Carl Levy

The European Union after 9/11: The Demise of a Liberal Democratic Asylum Regime?[1]

IN THE PAST TEN YEARS THE EUROPEAN FAR RIGHT HAS SCORED notable electoral victories in Scandinavia, Austria, Italy, the Low Countries, Switzerland, France, Portugal and elsewhere. There are many reasons why the far right has improved its electoral performance in domestic European elections. However, the one common denominator shared by this disparate group of political parties is a harsh stance against asylum seekers and refugees. On the face of it, the situation is paradoxical. The two great surges of refugees and asylum seekers in the 1990s were experienced during the wars in Croatia and Bosnia (1992–93) and the upsurge of violence and ethnic cleansing in Kosovo in 1998–99. Due to a series of bilateral, inter-governmental and EU policies, it has been increasingly difficult for forced migrants to seek refuge in Europe.[2] The number of persons seeking asylum in the EU in 1992 was 675,460 and 384,530 in 2001.[3] Numbers have been nearly halved in a decade but the issue is more controversial and visible than ever. There has always been a security dimension to the coordination of the movement of peoples

[1] This is a much revised version of a paper given at the 53rd Annual Conference of the Political Studies Association (PSA), held at Leicester, UK (14–16 April 2003). I would like to thank Professor Michael Moran and two anonymous referees for their encouragement and suggestions.

[2] C. Levy, 'European Refugee and Asylum Policy after the Treaty of Amsterdam: The Birth of a New Regime?', in A. Bloch and C. Levy (eds), *Refugees, Citizenship and Social Policy in Europe*, Basingstoke, Macmillan, 1999, pp. 12–50; A. Geddes, *Immigration and European Integration. Towards Fortress Europe?*, Manchester, Manchester University Press, 2000; S. Lavenex, *The Europeanisation of Refugee Policies. Between Human Rights and Internal Security*, Aldershot, Ashgate, 2001.

[3] M. Bright, 'Asylum Crisis Hyped in Europe, Says UN', *Observer*, 2 June 2002, p. 5.

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across the borders of Europe. But has the liberal democratic tradition of asylum embodied in the Geneva Convention of 1951 and the 1967 New York Protocol been sacrificed because of the dual pressures of the electoral victories of the far right in Europe and a new form of terrorism that threatens European societies? Will European governments disavow the principle of *non-refoulement*[4] and Article 3 of the Convention Against Torture in order to secure their homelands? In short will failed asylum applicants and terrorist suspects claiming asylum be sent back to unsafe countries where they might suffer torture? According to the Treaty of Amsterdam (1997) and the Tampere Declaration (1999), the European Union will start to formulate a common policy on refugees and asylum seekers after 2004. Will the European Union create an 'Area of Freedom, Security and Justice'[5] as the Treaty of Amsterdam promises? Or will the fundamental rights of the Geneva Convention and the European Convention of Human Rights be violated and even sacrificed in order to protect Europeans from the greater threat of global terrorism?

The treatment of refugees using the UNHCR guidelines, the abolition of the death penalty and a more expansive welfare state have been placed forward as a West European model of liberal democracy that in recent decades has been contrasted to its American ally across

[4] Article 33 of the 1951 Geneva Convention prohibits the return (*refoulement*) of a refugee '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'.

[5] The 'Area of Freedom, Security and Justice' was original discussed in Articles 2 and 29 of the Treaty on European Union (the Maastricht Treaty) but was amended and given much greater prominence in the Treaty of Amsterdam. This is an ambitious project of the member states of the European Union in the area of justice and home affairs (JHA). 'Security' includes areas of mutual concern in fighting crime and terrorism. 'Justice' includes joint cooperation in enforcement of criminal and civil judgements, extradition and the defence of equal access to justice. 'Freedom' deals with the free movement of persons, human rights and anti-discrimination policies. Most directly relevant for this article, 'freedom' also deals with cooperation and joint European legislation in the fields of asylum and immigration. The European Council at Tampere in 1999 launched a project to create a Common European Asylum System (CEAS) with a uniform method of determining asylum within the member states and a uniform status valid for refugees throughout the European Union. European legislation has slowly been grappling with this project but the results so far have usually been pitched at the lowest common denominator.

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the Atlantic. Since 11 September 2001 tensions over the possible extradition from Europe to the USA of terrorist suspects, who might face the death penalty, have underscored these differences. The UNHCR can still rely on the European Union to defend publicly and in documents the sanctity of the Geneva Convention. But there are manifest contradictions between the drive to securitize European Union immigration policy and the demands to deepen the elements of freedom and justice in the proposed Area of Freedom, Security and Justice. Over the years, I have been charting the fraught European Union policy that promotes the free movement of people and yet concurrently has sought to create a harmonized system of asylum and refugee policy based on 'restrictionist' first principles.[6] At least until 2004 the aim of the Treaty of Amsterdam in 1997 and a follow-up EU summit in Tampere in 1999, to create a Common European Asylum System (CEAS), has produced mixed results. In order to have a fully operational CEAS the European Union would require clear chains of responsibility for determining which member state would receive an asylum seeker's application. There would have to be clear definitions of a refugee and temporary protection, a harmonization of procedural standards and reception conditions and effective 'burden-sharing' of refugees.[7] So far a pilot European Refugee Fund has been established as a financial instrument to help share the burden of assuming refugees. But the funds available have been scant and in any case it has been argued that refugee streams are

[6] For the period up to 2000 see C. Levy, 'European Refugee and Asylum Policy', op. cit. Also see the excellent surveys by A. Geddes, *Immigration and European Integration*, op. cit.; S. Lavenex, *The Europeanisation of Refugee Policies*, op. cit. Contrasts between American and (West) European models of International Protection Regimes and attitudes towards human rights in the period after 1945 are discussed in two important new works, see B. Cronin, *Institutions of the Common Good. International Protection Regimes in International Society*, Cambridge, Cambridge University Press, 2004, and M. Mazower, 'The Strange Triumph of Human Rights, 1933–50', *Historical Journal*, 47: 2 (2004), pp. 379–98. For a good survey of the period 1999 to 2003 see V. Guiraudon, 'Immigration and Asylum: A Politics Agenda', in M. G. Cowles and D. Dinan (eds), *Developments in the European Union 2*, Basingstoke, Palgrave Macmillan, 2003, pp. 160–80.

[7] For the question of burden-sharing see, E. R. Thielemann, 'Between Interests and Norms: Explaining Burden-Sharing in the European Union', *Journal of Refugee Studies*, 16: 3, 2003, pp. 253–73, the special issue of *Journal of Refugee Studies* on 'European Burden-Sharing and Forced Migration' edited by E. R. Thielemann.

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determined by root causes in the homelands of the refugees. And destinations are determined by a complex combination of cultural, historical and situation factors in the minds of the refugees themselves. A Directive on Temporary Protection was agreed so that chaotic crises like those created by the Yugoslav 'Wars of Succession' of the 1990s would not be repeated. But this directive has never been put into practice. A Directive on Reception Conditions for Asylum Seekers is in operation, and the Eurodac finger-printing system and Dublin II used to identify asylum seekers and refugees throughout the European Union has been operational since early 2003 (discussed below). In any case, under the provisions of the Treaty of Amsterdam, activity in this field has been 'communitarized' not 'supranationalized'. Thus the community institutions (the European Commission, the European Court of Justice and the European Parliament) are at the mercy of the member states who decide everything on the basis of consensus rather than qualified majority voting (QMV). It was suggested that after five years – in 2004 – the QMV and the EU's institutions would accelerate the move towards a CEAS. But this was dependent on a satisfactory outcome for the European constitution. At the time of writing the European constitution faces the daunting task of ratification. But the Council of Ministers in Luxembourg of 25 October 2004 endorsed the European Council's Hague Programme, agreed by the European Council on 5 November 2004, which will allow QMV to come into effect in April 2005. The mixed response by the ministers of interior to a speeded-up CEAS at Luxembourg leaves many questions unanswered. Perhaps the European aim of harmonization of refugee and asylum policy has been replaced by approximation.[8] In any case, since these pieces of legislation were only passed through consensus, the net

[8] It was predicted in May 2003, before the fiasco of the Constitutional Convention, that 'there is little doubt that the outstanding texts on immigration and asylum will be adopted by the end of the first semester of next year, when Ireland will hold the EU presidency. The principle to which the EU member states appear to adhere is that approval for a poorly-worded text is better than no approval at all', *Migration News Sheet*, May 2003, p. 12. It has also been suggested that only the European Union's non-binding, voluntary system of moral persuasion, known as the 'open method of co-ordination' will be successful, see A. Caviedes, 'The Open Method of Co-ordination in Immigration Policy: A Tool for Prying Open Fortress Europe', *Journal of European Public Policy*, 11: 2 (2004), p. 306. For the possible move towards QMV in April 2005, see: R. Minder and J. Burns, 'EU dilutes commitment to common asylum policy', *Financial Times*, 26 October 2004, p. 2; D. Gow and M. White, 'Blunkett claims EU

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effect has been a drive to agree at the lowest common denominator. So that 'the standards of protection agreed in core texts is so low in many respects as to raise doubts about the legitimacy of the EU's policy.'[9] A harmonized refugee and asylum policy may lead to greater freedom and justice in the European Union if the Court of Justice is given a greater role and a European legal space really functions. In the meantime the policy of 'approximation' between member states and especially between ministers of the interior and home secretaries in the 'Third Pillar' of the European Union highlights questions of crime and security. But turning the immigration issue into a security issue plays into the hands of the far right, which the European Union has publicly denounced and ostracized in the recent controversies over the political colour of an Austrian government.[10] But failure to deal with fears may lead to greater insecurity and increased support for the far right in Europe.

Thus this article will illustrate in a most relevant and painful way the paradoxes of European liberal democracy. The argument is approached by first examining the extent to which the rise of the far or populist right has pressurized the European Union into becoming more intolerant and then the argument proceeds to examine to what extent the threat of terrorism has undermined the liberal democratic consensus. The case is therefore pitched at two levels: the effects of domestic politics on the national policies of member states and the inputs of member states on the joint policies of the European Union. Elsewhere I have used this argument as an

victory on asylum', *Guardian*, 26 October 2004, p. 2. For the Hague Programme see, *The Hague Programme. Strengthening Freedom, Security and Justice in the European Union*, Brussels, Council of the European Union, 15 October 2004 and S. Peers, *Statewatch Briefing, Vetoes, Opt-Onts and EU Immigration and Asylum Law*, 8 November 2004.

[9] S. Peers, 'Key Legislative Developments on Migration in the European Union', *European Journal of Migration and Law*, 5 (2003), p. 387. For earlier surveys of progress see, S. Peers, 'Key Legislative Developments on Migration in the European Union', *European Journal of Migration and Law*, 5 (2003), pp. 85–126; S. Peers, 'Key Legislative Developments on Migration in the European Union', *European Journal of Migration and Law*, 4 (2002), pp. 339–67. Also see, K. Kerber, 'The Temporary Protection Directive', *European Journal of Migration and Law*, 4 (2002), pp. 193–214; N. Rogers, 'Minimum Standards for Reception', *European Journal of Migration and Law*, 4 (2002), pp. 215–30.

[10] A. Wahlrab, 'The Case of Austria: Policing Democratic Values in the Global North', Workshop 4, 30th Joint Sessions of Workshops, European Consortium for Political Research (ECPR), Edinburgh, UK, 28 March–2 April 2003.

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illustrative case study in the wider debate about the nature of multi-level governance in the European Union and the associated debate about the extent to which the European Union had taken on the attributes of a sovereign nation-state.[11] Here I can only declare my interest, but of course this interest does shape the way I will pitch my argument. What should be clear by now is that I will not argue that a liberal asylum regime was in rude health before 9/11: my argument is that the events of 11 September 2001 highlighted the contradictions and tensions within the asylum regime in the European Union. This reveals the manifest tensions within the European Union's own self-image as the guardian of liberal democratic values and the evolution of European policy since the middle of the 1980s.[12]

THE IMPACT OF THE EVENTS OF 11 SEPTEMBER 2001

The events of 11 September deepened the strains and fissures in the emergent post-Amsterdam European refugee and asylum regime. And yet the entire system seemed to be unravelling before 2001:

[11] C. Levy, 'Harmonisation or Power Politics? EU Asylum and Refugee Policy Five Years After Amsterdam', ECPR Workshop 23, 'Immigration Politics: Between Centre and Periphery, National States and the EU', ECPR 29th Joint Sessions of Workshops, Turin, 22–7 March 2002. For a good account of debates about multi-level governance in the European Union see, M. A. Pollack, *The Engines of European Integration. Delegation, Agency, and Agenda Setting in the EU*, Oxford, Oxford University Press, 2003. For excellent studies that apply this approach to the European Union's and the member states' policies on asylum seekers, refugees and immigration see V. Guiraudon, 'The Constitution of a European Immigration Domain: A Political Sociology Approach', *Journal of European Public Policy*, 10: 2 (2003), pp. 263–82; A. Geddes, 'Still Beyond Fortress Europe: Patterns and Pathways in EU Migration Policy', PSA Annual Conference, University of Leicester, 14–16 April 2003.

[12] Joanne van Selm has argued European asylum and refugee policy has been predicated on the belief (until recently) that Europe is not a continent of immigration and needs to protect its welfare state from abuse. Thus she writes: 'European concerns about numbers and the protection of society explain the restrictive use of admission criteria and the limitation of immigration to asylum and family unity – both of which reflect the fundamental understanding of Europe as a cradle of human rights.' J. van Selm, 'Refugee Protection Policies And Security Issues', in E. Newman and J. van Selm (eds), *Refugees and Forced Displacement: International Security, Human Vulnerability and the State*, Tokyo, United Nations Press, 2003, p. 87.

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witness the distress of the Dublin Convention.[13] The European Commission, mindful of the increasing demands to restrict the flows of refugees and asylum seekers into Europe, carefully and then rather boldly suggested that Europe had to review the post-1973 stop on labour migration into Europe. During the late 1990s boom this was being revised by various member states at the national level. The European Commission argued that migrants were needed for the European economy and for the future viability of the continent's pensions system. These needs were recognized and the recruitment of workers from the rest of the world was officially sanctioned, for the first time since the official stop in the wake of the 1973 oil-shock. The link between forced migration caused by economic hardship and migration forced by war and persecution was made. Such a policy might undermine the Geneva Convention, a topic I have discussed

[13] The Dublin Convention was signed in 1990 but took seven years of haggling amongst the signatories to come into force. The inter-governmental Dublin Convention was incorporated into the (inter-governmental) Third Pillar (Justice and Home Affairs) of the European Union under the Treaty of Amsterdam in 1999. According to the Dublin Convention a claim for asylum must be examined by the first member state of the European Union which an asylum seeker reaches, unless there is good cause otherwise. The aim was to prevent multiple or serial applications to member states by asylum seekers. But in practice it has been very difficult to establish the route of many asylum seekers because they may have few if any travel documents with them. And solidarity and cooperation between member states was not very strong in any case. The controversy several years ago between France and the UK over refugees housed near the Channel Tunnel is a case in point. Entry-point member states such as Greece, Italy or Spain felt increased pressure due to this Convention. Recently the Dublin Convention has been replaced by so-called 'Dublin 2'. Under the Danish presidency of the EU in the autumn of 2002 a new system was agreed that came into operation in 2003. This has clarified the procedures for the transfer of an asylum seeker to the first European Union country he or she entered (readmission) and uses the now functional Eurodac computerized finger-print system to identify asylum seekers anywhere in the European Union even if they lack documents. It remains to be seen if the member states will have the political will to operate the new system efficiently and fairly. See A. Hurwitz, 'The 1990 Dublin Convention: A Comprehensive Assessment', *International Journal of Refugee Law*, 11: 4 (1999), pp. 646–77; N. Blake, 'The Dublin Convention and the Rights of Asylum Seekers in the European Union', in E. Guild and C. Harlow (eds), *Implementing Amsterdam: Immigration Rights in EC Law*, Oxford, Hart Publishing, 2001, pp. 90–120; *Migration News Sheet*, January 2003, pp. 10–12; N. Scutari, 'The Dublin Convention and the Effects on Asylum Seekers in Europe', *Migration*, 36/37/38 (2002), pp. 39–69; *Migration News Sheet*, February 2003, p. 8.

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elsewhere, since the Convention should not be interpreted as an ad hoc form of immigration policy but as an international obligation of the signatories to consider the claims of applicants fleeing persecution. The argument had been muddied because, by the 1990s more than 90 per cent of all asylum seekers in Europe were not granted full Convention status but allowed to stay in member states under ad hoc conditions. They were given this partial status because they were either displaced from the wars of the Yugoslav succession or considered endangered by home offices or national courts if they were forcibly repatriated, even if they could not meet the stricter standards of proof demanded by the Convention to secure full refugee status.[14] But from the 1980s onwards anti-immigration discourse towards refugees as 'bogus asylum seekers', 'abusers of the asylum system' or disguised 'economic migrants' became and remained part of the 'common sense' of political discussion in Western Europe. Introduced by the far right and centre right in the 1980s, by the early twenty-first century it had become the pivot upon which mainstream policy moved.[15] Even if the boundaries have shifted, so that the 'exclusionary rhetoric and policy proposals' now divide the productive labour migrant from the undocumented migrant and asylum seeker, the latter are associated with 'criminality, welfare abuse and insecurity'.[16]

Thus a linkage made between the erosion of the Geneva Convention and the demands for labour in the documents of the commission might also cause Europe to realize that it is and has always been a continent of immigration and migration. It was implied that many forced migrants arriving in Europe inhabited a grey area between the Convention refugees and economic migrants. This, of course, was part of a much longer trend in European migration policy. During the Cold War, when most refugees came from the

[14] C. Levy, 'The Geneva Convention and the European Union: A Fraught Relationship', in J. van Selm, K. Kamanga, J. Morrison, A Nadig, S. Spoljar Vrzina and L. van Willigen (eds), *The Refugee Convention at 50: A View from Forced Migration Studies*, Lanham, MD, Lexington Books, 2003 pp. 129–44.

[15] C. Boswell, *European Migration Policies in Flux. Changing Patterns of Inclusion and Exclusion*, London, Royal Institute of International Affairs, Blackwell, 2003; L. Schuster, *The Use and Abuse of Political Asylum in Britain and Germany*, London, Frank Cass, 2003.

[16] Boswell, *European Migration Policies in Flux*, op. cit., pp. 5–6; 67.

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Soviet bloc, the Convention was largely unproblematic. And during the Great Boom before 1973, the demand for labour made a grey area unnecessary. A migrant could easily find employment in Europe and a refugee would be welcomed as a victory for the West over the East.

The cautious and then bold return to labour recruitment by the European Union thus fits into an historical pattern stretching back decades.[17] In 2000 the European Commission signalled a new more liberal policy on immigration in a communication to the Council of Ministers and the European Parliament.[18] The Commission called on the Council and Parliament to rethink Europe's zero immigration policy, stating that 'channels for legal immigration to the Union should now be made available to labour migrants'.[19] The Commission noted 'growing shortages of labour at both the skilled and unskilled levels'.[20] It concluded: 'while immigration will never be a solution in itself to the problems of the labour market, migrants can make a positive contribution to the labour market, to economic growth and to the sustainability of social protection systems.'[21] This might have signalled a paradigm shift in European Union immigration policy.

Furthermore, earlier, the Nice Inter-Governmental Conference (IGC) in December 2000 seemed to underline the importance of treating long-term third country nationals more fairly. Thus the boundaries between refugees, forced migrants granted special leave to remain and economic migrants were somewhat eroded. The Commission's proposed Council Directive on the Status of Third Country Nationals who are Long-Term Residents, of March 2001, set out measures to ensure equality of treatment with Union citizens in terms of normative and practical grounds. Thus the needs of 'the employment market, the effective attainment of the internal market, and the enhancement of economic and social cohesion (Articles 2

[17] See the incisive remarks in A. Favell and R. Hansen, 'Markets Against Politics: Migration, EU Enlargement and the Idea of Europe', *Journal of Ethnic and Migration Studies*, 28: 4 (2002), pp. 581–601.

[18] COM (2000) 757 final, 'Communication from the Commission to the Council and the European Parliament on a Community Immigration Policy', Brussels, 22 November 2000.

[19] Ibid., p. 2.

[20] Ibid., p. 3.

[21] Ibid., p. 21.

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and 3(1)(k) of the TEC) [are ensured through] the integration of third country nationals.'[22] However, this trend towards liberalization seemed to be stopped dead in its tracks by the events of 11 September 2001. Differences were emphasized and the need to address security issues was underlined. The Extraordinary Justice and Home Affairs Council meeting of 20 September 2001 asked 'the Commission to examine urgently the relationship between safeguarding internal security and the complying with international protection obligations and instruments'.[23] On 5 December 2001 the European Commission issued a working paper which encouraged member states to 'scrupulously and rigorously' apply the exclusion clauses contained in Article 1(f) of the Geneva Convention in order to prevent persons suspected of terrorist acts from seeking asylum. The Commission suggested that:

> pre-entry screening, including strict visa policy and the possible use of biometric data, as well as measures to enchance co-operation between border guards, intelligence services, immigration and asylum authorities of the State concerned, could offer real possibilities for identifying those suspected of terrorist involvement at an early stage.[24]

Furthermore a common position adopted by the EU on 27 December 2001 required that member states investigate refugees and asylum seekers 'for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts'.[25] Thus the competing policy tradition of the securitization of migration and refugee policy in Europe once again became the agenda setter after 9/11.[26]

[22] T. Kostakopoulou, '"Integrating" Non-EU Migrants in the European Union: Amibivalent Legacies and Mutating Paradigms', *Columbia Journal of European Law*, 8: 2 (Spring 2002), pp. 194, 195, 197–8. Also see T. Kostakopoulou, '"The Protective Union": Change and Continuity in Migration Law and Policy in Post-Amsterdam Europe', *Journal of Common Market Studies*, 38: 3 (2000), pp. 497–518.

[23] SN 3926/6/01, 'Conclusions Adopted by the Justice and Home Affairs Council', Brussels, 20 September 2001, Conclusion 29.

[24] COM (2001) 743 final, 'The Relationship Between Safeguarding Internal Security and Complying with International Protection Obligations and Instruments', *Commission Working Document*, Brussels, 5 December 2001, p. 6.

[25] 2001/931/CFSP, 'Council Common Position of 27 December 2001 on Combating Terrorism', Article 16.

[26] For an analysis of this policy tradition see J. Huysman, 'The European Union and the Securitization of Migration, *Journal of Common Market Studies*, 38: 5 (2000),

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This discussion demonstrates the difficulties of evaluating the contrary influences of politics, the economy and law and the role of liberal democratic values in the formation of policy. Sociological or IR realist approaches would quickly dismiss the issue of liberal democratic values as naive: clearly the Convention was used as a tool of the Cold War and was at the mercy of long-term trends in European demographics and the labour market since the 1950s. It has also been argued that states determine who is granted Geneva or temporary status. The definition of the refugee and 'refugeehood' and whether or not an asylum seeker has a 'well-founded fear of persecution' as defined in the 1951 Convention are in the hands of the sovereign signatories of the Geneva Convention and the 1967 New York Protocol. And it has been suggested that a strict interpretation has 'led to the refugee's increasing disenfranchisement from the determination process'.[27] Thus, it has been argued that, through a selective and strict interpretation of the Geneva Convention, European nation-states and the European Union have defined illegal immigrants and asylum seekers as 'the other' upon which European citizenship and belonging to Europe are measured and forged.[28]

But this does miss the point. Formal acceptance of the Convention is the guarantor of a liberal democratic benchmark. The sovereign signatories have promised to defend the principle of *non-refoulement*. National courts have refused to deport failed asylum applicants to places the courts determined as unsafe third countries or to the applicants' homelands if the courts felt that the asylum

pp. 751–77. For policy since 11 September see T. Faist, 'Extension du domaine de la lutte: International Migration and Security before and after 11 September 2001', *International Migration Review*, 36: 1 (2002), pp. 7–8; G. Karyotis, 'European Immigration Policy in the Aftermath of September 11: Reinvigorating the Securitisation Discourse', UACES Annual Conference, Queen's University Belfast, 2–4 September 2002; J. van Selm, 'Refugee Protection in Europe and the U.S. after 9/11', in N. Steiner, M. Gibney and G. Loescher (eds), *Problems of Protection. The UNHCR, Refugees and Human Rights*, London, Routledge, 2003, pp. 237–62.

[27] P. Tuitt, *False Images. Law's Construction of the Refugee*, London, Pluto Press, 1996, p. 2.

[28] N. Soguk, *States and Strangers. Refugees and the Displacement of Statecraft*, Minneapolis, University of Minneapolis Press, 1999; E. Haddad, 'The Refugee: Forging National Identities', *Studies in Ethnicity and Nationalism*, 2: 2 (2002), pp. 23–38; I. Ward, 'Identifying the European Other', *International Journal of Refugee Law*, 14: 2 (2002), pp. 219–37.

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seekers' lives were under threat or that they faced possible torture. Liberal democratic states and their courts have been in conversation with each other over how to define who should be protected from 'a well founded fear of persecution' as defined in the Geneva Convention. Thus the Canadians grant Convention status to people on the grounds of domestic violence, harassment of same-sex couples, racial harassment by fellow citizens and to those at risk in situations of generalized civil unrest by 'non-state' actors when the state authority has disintegrated. Sweden and Denmark have liberalized and tightened their criteria based on questions of interpretation surrounding these forms of persecution.[29] Without the Geneva Convention and the Torture Convention the national courts would have no recourse to an internationally sanctioned set of liberal democratic ground rules. The sovereign signatories are obliged to consider the cases of applicants, and it is for them as nation-states to determine who is and who is not a Convention Refugee. But without the Geneva Convention the determination of refugee status would be entirely seen as a gift of each nation-state rather than an obligation backed by international law. A 'realist' approach to this subject fails to explain the actual policy outcome. Even if the Convention has failed in nine out of ten cases, asylum seekers were given some sort of landed status in Europe during the 1990s. The Convention served as the moral and legal benchmark for the entire system. Without it those under temporary protection regimes would be under far greater threat of deportation.[30]

To what extent did the increasing prominence of the far or populist right in Europe undermine this benchmark at the member state level of governance? The next section of this article addresses this question.

[29] O. Chinedu Okafor and P. Lekwuwa Okoronkwo, 'Re-configuring Non-refoulement? The Suresh Decision. "Security Relativism", and the International Human Rights Imperative', *International Journal of Refugee Law*, 15: 1 (2003), pp. 30–67.

[30] The boundaries between forced migration and economic migration and their effects on politics of liberal democracy is interestingly discussed in a new overview, see B. Jordan and F. Düvell, *Migration. The Boundaries of Equality and Justice*, Cambridge, Polity, 2003:

Migration illustrates the precarious balance between the power of global and regional regimes and that of nation states. Freedom of movement for the purposes of business, study and tourism has become established throughout the world under rules sustained through international agreements. There is an international convention on rights to humanitarian protection for victims of

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THE FAR RIGHT AND MAINSTREAM POLITICAL PARTIES: RESHAPING ASYLUM SEEKER POLICY AT THE DOMESTIC LEVEL?

In reaction to 9/11 the far and/or populist right was reinvigorated, although one must note that the effect was not uniform throughout Europe. Certainly the surprisingly strong showing for the hard-line maverick magistrate, Ronald Schill, in Hamburg's elections in September 2001 can be tied to the fact that the leader of the hijackers of the planes that crashed into the Twin Towers lived in that city for many years.[31] The flash victory of the Dutch populist, the assassinated Pim Fortuyn, can be tied to his Islamophobia. Indeed the ground was well prepared. After a poll of Muslims indicated that a small percentage applauded the attacks on the Twin Towers, another poll of Dutch citizens demonstrated that 63 per cent felt that radical Muslims should be removed from the country. And generally two thirds of Dutch citizens feared that the integration of Muslims into Dutch society would be hindered by reactions to the attacks. Fortuyn exploited a 'gap' in the political market: he did not create it.[32] Although Jean Marie Le Pen has been around for decades and his ability to enter the second round of the French presidential elections in June 2002 owed a great deal to the disarray of the French left, nevertheless his Islamophobic and anti-migrant discourse found new support after 9/11.[33] In November 2002 the narrowly defeated referendum championed by the populist businessman leader of the Swiss People's Party (SVP), Christoph Blocher, which would have

war and oppression. But rules on who can work, who can settle and who can become a citizen are still the province of national governments. The tension between these three systems, existing side by side, is reflected in periodic 'moral panics' about immigration, asylum seeking, race relations and the cultural basis for political communities in First World countries (p. 17).

[31] H. Simonian and H. Williamson, 'SPD seeks partners after Hamburg upset', *Financial Times*, 25 September 2001, p. 12.

[32] C. Mudde, 'The Pink Populist: Pim Fortuyn for Beginners', *E-Extreme, Electronic Newsletter of the ECPR-SG on Extremism & Democracy*, 3: 2 (2002), pp. 3–6; Van Selm, 'Refugee Protection in Europe and the U.S.', op. cit.; J. J. M. Van Holsteyn, G. A. Irwin and J. M. Den Ridder, 'In the Eye of the Beholder. The Perception of the List Pim Fortuyn and the Parliamentary Elections of May 2002', *Acta Politica*, 38: 1 (2003). In fact Geddes argues that the themes Fortuyn exploited had been percolating beneath the surface of Dutch politics since the early 1990s. See A. Geddes, *The Politics of Migration and Immigration in Europe*, London, Sage, 2003, pp. 157–60; 178.

[33] D. S. Bell, 'The Election of Extremes', *E-Extreme, Electronic Newsletter of the ECPR-SG on Extremism & Democracy*, 3: 2 (2002), pp. 1–3.

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essentially forced Switzerland out of the Geneva Convention of 1951, seemed to also be partially influenced by the events of the last year, although other issues were invoked by the campaigners.[34]

Nevertheless the influence of the far right on the governing and/or mainstream parties is neither clear-cut nor self-evident. First what parties are we talking about?[35] Some of the most notable gains for the far and populist rights have been in consociational or consensual democracies (Norway, Denmark, Belgium, the Netherlands, Austria and Switzerland). In some of these places charismatic populist politicians (Jörg Haider in Austria, the deceased Pim Fortuyn in the Netherlands or Carl Hagen in Norway) have posed as the outsiders, undermining the cosy cartels that have run national politics for decades and claiming to tell the 'truth' about the 'scandal' of unhindered migration and rampant multi-culturalism. But the far right has also appealed to regionalisms (Filip Dewinter in Belgium and Umberto Bossi in Italy). The Alleanza Nazionale in Italy drew its support from elements of southern Christian Democracy after the collapse of the First Republic ten years ago. Similarly new 'political space' helped Jean Marie Le Pen to get into the final round of the presidential elections: in this case the failure of the left at mounting a coherent unified campaign against the centre right in the first round.

But victory rapidly turned to defeat if party structures were weak or non-existent, the most spectacular case being the collapse of the Pim Fortuyn List following the death of its leader. Or victory was thrown away if the charismatic leader behaved in an erratic, extreme or egotistical manner, as was the case, to a certain extent, for Bossi and the Lega Nord and Haider and the Freedom Party. Alternatively, the Danish People's Party, the Norwegian Progress Party, Belgium's Vlaams Blok, the Italian Alleanza Nazionale and the French Front

[34] J. Henley, 'Swiss Reject Harsh Asylum Laws – Just', *Guardian*, 25 November 2002, p. 15.

[35] For the most recent overviews of the far or populist right see C. Mudde, *The Ideology of the Extreme Right*, Manchester, Manchester University Press, 2002; P. Ignazi, *Extreme Right Parties in Western Europe*, Oxford, Oxford University Press, 2003; P. H. Merkl and L. Weinberg (eds), *Right-Wing Extremism in the Twenty-First Century*, London, Frank Cass, 2003; R. Eatwell and C. Mudde (eds), *Western Democracies and the New Extreme Right Challenge*, London, Routledge, 2004; C. Levy, ' "There is Something Nasty in the Woodshed". The Far Right and Conservatives in Consensual and Consociational Democracies: A Comparative Analysis of the Far Right in Scandinavia, the Low Countries and Central Europe, 1970s to 2003', unpublished paper, 2004.

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National have well-organized party machinery that has embedded them in the political system.

Whether or not it makes sense to place all these parties in the same family is another question, beyond the scope of this article. Some of these parties find their origins in breakaways from mainstream Christian Democrat and Liberal parties. Some of them have evolved from historical fascist antecedents; others might be closer to neo-liberal charismatic politics. None, though, can be directly equated with historical fascism: they all praise democracy, few of them dream of imperial conquest (although Vlaams Blok dreams of a greater Flemish homeland), anti-communism has an antiquated air to it (even if it still is used in Italy). Neither have those parties recognized a kinship between themselves. Before his death Fortuyn denounced Haider and Le Pen, indeed, he characterized his politics as like Berlusconi's but with less money. The lifestyle of the openly gay Fortuyn must have scandalized Le Pen or the Scandinavian populists. Some of these parties embraced neo-liberalism at home and abroad: others were rather more critical of it. Some of these parties endorsed the EU but most were critics. What they all shared, however, was a core ideology that vigorously criticized multi-cultural society. They all demanded strict assimilation for migrants into a homogenized national culture. They advocated a 'welfare state chauvinism', namely, a welfare state for the assimilated and lesser forms of assistance for other residents of their country. And these core values were melded together by a policy of strict restrictions on migration and on the right of asylum in their country.[36] Thus the charismatic leader embodied the 'common sense' of the average, forgotten citizen, who had been an alien in his own land. The use of direct televisual democracy, earthy language and referenda were seen as ways to circumvent the special interests of those who had prevented the message of the 'real' people from being heard. But if the restriction of migration

[36] For analysis of the new populism see Y. Mény and Y. Surel, *Par le peuple, pour le peuple*, Paris, Librairie Arthème Fayard, 2000. Also worth looking at is R. A. DeAngelis, 'A Rising Tide for Jean-Marie, Jörg and Pauline? Xenophobic Populism in Comparative Perspective', *Australian Journal of Politics and History*, 49: 1 (2003), pp. 75–92. Gallya Lahav's recent monograph demonstrates a congruence between support for populist restrictive arguments amongst the public and political elites in Europe, especially a correlation between Eurosceptical opinion and anti-immigrant/asylum seeker sentiment, see *Immigration and Politics in the New Europe. Reinventing Borders*, Cambridge, Cambridge University Press, 2004.

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and the right of asylum was the common factor shared by all these parties, the measurable effects on policy in any given country varied.

A direct influence can be detected in countries where a far or populist right party has joined a coalition or whose votes were needed by a coalition in order to stay in power.[37] The most spectacular case was the Danish People's Party, where – although it remained outside power – the centre right coalition enacted legislation that severely restricted entry into Denmark by refugees and asylum seekers and strict citizenship and residency requirements. The Danish abolition of the de facto status has also narrowed the scope for the recognition of claims of temporary protection, but this law may be unworkable.[38] On the other hand, although two far or populist right parties in Italy are part of Berlusconi's coalition government and have been influential in the formation of asylum and refugee law, real effects have been diluted through the influence of the tradition of Catholic solidarity, employers' voices and the impenetrability of 'economic informality'.[39] Although Italian policy has shifted with the Berlusconi government, the new draconian Bossi–Fini law was undermined by another regularization of undocumented and illegal immigrants, thus continuing a policy of periodic amnesties carried out by the centre left in the 1990s.[40]

But the influence of the far and populist right can also be measured by anticipatory or reactive responses by mainstream politicians of the centre right and centre left, which has been termed the 'populist gap': 'A gap between what can feasibly be done to restrict

[37] A recent good survey can be found in John Lloyd's 'Europe's New Politics. No to Brussels, No to Immigration: How Rightwing Populism Entered the Mainstream', *Financial Times*, 28 November 2002, p. 21, and John Lloyd, 'The Closing of the European Gates? The New Populist Parties of Europe', in S. Spencer (ed.), *The Politics of Migration. Managing Opportunity, Conflict and Change*, Oxford, Blackwell, 2003, pp. 88–99.

[38] K. J. Kjær, 'The Abolition of the Danish de facto Concept', *International Journal of Refugee Law*, 15: 1 (2003), pp. 254–75. For a good discussion of the Danish People's Party, see J. Rydgren, 'Explaining the Emergence of Extreme Right-Wing Populism: The Case of Denmark', *West European Politics*, 27: 3 (2004), pp. 474–502.

[39] L. Morris, *Managing Migration. Civic Stratification and Migrants' Rights*, Cambridge, Cambridge University Press, 2002, pp. 53–79; G. Zincone, 'Immigration Policy-Making in Italy: An Eclectic Interpretative Approach', ECPR Workshop 23, 'Immigration Policies: Between Centre and Periphery, National States and the EU', ECPR Joint Sessions of Workshops, Turin, 22–7 March 2002; Geddes, *The Politics of Migration and Immigration*, op. cit., pp. 157–60.

[40] Boswell, *European Migration Policies in Flux*, op. cit., pp. 49–50.

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migration in liberal democracies and the often unrealistic and ethically unacceptable demands of populist politics. The "populist gap" often pressures mainstream parties into embracing more radically restrictive measures in order to compete for electoral support.'[41]

In the Netherlands, in March 2002 on the eve of the municipal elections, two months before the flash victory of Fortuyn in the polls, the secretary of state for justice, Ella Kalsbeek suggested in an interview that Afghan refugees might be forcibly repatriated in the longer term.[42] The home secretary of the British Labour government, David Blunkett, piloted the Nationality, Immigration and Asylum Act through Parliament, which closed illegal routes for asylum seekers and refugees and advocated settlement camps, while expediting citizenship applications for those who would boost the UK economy. Nicolas Sarkozy, the interior minister of France in the new centre right government, guided the Law on Internal Security though the National Assembly; it was designed to reassure the electorate that spiralling crime rates were being tackled and illegal immigration was being kept down. Otto Schily, the German interior minister, in the recently re-elected Social Democrat–Green coalition took measures against the extreme right and guided legislation that granted mainly Turkish guest workers the right to German citizenship. But he also introduced tougher measures to combat crime and saw the Immigration Act passed by the Bundestag, to control and limit the number of immigrants allowed to take up legal residence.[43] Thus the restrictive agenda in the brace of centre left governments that came to power in the late 1990s seems to have been pursued by re-elected governments or their replacements.[44] However, a certain opening to

[41] Ibid., p. 4.

[42] Van Selm, 'Refugee Protection in Europe and the U.S.', op. cit., p. 255.

[43] J. Lloyd. 'Europe's New Politics', *Financial Times*, 29 November 2002, p. 17. For constitutional reasons the proposed law is still delayed in its passage into law. In any case, commentators were surprised in 2002 by the failure of the far right anti-immigrant parties in the general elections and a general lack of interest in the question of immigration by the electorate during the electoral campaign. See Boswell, *European Migration Policies in Flux*, op. cit., p. 44.

[44] L. Schuster, 'A Comparative Analysis of Asylum Policy of Seven European Governments, *Journal of Refugee Studies*, 13: 1 (2000), pp. 1–15. For a discussion of the effects of party politics on the generally increasing restrictive nature of asylum and refugee policy in Europe from the 1980s to the late 1990s see Boswell, *European Migration Policies in Flux*, pp. 15–23 and Schuster, *The Use and Abuse of Political Asylum*, op. cit.

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immigration and citizenship for long-term residents is also present that the far or populist right finds anathema. Governments have argued that they want to be more restrictive in order that genuine asylum seekers are granted refugee status and those who are allowed to stay are more easily integrated into their host society.

The next section of this article examines how the domestic agendas of the member states have affected the policies of the European Union. It will be shown that there is no clear transferral of policy trends from the domestic to the European. This means that, so far, the European Union moderates the more restrictionist policies of the member states. On the other hand, the European Union's common policy is still lacking any real teeth. If the political voices of the Commission, the Council of Ministers, the European Parliament and even the European Council have defended the ethics behind the Geneva Convention, for many years the inter-governmental cooperation of interior and security officials have assisted in the securitization of European Union policy long before 9/11.

THE EUROPEAN UNION AND THE MEMBER STATES: RESTRICTIONISM AND THE LEGACY OF THE GENEVA CONVENTION

I have argued that restrictionism seems to have taken the initiative in European policy-making since 9/11. Nevertheless, the long-term attachment to the Geneva Convention has meant that the European Union has been uneasy to disavow its past totally. The USA kept the UNHCR at arm's length during most of the Cold War. The USA openly employed its asylum and refugee policy as a tool in its struggle against the Eastern Bloc. By contrast, in the 1960s and 1970s, Western Europe used the handbook of the UNHCR to develop best practice for the treatment of asylum seekers.[45] In a survey of

[45] G. Loescher, *The UNHCR and World Politics. A Perilous Path*, Oxford, Oxford University Press, 2001, pp. 176, 183, 185. Cronin, *Institutions of the Common Good*, op. cit., places the West European commitment to the Geneva Convention regime in historical context:

> The strongest supporters of a United Nations based international order were also those promoting the broadest and most liberal protection system for refugees. Specifically, France, Belgium, the

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parliamentary debates about the reform of asylum and refugee law in Switzerland, Germany and the UK from the middle 1970s to the middle 1990s, a recent study has demonstrated that not a single parliamentarian demanded the renunciation of the Geneva Convention by their country's government. Even advocates of restriction saw the Geneva Convention as a 'constitutive part' of liberal society.[46] Since the 1990s, it has been argued that growth of the far right has not only threatened 'the self-proclaimed liberal democratic and human rights-based values underpinning the European project' but this threat also undermined 'the practical feasibility of the liberal universalist model for defining asylum policy'. This is why the recent debates over the future of the Geneva Convention have been so heated.[47]

The sanctity of international law and the Geneva Convention has also been repeatedly defended in the official documents of the European Union. The sentiment can also been found in the informal minutes of the heads of government and state, as was the case just

Netherlands and Britain all fought for an open-ended regime that would protect refugees from anywhere in the world anytime. On the other hand, after the United States shifted its support from a UN-based international order towards regional and *ad hoc* institutions in 1950, it became the primary advocate of a highly restricted protection system with a short life and a limited mandate (p. 191).

[46] N. Steiner, *Arguing about Asylum. The Complexity of Refugee Debates in Europe*, Basingstoke, Palgrave, 2001, p. 149. Also see Schuster, *The Use and Abuse of Political Asylum*, op. cit., for the German case:

> It would therefore be very difficult for any state to decide, for example, to abolish asylum and still plausibly claim to be a *liberal* or *democratic* state. Even the most outspoken opponents of Germany's relatively liberal asylum regime, while advocating draconian restrictions, do not demand that asylum cease to be granted at all. Not only was there no popular mandate for such an action, but the idea of abolishing it would have been outside their own normative vocabulary (p. 55).

And: 'In the case studies of Britain and Germany the analysis of the debates found that when asylum was discussed, the granting of asylum was indeed spoken as a defining characteristic of a liberal state' (p. 263). For an excellent discussion of the ethics of asylum within liberal democratic society, see Matthew J. Gibney's recent monograph, *The Ethics and Politics of Asylum. Liberal Responses to Refugees*, Cambridge, Cambridge University Press, 2004. But this 'constitutive part' of liberal society is shaped by the imperatives of the state system and the constraints of domestic politics, see ibid., pp. 212–13.

[47] C. Boswell, 'European Values and the Asylum Crisis', *International Affairs*, 76: 3 (2000), p. 537.

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before the Tampere conference in 1999. While the German federal minister of the interior, Otto Schily and his French partner, Jean-Pierre Chévènement, addressed the future of European Union policy on asylum and immigration, the Austrian presidency paper of the previous year was the ghost at the banquet, questioning the future of the Geneva Convention. Instead, the Franco-German document reiterated the values of the Geneva Convention. 'Asylum is not immigration', the document argued, 'and in spite of the confusion kept up by false applicants, the control of migratory movements ought not undermine the Union's capacity of offering reception to those persecuted'.[48] The ministers stated that the opponents of the Geneva Convention should not use a form of cagey realism to undermine the bedrock principle of *non-refoulement*. The ring-fenced solemn international obligation recognized as part of the case law of the member states should not be elided into a discussion of general issues of migration. Thus even if more than 90 per cent of refugees in Europe did not get Convention status, it was still nearly impossible to deport them to countries where their lives might be endangered. A member state in Europe might aspire to a zero immigration policy but it would be bound to accept asylum seekers on its territory so long as it remained a signatory of the 1951 Geneva Convention. And the Treaty of Amsterdam and the declarations at Tampere and Laeken by the European Council have consistently reiterated this position. Harmonization of asylum and refugee policy and transparent burden-sharing of refugee inflows would save, not scupper, the Geneva Convention.

The British have advanced radical plans that go beyond this. These are worth looking at in some detail because they have had the temerity to question directly the viability of the Geneva Convention. The aim of both sets of proposals was to tackle forced migration at its source and can be associated with the well-known concept of tackling forced migration at its roots.[49] The first premises of such policies, however, can lead to dramatically different types of effects on

[48] *Migration News Sheet*, October 1999, p. 1. For a discussion of Tampere see I. Boccardi, *Europe and Refugees: Towards an EU Asylum Policy*, The Hague, Kluwer Law International, 2002, pp. 175–80.

[49] A recent analysis of the root-cause approach can be found in C. Boswell, 'Preventing the Causes of Migration and Refugee Flows: Towards a EU Policy Framework', *New Issues in Refugee Research*, Geneva, UNHCR, 2002.

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the present asylum policy regime. At the Seville summit of the EU in the early summer of 2002, David Blunkett proposed the tying of future aid to developing countries to their cooperation in curbing illegal immigration.[50] Although embraced by many of his fellow interior ministers, it was felt too illiberal for the heads of government and state. They thought that linking the continuation of aid to the effectiveness of developing countries' policies in preventing emigration of their citizens to the West was a violation of the spirit of the Geneva Convention and the international rights regime that formed part of the European model. A more consistent and far more serious threat to the Geneva Convention has been the proposed policy of externalizing refugee management and control through the processing of claims in camps outside the European Union.[51] This has its antecedents in the policies of 'safe areas' and camps that were established during the Yugoslav wars of the 1990s, which are discussed in the conclusion of this article. However these systems of externalization and temporary protection[52] were seen as ways to preserve the sanctity of the Geneva Convention and were even, perhaps unfortunately, endorsed by UNHCR.[53] The various British plans of the last few years envisage their systems as a replacement of Geneva. Thus in the spring of 2000 Jack Straw at the European Conference on Asylum, sponsored by the then current Portuguese presidency of the EU, called for a redrafting of the Geneva Convention.[54] He suggested an international quota system under which European countries would share asylum seekers from countries recognized as violators of human rights. Straw seemed to confuse temporary protection with the Geneva Convention system of individual determination of cases. The system would also undermine the concept of

[50] Boswell, *European Migration Policies in Flux*, op. cit., p. 106.

[51] For a general discussion of the externalization of EU asylum and refugee policy see C. Boswell, 'The "External Dimension" of the EU Immigration and Asylum Policy', *International Affairs*, 79 (2003), pp. 619–38.

[52] K. Koser and R. Black, 'Limits to Harmonisation: The "Temporary Protection" of Refugees in the European Union', *International Migration*, 37: 3 (1999), pp. 521–43.

[53] E. Roxström and M. Gibney, 'The Legal and Ethical Obligations of UNHCR. The Case of Temporary Protection in Western Europe', in Steiner, Gibney and Loescher, *Problems of Protection*, op. cit., pp. 56–7.

[54] J. Straw, 'Towards a Common Asylum Procedure', European Conference on Asylum, Lisbon, 16 June 2000.

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non-refoulement by creating an ad hoc system of safe countries. His suggestions were not immediately successful, but the matter was not allowed to rest. In the spring of 2003 the British government released a 'vision paper' that rapidly became the basis for a discussion between the EU and UNHCR.[55] This advanced the development of 'transit-processing camps' outside the EU and 'regional processing centres' closer to the countries of origin in the developing world. Ruud Lubbers, high commissioner, responded immediately with a three-pronged approach that envisaged a role for UNHCR in the global management of the system, especially in partnership with the EU in aiding countries of origin to build capacity to manage migration flows. The deepening of a root-causes approach in this respect was not controversial but it remained to be seen if the EU would ever supply the financial resources sufficient to underwrite this form of global burden-sharing.[56]

The suggestion of establishing 'transit-processing centres' was more controversial and demonstrated the transfer of models used by the Australians in the off-shore processing of refugees since 2001 (the so-called Pacific Solution), and the former usage of Guantánamo Bay by the Americans as a processing point for Haitian and Cuban forced migrants.[57] Indeed the British proposal was more radical than the 'Pacific Solution', since it argued for the

[55] For detailed discussion of the British paper see, G. Noll, 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones', *European Journal of Migration and Law*, 5 (2003), pp. 303–41.

[56] G. Loescher and J. Milner, 'The Missing Link: the Need for Comprehensive Engagement in Regions of Refugee Origin', *International Affairs*, 79 (2003), pp. 583–617.

[57] For an excellent comparison of Australian, EU and US migration policies see Van Selm, 'Refugee Protection Policies', op. cit., pp. 66–92. For detailed analyses of Australia's policies that seem to violate the spirit and the law of the Geneva Convention and other international laws see A. Schloenhardt, 'To Deter, Detain and Deny: Protection of Onshore Asylum Seekers in Australia', *International Journal of Refugee Law*, 14: 3 (2002), pp. 302–28; C. Marie-Jeanne Bostock, 'The International Legal Obligations Owed to the Asylum Seekers on the MV *Tampa*', *International Journal of Refugee Law*, 14: 3 (2002), pp. 279–301; A. Edwards, 'Tampering with Refugee Protection: The Case of Australia', *International Journal of Refugee Law*, 15: 2 (2003), pp. 193–211; T. Magner, 'A Less than "Pacific" Solution for Asylum Seekers in Australia', *International Journal of Refugee Law*, 16: 1 (2004), pp. 53–90. Gibney notes the uniqueness of the Australian case in the willingness of Australian officials and politicians to admit that

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deportation of asylum seekers already within the territory of the EU to the transit-processing centres. The Australians invented the 'Pacific Solution' precisely to prevent asylum seekers from touching Australian soil and thereby forcing their claims to be heard in another country.[58]

At the meeting of the European Council of 28 March 2003 David Blunkett suggested that Albania and Croatia become venues for the screening of all refugees in Europe. This in effect would make it impossible for spontaneous asylum seekers to seek asylum in a member state and would effectively make all such attempts illegal. An international quota system would thus replace the right of asylum for the individual fleeing persecution. Temporary refugees caused by ethnic cleansing or war and the individual asylum seeker would, it seems, be treated officially under the same regime. But even Blunkett's return to the 'Straw plan' met with objections. Although many member states seemed to endorse it, they also wanted the blessings of Ruud Lubbers. He would only approve the plan if it was located within the EU and only entailed processing claimants from 'safe countries': in other words the purpose of the 'vision paper' was undermined. In any case the Germans[59] and the Swedes objected to the plan and the European Commission communication in June distanced itself from the UK position and stressed the need for burden-sharing within the EU. The European Council presidency conclusions at Thessaloniki on 19–20 June 2003 emphasized the sanctity of the Geneva Convention and by now the British withdrew their proposal from the EU and seemed intent on pursuing it with a coalition of the willing (Denmark and possibly the

all unauthorized 'entrants are unwelcome, regardless of whether or not they are refugees. This is honesty, albeit at its most brutal.' (*The Ethics and Politcs of Asylum*, op. cit., p. 193).

[58] *Migration News Sheet*, July, 2003, p. 13.

[59] The Swedes and Germans seemed to object to the British plan on principled grounds. The Swedish minister for immigration, Jan O. Karlsson, declared, 'We are against any sort of system that would deny people the right to apply for asylum in the country that they have sought refuge in'. (*Migration News Sheet*, July 2003, p. 13). But one report of the meeting implied that Otto Schily objected to the plan because it would reduce the distance that asylum seekers would have to travel and thereby increase the total number of asylum seekers that the European Union would have to process. See, D. Dombey, 'UK Asylum Proposals Draw Mixed Response', *Financial Times*, 29 March 2003, p. 12.

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Netherlands). The British proposals were the greatest challenge to the 1951 Convention, yet a majority of EU member states chose to oppose it.

These challenges to the consensus on asylum and refugee policy demonstrate the degree to which the fully fledged demands of the far and populist right have lacked support at the highest level of EU policy-making. The Austrian presidency's and the British home secretaries' interventions mirror in a more polite and measured way key planks of these parties' more rough-and-tumble pronouncements. Thus the conversion of the right of asylum from international law to charitable gift or the tying of aid to the developing world to its co-operation in policing all forms of migration are there in the manifesto of the Danish People's Party, for example.[60] Naturally these parties would disagree with the British call for some form of measured labour migration[61] and would find their endorsement of the Treaty of Amsterdam's struggle against racism and xenophobia tiresome and 'politically correct'. Article 13 of the Treaty of Amsterdam was rapidly turned into two directives addressing racism and discrimination, partially, it has been argued, in response to the victory of the Freedom Party in Austria.[62] Therefore this exercise does demonstrate that, at least at the level of polite official conversation and even law, the European Union still could not stomach a fundamental challenge to its conception of the European role in the international regime of rights and law.

Nevertheless, the effects of 11 September challenged the bedrock of the Geneva Convention, but this originated from the logic of

[60] The Danish government (under the influence of the Danish People's Party) has suggested that the forthcoming Commission directive on the definition of refugee/subsidiary protection includes a clause in which all new successful applicants for refugee or subsidiary protection have their cases reviewed regularly in order to have their status terminated as soon as possible. This would be a grave blow to the Geneva Convention. But it remains to be seen if this will pass (*Guardian*, 11 December 2002). Indeed the British 'vision' was originally advanced by the Danish government under its presidency in the autumn of 2002, but it was diplomatically astute to allow the British to go public in the spring of 2003 and take the heat. See, Noll, 'Visions of the Exceptional', op. cit., p. 305.

[61] An excellent analysis of the shift in British policy is found in Boswell, *European Migration in Flux*, op. cit., pp. 37–41.

[62] Geddes, *The Politics of Migration and Immigration*, op. cit., pp. 143–4.

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security rather than the welfare chauvinism of the far or populist right. *Non-refoulement* has been placed under severe pressure because of the threat of global terrorism, even if the member states may be also opening their gates to greater economic migration, arguing that the boat is indeed not full, and promoting anti-racist strategies aimed at combating the extreme right. In debates held during the period 2001–3 the European Commission suggested that the suspension of a guarantee of *non-refoulement* in Article 3 of the European Convention on Human Rights might have to be ruled on by the European Court of Human Rights. The whole discussion of human rights, terrorism and the suspension of *non-refoulement* will be a complex and fraught subject. But it has had knock-on effects in the meantime. Thus the British home secretary, David Blunkett, announced on 16 October 2001 that the UK would derogate from Article 5 of the European Convention on Human Rights (only incorporated in UK law four years earlier). This was done in order to allow the detention of a suspected terrorist in the UK where there is no extradition treaty with the country of origin or transit, or because he or she might face torture or death in that country.[63] This UK case is interesting because it demonstrates a general European trend to support some degree of managed immigration while at the same time placing greater pressure on asylum seekers and refugees. Thus the Anti-Terrorism, Crime and Security Act of 2001 should be placed alongside the Nationality, Immigration and Asylum Act of 2002. The effect of the 2002 Act is to further differentiate asylum seekers and refugees from what is termed legitimate labour migration. The Act creates a series of accommodation, reception and detention centres for the processing of asylum seekers. It severely limits social assistance to asylum seekers when they do not make their claim for asylum within a short time of their arrival in the UK. The appeals procedure is speeded up and limited in scope. For all intents and purposes the effect of this Act has made it very difficult for spontaneous refugees arriving in Britain not to be categorized as bogus or illegal and leaves them with a good chance that they will be left destitute.[64] The separation from judicial oversight and its replacement by administrative decision-making is even more blatant in the 2001 Act. Once the home secretary declares

[63] Van Selm, 'Refugee Protection in Europe and the U.S.', op. cit.

[64] *JCWI Bulletin* (Autumn/Winter 2001); *JCWI Bulletin* (Spring/Summer 2002); *JCWI Bulletin* (Winter 2003).

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that a foreign citizen is believed to be a terrorist, even if proof of criminal activity cannot be demonstrated, the individual can be detained for up to fifteen months. This is renewable for the next five years every twelve months. The only check to this power is the Special Immigration Appeals Commission (SIAC), a secretive administrative tribunal outside the purview of the judicial system. The logic of this Act was based on the imminent threat of a terrorist outrage, but in fact Blunkett declared at the time of passage, in the autumn of 2001, that no such threat existed.[65] Furthermore, if the detained person is shown to have committed an extra-territorial crime this could be prosecuted under UK law. According to a recent analysis of the Act, SIAC, 'would have to be satisfied that detention was strictly necessary on the merits to prevent violence etc. that threatened the United Kingdom'.[66] Otherwise, '[T]he risk is that what has been sold to the public as a necessary measure of defence against suicide bombers, or chemical warfare spreading terrorists, may be used against exiled dissidents and political activists who displease oppressive regimes aboard'.[67] At the end of 2003, fourteen prisoners were being held at two top security prisons under the provisions of the 2001 Act. Their imprisonment was being likened to the status of the US prisoners at Camp Delta in Guantánamo Bay.[68] Furthermore no other country in Europe has seen fit to derogate from Article 5 of the European Convention on Human Rights. Indeed, it has been argued that the Terrorism Act of 2000 had sufficient power to deal with suspected terrorists, without resorting to this draconian decision.[69]

[65] P. Cruz, 'United Kingdom: Withdrawing from the International Human Rights Standards', in E. Brouwer, P. Catz and E. Guild et al. (eds), *Immigration, Asylum and Terrorism: A Changing Dynamic in European Law*, Nijmegen, Instiuut voor Rechtssoglie/Centrum voor Migratiericht, 2003, p. 83.

[66] N. Blake and R. Husain, *Immigration, Asylum and Human Rights*, Oxford, Oxford University Press, 2003, p. 344. Blake and Husain's analysis is masterful, see pp. 336–45. Noll places the concept of 'the protection zone' in a broader historical context in 'Securitizing Sovereignty? States, Refugees and the Regionalization of International Law', in Newman and Van Selm, *Refugees and Forced Displacement*, op. cit., pp. 277–303.

[67] Ibid.

[68] M. Bright, 'Revealed: Shocking Truth of Britain's "Camp Delta"', *Observer*, 14 December 2003, pp. 1, 3.

[69] Cruz, 'United Kingdom: Withdrawing from the International Human Rights Standards', op. cit., p. 85.

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The British case demonstrates a general trend in European immigration and asylum policy. On the one hand, a regime of 'post-national rights' is recognized and the need for labour migration is acknowledged. But on the other, both of these liberal developments are placed without a broader context of managing security risks and public opinion. A regime of more openly accepted labour migration and even the acknowledgement of a 'post-national' regime of rights should not be 'interpreted simply as the incremental extension of universal rights, but rather as a cautious system of management and regulation which can equally involve a limitation or contraction of rights'.[70] This so-called securitization of immigration and asylum management is nothing new. Indeed a survey of several major European countries' responses to 9/11 has shown that in many respects policies demonstrated a good deal of continuity with past practices. Thus the UK drew on its past experience in Northern Ireland, whilst the Italian drew upon their anti-Mafia laws. The Germans instituted more stringent controls and identification of foreigners on German territory, while France and the Netherlands continued and strengthened emergency measures already in place. It is also worth noting that, even if the Europeans have been disturbed by the detention of individuals by the US in the 'legal black hole' of Guantánamo Bay, the detention of refugees, asylum seekers and immigrants with less than generous rights of appeal by the detained is and has been part of American and European practice for many years.[71] The USA PATRIOT Act of 2001 (Uniting and Strengthening America by Providing Appropriate Tools Requiring to Intercept and Obstruct Terrorism) expands the right of the authorities to detain aliens who are suspected of being terrorists but where criminal evidence is not sufficiently strong for a prosecution.[72] Violators of immi-

[70] L. Morris, 'Britain's Asylum and Immigration Regime: The Shifting Contours of Rights', *Journal of Ethnic and Migration Studies*, 28: 3 (2002), p. 422.

[71] T. J. Randazzo, 'The Detention of Asylum Seekers in the United States', unpublished MS, Berkeley, University of California, 2003; M. Dow, *American Gulag. Inside U. S. Immigration Prisons*, Berkeley, University of California Press, 2004. For a balanced account of German policy since 9/11 see P. Hogwood, 'German Immigration Policy after September 11: Militant Democracy in the Twenty-First Century', Workshop, 'Who Makes Immigration Policy? Comparative Perspectives in a Post 9/11 World', ECPR Joint Sessions of Workshops, Uppsala, 2004.

[72] R. Gorman, 'Rushing to Judgement: The Unintended Consequences of the USA PATRIOT Act for *Bona Fide* Refugees', *Georgetown Immigration Law Journal*, 16: 2 (2002),

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gration law have been detained before 2001, but under the PATRIOT Act information about those aliens certified as likely terrorists or members of organizations classified as terrorist by the attorney general is limited, and their right of redress is very limited. The provisions and the regime of the detention at Camp Delta were challenged in the Supreme Court of the USA. On 28 June 2004 the court handed down two decisions – Hamidi *v.* Rumsfield and Rasul *v.* Bush, which respectively allowed enemy combatants to contest their detention in front of a neutral adjudicator and allowed them to challenge their detention in US courts. Since the ruling the Pentagon has established tribunals to define the status of the combatants. But these procedures and parallel trials of some of the enemy combatants for crimes have been subject to sharp criticism by outside legal observers and by the very military defence lawyers appointed by the Pentagon. Using other procedures, so far 156 prisoners have been released or given to their home governments to incarcerate. Only one prisoner has been found imprisoned incorrectly according to the Pentagon. The Supreme Court did undermine the concept of extra-legal zones in the American case.[73] In this sense the legal challenge has leapfrogged the UK form of detention. And even if Camp Delta has been challenged by the Europeans, the idea of using offshore processing zones for asylum seekers and refugees and not for suspected terrorists or enemy combatants became a major issue in 2003, which I will return to in the final section of this article.

There is, however, a direct knock-on effect from the events of 9/11. On the level of the European Union, measures that had been debated for years in order to create a stricter EU immigration control regime were agreed because of the threat of terrorism. Whether or not the finger-printing of asylum seekers, the exchange of such data, or stricter visa requirements, will limit the movement of terrorists can

pp. 505–31; P. Buchanan, 'Immigration Law Developments in the United States since September 11, 2001', in Brouwer, Catz and Guild, *Immigration, Asylum and Terrorism*, op. cit., pp. 149–68.

[73] 'Guantanamo Bay Detainees Legal Updates', http://www.globalsecurity.org/miliary/facility/guantanamo-bay_legal.htm (accessed 17 September 2004); 'Guantanamo Prisoner Incorrectly Detained', 8 September 2004, http://www.reuters.co.uk (accessed 17 September 2004). For the context of the Supreme Court cases see A. Lewis, 'Bush and the Lesser Evil', *New York Review of Books*, 27 May 2004, pp. 9–11.

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be questioned: it does however demonstrate a historical continuity, to which I will now turn.[74]

The securitization agenda preceded the new era of refugees and asylum seekers, it was located in a tradition that grew up in the 1970s and was then concerned with international left-wing and right-wing terrorism amongst European citizens and Palestinians and secular Middle Eastern activists. It was found in the secretive conclaves of middle-level officials that have gone on for decades. Transnational and transgovernmental networks of working groups of police officials and civil servants from ministries of the interior or home offices developed from the 'wining and dining' circles of the 1970s.[75] In order to avoid the annoying opposition of national courts, other more liberal ministries and NGOs, law and order officials employed the mechanism of supranational venues to avoid prying eyes.[76] As has been recently argued, 'Trevi provided a "security" frame into which migration issues were inserted when they rose up the political agenda from the late 1980s'.[77] Thus an 'escape to Europe' allowed politicians to sanction illiberal policies outside the framework of their own liberal democratic polity.[78] These policy networks stressed security issues and drove the restrictive practices of 'Schengenland' and the Dublin Convention. Migration control was also shifted from national courts and other ministries to home offices or private entities. Airline officials became de facto immigration officials and buffer policies made it virtually impossible for spontaneous asylum seekers to reach most of the European Union without violating the law.[79] Refugee

[74] E. Brouwer and P. Cruz, 'Concluding Remarks: The Fight Against Terrorism and the Protection of Human Rights', in Brouwer, Catz and Guild, *Immigration, Asylum and Terrorism*, op. cit., pp. 169–70.

[75] V. Guiraudon, 'European Integration and Migration Policy: Vertical Policy-Making as Venue Shopping', *Journal of Common Market Studies*, 38: 2 (2000), pp. 251–71; D. Bigo, 'Migration and Security', in V. Guiraudon and C. Joppke (eds), *Controlling a New Migration World*, London, Routledge, 2001, pp. 121–49.

[76] V. Guiraudon and G. Lahav, 'A Reappraisal of the State Sovereignty Debate. The Case of Migration Control', *Comparative Political Studies*, 33: 2 (2000), pp. 163–95.

[77] Geddes, *The Politics of Migration and Immigration*, op. cit., p. 130.

[78] J. Hollifield, 'Ideas, Institutions and Civil Society: On the Limits of Immigration Control in France', in M. Brommes and A. Geddes (eds), *Immigration and Welfare: Challenging the Borders of the Welfare State*, London, Routledge, 2000.

[79] D. Bouteillet-Paquet, 'Passing the Buck: A Critical Analysis of the Readmission Policy Implemented by the European Union and Its Member States', *European Journal*

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policy in Europe had been regionalized.[80] The disastrous policy of so-called safe areas during the Bosnian war, or the more effective and noble burden-sharing and joint military action against a refugee-producing state in the Kosovo intervention, emphasized the role of security and military networks. Burden-sharing agreements validated the temporary protection of Kosovar Albanians within member states' national territory but spontaneous refugees from Kosovo and elsewhere had to break the law in order to reach the member states of the European Union to claim asylum.[81] The candidate member states of the former communist Eastern Europe at first broadened their international human rights profile by adopting the Geneva Convention and then narrowed it down to act as 'safe third countries' to prevent asylum-seekers and refugees reaching Germany and the West.[82]

With legal routes of entry into the European Union blocked off, the position of spontaneous asylum seekers was further criminalized as the role of smuggling networks grew.[83] The far and populist right fed off the public disquiet that this criminalization produced and thus the well-established and secretive meso-level networks of law-and-order officials found a new justification for their long-standing policies. The transfer of policy-making from the security-conscious Third Pillar of the European Union to the legal order of the European Court of

of Migration and Law, 5 (2003), pp. 359–77. Virginie Guiraudon traces the historical roots of 'remote control policy' in 'Before the EU Border: Remote Control of the "Huddled Masses"', in K. Groenendijk, E. Guild and P. Minderhoud (eds), *In Search of Europe's Borders*, The Hague, Kluwer Law International, 2002, pp. 191–214.

[80] For the most recent summary see, Boswell, 'The "External Dimension"', op. cit.

[81] J. Van Selm-Thorburn (ed.), *Kosovo's Refugees in the European Union*, London, Pinter, 2000.

[82] H. Grabbe, 'The Sharp Edges of Europe: Extending Schengen Eastwards', *International Affairs*, 76: 3 (2000), pp. 519–36; S. Lavenex, 'Migration and the EU's New Eastern Border: Between Realism and Liberalism', *Journal of European Public Policy*, 8: 1 (2001), pp. 24–42; S. Lavenex, 'EU Enlargement and the Challenge of Policy Transfer: the Case of Refugee Policy', *Journal of Ethnic and Migration Studies*, 28: 4 (2002), pp. 701–21.

[83] J. Morrison and B. Crosland, *The Trafficking and Smuggling of Refugees: The End Game in European Asylum?*, Geneva, UNHCR, 2000; Boswell, *European Migration Policies in Flux*, op. cit., pp. 61–2; K. Koser, 'Reconciling Control and Compassion? Human Smuggling and the Right of Asylum', in Newman and Van Selm, *Refugees and Forced Displacement*, op. cit., pp. 181–94.

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Justice located in the First Pillar of the Union did not easily counterbalance this influence. This nascent legal order will have to overcome a formidable barrier of personal contacts and unspoken assumptions or secretly discussed agreements long in place. In any case the Court of Justice has little say over asylum and refugee policy at this stage: the European Charter of Fundamental Rights did promise to form a firmer basis for a judicial framework to protect asylum seekers and refugees in the future, but it was never legally binding.[84] The European Court of Justice still has little control over the technocrats and police officials, but neither in fact do the politicians. A joint policy on refugees and asylum seekers will necessarily be slow in coming, since at Nice the European Council decided against the introduction of QMV, thus demonstrating 'the enduring reluctance of the Member States to transfer sovereignty'.[85] And it remains to be seen if QMV will be in effect by April 2005 and how much of the Hague Programme will be approved. Certainly at the end of October 2004 the British home secretary and other ministers of interior significantly diluted its content, so that this alternative route not reliant on the ratification of the Constitution may not in effect expedite matters. In the future there may be a clash between 'technocratic Europe' and a 'rights-based Europe': but at the present high- and meso-level policy networks of security officials and interior ministers are still dominant and indeed since 11 September far more so.

CONCLUSION

This article has examined the effects on national and European asylum and refugee policy of the triangular relationship between the far and radical populist right in member states, the member states' governments and the European Union. The guiding principles of European refugee and asylum policy have been set by the 1951 Geneva Convention and by the sanctity of *non-refoulement*. Recent

[84] G. S. Goodwin-Gill, 'The Individual Refugee, the 1951 Convention and the Treaty of Amsterdam', in Guild and Harlow, *Implementing Amsterdam*, op. cit., pp. 141–63; S. Peers, 'Immigration, Asylum and the European Union Charter of Fundamental Rights', *European Journal of Migration Law*, 3 (2001), pp. 141–69.

[85] S. Lavenex, 'The Europeanization of Refugee Policies: Normative Challenges and Institutional Legacies', *Journal of Common Market Studies*, 39: 5 (2001), p. 865.

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commentators fear that this may well be sacrificed in the struggle against global terrorism.[86] But even if it is not, other paradoxes arise. Thus the British government has derogated from the European Convention of Human Rights in order to instigate preventive detention of suspect terrorist refugees and asylum seekers *because it wanted to adhere to its commitment to the principle of non-refoulement.* Suspects were not deported but their detention forced the British to sacrifice another aspect of international human rights legislation. More generally arguments for greater restrictive conditions for the recognition of refugees in Europe through the harmonization of refugee policy at the EU level is accompanied by member states arguing that this will save the principle of *non-refoulement.*[87] The cumulative effect of these trends would in effect empty the 1951 Convention of any real content in any case. Thus one of the most recent proposals that has been secretly discussed by ministers and civil servants in the European Council was a new directive (one of a raft in the harmonization project started by the Treaty of Amsterdam) that would define European refugee/subsidiary protection. All new *successful* applicants for refugee or subsidiary protection status in the EU would have their situation regularly reviewed with the view of terminating their status as soon as possible. This would break a principle of the Geneva Convention, which awards this status permanently.[88] Furthermore, the European Council also wanted to strengthen the exclusion clauses of the Geneva Convention that deal with terrorists. Under Article 1(f) persons can be excluded from refugee status on grounds that they have committed a crime against peace. They are also barred if they are a war criminal or have committed a crime against humanity. They are also excluded if they have committed a serious non-political crime outside their country of refuge prior to admission, or if they have been guilty of acts contrary to the principles and purposes of the United Nations. The European Council would like to add to their directive articles that would exclude from refugee status the perpetrators of cruel crimes with an allegedly

[86] Van Selm, ‘Refugee Protection’, op. cit.

[87] Steiner, *Arguing About Asylum*, op. cit., p. 147. For a discussion of the dilemma of liberal democracy in an era of international terrorism, see M. Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror*, Edinburgh, Edinburgh University Press, 2004.

[88] *Guardian*, 11 December 2002. Incidentally, this proposal was originally advanced by the Danish People’s Party.

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political objective. This does not appear in the Geneva Convention, but since the Security Council ruled after 9/11 that terrorism is against the purposes and principles of the UN, it is now covered by Article 1(f) of the Convention. But the proposed EU directive would also extend exclusion to persons who 'instigate or otherwise participate' in activities subject to the exclusion clause. This does not exist in the Geneva Convention and would be open to a much broader interpretation, affecting those who were involved in liberation or opposition movements against an oppressive government and who were only suspected of alleged terrorist activity.

The principle of *non-refoulement*, it has recently been argued, can be defended if there is a will nationally and internationally to bring suspected terrorists to justice. The proliferation of exceptional regimes of detention is a dangerous threat to liberal democracy. In this respect two sets of detention regimes are emerging and at times merging in the minds of certain politicians and policy makers in the West. The UK Vision Paper is a parallel development to the policy of 'Camp Deltas'. 'The injustice of the global refugee regime', it has recently been noted, 'is addressed by locating the refugee beyond the domain of justice', so that this vision 'will introduce a permanent state of exception in asylum and migration policies'.[89] Instead the strengthening of regional law – such as a European legal space underpinned by a constitution – and internationally, through a strengthened mandate for the UN, would be steps in the right direction in order to bring to justice accused terrorists.[90] Some would argue that these are Utopian or at least rather distant prospects in early 2005. But if the 'War on Terrorism' promises to last for decades it is prudent that we begin to create a new global architecture so the

[89] Noll, 'Visions of the Exceptional', op. cit., p. 338.

[90] L. Barnett, 'Global Governance and the Evolution of the International Refugee Regime', *International Journal of Refugee Law*, 14: 2 (2002), pp. 257–62; R. Bruin and K. Wouters, 'Terrorism and the Non-Derogability of Non-Refoulement', *International Journal of Refugee Law*, 15: 1 (2003), p. 29; J. van der Klaauw, 'European Asylum Policy and the Global Protection Regime: Challenges for UNHCR', in S. Lavenex and E. M. Uçarer (eds), *Migration and Externalities of European Integration*, Lanham, MD, Lexington Books, 2002, pp. 33–53. And for a more critical account of the regionalization of international law, see G. Noll, 'Securitizing Sovereignty? States, Refugees and the Regionalisation of International', in Newman and Van Selm, *Refugees and Forced Replacement*, op. cit., pp. 277–305.

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rule of law is not destroyed during the course of this struggle.[91] I have argued at the beginning of this article that the EU was undergoing a paradigm shift on the eve of 9/11. It was publicly stating for the first time in 30 years that Europe needs labour migration and that Europeans should manage it in a sensible and fair manner. In parallel an ideological paradigm shift is needed in the EU, the USA and Australia, to name three of the most important players in the developed world, from the control of forced migration to its management.[92]

Earlier I argued that the Geneva Convention has been always at the mercy of economic and power political considerations. Thus one could conclude that arguments about its sanctity are irrelevant. Nevertheless without this bedrock the ad hoc imperatives of technocratic 'securocrats' and the whims of charity might replace the international regime of asylum and refugee law.[93] A world of less liberal certainties might reassure the public of Europe, weaken the arguments of the far right and lessen a problem that has sometimes threatened the future of incumbent politicians. However, this route would undermine one of the cardinal products of liberal democracy in Europe and would certainly go against the open society that is at the heart of European 'embedded liberalism'.[94]

[91] For an overview of the state of health of the Geneva Convention in the early twenty-first century, see UNHCR's global consultations on international protection, E. Feller, V. Türk and F. Nicholson (eds), *Refugee Protection in International Law. UNHCR's Global Consultations on International Protection*, Cambridge, Cambridge University Press, 2003.

[92] Van Selm, 'Refugee Protection', op. cit., pp. 88–90. Gibney argues that politicians should have the courage to back up their official support of *non-refoulement* with a conscious strategy of shaping public opinion in its favour (*The Ethics and Politics of Asylum*, op. cit., p. 245).

[93] Bruin and Wouters, 'Terrorism and the Non-Derogability of Non-Refoulement', op. cit.

[94] J. Hollifield, *Immigrants, Markets and States: The Political Economy of Post-War Europe*, Cambridge, MA, Harvard University Press, 1992. As Gibney puts it:

> The unspoken truth is that, as shocking as the recent terrorist attacks in New York, Pennsylvania and Virginia were, the number of people killed by them is dwarfed by the number of people whose lives are saved from death and torture annually as a result of the asylum policies of the US, Canada and other Western countries. Even if there are good moral reasons for prioritising the needs of one's compatriots, the value of these lives saved cannot be completely written off (*The Ethics and Politics of Asylum*, op. cit., pp. 257–8).

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