

FREEDOM, SECURITY AND JUSTICE
AFTER LISBON AND STOCKHOLM

edited by

Sarah WOLFF
Flora GOUDAPPEL
and
Jaap DE ZWAAN

T•M•C•ASSER PRESS

FOREWORD

When asked about my job as Vice-President of the European Commission, and the European Union's Justice Commissioner I like to say that it is the most beautiful job in the European Union.

Indeed, the implementation of the provisions of the Lisbon Treaty in the field of justice and fundamental rights is about the creation and the strengthening of a European area of Freedom, Security and Justice, today one of the main objectives of the European Union. And this area is where you can best see how the procedural innovations and institutional changes made by the new Treaty have marked the ground in building a Europe for the people.

For decades, the European Communities have had little competence in the field of Justice and Home Affairs. It was barely twenty years ago that with the Maastricht Treaty, these important areas became part of EU policy making. But the EU was not fully equipped to act in the interests of citizens. In particular, decisions had to be taken unanimously by EU governments, in most cases behind closed doors, and the European Parliament and the European Court had very little say in what was known then as the so-called 'Third Pillar'.

This situation has now evolved radically. The Lisbon Treaty got rid of pillars and introduced major changes in the field of Justice and Home affairs. The Lisbon Treaty provides the tools necessary for the development of a European area of Freedom, Security and Justice, opening up new opportunities to re-orient EU policies in these fields, in the interests of EU citizens. The co-decision procedure, with the European Parliament and qualified majority in Council of Ministers, is now the rule for new legislation. Judicial review is fully available both at the Court of Justice and in the national courts. Our EU Charter of Fundamental Rights is finally, after ten years of existence, legally binding, and on equal footing with the Treaties. The EU is now able to seek accession to the European Convention on Human Rights and we are already working on it. Finally, the European Council set, in the Stockholm Programme, an ambitious agenda of priorities and strategic objectives.

In my daily work at the European Commission, I am absolutely committed to make full use of the tools provided by the new legal and policy framework. This is why in its first year in office, the Barroso II Commission has issued a number of proposals addressing various aspects of individual rights – procedural rights of suspects and the accused, children's rights, victims' rights – with the aim of rein-

ISBN 978-90-6704-317-5

All rights reserved.

© 2011, T.M.C.ASSER PRESS, The Hague, The Netherlands and the Authors

No part of the material protected by this copyright notice may be reproduced or utilized in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without written permission from the copyright owner.

PRINTED IN THE NETHERLANDS

<i>Chapter 7</i>			
The impact of EU asylum policy on national asylum regimes	97		
<i>N. El-Ehany and E.R. Thielemann</i>			
<i>Chapter 8</i>			
Border management: Impacting on the construction of the EU as a polity?	117		
<i>S. Wolff and R. Zapata-Barrero</i>			
<i>Chapter 9</i>			
Policing and internal security in the post-Lisbon era: New challenges ahead	135		
<i>W. Brüggeman and M.G.W. den Boer</i>			
<i>Chapter 10</i>			
European criminal law	155		
<i>M. Dane and F.A.N.J. Goudappel</i>			
<i>Chapter 11</i>			
Counter-terrorism in the European Union: Legal issues in the post-Lisbon era	173		
<i>M.G.W. den Boer and F.A.N.J. Goudappel</i>			
<i>Chapter 12</i>			
The Lisbon Treaty the Stockholm Programme and data transfers in the new AFSJ: Where are the limits?	195		
<i>E. Gutild</i>			
<i>Chapter 13</i>			
Fundamental rights in the Area of Freedom, Security and Justice	213		
<i>H.S. Rautlus</i>			
<i>Chapter 14</i>			
The external dimension of JHA: A new dimension of EU diplomacy	241		
<i>S. Wolff and G.P.M. Mounier</i>			
Glossary	257		

LIST OF ABBREVIATIONS

AFSJ	Area of Freedom, Security and Justice
AIRPOL	Network to Enhance the Overall Security at EU Airports
ALDE	Alliance for Liberals and Democrats for Europe
AOP	Action Oriented Papers
ARO	National Asset Recovery Offices
CBRN	Chemical, Biological, Radioactive and Nuclear
CDSP	Common Security and Defense Policy
CEAS	Common European Asylum System
Cepol	European Police College
Givcom	Committee for Civilian Aspects of Crisis Management
COPEN	<i>Coopération Pénale</i>
CoPPRA	Community Policing Preventing Radicalism and Terrorism
COREPER	Committee of Permanent Representatives
COSAC	Conference of Community and European Affairs Committee's of Parliaments of the European Union
COSI	Committee on Internal Security (<i>Coopération Operationnelle en Matière de Sécurité Intérieure</i>)
COSPOL	Comprehensive Operational Strategic Planning for the Police
CPCC	Centre for Police and Customs Cooperation
CRATE	Centralized Record of Available Technical Equipment
EASO	European Asylum Support Office
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECIM	European Crime Intelligence Model
ECJ	Court of Justice of the European Union
ECtHR	European Court of Human Rights
EEAS	European External Action Service
EBC	European Economic Community
EES	Entry Exit System
EIO	European Investigation Order
ELU	European Liaison Unit
ENFAST	European Network Fugitive Active Search Teams
ENP	European Neighborhood Policy
EPICC	European Police Information and Coordination Centre
EPP	European People's party
EPPD	European Public Prosecutor's Office
EPPS	European Public Prosecution Service
EU IMS	European Union Information Management Strategy
EURODAC	European Dactyloscopy
Europol	European Law Enforcement Agency
EUROSUR	European Border Surveillance System
FIU	Financial Intelligence Unit
FRA	Fundamental Rights Agency

forcing citizens' confidence in other Member States' judicial systems and mutual trust between judicial systems themselves, which are both preconditions for a fully operational Area of Freedom, Security and Justice.

The current situation and the future perspectives of the European Area of Freedom, Security and Justice are exactly what this very welcomed book is about. It provides a comprehensive overview of all the different policies included in the area, from migration, asylum and borders control, to police and judicial cooperation, from substantive and procedural criminal law, counterterrorism measures and access to justice, to foreign policy and data protection.

Benefiting from the expertise of contributors with different backgrounds, both academics and practitioners, the book assesses what are the current achievements and the future challenges in this field, showing which of the steps already taken by the EU have produced positive effects on citizens, migrants and practitioners, and what, on the contrary, still needs to be done.

We should be really thankful to the Authors for providing EU officials, judges, lawyers, police officers, academics, and students with such a useful tool to assist them in playing their role to the full in what is a fascinating and multifaceted EU policy area so central to the wishes and expectations of citizens.

Viviane REDING

*Vice President of the Commission of the European Union
and Commissioner of Justice, Fundamental Rights and
Citizenship*

TABLE OF CONTENTS

Foreword <i>Viviane Reding</i>	I
List of Abbreviations	
<i>Chapter 1</i> Editorial – The Area of Freedom, Security and Justice after the Lisbon Treaty and the Stockholm Programme: From myth to reality <i>S. Wolff, F.A.N.J. Goudappel and J.W. de Zwaan</i>	
<i>Chapter 2</i> The new governance of justice and home affairs: Towards further supranationalism <i>J.W. de Zwaan</i>	
<i>Chapter 3</i> European citizenship and free movement rights <i>F.A.N.J. Goudappel and J.W. de Zwaan</i>	2
<i>Chapter 4</i> Justice and home affairs 'at home': Shaping the AFSJ at the national level <i>M. van Keulen and F. Mittendorff</i>	4
<i>Chapter 5</i> A European migration policy fit for future challenges <i>S. Wolff and F. Traumer</i>	6
<i>Chapter 6</i> The EU asylum policy: Towards a common area of protection and solidarity? <i>C. Kaunert and S. Léonard</i>	7

Chapter 7

THE IMPACT OF EU ASYLUM POLICY ON NATIONAL
ASYLUM REGIMES

Nadine El-Enany* and Eiko Thielemann**

1. INTRODUCTION

EU law is having an increasing impact on asylum policy in Europe. Member States have gradually transferred policy-making competences in this area¹ in order to better control asylum flows and to share more equitably responsibilities arising from such migratory movements. For many years, policy-makers considered inter-governmental cooperation between the Member States as a means of more effectively dealing with perceived abuses of the asylum system and EU law was seen as an avenue through which new policy measures could be introduced into national legislation, sometimes effectively bypassing domestic opposition. More recently, as highlighted by Lisbon Treaty and the Stockholm Programme, European asylum policy-making has become less intergovernmental and increasingly influenced by the EU institutions. This trend has contributed to a changing focus in EU legal developments as EU policy has shifted from an exclusive concern about controlling asylum flows towards the setting of European wide minimum standards for the treatment of asylum seekers of refugees. In doing so, EU asylum cooperation has created adaptation pressures in several Member States, which were required to 'upgrade' domestic legislation in order to comply with the higher standards of EU asylum provisions. While many aspects of EU asylum law continue to reflect restrictive trends in the rest of the world and considerable variation in the implementation of EU law remains, there is no evidence to support the claim that European cooperation has 'hollowed out' Europe's refugee protection efforts. On the contrary, it can be shown that EU asylum legislation has had a significant rights-enhancing impact in both old and new Member States, a trend that one can expect to gain further strength in the post-Lisbon era.

* Dr. N. El-Enany is lecturer at the Brunel Law School, Brunel University London.

** Dr. E.R. Thielemann is senior lecturer in European Politics and Policy of the Department of Government & European Institute, London School of Economics.

¹ See Chapter 6 in this volume.

2. ASYLUM TRENDS IN EUROPE

In the 1990s and the first few years of this century, there was a much talk about an asylum crisis in Europe as the number of asylum applications reached record highs. Many saw this as a new trend that was likely to persist due to events such as the fall of the Iron Curtain, lower costs of transportation and an expanding global market in human smuggling. While these factors have no doubt had some impact on migration flows, a look at asylum statistics over the last two decades (Figure 1) shows that high asylum numbers in Europe have mostly been driven by particular crises, that is refugee producing conflicts such as the Bosnian war in the early 1990s or the wars in Kosovo, Afghanistan and Iraq at the turn of the century.

When looking at the evolution of total asylum applications in EU Member States and other industrialised countries over this period, one observes that the total number of asylum requests has been in decline since the early 1990s. Applications peaked during the Bosnian wars and even during the refugee producing conflicts in Kosovo, Afghanistan and Iraq in the late 1990s and in early 2000, applications remained below those of the early 1990s. To what extent this overall decline in asylum applications is the result of increasingly restrictive policy measures or simply a reflection of fewer persons seeking refugee protection is difficult to ascertain given that there is no comparable data on the evolution of refugee producing conflicts. What is clear, however, is that applications in the EU have fallen from a much higher peak compared to other industrialised countries (the

most significant recipients being the US, Canada and Australia). This can at least in part be explained by the fact that the two principal refugee producing conflicts of the 1990s (in Bosnia and Kosovo) took place in Europe and that more recently the principal countries of origin for asylum seekers have been non-European countries such as Iraq, Afghanistan and Somalia.

There is a widely held view in some of the larger EU Member States that their countries have been most affected by asylum flows. This belief, however, is not borne out in the official statistics, which show that while larger states are attracting the largest absolute numbers of asylum applications (Figure 2) on a per capita basis, asylum responsibilities in a number of smaller countries are much higher than the responsibilities faced by the larger OECD states (see Figure 3). In recent years, Malta and Cyprus, some of the smallest EU Members States, have regularly topped the table of relative asylum applications.

When analyzing recognition rates in OECD countries, one observes a much more pronounced downward trend in the EU than in the rest of the world. In non-EU states recognition rates have remained relatively stable, fluctuating at around 35 percent with recognition rates being traditionally higher in North America than in the Pacific. This means that on average 35 percent of all applicants in non-EU countries have received either refugee status or some other subsidiary protection status that has allowed them to remain legally on their territory. Recognition rates in the EU have dropped from 60 to 25 percent over the period 1985 to 2005 (Figure 4).

Figure 1. Total Number of Asylum Applications in OECD countries, 1985-2007

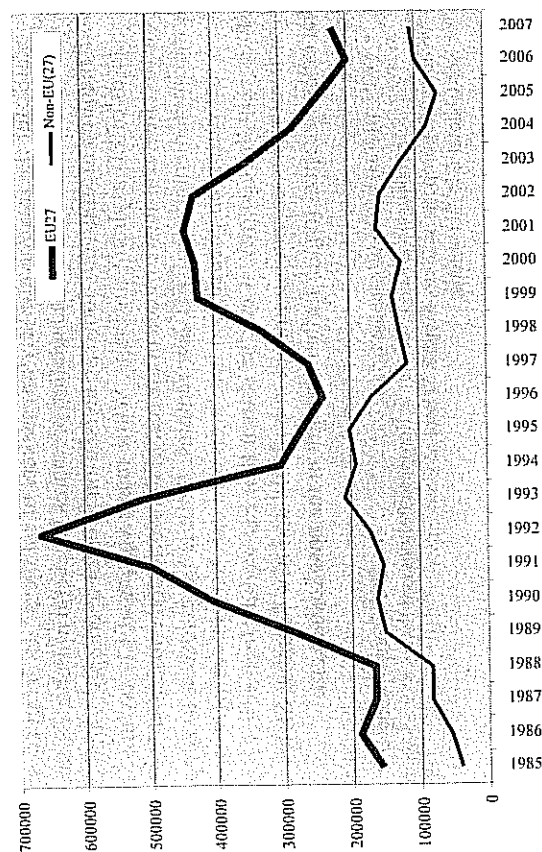
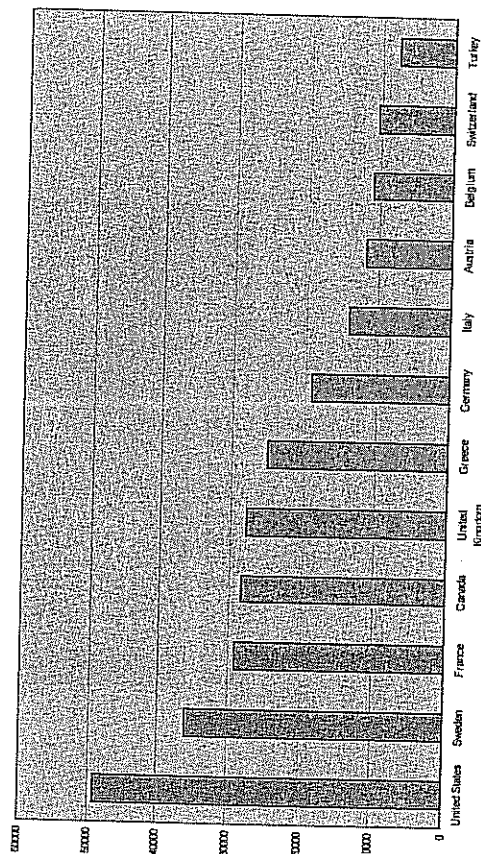
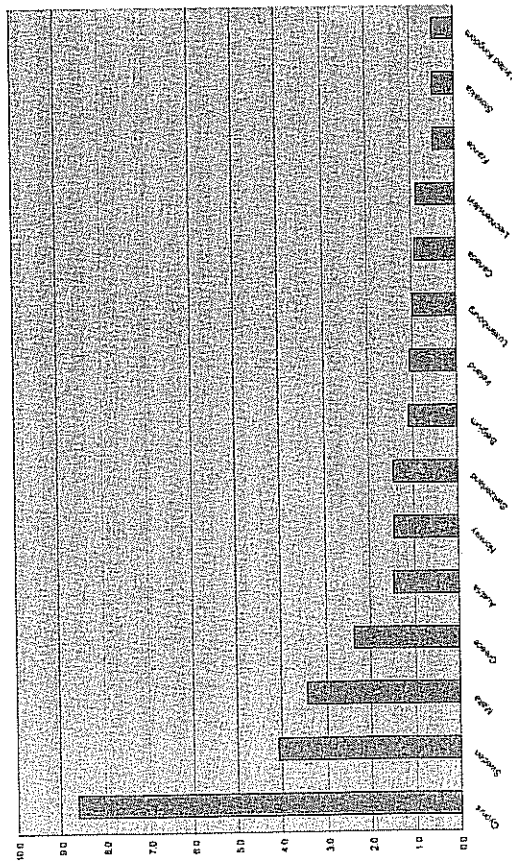


Figure 2. Absolute Number of Asylum Applications in 2007 (top 12 OECD countries)



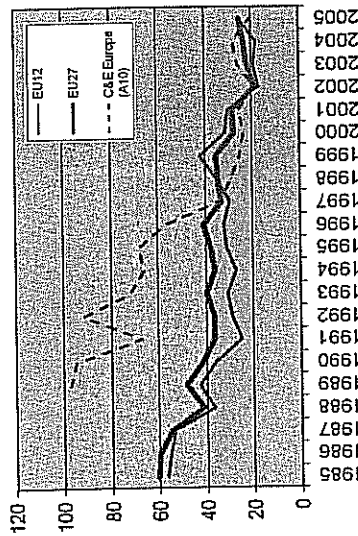
Source: UNHCR Statistical Yearbooks (own calculations)

Figure 3. Relative Asylum Applications (per 1000 of population) in 2007 (top 12 OECD countries)



Source: UNHCR Statistical Yearbooks (own calculations)

Figure 4. Refugee Recognition Rates in Europe, 1985-2005



Source: UNHCR Statistical Yearbooks

The figures in Figure 4 suggest that declining recognition rates inside the EU (27) are to a large extent due to rapidly declining figures in the countries of Central and Eastern Europe. During the early 1990s when the Eastern European states were only beginning to establish their own domestic institutions to deal with asylum-seekers and refugees, unusually high recognition rates probably were a reflection of the very small number of applications at the time. Since then, the number of

asylum seekers in Central and Eastern Europe has increased significantly and recognition rates have fallen to levels comparable to those of West European states.

Overall asylum trends in Europe over the past 25 years have similar features to those in the rest of the developed world. They have been characterized by significant fluctuations in asylum applications, a highly inequitable distribution of asylum responsibilities and restrictive national policy responses. What has been unique in Europe over this period is that these trends have sparked numerous multilateral policy responses at the European level as Member States have increasingly moved towards closer cooperation and more substantive legal harmonization in this field.

3. NATIONAL AND EU POLICY RESPONSES

The economic crisis of the 1970s had made it difficult for European states to be able to absorb the number of migrants they had been encouraging in previous decades. The closing of legal immigration routes contributed to a rise in the number of asylum applications, which became the only route of entry to Western European countries. As a result, pressure on national asylum regimes was building with the outcome of "an almost total paralysis of European asylum systems by the beginning of the 90s".² These difficulties led to the growing awareness amongst some European states for the need for an international approach to the problem of asylum. As Boccardi writes: "in the face of ever increasing cross-border refugee mobility it gradually became apparent that purely national asylum strategies would inevitably be doomed to failure".³

Intergovernmental cooperation on asylum in the form of ad hoc groups began with the Trevi group, established in 1976 by the then twelve EC Member States. Its task was to counter terrorism as well as to coordinate policing and other border-control related tasks within the EC.

In 1990, the Ad Hoc Group on Immigration, comprising Interior and Justice Ministers produced a draft of the Dublin Convention, which was signed by all Member States in 1990.⁴ The UK was one of the first Member States to ratify the Convention. Its content was 'lifted wholesale' from Chapter 7 of the Schengen Agreement entitled 'Responsibility for processing applications for asylum', which was signed at the same time as Dublin.⁵ The Convention was designed to ensure that asylum applicants only made one such claim in Europe, while also preventing

² I. Boccardi, *Europe and Refugees: Towards an EU Asylum Policy* (The Hague: Kluwer Law International, 2002), pp. 27-28.

³ *Ibid.*, p. 28.

⁴ *OJ C254/1*.

⁵ F. Webber, 'European conventions on immigration and asylum', in T. Bunyan (ed.), *Statewatching the new Europe: a handbook on the European State* (Statewatch, 1993), p. 142.

tus applicable throughout the European Union. These objectives were defined first in the Tampere Programme in 1999 and then confirmed and elaborated in the Hague Programme of 2004. Three main legislative instruments have been adopted under the Hague Programme. These comprise Directive 2003/9 laying down minimum standards for the *reception* of asylum seekers,⁷ Directive 2004/83 on minimum standards for the *qualification* of persons as refugees or those in need of subsidiary protection⁸ and Directive 2005/85 on minimum standards on *procedures* in Member States for granting and withdrawing refugee status.⁹

4. THE IMPACT OF THE EU ON NATIONAL POLICIES

There is a widely held view that these developments in European cooperation and early moves towards a common EU asylum policy in particular have had a restrictive impact on asylum policy in Europe, making it increasingly difficult for asylum seekers to reach European territory and benefit from effective protection. This has become known as the 'Fortress Europe' thesis.¹⁰ This thesis argues on a theoretical level that Member State cooperation on asylum and refugee matters has fostered restrictiveness through processes of 'venue shopping',¹¹ 'securitisation',¹² and the legitimisation of 'lowest common denominator standards'.¹³ Cooperation, however, does not have to lead to restrictive outcomes.¹⁴ It can also have a 'rights-enhancing' impact on domestic asylum legislation as it curtails regulatory competition and in doing so halts the race to the bottom in protection stand-

⁷ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, *OJ L* 31, 6 February 2003, p. 18.

⁸ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted *OJ L* 304, 30 September 2004, p. 12.

⁹ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, *OJ L* 326, 13 December 2005, p. 13.

¹⁰ Geddes, A. *Immigration and European Integration: Towards Fortress Europe?* (Manchester and New York: Manchester University Press, 2000); A. Luedtke, 'Fortifying Fortress Europe? The Effects of September 11 on EU Immigration Policy' in G. Freeman, and T. Grivens (eds.), *Immigration after 9/11* (New York: Falgrave, 2009), pp. 127-146.

¹¹ V. Guiraudon, 'European Integration and Migration Policy: Vertical Policy-making as Venue Shopping', *38/2 Journal of Common Market Studies* (2000), pp. 251-271.

¹² J. Huysmans, 'The European Union and the Securitization of Migration', *38/5 Journal of Common Market Studies* (2000), pp. 751-757.

¹³ S. Lavenex, 'Migration and the EU's new eastern border: between realism and liberalism', *8/1 Journal of European Public Policy*, pp. 24-42.

¹⁴ E.R. Thielemann and N. El-Enany, 'Beyond "Fortress Europe": How European Cooperation Can Strengthen Refugee Protection', Paper presented at the Fifth General Conference of the European Consortium for Political Research (ECPR), Potsdam, 10-12 September 2009.

asylum seekers from being able to choose the country in which they made their claim by requiring that the individual's claim be heard in the first European Member State through which she passes, i.e., the 'safe third country' notion. A 'safe third country' is one through which an individual has passed and *could have* found protection, but has not done so, either because she did not lodge a claim, or her claim was rejected. Where the individual subsequently travels to another State, she is liable to be returned, subject to the existence of a readmission agreement. The 'safe third country' concept was born out of a conviction that the unequal spread of asylum seekers across the EU was due to 'forum shopping' by applicants, who were perceived as making their way to States in which they believed their claims were likely to be treated sympathetically. The Dublin Convention thus established the rules for the determination of the Member State responsible for hearing the claims of asylum seekers, and is founded on the notion that this responsibility lies with the first Member State with which the asylum applicant establishes contact, whether by the issue of a transit visa, the legal presence of a close family Member, or in the absence of these, the first physical contact with the territory.⁶ State Parties are required to readmit individuals transferred on the basis of the Dublin regime, whilst respecting the principle of mutual recognition with regard to the application of its rules.

Unsurprisingly, despite the adoption of the Dublin Convention, the relative distribution of asylum seekers across Europe has remained volatile over the years. Increasingly, differences in the relative restrictiveness of countries' national asylum regimes came to be regarded as one of the main reasons for disparities in asylum burdens. According to this view, host countries with a high relative number of applications will try to make their asylum policies more restrictive and other host countries will, as a result, become more attractive destination countries. This has sparked a heated debate about whether countries in which asylum applications have increased in recent years represent a 'soft touch' for asylum seekers and economic migrants using the asylum route of entry. It has also raised concerns that European countries, afraid of being seen as a 'soft', have become engaged in the competitive downgrading of refugee protection standards. In order to achieve a more stable and equitable distribution of asylum burdens and prevent a 'race to the bottom' in protection standards, policy makers in Europe have turned to policy harmonisation at the European level. Policy convergence in the field of asylum is seen as the key towards more equitable burden-sharing and as an end to regulatory competition.

Moves towards the Common European Asylum System (CEAS) therefore have aimed at establishing a common asylum procedure and a uniform protection sta-

⁶ Dublin Convention 4 June 1985, *OJ L* 176; see S. Lavenex, "'Passing the Back': European Union Refugee Policies towards Central and Eastern Europe", *11/2 JIL* (1998), p. 130.

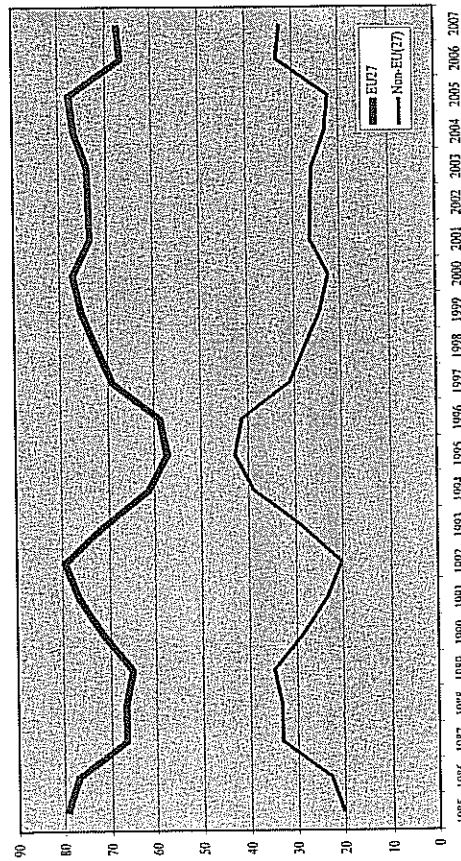
ards in the EU. Rather than leading to policy harmonisation at the 'lowest common denominator', EU asylum laws can lead to an upgrading of domestic asylum laws, strengthening protection standards for groups of forced migrants. Ultimately, the question of the impact of European cooperation on asylum and refugee policy is an empirical one.

A look at comparative quantitative data suggests that there is little evidence demonstrating that EU cooperation on asylum has led to a decline in Europe's refugee protection efforts relative to that of other comparable OECD countries. While the numbers of asylum applications have declined across OECD countries compared to the early and late 1990s, a look at the evolution of application shares across industrialised countries (Figure 5) shows that the EU's share of asylum applications in the industrialised world has fluctuated, but today is similar to its share in the late 1980s.

A closer look at intra-EU trends (Figure 6) reveals two opposing trends among the current EU Member States. While the share of the old EU Member States has declined, it has been the increasing share of the Central and Eastern European Member States that has kept the overall EU share stable. The extent to which that trend is clear evidence of burden-shifting dynamics from West to East in the EU is however not clear, given that asylum applications in Eastern European countries are well below average both in terms of absolute numbers and relative to population size.

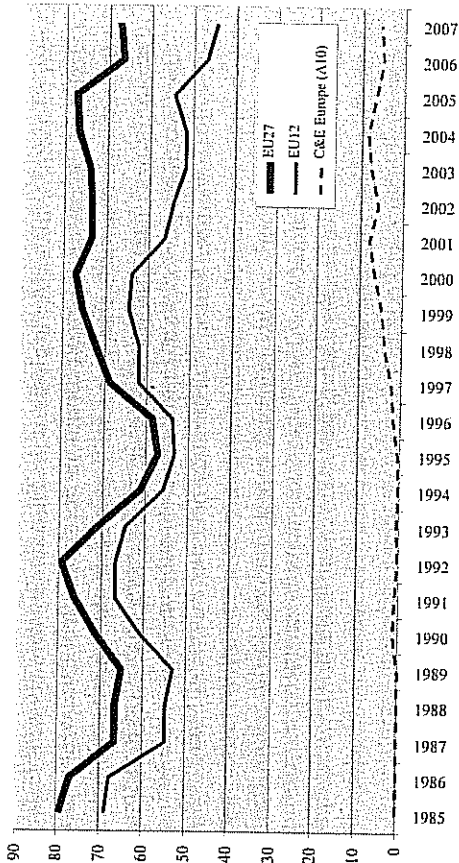
That the EU's share of overall protection responsibilities has not declined seems to indicate that European cooperation has not led to uniquely restrictive asylum

Figure 5. Relative Shares of Asylum Applications in OECD Countries, 1985-2007



Source: UNHCR Statistical Yearbooks

Figure 6. Relative Shares of Asylum Applications in Europe, 1985-2007



Source: UNHCR Statistical Yearbooks

policies in the EU when compared to other OECD countries. Indeed, the qualitative analysis of four of the EU's principal legal instruments in this field will demonstrate how European cooperation has strengthened refugee rights in several Member States.

4.1 The Reception Directive

Traditionally, "states have strong reservations about granting important rights to asylum seekers because no final decision has been taken yet on the substantive issue of their application".¹⁵ Nevertheless, the Tampere Conclusions of 1999 provided that the Common European Asylum System should include the establishment of common minimum standards of reception conditions for asylum seekers.¹⁶ Although this Directive has been strongly criticized for not providing adequate standards for asylum seekers,¹⁷ there is little evidence to suggest that the Directive has led to further restrictions of existing national standards.¹⁸ On the con-

¹⁵ H. Lambert, *Seeking Asylum: Comparative Law and Practice in Selected European Countries* (Dordrecht: Martinus Nijhoff, 1995), p. 103.

¹⁶ Tampere Presidency Conclusions, October 1999.

¹⁷ UNHCR, 'UNHCR annotated comments on Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers', July 2003.

¹⁸ And Art. 4 of the Directive explicitly allows Member States "to introduce or retain more favourable domestic provisions".

welcomed. Transposition also significantly advanced standards in some Member States where non-state actors of persecution were recognised for the first time, or subsidiary protection was introduced as a concept.²⁴ The Directive's provisions on subsidiary protection have been welcomed²⁵ in representing the first supra-national legislation in Europe defining qualification for subsidiary protection, and creating an obligation to grant this status to those who qualify. Many EU Member States had pre-existing national provisions to afford individuals some form of complementary protection status. The Directive has also been praised for recognising the fact that persons fleeing the indiscriminate effects of violence associated with armed conflict, but who do not fulfil the criteria of the 1951 Convention, nevertheless require international protection.²⁶ As regards non-state persecution, according to the UNHCR, "the Qualification Directive has resulted in much greater conformity of legal interpretation on non-State actors of persecution or serious harm [...]. The shift to a focus on the availability of protection, rather than the actor of persecution or serious harm, should be commended. In France and Germany, the Directive has enlarged the scope of grounds for granting protection and thereby reinforced the protection system."²⁷ In Germany, the introduction of the concept of non-State actors of persecution is widely seen as having enlarged the scope of protection. This is reflected in the sharp rise in decisions by the authorities granting refugee status to Somalis since this provision has entered into force under German law.²⁸

4.2 The Procedures Directive

The Procedures Directive was formally adopted on 1 December 2005. The key elements that fall under the topic of asylum procedures include the question of access to procedures, procedural guarantees such as the opportunity to communicate with the relevant authorities, access to an appeal process as well as the procedure for the withdrawal of refugee status. The Directive faced calls for withdrawal,²⁹ strong criticism from the UN High Commissioner for Refugees,³⁰ as well as from

²⁴ ELENA, *The Impact of the EU Qualification Directive on International Protection*, Report by the European Legal Network on Asylum (2008), p. 5.
²⁵ UNHCR, *supra* n. 23.

²⁶ *Ibid.*, p. 81.

²⁷ *Ibid.*, p. 9.

²⁸ *Ibid.*, p. 46.

²⁹ ECRE et al. (2004), ILGA Europe, Amnesty International, Pac Christi International, Quaker Council for European Affairs, Human Rights Watch, CARITAS-Europe, Médecins Sans Frontières, Churches' Commission for Migrants, Save the Children in Europe, Call for withdrawal of the Asylum Procedures Directive, 22 March 2004.

³⁰ UNHCR, Press Release, Lubbers calls for EU asylum laws not to contravene international law, 29 March 2004.

rary, it is shown below that key elements of the Reception Directive have triggered a process that can be expected to lead to an upgrading of domestic standards in several Member States. An analysis of the Directive by the Odysseus Network suggests that EU law on reception conditions does not reflect the lowest common denominator of standards that previously existed in the Member States. The Odysseus Network has noted that the Reception Directive has "led to the adoption of more favourable provisions at national level than the ones applicable before its adoption in 10 Member States".¹⁹ The study held that in several Member States the Directive has enhanced protection standards in areas such as provisions for unaccompanied minors, access to health care and access to the labour market. Regarding labour market access, asylum seekers have been given the opportunity to work (after a twelve months waiting period) in countries such as Estonia, France, Latvia, Poland and Slovakia which had previously barred asylum seekers from entering their labour market until a decision on their application for refugee status had been taken.²⁰ The Odysseus study concluded that the Directive generally did not have the effect of lowering previously higher national standards as would have been possible in the absence of a standstill clause. Possible exceptions noted were Austria and in the United Kingdom where the report states that "elements of a (potentially) restrictive nature have been introduced". These consist of limitations on access to employment in Austria and harsher penalties in the UK.²¹ Overall the Odysseus Network report held that "the positive effects of its transposition overshadow its negative effects".²²

4.2 The Qualifications Directive

The Qualifications Directive sets out the rules and principles to be applied by Member States in their identification of refugees and those deserving of subsidiary protection status, and entered into force on 20 October 2004. Critiques of the Directive have highlighted a number of elements of the Directive which have been seen as having the potential to undermine existing protection standards.²³ Despite these criticisms, the assessment of the impact of the Qualifications Directive has in part been very positive. The introduction of more detailed rules of evidentiary assessment and a clearer definition of persecution have been widely

¹⁹ Odysseus Academic Network, 'Comparative overview of the implementation of the Directive 2003/9 of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the EU Member States', 2006, p. 11.

²⁰ *Ibid.*, p. 113.

²¹ *Ibid.*, p. 114.

²² *Ibid.*

²³ UNHCR, *Asylum in the European Union: A Study of the Implementation of the Qualification Directive*, Brussels, UNHCR, November 2007.

within the EU institutions.³¹ However, the Directive can be seen to have improved standards of protection for individuals accessing EU territory. The 'safe third country' provisions in the Directive can be seen as having undergone rights-enhancement during the negotiations on the Directive. As Doede Ackers reports: "There were drafting sessions which resulted in considerably improving the text on rules with respect to the individual consideration in safe third country cases."³² The Commission has stated that the first instance procedures are fully in accordance with the essential rights provided for in Section 192 of the UNHCR Handbook on procedures and criteria for determining refugee status.³³ What is more, on appeal, the provisions it includes on judicial scrutiny go beyond the Handbook in requiring Member States to ensure an effective remedy before a court or tribunal as opposed to merely "a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system."³⁴ Further, in a report published by the Refugee Council in 2007 on the UK's implementation of the Procedures Directive, the Refugee Council makes clear that the standards of the Directive would require an improvement of standards in the UK. Article 8(1) for example, states that "Member States shall ensure that applications for asylum are neither rejected nor excluded from examination on the sole ground that they have not been made as soon as possible."³⁵

4.4 The Return Directive

The Directive on common standards and procedures in Member States for returning illegally staying third country nationals (including failed asylum seekers) was approved by the European Parliament on 18 June 2008, formally adopted by the Council on 9 December 2008, and published in the Official Journal on 24 December 2008. The Directive applies to all EU Member States except the United Kingdom, Ireland and Denmark.³⁶ It also covers Iceland, Norway, Switzerland and

Liechtenstein. The Return Directive³⁷ is the most ambitious asylum instrument that the EU has adopted concerning return until now. The Directive provides for a set of rules to be applied throughout the return and removal process, for example concerning the form of the relevant decisions, the use of coercive measures, detention and safeguards pending return. Although national legislation generally provides that the confinement of returnees should take place in special facilities, different to those in which ordinary prisoners are detained, this is not always the case in practice in all EU countries – in Ireland, for example, returnees are regularly held in prisons.³⁸ Significant differences also prevail between the Member States in relation to whether the detention of vulnerable groups, such as minors is permitted. The Directive subjects detention to the principle of proportionality, providing that deprivation of liberty is justified "only to prepare return or carry out the removal process and when the application of less coercive measures would not be sufficient" (Recital 16). Detention orders that are not issued by judicial authorities have to provide for the possibility of judicial review, although no deadlines are specified (Article 15(2)). Custody should be sustained for as short a period as possible, and only as long as removal arrangements are in progress and executed 'with due diligence' (Article 15(1)). In summary, not only are there powerful constraints on the downgrading of existing standards in the Member States, but we can also expect several protection-enhancing dynamics to result from the adoption of the Directive. In states where currently detention and entry bans can last indefinitely, Member States will have to change their national legislations in order to establish upper time limits.

The analysis of these four key Directives suggests that European cooperation and the development of the common asylum law on the basis of EU minimum standards in this area has curtailed regulatory competition and in doing so it has largely halted the race to the bottom in protection standards in the EU. In more recent years, rather than leading to policy harmonisation at the 'lowest common denominator', EU asylum law has led to some significantly strengthened protection standards in the domestic asylum laws of several Member States.

5. THE IMPACT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION ON POLICY IMPLEMENTATION

Higher EU asylum standards matter only to the extent to which they are properly implemented by the Member States. It is well established that EU asylum policies

³¹ See for example, European Parliament legislative resolution on the amended proposal for a Council directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (14203/2004 – C6-0200/2004 – 2000/0238(CNS)).

³² D. Ackers, 'The Negotiations on the Asylum Procedures Directive', *EJML* (2005), p. 30.

³³ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/TP/4/Eng/REV.1 Recited, Geneva, January 1992, UNHCR 1979. See *Ibid.*, 32.

³⁴ *Ibid.*

³⁵ Refugee Council, 'Refugee Council response to UK Implementation of Council Directive 2005/85/EC of 1 December 2005 laying down minimum standards on procedures in Member States for granting and withdrawing refugee status', Refugee Council, October 2007, p. 7.

³⁶ In accordance with Art. 5 of the Protocol on the position of Denmark annexed to the Treaty of the European Union, this Member State will decide within a period of six months from the adoption of the Directive whether to implement it in its national law.

³⁷ Directive 2008/115/EC of the European Parliament and of the European Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country Nationals, *OJ L348/98*.

³⁸ K. Hailbronner, *Refugee Status in EU Member States and Return Policies: Study*, Brussels: European Parliament, 2005, p. 144.

have suffered from significant implementation deficits.³⁹ However, we know from other (more established) areas of EU law that the EU legal system and in particular the Court of Justice of the European Union (ECJ), can play a crucial role in narrowing implementation gaps. The EU's judicial system allows national courts to request a preliminary ruling from the ECJ under Article 267 TFEU. The Lisbon Treaty extended the jurisdiction of the ECJ, bringing the whole of the Area of Freedom, Security and Justice (AFSJ) within its general jurisdiction. No longer is the preliminary reference procedure limited to national courts or tribunals against whose decisions there is no judicial remedy, but is available to all national courts.⁴⁰ It has been noted that a truly common European asylum system necessitates court rulings on the interpretation of EU asylum legal provisions. Only in this way can uniform standards be achieved across the Union.⁴¹ Arguably, the ECJ's activity in this area has already led to increased legal protection for the rights of individuals in the field of asylum. This has primarily taken place through the Court's interpretation of substantive provisions of EU law.⁴² In this respect we have seen some positive signs from the ECJ that it is willing to interpret provisions of European asylum law in a manner that better protects the rights of asylum seekers at the stage of implementation of EU law. In the *Elgafaji* case,⁴³ Mr Elgafaji and his wife, who were Iraqi nationals, brought a case against the Netherlands after being refused temporary permits allowing them to stay in the Netherlands on the grounds that they had failed to demonstrate that they faced a real risk of serious and individual harm in Iraq. Under the Qualifications Directive, an individual may not be returned to a country in which she faces risk of suffering 'serious harm', which pursuant to Article 15(c) of the Directive includes a 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'. The ECJ interpreted the reference in the provision to an 'individual threat' broadly, stating that it "must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place ... reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive".⁴⁴

³⁹ See Odysseus Academic Network, *supra* n. 18; UNHCR, *supra* n. 22.

⁴⁰ See House of Lords European Union Committee, *The Treaty of Lisbon: An Impact Assessment*: Vol. I Report, 10th Report, Session 2007-2008, pp. 125-126.

⁴¹ *Ibid.*

⁴² See A.M. Collins, 'Recent developments in asylum and immigration law before the Court of Justice', 9 *ERA Forum* (2009), pp. 581-590.

⁴³ Case C-465/07, *Elgafaji and another v. Staatssecretaris van Justitie*, ECR (2009) I-06921, European Court of Justice, 17 February 2009.

⁴⁴ *Ibid.*, para. 35.

In another case, *Petrosian*,⁴⁵ the ECJ was asked to rule upon the question of the time-period for Dublin transfers in relation to sending Member States with appeal systems that provide for suspensive effect. The question was essentially whether the allotted six month period for transfer of an asylum seeker to the responsible Member State was to be interpreted as beginning to run from the time of the provisional judicial decision suspending the implementation of the transfer procedure or from the final ruling on the merits of the procedure thereby allowing the transfer to take place. The ECJ held that the latter interpretation was the correct one. This was primarily on the basis that the EU legislators "did not intend that the judicial protection guaranteed by the Member States whose courts may suspend the implementation of a transfer decision, thus enabling asylum seekers duly to challenge decision taken in respect of them, should be sacrificed to the requirement of expediting in processing asylum applications".⁴⁶ Essentially, the ECJ was safeguarding the judicial protection that some Member States guarantee in their judicial appeals system and ensuring these Member States are not forced by an interpretation of EU law that would require them to sacrifice the judicial protection of individual appeal rights in favour of accelerated procedures in order to comply with the Dublin transfer system. The ECJ also based its decision on the principle of national procedural autonomy, warning that if the period for the implementation of the transfer were to begin to run from the time of the provisional decision having suspensive effect, "a national court wishing to reconcile compliance with the time-limit and compliance with a provisional judicial decision having suspensive effect would be placed in the position of having to rule on the merits of the transfer procedure before the expiry of that time-limit by a decision, which may, owing to lack of sufficient time granted to the courts, have been unable to take satisfactory account of the complex nature of the proceedings".⁴⁷

In the case of *Bolbol*, which concerned the question of exclusion from refugee protection, the ECJ was asked to rule on the interpretation of Article 12(1)(a) of Directive 2004/83 (the Qualification Directive) which excluded individuals from refugee protection who fall under Article 1 D of the 1951 Refugee Convention. Article 1 D states that an individual is excluded from refugee protection where she is "at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance". The Budapest Municipal Court asked the Court of Justice whether the individual concerned must actually have availed herself of that protection or assistance in order to be considered as 'receiving the protection and assistance' of a UN Agency other than the UNHCR. In this case, Ms Bolbol claimed not to have availed her-

⁴⁵ Case C-19/08 *Migrationsverket v Petrosian and others*, ECR (2009) I-00495, European Court of Justice, 29 January 2009.

⁴⁶ *Ibid.*, para. 48.

⁴⁷ *Ibid.*, para. 52.

self of the protection and assistance of the United Nations Relief and Works Agency for Palestine Refugees (UNRWA) to which she claimed to be entitled and therefore could not be excluded from refugee status in Hungary. The ECJ held that "it follows from the clear wording of Article 1 D of the Geneva Convention that only those persons who have actually availed themselves of the assistance provided by UNRWA come within the clause excluding refugee status set out therein, which must, as such, be construed narrowly and cannot therefore cover persons who are or have been eligible to receive protection or assistance from that agency." The individual must actually have availed herself of that protection for the purposes of exclusion from refugee status under Article 12(1)(a) of the Qualifications Directive.

Finally, the case of *B and D*⁴⁸ concerned the interpretation of Articles 12(2)(b) and (c) of the Qualifications Directive, which provided for the exclusion of an individual from refugee status "where there are serious reasons for considering that (b) he or she has committed a serious non-political crime outside the country of refuge" or "(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations". The question referred by the German court was whether a case involving an individual who has been a member of an organization which, because of its involvement in terrorist acts, is on the list of persons, groups and entities annexed to Common Position 2001/931 and that individual has actively supported the armed struggle of that organization is to be considered a case of 'serious non-political crime' or 'acts contrary to the purposes and principles of the United Nations within the meaning of Article 12(2)(b) or (c) of the Qualifications Directive'. The ECJ held that in such a case, the activities of such an individual do not 'automatically constitute a serious reason for considering that person has committed "a serious non-political crime" or "acts contrary to the purposes and principles of the United Nations"'.⁴⁹ Rather, what was required for such a finding was "an assessment on a case-by-case basis of the specific facts with a view to determining whether the acts committed by the organization concerned meet the conditions laid down in those provisions and whether individual responsibility for carrying out those acts can be attributed to the person concerned, regard being had to the standard of proof required under Article 12(2) of the Directive".⁵⁰ The ECJ also warned that that is it important to note that even where an individual is excluded from refugee protection pursuant to Article 12(2) of the Qualifications Directive, this did "not imply the adoption of a position on the separate question of whether that person can be deported to his country of ori-

gin".⁵¹ Further, the ECJ interpreted Article 3 of the Qualifications Directive, which allows Member States to introduce more favourable standards for determining who qualifies as a refugee as permitting a Member State to grant refugee or subsidiary protection to an individual excluded from refugee status under Article 12(2) of the Qualifications Directive pursuant to its own national law. These cases demonstrate that the ECJ is willing to interpret the substantive provisions of the asylum directives broadly thereby providing a wide scope of protection for asylum seekers in European law. The ECJ's willingness to interpret the asylum provisions liberally coupled with the high level of judicial protection offered to asylum claimants following the extension of the ECJ's jurisdiction in the AFSJ post-Lisbon suggests that further communitarisation of asylum policy can be expected to lead to a narrowing of implementation gaps which will further facilitate the development of a more effective EU protection regime.

6. CONCLUSION

Asylum policy has increasingly been regulated at the European level, where initial intergovernmental cooperation has evolved into highly 'communitarised' policy making. EU institutions are playing an increasingly important role and Member States are able to take decisions by Qualified Majority Vote. Consequently, European cooperation is no longer a mechanism whereby EU policy is determined by the most restrictively minded Member State (if it ever was). Instead, European cooperation has increasingly put pressure on Member States to fall in line with EU minimum standards, which has often meant that Member States have had to adapt their domestic legislation in order to comply with new EU legislation and grant new rights to asylum seekers and refugees. As Member States have come under increasing pressure to 'upgrade' domestic legislation in line with EU standards, the countries which secured a special legal status in this area (like the UK) have become more reluctant to adopt new EU legislation and have become more willing to use the 'opt out' negotiated under the Amsterdam Treaty, which provides them with the opportunity to side-step the 'rights-enhancing' impact of EU policy in this area. Such opportunistic behaviour thus underscores our central claim, that notwithstanding the short-comings of EU legislative provisions and their yet unsatisfactory implementation, the development of EU asylum law has strengthened rather than undermined refugee protection standards in Europe. With the new commitments in both the Lisbon Treaty and the Stockholm programme to the development of uniform standards, greater solidarity among the Member States and a greater role of the ECJ in asylum matters, one can reasonably expect a

⁴⁸ *B and D* Joined Cases C-57/09 and C-109/09, ECR n.y.t., European Court of Justice, 9 November 2010.

⁴⁹ *Ibid.*, para. 99.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, para. 110.

further strengthening of the 'rights-enhancing' impact of the EU not just on paper but also in practice.

7. REFERENCES

- Ackers D., 'The Negotiations on the Asylum Procedures Directive', 7 *EJML* (2005).
- Bigo, D., 'The European Internal Security Field: Stakes and Rivalries in a Newly Developing Area of Police Intervention', in Anderson, M. and Den Boer, M. (eds.) *Policing Across National Boundaries* (London/New York: Pinier Publishers, 1994).
- Boccardi, I., *Europe and Refugees: Towards an EU Asylum Policy* (The Hague: Kluwer Law International, 2002).
- Bunyan, T. (ed.), *Key texts on justice and home affairs in the European Union Vol. 1 (1976-1993)* (Statewatch, 1997).
- A.M. Collins, 'Recent developments in asylum and immigration law before the Court of Justice', 9 *ERA Forum* (2009), pp. 581-590.
- ECRE et al., *ILGA Europe, Amnesty International, Pac Christi International, Quaker Council for European Affairs, Human Rights Watch, CARITAS-Europe, Médecins Sans Frontières, Churches' Commission for Migrants, Save the Children in Europe, Call for withdrawal of the Asylum Procedures Directive* (22 March 2004)
- ELENA, *The Impact of the EU Qualification Directive on International Protection, Report by the European Legal Network on Asylum* (2008).
- Geddes, A., *Immigration and European Integration: Towards Fortress Europe?* (Manchester/New York: Manchester University Press, 2000).
- Guiraudon, V., *European Integration and Migration Policy: Vertical Policy-making as Venue Shopping*, 38/2 *Journal of Common Market Studies* (2000), pp. 251-271.
- Home Affairs Select Committee, *Practical Police Cooperation in the European Community*, HC 363-I, 5 (London: HMSO, 1990).
- House of Lords European Union Committee, *The Treaty of Lisbon: An Impact Assessment: Vol. 1 Report* (10th Report, Session 2007-2008).
- House of Lords (2009) Press Release, Opt-Out from asylum reception conditions directive will highlight recipe for confusion over EU opt-ins, pn240309euf, Tuesday 24 March 2009 <www.parliament.uk/parliamentary_committees/lords_press_notices/pn240309euf.cfm>
- Huysmans, J., 'The European Union and the Securitization of Migration', 38/5 *Journal of Common Market Studies* (2000), pp 751-757.
- Lambert, H. (1995) *Seeking Asylum: Comparative Law and Practice in Selected European Countries* (Dordrecht: Martinus Nijhoff, 1995).
- Lavenex, S., "'Passing the Buck': European Union Refugee Policies towards Central and Eastern Europe", 11/2 *JIL* (1998), p. 130
- Luedtke, A., 'Fortifying Fortress Europe? The Effects of September 11 on EU Immigration Policy', in Freeman, G. and T. Givens (eds.), *Immigration after 9/11* (New York: Palgrave, 2009), pp. 127-146.

Odysseus Academic Network, 'Comparative overview of the implementation of the Directive 2003/9 of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the EU Member States' (October 2006).

Refugee Council (2007), 'Refugee Council response to UK Implementation of Council Directive 2005/85/EC of 1 December 2005 laying down minimum standards on procedures in Member States for granting and withdrawing refugee status' (Refugee Council, October 2007).

UNHCR (multiple years), 'Statistical Yearbook', Geneva: United Nations High Commissioner for Refugees.

UNHCR (2003), 'UNHCR annotated comments on Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers' (July 2003).

UNHCR (2004) Press Release, Lubbers calls for EU asylum laws not to contravene international law (29 March 2004).

UNHCR (2007) Asylum in the European Union: A Study of the Implementation of the Qualification Directive, November 2007. Brussels: UNHCR.

UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979).

Webber, F., 'European conventions on immigration and asylum', in T. Bunyan (ed.) *Statewatching the new Europe. A handbook on the European State* (Statewatch, 1993), p. 142.