which expressed the States parties’ collective will to recommit themselves to upholding the Refugee Convention.96 Under article 35 of the Refugee Convention, States parties are obligated to cooperate with UNHCR, and a similar obligation is reiterated in article 2(1) of the 1967 Protocol.97 The duty imposed by UNHCR is not a static obligation, but rather is one of a “highly dynamic and evolutive” character.98 In establishing a duty to cooperate with UNHCR “in the exercise of its functions,” the Refugee Convention does not refer to a specific and limited set of functions, but rather, to all present and future aspects of UNHCR’s work.99 Thus, the duty to cooperate with UNHCR

92. Refugee Convention, supra note 17; 1967 Protocol, supra note 86.
95. Id.
96. Id.
97. 1967 Protocol, supra note 86.
99. Id.
must evolve with its changing role in monitoring and supervising of the Refugee Convention.

However, unlike other international treaties, there is no final judicial authority or arbiter of the exact contours of the refugee definition. The European Union has consistently stated its commitment to including UNHCR’s guidance in its policy making, but the issue of present concern—interpreting the refugee definition—extends beyond merely acknowledging UNHCR’s advice or recommendations, which is all that it is mandated to offer. While the European Union must continue to consult UNHCR and even amplify its voice in the process of harmonization, UNHCR cannot enforce its own recommendations. Ultimately the responsibility for adhering to a more comprehensive, rather than restrictive, refugee definition rests with the Member States.

B. The Threat of the Lowest Common Denominator

1. Aiming for the Bottom

The threat of the lowest common denominator looms over all areas of the nascent harmonized EU common asylum policy. This includes the standards for temporary protection, tactics for combating human smuggling, asylum procedures relating to appeals, accelerated procedures, expansion of the criteria by which claims are declared “manifestly unfounded,” application of the “safe third country” principle, and contours of the principle of family reunification. According to ECRE, “at the heart of the problem is the widespread belief amongst governments that the solution to uneven flows of asylum seekers is for those countries with

100. Article 35 of the Geneva Convention Relating to the Status of Refugees reads as follows:

Co-Operation of the National Authorities with the United Nations

1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.

2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them 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.

Refugee Convention, supra note 17, art. 35, 189 U.N.T.S. at 150.

101. See Towards a Common Asylum Procedure, supra note 2, at 18.

102. For an example of the Commission considering this possibility, see Communication on the Agenda for Protection, supra note 71, at 9.

103. Kalin, supra note 98, at 634. UNHCR’s independence for the purposes of monitoring implementation and enforcement is necessarily limited because of the tension resulting from its efforts to act as a partner both to refugees and to governments. Id. UNHCR depends on a degree of trust from governments to implement its agenda, which can be violated by public condemnation rather than private consultation. Id. Furthermore, its activities depend in large part on voluntary contributions from countries, so it has limited ability to pressure those that do not comply. Id.
higher standards to lower them." The dispute between France and the United Kingdom in 2001 over the reception center for "irregular migrants" in Sangatte is a perfect example of this dynamic. The French Ministry of Foreign Affairs urged the British government to "give consideration to anything that can reduce the difference between the laws and practices of the United Kingdom and those of the European Union countries" since such "differences render British territory particularly attractive for all would[-]be immigrants."

Thus, ECRE concludes that in the absence of a political commitment from Member States to adjust their national legislation to create a higher set of standards that will meaningfully raise the bar for each country, the European Council negotiations are instead leading toward compromises that will continue to tolerate a wide disparity in national policies. Advocates fear that beyond asylum policies and procedures simply remaining at their abysmal levels, certain Member States, finding that their standards are more attractive than the next country’s, will rush to lower them to the agreed-upon set of standards under the guise of a European agreement. ECRE questions whether some governments are "moving swiftly to create ‘facts on the ground’ to strengthen their negotiating positions or to drive down standards before they are agreed at the EU level."

It is not surprising that there exists a wide disparity in the asylum policies and procedures among Member States. Beginning with the Joint Position of 1996, one of the earliest articulations of the shared goal of a common asylum policy, the Member States expressed their collective understanding of article 1 of the 1951 Convention in terms of the minimum content it imposed upon them. Furthermore, the Member States confined their nascent collective understanding as "adopted within the limits of the constitutional powers of the Governments of the Member States" and as having no binding effect on "the legislative authorities or judicial authorities of the Member States." Thus, the commitment to a restrictive harmonized asylum regime has been evident from the beginning. In its own evaluation of the Tampere process, the European Commission noted the continuation of these trends and the continued reliance upon the national

104. European Council on Refugees and Exiles, supra note 4, at 21.
105. Id. (quoting the French Ministry of Foreign Affairs).
106. For example, ECRE points out that very shortly after Tampere, a new aliens law was introduced in Greece in spring 2000, followed in June of that year by a change in Danish law allowing the indefinite detention of asylum seekers suspected of criminal offenses. See id. at 22.
107. Id. at 21.
108. Id. at 22.
wills of the Member States to create and implement a truly harmonized European asylum system.110

Looking to the latest agreed-upon version of the Qualification Directive that made it out of the Commission and is still awaiting approval by the Council, it appears that some progress has been made. While it meets some expectations, it fails to adopt the Tampere Summit’s recommendation of a “full and inclusive application” of the refugee definition.111 Specifically, its definition of “social group” and its inclusion of persecution by non-state agents are close approximations of the recommended interpretations suggested in the UNHCR guidelines.112 Nevertheless, as ECRE points out in its evaluation of the proposed directive, areas of concern remain.

2. Particular Concerns Regarding the Qualification Directive

Human rights groups have several particularized concerns regarding the Qualification Directive. Most importantly, ECRE points out inadequacies with article 7113 (defining “state-like” actors as actors of protection, even though such actors are not signatories to international treaties and therefore cannot be held accountable for violations of international humanitarian and refugee law obligations); article 8114 (allowing Member States to consider “internal protection” of asylum applicants in “safe” areas of a country of origin, while ignoring the absence of the key criteria necessary for a suitable area for internal protection elsewhere in the country); article 14115 (including “national security” rationales as a justification for denying refugee status, in an expansion of the Refugee Convention’s permitted grounds for exclusion, such as criminal activity); and finally, the related articles dealing with subsidiary protection (articles 23, 26, 28, 29, and 33).116 Compared with those who have been granted refugee status, persons who have been granted subsidiary protection have significantly reduced benefits and rights, such as access only to emergency health care and “core benefits,” as well as reduced access to the labor market.117

These issues could have drastic effects if applied in the new harmonized system. An exhaustive discussion of the dangers that minimum standards pose is beyond the scope of this Comment. However, it is readily apparent that the lowest-common-denominator approach is not consistent with an EU asylum regime that casts itself as an area of “freedom, security

110. See Assessment of the Tampere Programme and Future Orientations, supra note 83, at 4-5.
111. See European Council on Refugees and Exiles, supra note 4, at 3.
112. Id. at 10.
113. Qualification Directive, supra note 5, art. 7.
114. Id. art. 8.
115. Id. art. 14.
116. Id. arts. 23, 26, 28, 29, and 33.
117. See European Council on Refugees and Exiles, supra note 4, at 37-38.
and justice." An additional set of considerations that arises from the discussion of the shortfalls of a harmonized asylum system is innate to the refugee definition itself, which is highly evolutionary in character.

3. The Evolutionary Character of the Refugee Definition

Even if the proposed Qualification Directive represents a modest step toward a common asylum policy, it is important to note the evolutionary character of the Refugee Convention, particularly the elements of article I. Even if the EU documents are more or less consistent with the intentions of the Refugee Convention, there still remains the additional step of norm internalization to be carried out on national levels throughout the European Union. To this end, the Commission envisages creating a Contact Committee to facilitate this purpose. 118 This Contact Committee, however, will prove insufficient because it will still be anchored to the politics of the Member States and not sufficiently independent from their concerns. Furthermore, the definitions and recommended guidelines in some areas are still open enough to allow for both progressive and restrictive applications, leading to possible disparities in protection between Member States for particular types of refugees, which would counteract the very purpose of a harmonized asylum regime. 119 Consequently, the need to create binding interpretations of new categories of asylum seekers will only continue

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118. The Contact Committee:

will facilitate the transposition and the subsequent implementation of this and other Directives in the field of asylum through regular consultations on all practical problems arising from its application. It will help avoid duplication of work where common standards are set and to adopt complementary strategies in combating abuse of the protection regime. In addition, the Committee will facilitate consultation between the Member States on reaching similar interpretations of the rules laid down on international protection that they may lay down at national level. This would greatly help the construction of a Common European Asylum System as envisaged by the Conclusions of the Presidency at the Tampere European Council in October 1999. Lastly, the Committee will advise the Commission, if necessary, on any supplements or amendments to be made to this Directive or on any adjustments deemed necessary.

Qualification Directive, supra note 5, at 7.

119. For example, the agreement that adequate state protection may be provided by international organizations and stable, state-like authorities that control clearly defined territories is not consistent with the Refugee Convention. See Qualification Directive, supra note 5, at 18. ECRE argues that

[stable, state-like authorities cannot sign international human rights treaties, are not subject to international law and cannot be held responsible for ensuring that human rights standards are safeguarded. The recent history of Kosovo and Bosnia has shown the ineffectiveness of international organizations in maintaining peace and security and guaranteeing human rights in conflict areas.

European Council on Refugees and Exiles, supra note 4, at 11. Thus, one could foresee different national interior ministries making misinformed and ultimately divergent determinations over the extent of stability and control exercised by international organizations in the Darfur region of Sudan. These divergent interpretations could lead to "forum shopping" by Sudanese refugees, thus destabilizing the goals of the harmonization regime.
in the future. This will be discussed in detail below with respect to claims of persecution on account of sexual orientation.

4. Membership in a Particular Social Group

According to the UNHCR's handbook on criteria for determining refugee status, "a 'particular social group' normally comprises persons of similar background, habits or social status." The handbook states further that membership in a particular social group "may be at the root of persecution" because there is "no confidence in the group's loyalty to the Government" or because the "political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies." Finally, the handbook cautions that "mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status," though the guidelines leave open the possibility that there may be "special circumstances where mere membership can be sufficient ground to fear persecution."

The UNHCR has also promulgated guidelines that go beyond the handbook in their comprehensive treatment of questions of interpretation of the Refugee Convention and its Protocol. According to the guidelines for membership in a particular social group, states have taken two approaches to interpreting this ground. The first approach, known as the "protected characteristics" or "immutability" approach, examines whether an immutable characteristic, or a characteristic "that is so fundamental to human dignity that a person should not be compelled to forsake it" unites a group of people. An immutable characteristic "may be innate (such as sex or ethnicity) or unalterable for other reasons (such as historical fact or a past association, occupation or status)." The second approach, known as the "social perception" approach, "examines whether or not a group shares a common characteristic that makes them a cognizable group or sets them apart from society at large." The guidelines note that courts and

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120. The European Union acknowledges the need for further harmonization even after the unanimous acceptance of the Qualification Directive and the end of the first stage of the harmonization process. See Towards More Accessible, Equitable and Managed Asylum Systems, supra note 1, at 11.


122. Id. ¶ 78.

123. Id. ¶ 79.


125. Id. ¶ 6.

126. Id.
administrative bodies applying both of these approaches have concluded that “women, homosexuals, and families, for example, can constitute a particular social group within the meaning of Article 1A(2).”\textsuperscript{127} Given the protection gaps which can result from these sometimes divergent approaches, UNHCR recommends that the approaches be reconciled.\textsuperscript{128} UNHCR merges the two into one single standard:

A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.\textsuperscript{129}

Thus, in this merged approach, if a characteristic claimed to be immutable or innate is found not to be so, the analysis must proceed to question whether persons sharing this common characteristic are nonetheless perceived to be “a cognizable group in that society.”\textsuperscript{130} Furthermore, persecution itself can serve as the basis for societal perception of a social group.\textsuperscript{131}

Article 12(d) of the proposed Qualification Directive states:

the concept of social group shall include a group which may be defined in terms of certain fundamental characteristics, such as sexual orientation, age or gender, as well as groups comprised of persons who share a common background or characteristic that is so fundamental to identity or conscience that those persons should not be forced to renounce their membership. The concept shall also include groups of individuals who are treated as “inferior” in the eyes of the law.\textsuperscript{132}

In the explanatory notes to article 12, the proposed Qualification Directive elaborates that a fundamental characteristic can include “gender, sexual orientation, age, family relationship, or history.” The notes also state that a group characteristic that is so fundamental to identity or conscience that persons should not be forced to renounce their membership in the group can include “trade union membership or the advocacy of human rights.”\textsuperscript{133} The notes further explain that the concept is “not confined to narrowly defined, small groups of persons, and no voluntary associational relationship or de facto cohesion of members is required.”\textsuperscript{134} It also restricts the possible application of gender and sexual orientation, stating that

\begin{itemize}
\item \textsuperscript{127} Id.
\item \textsuperscript{128} Id. \textsuperscript{¶} 10.
\item \textsuperscript{129} Id. \textsuperscript{¶} 11.
\item \textsuperscript{130} Id. \textsuperscript{¶} 13.
\item \textsuperscript{131} Id. \textsuperscript{¶} 14.
\item \textsuperscript{132} Qualification Directive, supra note 5, at 46.
\item \textsuperscript{133} Id. at 22.
\item \textsuperscript{134} Id.
\end{itemize}
reference to these concepts "does not imply that this persecution ground necessarily covers all women and homosexuals," but that its applicability will be contextually defined by the situation in the country of origin and the nature of the persecution and the characteristics of the persecuted.\textsuperscript{135} The comments to article 12 also state that interpretation should allow for the inclusion of groups of individuals who are treated as "inferior" or as "second class" in the eyes of the law.\textsuperscript{136} This includes states applying the law in a discriminatory manner or refusing to invoke the law to protect a particular group. An example would be instances in which women are victims of domestic violence, including sexual violence and mutilations, in states where they are unable to obtain effective protection because of their gender or social status as married women, daughters, widows, or sisters, in that particular society.\textsuperscript{137} Condoning persecution at the hands of private individuals or other non-state actors turns into a question of a "lack of protection by the state," a recognized form of persecution under the Refugee Convention.\textsuperscript{138}

Thus, a textual analysis of the proposed Qualification Directive shows that it closely approximates the intentions of the UNHCR guidelines with respect to members of a particular social group. However, the fate of claims of persecution on account of membership in a particular social group is by no means certain, even with the standard being set relatively high. As the explanatory notes show, the Qualification Directive is somewhat restrictive in its application to gender and sexual orientation. For instance, the language explicitly providing that women and homosexuals are not automatically covered seems contrary to the intent of the Refugee Convention.\textsuperscript{139} The application of these concepts by Member States will be contextual, varying from country to country based on country conditions, characteristics of the persecuted party, and the nature of the persecution.\textsuperscript{140}

\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} See UNHCR Guidelines, supra note 124, at ¶ 20-21.
\textsuperscript{139} As ECRE notes:
Paragraph 1(d) further suggests that sexual orientation or gender would not alone create a presumption for the applicability of this Article whereas ECRE would instead take the view that each is always a group defined by a fundamental immutable characteristic and is in all cases the basis for a particular social group, although whether group membership would in itself give rise to a well founded fear of persecution is a separate question altogether.


\textsuperscript{140} Qualification Directive, supra note 5, at 22. Here the Qualification Directive reserves the discretion of individual countries to make assessments on the general conditions in an applicant's state of origin, such as the general sociopolitical status of women or the general treatment of homosexuals in any given state.
Indeed, the current variations among European countries in the application of the social-group ground for persecution suggest that even with the Qualification Directive’s relatively inclusive language, there is substantial room for diverse application of the law. This can be seen quite clearly in the case of applications for asylum lodged on the basis of sexual orientation.

Though there have been fewer claims for asylum lodged with sexual orientation as a ground for persecution than any of the other four grounds for determination, the flexibility of the “membership of a particular social group” ground and the lack of illuminating case law have kept this ground particularly ambiguous. The tendency of this ground to overlap with other grounds, particularly political opinion, has exacerbated the ambiguity, leaving judges the option to grant asylum on the other overlapping basis without commenting on the relevance of “membership in a particular social group.” However, the increasing number of claims brought under the social-group category worldwide is producing more judicial decisions considering what constitutes “membership of a particular social group.” This growing body of decisions has led to an expansion and broadening of the “defining” factors, a trend which may increase in the future, certainly on an international scale, if not on the regional European level. Thus, according to the European Legal Network on Asylum (ELENA), the “relevance of the social group category is changing rapidly, both through the development of new precedents and the development of new asylum legislation.” The current diversity of opinion on the application of this ground to cases of sexual orientation is as strong a case as any for instituting some form of appellate mechanism that can address the evolution of this part of the refugee definition as it becomes a greater issue for Member States.

142. Id.
144. European Legal Network on Asylum, supra note 141, at 1.
145. Id.
146. For a review of country interpretations in Europe and elsewhere, see id. at 7-21. See also Aleinikoff, supra note 143, at 268-84. Admittedly, claims based on sexual orientation do not represent a very large percentage of all asylum claims in Europe or elsewhere. However, these claims are an example of the problem of interpretation created by agreement to minimum standards and the subsequent possibility of further divergence, rather than convergence, of national asylum law. Another example would be the Qualification Directive’s inclusion of “stable, state-like authorities” as capable of offering protection. See supra note 120 and accompanying text.
IV
INSUFFICIENCY OF EXISTING COURTS AS APPELLATE BODIES

This Part considers whether existing judicial bodies—the European Court of Justice (ECJ) and the European Court of Human Rights ("Human Rights Court")—can provide an adequate appellate function within the newly harmonized asylum system. Specifically, this Part examines whether these bodies are capable of establishing a definition and determination of refugee status in the European Union through binding case law to be followed by the national and administrative courts of the Member States. The Human Rights Court, though providing a vital safety net for some individual asylum claims—thus satisfying the first of the two objectives of an appellate mechanism outlined above—does not fulfill the further goal of establishing binding case law that interprets the refugee definition. On the other hand, the ECJ would seem a natural forum for such claims as a court of final resort because of its status as arbiter of EU legislation interpretation. However, restrictions placed on the ECJ's jurisdiction in the Treaty of Amsterdam limit its powers regarding matters of asylum and immigration. Part of the Treaty of Amsterdam process includes a review and reform of the ECJ that should have occurred by May 1, 2004, but it remains unclear whether broader powers over asylum and immigration matters will result from this reevaluation of the Court's role, if and when it occurs.147

A. The European Court of Human Rights: No Binding Authority over Interpretation of the Refugee Definition

The Human Rights Court decides cases involving asylum seekers whose asylum status has been denied or whose rights have been threatened or violated by procedures followed by Member States during the determination process. According to article 32 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter European Convention on Human Rights), the treaty which established the Human Rights Court, the Court's jurisdiction "shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in articles 33, 34 and 47."148 Furthermore, the Human Rights Court may hear applications by individuals alleging violations of the European Convention on Human Rights. Specifically, the Court may receive applications from any person, non-governmental organization, or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights

147. See infra Part IV.B.1.
set forth in the Convention or its protocols. 149 The parties to the European Convention on Human Rights "undertake not to hinder in any way the effective exercise of this right." 150 Appellants bring their appeals to the Human Rights Court typically under article 3 (prohibiting subjection to torture or to inhuman or degrading treatment or punishment), 151 or under article 13 (guaranteeing an effective remedy before a national authority), 152 or both. These cases effectively uphold the integrity of the principle of non-refoulement articulated in the 1951 Refugee Convention, 153 but significantly, they are technically brought under the European Convention on Human Rights. 154

Such appeals, however, are poor substitutes for a judicial interpretation of the Refugee Convention because the scope of protection offered by article 3 of the European Convention on Human Rights differs from that provided by article 33 of the Refugee Convention. In contrast to the Refugee Convention, the Human Rights Court can offer appellants whose claims are based on article 3 of the European Convention on Human Rights both more protection and less protection. Article 3 of the European Convention on Human Rights is less restrictive in the sense that, unlike article 33 of the Refugee Convention, it does not require a nexus of a refugee's fear of persecution ("for reasons of") and does not limit the grounds for fear of persecution as the Refugee Convention does. 155 Unlike article 33 of the Refugee Convention, which guarantees the right of non-refoulement prohibiting the return of a refugee to states where he or she fears persecution, 156 article 3 of the European Convention on Human Rights only applies

149. Id. art. 34.
150. Id.
151. In the landmark case Chahal v. United Kingdom, the prohibition of article 3 of the European Convention on Human Rights was decided to be absolute and therefore applicable to asylum seekers and extradition cases. See App. No. 22414/93, 23 Eur. H.R. Rep. 413 (1997). Article 3 of the European Convention on Human Rights provides, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." European Convention on Human Rights, supra note 148, art. 3.
152. Article 13 of the European Convention on Human Rights provides, "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." European Convention on Human Rights, supra note 148, art. 13.
153. Refugee Convention, supra note 17, art. 33.
154. For instance, article 3 of the European Convention on Human Rights contains an express prohibition against torture. See European Convention on Human Rights, supra note 148, art. 3. However, this is a general prohibition against torture, irrespective of a person's status as a refugee. In contrast, the Refugee Convention specifically prohibits non-refoulement of potential refugees or others deserving international protection to countries in which they fear persecution. Thus, the protections provided by the Refugee Convention extend beyond the European Convention on Human Rights' prohibition against torture.
155. See Refugee Convention, supra note 17, art. 33.
156. Article 33 provides, "No Contracting State shall expel or return ('refoul') 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." Id., art. 33.
to cases in which an applicant fears torture or degrading treatment or punishment. If an applicant who should have been recognized as a refugee under the Refugee Convention is unfortunate enough to be able to claim fear of such torture or degrading treatment or punishment, he or she may “luckily” fit within article 3 of the European Convention on Human Rights and find relief at the Human Rights Court, but the court will not be able to hear the larger category of individuals whose suffering does not amount to torture, but rather, merely to other forms of persecution. Thus, the Court can offer redress to only a select group of asylum seekers, restricting its ability to further the process of harmonization.

An example of a typical asylum case before the Court is *Hilal v. United Kingdom*, which came several years after the precedent-setting *Chahal* judgment. The procedural and definitional issues it raises illustrate the Court’s limited usefulness in improving upon EU asylum harmonization. Instead of protecting against violations of the Refugee Convention or its Protocol, the Human Rights Court acts as a court of last resort solely for violations of individual rights under the European Convention on Human Rights or other international covenants.

In *Hilal*, Said Mohammed Hilal, a national of Tanzania, brought an action challenging his expulsion from the United Kingdom, claiming that if returned to Tanzania he would be placed at risk of torture or inhuman or degrading treatment, that he would not receive a fair trial, and that he had no recourse to an effective remedy. He relied on articles 3, 6, 8 and 13 of the ECHR.

In 1992, Hilal joined the Civic United Front (CUF), an opposition party in Zanzibar, an island with significant autonomy off the coast of mainland Tanzania. An active member of the CUF, he attended meetings and contributed money to the party. In August 1994, the officers of the ruling party, Chama Cha Mapinduzi (CCM), had Hilal arrested for his involvement with the CUF. Hilal was detained for three months, during which time he was tortured. He was repeatedly locked in a cell full of water for days at a time and was unable to lie down, he was hung upside down with his feet tied together until his nose bled, and he was subjected to electric shocks. After CUF leaders applied pressure to the Tanzanian government, Hilal was released in November 1994 and admitted to a
hospital. A medical officer found Hilal was hemorrhaging severely through the nose as a result of mistreatment during detainment that endangered his life.\textsuperscript{166} In addition to his own mistreatment, Hilal claimed that his brother, who had been detained shortly before he was, died in a hospital in January 1995 due to mistreatment while in detention.\textsuperscript{167}

Upon his release, police came to Hilal’s residence looking for him.\textsuperscript{168} Since Hilal was not at home, the police detained his wife overnight and questioned his friends.\textsuperscript{169} Fearing for his safety, Hilal left Tanzania, arriving in the United Kingdom on February 9, 1995, claiming asylum.\textsuperscript{170} When asked during a \textit{pro forma} interview that day for the basis of his asylum claim, Hilal, assisted by an interpreter, said, “Because of the problems in the country and my safety. I have been threatened a lot by the ruling party so I decided to leave the country.”\textsuperscript{171}

After his full asylum interview, the secretary of state denied Hilal’s asylum, finding inconsistencies in his story and, in any case, that conditions had changed in Tanzania, and Hilal could return to the mainland (rather than Zanzibar) without fear of harm.\textsuperscript{172} Subsequent petitions to appellate bodies were rejected, leading Hilal to seek judicial review from the Court of Appeal, arguing that the secretary of state’s findings were wrong as a matter of law and that it was unreasonable to assume that Hilal could safely return home.\textsuperscript{173} The Court of Appeal denied leave for judicial review, finding that the secretary of state’s conclusion that Hilal could live safely on the mainland was not unreasonable.\textsuperscript{174} Consequently, Hilal brought his action before the Human Rights Court.

The Court ruled that Hilal’s removal to Tanzania would violate article 3 of the European Convention on Human Rights and that there had been no violation of article 13.\textsuperscript{175} The legal effect of the decision, however, was limited to granting Hilal’s appeal against his expulsion to Tanzania on the

\begin{footnotes}
\item[166.] \textit{Id.} \textsuperscript{\textsection} 10.
\item[167.] \textit{Id.} \textsuperscript{\textsection} 11.
\item[168.] \textit{Id.} \textsuperscript{\textsection} 12.
\item[169.] \textit{Id.}
\item[170.] \textit{Id.} \textsuperscript{\textsection} 13.
\item[171.] \textit{Id.}
\item[172.] \textit{Id.} \textsuperscript{\textsection} 15.
\item[173.] \textit{Id.} \textsuperscript{\textsection} 25; The Court of Appeal Civil Division “hears appeals from the three divisions of the High Court (Chancery Division, Queen’s Bench Division and Family Division), from county courts and some tribunals, i.e. The Employment Tribunal, The Immigration Appeal Tribunal, The Lands Tribunal and the Social Security Commissioners.” It is the highest court in the United Kingdom except for the House of Lords. See Her Majesty’s Court Service, \textit{Court of Appeal (Civil Division)}, \texttt{http://www.hmcourts-service.gov.uk/aboutus/structure/coa\_civil.htm} (last updated Mar. 31, 2005). For a structural map of the British court system, see Her Majesty’s Court Service, \textit{The Court Structure of Her Majesty’s Courts Service (HMCS)}, \texttt{http://www.hmcourts-service.gov.uk/aboutus/structure/index.htm} (last updated Mar. 31, 2005).
\item[174.] \textit{Id.} Hilal, \textsuperscript{\textsection} 24-25.
\item[175.] \textit{Id.} \textsuperscript{\textsection} 68, 76.
\end{footnotes}
basis of article 3 of the European Convention on Human Rights. The decision does not have any binding effect on the United Kingdom’s future application of the Refugee Convention under its own laws, and it certainly has no greater EU-wide effect on continuing interpretations of the refugee definition.\textsuperscript{176}

Removed from the demographic politics and border hysteria of individual Member States, the judges of the Human Rights Court are capable of intervening on a case-by-case basis to serve the interests of justice in individual asylum cases. They are not, however, capable of making substantive changes to the way Member States must interpret the Refugee Convention. Therefore, the Court cannot counter the effects the threat of the lowest common denominator has had on the harmonized EU asylum legislation, nor can it dictate how Member States must handle evolution in the application of the Refugee Convention.\textsuperscript{177}

It might appear to be far easier for the Council of Europe (not to be confused with the European Union) to amend the European Convention on Human Rights and the Human Rights Court’s rules of procedure to include jurisdiction over claims arising out of the Refugee Convention violations, rather than to create an entirely new European court with exclusive jurisdiction over asylum. This suggestion, however, overlooks an important obstacle, namely, that the jurisdictional scope of the European Convention on Human Rights and the Council of Europe do not overlap coherently with the geographic domain of the European Union. In fact, the Court’s jurisdictional reach greatly exceeds the geographic domain of the European Union. Without mimicking the deluge arguments mentioned above, it is important to keep in mind the disparity in population and geography separating the European Union and the geographic area covered by the European Convention on Human Rights.

The Council of Europe, which created the European Convention on Human Rights, is a far larger entity than the European Union. The Council of Europe consists of forty-six countries governing more than 800 million Europeans, whereas the European Union has only twenty-five Member States. Historically, no country has ever joined the European Union without first becoming a member of the Council of Europe. Whereas the European Union developed primarily out of a desire for a common European market, the Council of Europe emerged after World War II as a means of cultivating commonalities shared across European countries, and to coordinate and standardize shared social and legal practices, particularly in regard to human rights, parliamentary democracy, and the rule of law.\textsuperscript{178}

\textsuperscript{176} Id.
\textsuperscript{177} See About the Council of Europe, http://www.coe.int/T/e/Com/about_coe (last updated Jan. 2005).
\textsuperscript{178} See id.
Thus, a further difficulty in amending the European Convention on Human Rights and the Court rules is administrative. Because there is a right of individual petition under the Human Rights Court, the Court’s forty-six judges already face tens of thousands of applications yearly. In fact, in 2004 alone, the court received 40,943 applications.179

B. The European Court of Justice: Held in Check by Amsterdam

The European Court of Justice (ECJ) has jurisdiction over interpretation of the various treaties establishing the European Communities and the provisions enacted by various European institutions.180 As might be expected, its role as arbiter of the obligations binding the Member States under Community rules has consistently put it on a collision course with the ministries of Member States.181 This power struggle came to a head with the ECJ’s imposing its will in the Francovich decision in 1991, which established the principle of state liability for breach of Community law.182 Despite the increase in power the ECJ enjoyed following the Francovich decision, the Member States, rather than the ECJ, continue to control the interpretation of laws regarding the free movement of persons. After intensifying in the 1980s, particularly regarding the status of third-country nationals, the dispute over free movement of persons came to a climax in 1991 with the Maastricht Treaty, which marked a turning point in the power struggle.183 The Member States, acting out of a collective recognition of mutually shared individual needs, sought to reassert their sovereignty in response to the ECJ’s integrationist approach by excluding the ECJ from competence in the field of immigration and asylum.184 The ECJ reacted by tempering its judgments, even though this may have led to "internally inconsistent treatment of persons and goods."185 The last

181. For a history of the Court’s evolving jurisdiction over immigration and asylum, see Elspeth Guild & Steve Peers, Defeance or Defiance? The Court of Justice’s Jurisdiction Over Immigration and Asylum, in IMPLEMENTING AMSTERDAM: IMMIGRATION AND ASYLUM RIGHTS IN EC LAW 267 (Elspeth Guild & Carol Harlow eds., 2001).
184. See id. at 273.
185. See id. at 267.
episode of this battle was the ECJ’s limited inclusion in the Treaty of Amsterdam.186

The discussion below focuses on the current role of the ECJ in matters of asylum. As currently situated, it is in a poor position to serve the function of an EU-wide appellate mechanism, particularly for the purpose of refining the refugee definition and its implementation in the Community, because its powers are significantly restrained by article 68 of the European Community Treaty. Future negotiations may present new opportunities for a shift in the ECJ’s role, but this would be dependent upon a substantial revamping or abolition of article 68.

1. **The Court’s Powers of Interpretation Post-Amsterdam**

As stated earlier, the Treaty of Amsterdam effectively moved issues of asylum and immigration from the Third Pillar (intergovernmental negotiation and cooperation) to the First Pillar (direct supranational control by the European Commission).187 Article 68 of the new Title IV of the European Community Treaty, which concerns visas, asylum, immigration, and other policies related to the free movement of persons, grants the ECJ jurisdiction over Title IV (“Article 234 shall apply to this Title...”).188 A significant distinction between the ECJ’s powers in regard to Title IV and elsewhere in Community law arises in article 68(2), which states that “the Court shall have no jurisdiction to rule on any measure or decision relating to the maintenance of law and order and the safeguarding of internal security.”189 According to Elspeth Guild and Steve Peers, this clause is “obviously intended to ‘carve out’ a sphere of action which is reserved to


187. See supra notes 55-58 and accompanying text.

188. Article 68 provides:

1. Article 234 shall apply to this Title under the following circumstances and conditions: where a question on the interpretation of this title or on the validity or interpretation of acts of the institutions of the Community based on this title is raised in a case pending before a court of a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

2. In any event, the Court of Justice shall not have jurisdiction to rule on any measure or decision taken pursuant to Article 62(1) relating to the maintenance of law and order and the safeguarding of internal security.

3. The Council, the Commission or a Member State may request the Court of Justice to give a ruling on a question of interpretation of this title or of acts of the institutions of the Community based on this title. The ruling given by the Court of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become res judicata.

EC Treaty, supra note 63, art. 68.

189. See id.
interior ministries, and which cannot be touched by the Court." This reservation certainly has a chilling effect on the ECJ’s abilities vis-à-vis asylum cases. Article 67(2) of the European Community Treaty states that the Council “shall,” by May 2004, “adapt” the rules relating to the ECJ’s jurisdiction. As Steve Peers notes elsewhere, this requirement to alter the rules controlling the Court’s jurisdiction “appears to be a legal obligation, which could be enforced by the European Parliament, the European Commission or one or more EU Member States taking the Council to the European Court of Justice for its ‘failure to act.’” But Peers notes that as of October 2004 no such proceedings have been brought.

To make matters worse, article 68 restricts the ability of the ECJ to issue preliminary rulings when questions of immigration and asylum are involved. In these matters, article 68 limits the referral mechanism, codified under article 234, to courts “against whose decisions there is no judicial remedy under national law,” or, in other words, courts of final instance. Article 68(3) further requires that “ruling[s] given by the Court of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become res judicata.” Guild and Peers offer several explanations for this restriction, which will reduce the rate and total amount of preliminary references to the ECJ. J.H.H. Weiler explains this preference for courts of final instance by noting that since the early 1960s, it had been the lower courts who were “willing partners in [the] the use of Article [234] ‘against’ national public authorities.” Weiler also argues that the lower courts’ engagement with the ECJ may have been motivated by simple power politics, as they would

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190. Guild & Peers, supra note 181, at 279. Furthermore, Guild and Peers note that such a limitation is not completely new, since a similar specification existed in former article 100c(5) of the EC Treaty, before the Treaty of Amsterdam abolished article 100c. However, this governed the exercise of Community powers over visas, not the Court’s jurisdiction. Id. They add, nevertheless, that the obvious successor to article 100c(5) is article 64(1), not article 68. Id.

191. EC Treaty, supra note 63, art. 67(2).


193. Id. at 281 (quoting J.H.H. Weiler).

194. Article 234 is the provision permitting national courts and tribunals to ask the ECJ questions regarding interpretation of the EC Treaty itself, the validity and interpretation of the institutions of the Community, or on the interpretation of the statutes of bodies established by an act of the Council. EC Treaty, supra note 63, art. 234.

195. Id. at 68.

196. Guild and Peers point out that many Member States have been limiting appeals of asylum decisions, thus making the court of final instance lower and lower. See Guild & Peers, supra note 181, at 282. For example, in the Netherlands the court of first instance can even be the court of final instance if the court refuses asylum on the basis of the availability of a safe third country. Id. at 282, n.52. Paradoxically, Guild and Peers argue, this trend will mean that in some Member States efforts by interior ministries to limit national court control over their asylum and immigration practices will in fact increase access to the Court of Justice by lower courts. Id. at 282.

197. Id. at 281 (quoting J.H.H. Weiler).
be given judicial review over the very executive and legislative branches with whom they regularly clashed, even in jurisdictions where judicial power was relatively weak or non-existent. The reluctance of Member States’ interior and justice ministers to grant broad powers of review to the ECJ is understandable given their preference to avoid judicial activism and even politicking in matters of immigration and asylum. Higher courts, on the other hand, are perhaps perceived by the Member States as more sensitive to the concerns of the interior and justice ministries and less likely to make radical references to the ECJ. The higher courts also tend to be slower to avail themselves of the preliminary reference procedure, and thus are a more attractive choice to the interior and justice ministers than the more proactive and expedient lower courts.

Limiting the ECJ’s jurisdiction on matters of asylum and immigration to referrals from higher national courts will not only create a delay in the time it takes for questions to be presented to the ECJ, but it might also limit the referrals to more conservative issues, emerging as they would from the less radical and more nationally minded higher courts. Guild and Peers suggest that this limiting of the court’s jurisdiction may reflect an internalization by the ECJ of the interior ministries’ criticisms of article 68. The interior ministries had argued that limiting referrals to courts of final instance would reduce the ECJ’s potential caseload by stemming the deluge of references on matters of asylum and immigration (particularly the threat of a flood of cases regarding the status of third-country nationals).

Similar “deluge” arguments plague European asylum and immigration discourse on many fronts and are propagated by a variety of actors, from news media to interior ministers, particularly around each discussion of further Union enlargement. Guild and Peers note that if the fear of a deluge of cases was the true motivation for the ECJ’s complacency regarding the limitation of its powers, then the European Council’s planned reform of the ECJ by May 1, 2004, would have been the opportune moment to

198. Id. at 280. Guild and Peers also question the definition of “judicial remedy.” What if the “remedy” does not ensure a suspensive effect during the waiting period, as is the case in many countries? Should this qualify as an adequate judicial remedy? Id. at 282. The interpretation of this requirement is of paramount importance in asylum cases in which, despite being entitled to an appeal, an applicant is removed to a country where she fears persecution or torture while she awaits a decision on her appeal because the host country does not provide for a suspensive effect of the applicant’s status until a final decision is rendered. This lack of protection makes any non-suspensive appeals procedure a poor remedy, and thus, considering it an adequate judicial remedy would circumvent the ECJ’s ability to accept a reference.

199. See id.

200. See id.

201. See id.


203. See id. at 284; see also supra notes 42-45 and accompanying text.
address this fear. It could even have been addressed at the 2000 Intergovernmental Conference, but the ECJ had, at least through that point, supported the restrictions imposed on it by article 68. Nonetheless, as Guild and Peers show, there is little justification for the deluge argument.

The final jurisdictional issue of concern arises in article 68(3), which allows the Council, the Commission, and the Member States to request that the ECJ rule on an interpretive question of the new Title IV, or on acts of Community institutions based upon the title. This is the first time that such a power has been granted, and it is possible that Member States will seek clarification of their responsibilities regarding asylum seekers (assuming that the directives called for in article 63 of Title IV establishing minimum standards are implemented). An advantage of this framework, according to Guild and Peers, is that it is, in principal, non-confrontational. Thus, the ECJ is invited to interpret a provision without there having to be a specific case before it.

Article 68(3) appears to create an opportunity through which the Commission could implement its proposal for review of the status of asylum law harmonization considered in the Agenda for Protection. However, there is a significant drawback to this approach that may limit any involvement of the ECJ in these matters. This approach relies upon actors other than the ECJ—Commission-led committees comprised of a mixture of “experts of Member States” and “members of civil society,” with the possibility for a role for the high commissioner for refugees—to take the initiative and bring interpretive issues to its attention by alerting the Council, the Commission, or relevant national authorities. It is

204. Guild & Peers, supra note 181, at 284-86.
205. Id. at 288. To show that the supposed “deluge” is, in reality, a weak trickle, Guild and Peers point to family-reunification cases referred to the Court (on average, one case every two to three years) and cases involving nationals from the Central and Eastern European countries (from 1994 to 2001, only five were referred from national courts). Id. at 288.
206. Id. at 283.
207. According to the Communication, supra note 71, at 8:
One of the objectives of the main Community instrument is to narrow divergences of interpretation in the implementation of the convention’s rules on recognition of refugee status. There are different ways of doing this: meetings of contact committees could be held to review the application of the directive on the definition and status of refugee, prerogatives of the Commission and the European Court of Justice in ensuring compliance with Community law. Here the HCR could intervene in cases before the national courts and the European Court of Justice in preliminary ruling proceedings under Article 234 of the EC Treaty. If it is pointed out that there remain wide divergences of interpretation of the rules governing refugee status under the directive, that would be clear evidence that there is inadequate harmonisation in terms of the objective of a uniform status. The Commission should draw the conclusions and produce a legislative proposal.
208. For a discussion of new tools for exchanges and analysis, such as the creation of new Commission-led initiatives relating to asylum, see Communication on the Agenda for Protection, supra note 71, at 22-23. One such program is an exchange and consultation procedure with an Immigration and Asylum Committee as a central component. Its main purpose is to identify and analyze common challenges in immigration and asylum policies, spread the best practices, and achieve greater convergence. The members of the committee are experts of the Member States but also representatives
possible that the political interests of Member States could undermine referrals to the ECJ by the high commissioner for refugees or other parties, such as NGOs, thereby short-circuiting the process by which the Commission would consider amending EU legislation based upon the ECJ's recommendations. Perhaps more importantly, this limitation precludes individuals from appealing directly to the ECJ, thereby limiting the ECJ's function as a court of last resort, one of the two primary objectives an EU-wide asylum appellate court would serve.

2. A Potential Reprieve from Restrictions on Asylum Adjudications

In its recommendations to the Intergovernmental Conference of 2000, the ECJ raised the possibility of creating specialist EU courts to deal with various issues. Though this proposal was raised in reference to staff disputes and intellectual property issues, nothing in the proposal would seem to prevent similar courts from being created to deal with immigration and asylum matters. The first step toward realizing this, however, would require significant changes to article 68. In fact, Guild and Peers recommend the total abolishment of article 68, or, as a compromise, the asylum court's establishment could be accompanied by a Council decision to amend Title IV's jurisdictional limitations by the end of the harmonization process. Amending Title IV would allow the Council to wait and see if the feared deluge really occurs before instituting an expensive new court. The institution of such a court would actually be further justified if a deluge of asylum and immigration cases occurs. Guild and Peers add that, given the close connection between Title IV and the internal market, such a tribunal would need to be linked closely to the existing European Community courts to prevent the problems created by "mixed jurisdiction" disputes.

of civil society. The Commission also established EURASIL in July 2002. EURASIL is an EU network for asylum practitioners chaired by the Commission. These practitioners are involved with EU Member State authorities responsible for the adjudication of asylum applications (in first instances and also from appellate bodies). The Commission will invite UNHCR, other international or non-governmental organizations, and experts on certain issues when necessary. According to the Commission, the aim of the network is to improve convergence in asylum policies, decisions, and practices through enhanced exchange of information and best practices among EU Member States' asylum adjudicators and the European Commission. They will focus on information with regards to the situation in countries of origin and transit and treatment of cases by first instances decision-making authorities and review bodies and any other relevant matters of interest for the asylum practice.

Id. at 22.

210. Id. at 286.
211. Id. For the final scorecard on the progress of the initial stage of the harmonization process, see Assessment of the Tampere Programme and Future Orientations, supra note 83.
213. First Pillar matters are those governed directly via the shared sovereignty of the common EU institutions. See Treaty of Maastricht on European Union, supra note 54. The Commission addresses
proposals resonate with the creation of an EU-wide appellate system, which is addressed in further detail in Part V.B.

V

PROPOSALS FOR ENABLING GREATER HARMONY

A. Integration of a Robust Refugee Definition into the First Pillar

The refugee definition could be harmonized by fully integrating an interpretation of the definition within the First Pillar legislation. The interpretation could incorporate UNHCR guidelines, the case law of other countries interpreting the Refugee Convention, decisions from the European Court of Human Rights, and other relevant instruments such as the International Covenant on Civil and Political Rights and the Torture Convention. The UNHCR guidelines are quite clear, and jurisprudence examining various interpretive disputes regarding the refugee definition already exists. Thus, the main obstacle to pursuing this path, as in other alternative solutions, is political will. There is also the legislative hurdle presented by the Community’s competence under article 63(1)(d), which restricts the Community to determining minimum standards for asylum, highlighting that it was not the intention of the Member States to create a comprehensive EU asylum law that would replace national laws. Thus, any institutional approach in another direction would be dependent on an amendment to the European Community Treaty, and, by implication, the political will of Member States to alter the nature of their collective composition.

Though this proposal would seem to be particularly ill-fated given the current political climate among the Member States, there are nonetheless strong economic and efficiency-related arguments that support such an idea. A harmonized definition within Community law allows for faster and more effective decision making earlier in the determination process. All interested parties benefit from such a harmonization because it front-loads this very possibility and argues that the point is not to replace the rights and entitlements provided by the Refugee Convention with a "regional scheme," but rather, to "transpose" them "as appropriate into Community law, in particular in the light of the harmonisation of third country nationals' rights, the objective of uniform application of these rights, freedom of movement and the right of residence in another Member State and progress in constructing a Community corpus of fundamental rights." See Towards a Common Asylum Procedure, supra note 2, at 12.

214. See supra note 54 and accompanying text. See also Nicholas Blake, The Dublin Convention and the Rights of Asylum Seekers in the European Union, in IMPLEMENTING AMSTERDAM, supra note 181, at 118.


217. See Blake, supra note 214, at 118.

the procedures, thereby relieving the pressures on appellate bodies in Member States and the Human Rights Court. If the legislation incorporates a comprehensive interpretation of the Refugee Convention, there will be a significant reduction in the number of cases that require extensive judicial interpretation. One commentator suggests that this process should be further buttressed by an information-sharing system that keeps judges in Member States apprised of the latest decisions emerging from their neighbors, allowing them to share their knowledge and expertise in resolving challenging and ambiguous cases.\textsuperscript{219} The Council could create a perennial review procedure to examine how the law is being applied and to what result.\textsuperscript{220} While this information-sharing system has the potential to contribute to the dissemination of best practices, it could also lead to future retrograde movement, since it would remain within the Council's powers to amend any legislation, and thus changes would be subject to the political wishes of its members.

It is likely, though, that the Member States, rather than being bound initially by a rather high set of standards and practices, would prefer to waste time and resources in haggling over minimum standards, rejecting deserving cases, and "daring" the courts, like the Human Rights Court, to hear appeals. They would most likely even prefer establishing an appellate body that only intercedes when they fail to uphold their international obligations of protection under the Refugee Convention, rather than binding themselves irrevocably within First Pillar law.

\textbf{B. The Need for an EU Asylum Appellate Court}

Responding to the international challenges to protection and implementation facing the UNHCR, Walter Kälin has proposed the establishment of a judicial or quasi-judicial body—a universal court.\textsuperscript{221} This independent third party could enhance the supervisory and monitoring role of UNHCR by accepting individual complaints and interpreting international refugee law.\textsuperscript{222} Although his analysis questions the present necessity of such an instrument on an international scale, he concludes that such a court would fulfill the criteria necessary for a monitoring body, including independence, expertise, objectivity, and transparency. Kälin thus leaves open the possibility of more serious consideration of a universal court in the future.

Kälin nonetheless addresses three primary weaknesses of such a proposal. First, such a treaty body would not have universal jurisdiction.

\textsuperscript{219} See Blake, supra note 214, at 118.
\textsuperscript{220} The Commission did, in fact, anticipate such review procedures. See Communication on the Agenda for Protection, supra note 71, at 22-23.
\textsuperscript{221} Kälin, supra note 98, at 655-56.
\textsuperscript{222} See id.
Rather, its competence would be limited to those States parties that have ratified the optional protocol to the Refugee Convention needed to establish such a body. This is a particularly limiting reality because those states tending to follow more restrictive interpretations, and thus, more likely to "lose" a case brought before the body, would be especially reluctant to ratify the protocol.\footnote{Id. at 656.} Second, if many countries, including those with large numbers of asylum seekers, ratified the protocol, it could be inundated with tens of thousands of cases because rejected asylum seekers would be encouraged to avail themselves of this further last recourse for protection, or, at the least, to avoid immediate deportation.\footnote{Id.} Finally, such a treaty body could present a danger to UNHCR's work. The mere existence of a mechanism to accept individual applications will weaken UNHCR's existing power to address protection issues affecting any asylum seeker or refugee at any time. It would seem, however, that this danger is not necessarily imminent, and even if it were, there would likely be ways around it. For instance, a deferral could be issued for cases involving countries that are engaged in active consultation with UNHCR. A suspensive effect could be created for any deportations of the appellees of such cases until either (1) UNHCR's intervention at the governmental level affects the appellee's status, or (2) failing successful intervention by UNHCR on a policy level, a suspensive effect would exist until a resolution of the appeal.

Källin's observations are important and worth considering in a proposal for an EU-wide judicial mechanism performing a similar function on a regional level. A potential concern is that if every regional instrument or body (for example, the 1969 Organization of African Unity Refugee Convention\footnote{See Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 6-10, 1969, available at http://www.africaunion.org/Official_documents/Treaties_20Protocols/Refugee_Convention.pdf.}) created a court system dedicated to interpreting international refugee law within its particular geographic domain, it could create obstacles to later synthesis and the establishment of a universal court. These obstacles likely will arise if there is no communication or attempts to harmonize the respective case laws which would develop in isolation from each other. This reservation by itself, however, should not stand in the way of the development of a European court, especially given the limited likelihood of the other regional instruments or organizations pursuing a similar path.\footnote{This is unlikely mainly because other regions are far less politically cohesive and economically integrated than the Member States of the European Union (though "progress" is being made toward a free-trade zone in Latin America, this is far from the Single Market Europe constructed in 1986). This possibility is made even more unlikely by global asylum-seeker population flows—Europe handles more asylum seekers than Latin America, the Caribbean, and Africa combined.}
Nonetheless, something is needed to address the current situation in Europe, especially if the fears regarding the “lowest common denominator” materialize in the final version of the directive. As already discussed, the two existing judicial remedies—the European Court of Human Rights and the European Court of Justice—fall short of providing a court of last resort capable of taking appeals from the administrative and national courts of the various Member States. Further, neither court has the ability to promote, through the development of a body of appellate case law, a complete and robust interpretation of the 1951 Refugee Convention, 1967 Protocol, or human rights instruments and case law, within the harmonized community laws. Although the Human Rights Court fulfills the court-of-last-resort role, its decisions have no impact on the harmonized community law and no binding effect on individual Member States’ administrative and national courts beyond the immediate case at hand. Meanwhile, were its judicial hands not tied by the Treaty of Amsterdam, the ECJ would be poised to fulfill the second goal of establishing a binding case law. However, as it is currently formulated under article 68(3), the ECJ can only take referrals for preliminary rulings from the Council, Commission, or a Member State, and consequently, it would not be available as a court of last resort to the very people who need it most, namely, individual asylum seekers. In light of these shortcomings and the political unpopularity of the immediate integration suggested above, a separate EU appellate mechanism focused on receiving individual asylum appeals seems necessary.

C. Designing an EU Asylum Appellate Court: A Brief Consideration

The rest of this Comment briefly addresses some of the more pressing issues that must be addressed if an appellate court were established. There would, of course, be myriad issues requiring fine-tuning and further negotiation, but the following essential issues relating to jurisdiction would determine the core of the court’s mandate, which is most pertinent to this Comment.

1. Determining the EUAAC’s Jurisdictional Scope

One of the first decisions that architects of an EU Asylum Appellate Court (EUAAC) will face is establishing the scope of the court’s jurisdiction. Title IV should be amended to mandate the creation of an EUAAC to hear appeals based on negative decisions in Member States’ administrative courts. Similar to the issue presented above regarding the ECJ, it would be necessary to decide whether the EUAAC could hear appeals from all

levels, or whether its powers would be constrained to appeals from courts of last instance. However, following the latter path would duplicate the error made in article 68 of the ECT constraining the ECJ’s powers, which, as noted, is especially dangerous in those instances where judicial remedies without suspensive effect or other procedural pitfalls are considered adequate remedies at law.

It is quite possible that allowing appeals from courts of first instance would, in fact, make the processing of asylum seekers in Member States more efficient. Instead of a particularly challenging case having to be heard by each subsequent court within a Member State, which contributes to an overall lag in the decision-making process, an appeal from a negative decision could be brought straight to the EUAAC. This would also alleviate the pressure on national courts to give short shrift to individual cases. Of course, such a policy itself might be considered by some to be an effacement of due process, and even an affront to national sovereignty. However, given the likelihood that the appellate level court will apply a more generous application of the refugee definition, such a policy would certainly not be an abridgment of an asylum seeker’s rights to seek an adequate remedy at law. It also would not subject an asylum seeker to a situation in which abbreviated or inadequate procedures lead to the asylum seeker’s return to a third country where the applicant’s life may be endangered. Furthermore, an EUAAC would have a broad perspective on particular issues emerging all over the European Union, and it could render decisions on individual cases based on a collective body of experience and knowledge, leading to more cohesive decisions throughout the European Union. Finally, as Guild and Peers suggest, before imposing restrictions on the right to appeal, it is perhaps more prudent to determine whether any administrative inefficiency does in fact arise from a “deluge” of cases.227 If no flooding of the court materializes, there would be little empirical support for limiting the court’s jurisdiction to appeals from courts of last instance, though the pro-sovereign arguments would remain and could muster substantial political opposition.

2. Determining Which Cases the EUAAC Should Hear

Another primary decision to be made regarding the EUAAC’s powers is whether its jurisdiction would be limited to appeals regarding the merits of an asylum claim, or whether it would also be capable of hearing cases relating to the process by which a Member State analyzed a particular claim. This is especially important in light of the myriad procedural deficiencies that may soon be codified in the harmonized EU laws, particularly the concern expressed recently by advocates that certain countries do not

provide for a suspensive effect on an application's status while she awaits appeal, which could lead to her removal to a country where she might face torture or other persecution. It would seem that the Human Rights Court already fulfills this function, so precluding it from an EUAAC's jurisdiction would not leave these appeals unheard, and would allow the EUAAC to take a greater number of appeals based on the interpretation of the refugee definition. This would help to counter any negative predictions of the inability of such a court to function because of the feared "deluge" of cases it might face.

On the other hand, procedures play a critical role in securing the rights of asylum seekers as part of a comprehensive protection regime. After all, without guarantees to court access, an asylum claim cannot even be made. Asylum procedures are also subject to much debate in the harmonization process, exposing them to the same "threat of the lowest common denominator" that the proposed refugee definition faces. The same concern expressed above regarding the Human Rights Court would apply here as well. The Court might be able to save individual asylum seekers from unfortunate fates, but its powers to influence norms in the Member State where the appeal originated or in other Member States may be limited. Realization of the threat of the lowest common denominator's very real danger coupled with an understanding of the Court's limited powers to interpret and change EU law suggests that an EUAAC would need to consider all appeals from Member State asylum decisions—both procedural and definitional. Though the refugee definition was conceived in an international setting, procedures relating to its implementation are nonetheless localized and, consequently, vary quite a bit. As Member States gain a sense of membership in the larger European community, variations in their asylum procedures become increasingly incompatible with a truly comprehensive asylum protection regime.

3. Determining the UNHCR's Role in Relation to an EUAAC

A final pressing consideration is the role that the UNHCR should play in an EUAAC. There are several possible scenarios. Member States, in conceding to the establishment of an EUAAC, could insist that the decisions and interpretations its justices make in an EUAAC are final and do not need the interference of UNHCR. A more compromising position might be to allow UNHCR to have some permanent representation at an EUAAC, perhaps as an ex officio officer of the court, permanent member of the court, permanent friend of the court, or, on the more restrictive side of the spectrum, the Member States might grant UNHCR permanent observer status. There is an additional concern that an EUAAC could threaten

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228. See European Council on Refugees and Exiles, supra note 4, at 9.
UNHCR’s work. If the EUAAC reached conclusions on a given issue that differ from UNHCR’s views, and the EUACC ruled (as the U.S. Supreme Court has\textsuperscript{229}) that UNHCR’s views are not binding but merely provide guidance, this could undermine UNHCR’s authority.\textsuperscript{230}

Other issues regarding the composition, structure, and jurisdiction of an EUAAC would no doubt require great attention, discussion, and ultimately negotiation between Member States. The initial concerns addressed in this Comment are raised in order to explore such a court’s potential role and utility in ensuring more comprehensive protection in a harmonized EU asylum regime.

**CONCLUSION**

A judicial body with exclusive jurisdiction over asylum appeals arising out of the Member States could counter regressive trends in the harmonization process by (1) serving as a court of last resort for those denied asylum based on overly restrictive interpretations and applications of the refugee definition; and (2) contributing a case law of decisions effectively raising the minimum asylum standards to levels that adhere more closely to the UNHCR guidelines, relevant case law, and other international instruments.

The European Union is explicitly opposed to the introduction of such a body because it would violate the subsidiarity and proportionality principles, two core concepts adopted at the inception of the European Union to support and maintain the framework of the greater alliance of countries. Given the European Union’s record on immigration and asylum, however, one cannot help but wonder whether political concerns, perhaps fueled in part by a xenophobic vigilance against potential “deluges” of foreigners, are also partially motivating resistance to something like an EUAAC. Whatever its cause, this obstinacy is misplaced because an appellate body will ultimately further, rather than impede, the European Union’s objectives in harmonizing its asylum laws. By contributing to a more uniform interpretation of the refugee definition within the Member States’ administrative and national courts, an appellate court will further the European Union’s goals in embarking on the harmonization process, namely, (1) to strengthen internal security and control within the borders of the enlarged EU “area of freedom, security and justice” through the standardization of policies and procedures at levels with which all Member States are comfortable; and (2) to neutralize the disproportionate impact of asylum migration on some Member States by negating asylum seekers’ perceptions of

\textsuperscript{229} See \textit{INS} v. \textit{Cardoza-Fonseca}, 480 U.S. 421, 439 n. 22 (1987) (noting that the UNHCR Handbook “provides significant guidance in construing the Protocol, to which Congress sought to conform,” but is not binding authority on asylum adjudicators).

\textsuperscript{230} The author wishes to thank Professor Kate Jastram for this insight.
relative differences in protection from country to country, thereby spreading the burden more equitably.

Because the available judicial remedies—the European Court of Human Rights and the European Court of Justice—would not adequately serve the functions for which an appellate mechanism would be designed, such a mechanism should be created. This option would certainly be more attractive to European ministers of the interior than would comprehensively integrating a robust interpretation of the refugee definition into the First Pillar itself under the new Title IV.