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Harmonizing for Whom? The Devaluation of Refugee Protection in the Era of European Economic Integration

The pursuit of enhanced economic integration within Europe poses a threat to both the substance and the processes of the international system of refugee protection. In substantive terms, European Community governments have seized upon the impending termination of immigration controls at intra-Community borders to demand enhanced security at the Community's external frontiers. Fearful that a continuing commitment to refugee protection threatens the viability of a union premised on external closure, states have taken the facile approach of elaborating a policy of generalized deterrence: all persons seeking entry from less developed states—whether or not they have a valid claim to refugee status—will be stigmatized as potential threats to European communal well-being, and their prospects for ingress consequently constrained. Under the guise of “harmonization”, European governments have effectively renounced their commitment to an inter-regional system of asylum.

Equally ominous is the decision-making process from which this common policy of deterrence has emerged, for it breaks with the tradition of elaborating norms of refugee law in an open and politically accountable context. Collaborating within a covert network of intergovernmental decision-making bodies spawned by the economic integration process itself, governments have dedicated themselves to the avoidance of national, international, and supranational scrutiny grounded in the human rights standards inherent in refugee law. This dangerous precedent represents a serious constriction of the modest opportunities traditionally available within the international community to advocate for

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principled limitations on the scope of purely self-interested policy-making.

I. European Integration as the Pretext for Deterrence

Regional economic integration has not caused the diminished commitment to refugees within Europe; rather, the heightened restrictionism is a reflection of the fact that Europeans have come to see "foreigners"¹ as threats to regional stability² and security.³ There is a pervasive belief that the cultural and racial heterogeneity⁴ which accompanies immigration jeopardizes European identity⁵ and solidarity.⁶ There is concern that immigrants will neither adjust to nor be accepted within European society,⁷ and that they will offer unwelcome competition for scarce jobs and housing.⁸ Governments have sustained this popular xenophobia,⁹

1. "To a great extent the distinction between refugees, illegal immigrants, drug traffickers and terrorists has become blurred in the public mind and they are all seen to be problems which can only be resolved by stricter border controls." Gil Loescher, *The European Community and Refugees*, 65 INT'L AFFAIRS 617, 624 (1989).

2. "The healthy feeling that binds together the societies of Europe's nation-states now seems to be breeding something far from healthy, a mindless intolerance of outsiders." *Europe's Immigrants: Strangers Inside the Gates*, THE ECONOMIST, Feb. 15, 1992, at 21.

3. Jonas Widgren, *International Migration and Regional Stability*, 66(4) INT'L AFFAIRS 749, 749 (1990).

4. [W]hat concerns policy-makers more is the kind of asylum-seeker who is appearing at their borders, and the fact that his arrival is totally unregulated. Many of the 'new' refugees originate in the Third World, whereas in the past there were few large-scale spontaneous arrivals from distant countries. Loescher, *supra* note 1, at 619. Accord J.Y. Carlier, *Harmonisation des politiques d'asile des pays d'Europe: Les enjeux juridiques*, Conference paper, COLLOQUE DE L'O.F.P.R.A., June 1992, at 2. Compare with the reaction to Eastern European migrants: "Rightly or wrongly, the Community is less in a panic over immigrants from the east. They are, after all, fellow Europeans, often with useful skills to offer and many of them anyway likely to return home when economic circumstances permit." THE ECONOMIST, June 1, 1991, cited in *Third World Migrants and Refugees in the 'Common European Home'*, 18 North/South Issues 6 (1992).

5. "Despite the move toward an integrated Europe, the citizens of the EC want to retain their culture and nationality." E. Whitaker, *The Schengen Agreement and Its Portent for the Freedom of Personal Movement in Europe*, 6 GEO. IMMIGR. L.J. 191, 214 (1992).

6. "The interplay of numerical importance and foreign origin does not permit European countries to regard with equanimity a situation which breeds social tensions, nurtures festering ethnic conflicts and saps democratic traditions and freedoms." W. R. Böhring, *Integration and Immigration Pressures in Western Europe*, 130(4) INT'L LABOUR REV. 445, 450 (1991).

7. Unlike the East Europeans, many of the new asylum-seekers have arrived without readily transferable skills. This, combined with their different race and their alien religions, is seen as posing extremely difficult social and political problems both now and in the future. In the face of this perceived threat, xenophobic and racist attitudes are increasingly obvious among some segments of the Western public.

Loescher, *supra* note 1, at 623.

8. Böhring, *supra* note 6, at 449. But cf. DANIELE JOLY & CLIVE NETTLETON, REFUGEES IN EUROPE 13 (1990): "Economic recession and unemployment have often been put forward as an explanation for this [restrictionist] trend, but by itself it does

at times even stooping to the blatant racism of former French premier Jacques Chirac's claim that the "noise and smell" of Arab and black immigrants were driving French workers crazy.¹⁰

Pandering to this combination of protectionist and racist fears, states have ended most opportunities for immigration.¹¹ Not even the traditional exception in favor of "temporary" workers has survived,¹² since economic restructuring has dramatically reduced the perceived value of unskilled labor.¹³ The termination of most labor-based immigration has put real pressure on the asylum process, now the only legal mechanism to come to Europe available to most foreigners.¹⁴ As an unwelcome "loophole" in the European closure program,¹⁵ refugee protection has thus attracted the negative scrutiny of those involved in the elaboration of the regional economic integration process.¹⁶

not seem a sufficient explanation: Norway became one of the strictest countries for asylum-seekers . . . at a time when there was practically no unemployment."

9. "European electorates expect their governments to maintain a tough immigration policy, and that is very difficult to combine with a generous asylum policy." Edward Mortimer, *Behind Closed Doors*, FIN. TIMES, Oct. 28, 1992, at 21.

10. The Guardian, June 28, 1991, cited in S. Egan & A. Storey, *European Asylum Policy: A Fortress Under Construction*, TRÓCAIRE DEVELOPMENT REVIEW 49, 55 (1992).

11. "The desire to preserve a unique, national culture goes a long way to explaining why the majority of countries in Western Europe did not establish immigrant policies which integrated immigrants into society as a whole, but rather treated immigrants as temporary residents." Whitaker, *supra* note 5, at 215.

12. Now that the asylum procedure is being used by a growing number of economic migrants to circumvent the various restrictive measures which the European countries have introduced since the first oil crisis in order to stop permanent immigration for employment purposes, the right of asylum is viewed against the backdrop of the immigration question.

Discussion Paper on the Right of Asylum, Commission of the European Communities, annex to Doc. SEC(91)1857, Oct. 11, 1991, at 3.

13. The realization in industrialized European states of the . . . imminent need to restructure industry to make it more competitive with Japan and the United States, induced these states to scale down schemes for recruiting foreign workers . . . Traditional markets for unskilled foreign labour are shrinking in all the world's economic growth centres.

Widgren, *supra* note 3, at 753-54. Accord Böhning, *supra* note 6, at 454.

14. C'est que, à l'évidence, lorsque les portes sont fermées et que les circonstances imposent de trouver abri, on entre par les fenêtres. Ce n'est pas dire uniquement que de nombreux requérants d'asile ne justifient pas de craintes avec raison de persécution. C'est dire aussi qu'antérieurement, alors qu'ils pouvaient entrer par les portes d'immigration de travail, ils n'avaient nul besoin de grimper l'échelle, pour pénétrer les fenêtres, d'une procédure complexe de reconnaissance de la qualité de réfugié, avec les conséquences que cela peut entraîner au regard des proches demeurés au pays d'origine.

Carlier, *supra* note 4, at 2.

15. "Many Western governments now perceive asylum applications to be a smokescreen for the 'economic migration' which they had attempted to end." Egan & Storey, *supra* note 10, at 51.

16. But even *bona fide* fugitives can reach unmanageable numbers, or at least numbers that exceed the compassion and hospitality of the resident population. In Germany that point has been reached . . . Sadly, a tougher asylum policy is bound to [evolve], and it will have to be a European policy if other

II. Development and Evolution of the Deterrent Regime

A cornerstone of the evolving union within Europe is the elimination of internal barriers to freedom of movement.¹⁷ The 1957 Treaty of Rome's provisions on freedom of movement within the Community for workers¹⁸ are to be extended to all EC citizens under the 1986 Single European Act¹⁹ and the proposed Maastricht Treaty on European Unity.²⁰ While states have thus far refused to cede sovereignty over immigration law to the European Community,²¹ nonetheless they have recognized that the ending of internal border controls makes effective exercise of *de jure* national competence over immigration nearly impossible:²² once an individual has successfully entered the common territory, he or she is unlikely to be inspected again.²³ Governments have as a result sought agreement on common criteria to regulate the entry of foreigners into the Community.²⁴

EC members wish to retain free movement for their own nationals in and out of the German market.

Mortimer, *supra* note 9.

17. See, e.g., Loescher, *supra* note 1, at 617.

18. Treaty Establishing the European Economic Community, art. 3(c) [hereinafter EEC Treaty].

19. Article 8A amended the Treaty of Rome to establish "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured" by not later than December 31, 1992. Regulation 1612/68 requires equality of treatment for EC nationals in member states other than their own in regard to eligibility for employment, tax and social benefits, and family reunion.

20. Under Article 8, the concept of citizenship in the European Union is established, and every citizen of the Union is granted the right to move and reside freely within the territory of any of the member states. The target date for the elimination of all internal border checks is now January 1995. Ronald Kaye, *British Refugee Policy and 1992: The Breakdown of a Policy Community*, 5(1) J. REFUGEE STUD. 47, 57 (1992). Upon ratification by all EC states, association agreements with Poland and Hungary will allow freedom of movement for their nationals into the EC. Similar arrangements are under negotiation with the Czech and Slovak Republics. IMMIGRATION LAW PRACTITIONERS' ASSOCIATION, UPDATE: JANUARY 1993, at 2.

21. The conflict between the Treaty of Rome and the Single European Act, on the one hand, and the goal of an integrated Europe, on the other, stems from the fact that the Treaties allow each country to continue its immigration policy, but the goal of an integrated Europe would seem to require a common immigration policy to ensure freedom of movement of all persons within the EC.

Whitaker, *supra* note 5, at 196.

22. "Member States have realized that completion of the internal market already necessitates, and establishment of political union certainly will necessitate, harmonization of the formal (organization, length of procedures and means of redress) and substantive aspects of the right of asylum." Communication from the Commission to the Council and the European Parliament on the Right of Asylum, Commission of the European Communities, Doc. SEC(91)1857, Oct. 11, 1991, at 4.

23. "Freedom of movement is a threat to the security of each of the nations in the Schengen group because once someone is in Schengenland, legally or illegally, they will not be inspected again." Whitaker, *supra* note 5, at 219. See also Böhning, *supra* note 6, at 451-52.

24. Carlier, *supra* note 4, at 2.

The substance of the consensus is devastating for refugees.²⁵ Governments have decided to treat migrants from the less developed world as an undifferentiated evil: refugees, economic migrants, drug traffickers, and terrorists are officially categorized as presenting a unified threat,²⁶ and will all confront a common policy of deterrence.²⁷ States have elaborated an absolutely blunt legal response to the alleged menace of "foreigners" which effectively buries any concern for the human rights principles of international refugee law.²⁸ In the end, refugees will be treated as presumptively unworthy of protection.²⁹

The first guiding principle of the coordinated approach is the duty systematically to impose visa requirements on the nationals of most migrant-generating, less developed countries, and to enforce this policy by sanctioning carriers which transport asylum seekers and others not in possession of the requisite visa.³⁰ This is an almost complete barrier to access, since even if refugees are able safely to access a European consular authority in their state of origin, no visa will be issued to an individual for the purpose of making a claim to protection in Europe.³¹

25. "While it is important that governments are able to remove clearly fraudulent asylum applications from the process as swiftly as possible, an asylum policy based solely on an accelerating process of control and deterrence throughout the Community weakens refugee protection." Loescher, *supra* note 1, at 631.

26. The origin of this association of concerns derives from the work of the inter-governmental Trevi group (discussed *infra* notes 76-100 accompanying text), which was charged with the examination of asylum issues in the context of broader discussions of violence, international terrorism, and drug trafficking. "Maastricht . . . retains the dangerous practice of associating asylum and immigration issues with criminality: the articles dealing with asylum policy also refer to 'combatting terrorism, unlawful drug trafficking and other serious forms of international crime.'" 18 North/South Issues 3 (1992).

27. Joly & Nettleton, *supra* note 8, at 21.

28. "Malgré le rappel des engagements internationaux, certaines mesures prises actuellement, tant dans les mesures d'harmonisation que par les Etats, portent atteinte à la première étape des droits de l'exilé: celle de quitter son pays." Carlier, *supra* note 4, at 6.

29. See, e.g., Widgren, *supra* note 3, at 751:

The process of establishing the internal market is already leading EC states to foresee potential migratory pressures from outside the Community, exacerbated by the present influx of illegal migrants and asylum seekers from developing countries, many of whom lack valid refugee claims, i.e. are refugees from poverty rather than persecution.

30. As part of the process for achieving the single internal market within the European Community (EC) . . . the member states are making arrangements to cooperate systematically with each other in imposing visa requirements on nationals of the same countries and sanctions on transport operators which carry people—including asylum seekers—not in possession of the required visas or travel documents.

Amnesty International, *Europe: Harmonization of asylum policy: Amnesty International's concerns* at i (1990). See, e.g., Schengen Agreement (1990), at art. 26(2); and the draft Convention on the Crossing of External Borders, Doc. SN 2528/91 (WGI 822), June 24, 1991, at art. 14(2).

31. But see Kay Hailbronner's argument that as a companion piece to the current harmonization legislation in Europe, asylum seekers should be given the opportunity to claim an entry visa which permits them to seek asylum in one of the contracting states. Kay Hailbronner, *Möglichkeiten und Grenzen einer europäischen Koordinierung des*

Only states which accept this obligation to block the entry³² of "undesirable" national groups will, in return, see their own citizens granted unrestricted freedom of movement within the Community. For example, Italy, Spain, Portugal, and Greece were required to adopt stringent visa and other external border controls³³ as a condition precedent to being allowed to accede to the Schengen Agreements.³⁴ Similar requirements are found in both the proposed Maastricht Treaty³⁵ and the draft Convention on the Crossing of External Borders.³⁶ Effectively, those European states which have traditionally allowed foreigners to make their case for admission at a domestic port of entry will now have to choose between the continuation of that policy and the extension to their nationals of unrestricted regional freedom of movement.³⁷ In the current xenophobic environment, there is little domestic political advantage to championing the rights of foreigners.

Visa requirements and carrier sanctions are crude instruments which bar genuine refugees from exercising their right to seek asylum. As noted by the United Nations High Commissioner for Refugees, "While such measures are targeted at foreigners in general, in the case

Einreise-und Asylrechts: Ihre Auswirkungen auf des Asylrecht der Bundesrepublik Deutschland (1989), abstracted at 4(1) INT'L J. REFUGEE L. 126 (1992).

32. "The [Schengen] Convention compels the States to refuse entry . . . quite a new phenomenon in aliens law. Generally, a refusal takes place only after the interests of the alien and the general interest of the State concerned have been balanced." J. Steenbergen, *Schengen and the Movement of Persons*, in SCHENGEN: INTERNATIONALISATION OF CENTRAL CHAPTERS OF THE LAW ON ALIENS, REFUGEES, PRIVACY, SECURITY AND THE POLICE 65 (H. Meijers et al., 1991).

33. The northern countries, which have long since closed their gates, are now looking nervously at their Mediterranean partners, relatively unaccustomed, except for France, to heavy immigration. They fear that illegal migrants, having slipped into, say, Portugal or Spain, will be unchecked all the way to the North Sea. So the southerners have been hurriedly installing the paraphernalia of immigration control.

Europe's Immigrants, *supra* note 2, at 21-22.

34. Whitaker, *supra* note 5, at 197-99.

35. The proposed Article 100(c) allows for Community control of the common visa policy, while Article K.1 defines both asylum policy and the rules governing crossing of external frontiers to be matters of Community interest.

36. The Member States undertake to harmonize their visa policies progressively. Pending such harmonization, the Member States shall agree, by the entry into force of this Convention at the latest, on the countries for which there exist common visa arrangements. These arrangements, as part of a common visa policy, determine for each of the countries whether or not its nationals are subject to the visa requirement.

Convention of the Member States of the European Communities on the Crossing of Their External Borders, AD HOC GROUP IMMIGRATION, Doc. SN 2528/91 (WG1 822), June 24, 1991, at art. 17.

37. "Les candidats devraient convaincre les membres du groupe Schengen de leur détermination à oeuvrer pour la construction européenne . . . La structure Schengen est née de la crainte de voir la mise en oeuvre du programme communautaire provoquer un déficit de sécurité." Phillipe Weckel, *La Convention Additionnelle à l'Accord de Schengen*, REVUE GÉNÉRAL DU DROIT INTERNATIONAL PUBLIC 403, 429 (1991).

of asylum-seekers they tended to increase the risk of *refoulement*.”³⁸ Most perniciously, the mechanism for the enforcement of these generic visa requirements falls wholly outside the realm of legal accountability:

Forcing carriers to verify visas and other travel documentation helps to shift the burden of determining the need for protection to those whose motivation is to avoid monetary penalties on their corporate employer, rather than to provide protection to individuals. In so doing, it contributes to placing this very important responsibility in the hands of those (a) unauthorized to make asylum determinations on behalf of States, (b) thoroughly untrained in the nuances and procedures of refugee and asylum principles, and (c) motivated by economic rather than humanitarian considerations. Inquiry into whether the absence of valid documentation may evidence the need for immediate protection of the traveller is never reached.³⁹

These “migration-hampering policies” are tough and explicitly discriminatory,⁴⁰ and violate the most basic rationale for the 1951 Convention relating to the Status of Refugees.⁴¹ Indeed, by blackmailing other states to comply with deterrent measures by conditioning access to regional freedom of movement of Europeans, the Schengen Agreements and their progeny arguably induce a violation of international law.⁴²

The second substantive aspect of the evolving European policy on asylum is the denial to those refugees who manage successfully to evade overseas deterrence of their right to choose the state in which they will seek protection.⁴³ In most cases, it is the country which either issued

38. U.N. Doc. E/1992/65 (1992), at 30.

39. United Nations High Commissioner for Refugees, UNHCR Position on Conventions Recently Concluded in Europe (Dublin and Schengen Conventions), Aug. 16, 1991, at 5.

40. Widgren, *supra* note 3, at 762-64.

41. “Although carrier sanctions are not necessarily contrary to international law, UNHCR is particularly concerned about the imposition of carrier sanctions and strict visa requirements which do not distinguish asylum-seekers from other aliens.” United Nations High Commissioner for Refugees, *supra* note 39, at 5. See also Egan & Storey, *supra* note 10, at 61; INTERNATIONAL LAW ASSOCIATION INTERNATIONAL COMMITTEE ON THE STATUS OF REFUGEES, *Restrictive Measures in Europe* 21 (1992).

42. Schengen II and Dublin contain rules on the requirement of visa and on the imposition of penalties on carriers who transport aliens without possession of the requisite travel documents. Although these provisions do not appear to be contrary to Articles 33 and 31 of the 1951 Convention when taken literally, they are, however, contrary to the 1951 Convention as a whole.

INTERNATIONAL LAW ASSOCIATION, *supra* note 41, at 21. See also Carlier, *supra* note 4, at 6.

43. The intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account. Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another state. Where, however, it appears that a person, before requesting asylum, already has a connection or close links with another State, he may if it appears fair and reasonable be called upon first to request asylum from that State.

Conclusion 15(XXX) of the Executive Committee of the High Commissioner's Programme, at para. (h)(iii)-(iv), U.N. Doc. HCR/IP/2/Eng./REV.1986 (1979). See generally JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 46-50 (1991).

the refugee claimant a visa or in which the claimant first arrived which will now be required to consider the claim to asylum, provide protection if warranted, and remove unrecognized claimants from the continent.⁴⁴ The refugee has no right to continue her or his initial journey towards a different European state, nor to move on within the region after an adverse determination.⁴⁵ This policy clearly bolsters the mechanisms of external deterrence,⁴⁶ in that it imposes a particularized duty on any state which fails adequately to fend off the inflow of refugees, genuine or not.

For the refugee, the consequences of this regime are serious. Because there is no procedural or substantive harmonization of affirmative norms of refugee law in Europe, recognition rates for persons with comparable claims differ quite significantly from country to country.⁴⁷ The prevailing policy in Europe, elaborated in both the Schengen Agreements and Dublin Convention, takes no account of these critical variations.⁴⁸ It is rather assumed that the treatment a refugee claimant receives in one contracting state can reasonably be taken as discharging the duty of all other participating governments. This position is in direct conflict with the international legal duty of each state independently to implement its obligations under the Refugee Convention.⁴⁹

44. The procedures summarized here are those established by the two accords agreed to in June 1990: first, the Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities ("Dublin Convention"), at arts. 4-8; and second, the Convention on the Application of the Schengen Agreement of 14 June 1985 relating to the Gradual Suppression of Controls at Commons Frontiers, between the Governments of States Members of the Benelux Economic Union, the Federal Republic of Germany and the French Republic ("Schengen II"), at art. 30. Regarding the compatibility of these two accords, see INTERNATIONAL LAW ASSOCIATION, *supra* note 41, at 7.

45. "Since a sole state is deemed responsible for handling a request for asylum, the freedom of choice of the asylum-seekers is radically reduced. They cannot choose a country with more liberal laws. The will of the state has usurped the will of the individual." Tom Casey, *Europe 1992—Closing the Doors*, [Spring 1991] STUDIES 48, 52.

46. "UNHCR is concerned where the emphasis on this 'authorization principle' has the effect of causing States to strengthen even further both their entry requirements (visa arrangements), and their mechanisms to enforce these requirements (airline sanctions)." United Nations High Commissioner for Refugees, *supra* note 39, at 4.

47. Amnesty International, *Europe: Human Rights and the Need for a Fair Asylum Policy* 12-15 (1991); Hailbronner, *supra* note 31, at 126; United Nations High Commissioner for Refugees, *supra* note 39, at 3.

48. "The EC Commission and some governments, notably the Dutch, would like to see a greater level of policy harmonisation in the future, but other governments fear that harmonisation might involve a dilution of their present restrictive stances." 18 North/South Issues 3 (1992). Accord Weckel, *supra* note 37, at 414.

49. [S]trict assignment of responsibilities on the basis of which State authorized entry could lead to rejection of individual claims which, in another State party, might have been recognized Since the [Schengen and Dublin] Conventions' provisions for informal consultation between States should not be a substitute for adherence to international obligations (*non-refoulement*, etc.) UNHCR has a role to play in assisting States to achieve consistency and

Because of the economic integration program, there will likely be a decline in the overall level of openness,⁵⁰ since no state "will want to attract more than its fair share of asylum applicants by appearing to be too liberal in its admissions policy."⁵¹ This tone was set by the document prepared by the Ad Hoc Group Immigration for the 1991 Maastricht Summit, which identified "substantive harmonization" as a key element of the proposed refugee work program.⁵² However, in actually defining the content of this initiative, the Ad Hoc Group recommended that priority attention be given to the grounds for excluding refugees through common policies on manifestly unfounded claims, the principle of first host country, and country condition assessment. Attention to interpretation of the Refugee Convention ranked as only its fourth (and last) substantive goal.⁵³ Rallying to this agenda, the December 1992 meeting of EC immigration ministers was indeed able to reach consensus on the appropriateness of "fast track" procedures to reject the claims of persons who it is judged ought to have sought an internal flight alternative, or who can be removed to a non-European "host third country."⁵⁴ It also provided for the outright exclusion from the determination process of those who come from a country "in which there is generally no serious risk of persecution," individual circumstances

complementarity between the requirements of regional and of international refugee instruments.

United Nations High Commissioner for Refugees, *supra* note 39, at 3-4. It is particularly noteworthy that the Dutch Council of State advised against ratification of the "Schengen II" Agreement on the ground that Dutch authorities might be acting in violation of international law were they to require a claimant to have his or her case heard in a jurisdiction with a less adequate protection regime.

50. There was, after all, a logical tendency to seek asylum in countries which were considered to have the most generous admissions policy, and it was feared that the resultant pressure on the countries concerned would cause them to adopt a more restrictive policy. If the flow of asylum seekers was then diverted to countries with—relatively speaking—more liberal admissions policies, pressure would then shift to those countries. It seemed that a downward spiral might be set in motion, not because of any general change in attitude towards the asylum issue, but solely as a result of individual countries' fears that a relatively tolerant policy might create a pull factor.

Dutch Advisory Committee on Human Rights and Foreign Policy, *Harmonization of Asylum Law in Western Europe* 13. See also Casey, *supra* note 45, at 54; INTERNATIONAL LAW ASSOCIATION, *supra* note 41, at 18.

51. Loescher, *supra* note 1, at 629.

52. "As for the tasks to be performed, priority would appear to go to preparing implementation of the Dublin Convention and harmonizing the substantive rules of asylum law in order to ensure uniform interpretation of the Geneva Convention." Ad Hoc Group Immigration, "Report from the Ministers responsible for immigration to the European Council meeting in Maastricht on immigration and asylum policy", Doc. SN 4038/91 (WGI 930), Dec. 3, 1991, at 4.

53. *Id.* at 8.

54. *Resolution on a Harmonized Approach to Questions Concerning Host Third Countries*, AD HOC GROUP IMMIGRATION DOC. SN4823/92 (WGI 1283), Nov. 19, 1992; *Resolution on Manifestly Unfounded Applications for Asylum*, AD HOC GROUP IMMIGRATION DOC. SN4822/1/92 (WGI 1282), Dec. 2, 1992.

notwithstanding.⁵⁵ The portrait which emerges is of commitment to accelerated control and deterrence,⁵⁶ in which the unification of external frontier security jurisdiction not yet formally achieved in Community law is obtained *de facto* as an integral step in the establishment of freedom of movement within Europe.⁵⁷

III. The Avoidance of Human Rights-Based Scrutiny

International refugee law is not the product of an unadulterated humanitarian or human rights vision. Rather, it is fundamentally an attempt to reconcile the dominant intention of states to control entry into their territories with the human reality of coerced migrations. Therefore, while refugee law falls significantly short of recognizing the right to migrate of all victims of human rights abuse, it nonetheless requires that states employ the rubric of human rights law in their scrutiny of the risks faced by those who claim protection.⁵⁸ How is it that the evolving European regime has managed to distance itself so fundamentally from this human rights context in an apparently single-minded pursuit of deterrence?⁵⁹

The primary regional site for discussion of refugee law issues was

55. *Conclusions on Countries in Which There is Generally No Serious Risk of Persecution*, AD HOC GROUP IMMIGRATION DOC. SN4821/92 (WGI 1281), Nov. 18, 1992. See generally Jacqueline Bhabha, *Harmonization of European Immigration Law*, 70(2) *Interpreter Releases* 49, 55-57 (1993); AMNESTY INTERNATIONAL, EUROPE: HARMONIZATION OF ASYLUM POLICY: ACCELERATED PROCEDURES FOR "MANIFESTLY UNFOUNDED" ASYLUM CLAIMS AND THE "SAFE COUNTRY" CONCEPT, Nov. 1992.

56. "Les projets actuels se contentent de mettre l'accent sur les contrôles procéduraux à l'entrée, au risque de vider la procédure de reconnaissance de la qualité de réfugié de tout contenu, d'une part parce qu'il n'est pas possible pour le réfugié d'accéder à la procédure s'il ne peut accéder au territoire d'un Etat d'accueil, d'autre part parce que cette procédure n'emporterait pas référence à une interprétation commune de la notion de réfugié." Carlier, *supra* note 4, at 8. *Accord Loescher*, *supra* note 1, at 631.

57. "[L]a Convention de Schengen élève au plan européen la préoccupation de l'ordre public qui demeure étrangère au droit communautaire." Weckel, *supra* note 37, at 436.

58. See, e.g., Jack Garvey, *Toward a Reformulation of International Refugee Law*, 26 HARV. INT'L L.J. 483, 500; G. Coles, *Approaching the Refugee Problem Today*, in REFUGEES AND INTERNATIONAL RELATIONS 373, 407-10 (Gil Loescher & Laila Monahan eds., 1989); and James C. Hathaway, *Reconceiving Refugee Law as Human Rights Protection*, 4(2) J. REFUGEE STUD. 113 (1991). Indeed, the Committee on Population and Refugees of the Council of Europe recommended that

the concept of persecution should be interpreted and applied liberally and also adapted to the changed circumstances which may differ considerably from those existing when the Convention was originally adopted . . . [A]ccount should be taken of the relation between refugee status and the denial of human rights as laid down in different international instruments.

J. Thomas, *Refugees: A New Dimension in International Human Rights*, 70 A.S.I.L.P. 58, 69 (A. Woods ed., 1976).

59. "So far, the Member States and the Commission have looked at the question of the right of asylum solely from the point of view of the completion of the internal market." Commission of the European Communities, *supra* note 12, at 9.

initially the Council of Europe,⁶⁰ the body with main responsibility for administration of human rights law in Europe.⁶¹ The early refugee-related work of the Council is faithful to its human rights mission,⁶² including resolutions in 1976⁶³ and 1981⁶⁴ calling for procedural and substantive harmonization of refugee law. With the reconstruction of refugee flows as an aspect of the drive towards European freedom of movement, the locus for debate on asylum policy shifted during the mid-1980s to the public organs of the European Community.⁶⁵ Like the Council of Europe, the European Parliament embraced a largely humanitarian vision of refugee law, and had the temerity to pass resolutions which focused on the rights of refugees and explicitly condemned visa requirements that impede access to protection.⁶⁶ Governments responded by denying that the EC had any competence in the field of asylum law, and that requisite coordination of refugee policy would be

60. Of particular significance is the work of the Ad Hoc Committee of Experts on the Legal Aspects of Refugees (CAHAR). See generally Loescher, *supra* note 1, at 628-29.

61. [L']insertion du droit d'asile dans le cadre du Conseil de l'Europe permettrait l'utilisation des mécanismes de protection mis en place par la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales. Diverses propositions en vue d'ajouter à la convention un protocole sur le droit d'asile ont été faites.

Carlier, *supra* note 4, at 5.

62. In contrast to the approaches of intergovernmental structures, the representative institutions such as The Council of Europe, the European Parliament and their various committees, have reflected a more liberal and humanitarian attitude in their debates, motions, and reports, and have tried to promote a more sympathetic policy towards refugees and asylum seekers.

Kaye, *supra* note 20, at 57. Accord Carlier, *supra* note 4, at 4.

63. Harmonization of eligibility practice under the 1951 Geneva Convention on the Status of Refugees and the 1967 Protocol, Rec. 787 (1976) (adopted by the Parliamentary Assembly of the Council of Europe, Sept. 16, 1976).

64. Recommendation on the Harmonization of National Procedures relating to Asylum, Council of Europe Rec. No. R(81)16 (1981).

65. Refugee issues have been considered in a number of committees, including the Political Affairs Committee and the Committee on Legal Affairs and Citizens' Rights. JOLY & NETTLETON, *supra* note 8, at 20. Of particular note during this era is the 1987 report of the latter committee prepared by Oskar Vetter which

contained extensive recommendations which focus on rights for refugees and asylum-seekers, the expeditious treatment of their cases, and avoidance of the use of deterrence measures. It also called on the European Commission to facilitate burden-sharing and to underwrite the work of government and non-government agencies through its budget.

Loescher, *supra* note 1, at 630. A 1985 White Paper on the completion of the internal market foreshadowed a European Commission directive on the right to asylum. Kaye, *supra* note 20, at 56.

66. Resolutions of Mar. 12, 1987, O.J. No. C.099, 13.4.1987, at 167; June 18, 1987, O.J. No. C.190, 20.7.87, at 105; and of Mar. 15, 1990, O.J. No. C.096, 17.4.1990, at 274. "These initiatives have had little significant effect because governments have maintained, under the Treaty of Rome, that the Commission (which has shown more flexibility and liberality than its political masters) and the European Parliament, had no competence to deal with asylum and immigration matters." Kaye, *supra* note 20, at 57. See also Loescher, *supra* note 1, at 631; Weckel, *supra* note 37, at 433-34.

achieved by the governments' own informal mechanisms. The European Commission in 1988 "decided not to oppose the intergovernmental approach,"⁶⁷ for which it was rewarded by being allowed to participate in the private deliberations among states.

In the result, the two supranational authorities have been effectively excluded from the elaboration of a common asylum law for Europe.⁶⁸ The European Parliament has since passed a series of resolutions in which it effectively pleads to be re-admitted to the inner circle of decision-making,⁶⁹ and has sponsored reports on the harmonization of asylum policy by its constituent committees.⁷⁰ For its part, the Council of Europe has attempted to win back the favor of states by drafting mechanisms to exclude the citizens of "safe countries" from the refugee determination process,⁷¹ and by explicitly recognizing the importance of humanitarian mechanisms to stem the flow of migrants to Europe.⁷² Neither body is, however, likely to succeed in convincing states to relinquish control over asylum policy.⁷³ National authorities have instead embraced the informal intergovernmental approach to lawmaking⁷⁴ as ideally suited to their interests.⁷⁵

67. Commission of the European Communities, *supra* note 12, at 9.

68. It has been observed that "the institutions of the Council function as lobbyists attempting to influence national governments and community institutions." JOINT COMMITTEE FOR THE WELFARE OF IMMIGRANTS, *Unequal Migrants: The European Community's Unequal Treatment of Migrants and Refugees* 37 (1989). "The European Parliament was kept completely out of the Schengen negotiations, although it was 'informed' about the drafting of the Dublin Convention." Egan & Storey, *supra* note 10, at 59.

69. See, e.g., European Parliament Resolutions of Mar. 15, 1989, O.J. No. C96, 17.04.1989, at 57; Nov. 23, 1989, O.J. No. C323, 27.12.1989, at 98; Mar. 15, 1990, O.J. No. C96, 17.04.1990, at 274; June 14, 1990, O.J. No. C175, 16.07.1990, at 170; Feb. 22, 1991, O.J. No. C72, 18.03.1991, at 213; Sept. 13, 1991, O.J. No. C267, 14.10.1991, at 197; and of Apr. 7, 1992, P.E. 160.902, at 48.

70. Report of the Committee on Legal Affairs and Citizens' Rights on Freedom of Movement for Persons and Problems Relating to National Security in the Community, EUR. PARL. DOC. A3-0199/91, 2.7.1991; and Report of the Committee on Civil Liberties and Internal Affairs on the Harmonisation within the European Communities of Asylum Law and Policies, EUR. PARL. DOC. A3-0337/92/Part B, 5.11.1992.

71. Cf. Amnesty International, *supra* note 47, at 16.

72. Parliamentary Assembly of the Council of Europe Res. 1149 (1991).

73. "In the mid-1980s governments came to the conclusion that they needed to harmonize their asylum policy but their proposals are not in accordance with the Council of Europe guidelines. On the contrary, the main thrust of their discussions concentrates on measures to reduce the number of asylum-seekers and refugees in Europe at almost any cost." JOLY & NETTLETON, *supra* note 8, at 19.

74. "The moves towards the single internal market from 1987 have . . . had considerable bearing on refugee and asylum policy. The Commission's plans for the completion of the internal market included a proposal for a directive to coordinate provisions for the right of asylum and refugee status in the EC. At the end of 1988, the EC Council of Ministers decided not to continue work on the Commission's draft directive, and instead adopted an intergovernmental approach." Kaye, *supra* note 20, at 56.

75. "The nation initially exercises its sovereignty by committing the country to a general will, but retains voting rights to determine the policy of the association of nations. While relinquishing its absolute sovereignty to determine an independent

The first of two key sets of intergovernmental institutions which have addressed refugee issues is the Trevi ("Terrorism, Radicalism, Extremism, Violence International") Group,⁷⁶ constituted in the mid-1970s to allow the immigration and justice ministers of EC states to coordinate policy on security matters.⁷⁷ In 1986, the Trevi Group established the more specialized Ad Hoc Group Immigration to enable immigration ministers and officials to address concerns associated with the plan to end internal border controls, including the risks associated with refugee protection.⁷⁸ A sub-committee of the Ad Hoc Group has produced three major accords: the 1990 Dublin Convention on responsibility to examine asylum requests,⁷⁹ which, as previously observed, denies refugees the right to choose the country in which they will seek asylum without setting any standards for procedural or substantive coordination; a "parallel convention," approved in principle in June of 1992 by EC immigration ministers, and intended to allow non-EC states to accede to the regime;⁸⁰ and a draft Convention on the Crossing of External Borders which deals with such matters as mandatory external border controls, unified visa requirements, and the sanctioning of carriers which transport passengers without proper documents.⁸¹ While the latter accord pays lip service to the legal rights of refugees, it contains no specific exemptions in fact to address the needs of genuine asylum-seekers.⁸²

course of action, the nation joins an association of nations in order to achieve a more secure and profitable existence." Whitaker, *supra* note 5, at 194.

76. "The original task of the [Trevi] Group was to examine issues of terrorism and international violence, and the inclusion of immigration within its responsibilities reveals a dubious association of ideas i.e., migrant/refugee = suspect person = potential terrorist." 16 NORTH/SOUTH ISSUES 2 (1992).

77. "The ministers wanted to co-operate more closely in fighting terrorism, international crime, drug trafficking and such like activities. They quickly established a working group to discuss and try out measures aimed at preventing the abuse of asylum rights." Casey, *supra* note 45, at 49. See generally Loescher, *supra* note 1, at 630.

78. "The ad hoc group is a purely inter-governmental body . . . unsullied by any contact with the Commission, the European Parliament, or indeed national parliaments, let alone the wretched media. Meeting behind closed doors, it has—perhaps not surprisingly,—drawn up a policy for closing the doors of Europe on as many refugees as possible." Mortimer, *supra* note 9, at 21.

79. Widgren, *supra* note 3, at 763. This accord has been signed by all twelve EC states, but has thus far been ratified by only Denmark, Greece, Luxembourg, Portugal, and the United Kingdom.

80. Avant projet de convention parallèle à la Convention de Dublin du 15 juin 1990, Doc. SN 1729/2/92 (WGI 1008, Rev. 2), May 8, 1992. See also Amnesty International, *supra* note 47, at 4. This would be of particular interest to the states of the European Free Trade Association (EFTA), as well as to Australia, Canada, and the United States which have met regularly with their EC partners since 1985 to discuss "shared responsibility" under the auspices of the "Informal Consultations." See generally Widgren, *supra* note 3, at 763.

81. *Supra* note 36. See generally INTERNATIONAL LAW ASSOCIATION, *supra* note 41, at 19-20; JOLY & NETTLETON, *supra* note 8, at 20; Egan & Storey, *supra* note 10, at 58.

82. For example, the proposed Article 2(2), which requires states to impose a sanction on persons "crossing external borders at any point other than authorized crossing points," appears to conflict with Article 31 of the Refugee Convention,

The projects elaborated within the Trevi process are modelled on the work of a subset of EC states, known as the Schengen Group.⁸³ Initial parties included Belgium, France, Germany, Luxembourg, and the Netherlands. Greece, Italy, Portugal, and Spain have since been allowed to join.⁸⁴ Meeting regularly since 1985, this informal group of states embraces the "fast track" approach to European integration,⁸⁵ in which the right to asylum is perceived as an irritant to be constrained to the maximum.⁸⁶ The 1985 and 1990 Schengen Agreements are expected to be fully implemented during 1993,⁸⁷ at which time this group of EC countries will "become a testing ground for the EC's own drive to give its citizens free movement across borders."⁸⁸ The governance of the Schengen system, including authority over visa policy, is vested in an intergovernmental Executive Committee which operates completely outside the constraints of domestic or supranational law.⁸⁹

which prohibits the imposition of penalties on refugees "on account of their illegal entry or presence" provided they present themselves without delay to authorities. While this conflict arguably is resolved by Article 27, which mandates that the proposed Convention applies "subject to" the Refugee Convention and Protocol, it is difficult to see how the conflict between generic visa requirements and the refugee's right to seek asylum can be resolved.

83. See generally Steenbergen, *supra* note 32, at 61; Weckel, *supra* note 37, at 426; Loeschner, *supra* note 1, at 629.

84. The Schengen Central Negotiation Group "has abandoned hopes that Italy, Spain and Portugal would, at the initial stage, be part of the Schengen Area without internal frontiers" since the requirement of Article 140 of the Supplementary Agreement that each founding member of the Group approve new accessions is far from being met, particularly in France and Germany. *Schengen Area Without Internal Borders is Still Far From Being Accomplished*, MIGRATION NEWS SHEET, Sept. 1992.

85. "It has . . . become clear that if the EC cannot get final agreement among the Twelve on the remaining issues, then the Schengen group will become the 'fast track' for European integration, while others, presumably like the UK, Denmark, and Greece, will be in the slower track." Kaye, *supra* note 20, at 57. "This will be a new iron ring, dividing one part of the EC from the rest." John Carvel, *Please Have Your Passports Ready* . . . , THE GUARDIAN, July 22, 1992, at 23.

86. "The Schengen agreement displays no concern for the human rights of the refugees and asylum-seekers. Economic alignment is the priority. The problem of asylum-seekers and refugees represents a technical hitch which needs to be eliminated." Casey, *supra* note 45, at 51. Accord Weckel, *supra* note 37, at 414: "Il faut constater . . . une différence sensible d'appréciation entre les membres du groupe Schengen et la Commission des Communautés européennes. Celle-ci avait fixé l'objectif de parvenir à une harmonisation du droit d'asile, ambition qui ne semble pas vraiment partagée par les signataires de l'accord à six."

87. *EC/Schengen: Greece Becomes Ninth Member*, AGENCE EUROPE, Nov. 6, 1992.

88. *Italy Expected to Sign European Free Travel Agreement*, REUTER LIBR. REP., Oct 16, 1990, quoted in Whitaker, *supra* note 5, at 193, n.12. Indeed, it is reported that Czechoslovakia, Hungary, and Poland have modelled their new immigration agreement on the Schengen Agreement. Whitake, *supra* note 5, at 222.

89. An important role is reserved for the Executive Committee in the visa policy . . . [T]here is no legal remedy against the refusal to grant a visa. The national judge is in general not empowered to examine decisions taken by international organs and the 1990 Schengen Convention does not make provision for any remedy either.

Steenbergen, *supra* note 32, at 68-69. See also Whitaker, *supra* note 5, at 203-12.

The advantages of an intergovernmental approach for states committed to deterrence are clear. Because critical decisions have been taken within an international body and codified in international agreements, governments have not had to contend with the vagaries of a domestic policy debate.⁹⁰ Yet by avoiding the supranational fora of the Council of Europe and European Community, it has proved possible to achieve the coordination of immigration policy without any *formal* renunciation of domestic jurisdiction⁹¹ or submission to substantive scrutiny and procedural accountability.⁹² There has thus been no imperative to engage in the balancing of communal closure and the human rights of coerced migrants that an open and principled reform of refugee law would have required.⁹³

There are belated and tentative signs that this undemocratic mode of decision-making may be challenged. In ultimately agreeing to the ratification of the 1990 Schengen Agreement, for example, the Dutch Parliament reserved to itself the right to approve or reject any decision of the Executive Committee of Schengen.⁹⁴ The Belgian Conseil d'Etat has since declared its concerns regarding the legality of the Schengen Agreement.⁹⁵ As well, the beleaguered Maastricht Treaty on European Unity—even though it retains the invidious association of asylum with issues of terrorism, drug trafficking, and international crime—would nonetheless allow a coordinated common visa policy to be set by the EC with the involvement of the European Parliament,⁹⁶ and requires that a

90. "If the policy decision remains at the national level, the government faces a battle, with possible election consequences. It can also be very difficult to muster the majority necessary to change national immigration or asylum law." Whitaker, *supra* note 5, at 216.

91. "Si l'idée maîtresse a bien été de responsabiliser chaque Etat, il convient d'admettre que le maintien de l'autonomie dans l'exercice de la compétence a été voulu comme un corollaire de la délimitation de la responsabilité." Weckel, *supra* note 37, at 415-16.

92. "From a democratic and legal point of view, Community regulation is highly preferable to intergovernmental arrangements." INTERNATIONAL LAW ASSOCIATION, *supra* note 41, at 17. Indeed, it would appear that "[t]he use of inter-governmental arrangements, rather than the formal institutions of the EC itself, represents a deliberate decision to avoid scrutiny by EC bodies and accountability under EC law." Egan & Storey, *supra* note 10, at 57. See also Amnesty International, *supra* note 30, at 2.

93. "La circonscription, le pragmatisme et le souci d'efficacité ont incité les rédacteurs de la Convention de Schengen à éviter les formules de principe évoquant les objectifs généraux à atteindre." Weckel, *supra* note 37, at 426. This avoidance of questions of principle is highly problematic as "... there are clearly inherent limits to the treatment democratic societies can mete out to foreigners if they are to honour their humanitarian commitments towards genuine refugees." Böhning, *supra* note 6, at 455.

94. Les députés et sénateurs néerlandais ont obtenu un droit de veto sur l'application des accords de Schengen, LE MONDE, June 25, 1992.

95. MIGRATION NEWS SHEET, *supra* note 84, at 1.

96. Article 100(c) provides that decisions on a common visa policy will initially require unanimity, except in emergency situations in which cases a maximum six month visa requirement may be enacted by qualified majority vote. From 1996 onward, all decisions on visa requirements will be made by qualified majority vote.

process be set in motion to examine EC assumption of jurisdiction over asylum more generally.⁹⁷ There is a risk, however, that the momentum generated by the Trevi and Schengen schemes is simply too great to be redirected,⁹⁸ and that the unaccountable⁹⁹ intergovernmental model may be here to stay.¹⁰⁰

IV. Implications

What are the lessons of this European experience? First, that increasing levels of economic integration lead logically towards a policy of generalized freedom of movement within the economic zone, which in turn will require some coordination of strategy regarding external frontiers. Second, that the self-interested drive towards unification presents states with an opportunity to reconceptualize refugee flows as irritants to coordination, and to pursue with impunity generalized policies of deterrence. Third, that the intergovernmental structures requisite to detailed alignment of economic policy can be used in order to shield protectionist lawmaking from scrutiny or review, allowing the human rights mandate of refugee law to be effectively undercut. Finally, and most

97. *The Deal is Done*, THE ECONOMIST, Dec. 14, 1991, at 51-54. See generally Carlier, *supra* note 4, at 4-5; Egan & Storey, *supra* note 10, at 60-61. While Article K.1 defines asylum policy to be a matter of common interest, Article K.4 maintains the intergovernmental coordination approach subject to the possibility set out in Article K.3 for future agreement on an expanded EC role in regard to asylum. A Declaration attached to the Treaty notes the agreement of states to seek enhanced harmonization of asylum policy before the end of 1993.

98. "Tout donne à penser que cette structure d'action, créée dans la perspective de la réalisation du marché intérieur, continuera de fonctionner durablement, forte de la solidarité particulière qui unit les six membres fondateurs de la Communauté." Weckel, *supra* note 37, at 434. For example, in February 1993, Germany agreed to pay Poland and the Czech Republic DM 55 million to strengthen border guards, construct transit camps and refugee facilities, and pay for the onward deportation of rejected asylum-seekers to their country of origin. Michael Binyon, *Poles Promised Immigration Cash*, THE TIMES OF LONDON, Feb. 9, 1993. Moreover, 35 European interior ministers meeting in Budapest recently agreed to standardize border control procedures, and to establish an inter-governmental work group to draft a treaty on returning illegal migrants. E. Varadi, *European Countries Agree on Ways to Halt Illegal Migration*, REUTER, Feb. 16, 1993.

99. Title VI, 'provisions on co-operation in the fields of justice and home affairs' . . . is one of the two 'pillars' of the proposed union which the British government is so pleased to have kept separate from the EC proper: an inter-governmental affair, in which national sovereignty will be preserved It means, in reality, that ministers reckon to decide these matters among themselves without the intrusion of public scrutiny or debate.

Mortimer, *supra* note 9, at 21.

100. "These provisions of the Maastricht Treaty . . . do not formally propose a significant extension of official EC competence [C]oordination is to remain primarily at intergovernmental level, and policy can hence continue to be relatively secretive and unaccountable." 18 North/South Issues 3 (1992). It is noteworthy that both the "Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities" ("Dublin Convention") [Art. 18] and the draft "Convention of the Member States of the European Communities on the Crossing of their External Borders" [Art. 26] adopts the intergovernmental supervisory approach.

profoundly, the experience to date shows that the basic commitment to balance domestic self-interest with the human rights of those forced to flee in search of protection is now extraordinarily fragile, even in the very states which crafted the modern international human rights and refugee regimes.¹⁰¹

101. "Considered in the light of the former more hospitable attitude towards asylum seekers, the fact that the idea of individual human rights originated in Western Europe appears now as somewhat ironic. The European 'Enlightenment' produced the related ideas of human rights, separation of powers and the rule of law as the main elements of the modern—constitutional—State. Recognition of—universal—human rights implies in principle also hospitality to asylum seekers." INTERNATIONAL LAW ASSOCIATION, *supra* note 41, at 3.

