

# **The European Union and the Geneva Convention after 9/11: Towards an American or Australian Solution?**

## **Who Makes Immigration Policy? (Workshop 16)**

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### **Introduction**

In recent papers and publications I have examined the extent to which the liberal democratic regime based on the adherence to the Geneva Convention has been undermined in Europe.<sup>1</sup> I argued that the complex effects of 9/11 and the rise of Far Right parties are neither unilateral nor clear. Although the Geneva Convention may have been hallowed out even before 9/11, that event placed a great strain on it. And yet European politicians at the senior level still defended it in the European Union. It had become a benchmark of their liberalism. In this paper I will examine the extent to which American and Australian policies have influenced the shaping of the debate in Europe. And the extent to which the denunciation by European politicians of

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<sup>1</sup> C. Levy, 'European Refugee and Asylum Policy after the Treaty of Amsterdam: The Birth of a New Regime?', in A. Bloch and C. Levy (eds.), *Refugees, Citizenship and Social Policy in Europe*, Macmillan, Basingstoke, 1999, pp. 12-50; 'Asylum Seekers, Refugees and the Future of Citizenship in the EU', in *ibid*, pp. 211-31; C. Levy, 'The Geneva Convention and the European Union: A Fraught Relationship', J. Van Selm *et al.* (eds.), *The Refugee Convention at Fifty: A View from Forced Migration Studies*, Lexington Books, Lanham, Maryland, 2003, pp. 129-44; C. Levy, 'The European Union after 9/11?', NEC Paper No. 109, 2003, [www.anu.edu.au/NEC/publication.html](http://www.anu.edu.au/NEC/publication.html); C. Levy, 'The European Union after 9/11: The Demise of a Liberal Democratic Asylum Regime?', *Government and Opposition*, forthcoming, 2004.

illiberal policies carried out in Australia or the US has in fact disguised the fact that much policy transfer from these two nations to the European Union has occurred.

This paper will be divided into three sections. The first section reviews the position of European Union policy up to the present. It will show that establishment of extra-territorial zones to process asylum seekers and prevent those fleeing from persecution and mortal danger were not American and Australian inventions. And in general the reaction of the European Union to 9/11 was not a watershed in asylum and refugee policy: innovations were inconsistent and patchy on the ground. The second section traces the impact of Australian and American policies on the European Union. Calls for the creation of extra Union 'processing zones' and the modification or abandonment of the Geneva Convention are discussed. The legal black hole of Guantanamo Bay and 'the Pacific Solution' were posited against the liberal legal order of the European Union. And yet both approaches were not lacking their supporters in the European Union. Nevertheless the Geneva Convention defined the liberal image of the European Union, whilst Europe unlike the US or Australia only reluctantly admitted that it was a continent of migration and immigration. In the final section I will try to place the European debate over recent American and Australian policies within the recent innovative contributions of Noll<sup>2</sup> and van Selm.<sup>3</sup>

## **1. Historical Precedents and Present Condition**

It is undoubtedly the case that the events of 9/11 acted as a catalyst for a stricter regime. Thus the fingerprinting of asylum seekers and the exchange of such data was

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<sup>2</sup> G. Noll, 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones', *European Journal of Migration and Law*, Vol. 5, 2003, pp. 303-41; G. Noll, 'Securitizing Sovereignty? States, Refugees, and the Regionalisation of International Law', in E. Newman and J. van Selm (eds.), *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State*, United Nations University Press, Tokyo, 2003, pp. 277-306

<sup>3</sup> J. van Selm, 'Refugee Protection Policies and Security Issues', in Newman and van Selm, 2003, pp. 66-92.

agreed after years of halting discussions.<sup>4</sup> However the securitisation agenda associated with an era of globalised economic and forced migration and hyper-terrorism in the 1990s and early twenty-first century originated in the 1970s, and concerned left and right-wing or nationalist terrorism amongst European citizens, Palestinians and secular Middle Eastern activists. It was born in the secretive conclaves of middle-level officials that have gone on for more than a generation. Transnational and transgovernmental networks of working groups of police offices and civil servants from Ministries of the Interior or Home Offices developed from the 'wining and dining circles' of the 1970s.<sup>5</sup> In order to avoid the annoying opposition of national courts, other more liberal ministries and NGOs, law and order officials employed the mechanism of supranational venues to avoid prying eyes.<sup>6</sup> As has been recently argued, 'Trevi provided a 'security' frame into which migration issues were inserted when they rose up the political agenda from the late 1980s'.<sup>7</sup> Thus an 'escape to Europe' allowed politicians to sanction illiberal policies outside of the framework of their own liberal democratic polity.<sup>8</sup> These policy networks stressed security issues and drove the restrictive practices of 'Schengenland' and the Dublin Convention. Migration control was also shifted from national courts and other ministries to Homes Offices and private entities. Airline officials became *de facto* immigration officials and buffer policies made it virtually impossible for spontaneous asylum seekers to reach most of the European Union without violating the law. Refugee policy in

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<sup>4</sup> E. Brouwer and P. Cruz, 'Concluding Remarks: The Fight Against Terrorism and the Protection of Human Rights', in E. Brouwer, 2003....., pp. 169-70.

<sup>5</sup> V. Guiraudon, 'European Integration and Migration Policy: Vertical Policy-making as Venue Shopping', *Journal of Common Market Studies*, Vol. 38, No. 2, 2000, pp. 251-71; D. Bigo, 'Migration and Security', V. Guiraudon and C. Joppke (eds.), *Controlling a New Migration World*, Routledge, London, 2001, pp. 90-120.

<sup>6</sup> V. Guiraudon and G. Lahav, 'A Reappraisal of the State Sovereignty Debate. The Case of Migration Control', *Comparative Political Studies*, Vol. 33, No. 2, 2000, pp. 163-95.

<sup>7</sup> A. Geddes, ....., p. 130.

Europe had been regionalised.<sup>9</sup> The disastrous policy of so-called safe areas during the Bosnian War or the more effective and noble burden-sharing and joint military actions against a refugee-producing State in the Kosovan intervention emphasised the role of security and military networks. Burden-sharing agreements validated the temporary protection of Kosovar Albanians within Member States' national territory. But spontaneous refugees from Kosovo or elsewhere has to break the law in order to reach the Member States of the European Union to claim asylum.<sup>10</sup> The candidate Member States of the former Communist Eastern Europe at first broadened their international human rights profile by adopting the Geneva Convention and the narrowed it down to Act as 'safe third countries' to prevent asylum-seekers and refugees reaching the West.<sup>11</sup>

With legal routes to entry into the European Union blocked off, the position of spontaneous asylum seekers was further criminalised as the role of smuggling networks grew.<sup>12</sup> The Far and Populist Right fed off the public disquiet this criminalisation produced and thus the well-established and secretive meso-level networks of law and order officials found a new justification for their long-standing policies. The transfer of policy-making from the security-conscious third pillar of the European Union to the legal order of the European Court of Justice located in the first

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<sup>8</sup> J. Hollifield, 'Ideas and Institutions and Civil Society: On the Limits of Immigration Control in France', in M. Brommes and A. Geddes (eds.), *Immigration and Welfare: Challenging the Borders of the Welfare State*, Routledge, London, 2000.

<sup>9</sup> For the best survey, see C. Boswell, 'The 'external dimension' of EU immigration and asylum policy', *International Affairs*, Vol. 79, No.3, 2003. pp. 619-38.

<sup>10</sup> J. van Selm-Thorburn (ed.), *Kosovo's Refugees in the European Union*, London, 2000.

<sup>11</sup> H. Grabbe, 'The Sharp Edges of Europe: Extending Schengen Eastwards', *International Affairs*, Vol. 76, No. 3, 2000, pp. 519-36; S. Lavenex, 'Migration and the EU's New Eastern Boarder: Between Realism and Liberalism', *Journal of European Public Policy*, Vol. 8, No. 1.; S. Lavenex, 'EU Enlargement and the Challenge of Policy Transfer: the Case of Refugee Policy', *Journal of Ethnic and Migration Studies*, Vol. 28, No. 4, 2002, pp. 701-21.

<sup>12</sup> J. Morrison and B. Crosland, *The Trafficking and Smuggling of Refugees: The End Game in European Asylum?*, UNHCR, Geneva, 2000, C. Boswell, *European Migration Policies in Flux...*, p. 61-2; K. Koser, 'Reconciling control and compassion? Human smuggling and the right to asylum', E. Newman and J. van Selm (eds.), *Refugees and Forced Displacement: International Security, Human Vulnerability*, United Nations University Press, Tokyo, 2003, pp. 181-94.

Community pillar of the Union did not easily counterbalance this influence. This nascent legal order will have to overcome a formidable barrier of personal contact and unspoken assumptions or secretly discussed agreements long in place. In any case Court of Justice had little say over asylum and refugee policy in the early twenty-first century. It was thought that the European Charter of Fundamental Rights might form a firmer basis for a judicial framework to protect asylum-seekers and refugees in the future, but events awaited the final denouement of the European Constitution.<sup>13</sup> In the initial years of this century the European Court of Justice had little control over the technocrats and police officials, but neither in fact did the politicians. A joint policy on refugees and asylum seekers was necessarily slow in coming since at the Nice summit, the European Council decided against the introduction of QMV, thus demonstrating 'the enduring reluctance of the Member States to transfer sovereignty'.<sup>14</sup>

The impact of 9/11 is not as clear-cut as one might think. On the one hand, in the European Union of the early twenty-first century, a regime of 'post-national rights'<sup>15</sup> is recognised and the need for migration is acknowledged. But on the other both of these liberal developments are placed within a broader context of managing security risks and public opinion. A regime of more openly accepted labour migration<sup>16</sup> and even the acknowledgement of a 'post-national' regime of rights, should not be 'interpreted simply as the incremental extension of universal rights, but

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<sup>13</sup> G. S. Goodwin-Gill, 'The Individual Refugee, the 1951 Convention and the Treaty of Amsterdam', in E. Guild and C. Harlow (eds.), *Implementing Amsterdam: Immigration Rights in EC Law*, Hart Publishing, Oxford, 2001, pp.141-63; S. Peers, 'Immigration, Asylum and the European Charter of Fundamental Rights', *European Journal of Migration Law*, Vol. 3, 2001, pp. 141-69.

<sup>14</sup> S. Lavenex, 'The Europeanization of Refugee Policies: Normative Challenges and Institutional Legacies', *Journal of Common Market Studies*, vol. 39, no. 5, 2001, p. 865.

<sup>15</sup> T. Kostakopoulou, 'The 'Protective Union': Change and Continuity in Migration Law and Policy in Post-Amsterdam Europe', *Journal of Common Market Studies*, Vol. 38, no. 3, 2000, pp. 497-518; T. Kostakopoulou, "'Integrating" Non-EU Migrants in the European Union: Ambivalent Legacies and Mutating Paradigms', *The Columbia Journal of European Law*, Vol. 8, No. 2, 2002.

rather as a cautious system of management and regulation which can equally involve a limitation or contraction of rights'.<sup>17</sup> Thus the continuity of securitisation of immigration and asylum management, the theme so far pursued in this paper, reflected on the reaction of Member States to 9/11. Thus the UK drew on its past experience in Northern Ireland, whilst the Italians drew upon anti-Mafia laws. The German's deepened a policy of more stringent control and identification of foreigners on German territory. While France and the Netherlands continued and strengthened existing emergency measures already in place.<sup>18</sup> The Europeans may have been disturbed by the detention of individuals by the US in the 'legal black hole' of Guantanamo Bay. But the detention of refugees, asylum seekers and immigrants with less than generous rights of appeal for the detained is and has been part of American and European practice for many years.<sup>19</sup> The regime in Camp Delta and aspects of the PATRIOT Act are now being challenged in the US courts.<sup>20</sup> And in this sense has leapfrogged legal challenges to the UK's version of this legal limbo.<sup>21</sup> The events since 9/11 have not shifted the balance of forces appreciably. In the future there may

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<sup>16</sup> A. Favell and R. Hansen, 'Markets against politics: migration, EU enlargement and the idea of Europe', *Journal of Ethnic and Migration Studies*, Vol. 28, No.4, pp. 581-601.

<sup>17</sup> L. Morris, 'Britain's asylum and immigration region: the shifting contours of rights', *Journal of Ethnic and Migration Studies*, Vol. 28, No. 3, 2002, p. 422.

<sup>18</sup> E. Brouwer and P. Cruz, 'Concluding Remarks: The Fight Against Terrorism and the Protection of Human Rights', in Brouwer, 2003, pp. 169-70.

<sup>19</sup> T. J. Randazzo, 'The Detention of Asylum Seekers in the United States', University of California, Berkeley, 2003.

<sup>20</sup> For initial examination of the PATRIOT Act see, R. Gorman, 'Rushing to Judgement: The Unintended Consequences of the USA PATRIOT Act for *Bona Fide* Refugees', *Georgetown Immigration Law Journal*, Vol. 16, No.2, 2002, pp. 505-3; P. Buchanan, 'Immigration Law Developments in the United States since September 11, 2001', in Brouwer, pp. 149-68; J. van Selm, 'Refugee Protection in Europe and the U. S. after 9/11', in N. Steiner, M. Gibney and G. Loescher (eds.), *Problems of Protection. The UNHCR, Refugees, and Human Rights*, Routledge, London, 2003, pp. 237-61.

E. Alden, 'Court rulings deal blow to US terror policy', *Financial Times*, 19 December 2003, p. 1.

<sup>21</sup> See the masterful analysis of British legislation since 9/11 by N. Blake and R. Husain, *Immigration, Asylum and Human Rights*, Oxford University Press, Oxford, 2003, pp. 336-45. Also see, P. Cruz, 'United Kingdom: Withdrawing from the International Human Rights Standards', in E. Brouwer. P. Catz and E. Guild et. al., *Immigration, Asylum and Terrorism: A Changing Dynamic in European Law*, Instituut voor Rechtsoglie/Centrum voor Migratiericht, Nijmegen, 2003.

M. Bright, 'Revealed: Shocking Truth of Britain's 'Camp delta'', *The Observer*, 14 December 2003, pp. 1,3.

be a clash between 'technocratic Europe' and a 'rights-based Europe': but at the present, even if NGOs can use anti-discriminatory and anti-racism policy instruments and European directives to some effect, high and meso-level policy networks of security officials and Interior Ministers are in the ascendant.<sup>22</sup> While Camp Delta has been challenged by the Europeans. With the US releasing some prisoners due to this pressure and the impending case in the Supreme Court. The idea of using offshore processing zones for asylum seekers and refugees if not for suspected terrorists or enemy combatants, became a major issue in 2003, which I will now turn to in the next section of this paper.

## **2. Into the Zone**

The use of 'off-shore processing' of refugees and asylum seekers saw Australian, American and European Union policy merge around a series of similar arguments. However, as we will see in greater detail in the next and concluding section of this paper, the European Union's road to off-shore zones was unique for two reasons. European policy was driven by two imperatives: the importance of the Geneva Convention to the liberal self-image of Member-States' polities and the inability that Europe was a continent of immigration.

In a survey of parliamentary debates about the reform of asylum and refugee law in Switzerland, Germany and the UK from the middle 1970s to the middle 1990s, a recent study has demonstrated that not a single parliamentarian demanded the renunciation of the Geneva Convention by their country's government. Even advocates of restriction saw the Geneva Convention as a 'constitutive part' of liberal

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<sup>22</sup> V. Guiraudon, 'The Constitution of a European Immigration Policy Domain: A Political Sociology Approach', *Journal of European Public Policy*, Vol. 10, No.2, 2003, pp. 263-82.

society.<sup>23</sup> But since the 1990s, it has been argued that the growth of the Far Right not only threatened 'the self-proclaimed liberal democratic and human rights-based values underpinning the European project' but this threat also undermined 'the practical feasibility of the liberal universalist model for defining asylum policy'.<sup>24</sup> But the argument was muddled because by the 1990s more than 90% of all asylum seekers in Europe were not granted full Convention status but allowed to stay in Member States under ad hoc conditions because they were either displaced from the wars of the Yugoslav wars of succession. Or considered endangered by Home Offices or national courts if they were forcibly repatriated even if they could not meet the stricter standards of proof demanded by the Convention to secure full refugee status.<sup>25</sup> A Member State in the European Union might aspire to a zero immigration policy in the 1990s or during the first years of this century, but it would be bound to accept asylum seekers on its territory so long as it remained a signatory of the 1951 Geneva Convention. And the Treaty of Amsterdam and the declarations at Tampere and Laeken by the European Council consistently reiterated this position. Thus the major themes of the past seven years: harmonisation of asylum and refugee policy and transparent burden sharing of refugee inflows, it was argued, would save, not scupper, the Geneva Convention.

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<sup>23</sup> N. Steiner, *Arguing about Asylum. The Complexity of Refugee Debates in Europe*, Palgrave, Basingstoke, 2001, p.149. Also see L. Schuster, *The Use and Abuse of Political Asylum in Britain and Germany*, Frank Cass, London, 2003, for the German case: 'It would therefore be very difficult for any state to decide, for example to abolish asylum and still plausibly claim to be a *liberal* or *democratic* state. Even the most outspoken opponents of Germany's relatively liberal asylum regime, while advocating draconian restrictions, do not demand that asylum cease to be granted at all. Not only was there no popular mandate for such an action, but the idea of abolishing it would have been outside their own normative vocabulary (p. 55)'. And: 'In the case studies of Britain and Germany the analysis of the debates found that when asylum was discussed, the granting of asylum was indeed spoken as a defining characteristic of a liberal state (p. 263).'

<sup>24</sup> C. Boswell, 'European Values and the Asylum Crisis', *International Affairs*, Vol. 76, No. 3, 2000, p. 537.

<sup>25</sup> Levy, 2003, pp. 129-44.

But as we have seen, in parallel to this harmonisation project, the European Union had created a system of externalising the processing refugees and asylum seekers. Thus safe third countries, readmission agreements, the vetting of passengers by employees of the civilian air travel industry, indeed the entry of new members to the Union itself, pushed the boundaries of the Union further away for would-be asylum claimants.<sup>26</sup> The externalisation of the European Union's refugee policy was joined to two other policies that found their roots in the 1990s, but were given fresh impetus by the British (with considerable assistance from the Austrians, Danish and Dutch) from 2000 to 2004. The aim of both sets of proposals was to tackle forced migration at its source and can be associated with the well-known concept of tackling forced migration at its roots.<sup>27</sup> At the Seville summit of the EU in the early summer of 2002, David Blunkett proposed the tying of future aid to developing countries to their co-operation at curbing illegal immigration.<sup>28</sup> Although embraced by many of his fellow Interior Ministers, it was felt too illiberal by the Heads of Government and State. They thought that tying the continuation of aid to the effectiveness of developing countries curbing emigration a violation of the spirit of the Geneva Convention and the international rights regime that formed part of the European model.

A more consistent and far more serious threat to the Geneva Convention has been the proposed policy of externalising refugee management and control through the processing of claims in camps outside the European Union.<sup>29</sup> This has its antecedents in the previously discussed policies of 'safe areas' and camps that were

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<sup>26</sup> Lavenex, 2002; D. Bouteillet-Paquet, 'Passing the Buck: A Critical Analysis of the Readmission Policy Implemented by the European Union and its Member States', *European Journal of Migration of Law*, vol. 5, 2003, pp. 359-77.

<sup>27</sup> For a recent analysis of the root cause approach see, C. Boswell, 'Preventing the Causes of Migration and Research Flows: Toward a EU Policy Framework', *New Issues in Refugee Research*, UNHCR, Geneva, 2002.

established in the Yugoslav wars of the 1990s and the Dutch inspired suggestions by the High Levy Working Group on Asylum and Migration Policies in 1999. However, these systems of externalisation and temporary protection<sup>30</sup> were seen as ways to preserve the sanctity of the Geneva Convention and were, unfortunately, sponsored by UNHCR.<sup>31</sup> The various British and Danish plans of the last few years envisage their systems as a replacement for Geneva. A similar plan was flagged at by the Austrian presidency in 1998 and discussed at Tampere in 1999, but was shot down by the French and Germans. They felt that the Austrian suggestions were a direct threat to the principle of *non-refoulement*, which confused the issues of asylum and economic migration. But in the spring of 2000, at the European Conference on Asylum, sponsored by the then current Portuguese Presidency of the EU, the British Home Secretary, Jack Straw, called for a redrafting of the Geneva Convention.<sup>32</sup> His plan had much in common with the previous Austrian plan and he suggested an international quota system under which European countries would share asylum seekers from countries recognised as violators of human rights. Straw seemed to confuse temporary protection with the Geneva Convention system of individual determination of cases. The system would also undermine the concept of *non-refoulement* by creating an ad-hoc system of safe countries.

However his suggestions were not immediately successful. But the matter was not allowed to rest. And in the spring of 2003 the British government released a 'vision paper' that rapidly became the basis for a discussion between the EU and

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<sup>28</sup> C. Boswell, *European Migration Policies in Flux*, , London, 2003, p. 106.

<sup>29</sup> See, Boswell, 'The External Dimension', 2003.

<sup>30</sup> K. Koser and R. Black, 'Limits to Harmonisation: The "Temporary Protection" of Refugees in the European Union', *International Migration*, Vol. 37, No. 3, 1999, pp. 521-43.

<sup>31</sup> E. Roxtröm and M. Gibney, 'The Legal and Ethical Obligations of UNHCR. The Case of Temporary Protection in Western Europe', in Steiner, Gibney and Loescher, 2003, pp. 56-7.

<sup>32</sup> J. Straw, 'Towards a Common Asylum Porcedure', European Conference on Asylum, Lisbon, 16 June 2000.

UNHCR.<sup>33</sup> This advanced the developing of 'transit processing camps' outside the EU and 'regional processing centres' closer to the countries of origin in the developing world. The plan however not only drew on Straw's original foray but the work of the Danes who lobbied for reception in region during their Presidency in the second half of 2002. Indeed it has been argued that the Danes let the British 'take the heat' for this series of controversial proposals: which were considered 'superb' by the leader of the Far Right Danish People's Party.<sup>34</sup>

Ruud Lubbers, UNHCR High Commissioner, responded immediately with a three-pronged approach that envisaged a role for UNHCR in the global management of the system, especially in partnership with the EU in aiding countries of origin to build capacity to manage migration flows. The deepening of a root causes approach in this respect was not controversial but it remained to be seen if the EU would ever supply the financial resources sufficient to underwrite this form of global burden sharing.<sup>35</sup>

The suggestion of establishing 'transit processing centres' was more controversial and demonstrated the transfer of models used by the Australians in the off-shore processing of refugees since 2001<sup>36</sup> and the former usage of Guantanamo Bay by the Americans as a processing point for Haitians and Cubans. Indeed, even the European Union's own policy in Macedonia and Albania during the crisis of Kosovo of 1999. We will shortly return to the Australian case in the concluding section of this

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<sup>33</sup> For a detailed discussion see Noll, 'Visions of the Exceptional', 2003.

<sup>34</sup> Noll, 2003, p.305.

<sup>35</sup> G. Loescher and J. Milner, 'The Missing Link: the Need for Comprehensive Engagement in Regions of Refugee Origin', *International Affairs*, Vol. 79, 2003, pp. 583-617.

<sup>36</sup> For detailed analysis of the Australian policy, that seems to violate the spirit and the law of the Geneva Convention and other international laws see, A. Schleonhardt, 'To Deter, Detain and Deny: Protection of Onshore Asylum Seekers in Australia', *Journal of International Refugee Law*, Vol. 14, No. 3, 2002, pp. 302-28; C. Marie-Jeanne Bostock, 'The International Legal Obligations owed to Asylum Seekers on the *MV Tampa*', *International Journal of Refugee Law*, Vol. 14, No. 3, 2002, pp. 279-301; A. Edwards, 'Tampering with Refugee Protection: The Case of Australia', *International Journal of Refugee Law*, Vol. 15, No. 2, 2003, pp. 193-211.

paper. But it can be argued that the British proposal was more radical than the 'Pacific Solution', since it argued for the deportation of asylum seekers already within the territory of the EU to the transit processing centres. The Australians invented the 'Pacific Solution' precisely to prevent asylum seekers from touching Australian soil and thereby forcing their claims to be heard in country.<sup>37</sup>

At the meeting of the European Council of March 28<sup>th</sup> 2003, David Blunkett suggested that Albania and Croatia become venues for the screening of all refugees in Europe. This in effect would make it impossible for spontaneous asylum-seekers to seek asylum in a Member State and effectively make all such attempts illegal. An international quota system would thus replace the right of asylum for the individual fleeing persecution. Temporary refugees caused by ethnic cleansing or war and the individual asylum-seeker would thus, it seems, be treated officially under the same regime. In some ways, making plain, the system which in fact on the ground had been developing since the wars of the Yugoslav succession.

But even Blunkett's return to the 'Straw Plan' met with objections. Although many Member States seemed to endorse it, they also wanted the blessings of Ruud Lubbers, UNHCR High Commissioner. He would only approve the plan if it *was located within the EU* and only entailed processing claimants from 'safe countries': in other words the purpose of the 'vision paper' was undermined. The Germans and Swedes objected to the plan on principled grounds. The Swedish Minister for Immigration, Jan O. Karlsson declared, 'We are against any sort of system that would deny people the right to apply for asylum in the country they have sought refuge in'.<sup>38</sup> Although one report of the meeting implied that Otto Schily objected to the plan because it would reduce the distance asylum seekers would have to travel and thereby

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<sup>37</sup> *Migration News Sheet*, July 2003, p. 13.

<sup>38</sup> *Migration News Sheet*, July 2003, p. 13.

increase the total number of asylum seekers the European Union would have to process.<sup>39</sup> Meanwhile the European Commission Communication in June distanced itself from the UK position and emphasised the need for burden-sharing within the EU. The European Council Presidency Conclusions at Thessaloniki on 19-20 June 2003 emphasised the sanctity of the Geneva Convention and by now the British withdrew their proposal from the EU and seemed intent on pursuing it with a coalition of the willing (the Danes and the Dutch). But this does not mean that the proposal is dead in the water. First it should be recalled that variations on this theme have been floated from 1998 and in a certain sense were in operation in the Balkans in the late spring of 1999. Secondly, a coalition of the willing could still eventually bring this policy to fruition at the European Union level. For instance, the Danish parliament passed a law in 1986 which is considered to be the precursor of the concept of the 'safe third country', which as I write is being discussed by the Irish Presidency in order to be transformed into a Directive for the forthcoming May deadline. Albeit under the fierce criticism of NGOs, UNHCR and the Secretary General of the United Nations.<sup>40</sup> The process of a single or a smaller group of like-minded member states instituting a policy decision at the national level, then flying it as Community soft law and then transforming it into hard Community law may be torturous but it can be relentless nevertheless.

### **3. 'The Other', Policy Transfer and Learning and Garbage Cans**

So how have the US and Australian practices affected EU asylum and refugee policies? First we should separate the impact of 9/11 and the Camp Delta. I have argued that European Union member states demonstrate continuity with past practices. Even the British derogation of European rights legislation in order to detain

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<sup>39</sup> D. Dombey, *Financial Times*, 29 March 2003, p. 12.

<sup>40</sup> Noll, 2003, p. 310; I. Black. 'EU's 'safe country' asylum plans attacked', *Guardian*, 30 March 2004.

terrorist suspects who could not be refouled because of the prohibitions of the anti-torture convention recalls the fact that Britain remained outside this legal order precisely because of the Troubles in Northern Ireland. The Americans had to promise the Europeans that extradited terrorists suspects would not be subject to capital punishment. In this respect this is just part of the same liberal self-image that the Europeans burnished through their rhetorical endorsement of the Geneva Convention during the Cold War and its aftermath.<sup>41</sup> On the other hand, the assault on the Geneva Convention has certainly found ammunition from the examples of Guantanamo Bay's former usage as a detention centre for Cuban and Haitian migrants. And as Noll shows there is abundant evidence that Danish and British memoranda and joint meeting of the Danes, Dutch and British in 2002 and 2003 were strongly influenced by the Australian example. Australian influence arrived separately and directly to Danish and British policy makers.<sup>42</sup> Though it is strange that the same policy makers did not either acknowledge that the Cuban and Haitian campaigns were seen as expensive failures by the Americans themselves.<sup>43</sup> And that the Australian 'Pacific Solution' has been shown to be an extraordinarily (not to say illegal and brutal) expensive method to dissuade 'boat-people' from making a landfall on Australian territory.<sup>44</sup> In any case one suspects that much of the British, Danish and Dutch policy lobbying for the moment is grandstanding. Governments that were elected to be tough against asylum seekers in the Netherlands or Denmark could be seen to be doing their level best to appease their electorate. While the Blair government promised to halve the intake of refugees and asylum seekers and this could underscore its intentions to

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<sup>41</sup> Levy, 2004.

<sup>42</sup> Noll, 2003.

<sup>43</sup> IGC, *Reception in the Region of Origin. Draft Follow-Up to the 1994 Working Paper*, Geneva, 1995.

<sup>44</sup> Noll, 2003, p. 328.

the British public. But beyond the contingent, short-lived but nevertheless important effects of the electoral cycle, it is possible to make some broader conclusions.

First one might look at this as a long-term process of turning the refugee and the asylum seeker in to the European's 'other': who on the one hand reaffirms Europe's liberal values but must be kept at arms length due to the present and continuing emergency.<sup>45</sup> In this respect, although the effect of 9/11 on the policy of treating refugees and asylum-seekers is complex and not as unilateral as one might think.<sup>46</sup> Nevertheless, it certainly must be the case that gradual separation of the 'bogus' and even the 'genuine' refugee from the body politic, has seeped into the public's heightened fear of terrorism and the recent alarms about the impact of migration from the new eastern Member States. Thus it is instructive to view the growing sense of crisis in Britain where rows over forced and economic migration are beginning to pose a real threat to the very government (Tony Blair's) which was such a motive force in the frontal assault on the Geneva Convention. Thus as I write the Blair government is being accused of making a deal with the Romanians to allow them rather easier entry into the UK as economic migrants so long as their government reduced the number of their fellow citizens from claiming asylum in the UK! Whether or not this true, it shows that continual pressures for labour migration make it difficult for the British government or other member states from being too rigorous about their policy of 'otherness' or zone building. In this respect the heartfelt cries of Noll who sees zone building as method to create places of the exceptional. In which, as he puts it, the British decrying of the injustice of the global refugee regime is resolved through 'locating the refugee outside the domain of justice', is probably overdone.<sup>47</sup> Overdone because the unintended effects of policy ties the toughest advocates of

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<sup>45</sup> On the refugee as the European 'other' see,

<sup>46</sup> Levy, 2004.

restriction who can still be considered within the parameters of liberal democracy (such as Blair or Blunkett) in rather difficult knots.<sup>48</sup> Too banal because the worst has already happened at Srebrenica nearly a decade ago when a 'safe haven' became a killing field in the heart of Europe.

In more mundane fashion one might look at broader context of policy transfer and emulation between the US, Australia and the EU. Lavenex and Uçarer have looked at the external influences of the EU on a series of concentric circles of EU partners (the rump EFTAs, the candidate member states, Mediterranean and Balkan states, and the ACP states). They create a sensitive and sophisticated explanation of emulation and anticipated response by cases lying closest or close to the EU and indifference by others.<sup>49</sup> However, the editors of this valuable volume do not examine policy transference between the US, Australia, Canada and the EU.

In an interesting comparative essay, van Selm does this for the Americans, Australians and Europeans.<sup>50</sup> Van Selm argues that policy is converging in all three cases even if they start from widely different points. Thus the Americans and the Australians both have clearly enunciated policies of fostering immigration and accepting refugees and asylum seekers. The Australians have always been more focused on controlling their intake of economic migrants for racial and more continually for certain skills-based criteria. Like the Australians, the Americans have also had policy informed by racial criteria until the last half of the twentieth century but were less concerned about keeping their quotas merely filled with the English speakers. In both cases the aim of immigration was to recruit new citizens into their

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<sup>47</sup> Noll, p. 338.

<sup>48</sup> These 'knots' are also discussed at the European Union level by Guiraudon, 2003.

<sup>49</sup> E. M. Uçarer and S. Lavenex, 'Ripples of European Integration: Modes and Consequences of Migration Transfer', in S. Lavenex and E.M. Uçarer (eds.), *Migration and the Externalities of European Integration*, Lexington Books, Lanham, 2002, pp. 209-221.

societies. And in both cases this factor determined their policy towards asylum seekers and refugees.

Refugees and asylum seekers were part of the American Cold War. In this respect refugees and asylum seekers were selected by the Americans, certain categories of spontaneous arrivals were not welcomed. Australians feared spontaneous arrival for similar existential reasons. Boat people arriving over the horizon breached the 'security' of the nation. The quota system could be invoked to demonstrate the humanitarianism and solidarity of the Australian people, while serving as a handy stick to beat the recently arrived boat people who somehow jumped some imaginary global queue of refugee patiently waiting their turn. The Europeans have emphasised the sanctity of the Geneva Convention and refused to acknowledge the constant flow of economic migrants or new citizens into the continent even after the so-called labour stop in 1973-1974. But the Europeans have been in the forefront of creating a system of temporary protection so that refugees do not stay longer than they should: the Americans and the Australians have seen landed refugees as there for the duration, as merely another group to be guided towards citizenship.

Nevertheless, in all three cases policy transfer and convergence has developed apace. Thus temporary protection, zones and interdiction of refugees on the high seas is now the common property of all three examples discussed here. Van Selm suggests that the way forward is to replace the ideology of control with the management of the flow of forced migrants. Management implies that countries would engage a variety of policies: dialogue would replace the lowest common denominator. And it should not be forgotten that the ideology of control has never always had it own way: the

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<sup>50</sup> J. van Selm, 'Refugee protection policies and security issues', in Newman and van Selm, 2003, pp. 66-92.

Geneva Convention has spread or been fully instituted over the past thirty years in Spain, Italy, eastern Europe, and Turkey to cite just a few examples. Even the treatment of asylum seekers in Moscow is discussed in the British press.<sup>51</sup> And there has been another form of libertarian policy transfer. Thus a recent review of UNHCR's global consultations mentions the growing recognition that the Geneva Convention must recognise the victims of non-state actors, and sexual and gender forms of persecution<sup>52</sup>: the exceptional regime of the zone can be replaced by capacity building, pragmatic planning and the solidarity of civil societies.<sup>53</sup>

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<sup>51</sup> N. P. Walsh, 'Skinheads thrives as nationalist tide rises in Russia', *Observer*, 4 April 2004, p. 23.

<sup>52</sup> E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law. UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge, 2003. Also see, J. van der Klaauw, 'European Asylum Policy and the Global Protection Regime: Challenges for UNHCR', in Lavenex and Uçarer, 2002, pp. 33-53.

<sup>53</sup> Loescher and Milner, 2003.