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IMMIGRATION, REFUGEE AND ASYLUM MATTERS & PUBLIC POLICY

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Preface

We often imagine the world's borders as fixed lines on a map: the winding path of the Rio Grande, the rigid demarcation between Libya and Egypt, the jagged coastline of China. Yet, in truth, the world's borders are in a state of constant flux. Revolutionary communications technologies and the opening of international trade routes have made them more fluid than ever before. At the same time, shifting legislative priorities have rendered them paradoxically more rigid. Since 9/11, the United States and other Western countries have tightened restrictions on immigrants and asylum seekers in an attempt to bolster security, while increasing the number of visas granted to highly skilled workers of other nationalities to come work in the US. The push and pull between these competing forces has ignited an intense and urgent debate about who can cross national boundaries - and why.

The idea behind this issue of The Georgetown Public Policy Review was to capture some of the many facets of the debate surrounding immigration, refugee and asylum policy. Who are the actors that shape the movement of people across nations? How can the US balance national security priorities with its long tradition as a refuge for immigrants and asylum seekers? How can the international community work coherently to protect the rights and meet the needs of those who have fled their country due to war, persecution or famine? These are just some of the complex questions that this issue of The Review seeks to address.

People cross the world's borders for reasons that are both individual and universal: to build a better life, to seek refuge from the ravages of war, to flee persecution or natural disaster. Every country's policy towards immigrants, refugees and asylum seekers has both national and transnational implications: it impacts economic growth, influences foreign policy and helps define national values. In “Immigration Policy and Reform,” US Senator Mel Martinez - the only immigrant in the US Senate - speaks thoughtfully about how to shape US policy towards illegal immigrants in a way that is fair, compassionate and true to American values. Johanna Avato asserts that contrary to commonly-held belief, Europeans from various regions fare differently in the US labor market, while Deanna Ford offers an interesting perspective on how microfinance institutions in Latin America could better harness the development potential of remittances. Both insightful analyses underscore how interconnected the world’s economy has become.

As globalization blurs the lines between nations, national crises become global concerns. With the advent of the Internet, a tsunami in Indonesia, a hurricane in New Orleans and a brutal conflict in Sudan are not only local tragedies, but events that challenge all of us to respond. How do governments and international organizations deal with asylum seekers? What rights of refugees should the international community work to protect? Heleen Bouscher provides an historical perspective on the formation of the concept of a “refugee” at the 1951 Geneva Convention, while Ming H. Chen takes an in-depth look at how administrative structures in the US affect the outcomes of asylum claims. Alice Poole examines how
current efforts support (or fail to support) African refugees’ right to education and raises the
question, “Are the world’s wealthiest nations fulfilling their moral responsibility to help the
world’s poorest and most vulnerable?”

Two provocative pieces suggest that US and European security concerns have overtaken
immigration, refugee and asylum policy at the expense of humanitarian efforts. An interview
with Bill Frelick of Human Rights Watch addresses how changes in US asylum policy may
unjustly prohibit some asylum seekers from obtaining residency in the US. Marat
Kengerlinsky takes a look at how increased controls on non-EU nationals threaten the
European community’s commitment to protecting international human rights. Both pieces are
timely - as the US debates its own responsibility to grant asylum to Iraqi refugees - and pow-
erful - as these decisions are fraught with serious moral and security implications.

The world’s borders are constantly shifting. In this issue of The Review, we have sought to
examine the people, organizations and policies that define the shape of those borders. We
hope that you find the articles and interviews in our journal compelling and thought-provok-
ing. With the launch of The Online Review at www.gppr.org, we are proud to mark a ground-
breaking year at The Review. We hope that you will return to our print and online editions in
the future.

JOANNA MIKULSKI
EDITOR-IN-CHIEF
Immigration Policy & Reform
Interview with US Senator Mel Martinez

KATHRYN CLABBY

Senator Melquiades "Mel" Martinez, a first-term Republican Senator representing Florida, is the only immigrant in the US Senate. At the age of fifteen, he emigrated from Cuba to Florida, as part of “Operation Pedro Pan,” a humanitarian program that helped Cuban children escape communist Cuba. Recently appointed by President George W. Bush to serve as the General Chairman of the Republican National Committee (RNC), Senator Martinez played a key role in the passage of the Senate’s immigration reform bill in 2006. Before his election to Congress, he served as the Secretary of Housing and Urban Development (HUD) under President George W. Bush. The Review’s Kathryn Clabby and Brent Wisner sat down with Senator Martinez in December 2006 to discuss his views on immigration policy and the prospects for reform.

Why do you think immigration garnered so much attention in the past year?

It’s an issue that has become very emotional. It has hit an emotional chord because it has to do with the rule of law, which people consider important. Immigrants are viewed as people who have broken the law and who also might change our culture - which is a big mistake. That doesn’t happen, I don’t believe. It hasn’t happened in the history of our country... On the other side, you have people who are here, who have been here, who are a part of our society and making a contribution. Add to that, the number of immigrants that have come in such a short period of time. When all of that comes together, it makes for a volatile mix.

Following up on your comment about American culture, when you think about immigrants coming here and integrating into our society, what are the most important values or behaviors that make one American?

I was an immigrant myself. I understand that it’s fundamentally important that immigrants, while maintaining their identity of who they are and where they come from, also accept the principles of what it means to be American. That’s part of the immigrant experience - the acculturation. To be an American doesn’t mean to be a part of a racial group - it never has. To be an American doesn’t mean to be of an ethnic origin. But it means to value the principles of democracy, the principles that are enshrined in our basic documents - our Constitution and Declaration of Independence - those documents that fundamentally forged the compact of the

Acknowledgements: The author thanks the editorial staff for their support and advice.

American people with their government. I think one of the great things that America has that others can learn from, and that immigrants to this country understand once they get here and become a part of the American experience, is the involvement of community and civil society. Civil society is so important to the success of a society and is fundamental to the success of America. Even when Alexis de Tocqueville was writing on America in the 1830's, he noted that. It really hasn't changed.

You were instrumental in the passage of the immigration bill in the Senate last year. How did you envision that bill making a difference in immigrant communities?

The bill tries to do a comprehensive job of immigration reform. It looks at the issue in its complexity, and all of the facets of the problem. One of these facets is border security because, while we are an open country and we do welcome immigrants, it has to be orderly. But, unfortunately, for more than twenty years, we have had a broken system.

So the Senate bill attempted to not only create some order out of the chaos on the border, but also look at the people who are already here with an understanding heart. The deportation of 12 million people is impractical and inappropriate, and probably un-American. In dealing with them, we have to find a way - without only an out-and-out amnesty - to provide for some steps, some penalties, to bring them out of the shadows and into the mainstream.

Then in order to be successful in stemming the flow of illegals across the border, we created a guest worker program to provide for the necessary workforce that our country needs. If we do that legally, then we discourage illegal crossing. And doing it legally is much more humane because families can travel back and forth to see other family members. They can live in a legal world rather than in this underground world where they are subject to abuse and where they have no opportunity to travel across the border.

Frankly, it is not a perfect bill, but it certainly was a pretty good stab at a comprehensive solution for a problem that - to just suggest is a border problem - is really to overlook the human need for a broader solution.

What are the key factors for success for a guest worker program?

...There is a big question about what happens to [guest workers] once they are here. Do they stay here forever or do they come and go? I'm one who believes there should not be a permanent worker class that has no opportunity for citizenship. The opportunity for citizenship ought to be made available at some point, depending on the length of the stay of guest workers. I think its very, very important that we don't view [guest workers] as a permanent group of people who are just going to be here to work, because you will create enclaves of people who will never buy into the American dream, who will never buy into being an
American. I fear that we may have that already.

I run into so many people that are wishing and hoping that we solve this problem of immigration. They come to me and say, "I have lived here for 18 years; I have kids in school." I recently had one [person] say "I don't want to be a citizen; I just want to be legal." These people at some point become so disenfranchised from our system that they become the very worst that we would want - people who are living here but who have not bought into the American system. That's why - when the immigration demonstrations took place [this past year] - it was so easy for many [immigrants] to wear the Mexican flags because they felt more Mexican than American. They feel unwelcome.

In terms of the 12 million people that are already here, how do you think the current process for becoming a citizen needs to change?

First of all, there has to be a legal status to start with [for the 12 million]. How do you get to a legal status for the 12 million is one issue, but then in the broader sense of how do immigrants become citizens, I think it's important that immigrants make an effort to understand the American system, that they attend citizenship classes, and that we share a common language, which is English. While I am very proud of my Spanish heritage, and I've made sure my children have learned the Spanish language, I also understand that this is an English-speaking country, and it should remain so. English proficiency is important. Having met those requirements, then I think all those who are here ought to have a path to citizenship to avoid creating an enclave of people that are hopelessly outside of the system.

For both temporary guest workers and for immigrants who are on the path to citizenship, what types of benefits, such as health care benefits, should we be providing?

For guest workers, it ought to be incumbent upon the employers to provide health benefits. I think that ought to be a part of that agreement. If you are going to bring a guest worker into this country, and that process is going to benefit your business, then the government expects you to provide this worker with a livable wage and health insurance, so that they do not become a burden on our society, local governments, and local hospital districts, which is very unfair. I don't think that those who come as guest workers ought to fall into government-rendered unemployment services...

For some of these issues, you can come up with as many questions as there can be answers, and I'm not sure I have a ready answer for all of them. I think to me, we ought to hearken to private sector answers as we're bringing workers into the country.

Immigration reform bills passed both the Senate and House this past year. What are the prospects for immigration reform in the 110th Congress?

I don't think the bill that passed the Senate or the bill that passed the House will ever be what the immigration reform bill is ultimately. I think the House approach is certainly dead. A comprehensive bill will pass the next Congress. I really believe it will. I think it will look a lot more like the Senate bill than the House bill. But it probably won't be exactly like the 2006 Senate bill. I think the basic components of work security, guest worker, and doing something about the 12 million people already here are
going to be in any bill you see. Some of the
details may vary. Hopefully I will be
involved in the debate.
Tapping the Development Potential of Migration through MFIs

DEANNA FORD

This paper analyzes the impact of migration and remittances on economic development in Latin America and the ways in which microfinance institutions (MFIs) can help maximize that impact. By offering lower transfer costs, financial services, and business training services, MFIs can help channel remittances directly into productive investment opportunities in developing countries and capture the benefits of remittances for economic development. Furthermore, through continually engaging and providing attractive services for the migrant community, MFIs can encourage return migration and therefore reduce "brain drain," which plagues many low-income countries. This paper also presents a conceptual framework to understand how MFIs can be used to help facilitate a cycle of productive circular migration and return with long-term benefits for both labor-sending countries in Latin America and migrant-recipient countries, such as the United States. This process, however, requires policy assistance on both sides of the border in order to build an internally coherent process of migration that directly contributes to long-term sustainable economic development.

The Inter-American Development Bank estimates that in 2006 Latin American and Caribbean countries received $45 billion in migrant remittances sent from the United States. These remittances are private income transfers from migrant wage-earners in the US that provide additional income to their poorer families abroad. With this additional income, such families are able to increase their resources and improve the opportunities available to them in their home countries. Given both the vast sums of money channeled to Latin America through remittances and the underdeveloped state of the beneficiary economies, it is critical that these countries more actively convert the new wealth into a driving force for sustainable economic development. Unfortunately, evidence indicates that the development potential of remittances is grossly under-realized. Migrants in the US sending remittances often use expensive money transfer services because they do not have access to or knowledge of cheaper services offered through banks and other financial service providers due to legal, regulatory or language barriers. Further losses occur because a lack of information, knowledge and opportunity among recipients of remittances prevent them from using the money for productive investments in business or education. Furthermore, remittance recipients largely remain outside established financial systems, both unaware of and isolated from the benefits of credit and savings. Due to these inefficiencies,

Acknowledgements: Many thanks to Manuel Orozco, Lindsay Lowell, and Shelton Davis for their guidance and feedback.

recipient countries forfeit an important opportunity to harness these assets for long-term financial and economic development.

Not only are the potential benefits from remittances under-realized, but other non-monetary detrimental effects of migration are also frequently overlooked. Though migration offers increased income-generating opportunities for populations in poorer countries, "brain drain" - the mass emigration of talented, trained and educated individuals from one country to another in search of more opportunity - can be a significant source of economic and human capital loss for developing nations. Further arguments have been made that the greatest benefits from migration come from return migration, when migrants bring financial, social and human capital back to their home country (Ammassari and Black 2001). Instead of reaping the valuable effects of return migration, however, these countries generally experience a net loss of human and economic capital.

Policymakers and researchers continually seek better ways to channel the benefits of migration and remittances toward the long-term economic development of labor-sending countries. Specifically, microfinance institutions (MFIs) have gained much attention over recent years for their capacity to capture the volume of remittances for microenterprise development. In addition, MFIs have the ability to serve traditionally marginalized migrants and remittance recipients directly by offering services that encourage and facilitate investment in microenterprises. In providing financial services (i.e., business loans and savings instruments) and business training assistance (such as accounting, marketing and financial management), MFIs can help families direct their remittances toward economically advantageous investments. Such assistance, in turn, can encourage return migration, thereby capturing the full potential of remittances and migration for long-term, sustainable economic development in Latin American countries.

**Barriers to the Effective Use of Remittances for Microenterprise Development**

"Not only are the potential benefits from remittances under-realized, but other non-monetary detrimental effects of migration are also frequently overlooked."

The "new economics of migration" theory emphasizes the nature of migration as a family decision, acting collectively to maximize family income and using migration as an insurance mechanism to reduce financial and political risks in their home countries with outside sources of income (Stark and Bloom 1985). In other words, individuals initially migrate in order to improve the existing circumstances for their families at home. Evidence that migrants over time reduce the amount of remittances sent (MIF 2003) suggests, however, that migrants' ties to their home country eventually weaken the longer they remain in the US. Furthermore, there is strong evidence that increasingly restrictive US labor migration policies have led to the large scale transition over recent decades from temporary, circular migration patterns to permanent immigration (Massey 2004). Whether due to deficient opportunities in the home country, changing labor/migration laws or a simple loss of connection with their home countries over time, migrants appear to shift their focus to the host countries and decide not to return home. Acknowledging this trend will compel policymakers to improve the incen-
tives that keep migrants connected to their home communities. By solidifying the connection between migrants and their home countries, the country of origin stands to benefit substantially through these individuals' contributions to economic development.

The following table shows the extent of remittance flows from the United States to several Latin American countries in comparison to other economic indicators. The comparison illustrates the financial magnitude of remittances as self-driven, earned, private income transfers, which, if used more effectively, could greatly alleviate the need for development assistance currently directed toward these countries. The supplemental income that remittances provide is especially important in low-income countries where social protection mechanisms are inadequate or nonexistent.

Remittances can also allow low-income families to invest in small businesses or other capital ventures. Economic and social commitments surrounding the migration process often result in joint investment projects between migrants and their home country families (Jaramillo 2004). As Figure 1 indicates, in 2003 and 2004 a small but notable portion of remittances was spent on business ventures in Central America.

A number of barriers, however, prohibit the effective use of remittances for business development in these countries. Remittance recipients often lack ready opportunities for investment, particularly in underdeveloped rural areas. In addition, even if investment opportunities do exist, the home country often lacks the mechanisms that would allow potential low-income entrepreneurs access to the loans necessary for starting a business. Money from remittances greatly contributes to startup capital, but it is often insufficient to cover total costs. Under these circumstances, individuals must rely on informal credit sources, such as friends and family, to supplement the funding from remittances in order to cover total startup costs. Furthermore, underdeveloped education systems typically result in widespread human capital deficiencies and an overall lack of business training opportunities that inhibit business development. This void could either deter individuals from investing in the first place or cause them to invest unwisely, both of which can have negative consequences on an individual and the overall economy. Finally, evidence suggests that less developed countries have significant regulatory and institutional obstacles to business investments by new entrepreneurs attempt-

Table 1: Remittance flows to Mexico and Central America, 2005

<table>
<thead>
<tr>
<th>Country</th>
<th>Remittances as...</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>US (millions)</td>
</tr>
<tr>
<td>Mexico</td>
<td>20,034</td>
</tr>
<tr>
<td>El Salvador</td>
<td>2,830</td>
</tr>
<tr>
<td>Guatemala</td>
<td>2,993</td>
</tr>
<tr>
<td>Honduras</td>
<td>1,763</td>
</tr>
<tr>
<td>Nicaragua</td>
<td>850</td>
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</tbody>
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* Official Development Assistance


Figure 1: Remittances Spending on Businesses and Savings, 2003-2004

ing to start formal microenterprises (World Bank 2006a).

Related problems in the transfer of remittances also reduce their effective use as a tool for economic development. Although transfers are typically directed towards poor families, these transfers can lose significant value through transaction costs such as transfer fees and exchange rate profits. Migrants often opt to use high cost money transfer services instead of lower cost banks or credit unions because they are largely unfamiliar with the formal banking system or face legal issues with migrant status (Suro et al, 2002).

Policymakers and researchers have been seeking solutions to these problems in order to help facilitate the flow of remittances, particularly toward product investments. A groundbreaking solution that has gained much attention in recent years is the potential for MFIs to serve the needs of remittance recipients. In 2004 the Inter-American Development Bank (IADB) launched a $1.6 million project called "Mobilization of Remittances through Microfinance Institutions," operating in Bolivia, Colombia, Haiti, Nicaragua and Peru. The project aims to increase the productive use of remittances through MFIs by incorporating remittance recipients into the formal banking system (IADB 2004b). A model example of a successful MFI remittance program is Banco Solidario, operating between Spain and Ecuador, that offers a low cost remittance transfer service coupled with credit opportunities and a "Mi Familia, Mi Pais, Mi Regreso" ("My Family, My Country, My Return") savings account particularly aimed at encouraging return migration (Sander 2003a). Though it is still young, the MFI movement has vast potential for remittance recipients, microenterprise development and long-term sustainable economic development in Mexico and Central America.

OVERCOMING LONG-TERM STRUCTURAL BARRIERS

A number of longer-term obstacles also continue to block the effective use of remittances for microenterprise development in Mexico and Central America, further hindering the effectiveness of MFIs. First, underdeveloped financial systems constrain the expansion of MFIs and remittance-based services. Second, residents served by the underdeveloped financial systems are largely unfamiliar with the benefits of banking and the services that they can offer investors and entrepreneurs. For example, while a majority of remittances are distributed through financial institutions, only a small portion of remittances recipients actually have bank accounts. In contrast, MFIs and credit unions, which supplement deficient financial services in many under-served areas, have been shown to have relatively more success with channeling remittances into bank accounts, thereby bringing remittance recipients into the formal banking system (IADB 2006). Increasing the amount of remittances received through either MFIs or credit unions can therefore raise financial participation and facilitate overall financial development in migrant-sending countries. In fact, services of credit unions to remittance clients have expanded greatly over

"The business and financial services offered by MFIs have the potential to not only introduce incentives for remittance spending in migrants' home countries, but also to affect decisions of migrants abroad. ..."
recent years, particularly through the World Council of Credit Unions (WOCCU). Credit unions, however, do not directly encourage microenterprise development in the specific ways that MFIs do.

A variety of legal and regulatory issues also inhibit the effective, efficient and transparent flow of remittances and functioning of MFIs. Many donors, governments and other policy actors do not view microfinance as an industry in and of itself, but instead view microfinance as a vehicle to serve microenterprise development. This misconception results in a weak institutional framework that undermines the strength and robustness of the industry (CGAP 2006). The weakened institutional framework often accompanies a lack of state government capacity to implement the reforms necessary to correct for these failures. Private firms and banks, NGOs and international organizations will need to continue to put pressure on these governments for effective reforms in this area.

**POTENTIAL IMPACT OF BUSINESS DEVELOPMENT SERVICES IN THE REMITTANCE MARKET**

Successful microenterprise development is also severely inhibited by human capital constraints. Poor education systems in developing countries and a lack of previous business experience lead to a general dearth of the skills and knowledge necessary to start and manage successful businesses. Policy has recently focused on the importance of providing business development services to existing microenterprises, but little attention has been focused on the importance of these very same services to potential microentrepreneur remittance recipients. Business development services are training and consulting services provided to micro, small and medium sized enterprises to counter education and technical capacity constraints to successful growth and development of these businesses.¹

MFIs already offer these services in many Latin American countries, with substantial financial and technical support from international development agencies and banks. By channeling remittances for microenterprise development through MFIs, new entrepreneurs and existing remittance-based entrepreneurs would therefore directly benefit from greater access to business development services for the overall efficiency, profitability and success of their enterprises. With these newly available business training services, remittance recipients may be wisely induced to make a productive investment in a microenterprise. They could be further encouraged by the added lure of loans and other financial services available through MFIs. Through publicizing and advertising these services, MFIs could promote investments in microenterprises among those who might not otherwise invest and also draw remittance recipients into the financial system.

**MOVING FORWARD: POTENTIAL FOR MFIs AND RETURN MIGRATION**

The business and financial services offered by MFIs have the potential to not only introduce incentives for remittance spending in migrants’ home countries, but also to affect decisions of migrants abroad. The following discussion presents a conceptual framework for how MFIs might be used to encourage return migration, with the goal of maximizing development in the home country. These are theoretical arguments based on the existing evidence presented thus far, advocating policies that would support this framework.

One of the most pressing problems regarding migration out of Mexico and the rest of Central America into the US is "brain drain" (Adams 2003). Research shows that the outflow of motivated, skilled workers
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Related problems in the transfer of remittances also reduce their effective use as a tool for economic development. Although transfers are typically directed towards poor families, these transfers can lose significant value through transaction costs such as transfer fees and exchange rate profits. Migrants often opt to use high cost money transfer services instead of lower cost banks or credit unions because they are largely unfamiliar with the formal banking system or face legal issues with migrant status (Suro et al, 2002).

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The business and financial services offered by MFIs have the potential to not only introduce incentives for remittance spending in migrants' home countries, but also to affect decisions of migrants abroad. The following discussion presents a conceptual framework for how MFIs might be used to encourage return migration, with the goal of maximizing development in the home country. These are theoretical arguments based on the existing evidence presented thus far, advocating policies that would support this framework.

One of the most pressing problems regarding migration out of Mexico and the rest of Central America into the US is "brain drain" (Adams 2003). Research shows that the outflow of motivated, skilled workers
severely weakens human capacity in low-income countries (Lucas 2004, Lowell and Findlay 2001). Though labor migrant populations are poor relative to the average US worker, they are typically more educated than the majority of the population in their home countries. The drive of these labor migrants to improve their lives by going abroad suggests that they might also possess skills - such as self-motivation, determination and an entrepreneurial spirit - that would be beneficial in starting a microenterprise. Labor migrants often leave home because they do not have access to sufficient opportunities in their country of origin, and they have the means - initial investment and networking contacts - to go abroad for work. Though they initially migrate to improve their situation in their home countries, they often become unwilling to return if they perceive limited opportunities for socioeconomic advancement. Labor migrants often shift their attention to long-term goals in their host country and, as a result, make their moves abroad permanent.

By keeping migrants involved in their home countries and facilitating business opportunities for remittance recipients, MFIIs have the potential to make a substantial impact on migration patterns from Mexico and Central America to the US. From the outset, MFIIs can engage migrants and keep them more involved in their home countries throughout the entire cycle of migration and investment. Establishing relationships with migrants prior to their planned migrations through widespread marketing and engagement campaigns encourages the flow of remittances through more affordable transfer mechanisms and continues to promote and facilitate opportunities for investment in microenterprises. MFIIs will need to be proactive in marketing their services to potential target groups in order to capture the remittance market and incorporate migrants into the formal banking system. MFIIs will benefit from these relationships due to an increased client base and the resulting monetary resources. The migrants will in turn be motivated by the lure of business loans, attractive interest rates, lower transfer fees and business development support. Together, these incentives for both the client and provider will fortify the link between remittances and MFIIs.

"From the outset, MFIIs can engage migrants and keep them more involved in their home countries throughout the entire cycle of migration and investment."

Furthermore, in as much as the financial and business consulting services offered by MFIIs can facilitate the establishment of profitable businesses in the migrants’ home countries, there is reason to believe that MFIIs can also encourage migrants to return home in order to oversee their businesses. Undoubtedly, businesses that are not expected to be productive or profitable provide little lure to return. With the help of MFI-provided services, however, remittance funded microenterprises have a much higher likelihood of success. Given that a migrant’s original intentions of migrating are generally to seek better employment, such an opportunity is likely to be a substantial incentive for return migration. This would be particularly true if the migrant’s family still resides in the country of origin. With the current reconsideration of immigration policies in the US and proposals for a new temporary worker program,
this framework could be an opportune way to reap the greatest benefits of short-term work opportunities in the US. The host country would also profit from the more temporary migration scheme and continued MFI Development Potential

access to low wage labor. All the players would potentially benefit—the migrant, the migrant’s family, the country of origin and the host country. MFIs could play a key role in encouraging and facilitating return migration, completing the cycle in order to capture the benefits of migration for long-term economic development. This concept is illustrated in Figure 2.

This illustration presents migration as a cycle where migrants take advantage of available opportunities in order to improve outcomes in their home country. Ideally, this is how migration would function—not to the detriment of labor-sending countries, but for their advancement and improvement in the long-term. Indeed, research indicates that developing countries enjoy tremendous benefits with return migration through financial, human and social capital accumulation and transfer (Ammassari and Black 2001). Often, however, lack of opportunities in the home country interrupts this cycle.

MFIs can bridge this gap through engaging the migrant at the outset and facilitating home-oriented goals throughout the migration process.

CONCLUSION: Harnessing the Benefits of Migration for Long-Term Development

In order to foster a functioning migration system, a comprehensive framework first needs to be established that is internally consistent with reinforcing incentives. Channeling remittances through MFIs has the potential to facilitate these ends. Researchers and policymakers have taken steps in this direction already, recognizing the possibilities that this remittance/microfinance nexus has to offer. This paper argues for a framework that would use MFIs to facilitate and encourage return migration for the long-term development of the migrant-sending countries.

It will be important to continually identify and specifically address the challenges introduced by using MFIs to encourage return migration for long-term development of the home country. Field research should continue in order to monitor and evaluate the ability of and strategies for individual MFIs to meet remittance clients’ needs. There is also the obstacle of expanding and strengthening MFIs to form a more robust industry that operates under more stringent regulations and a sound legal framework. In addition, MFIs face the challenge of making responsible banking clients and potential entrepreneurs out of a largely undereducat-
One final barrier to note is that a catalyst for change will be necessary in order to change the role of MFIs in migrant remittances. Although it may be largely beneficial to reshape the migration process into a more temporary phenomenon with a continual mindset on the home country for microenterprise investment and long-term development, there needs to be an agent, or multiple agents, for change that can make this happen. Governments will largely serve that role-both in Mexico/Central America and the US- with additional efforts from NGOs, inter-governmental organizations and the private sector. Indeed, many incentives are already in place for these various actors to be involved, and many are already assuming their place in this process. Governments of labor-sending countries need to be increasingly made aware of the implications and potential benefits of a circular migration process facilitated by MFIs for both their citizens, their tax systems and the long-term economic development of their countries. Coordination and contribution among actors will be necessary to ensure the success of this process.

The potential benefits of migration for Mexico and Central America are vast, but much needs to be done and changed in order to fully harness the positive effects for broader economic development. Capturing remittances for microenterprise development in a process that uses MFIs to continually engage migrants and ultimately encourage return migration presents itself as a propitious framework to achieve these ends. In a global community where millions of dollars are being funneled toward development objectives, it is imperative to do everything possible to tap into this self-motivated, market-driven avenue toward those same ends.

ENDNOTE

1 Business development services are generally available in the following areas: market access, infrastructure, policy/advocacy, training and technical assistance, technology and product development and alternative financing mechanisms (see Miehlbradt and McVay 2003 for more details).

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Asylum Denied:
Seeking Asylum in the Age of Terrorism
Interview with Bill Frelick, Human Rights Watch

R. Brent Wisner

Bill Frelick is the director of Human Rights Watch's Refugee Policy Program, through which he monitors, investigates, and documents human rights abuses against refugees, asylum seekers, and internally displaced persons. From 2002-2005, Mr. Frelick was the director of Amnesty International USA's Refugee Program. He was also the director of the US Committee for Refugees for 18 years. He has traveled to refugee sites throughout the world and domestically and taught in the Middle East from 1979-1983. He was the editor of USCR's annual World Refugee Survey and monthly Refugee Reports. The Review's Brent Wisner and Jacqueline Geis sat down with Mr. Frelick in December 2006, to discuss the controversy over material support provisions for asylum seekers.

Editor's Note: International and domestic laws forbid granting "refugee" status to anyone who is a terrorist or provides support for terrorist activities. Such asylum seekers are considered undeserving of protection and/or pose a threat to national security. Shortly after the September 11, 2001 terrorist attacks, Congress enacted the USA PATRIOT ACT, and in 2005 passed the REAL ID Act. These laws broadened the definition of "terrorist" and "terrorist organization" and which activities constitute a terrorist act. These laws also expanded an immigration ban on individuals providing material support to terrorists or terrorist organizations. In recent years, several groups were denied asylum in the US because they fell under the broad scope of the new definitions.

What do asylum seekers have to worry about today that they did not have to worry about before 9-11?

Well it is a whole new ball game now. The PATRIOT ACT and the REAL ID Act in particular changed the definition of terrorist activities, terrorist organizations and what it means to provide material support. They considerably broadened the definition to the point where a normal person who is asked what terrorism or a terrorist activity is wouldn't recognize the distinction in our law. It is so broad that George Washington would have been considered a terrorist by this modern definition.

The new definition basically allows the United States to deny asylum to anyone it chooses under the proviso of national security, and in the process there are a lot of
That's very interesting how the question is phrased, the "final word," because in this current War on Terror environment it is usually some security guy in some nameless, faceless agency somewhere who probably wields veto power. You could be talking to the Assistant Secretary of State and have the most positive, sympathetic response, and find that the Assistant Secretary of State's hands are tied by someone way lower on the pay scale.

But some "no" coming out of some security agency can outweigh an awful lot of "yeses." The same phenomena exists on Capitol Hill, where there is reluctance to amend a bad law because no one wants to be caught with sound-bite negative ads in the next election in which they would be accused of being "pro-terrorist." This makes many members of Congress scared on this issue, even though many of them recognize that this is a bad law.

"... there is reluctance to amend a bad law because no one wants to be caught with sound-bite negative ads in the next election in which they would be accused of being 'pro-terrorist'."

What do you believe provoked the establishment of the material support provisions?

The United States - particularly after 9-11, and some of this actually pre-dates 9-11, with the Immigration Act of 1990 and the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA) of 1996 - sought to initially maximize the discretion of the administration to keep out anyone [who posed a national security threat]. But these acts have actually limited discretion, and now even if the United States would like to admit refugees on protection grounds, we are not able to; and the statute has also tied the hands of judges to make reasonable judgments on protection claims.

Who has the final word on which organizations are considered terrorists? And what process exists to make that determination?

That again is a very good question. I don't think there is a substantial burden of proof there. I could be wrong. And on the FTO list, I would be very curious to see what ability there is to challenge which groups belong on the FTO list. What are the criteria for putting a group on the list, and what are the criteria for taking an organization off? It is not a particularly transparent process as best as I know.

babies being thrown out with the bath water. In fact, a lot of innocent people who are victims of terrorism, rather than members of terrorist organizations, are being denied asylum, because of the threats perpetrated on these asylum seekers by organizations on the Foreign Terrorist Organizations (FTO) List. These asylum seekers were victimized by terrorist groups through extortion, threats, brutality and forced to do things against their will. They are then precluded from protection on the very grounds of their refugee claim - because they provided material support to these terrorist organizations. It is extremely perverse and equally tragic.
There are some groups that were involved in violent efforts to overthrow a government or dictatorship 20 to 30 years ago, but have not participated in any active armed struggles in over a decade and yet they are on this list. I am very interested to see what happens in Nepal, where the Maoists, which are on the FTO list, have officially become part of the government. A month ago, someone from that organization would have been considered a terrorist, and possibly in a month or so, they will be visiting the US as part of a diplomatic delegation. And now, if some anti-Maoist, pro-American group rises up in armed conflict against them, they may now qualify as a terrorist organization. We could end up in a situation where anyone in Nepal’s new government, because of their connection to the Maoists, will be considered to have provided material support to an FTO, and anyone opposing the group would also be considered a terrorist under the tier three interpretation. Essentially no one from Nepal on any side of the political coin would be allowed to seek asylum in the United States. I don’t know if it will come to that, but it is this type of problem that have not been thought through.

“\textbf{The simple solution would be to add one word to the statute, which of course is the word ‘willingly’...}”

Well this is certainly an area that is controversial. The simple solution would be to add one word to the statute, which of course is the word “willingly,” or something with a duress exception that would make it explicitly clear that to commit material support it must be done willingly as well as knowingly, which is already part of the statute. But there is a lot of discussion about whether doing something unwillingly constitutes material support since it would be under duress.

There is another approach which is to look at what is called the Charming Betsy rule (Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804), which requires that domestic law comport as much as possible with international law, international agreements and international treaties. And since the United States has acceded to the Refugee Protocol of 1967 there is an argument to be made that the United States is actually violating the Protocol if it excludes a refugee from protection without establishing the individual’s personal culpability for willingly committing criminal acts.

And then there is another area to look at with respect to duress which is simply looking at common law. Criminal and civil law both accept that duress is a reasonable basis for not holding a person accountable for a criminal act. If someone puts a gun to your head and forces you to do something, you are not held liable. And that is recognized across the board in both criminal and civil law. Material support has this stand-out exception, and does not incorporate instances of duress, because Congress did not put in this phrase “willingly.” It creates situations which are hard to imagine were Congress’ original intent, to preclude from protection people who literally had a gun put to their head to force them to cook a meal or incidentally aid some terrorist group.

You focus mostly on direct material support duress, a person putting a gun to someone’s head. What about de facto material support? Growing up or being raised in a region that is controlled by a terrorist organization, and simply paying your taxes - how is
that type of material support recognized?

Well I believe a lot of that falls under the "knowingly" provision. Are you aware that this is an organization, and that this organization has this terrorist component? It also really comes down to the question of what the word "material" means. Is it intended to mean support material to the commission of a terrorist act? Or does "material" mean any support? And if "material" did mean any support, why didn't Congress just say any support? Why did they use material support? Frankly I don't think that is an area that has been adequately adjudicated. I think that in quite a lot of the instances that we have seen the support that was given was trivial. It was inconsequential support, not material support. And yet the government has argued that a pocket full of loose change constitutes material support. They actually said that in the Board of Immigration Appeals oral arguments [in Matter of Ma San Kywe (2006)], that a pocket full of change or a glass of water constituted material support.

How do material support provisions limit judicial review and what processes currently exist to determine whether or not someone has in fact provided material support? What about de facto material support?

These come up in the context of an asylum claim. The claim goes before an immigration judge, the immigration judge looks at the statute, and the statute is written very broadly. For example, in Matter of Ma San Kywe, the case of a Baptist woman belonging to the ethnic Chin minority from Burma, the immigration judge and the Board of Immigration Appeals (BIA) were both very sympathetic to this woman, found that she was credible and had a well-founded fear of persecution, and recognized that the Chin National Front, the group to which she provided modest material support, was not in any way a threat to the security of the United States. The Chin National Front was engaged in armed resistance to a government the United States doesn't support, and they were engaged in traditional armed resistance which no reasonable person would define as a terrorist activity, but the way that the statute is written, with broad language on terrorist activities, the judge could not grant the woman asylum and the BIA, saying the statute was "breath-taking in its scope," could not overturn the judge's decision. This decision will bind immigration judges throughout the country. Appellate courts have been similarly constrained by the statute. In Singh Kaur v. Ashcroft, the Third Circuit found that even minor support, such as providing food and a tent for a terrorist meeting, constituted material support.

Terrorist activity is defined as one or more people, organized or not, that use any weapon including any dangerous device, like a brick, to intentionally cause bodily harm to one or more individuals or substantial property damage where such activity is unlawful in the place where it is committed. That is the definition of terrorist activity and a terrorist group, under what is called tier three, which is a terrorist organization not specifically designated by the State Department (tier one refers to organizations on a list formally designated as foreign terrorist organizations; tier two are organizations the Secretary of State has "otherwise designated" as terrorist). As a result of this peculiar definition, the immigration judge and immigration board both felt bound to deny asylum to this woman whom they recognized as
having a well found fear of persecution.

Are there currently any waivers for refugee groups?

There are waivers for refugees who provided material support to six Burmese ethnic opposition groups, including the Chin, and two other groups from Tibet and Cuba. But these waivers split up families. The people that are members of these organizations are still excluded; they are the sons and daughters of those who have been granted waivers for providing them material support. These waivers, while providing a few refugees asylum, don’t address the heart of the problem, because none of these waivers address the notion of duress. They are based on exemptions for particular groups not on a fairer and more reasonable policy.

Do you think there is value in having a more formal waiver process? Would that be a solution?

Well this problem ultimately has to be attacked on legislative grounds because the law really just needs to be changed. But in the meantime we need to work administratively. And unfortunately the statute requires the involvement of three different agencies, the Departments of Homeland Security, State and Justice. And getting each department and their bureaus to agree is very difficult. Just within the Department of Homeland Security there is an alphabet soup of bureaus that need to agree…. And just when you think you have made a convincing argument to one agency, you find yourself butting heads against some office you never heard of. Unfortunately, in the current political and security climate, nobody wants to take the first step or admit some refugee who ends up being a bad guy. This is why the law is written as broadly as it is, initially intended to provide discretion to these agencies, but in fact given the language of the statute as well as the culture of fear in government, very little discretion is actually exercised.

If there is no judicial process for determining which organizations are terrorists, and domestically we prosecute citizens for providing material support, how is that not a violation of due process or even freedom of speech?

It is. (Laugh.)

How can the United States strike a balance between maintaining national security and abiding by international treaties?

"National security" grounds are a basis for exemptions under international law. For example, Article 31 and Article 1F in the Refugee Conventions, and several other places in various other conventions, contain national security or terrorist exceptions. These exclusions were intended to be very narrowly applied to individuals who committed very serious crimes, but the States have used such national security exceptions as loopholes that you could drive a tank through.

Take for example a young man from Uzbekistan who is currently in detention in Pennsylvania and at risk of being deported to Uzbekistan. He was living in an apartment with two guys, and they used a shared computer. The FBI discovered that someone on this computer had visited an Al-Qaeda website. The government produced no evidence that he had engaged in any violent activities or that he had any friendships or other connections with anyone the US considers dangerous. This young man had strong grounds for an asylum claim and withholding of removal but was denied both on national security grounds. Citing In re A-H, in which the attorney general argued that a danger to national security need not be serious or significant. In other words, he was essentially saying that any danger to US secu-
rity, broadly encompassing US economic and foreign interests, any non-trivial threat could be used to deny asylum. They admitted that they did not know if this young man was the person looking at the website, but the possibility was enough of a threat to deny asylum.

The BIA assured him that he would not be deported to his home country because it deferred his removal under the Convention Against Torture. Low and behold, a few months later, he receives a letter from the Department of Homeland Security that they are seeking diplomatic assurances from Uzbekistan that they are not going to torture him upon return.

What this case really shows, aside from material support concerns, is that national security claims can really be used in the broadest terms.

According to current material support provisions, it is legal to provide medicine to a terrorist organization but illegal to provide the food or the doctors to administer that medication. How do these laws affect humanitarian efforts during emergencies? What implications do they have for organizations which provide aid?

...You could actually apply this to the US government. The US military came into Iraq to oppose the established regime of Saddam Hussein. The United States itself was engaged in activities that would fit the definition of terrorist activities under our own law.... The man who helped identify for the American soldier where Jessica Lynch was being held was arguably providing material support to the United States. Similarly, support of the Northern Alliance against the Taliban would fit the US legal definition of material support. The Taliban was the established authority. The Northern Alliance was illegally opposing them and using weapons and dangerous devices to oppose them, and the United States was supplying those weapons and dangerous devices. The United States was providing material support for the Northern Alliance for their "terrorist activities" against the Taliban. And today, as we speak, the United States, in its obligations under the Geneva Convention is providing protection to a group of Iranian Exiles, called the Mojahedin-e Khalq, inside Iraq, which is on the Foreign Terrorist Organizations list. This group is listed as a Foreign Terrorist Organization and the United States, US soldiers, is protecting them, and if the US soldiers weren't there, these people would be slaughtered. I am glad that [the soldiers] are there. But it is an anomaly - to say the least - that the United States under its Geneva Convention obligations is supporting a group that according to its own law is a Foreign Terrorist Organization and is in fact providing material support to those people.

So if the US government is doing it, and the American soldiers are doing it, it is hard to function in this world in conflict situations without [providing material support by the US definition], particularly if you are providing humanitarian assistance.

What is the solution to fixing these material support issues?

Changing the law is fundamentally the solution. It is a bad law. Whatever the court decisions, whatever administrative waivers, let's just change the law. Congress needs to take the final step to fix this. With the definition of terrorism being indistinguishable
from most other armed opposition to any authority, and the material support bar itself having such broad ramifications, the material support statute absolutely needs to be tightened to identify people who really do pose a threat. Possibly changing the definition of "material" to mean support "material to the commission of a terrorist act," or adding "willingly" to the provision to make an exemption for situations of duress. It would be also helpful to clarify that terrorist activities must threaten the US or US nationals, as it is overly broad to have any established opposition to any established authority in any country anywhere in the world. The law is so broad it is just dangerous.

To what extent do you think that the conversation about immigration reform has taken away from issues regarding material support?

When it comes to comprehensive immigration reform, the issues are so broad and it affects so many Americans and immigrants. The material support bar to be honest is something that most Americans are unaware of and doesn't really affect them in any noticeable way. This is something that affects a relatively small number of refugees overseas wanting to be admitted to the United States and asylum seekers here or asylees who want to adjust their status who have previously been granted asylum or are applying for family to join them. That's it. And so to the extent to which Americans are even aware of those groups of people is questionable. I don't fault Americans, but I do fault members of Congress for not being aware of what may be a relatively small group in the immigration debate, but while quantitatively small compared to all immigrants, qualitatively is very important to what traditionally the US has stood for from its inception. I think we have really strayed from that tradition in the last few years. For example, 70 percent of refugees from Colombia are denied US admission on material support grounds, and the refugee resettlement program in South America has ground to a halt.

What do you think the new Congress is going to do, if anything?

...This is an issue where Democrats have tended to run as scared as Republicans, and nobody wants to be seen as being soft on terrorism. I am old enough to remember the Cold War and the fear of being perceived as soft on Communism; it was the same bug-a-boo in many respects. Far be it for a politician, who had to face the voters, and has someone doing attacks ads that accuse him or her of being soft on terrorists. There actually have been attacks ads in the last couple of elections where peoples' faces would morph into a picture of Osama Bin Laden. You can talk to members of Congress and they can be eminently reasonable on the issue and sympathetic, but do they have the courage to come forward and fix a bad law? That's the question.
Explaining Disparities in Asylum Claims

MING H. CHEN

This paper examines the effects of institutional design and legal culture on asylum adjudication. Noting a disparity in the rates at which asylum is granted by Immigration Judges and Asylum Corps Officers, this paper sets forth several hypotheses that may explain the disparity. Highlighting features of each forum that may be associated with approval rates, this paper suggests that the two-tiered asylum adjudication system encourages asylum-seekers with the strongest claims to utilize affirmative application procedures while dissuading those with weaker claims from presenting their claims to asylum officers. Moreover, this paper argues that institutional features of asylum adjudication engender an ethos that favors asylum applicants in the Asylum Corps but disfavors them in the Immigration Courts. Accordingly, changing the patterns of asylum adjudications requires changes to both workplace structure and workplace culture.

The dramatic public protests seeking comprehensive immigration reform from the 109th Congress eclipsed an effort to reform the decision-making procedure for political asylum. A little-noticed provision contained in the Senate Bill 2454 (US Government Printing Office 2006) would have concentrated all immigration appeals in the Federal Circuit Court of Appeals, an administrative court that currently focuses on 1,500 patent cases and handles no immigration matters (Liptak 2005). The question of how these cases are handled is particularly sensitive because they typically address the highly-charged political issue of asylum and the reform efforts respond to scathing criticism of asylum adjudication.

In early 2006, US Attorney General Alberto Gonzales distributed memos to hundreds of federal judges launching a “comprehensive review” of the immigration system and expressing dismay over reports of “intemperate or even abusive conduct” in the Immigration Courts (Maclean 2006). Asylum applicants’ rights advocates have long complained of “a pattern of biased and incoherent decisions in asylum cases” and were notably joined by Seventh Circuit Judge Richard Posner, who announced that “the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice” (writing for Benslimane v. Gonzales, 430 F.3d 828, 830 7th Cir. 2005). These critiques stem in part from a surge in immigration cases before the federal appeals courts, whose caseloads included 12,000 appeals of asylum determinations in 2005, an increase of 14 percent since 2001. In the Second and Ninth Circuit,

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encompassing New York and California respectively, nearly 40 percent of federal appeals involved asylum claims (Office of the Circuit Court Executive 2004). However, criticism also stems in part from an asylum adjudication system that has been plagued by structural problems and long-standing political vulnerabilities (Swarns 2006).

Social science literature focusing on Immigration Courts as a case study of administrative adjudication is scarce. Nevertheless, at least two strands of scholarship have emerged regarding the way that administrative agencies organize their internal decision processes. The first strand attempts to specify “the principles that can be used to evaluate the justice inherent in administrative decision-making” (Adler 1993) and to determine how administrative decision-making should ideally be organized. The second and related strand marshals an empirical study of administrative decision-making to conceptualize the relative merits of different institutional designs (Mashaw 1983; Kagan 2006). In the tradition of these empiricists, this paper uses social science concepts as an analytical framework to explain the effects of institutional design and legal culture on asylum adjudication. Part I sets forth the substantive and procedural legal standards that govern asylum determinations and summarizes the most significant reforms to the processing of asylum applications. Part II separately describes the affirmative and defensive asylum application procedures and characterizes the nature of decision-making in each mode of adjudication using terms from the literature on case-processing within administrative agencies. Part III sets forth some possible effects of the institutional design of asylum adjudication and uses descriptive statistics, exploratory interviews and site observations to assess their validity. The conclusion reflects on the importance of these findings for the very different reforms proposed by legal activists and social scientists who seek to improve the quality of justice dispensed in administrative agencies. It also poses questions to guide further research on asylum adjudication.

**PART 1**

**A. Overview of Asylum Application Processing in the United States**

As a modern legal construct, asylum involves two essential components: protection from immediate punitive action and a careful objective determination of the need for longer-term protection. While the notion of asylum has long existed in the United States, a clear legal foundation for asylum was not laid until the US explicitly incorporated the international definition of refugee into immigration law by enacting the Refugee Act of 1980. The Refugee Act modified the Immigration and Nationality Act (INA) to define a refugee as someone who is unable or unwilling to return to her country of nationality “because of persecution or a well-founded fear of persecution” on account of race, religion, nationality, membership in a particular social group or political opinion. US immigration law mandates different procedures for dealing with those refugees who apply for protection while outside of the United States (economic refugees) and those who apply after arriving in the country (political refugees). The linchpin of obtaining political asylum is demonstrating a “well-founded fear of persecution” through individual testimony, documentary evidence, and expert reports on the country conditions precipitating an application for asylum (Anker 1994).

Typically, asylum applications in the United States are adjudicated in two forums governed by different styles of claim review. Following the investigation, the Attorney General announced 22 measures to improve the quality of asylum adjudication. Most of these have yet to be implemented (US
Commission on International Religious Freedom 2007). Applicants who apply for asylum once they have entered the United States, typically on a short-term visa such as a student or tourist visa or without inspection, file an application with the Department of Homeland Security (DHS) Asylum Corps and proceed to have their claims reviewed through a non-adversarial process termed “affirmative asylum” (US Court of Appeals for the Seventh Circuit 2005). If not granted asylum by DHS, or if the asylum applicant requests it during removal proceedings, the asylum applicant may renew his claim before an administrative tribunal located within the Department of Justice, Executive Office of Immigration Review (EOIR). In Immigration Courts, immigration judges conduct trial-like proceedings to determine the merits of the asylum applicant’s claim. Regardless of whether the claim is presented for the first or the second time in Immigration Court, the immigration judge considers the asylum claims de novo, or without deference to the previous findings by an asylum officer (Anker 1994).

B. Significant Reforms in Asylum Processing Procedures

While the substantive standards for asylum have remained relatively constant, the procedures have changed dramatically over time. According to section 208 of the INA, DHS is responsible for deciding asylum claims and for developing specific regulations establishing the criteria and procedures for granting asylum in the United States. For the first ten years, asylum applications were reviewed along with other immigration applications by generalist examiners in INS district offices. These examiners were provided no special training in interviewing refugees and possessed little access to asylum-related legal or other information (Anker 1994). Their decisions were reviewed by INS administrative law judges, renamed immigration judges after an internal reorganization of the Department of Justice (DOJ), whose decisions were subject to appeal in an administrative tribunal called the Board of Immigration Appeals (BIA). Decisions of the BIA were subject to judicial review in the federal courts.

In 1990, the DOJ decided to create a specialized group of front-line adjudicators who would be able to gather the relevant facts to make informed decisions in these unique cases. Final regulations established the United States Asylum Officer Corps (AOC), a professional cadre of officers specially trained in refugee and human rights law, conditions in countries of origin and interviewing refugees. These regulations took responsibility for asylum cases away from INS district offices and placed it in the

“The linchpin of obtaining political asylum is demonstrating a ‘well-founded fear of persecution’ through individual testimony, documentary evidence, and expert reports on the country conditions precipitating an application for asylum.”

hands of the AOC in an effort to professionalize asylum adjudication and to insulate it from foreign policy. The eight asylum offices currently in force became operational by 1994, along with a Resource Information Center to keep asylum officers informed of human rights conditions in countries around the world.

By most accounts, the 1990 creation of the AOC significantly improved the quality of decisions on asylum applications.
However, the asylum process was slow and cumbersome. The asylum program suffered from two major flaws which made it vulnerable to abuse: (1) the understaffed AOC was overwhelmed by the volume of asylum applications filed, and lengthy backlogs developed in the early 1990s and ballooned to more than 425,000 applications in 1995, with nearly two-thirds of claims augmenting the backlog each year (Office of the Circuit Court Executive 2004); (2) employment authorization was granted to asylum applicants at the time they applied, providing an incentive for asylum applicants who wanted to work in the US to apply for asylum regardless of the validity of their claim. As a result, individuals who had exhausted all other options for remaining in the US could stay in the country for a prolonged period of time simply by filling an asylum application and becoming lost in the backlog, even if they had no valid claim to asylum. In 1993, public and political attention to the flawed asylum system intensified when the media reported that Mir Aimal Kansi, who killed two Central Intelligence Agency (CIA) operatives in front of the agency’s headquarters, and Ramzi Yousef, who was involved in the 1993 World Trade Center bombing, had been allowed to remain in the US while their asylum applications were pending. A public outcry concerning the inefficiency of asylum adjudication fueled significant reforms and increased funding in 1995. The number of asylum officers more than doubled, and the number of immigration judges increased from 75 to 210. In addition, employment authorization was no longer issued at the time of asylum application and could only be sought if asylum was granted or in increasingly rare instances of delay. A target of 180 days for processing of asylum applications was instituted, which is met in 91 percent of cases (Beyer 1992). Moreover, the asylum process itself was streamlined so that a final decision could be reached in a shorter period of time. Previously, an asylum officer who wished to deny an application would file a Notice of Intent to Deny, allow the applicant time to rebut the proposed decision, and issue a denial if not persuaded by the rebuttal; the applicant could then renew the asylum claim before an immigration judge. Under the new rules, if the asylum officer finds an insufficient basis to grant asylum, the case is automatically referred to an immigration judge for a review that includes a ruling on the issue of deportability. As a result of these reforms, the backlog fell dramatically and the number of new asylum applications also decreased from over 147,000 in FY 1995 to 46,000 in FY 2003.3

Subsequent statutory changes streamlined the processing of asylum applicants by instituting expedited removal of asylum applicants who lack proper documentation at ports of entry,4 heightening the pre-screening security requirements of the asylum program5 and curtailing appeals to the BIA6 and the federal courts.7 Following the terrorist attacks of September 11, 2001, the Homeland Security Act of 2002 transferred INS functions to the newly-created Department of Homeland Security, including operation of the Asylum Program, and grouped the BIA and functions previously performed by immigration judges within the DOJ Executive Office for Immigration Review. This reorganization separated the enforcement and immigration service functions into independent agencies. Prompted by the US Commission on International Religious Freedom’s 2005 recommendations for immigration and asylum reforms, DHS appointed a senior advisor for Refugee and Asylum Policy in February 2006. Information has not been made publicly available on his authority, responsibilities or the resources at his disposal (USCRIF Report Card 2007).
EXPLAINING DISPARITIES IN ASYLUM CLAIMS

Figure 1

<table>
<thead>
<tr>
<th>KEY DIFFERENCES BETWEEN AFFIRMATIVE AND DEFENSIVE ASYLUM</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Affirmative</strong></td>
</tr>
<tr>
<td>Asylum-seeker has not been placed in removal proceedings</td>
</tr>
<tr>
<td>Asylum-seeker affirmatively submits his or her asylum application to a USCIS Service Center</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Asylum-seeker appears before asylum officer (within DHS)</td>
</tr>
<tr>
<td>Non-adversarial interview</td>
</tr>
</tbody>
</table>

PART II

For all of its complexities, asylum adjudication provides a fruitful setting for understanding the varieties of administrative decision-making. Depending on when the claim is filed, an asylum applicant participates in a non-adversarial hearing before an asylum officer or an adversarial hearing before an Immigration Court; many times the applicant’s claim is heard in both settings. This divided structure of claims review, with its repetition of de novo review before distinct entities, provides a useful comparison of the effects of institutional design within a single political system and within a single substantive area of administrative decision-making.

Part II of this paper describes the two-tiered structure of asylum processing and highlights the key differences between the affirmative and defensive application procedures.

A. Affirmative Asylum Applications

An asylum applicant may apply for asylum “affirmatively,” that is, without having been previously arrested or otherwise placed in removal proceedings, by submitting an I-589 asylum application to the DHS. An asylum officer schedules an in-person interview, typically within 43 days of application, “to elicit all relevant and useful information bearing on the applicant’s eligibility for asylum.” Over the course of an hour, the asylum officer elicits information from the asylum application, personal testimony, corroborating evidence, reports on country conditions and relevant laws. Usually, two or three case interviews are conducted each morning. Afternoons are spent making case determinations based on the interview and asylum application, assisted by both informal discussion and formal review of cases with supervisors. In order to meet productivity
eligibility are predominantly based on the expert judgment of asylum officers, who self-consciously operate as specialists in the knowledge and skills associated with asylum interviews. Although the face-to-face interview makes the fact-gathering process relatively participatory, the officers' initial decisions render the organization of decision-making authority predominantly hierarchical, because they are internally reviewed by supervisors who ensure that claim determination is centralized within hierarchical asylum offices. While seemingly counterintuitive, the 1995 reforms seeking to professionalize the asylum corps made the decision-making style less formal, not more formal. For example, the elimination of written opinions and notices of intent to deny meant that asylum officers were entrusted with greater decision-making authority and were insulated from direct challenges by the parties. Interviews endeavor to collect "the story" rather than to test the witness or challenge her story (Kagan 2001).

In order to facilitate comparisons of DHS and EOIR data, grant rates are reported as percentages of cases adjudicated on merits and overall in the table above. Data for cases "granted" and "denied" are taken from the DHS Office of Immigration Statistics, Statistical Yearbook (FY 1973-2003). "Other case closures" refers to administrative closures, cases referred to an immigration judge (e.g., due to mandatory statutory bars/exclusions), and failures to appear. "Grant rates" are calculated as follows: cases granted/(granted + denied) (on merits) and cases granted/(granted + denied + other) (cases completed).

goals, each case must be completely adjudicated in three and one-half hours, including review of the application, researching country conditions, interviewing the applicant, evaluating the applicant's credibility, performing security checks and writing the final decision (Ewing and Johnson, 2005). According to DHS headquarters, this process allows asylum officers to process the required 18 asylum applications during each two-week pay period. At the end of that two-week period, a batch of applicants returns to hear the asylum officer's decision and to complete any remaining paperwork. If successful, the asylum-seeker obtains legal status and becomes eligible for naturalization within one year. However, if unsuccessful, the claim is referred to an immigration judge for a new hearing on the merits (Ewing and Johnson, 2005).

Based on USCIS figures, from FY 2000 to FY 2003, the Asylum Corps completed work on 44,545 claims per year, on average. Of these cases, the number of cases approved was, on average, 16,790. This grant rate represents, on average a 38 percent approval rate when calculated as a percentage of all cases reviewed.

Asylum officer interviews are non-adversarial (PBS 2000). Determinations of eligibility are predominantly based on the expert judgment of asylum officers, who self-consciously operate as specialists in the knowledge and skills associated with asylum interviews. Although the face-to-face interview makes the fact-gathering process relatively participatory, the officers' initial decisions render the organization of decision-making authority predominantly hierarchical, because they are internally reviewed by supervisors who ensure that claim determination is centralized within hierarchical asylum offices. While seemingly counterintuitive, the 1995 reforms seeking to professionalize the asylum corps made the decision-making style less formal, not more formal. For example, the elimination of written opinions and notices of intent to deny meant that asylum officers were entrusted with greater decision-making authority and were insulated from direct challenges by the parties. Interviews endeavor to collect "the story" rather than to test the witness or challenge her story (Kagan 2001).

B. Defensive Asylum Applications
In Immigration Court, immigration judges hear asylum requests in courtroom-styled proceedings of an adversarial nature. The asylum applicants appearing before
### Figure 3: Asylum Cases Filed with EOIR Immigration Judges

<table>
<thead>
<tr>
<th>Year</th>
<th>Cases Granted</th>
<th>Cases Denied</th>
<th>Other Cases Closures</th>
<th>Grant Rate (on merits)</th>
<th>Grant Rate (cases completed)</th>
</tr>
</thead>
<tbody>
<tr>
<td>FY 2000</td>
<td>9,703</td>
<td>10,569</td>
<td>34,644</td>
<td>37%</td>
<td>18%</td>
</tr>
<tr>
<td>FY 2001</td>
<td>10,000</td>
<td>15,037</td>
<td>37,001</td>
<td>40%</td>
<td>16%</td>
</tr>
<tr>
<td>FY 2002</td>
<td>10,977</td>
<td>18,389</td>
<td>45,268</td>
<td>37%</td>
<td>15%</td>
</tr>
<tr>
<td>FY 2003</td>
<td>13,376</td>
<td>31,147</td>
<td>31,147</td>
<td>37%</td>
<td>20%</td>
</tr>
<tr>
<td>Average</td>
<td>11,014</td>
<td>38,240</td>
<td>38,240</td>
<td>38%</td>
<td>17%</td>
</tr>
</tbody>
</table>

Data for cases "granted" and "denied" are taken from the EOIR Statistical Yearbooks in FY 2003 and FY 2005. "Other case closures" are calculated from the same. "Grant rates" are calculated as follows: cases granted/(granted+denied) (on merits) and cases granted/(granted+denied+other) (cases received). Since EOIR has only one statistical reporting system that reports "cases received," rather than "cases completed," grant rates are averaged over a four-year period to make case receipts more comparable to completions.

Asylum applicants are entitled to counsel, at no expense to the government, and a considerable portion (35-48 percent, upward to 90 percent in expedited removal cases) obtain representation by the time their case is heard on the merits. The immigration judge hears the applicant's claim and also hears any concerns about the validity of the claim raised by the government, which is represented by a DHS attorney. After direct and cross examinations of the asylum applicant and any witnesses, the immigration judge makes a determination of eligibility and delivers an oral decision from the bench. If the applicant is not found eligible for asylum, the immigration judge determines whether the applicant is eligible for any other forms of relief from removal (e.g., voluntary departure). If not, the immigration judge will order the individual removed from the United States, within 30 days of a denial decision from an immigration judge (Anker 1994).

In FY 2003, Immigration Courts reviewed roughly 60,000 cases concerning asylum, in addition to many more raising non-asylum issues (e.g., adjustment of status). Of those heard on their merits, 13,376 asylum requests were granted and 22,415 asylum requests were denied. An additional 31,147 were denied for reasons unrelated to the merits of the case.

As a mode of policy implementation and dispute resolution, Immigration Courts, like many other federal courts, are characterized by adversarial legalism. The decision-making style is formal, with the petitioner and the respondent (the DHS) typically represented by counsel and the immigration judge ruling from behind an elevated bench. The asylum-seeker, who is assigned an "alien number" that serves as a case identifier, refers to the judge as "your honor." Counsel take turns presenting their claims and evidence. While the rules of evidence and civil procedure do not strictly apply, the process nevertheless approximates federal litigation.

The merits hearing is participatory. Testimony is delivered through direct and cross examination of witnesses, although the
regulations permit the immigration judge to engage in questioning to a greater extent than in a federal district court. Documentary and real evidence may be introduced into the record to corroborate or discredit the credibility of the petitioner and her story of persecution. Rights may be reserved or waived by counsel; objections are sustained or overruled. Proceedings are audio taped and subsequently transcribed; the decision of the immigration judge is orally delivered from the bench and typically includes citations to legal precedent and documentary evidence (Anker 1994).

PART III
Asylum advocates who urge increasing procedural protections for applicants might assume that applicants have their best chance before the immigration judges. In fact, comparing the grant rates of asylum officers and immigration judges suggests that applicants have a better chance of obtaining asylum in the non-adversarial setting of the DHS interview (91 percent) as in the quasi-judicial Immigration Court (38 percent). The difference is even more stark when asylum claims are broken into affirmative applications and defensive applications. Descriptive statistics about the dispositions in asylum cases constitute a limited comparison of adversarial and non-adversarial decision making. Nevertheless, they provide a useful starting point for understanding the effects of institutional design on administrative adjudication insofar as they summarize a range of variables acting upon the ultimate outcome - to grant or deny asylum - while excluding a range of other possible influences that would arise in a cross-country or cross-agency study of eligibility determinations.

It bears noting that numbers pertaining to asylum adjudication are hard to come by. The sweeping reforms in the substantive and procedural requirements for asylum sketched in Part I.A, for example, complicate comparisons of asylum decision-making in the Asylum Corps and the Immigration Court. Perhaps because the numbers are not readily available in a format that facilitates comparison, few studies have compared the grant rates in the adversarial and non-adversarial setting. Allowing for these limitations, this section presents preliminary findings based on comparisons of the grant rates in the non-adversarial setting of the Asylum Corps and the adversarial setting of the Immigration Court. While these comparisons are necessarily qualified, the essential finding that asylum applicants fare better in non-adversarial settings is sound. It is noteworthy for reasons that will be discussed in the conclusion.

By all accounts, it has never been easy to obtain asylum. The asylum process subjects an applicant to multiple security checks and interviews; it is designed to weed out individuals and stories that are not credible. Both asylum officers and immigration judges grant asylum in a minority of cases. As indicated in figures 2 and 3, asylum officers grant approximately 38 percent of asylum applications as compared with approximately 17 percent in Immigration Court (or 91 percent and 38 percent on the merits). Stated either way, asylum officers grant their cases twice as often as immigration judges. This section presents several hypotheses for the differing grant rates, beginning with the possibility that the cases differ, moving to the possibility that the decision-makers differ and ending with the possibility that adjudicatory settings differ.

Hypothesis One: Asylum Officers Skim the Easy Cases, Leaving the Harder Cases to Immigration Judges
A partial explanation for the dramatic difference in grant rates is that the pool of cases that reach the Immigration Judges tends to be less meritorious, on average. That is, a
significant percentage of the Immigration Court docket consists of affirmative asylum claims. Understanding how affirmative applications that have previously been turned down by the asylum corps flow to the Immigration Court (Part II) and adjusting the numbers to exclude non-discretionary closures, a portion of the 62 percent of affirmative applicants deemed to fall short of the required standard by the asylum officer constitute part of the 80 percent of applicants in removal who are subsequently denied by the immigration judge. These cases always had a lesser chance of prevailing. For example, Petitioner X may testify that her male relatives vowed to kill her in accordance with a Jordanian honor killing ritual; her claim may be based on her membership in the female-gendered “social group,” a relatively novel statutory ground. Asylum Officer X declines to grant Petitioner X asylum. A competent attorney is assigned to Petitioner X prior to the immigration judge’s consideration of the case. Attorney X bolsters the record with Amnesty International reports of honor killings in the very same tribe from which X hails and produces substantial evidence that relocation elsewhere is not possible. Despite X’s efforts, the unsettled legal precedent on whether gender constitutes a “social group” would remain the same. The immigration judge will likely rule against Petitioner X when the claim is renewed, even if the standard of review remains de novo. In contrast, it appears that clear winners rarely reach the Immigration Court. Whether based on strong facts or strong legal precedent, this paper hypothesizes that the more clearly meritorious cases will be “skimmed” by asy-
lum officers, thereby precluding review by an immigration judge.

Moreover, the winnowing effect would be intensified by strategic behavior on the part of the applicants. Suppose that an asylum applicant resides in the US and is out-of-status. As Brooklyn Defender Services immigration attorney Isaac Wheeler points out, “counsel will only advise that asylum applicant to file an affirmative claim and identify himself to customs if he has a decent chance of winning - otherwise coming forward would be foolish, especially now that filing the claim does not yield work authorization in the short term.” (Wheeler 2006) New York State Defenders Services Attorney Alina Das added that affirmative applicants who apply soon after their arrival in the US may have other advantages, such as greater access to corroborating documents and a sharper memory of their persecution (Das 2006). The first hypothesis certainly seems plausible, although more information about the scope of the phenomenon and other variables would be helpful in assessing whether it is a primary factor.

Hypothesis Two: Defensive Applications Skew Grant Rates for Immigration Judges

Unlike the AOC, Immigration Courts make asylum determinations in two types of cases - affirmative applications that arrive on appeal from the Asylum Corps and defensive applications that arrive during removal proceedings. The lower grant rate in Immigration Court reflects that some of the cases have been filtered through the asylum corps (the winnowing or skimming hypothesis). However, more explanation is necessary. The second hypothesis posits that the grant rates are skewed by the inflow of cases from the defensive application process.

Why might defensive cases be viewed so much less favorably than affirmative cases? Several reasons are possible. Immigration lawyers may advise applicants whose cases seem particularly strong to proceed with the affirmative asylum process. In contrast, applicants with weak cases may be advised by counsel to try to avoid the asylum process and instead present their cases only if they have been apprehended, placed in removal proceedings, and required to raise asylum as a defense to removal. Once this happens, defensive applicants have nothing to lose and much to gain by raising the asylum defense. Wheeler admits that “people in removal proceedings have an incentive to bring any colorable defense to removal, including a relatively weak asylum claim -- they have nothing to lose, after all” (Wheeler
Figure 6: Affirmative vs. Defensive Asylum Applications

<table>
<thead>
<tr>
<th></th>
<th>Affirmative Grant Rate</th>
<th>Defensive Grant Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>FY 2001</td>
<td>44%</td>
<td>33%</td>
</tr>
<tr>
<td>FY 2002</td>
<td>44%</td>
<td>28%</td>
</tr>
<tr>
<td>FY 2003</td>
<td>44%</td>
<td>26%</td>
</tr>
<tr>
<td>FY 2004</td>
<td>45%</td>
<td>26%</td>
</tr>
<tr>
<td>FY 2005</td>
<td>44%</td>
<td>28%</td>
</tr>
</tbody>
</table>

2006). Also, immigration judges may be less sympathetic to asylum applicants who have been caught by border control or customs and brought in for removal proceedings. This negative bias would mirror public dialogue about asylum applicants as law breakers, either for the perceived crime of being out-of-status or the real crime that led to subsequent revelation of lacking status.

As it turns out, in FY 2003 approximately 22,708 cases were referred to the Immigration Court. An additional 13,012 asylum requests arose through the defensive application process that year. The total number of asylum cases heard in Immigration Court in FY 2003 would have been 35,720; as in most years, two-thirds of the asylum caseload consists of affirmative applications and one-third consist of defensive applications. For the affirmative cases, approximately 44 percent were granted (9,912/22,708). For the defensive cases, less than 30 percent were granted (3,405/13,012). This number is consistent with others in recent years (Figure 6). However, as Immigration Judge Marilyn Teeter pointed out in an interview on March 21, 2006, the same asylum applicants who have stayed long enough to be discovered will have established community ties and developed "reliance interests" that merit sympathy from other judges.

The first two hypotheses suppose that the substance of the cases under review differs. The next two hypotheses suppose that the characteristics of the decision-makers differ. At least two types of characteristics may be relevant to the outcomes of claims determinations. Hypothesis three considers individual attributes of the asylum applicant such as demographic profile or country of origin, plus individual attributes of the decision-maker such as prior occupations and ideological preferences. Hypothesis four considers the influence of the task environment where asylum adjudication is performed and local political culture.

Hypothesis Three: Predispositions of Asylum Corps and Immigration Judges Impact Outcomes

Preliminary data shows that the grant rates vary in accordance with the demographic characteristics of the applicant and adjudicator. In both the Asylum Corps and the Immigration Court, grant rates vary significantly according to the asylum’s applicant nationality and by the geographic location of the tribunal. Of the courts hearing more than 1,000 cases on the merits, less than 20 percent of cases are granted in Miami, compared with more than 40 percent granted in New York, Los Angeles and San Francisco. Courts hearing fewer cases show an even wider range, from 0 to 85 percent. The Web site Asylumlaw.org lists comparable ranges, which allows the user to input characteristics of the adjudicator and to receive a
grant rate as output.

Some of this variance is likely accounted for by a clustering of applicants from certain nationalities in nearby courts, with the cases presenting similar socio-political circumstances that elicit public sympathy or public pressure around issues tangential to the asylum application. The leading empirical study of Immigration Courts concludes that ad hoc rules and standards, ideological preferences and impermissible political judgments influenced asylum decisions (Anker 1992). One example of this sort of extrajudicial influence may be the Cuban cases that tend to be concentrated in Miami and may instigate greater scrutiny following the Elián Gonzales case of 1999-2000. Still other variations may be accounted for by differences in judicial interpretation of legal precedent within the federal appellate circuit. The reputedly liberal Ninth Circuit tends to have the most pro-asylum applicant interpretations of ostensibly uniform immigration statutes, agency regulations, and higher court rulings, whereas the Second Circuit tends to balance pro-asylum applicant stances against strong business interests given the proximity of many corporate headquarters. Divergent interpretations of similar cases may be especially influential since the BIA issues few decisions and publishes even fewer as precedential decisions. If so, factually-similar cases - arising from persecution again Falun Gong or China’s one-family, one-child contraceptive policy, for example - may be decided differently for those whose port of entry is within the Ninth Circuit rather than the Second Circuit.

Local variations might also matter in ways not tied to the merits of the case or the socio-political circumstances animating them. The cities with the highest asylum applicant populations (San Francisco, New York and Miami) often list the highest grant rates despite the crowded dockets that could instead provide incentive to decrease grant rates. San Francisco, whose municipal government self-designates as a “sanctuary city” for its refusal to cooperate with federal immigration enforcement actions and which is well-known for its pro-asylum applicant political culture, lists the very highest. Both Haitian and Central American cases cluster in the states where their asylum applicant populations are highest (California, Florida, New York, Texas and New Jersey) but the community receptivity to newcomers varies widely in each of these five states. In each instance, this paper maintains that immigration judges (who are appointed to serve in specified regions, often for political reasons) would be more vulnerable to local culture and political bias than asylum officers (who are hired by national headquarters to be civil servants in field offices of a unitary bureaucratic structure), given the relative independence of judicial interpretations, the scope of discretion afforded immigration judges to reverse asylum officer determinations and the relative insularity of bureaucrats from public pressures.

Hypothesis Four: Occupational Socialization and Institutional Culture

In the absence of bad faith, institutional constraints may act on and around the taskforce environment in which adjudicators work. For example, an asylum officer who views his job in terms of the customer service function of the USCIS division may consider his role to be one of helping an asylum-seeker make the best case for his claim. An immigration judge is located within the Department of Justice’s EOIR and reports to the US Attorney General, the nation’s top law enforcement official and is primarily responsible for conducting removal hearings. Arguably, the particular demands posed by each of these roles gives rise to an ethos that either favors or disfavors asylum seekers. This culture originates with the background and training of adjudicators. Partly
as a matter of recruiting and partly as a matter of self-selection, asylum officers typically have more training in and deeper knowledge of humanitarian and foreign relations concerns than their Immigration Court counterparts; indeed, many are former peace corps officers (Beyer 1992). More of them come to the asylum corps from non-profit refugee organizations and service-oriented branches of government. Once hired, the basic asylum officer training course consists of a 10-week residential program, including five weeks of instruction in immigration law and processes and five weeks of asylum-specific training (Beyer 1992). Ongoing training ensures that asylum officer remains up-to-date on country conditions. While immigration judges also undergo training, it is less specialized since asylum represents only one topic among the many types of matters they adjudicate. In contrast, EOIR data shows that the Immigration Court currently handles 300,000 cases per year, which means asylum cases constitute only one-fifth of their caseload (US Department of Justice, Statistical Yearbook 2005).

Can occupational training overcome a strong office socialization effect? In the PBS documentary Well-Founded Fear, one officer asks “how possible is it to look for refugees when everyone around you is concentrating on looking for fraud?” (PBS 2000) The remark highlights the strong influence of a culture that is reinforced through monitoring, supervision and performance evaluations. Asylum officers routinely clear decisions and paperwork for every case with their supervisor, and each asylum office designates a quality assurance officer to review work of the entire staff. Problem or “sensitive” decisions are open to additional review from directors and DHS headquarters. Even if a written notification of intent to deny is no longer required, the burden of justifying a denial looms large. In close calls, it is the quality control apparatus and pressure from the administrative agency in which the asylum office is embedded that may tip the balance in favor of granting.

While comparable information about the workplace culture of the Immigration Court was not found, anecdotal evidence shows immigration judges operate more independently from the administrative agency and political pressures in which they are embedded. While on paper all 210 immigration judges report to the chief immigration judge in Washington, D.C., in reality each judge runs his or her own chambers. As a test of independence from the DHS, recall that immigration judges “reverse” the negative decisions of the asylum officers nearly half of the time (44 percent of affirmative cases on their merits). Each time, they transform a case previously deemed insufficient to meet the requirements for asylum into cases granted. Bearing in mind that the asylum officers refer less than 10 percent of the cases they adjudicate, this high reversal rate nevertheless signifies that the immigration judges exercise considerable independence from the asylum corps in their decision-making. Given that many of these cases were presumably close calls, reaching a different outcome is not remarkable per se. More remarkable is that the immigration judges evidently do not feel constrained to defer to the factual findings of their colleagues in the AOC. In contrast, immigration judges are administratively located within the Department of Justice’s EOIR, which includes the BIA, but operates separately from the rest of the DOJ (since an internal reorganization in 1983). Collected statistics show that the BIA affirms more than 90 percent of the outcomes in Immigration Court (up from 25 percent in 1999). This high affirmance rate may simply reflect the increased use of summary affirmances, also known as “affirmances without opinion,” since BIA streamlining began in 1999. The American Immigration Law Foundation has
consistently challenged the practice as less than meaningful review, and the First Circuit in *Alhathani v. INS*, 318 F.3d 365, 378 (1st Cir. 2003) expressed serious concern that "the very nature of the one-line summary affirmance may mean that BIA members are not in fact engaged in the review required by regulations." However, it is possible that the low reversal rate indicates a lack of independence between the Immigration Court and the BIA.

Many immigration attorneys have expressed concerns over perceived antagonism between immigration judges and asylum-seekers, which may partly stem from the law-enforcement culture of the DOJ or from the prior experience of many immigration judges as prosecutors (Anker 1993). The 2006 criticisms from Alberto Gonzales and federal appellate judges over the mistreatment of asylum-seekers suggest that these concerns do not lack basis, even if they are somewhat anecdotal. One way of understanding the adversarial tenor of Immigration Court may be to examine the perceived role of the immigration judge as an adjudicator within a broader system for parceling out administrative justice. As with any judge, immigration judges simultaneously represent a neutral arbitrator and the federal government. As Martin Shapiro has theorized, the judicial role is inherently unstable; the triad inevitably trends toward a dyad, which erodes the legitimacy of the decision-maker as a neutral third party to the dispute (Shapiro 1981). Based on interviews and observations, immigration judges usually have greater familiarity with the DHS attorneys who routinely appear before them as repeat-players, as compared with one-shot immigration attorneys (Gallanter 1974). In one observation by the author, an immigration judge and a DHS attorney reminisced about past cases they had worked on and shared gossip from Washington, D.C. headquarters while the petitioner awaited the arrival of his attorney. In the same case, the immigration judge needed to ask the petitioner's attorney to spell his name for the record. While these observations are not conclusive of bias, survey research and systematic study could determine the prevalence and significance of the effect of institutional culture on case outcomes.

**Hypothesis Five: Dealing with Uncertainty, Resource Limitations and High-Risk Errors**

According to a press release issued by the INS on the anniversary of the 1995 reforms, asylum reform led to a decrease by 75 percent in the number of new claims being filed with INS, with increased approval rates in both the Asylum Corps and the Immigration Court (Ewing and Johnson 2005). The trend of increasing grant rates and declining cases adjudicated raises the question whether the volume of cases influences the generosity of dispositions. While the resources allocated to asylum adjudication have generally increased since the 1995 reforms, there is some evidence that more resources would still be beneficial. According to an anonymous survey of 177 asylum officers (47 percent of the AOC) conducted by the American Federation of Government Employees, 93 percent of respondents worked unpaid overtime even though doing so is prohibited by agency regulations. The most common reasons for doing so were that there is insufficient time to do quality work during a 40-hour work week, unpaid overtime is necessary to complete cases in compliance with timeliness standards, and unpaid overtime is necessary to avoid creating a backlog (survey cited within Ewing and Johnson 2005). Under these circumstances, it is understandable that asylum officers would experience uncertainty about their decisions. This hesitance would likely be exacerbated by the high stakes nature of asylum cases. While compa-
rable survey data for immigration judges was not found, the pressures of productivity goals is likely the same. Moreover, their heightened visibility and government-besowed authority to order removal on-the-spot raises the stakes on their already high-risk and difficult decision-making.

In asylum adjudication, the subject matter and the conditions under which it is interrogated is inherently difficult. Accurate asylum determinations require the careful application of expertise to a body of information about the individual asylum seeker that is difficult to marshal. In principle, it should be possible to distinguish between genuine refugees and those who do not qualify. As David Martin explains, the task is far more difficult than may initially appear: the substantive legal standards governing asylum invite administrative interpretation and discretionary implementation; determining whether an applicant presents a “well-founded fear of persecution” requires individualized judgment of the risk of persecution the applicant would face in the homeland, which is based on general information about human rights conditions in the home country and elusive information that is specific to the individual applicant (Martin 1990). For all of these reasons, asylum adjudication is sometimes considered the most difficult form of administrative adjudication. These difficulties are echoed by the producers of Well-Founded Fear:

A line we overheard so often in Asylum Offices that it almost seemed a motto was, “Reasonable minds can differ.” [O]fficers were showing us how very possible it would be to write and defend a decision, equally true to asylum law and INS regulations, but opposite to the one they did submit.... That latitude, the potential variability, is not necessarily a measure of a quality control shortfall. The fragility here in the asylum process is that the individual is also the instrument, so variations are enormously influential in how the overall process works (PBS 1999).

These difficulties are compounded by the institutional weakness of the fact-gathering process. Neither the decision-maker nor the applicant have tools for obtaining corroborating or dis corroborating testimony from witnesses in the applicant's home village or city. Due to the high stakes of an erroneous decision, burden of proof rules remain relatively weak, giving way to the individual applicant’s ability to prove the merits of her case in a persuasive manner.

One way to understand asylum officers and immigration judges is to examine how they deal with these inherent difficulties (Kagan 2006, 13, 20). Given that they can never be entirely sure (and the accuracy of their decisions may never be known), a second best measure is their tendency to avoid certain types of errors (Mashaw 1983, 42; Skolnick, 2001). In asylum adjudication, wrongful denial decisions lead to drastic repercussions. But in the highly-politicized, emotional terrain of asylum, overly generous decisions also lead to drastic repercussions. Asylum officers generally have a strong incentive to grant asylum in uncertain situations since more strenuous justification is required of denials/referrals that put the asylum seeker on a path toward removal. Strained resources may amplify the grant ethos given the understandable fear associated with sending away someone to a potentially dangerous situation. What about immigration judges? Ostensibly, they, too, have an incentive to grant, although the adversarial process requires that at each moment either outcome be carefully justified. Judges cite a dense, highly-detailed set of regulations, statutes, and case law in their rulings. Such rulings allow them to credit detailed, consistent testimony, but not to discredit testimony for “adding to” the initial accounts recorded by the immigration inspector at a port-of-entry. They may ask about identification and warn against fraud, but they may not infer from the possession
of a real or false passport the cooperation or opposition of a sending nation-state toward the asylum seeker. Moreover, judges turn to the arguments of counsel to persuade themselves and the others charged with accepting their decisions (i.e., the parties, the BIA, and the federal courts). Against this background of uncertain facts, limited resources, and high stakes consequences, it is no wonder that asylum adjudicators lean heavily on their institutional “crutches” to make the best decision that they possibly can.

CONCLUSION

A central concern in obtaining administrative justice is the “dilemma of rule and discretion” (Selznick 1969). Yet asylum adjudication may be the most difficult form of administrative adjudication for its elusive facts, vexing law and high-stakes outcomes. It is understandable that immigration advocates and government attorneys argue vociferously about the legitimacy of asylum determinations and demand explanations for what appear to be different grant rates in asylum offices and Immigration Courts. However, they are unlikely to resolve their disputes without real information and reasoned analysis. This paper sets forth descriptive detail and empirical data about the asylum adjudication process. In addition, it presents several hypotheses for why the grant rates differ so dramatically in one forum versus another.

It begins by evaluating whether the differences are merely artifacts of case-flow processes and hence an imprecise measure of administrative justice. After admitting this possibility, it presses on to offer some possible explanations for the apparent discrepancies. Among other reasons, this paper offers an explanation for the grant rates based on the character of the decision-making style and the organization of the decision-making forum influences case outcomes. In so doing, it draws on the vocabulary and concepts of social science and specifically of administrative adjudication. Asylum officers rely on expert judgment and utilize a non-adversarial style of claims determination, whereas the immigration judges defer to the norms of adversarial legalism.

While it does not come to conclusions about the advantages and disadvantages of each organizational structure or style of decision-making, this paper does highlight relevant features of each forum that may be associated with their overall approval rates and illuminates their implications for administrative justice. Specifically, this paper suggests that the two-tiered asylum adjudication system encourages asylum seekers with the strongest claims to utilize affirmative application procedures and dissuades those with weaker claims from presenting their claims to asylum officers, despite termination of work authorization. However, once apprehended and brought into removal proceedings, the system encourages asylum applicants to request asylum as part of a last-ditch strategy to avoid removal and remain in the United States. Moreover, this paper argues that institutional features of asylum adjudication engender an ethos that favors asylum applicants in the asylum courts but disfavors them in the Immigration Courts. This ethos is manifested in the quality of treatment applicants receive as well as the quantity of affirmative dispositions adjudicators dispense. Accordingly, changing the patterns of asylum adjudications requires changes to both workplace structure and workplace culture.

It is important to highlight social scientific concepts in the framing of the problem and the formulation of explanatory hypotheses so that social science can also inform policy reforms. Notably, this study of asylum adjudication reveals that social science intuitions and explanations differ from
the shared wisdom of lawyers. Immigration attorneys implicitly assume that their clients will benefit from increased formalism and legalism. As a result, they struggle mightily to obtain increased substantive rights and enhanced procedural protections for asylum applicants. However, social science challenges that assumption. Under certain circumstances, the more informal and less adversarial climate of asylum interviews benefits asylum applicants, whereas the adversarial character of Immigration Court acts to their detriment.

More sustained or systematic research would strengthen the analysis in this paper and increase its usefulness for policy reforms. First, the DHS and the DOJ should collect uniform case processing statistics for the Asylum Corps and the Immigration Court (e.g. cases received vs. cases completed, cases adjudicated on the merits vs. total cases adjudicated) and publish them in a format that allows researchers to quantify the efficiency and consistency of decisions across forums, paying particular attention toward geographical variations in those forums. Second, the Government Accountability Office (GAO) and other non-governmental entities should encourage survey research and in-depth interviews with asylum adjudicators, as well as applicants, to better gauge the quality of decision-making across the many agencies involved in asylum case processing. While it may not be possible to measure the accuracy of such decisions (i.e. tracking specific cases by a number through the affirmative and defensive process, and then following up with asylum-seekers after removal), greater efforts to ascertain accuracy should be made. Otherwise, political passions and ideological predispositions will continue to dominate the effort to reform asylum. Finally, advocates, administrators and researchers should more widely share their resources and expertise for the common purpose of improving administrative justice in asylum and other immigration-related arenas. Throughout the 1980s and '90s, social security disability insurance and welfare claims flooded agencies and federal courts. Understandably, they became the focus of social science research on the administrative state. As the political tide shifts toward immigration-related claims in agencies and circuit courts during the current decade, academic attention in the fields of administrative and public law must also shift. The importance and sheer volume of asylum adjudication merits their increased attention. Of course, the advocates and administrators, who are well-positioned to respond to and implement reforms, should heed the suggestions of social scientists, especially if they challenge conventional wisdom.

ENDNOTES

1 Whereas "asylum" is a discretionary form of relief, "withholding of removal" is a mandatory form of relief that the immigration judge must grant if the applicant is found to have a clear probability of persecution in his or her country of origin, in accordance with US law. Throughout this paper, figures refer to asylum as a form of discretionary relief in order to isolate decisions made pursuant to the discretion of administrative adjudicators such as immigration judges and asylum officers.


3 For statistics on the asylum backlog, the USCIS history section of the USCIS website was used. However, it has since been redesigned. In the interim, the website provides an email address.
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(CISHistory.Library@dhs.gov). Information is also available through the following: Gregg Bayer, Establishing the US Asylum Officer Corps: A First Report, International Journal of Refugee Law, Vol. 4, No. 4 (Oxford University Press 1992); the Ewing and Johnson "Immigration Policy Brief" alf.org/ipc/asylumessentialsprint.asp); or Martin, 1327.

4 Expedited removal requires that aliens be sent back to their home nations immediately unless they are found by immigration officers to have a "credible fear" of prosecution. Those who express a "credible fear" are channeled into the traditional paths to asylum described in Part II.

5 For example, the Illegal Immigration and Reform Act (IIRIRA) of 1996 required that the identities of asylum applicants be checked against all databases maintained by the Attorney General. Among the databases consulted in the screening of asylum applicants are the Central Index System (CIS), Deportable Alien Control System (DACS), National Automated Immigration Lookout System (NAILS), Interagency Border Inspection System (IBIS), Automated Biometric Identification System (IDENTS), and FBIQuery.

6 Regulations issued in 1999 and 2002 restructured the organization and procedures of the BIA. BIA Streamlining enabled BIA to make most of its decisions with single-member panels, authorized panels to affirm the result of an immigration judge's decision without writing an opinion ("summary affirmances" or "affirmances without opinions"), and lowered the standard of review from de novo to "clearly erroneous" on factual findings.

7 The REAL ID Act of 2005 consolidated habeas corpus petitions, previously filed in the US District Court, with other immigration appeals filed in the US Circuit Courts of Appeals. The consolidation contributes to the already substantial backlog of immigration-related appeals in the US Circuit Courts of Appeals.


9 In 2006, USCIS Ombudsman Prakash Khatri recommended that the existing affirmative process be restricted to asylum applicants in valid immigration status (5-10% of those who currently apply with USCIS), thereby placing the remaining 90 to 95% who are not in valid immigration status directly into removal proceedings before an Immigration Judge without prior access to the USCIS adjudication process. On June 20, 2006, USCIS Director Emilio Gonzalez, in consultation with the UNHCR, USCIRF, EOIR, and several nongovernmental organizations involved in representation of asylum-seekers, opposed the recommendation. If adopted, the recommendation would represent the most significant change to the US asylum process since the creation of the Asylum Corps in 1990. (USCIS Response to Recommendation to Limit USCIS Adjudication of Asylum Applications to Those Submitted by Individuals in Valid Non-Immigrant Status, 2006).

10 This grant rate is calculated as a percentage of asylum decided on the merits (i.e. grants and denials). If the grant rate were calculated as a percentage of all 60,602 asylum completions, as opposed to only the claims decided on the merits, the rate would be significantly lower (e.g. 38 percent and 17 percent respectively).

11 Under US and international law, women often face barriers to the UNHCR definition of a refugee. First, the harms inflicted on women are often not considered to be persecution if they are condoned or required by culture or religion, disproportionately inflicted on women, or simply different from the harms suffered by men under similar circumstances. Second, the perpetrators of these harms are often non-State actors, such as husbands, fathers, or members of the applicant's extended community; recognition of such actors has been slow in coming. Third, and perhaps most importantly, women are often persecuted because of their gender; gender is not one of the five grounds in the Convention definition. It was in response to these interpretive barriers that the UNHCR recommended that under certain circumstances, women could constitute a "particular social group" and that nexus could be established on that basis (Musalo 2003).

12 A few inferences and questions stem from these calculations. First, that the asylum corps skims some of the strongest cases for asylum does not fully explain why the Immigration Court grants asylum only half as often. Among other things, the scope of the skimming phenomenon needs to be considered. Second, the overall grant rate (38 percent) represents a composite of affirmative cases and defensive cases, whereas the overall grant rate in the asylum corps only consists of affirmative cases. Were it possible to isolate the affirmative cases referred by the asylum corps, the expected grant rate for the affirmative cases would be 44 percent. This number is diluted by the defensive cases, which are only granted at 26 percent. No comparable dilution occurs for the USCIS cases. Third, the degree of dilution reflects in part the proportion of defensive cases making up the Immigration Court's docket, relative to affirmative cases.

13 Some notable grant rates, in light of the national average of 38 percent and omitting deten-
members were empowered to decide certain categories of cases without opinion, instead of the traditional panels of three judges. In 2002, noting the BIA's continuing backlog, Attorney General John Ashcroft announced additional reforms. Among other changes, these new rules expanded the number of cases referred for single-member summary review, eliminated de novo review of factual issues, and expanded the grounds for mandatory dismissal. 67 Fed. Reg. 54,878 (Aug. 26, 2002) (codified at 8 C.F.R. § 1003). Similar problems developed in the federal courts responsible for reviewing BIA decisions.


18 Prompted by the USCIRF Report Card, Senator Joseph Lieberman promised to introduce legislation in March 2006 that would require implementation of USCIRF recommendations for asylum reform, including an expanded role for Asylum Officers in expedited removal that would extend their authority to grant asylum outside the context of the affirmative process.

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Highly Skilled Europeans in the US Labor Market
Lessons for the US Immigration System

JOHANNA AVATO

This paper analyzes the differences in earnings among college-educated European immigrants in the United States. While most studies treat European immigrants as a single successful group in the United States labor market, this paper suggests that there is reason to assume differences in labor market integration among migrants from European countries. Indeed, idiosyncratic sociopolitical structures and heterogeneous education systems in European countries lead to significantly different regional results. Moreover, economic linkages between European countries as well as the US immigration system seem to affect immigrant earnings. Along the lines of economic assimilation theory, an analysis of 1993 microdata from the National Survey of College Graduates (National Science Foundation) in combination with various data sources on education, trade and the US immigration policy finds that immigrants educated in Eastern or Southern European countries earn less than native-born Americans. In contrast, and controlling for relevant variables, immigrants from Western or Northern Europe earn up to 14 and 23 percent more than comparable native-born Americans. These findings suggest differences in assimilation of European immigrants due to regionally diverse education systems, economic ties with the US and immigrants’ legal status when entering the US. The results highlight new aspects of the transferability of foreign skills and how European higher education is valued in international labor markets. Thus, it may provide valuable support for shaping US policy towards highly skilled immigrants.

At one time, Europeans were the largest group of migrants to have crossed the Atlantic to find political, economic and social freedom, and, as a result of their migration, they helped to develop the US into a powerful nation and vibrant economy. Their proportion among all foreign-born US residents has declined immensely within the last five decades, from 75 percent in 1960, to 22.9 percent in 1990 to 15.8 percent in 2000 (Dixon 2005).

However, immigration from Europe still remains very important, as European immigrants have a long history of rather successful integration and have brought in skills that have positively contributed to the US economy. Therefore, the performance of European immigrants within the US labor market should be accounted for in shaping immigration policy.

The political discussion about the immigration of highly skilled people with college

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degrees has gained momentum recently in various high income immigration countries. Many governments in developed countries try to implement immigration systems that select immigrants who offer skills that are particularly valued in the home economy. This is often a difficult task given the heterogeneous background of the foreign-born population. Even controlling for the particular college degree or years of professional experience, there are differences in the adaptability of such skills possessed by foreigners to the US economy because these skills are very much a product of the specific educational system and economic structure in the respective sending countries. These differences have important implications for how well different immigrants can assimilate into the US system.

In most of the literature on US immigration, Europeans have been treated as a rather homogeneous group that integrates very well into the US labor market. Still, Europe comprises a very diverse set of countries and, therefore, the characteristics that European immigrants bring to the US differ substantially from one individual to another. This wide variance in backgrounds raises the question of whether there are differences in Europeans' integration into the US labor market that can be explained by differences in the various European countries. Are there differences in assimilation that can be linked to a particular tertiary education system or to the intensity of economic interaction between the US and the sending country? Such analysis could reveal very interesting information on the types of foreign skills that are especially transferable to the US labor market and thereby contribute to effectively shaping the policy towards highly skilled immigration.

This paper argues that there are indeed differences in the integration of European immigrants due to the idiosyncratic diversity of education systems and economic structure in these sending countries. The following analysis will focus on identifying and explaining interregional differences in the transferability of European skills to the US. Special attention will be given to the differences in tertiary education systems as they seem to be crucial for the migrant's labor market performance in the US economy. This focus will paint a new picture of the transferability of European skills against the background of US immigration policy.

The next part of this paper will outline the underlying theory of assimilation in detail and develop the hypothesis. Foreign education and economic linkages between the US and Europe as well as US immigration policy will provide the starting point for propositions on differences in the labor market performance of highly skilled Europeans. Descriptions of and findings from the data comparing European immigrants who entered the US before the 1990s - with the oldest migrants coming as early as the 1950s - will then be presented, followed by the policy implications of the results. Throughout the analysis Europe will be grouped into four geographic regions, Northern, Western/Central, Southern and Eastern Europe (see appendix for more details), and it should be noted that this study is limited to tertiary-educated individuals only. Therefore, when the terms education and highly skilled are used, they always refer to tertiary education and college-educated individuals.
FOREIGN SKILLS AND ASSIMILATION

Three issues regarding the integration of European immigrants are of special importance. The first relates to the individual skills offered by each immigrant, based primarily on college education. The second explores the role of economic ties between the host and sending countries. The last addresses the influence of the US immigration system. While the first issue concentrates on individual characteristics, the second focuses more on macroeconomic components that may affect individual characteristics, and the third relates to policy issues. The latter two can also be viewed as potential mechanisms for the selection of certain kinds of immigrants crossing the border to the US.

THEORY OF ASSIMILATION

The theory of earnings assimilation explains how immigrants initially have relatively low earnings but subsequently enjoy faster wage growth than native workers with comparable skills in the host country (Chiswick 1978, 2005; Lowell 2004; Borjas 1985, 1995). The initial wage disadvantage of immigrants is due to differences in their general and country-specific sets of skills. Human capital theory indicates that a worker's education and work experience are crucial to his or her earnings (Mincer, 1974). Additionally these characteristics are mostly country-specific skills (Bratsberg and Terrell 2002; Friedberg 2000; Zeng and Xie 2004). The substance of education may differ across countries, and a worker's alma mater may not signal potential productivity to employers abroad as effectively as in the home country. As a result, the initial earnings disadvantage of immigrants can partly be explained by the lower value that the host country attributes to human capital obtained in a foreign county.

For the highly skilled Europeans in the United States, education is a crucial variable used to differentiate among groups of European immigrants. Where Europeans received their degrees may be of central importance to their earnings. Yet some observers have argued that European immigrants do fairly well in the US labor market regardless of where and in what economic environment they acquired their skills - thus assimilation theory would not apply to this group (Dixon 2005; Saint-Paul 2004; Bratsberg and Terrell 2002). However, I argue that there are notable differences between immigrants from different European countries owing to significant variation in educational systems and economic structures of the European countries. In fact, I show that the idea of education being a country-specific attribute is a remarkably important point in explaining the earnings of European immigrants from different regions.

Several studies confirm wage differences by place of education (POE). Highly skilled immigrants from Asia do not suffer from an initial wage disadvantage compared to natives when they have a US college degree (Zeng 2004). Similarly, Bratsberg and Ragan (2002) find that education received abroad is not remunerated as well as US education.

Additional research finds an unexpected advantage in European POE, although the explanation is not clear. Regets (2001) analyzes the impact of a foreign degree for highly skilled immigrants in the US who either work in science and engineering (S&E) or hold a S&E degree. He confirms lower wages for immigrants educated abroad. However, he shows that Europeans from English speaking countries actually have higher earnings than US natives while Europeans from other countries earn less. Similar findings were made by Friedberg (2000) for immigrants to Israel.

Indeed, these studies stress that there are differences in return on education received by European immigrants in their
country of origin versus the host country. However, they do not give a full picture of important components shaping the earnings for immigrants from Europe, nor do they offer a set of explanations as to why Europeans differ in terms of their ability to assimilate or integrate into the US economy.

**Propositions on Intra-European Differences**

1. **Place of Education (POE)**

   The importance of where a degree has been received for subsequent outcomes in the US labor market may indeed be complex. In fact, the research reviewed above suggests that there may be differences in the quality of education, such as the form of teaching, tertiary expenditure or importance of English as a foreign language, that are sometimes hard to measure but could cause education from particular European regions or nations to be favored in the US labor market. It is important to note that quality of education in this context primarily relates to the transferability of skills to the US labor market.

   The structure of higher education systems can vary greatly among the various European countries. Northern countries, which make up almost a third of the European immigrant pool, tend to have a system that is somewhat similar to the system in the United States and benefit from a significant language advantage, as English is either their mother tongue or widely used in the media. Therefore, we might expect Northern Europeans to do rather well in the US labor market (also see Regets 2001).

   For countries in Western and Central Europe, whose college-educated immigrants to the US comprise another third of all Europeans, the picture is more diverse. The higher education systems differ considerably from one another and from the US in terms of the length of study and types of degrees available, as well as in the funding of education. Nevertheless, Western and Central European universities are generally regarded as high quality institutions and traditionally enjoy favorable reputations. Also, many universities offer overseas exchange programs that are facilitated by a wealth of funding institutions specializing in furthering student exchanges, such as the German Academic Exchange Service (DAAD) in Germany. These student exchanges may play a role in helping to better prepare Western Europeans for the US labor market and ensure that US employers have a greater familiarity with Western European education systems. Consequently, Western European immigrants may experience comparatively better earnings.

   Conversely, immigrants from Eastern European countries, during the period analyzed here, most likely received their education in a communist system, which differs notably from the US system. This system's differences, unlike those of Western and Central Europe, are not offset by factors that would act as benefits for foreign workers in the US. Thus, Eastern European immigrants, who make up almost 17 percent of all European immigrants, would be expected to experience an earnings disadvantage in the United States.

   Countries of Southern Europe may also have an education system that is less comparable to that of the US than others. There is a lot of literature about the existence of a brain drain from Southern Europe, especially from Italy, which is the main Southern source country. These studies suggest that the education systems, which have been described as patterned on those of the Middle Ages, may provide a less favorable environment for research and confer less value to advanced degrees (Morano-Foardi 2004; Becker et al., 2003). The transferability of Southern European education to the US may consequently be relatively poor, and US labor market outcomes for immigrants
from the region are expected to be less successful.

2. Economic Factors in the Home Country

Economic interaction between sending and receiving countries, such as factor and trade flows, has always played a major role in developing migration theory. A vast amount of literature has been produced to assess questions of macroeconomic relevance and in particular whether migration and trade are substitutes or complements (Mundell 1957; Solimano 2001; Schiff 1996; Faini, et al., 1999). Empirical studies have mostly agreed on a complementary relationship between trade and migration (Head and Ries 1998; Stalker 2000). Krugman (1991) proposes a model of agglomerative forces that roughly states that regions with high economic international activity attract migrants. Moreover, it is especially likely that highly skilled migrants will follow the dynamics of agglomeration and thus concentrate in stimulating environments (Ellerman 2003).

As this study is not interested in the numbers per se, but rather in the quality of the immigrants’ skills in terms of transferability to the host US labor market, this literature is of secondary importance. However, it should be noted that when looking at migration and trade flows, it takes only one step further to propose that intensive trade flows and lively economic interaction among countries also influence the skill transferability for immigrants and the privileges they receive in their host country.

Potential differences in the value placed on the foreign skills of immigrants from countries with varying international economic activities may, on the one hand, become evident at the individual level in the quality of professional work experience. On the other hand, such international interaction increases the knowledge about the sending country’s economy and workers. This contact may improve credential recognition and remuneration of immigrants from countries that are more active internationally compared to workers from countries where such information is lacking because of weaker business linkages. Especially in highly skilled migration where a large proportion comes as “economic” migrants, this issue is likely to be very relevant.

Moreover, economic interaction between Europe and the US is even more important because trade and investment flows are immense, and there are many multinational corporations (MNCs) operating in both regions. Consequently, this analysis hypothesizes that the intensity of economic linkages between host and home country affects the assimilation of the respective immigrants. For European immigrants, this circumstance will cause them to have differential labor market outcomes due to their countries or regions of origin.

Countries in Northern Europe, particularly the United Kingdom, do have very close relations with the US. The same is true for Western and Central European countries, especially France, Germany and the Netherlands. Trade and investment flows and the degree of internationalization tend to be high in these regions. Thus, highly skilled emigrants to the US are likely to perform quite well even if carrying very country-specific skills.

For Southern European countries, postulations are harder to make. While these countries are indeed very integrated in the international economy, the degree to which they are integrated may vary compared to Northern, Western or Central Europe. This means that to the extent to which these inter-country relations matter, Southern Europeans find it harder to assimilate. Therefore, as in the case of education, the ease with which Southern Europeans are prepared to integrate into the US labor market is more questionable.

Linkages between the US and Eastern
European countries are likely to be different in many aspects. In fact, the iron curtain prevented trade and business relations from developing between these two regions for many years. Economic activities only started after the fall of the Soviet Union. Consequently, the unfamiliar business environment from which many Eastern Europeans originated may adversely affect their earnings in the US.

3. Aspects in Immigration Policy

The final component analyzed in this study concerns the US immigration system. Foreigners enter the US under different admission classes that have implications for their labor market performance. The admission classes can be divided into employment-based (EB), family-based (FB) and refugees. Immigrants entering in the EB category hold specific skills that are valued in the US and therefore should theoretically receive the greatest economic reward among the three classes. While this hypothesis is supported by some empirical research (Cobb-Clark 1990, 1993; Duleep and Regets 1996), other studies suggest that EB advantages relative to FB immigration may not be that significant (Lowell 1994, 1995; Sorenson 1992). Mostly, it is refugees - hence "non-economic" migrants - who tend to earn less than other immigrants (Fix and Passel 1994; Passel and Clark 1998).

For the set of countries analyzed in this study, the consideration of admission class is of particular interest because unequal proportions in admission classes among immigrants from different European countries may be a reason for different assimilation patterns. Specifically, attention needs to be given to immigrants from Eastern European countries, from which many fled in the 1980s and entered the US as refugees (Passel and Clark, 1998; INS various years).

To sum up the main propositions, it is very likely that labor market assimilation, in terms of earnings, differs according to the European country of origin. There is reason to believe that education systems and economic relations favor immigrants from Northern, Western and Central Europe, while the labor market outcomes for immigrants from Southern Europe are more questionable. Due to their countries' political developments during the Cold War, Eastern Europeans are likely to suffer a disadvantage, especially if they entered the US as refugees.

DATA

Due to the complexity of the question at hand and the need to find data for many different countries, it is not possible to address the issues by using a single microdata set alone, which would be most precise. Thus, the data used to assess the propositions above are taken from various sources.

In order to describe the group of European immigrants in the US, microdata are taken from the 1993 National Survey of College Graduates (NSCG) and from the 1990 US Census. The primary purpose of the NSCG is to capture detailed information on the education and occupation of the college-educated population. For Europeans with degrees received either in the US or an EU country, the assimilation benchmark, i.e. the sample of natives to which immigrant earnings are compared, is restricted to white Americans with a degree received in the US. This comparison is in line with most previous assimilation research, is the highest standard for comparison and logically compares mostly European-origin native Americans with European immigrants. The sample is further constrained to individuals who are employed full-time and earn a positive (non-zero) income. The dataset will therefore allow for both descriptive and econometric analysis (using OLS) of earning differences among skilled Europeans. Thereby, this
analysis regards those immigrants with foreign education as having the “most foreign” characteristics and assigns secondary attention to immigrants who hold a US degree.

Further data from the Organization for Economic Cooperation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), Barro and Lee (2000) and the World Bank are used to analyze differences in European education systems and transatlantic trade flows. At the aggregate level, this data provides more general information on the origin of immigrants. It should be noted that due to the timeframe of the NSCG, this analysis includes only immigrants who arrived in the US before the 1990s, with the oldest immigrants coming around 1950.

Finally, data on the entrance status of immigrants is gathered from the US Department of Immigration and Naturalization Services (INS), which publishes an annual Statistical Yearbook. Unfortunately, it is not possible to obtain consistent data for each country in every year, and the data is not disaggregated for college-educated immigrants. However, the reports do provide detailed information on who entered the US in what admission class and thus portrays a reasonably accurate picture of how European immigrants differ from each other.

**RESULTS**

Using this data, the following section first looks at the individual characteristics of European immigrants in the US and distinguishes them according to their POE. Regional differences among those with foreign education and data on differences in educational systems are shown as a set of explanations. Then, data describing the economic relations and labor flows between Europe and the US is presented. Subsequently, data by the INS is used to demonstrate the role of admission class for immigrants. Finally, the discussion is concluded by showing estimates from a regression analysis that attempts to capture these elements.

With regard to the distribution of their college education, European immigrants tend to achieve higher levels of education than college-educated US natives (see appendix Table 1). Across the board, workers educated in Europe are more likely to hold a master’s or doctoral degree. It is only among Northern Europeans that the number of immigrants with bachelor’s degrees is greater than those with a master’s degree. Altogether, the share of those holding a foreign degree increases proportionately with the level of the degree. This is true for all groups except Eastern Europeans (see appendix Table 2).

Nominal earning differences with respect to foreign education are presented in Tables 1 and 2. The comparative split by POE reveals interesting information about these respective groups. Table 1 shows that nominal earning differences are quite large among US-born and EU-born individuals. Additionally, those with foreign education tend to have higher salaries. The split by region of education in Table 2 underlines that there are even more significant differences, and the region or place of education seems to be a crucial aspect that differentiates between immigrants from Europe.

The numbers support the propositions made earlier. Not only are Europeans different from each other with respect to their foreign education; in addition, their earnings do

"Not only are Europeans different from each other with respect to their foreign education; in addition, their earnings do not simply follow the theory of assimilation."
Table 1: Socio-demographic Characteristics by Region of Education and Birth, NSCG 1993

<table>
<thead>
<tr>
<th>Region of Education</th>
<th>EU (EU born)</th>
<th>US (EU born)</th>
<th>US (US born)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mean yearly salary in $US</td>
<td>63,036.40</td>
<td>55,202.80</td>
<td>49,792.07</td>
</tr>
<tr>
<td>Mean years of work</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>experience</td>
<td>23.14</td>
<td>21.06</td>
<td>18.57</td>
</tr>
<tr>
<td>Mean age</td>
<td>46.35</td>
<td>44.08</td>
<td>41.3</td>
</tr>
<tr>
<td>Mean years in US</td>
<td>15.37</td>
<td>30.55</td>
<td></td>
</tr>
<tr>
<td>Proportion Male</td>
<td>0.7405</td>
<td>0.6769</td>
<td>0.6863</td>
</tr>
<tr>
<td>Proportion Married</td>
<td>0.7873</td>
<td>0.7175</td>
<td>0.7186</td>
</tr>
</tbody>
</table>

Table 2: Socio-demographic Characteristics by Region of Education and Birth, NSCG 1993

<table>
<thead>
<tr>
<th>Region of Education</th>
<th>Western/ Central EU</th>
<th>Southern EU</th>
<th>Northern EU</th>
<th>Eastern EU</th>
<th>US (EU born)</th>
<th>US (US born)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mean yearly salary in $US</td>
<td>67,293</td>
<td>49,299</td>
<td>71,685</td>
<td>40,860</td>
<td>55,202</td>
<td>49,792</td>
</tr>
<tr>
<td>Mean years of work experience</td>
<td>24.67</td>
<td>21.30</td>
<td>23.45</td>
<td>21.31</td>
<td>21.06</td>
<td>18.57</td>
</tr>
<tr>
<td>Mean years in US</td>
<td>18.9</td>
<td>15.39</td>
<td>14.53</td>
<td>13.61</td>
<td>30.55</td>
<td>0.00</td>
</tr>
<tr>
<td>Mean age</td>
<td>47.81</td>
<td>44.74</td>
<td>46.45</td>
<td>45.03</td>
<td>44.08</td>
<td>41.30</td>
</tr>
<tr>
<td>Proportion Male</td>
<td>0.69</td>
<td>0.81</td>
<td>0.83</td>
<td>0.54</td>
<td>0.68</td>
<td>0.69</td>
</tr>
<tr>
<td>Proportion Married</td>
<td>0.82</td>
<td>0.78</td>
<td>0.76</td>
<td>0.81</td>
<td>0.72</td>
<td>0.72</td>
</tr>
</tbody>
</table>

not simply follow the theory of assimilation. As expected, Eastern and Southern Europeans have lower average earnings relative to Americans. Northern and Western Europeans gain a wage premium due to their foreign education. Thus, it can be speculated that degrees received in these education systems are more than transferable to the US labor market. Of course, these figures should be regarded with caution, as these are nominal wage differences and may still be driven by variables other than POE. Such variables are, on the one hand, observable characteristics like the ones discussed below, but may, on the other hand, also include unobservable elements like the underlying
HIGHLY SKILLED EUROPEANS IN THE US LABOR MARKET

Figure 1

Average Years of Schooling of Population Aged 24 and over by Region and Year (Barro & Lee 2000)

<table>
<thead>
<tr>
<th>Region</th>
<th>1970</th>
<th>1980</th>
<th>1990</th>
</tr>
</thead>
<tbody>
<tr>
<td>Western Europe</td>
<td>8.0</td>
<td>8.5</td>
<td>9.0</td>
</tr>
<tr>
<td>Northern Europe</td>
<td>7.0</td>
<td>7.5</td>
<td>8.0</td>
</tr>
<tr>
<td>Southern Europe</td>
<td>6.0</td>
<td>6.5</td>
<td>7.0</td>
</tr>
<tr>
<td>Eastern Europe</td>
<td>4.0</td>
<td>4.5</td>
<td>5.0</td>
</tr>
</tbody>
</table>

Percentage of Population Aged 25 and Over with Completed Post Secondary Education by Region and Year (Barro & Lee 2000)

<table>
<thead>
<tr>
<th>Region</th>
<th>1970</th>
<th>1980</th>
<th>1990</th>
</tr>
</thead>
<tbody>
<tr>
<td>Western Europe</td>
<td>12.0</td>
<td>13.0</td>
<td>14.0</td>
</tr>
<tr>
<td>Northern Europe</td>
<td>9.0</td>
<td>10.0</td>
<td>11.0</td>
</tr>
<tr>
<td>Southern Europe</td>
<td>6.0</td>
<td>7.0</td>
<td>8.0</td>
</tr>
<tr>
<td>Eastern Europe</td>
<td>1.0</td>
<td>2.0</td>
<td>3.0</td>
</tr>
</tbody>
</table>

Selection inherent in the migration decision—a problem that has not yet been unambiguously solved by researchers.

Education Systems

However, there is adequate support in the data on why POE may affect earnings differently. Education systems are fairly diverse in the respective European countries, and data indicates that degrees may therefore transfer differently to the US labor market. Data on educational attainment in a particular country gives a general indication of how higher education is positioned in the country of origin. Figure 1 shows the percentage of the population that has completed a university degree as well as the total years of schooling by region. Southern Europe appears to have much lower totals and differs strongly from Northern and Western Europe in this respect. Eastern Europe shows comparatively high numbers. However, at this point it should be noted that Eastern European immigrants educated in the communist system, which promoted higher education, focused on skills not necessarily demanded by the US labor market.

A country’s or region’s enrollment ratio for higher education is one measure of the level of human capital in a population. Figure 2 shows that these numbers vary across regions; Southern and Eastern Europeans have much lower rates than Western and especially Northern European countries. Furthermore, Figure 2 illustrates the expenditure on tertiary education in each region. Again, the pattern is similar to previous analysis; expenditure in Southern Europe is relatively much lower. The case of Eastern Europe is likely to be unique, as mentioned previously.

Economic Relations

The proposition is made that differences in earnings among European immigrants occur because the degree of economic interaction between host and home country may affect integration in the host labor market.

Trade and investment data present a broad idea of the extent to which the economies are globally integrated. Figure 3 shows bilateral import and export flows between the EU and the US over the period 1960 to 1990. All regions except Eastern
Europe maintain a high share of their trade with the US economy. Absolute numbers reveal that the large economies in Northern and particularly Western Europe trade most actively with the US.

Similar observations can be made by looking at the foreign direct investment (FDI) of the regions (Figure 4). FDI flows clearly express the leading role of Western and Northern European countries and confirm the political and economic isolation of Eastern Europe during the Cold War.

Furthermore, the global activity of a country can be analyzed by looking at the intensity with which its companies participate in international mergers and acquisitions. Figure 5 shows purchases and sales made by companies from the different European regions in the early 1990s. The results support the patterns mentioned above.

MNCs are crucial entities connecting countries’ labor markets by operating across countries and transferring employees between different sites. In many cases, the company transfers high level staff with highly desirable skillsets to the host country. These transfers can therefore cause differential selectivity into higher positions for immigrants from countries with many MNCs. Data from the INS shows that intercompany transfers - currently possible under the L-visa program - have gained increasingly in importance since the mid-1980s. Many individuals from Northern and Western Europe migrate in this category.

Indeed, support can also be found in the microdata of the NSCG. Appendix Table 3 shows that European educated immigrants are overrepresented as managers, but particularly Europeans from the Western and Northern regions. Furthermore, managers with Western and Northern European education receive higher compensation than others on average. Thus, the earnings advantage of immigrants educated in Northern or Western Europe appears not only to be caused by higher management remuneration but is already observed in upper level positions.

US Immigration Policy

The US immigration system constitutes one mechanism by which immigrants with certain characteristics are selected, and these characteristics in turn influence their earnings. Figure 6 reports the percentage of immigrants migrating in a particular class by region of origin. While FB immigration is the most important category for all immi-
HIGHLY SKILLED EUROPEANS IN THE US LABOR MARKET

Figure 3

Tradeflows between the EU and the US as percentage of all Tradeflows by EU Region

[Graph showing tradeflows by EU region for different years]

Tradeflows from the EU to the US in Million $US by Region

[Graph showing tradeflows from EU to US by region for different years]

Source: UNCTAD. Various years.

grant groups, Eastern Europeans clearly have the highest share of refugees. Thus, the differential earnings observed among Europeans are likely to be connected to the immigration policy in the case of Eastern European immigrants. The other three regions show roughly the same pattern.

Regression Analysis

To underline the findings from the descriptive data above, regression analysis was undertaken using the NSCG microdata. Yearly earnings were regressed on relevant socio-economic variables, including dummies for POE, each capturing the group of migrants with college education from one of the European regions or from the US with native-born Americans as the base category. Additionally, a control variable for holding a manager position and admission class were included. The latter information had to be merged into the data set with the INS data. All variables that have been included as well as their coefficients are shown in appendix Table 4. The results of this analysis confirm the nominal earning differences that split Europeans by POE after controlling for other relevant factors. Northern and Western Europeans earn significantly more than native-born Americans (about 20 and 11 percent). Southern and Eastern Europeans have an initial earning disadvantage (about 14 and 10 percent). These differences corroborate the said influences of education systems and the direction of transferability of foreign skills to the US labor market.

Further, as predicted, the manager variable shows a positive and significant coefficient. Still, the inclusion of this variable does not have much effect on the regional earnings differences in POE, also indicated by descriptive data analysis. Other controls that incorporate the assumptions of the effect of economic relations between host and home country could not be included, unfortunately. Such information is hard to report in microdata; hence, a more intuitive interpretation of the available numbers has to suf-
The admission class, however, could be incorporated with the INS data. The analysis indicated that only the refugee variable matters for earnings, showing a negative coefficient, and solely affects the earnings of Eastern Europeans. In fact, its inclusion reduced the negative coefficient for the Eastern European immigrants from about 23 to 10 percent.7

Summing up, the findings from regression differential earnings of European educated immigrants are confirmed after controlling for relevant factors. Differences in the education systems are very likely to be the main reason. Descriptive data supports the interpretation that economic relations positively affect labor market outcomes; the incorporation of such control into regression analysis is not possible given the available data and therefore is not included here.

The admission class seems to adversely affect immigrant earnings if they enter as refugees, which primarily concerns Eastern European migrants.

**Policy Implications**

This study has analyzed earnings differences for highly skilled European immigrants in the United States at the outset of the 1990s. Based on the theory of economic assimilation and previous empirical research on the transferability of skills received in the sending country, it was proposed that foreign education is rewarded less than US education in the US labor market. However, the results of this study contradict this commonly held view by indicating that European immigrants educated in various European countries have differing wages due to their foreign skills and that some even earn more than native-born Americans. This notion is new to the existing body of literature and offers new insights for policies in both Europe and the US.

From the point of view of the receiving country, i.e. the US, three main policy implications can be drawn. First, under the assumption that the US labor market correctly prices foreign skills, i.e. that higher wages for various groups of immigrants are warranted by higher labor productivity, the results of this study imply that it may be in the interest of economic efficiency to adapt US immigration policy to differences in foreign skill transferability. Consequently, as the US labor market appears to value immigrants who have been educated in Northern, Western and Central Europe higher than those in Eastern and Southern Europe, it would be in the economic interest of the US to favor immigrants from the better performing countries through immigration policy. In light of the fact that highly skilled immigrants from these regions even outper-
Figure 5

Mergers and Acquisitions - Purchases in Million $US

Mergers and Acquisitions - Sales in Million $US

Source: UNCTAD, Various years.

ing their access to the US labor market. For example, this adjustment would entail shortening or even abolishing the time that foreign students have to work on H-1B visas before they can gain legal permanent residency. In fact, empirical research has shown that the H-1B status puts them in a disadvantaged situation and that it is not before gaining legal permanent residency that their earnings increase to a level comparable to US workers (Lowell and Schneider 2006).

Third, the finding that refugees encounter particular difficulties in the US labor market stresses the fact that they may need extra support to integrate in order to minimize the considerable brain waste that occurs when highly skilled refugees are only integrated marginally into the labor market. Concrete policies could focus on integration programs such as accelerating language training or further familiarization with the US system to help to transform their skills into valuable input to the US economy.

From the perspective of European sending countries, two major policy implications can be drawn from the findings of this study. First, the different performances of European immigrants in the US, depending on their country of education, provides an important benchmark for the quality of education systems. Apparently, highly skilled workers who have been educated in Northern, Western and Central European
countries are able to integrate more easily into the US labor market than Eastern and Southern Europeans, and the greater transferability of their skills is valued by the labor market. Considering that companies increasingly operate in international markets, this finding could be used by education policy makers as one indicator for the quality of education. Factors that characterize the more successful education systems, like funding, enrollment rate and number of graduates, could therefore be used to improve the education systems of those countries from which emigrants perform more poorly. Consequently, the findings are valuable input for the policies summed up under the Bologna Process - a policy initiative that is part of the EU's goal to increase international competitiveness by 2010 and aims at equalizing and improving the quality (and quantity) of the highly skilled labor force - and provide empirical evidence about which countries or regions lag behind in their quality of education. Considering that education policy is still a national domain not directly influenced by the EU, it would be useful to undertake the analysis performed here not only accounting for regional but also for country-level differences. While this breakdown was not possible here due to sample size issues, it would certainly be valuable to policy makers if future studies could be undertaken at this level.

Finally, a note of caution is warranted also for those countries whose education systems have performed best in this study. In fact, at least some of the success in US labor markets may be explained by a positive selection bias, i.e. the fact that emigrants may be among the best and brightest in their countries. Discussions of such a brain drain currently dominate many debates about labor markets and education policy in Europe, and the results of this study imply that, at least in

Note: There are two different kinds of FB immigration. FB1 is subject to numerical limitations while FB2 is exempted.
Source: INS, various years.
part, all European countries may be subject to it. EU governments anxiously look at the increasing number of researchers leaving Europe for the US as they fear the loss of human capital and the impact on economic growth. The high reward that some emigrants obtain in the US should not calm such concerns as this situation might draw even more skilled people. It should rather encourage politicians to speed up the establishment of a research friendly environment as well as labor market conditions that provide attractive opportunities to highly qualified people.

ENDNOTES

1. When speaking of European born immigrants, the following analysis strictly refers to the group of European countries that today (2006) form the European Union (EU). These include the EU 15 of the Maastricht Treaty - Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, United Kingdom -and the 2004 accession countries - Poland, Hungary, Estonia, Latvia, Lithuania, Malta, Czech Republic, Slovakia (in the data still former Czechoslovakia). For Cyprus and Slovenia there was no available data.

2. See European Commission (2005) for a detailed description of each system.

3. The NSCG 1993 is a follow up survey of the 1990 US Census including only college educated individuals.

4. Additionally, those few Europeans who completed their highest degree from a place other than the US or Europe are dropped from the sample.

5. Self-employed individuals are dropped from the sample.

6. This is a common method, but bears some imprecision as the admission class cannot be directly identified for each individual and the variable reports the proportion of immigrants in this category for a particular country and year. (Cobb-Clark, 1990; Duleep and Regets, 1996).

7. It should be noted that significance levels in the regression testing all the relevant hypotheses simultaneously are not always as good on the two tailed level. However, further test have shown that there is high multicollinearity associated with several coefficients (Eastern Europeans, US experience, US educated Europeans, Refugee status) that make it difficult to separately interpret each coefficient. Also, F-tests do not allow their exclusion.
Regional grouping of the EU countries included in the analysis

**Northern EU:** United Kingdom, Ireland, Sweden, Denmark, Finland
**Western/Central EU:** Netherlands, Germany, France, Belgium, Luxembourg, Austria
**Southern EU:** Italy, Spain, Portugal, Greece, Malta,
**Eastern EU:** Poland, Hungary, Estonia, Latvia, Lithuania, Czech Republic, Slovakia (in the data still the former Czechoslovakia).

For Cyprus and Slovenia there was no available data.

Table 1: Distribution of the Most Recent Degree among Highly Skilled European Immigrants and US Americans, in percent, NSCG 1993

<table>
<thead>
<tr>
<th>Place of Education by Region</th>
<th>Bachelor</th>
<th>Master</th>
<th>Doctorate</th>
<th>Professional Degree / Other</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>All European immigrants</td>
<td>58.98</td>
<td>27.65</td>
<td>7.90</td>
<td>5.47</td>
<td>100</td>
</tr>
<tr>
<td>Western/Central EU</td>
<td>61.27</td>
<td>25.50</td>
<td>7.85</td>
<td>5.38</td>
<td>100</td>
</tr>
<tr>
<td>Southern EU</td>
<td>63.64</td>
<td>27.31</td>
<td>4.75</td>
<td>4.30</td>
<td>100</td>
</tr>
<tr>
<td>Northern EU</td>
<td>59.66</td>
<td>25.89</td>
<td>8.88</td>
<td>5.57</td>
<td>100</td>
</tr>
<tr>
<td>Eastern EU</td>
<td>48.38</td>
<td>35.67</td>
<td>9.31</td>
<td>6.64</td>
<td>100</td>
</tr>
<tr>
<td>European educated EU immigrants</td>
<td>56.05</td>
<td>27.42</td>
<td>10.56</td>
<td>5.96</td>
<td>100</td>
</tr>
<tr>
<td>Western/Central EU</td>
<td>56.93</td>
<td>28.83</td>
<td>11.76</td>
<td>2.48</td>
<td>100</td>
</tr>
<tr>
<td>Southern EU</td>
<td>51.06</td>
<td>25.66</td>
<td>10.50</td>
<td>12.78</td>
<td>100</td>
</tr>
<tr>
<td>Northern EU</td>
<td>65.31</td>
<td>19.07</td>
<td>10.55</td>
<td>5.07</td>
<td>100</td>
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<tr>
<td>Eastern EU</td>
<td>33.11</td>
<td>47.81</td>
<td>9.29</td>
<td>9.79</td>
<td>100</td>
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<tr>
<td>US educated EU Immigrants</td>
<td>60.38</td>
<td>27.76</td>
<td>6.62</td>
<td>5.24</td>
<td>100</td>
</tr>
<tr>
<td>Western/Central EU born</td>
<td>62.27</td>
<td>24.96</td>
<td>6.66</td>
<td>6.12</td>
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</tr>
<tr>
<td>Southern EU born</td>
<td>66.01</td>
<td>27.55</td>
<td>3.69</td>
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<tr>
<td>Northern EU born</td>
<td>53.54</td>
<td>32.88</td>
<td>7.43</td>
<td>6.15</td>
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<tr>
<td>Eastern EU born</td>
<td>57.46</td>
<td>27.82</td>
<td>9.63</td>
<td>5.08</td>
<td>100</td>
</tr>
<tr>
<td>Native Born US educated</td>
<td>71.43</td>
<td>20.77</td>
<td>2.14</td>
<td>5.66</td>
<td>100</td>
</tr>
</tbody>
</table>
Table 2: Percentage of EU Immigrants Educated in the EU or US within Degrees by Region, NSCG 1993

<table>
<thead>
<tr>
<th></th>
<th>Western/Central EU born</th>
<th>Southern EU born</th>
<th>Northern EU born</th>
<th>Eastern EU born</th>
<th>All Europeans</th>
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<tbody>
<tr>
<td><strong>Bachelor</strong></td>
<td></td>
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<tr>
<td>EU educated</td>
<td>18.61</td>
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<td>55.91</td>
<td>26.2</td>
<td>30.83</td>
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<tr>
<td>US educated</td>
<td>81.39</td>
<td>91.08</td>
<td>44.09</td>
<td>73.8</td>
<td>69.17</td>
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<td><strong>Master</strong></td>
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<tr>
<td>EU educated</td>
<td>20.54</td>
<td>12.13</td>
<td>36.72</td>
<td>50.77</td>
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</tr>
<tr>
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<td>87.87</td>
<td>63.28</td>
<td>49.23</td>
<td>67.83</td>
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<tr>
<td><strong>Doctorate</strong></td>
<td></td>
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</tr>
<tr>
<td>EU educated</td>
<td>31.27</td>
<td>28.54</td>
<td>59.02</td>
<td>38.2</td>
<td>43.38</td>
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<tr>
<td>US educated</td>
<td>68.73</td>
<td>71.46</td>
<td>40.98</td>
<td>61.8</td>
<td>56.62</td>
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<td><strong>All Degrees</strong></td>
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<td>EU educated</td>
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<td>12.9</td>
<td>51.03</td>
<td>41.94</td>
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<td>58.06</td>
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<tr>
<td>Region</td>
<td>Manager status</td>
<td>Percentage</td>
<td>Mean yearly salary</td>
<td></td>
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<td>-------------------------</td>
<td>----------------</td>
<td>------------</td>
<td>--------------------</td>
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<tr>
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<td>Not a Manager</td>
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<td>55245</td>
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<td>86752</td>
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<td></td>
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<td>67293</td>
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</tr>
<tr>
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<td>43899</td>
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<td></td>
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<td>17.64</td>
<td>74519</td>
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<td></td>
<td>Total</td>
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<td>49299</td>
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<td></td>
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<td>Not a Manager</td>
<td>66.83</td>
<td>61724</td>
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<td></td>
<td>Manager position</td>
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<td></td>
<td>Total</td>
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<td>US educated and EU born</td>
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<td>Manager position</td>
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<tr>
<td></td>
<td>Total</td>
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<tr>
<td>US educated and US born</td>
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<td>Manager position</td>
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<tr>
<td></td>
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<td>100</td>
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<td></td>
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</table>
Table 4: Natural log of yearly earnings: estimated coefficients for college-educated EU immigrants and US natives, NSCG 1993

<table>
<thead>
<tr>
<th></th>
<th>-1</th>
<th>-2</th>
<th>-3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Work experience in years</td>
<td>0.0418*</td>
<td>0.0230*</td>
<td>0.0230*</td>
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Note: Standard errors below coefficients in italic. Due to heteroskedasticity the estimated coefficients are computed as heteroskedastic-ity robust estimators (White, 1974).

1) Estimates in column 3 are subject to multicollinearity.

Two-tailed level of significance (asymptotically normal \( t \)-statistic): + \( p < .10 \), * \( p < .05 \), ** \( p < .001 \)
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Humanitarian Motives, Political Statements and the 1951 Geneva Convention Relating to the Status of Refugees

HELEEN BOUSCHER

The 1951 Geneva Convention Relating to the Status of Refugees (1951 Refugee Convention) created the most widely accepted refugee definition to date. The Convention defined a refugee as "a person who has well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." The 1951 Refugee Convention created a right to asylum and has become the foundation of the current refugee system on which millions of people depend for asylum. The United Nations High Commissioner for Refugees asserts that the 1951 Refugee Convention is the Magna Carta for refugees, but the distinction it makes between refugees and economic migrants is arbitrary and has led to criticism by both academics and the public. Why did the drafters of the 1951 Refugee Convention choose this specific wording for the refugee definition? What were the intentions of the drafters?

The political climate played a major role in explaining the refugee definition. Some authors (Grahl-Madsen 1966; Holborn 1956) contend that after World War II nation-states wanted to protect human rights. Other authors argue that giving refugee status to people leaving Communist countries was a political strategy used by Western nations during the Cold War (Hathaway 1984). Previous research juxtaposed the humanitarian and political motives of the drafters. This has created an artificial contrast. This article provides a new perspective on the intentions of the drafters of the 1951 Refugee Convention. It argues that the political and humanitarian motives of the drafters cannot be separated because after World War II humanitarian intentions were themselves political statements.

The definition of refugee has been inconsistent throughout history and has changed with the political climate (Leenders 1993) for several key reasons. Firstly, states have been more willing to grant refugee status to a national of an enemy state than a national of a friendly state because acknowledging refugee status implies condemnation of a specific regime. Therefore, accepting or rejecting a refugee is a political statement that has consequences for a state's foreign relations. In the 1930s,

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for instance, many countries were hesitant to accept Jews fleeing Germany. These decisions were often based on the desire to keep good foreign relations with Hitler's Germany. Secondly, what is accepted by a government or the international community as a legitimate reason for flight has also been subject to different interpretations through history. Today, refugee status is only granted to a person when he or she has been personally persecuted. This was not always the case.

During the Interbellum, complete ethnic groups, such as the Armenians, were acknowledged as refugees. Thus, every person belonging to a clearly defined ethnic group, internationally recognized as refugees, was able to obtain refugee status without having to prove that he or she was personally in danger (Vermeulen, Battjes and Spijkerboer 2002). For the above-mentioned reasons, the definition of refugee has always been restricted to a certain time and place in history.

Political persecution was permanently established as a legal ground for a refugee status in 1951 with the signing of the UN Geneva Convention Relating to the Status of Refugees (Refugee Convention). It has become the foundation for the current refugee regime (Salomon 1991; Boswell 2000; Loescher 1993; Grahl-Madsen 1982-1983; Karatani 2005; Roversi 2003). A contemporary assessment of the Refugee Convention, and the refugee definition in it, influences the way refugee questions are currently managed by the 144 governments that have signed the 1951 Refugee Convention (http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf 2007). Since this assessment depends on the interpretation of how the Refugee Convention was created, a profound understanding of the dynamics that shaped the refugee definition is indispensable.

The definition of refugee in the 1951 Refugee Convention, considered an integral human right, has long been perceived as timeless and the intentions of the 26 drafting states participating in the final negotiations (Australia, Austria, Belgium, Brazil, Canada, Colombia, Denmark, Egypt, France, Federal Republic of Germany, Greece, Holy See, Iraq, Israel, Italy, Luxembourg, Monaco, Netherlands, Norway, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela, and Yugoslavia (http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf) were seen as humanitarian (Grahl-Madsen 1966, 1982-1983, 1982-1983, 1983; Holborn 1956 and 1975). More recently, this vision has been criticized because during the convention an arbitrary distinction was made between refugees and other 'persecuted' migrants, such as victims of sex-related crimes or economic exploitation (Hathaway 1984; Loescher 1993; Salomon 1991; Ruthström-Ruin 1993; Sjöberg 1991). Critics argue that the drafters of the Refugee Conventions were politically motivated and that since the definition of "refugee" in the Refugee Convention was only intended to refer to refugees from Communist countries, the Refugee Convention should be regarded as a political statement by Western states against communism (Kennedy 1986; Loescher 1993). The fact that member-states of the Refugee Convention were left to choose whether the convention would apply worldwide or to European refugees only, further shows that it is incompatible with the universal pretences of the Universal Declaration of Human Rights (UN 2006). This criticism of

"There was no clearly defined difference between a national and an alien before the 19th century."
the humanitarian point of view has elicited an understanding that the definition of "refugee" in the 1951 Refugee Convention is subjective and that the humanitarian beliefs of the drafters are not a sufficient explanation for the specific formulation of this refugee concept.

The debate over the intentions of the drafters does not end with the aforementioned criticism. Taking into account that in previous international refugee laws no humanitarian intentions were mentioned, the question that remains to be answered is why, if the drafters' interests were merely political, they claimed to base the 1951 Refugee Convention on human rights? A necessary part of understanding what altered the political interests of states drastically is the development in the first half of the 20th century of the nation-state which coincided with a rediscovered belief in human rights in the second half of the twentieth century. This historical perspective is combined with a complete reading of the minutes of the meetings where the contents of the 1951 Refugee Convention were discussed. These can be found in the collected travaux préparatoires (preparatory papers) of the Refugee Convention (Takkenberg and Tahbaz I, II, and III 1989). Until now, the travaux préparatoires have only been quoted partially, resulting in a distorted view of the convention. A more in-depth study of the meeting has enabled a carefully weighed analysis.

What is presented is not one but two separate discussions that took place during the drafting period of the Refugee Convention. The first discussion concerned the definition of refugee and the second discussion addressed the scope of this definition. While in both discussions humanitarian and political concerns played a role, it can be argued that these intentions cannot be juxtaposed or even analyzed separately. In the context of the meetings, the humanitarian intentions expressed by the delegates were themselves political statements. This fact explains and reconciles the opposing views in the literature and changes the interpretation of the intentions of the drafters.

**History of State Involvement in Refugee Matters**

Before World War I, European state lacked comprehensive alien immigration rules or laws (Hathaway 1984). There was no clearly defined difference between a national and an alien before the 19th century, yet states preferred not to become involved in refugee issues. Asylum was only granted if it would benefit the host state (Leenders 1993, 6-8). This changed from the 19th century onwards, but especially during the Interbellum when there were dramatic transformations in Western European societies (Caestecker 1998, 74-76; Loescher 1993, 36).

After World War I, the responsibilities of the state with respect to social and economic functions expanded resulting in a more intensive role for the state in people's daily lives (Caestecker 1998, 77-79). Immigration policy was affected by these changes. As the first steps were made towards a social security system, a closer connection between the state and its nationals was formed while aliens were increasingly excluded from the system. (Leenders 1993, 234). States started to enforce stricter border control, such as requiring travel documents and identity papers to cross borders, in an effort to reduce the number of aliens entering their countries. This is a perfect example of the influence of nationalistic state policy during the Interbellum when 19th century liberalism was replaced by nationalism (Hathaway 1984, 348).

Meanwhile, the Russian, Austro-Hungarian and Ottoman Empires collapsed, and millions of people were forced to flee and seek refuse in neighboring states (Loescher 1993, 35-36). These states were
forced to confront large numbers of refugees within their borders and refused to grant them the same rights as nationals due to the financial burdens refugees represented and nationalistic policies. As a result, large numbers of refugees became stateless and refugee matters became a structural problem on the international political agenda.

The Interbellum saw the creation of the first international refugee conventions which were drafted in response to these problems (UNHCR 2006). These instruments were supposed to be temporary solutions to urgent refugee crises and were pragmatic, not idealistic, in nature; however, the more social and economic provisions in the treaties, the fewer the states that were willing to sign them. The first three of these international treaties only provided a legal status for refugees; giving them the right to identity certificates in order to protect them against statelessness. Refugees were defined by their national, ethnic or religious characteristics. A new treaty was drafted for every group of exile, yet states did not intend to bind themselves to structural solutions. In short, these instruments were neither universal nor timeless and made important distinctions based on ethnic background.

**THE COLD WAR CHANGED REFUGEE POLICY**

World War II resulted in refugee problems on several continents. In September 1945 the estimated number of displaced people was approximately 14 million. As with the refugee policy during the Interbellum, each of these problems was dealt with separately. The majority of the refugees in Europe, more than seven million people, came from the Soviet Union and survived the war as forced laborers and prisoners of war. Other large groups came from France (almost two million) and Poland (more than 1.6 million) (Berghuis 1999). Four intergovernmental organizations were actively trying to solve European refugee issues. All four organizations had temporary mandates and focused on specific refugee groups; they were set up pragmatically in order to fix a temporary problem. A distinction was made between displaced persons compulsorily moved by the state (i.e. Nazi-Germany) and refugees who had decided to leave their country out of fear of persecution. Resolving this refugee and displaced persons problem took much longer than expected. In 1949, Europe still contained approximately one million refugees and displaced persons.

Meanwhile, immediately after World War II, tensions increased between the East and the West. The cooperation between former allies, including on refugee issues, proceeded with great difficulty. Western countries did not repatriate all displaced persons, as had been agreed at the Yalta conference in 1945, and the Russians refused the UN refugee organization entry into their German zone. In addition, Eastern Europeans kept coming to the West. This embarrassed the Communist states (Takkenberg and Tahbaz I 1989, 626) but was welcomed, and even encouraged, by Western states. The fact that people preferred to live in capitalist countries rather than Communist countries was good propaganda for the Western countries (Carruthers 2005, 911-912; Boswell 2000, 540; Loescher 1993, 51) and symbolized Western superiority. A conflict over whether refugees were allowed to refuse repatriation on political grounds arose between the East and the West.

Besides the political interests, ideological differences played an important role in this conflict. Repatriation was one of the main issues in this respect. The atrocities of World War II caused Western states to turn away from nationalism and to embrace humanitarian ideals. Did individuals have the right to refuse repatriation deriving from the
right to freedom of choice and the right to a dissenting political opinion, or were state interests more important? If a person had the right to refuse repatriation and he or she could not be sent back to the country of origin, then that person had the right to asylum. Communist states asserted that the state had the right to decide over its nationals and where they should reside. The East considered the Western refusal to repatriate nationals from Communist countries as the only cause of the refugee problem. In their eyes, the solution was easy, if only the democratic countries would repatriate all displaced persons, there would no longer be any refugees.

The majority of Western states believed that the continuation of international refugee protection after World War II would be beneficial for the remaining refugees in Europe and aimed for a liberal and international policy. Three arguments were formulated by the majority of Western states in support of a liberal and international refugee policy (Takkenberg and Tahbaz I 1989, 81-83). The first argument was that many refugees in Europe were stateless and without the same economic and social privileges as nationals, which inhibited their integration into society. The second argument stated that states with a relatively liberal policy would be punished by attracting many more refugees if an international organization did not coordinate the resettlement of the refugees. States did not want to be burdened with the costs of refugee relief, certainly not when the repair of their economies had first priority. The third argument contended that people without a nationality would end up in a socially inferior position that would have a disastrously negative impact on their self esteem. States knew that their grip on society and their influence on individual lives had increased. For this reason, statelessness involved political, economic and social consequences.

The debates on the refugee problem centered around those refugees living in Europe in refugee camps currently under the care of the International Refugee Organization (IRO) and who would be without protection after the termination of the IRO's mandate on June 30, 1950 (Takkenberg and Tahbaz I 1989, 80). Asylum seekers did not fall under the responsibility of the IRO and therefore they received little attention. Future refugees were not yet taken into consideration. Therefore, the solutions sought during the immediate post-war period were temporary (similar to the Interbellum policy) and only focused on one refugee group, the European

“In September 1945 the estimated number of displaced people was approximately 14 million.”

refugees. Due to the Cold War, no general consensus was reached on how the refugee problem could be solved.

THE CREATION OF THE 1951 REFUGEE CONVENTION

After August 8, 1949, the proceedings on finding solutions for the European refugee problem increased in pace and intensity. Although the majority of refugees had been resettled, approximately one million refugees remained in Europe. Research shows that intense discussions took place during important meetings of the Economic and Social Counsel (ECOSOC) of the UN regarding what to do with these refugees. Due to the East-West conflict, these meetings were inconclusive, and two special ad hoc committees were appointed to consider the matter further.

On August 6, 1949, during the ECOSOC's meeting, two important subjects were on the agenda. The first concerned the scope of refugee protection and the second
concerned the definition of the term refugee. Analysis of the preparatory papers proves that the two subjects would remain separate discussions. The delegates from France and Belgium preferred a very liberal asylum policy because, as the French representative explained, despite the price to be paid, the French government wanted to keep the country on a certain moral level. According to the French delegate, the French and Belgian stand was motivated by humanitarian considerations, not by political motives or self interest. The US disagreed, and opposed a widespread international refugee system; instead of committing itself to a legally binding convention, the US preferred to contribute financially, hoping the problem would be solved within the year (Takkenberg and Tahbaz 1989, 93-111).

The statement of the Indian delegate illustrates the perceptions of states not directly involved in the European refugee problem. The Indian delegate stated that since 1947 India had been confronted with huge refugee problems and, for that reason, was not able to contribute to the solution of the European refugee question. The Indian refugee problem was a result of the independence of British India in 1947 when it was divided into the secular state of India and the smaller Muslim state of Pakistan. As a result, approximately 14 million people sought refuge on the Indian subcontinent (Ruthström-Ruin 1993). Clearly, the Indian representative was under the impression that the prospective refugee convention would not apply to refugees on Indian territory and saw no need for a universal convention. From the Communist perspective, there was obviously no need for new international refugee legislation, and a new Refugee Convention was regarded as a lawful excuse for breaking the Yalta agreements. Additionally, the Communist countries believed there were no refugees and the problem would cease to exist if the Western countries would simply repatriate those who had fled. However, the objections of the Communist countries had hardly any effect because capitalist countries had a majority in the UN meetings on the European refugee problem. Fundamentally, the grounds for granting refugee status (and even the definition of who a refugee was) were in dispute.

After the ECOSOC meeting, the above mentioned ad hoc committee was appointed. Unsurprisingly, almost all delegations that were members of the committee had a stake in the European refugee problem. These states either had a refugee problem within their borders, many of the refugees were former inhabitants of their state, or the state was a popular resettlement destination for refugees. If the main issue had been purely universal human rights protection, other states would have been present too because the convention would have a worldwide application. Their absence demonstrates that, initially, the focus of the future refugee convention was on solving a practical problem, in the tradition of the Interbellum.

The first point of dispute on the ad hoc committee agenda, the definition of the term refugee, was settled before the opening of the first meeting. Western states were able to determine the contents of the Refugee Convention without the interference or input of Communist countries because the representatives of the Communist countries, the Soviet Union and Poland, left the room seeing no need for a new refugee convention (Takkenberg and Tahbaz 1989, 153-155). When the Communist countries walked out of the meetings, the Refugee Convention became a Western legislative instrument. It is clear that the definition of the term refugee was a political question resolved by political actions. Because the political conflict was one between two ideologies, the definition of refugee became based on Western ideology. Thus human rights, and especially the freedom from political persecution from a
state, became the only grounds for granting refugee status.

However, the departure of the Soviet Union and Poland did not fully determine the definition of refugee. While the politico-ideological basis of the definition had been determined by the Communist walkout, analysis shows that a second intense debate about the scope of this definition ensued and influenced the outcome of the convention. This debate concerned whether the future Refugee Convention should be applied only to Europe or throughout the world. Initially, the delegates from France, Great Britain and Belgium, who claimed to be inspired by humanitarian ideals and the Universal Declaration of Human Rights, wanted to make this declaration the foundation for a new refugee convention. Other countries disagreed and were afraid that a general definition would result in a ‘blank check’ for refugees, which would have consequences that states would be unable to bear economically, socially or politically (Fakkenberg and Tahbaz I, 158-160, 165-166).

After the first ad hoc committee-session, ECOSOC held a meeting on the European refugee question and the recent developments in the ad hoc committee. Two remarkable changes occurred that further complicated these meetings and the relations between the states. The first change was the position of states not directly involved with the European refugee problem. Pakistan argued that on the basis of humanitarian ideals, every refugee should have the right to asylum and international help. Pakistan thus advocated for a universal treaty. The second change of position came from France. While France initially had a strong preference for a general refugee definition, it now wanted a limited definition. The French delegate explained that a general refugee definition would be dangerous for the receptive countries because some governments would simply not be able to meet the standards. France did not, however, change its supporting arguments. The French delegate still insisted that France was only motivated by humanitarian ideals. In fact, both proponents and opponents of a universal treaty claimed to have been inspired by humanitarian ideals (Takkenberg and Tahbaz II 1989, 10-14). This is crucial to the understanding of how the 1951 Refugee Convention was not required, but had the option, to be applied universally.

After the ECOSOC session, the ad hoc committee met for a second session (Takkenberg and Tahbaz II 1989, 64-70). The minutes of these meetings reveal the importance of the humanitarian argument: despite a state’s stand regarding the refugee definition, ideology itself functioned as a weapon during the Cold War, and thus Western states had to insist on supporting human rights, which was a key element in Western ideology. However, a consequence of the use of the humanitarian argument by all countries was that it became difficult to deny refugee status to people outside Europe. The demands of non-European countries had to be taken seriously.

During the Conference of Plenipotentiaries (1951) where the final draft was discussed, there was a clear division between those Western states advocating a universal convention and those states advocating a European convention. Since both
sides refused to give in, the Vatican offered a solution: a clause with a choice that resulted in an optional geographical restriction ‘in Europe’ (Takkenberg and Tahbaz III 1989, 372-386). The humanitarian nature of the Refugee Convention was left to the preference of states.

A universal convention could harm states financially and socially because a time-less and universal convention could have consequences that states would not be able to manage or even anticipate. Why would states pursue such a damaging solution? One explanation could be that Western states had put themselves forward as the protectors of individual rights after World War II (Goodwin-Gill 1989, 526). Individualism and human rights had obtained a more prominent role in Western civilization but had also become of political interest. The Cold War, and its accompanying ideological conflict, made promoting human rights essential for Western politics.

CONCLUSION

In the first half of the 20th century Western states became increasingly involved in society both economically and socially, and a closer relationship between state and citizen was established. Combined with nationalistic politics, this resulted in a clear division between foreigners and nationals which had not previously been precisely defined; whereas nationals could benefit from many state privileges, aliens could not. Without a nationality or refugee status, resettlement and integration in a new country became almost impossible. These factors resulted in refugees becoming an international problem and international refugee laws were drafted. The first international refugee instruments mainly provided for a legal status for refugees. All international measures relating to refugees in this period were temporary and limited in scope to specific groups of refugees.

After World War II there were many refugees and displaced persons in Europe mainly of Eastern European origin. This problem was not easily resolved as refugees kept leaving the East for the West and tensions between these blocs increased. Several international meetings took place in order to solve this problem. Analysis of the travaux préparatoires shows that two parallel discussions took place during these meetings. Both had an enormous impact and both reflected the international political interests of that time. The first discussion took place between the East and the West and determined the legal grounds on which a person could, and still can, obtain refugee status. Major political interests played a role since Eastern European nationals mainly came to the West, which was regarded by the West as a proof of Western ideological superiority. Eastern Europe saw the refugee problem as one created by Western refusal to repatriate its nationals, despite its demands, and the new refugee convention as undermining previous agreements. Western political interests coincided with its humanitarian ideology, which granted refugees a right to asylum and freedom of political expression. These Western humanitarian ideals clashed with the interests of the Communist states. The refugee problem thus became a focus of conflicting political ideologies. This debate was settled when the Communist countries left the meetings and Western states were able to determine the criteria for refugee status on their own. Political persecution became the only grounds on which a person could obtain refugee status according to the convention.

The Cold War thus had a big impact on the refugee definition. It not only created part of the ‘refugee problem, but it also made the refugee convention a political statement that was crafted on an ideological basis. Despite initially having been intended as a temporary and exclusive convention in
the spirit of previous refugee instruments, this convention allowed for a new element in the Refugee Convention, namely the option to make it universally applicable. This was the result of the fact that the Refugee Convention claimed to evolve out of concerns for universal human rights. This claim made it impossible to deny refugee status to non-Europeans in the same position as European refugees, which was the topic of the second discussion. The universal aspect of the Refugee Convention was a consequence of the incorporation of human rights. Western countries used human rights as a weapon during the Cold War. Therefore, it can be concluded that the 1951 Refugee Convention was a Western treaty and had a political purpose, namely granting asylum to people from Communist countries.

However, taking the history of refugee law into account, it is remarkable that the 1951 Refugee Convention even contends to be humanitarian. The question arises to what extent humanitarian ideals were more than just strategic rhetoric for exclusively political aims. This ideological component had its effect on the second debate amongst Western countries only, which mainly concerned the geographical reach of the new refugee convention. This intense debate gives insight into the humanitarian intentions of Western states. All countries placed large emphasis on their humanitarian intentions regardless of their position. Although it is hard to believe in the sincerity of France because it shifted its stand without changing its support for the humanitarian argument, one cannot generalize. Other countries, like Great Britain and Belgium for example, consistently advocated a broad refugee definition based on humanitarian ideals, despite the political disadvantages. This leads to the conclusion that one must interpret the alleged humanitarian motives of different Western states separately in order to avoid underestimating the role of the humanitarian intentions. While only some Western states may have been convinced of the importance of human rights, ultimately both sides made a compromise resulting in the ability to choose between a European and a universal refugee convention.

Several factors make it likely that the true intentions of Western states defending a broad refugee definition were indeed humanitarian. As Western nation-states wanted to distance themselves from the horrors they were associated with during World War II, the Western traditions of individualism and human rights were rediscovered. Western states came to regard themselves as the protectors of the individual, and his or her rights, and saw the right to flee political oppression as an integral part of those rights. States knew that statelessness meant an inferior social status which had a negative impact on an individual's self esteem. They acknowledged the fact that the relationship between the State and its nationals was much closer than at other times in history, with nationals having benefits that aliens did not have. Therefore, Western governments felt responsible for improving the situation of stateless people.

The motives of the drafters of the 1951 Refugee Convention were not different from the motives of the drafters of earlier international refugee law, namely realizing state interests. However, the interests of Western states changed after World War II with humanitarian ideals reaching political significance. Because of this, it is fruitless to discuss, as previous literature has, whether the drafters of the Refugee Convention had humanitarian or politically motivations. The two are intertwined and cannot be separated.
REFERENCES


Heleen Bouscher recently obtained her master's degree in social history from Leiden University, The Netherlands. She worked on the influence of 20th century nation-state building on international refugee law, and in particular the complexity of the refugee definition.
Consistent, high quality education provision for refugees within Africa is an important objective. However, a substantial gap is likely to remain between the desired level of provision and the current level because of the scale of the delivery challenges. Despite these challenges, efforts to improve delivery of the Education for All and Millennium Development Goals must continue. More specifically, refugees have a recognized right under international law to access education. Education plays a critical role in sustaining and saving refugee lives; consequently, it is now considered one of the four fundamental humanitarian pillars of refugee assistance, on par with provision of food, shelter and medical assistance. These services should be provided from the outset of a crisis through reconstruction. Although this recognition of the value of education is welcome, it does not ensure that delivery is actually improved. This paper suggests that an incentive-based approach should be used to encourage stakeholders to deliver the desired outcomes effectively.

Refugees are among the poorest, most vulnerable and excluded people in society: more specifically, in Africa, they suffer violence, repression and civil rights abuses. Largely unable to access basic health and education services, they remain mired in poverty without sufficient opportunities for personal and collective development. Specific, targeted incentives need to be designed and implemented effectively in order to align different stakeholders with the aim of providing consistent, high quality education to refugees. Otherwise, a sizeable gap in education delivery for refugees in Africa will remain. In the absence of such programs, both the Education for All (EFA) Goal and Millennium Development Goal (MDG) II for universal primary education will be unachievable. Even more seriously, because education underpins delivery of all other MDGs, if universal primary education is not achieved, delivery of the other goals will also be seriously jeopardized (McGinnis 2006).

This paper outlines the international legal and development framework underpinning education provision and the role of education. This outline is followed by a review of the available data, and a discussion of pertinent issues. Finally, policy solutions are elaborated using an incentive-based framework.

A strong international legal framework outlines the right of refugees to access edu-
International normative values and states’ commitments under international law reinforce this right. First, the right to education is enshrined as a universal human right. Article 26 of the 1948 Universal Declaration of Human Rights states that “Everyone has the right to education.” All states are expected to provide at least universal elementary and fundamental education. The primary treaty that delineates refugee rights is the 1951 Convention relating to the Status of Refugees and its 1967 protocol. Over 140 countries signed these inter-state legal agreements that form the basis of refugee rights and protection (United Nations 1989, 2002). Under Article 22, states made a commitment to provide full access for refugees to elementary education on the same ground as nationals and as favourable access as possible to non-elementary education, particularly in relation to funding. Additionally, in 1989, 191 states signed the Convention on the Rights of the Child that reiterated international commitment to children: this was the largest number of state signatories ever to a convention. It outlines the states’ legal obligations to refugees as a grouping of people and to education provision as a service. Article 22 of this treaty details the obligation of states to follow international and domestic law in relation to the rights of child refugees. It also requires states to co-operate with the United Nations and other NGOs to provide support to refugee children. This is essential given that, in host countries, much of the provision of education and other services to refugees (at least in refugee camps) is provided by international organizations and NGOs. The right to education is reiterated in this treaty under Article 28, which again confirmed the obligation of states to provide primary education to all children, including refugee children (United Nations 1989).

The second pillar of the international framework consists of the educational targets established by and for the international community. The targets supplement states’ legal obligations as outlined in treaties, and focus on specific goals and delivery mechanisms. At the World Education Forum in Dakar in 2000, 180 countries collectively committed to the goal of EFA (UNESCO 2000). This included a commitment to improve comprehensive early childhood care and education for the most vulnerable people, including both refugees and Internally Displaced Persons (IDPs). Although all of the EFA goals are relevant to the topic of refugee education, several were particularly apt: combating gender and ethnic discrimination; improving adult literacy and opportunities for adult continuing education; and developing learning outcomes in literacy, numeracy and life skills. Each region subsequently developed a Framework for Action, a plan for achieving the overarching goals. Sub-Saharan Africa’s action framework included four main components: institutional restructuring to improve delivery, increasing state commitment to education, developing educational legislation and targeted government funding to improve basic education (UNESCO 1999). Additionally, the United Nations’ General Assembly incorporated the two EFA aims of universal primary education and gender parity into two of the eight MDGs for 2015 (United Nations 2000). By forming these educational targets, the international community affirmed its belief in the critical role of education in human development, and the necessity of supporting the most vulnerable people to access education. Projects that are designed to increase states’ capacity to deliver education are increasingly funded by international and non-governmental organizations. Furthermore, the World Bank, UNESCO and other agencies monitor progress against both the MDG and the EFA education targets (McGinnis 2006).

Education has an ability to sustain and
to save lives, which is vitally important for refugees because of their vulnerability (INEE July 2005). Sustaining lives includes stability and psychological recovery, skills development and enhancing job opportunities. Supporting the employability of refugees is especially critical, since education "is vital to the reconstruction of the economic basis of family, local and national life" (UNHCR 2004). In this context, employment is conceived as the basis for economic reconstruction and stability rather than refugee dependency on aid over the long-term. Saving lives incorporates protection from military conscription, sexual exploitation, trafficking, landmines and disease (especially HIV/AIDS, tuberculosis, malaria and cholera) (EXCOM 2003). Education also provides a mechanism for disseminating critical information, which can mean the difference between life and death - for example, by informing children about the dangers of playing in fields where there are known landmines. Over the past five to 10 years, the Office of the United Nations High Commissioner for Refugees (UNHCR), the United Nations’ Children’s Fund (UNICEF), the United Nations’ Educational, Scientific and Cultural Organization (UNESCO), and other organizations have recognized that education provision for refugees should not be considered a “luxury” extra service. Rather, it should be a “fourth pillar of humanitarian assistance,” one of the fundamental provisions to refugees alongside food, shelter and medical support (Dakar Strategy 5 2000).

Analysis of refugee education in an African context is important: the continent both generates and hosts millions of refugees. In March 2004, the Africa dialogue in Geneva was based upon a collective understanding that there were four million refugees in question, excluding IDP numbers (UNHCR 2005). By the end of 2005, Africa hosted 5.2 million people of concern to UNHCR (UNHCR 2006). An estimated 2.4 million people live in 267 refugee camps worldwide, most of which are in Africa: 170 camps, representing 64 percent of the total global number (UNHCR 2003, 26). The majority of people that seek refuge move from their state of origin to a neighboring one because neighboring states are the easiest to access physically and poverty means that refugees normally lack the funds required to flee to more distant countries. The largest state hosts for African refugees are Tanzania, the Democratic Republic of Congo (DRC), Sudan, Zambia, Kenya and Uganda. These host countries primarily support refugees fleeing from Burundi, Sudan, Angola, DRC and Somalia (UNHCR 2003, 15).

The number of refugees is volatile because refugees are affected by the ebb and flow of political situations. In 2004, repatriation of refugees to newly peaceful states included 90,000 returnees to both Burundi and Angola and 57,000 to Liberia (UNHCR). However, conflicts in other countries can erupt at the same time. For example, in 2004, more than 200,000 citizens from Darfur in Sudan, the Democratic Republic of Congo (DRC), and Somalia moved to other countries to claim refuge from violence and instability (UNHCR). This makes it virtually impossible to deliver education consistently to those most at risk.

There are significant costs involved in supporting refugees, which are borne primarily by host countries and the international community. However, neither host countries nor international donors provide a high enough level of support. Host governments may view refugee camps “as a means of isolating potential troublemakers and forcing the international community to assume responsibility” (Arafat 2003). They may also refuse to allow refugees to study alongside their citizens in local schools, and may insist upon the establishment of separate provi-
sions for refugees. This has an especially negative impact on secondary education, as neither host countries nor international donors are unlikely to provide this level of service for refugees. A parallel support system covering both refugees and their host community is costly. It can be so inefficient that "the cost per refugee is much more than the gross national product per head of the population of the host country" (Harrell-Bond 2001). However, although it might be more cost-effective to invest in community provision on the basis that refugees can also use such services, it may not be politically viable. This problem is compounded because international appeals to donors, mainly developed country states and large NGOs, tend not to raise adequate levels of funding for refugees. In March 2005, UNHCR's Africa bureau director David Lambo declared:

We appealed for $60 million for Burundi, where we repatriated 90,000 refugees last year, despite all the problems...we only got $2.5 million in response to that appeal. This is obviously not enough (UNHCR 2005).

In a 2006 interview with Lisa Fry, Nathalie Meynet, and Claas Moelang, members of UNHCR's education unit, they stated that in the context of severe under-funding of refugees, education is rarely supported to the extent that would match the belief in its strategic importance.

All of the large international and non-governmental organizations that support refugees believe that emergency operations should include education and training of refugees at the outset rather than as a secondary phase. UNHCR is the major international player, and acts as both the policy guardian of the refugee convention and as one of the principal sources of practical support to refugees. UNICEF supports continuity between basic education of refugees and basic education in the refugees' country of origin, chiefly focusing on strategy, teaching content and teacher training. UNESCO and the United Nations' Office for the Coordination of Humanitarian Affairs (OCHA) also support education provision. Hundreds of NGOs also deliver services to refugees, many of which are strong advocates for refugee education, especially the Women's Commission for Refugee Women and Children.

At the World Education Forum in 2000, it was evident that there was a serious lack of co-ordination between these agencies. As a result, the Inter-Agency Network for Education in Emergencies (INEE), a global network for education practitioners, was formed to increase co-ordination for both policy-making and policy implementation. Within four years of its inception, the INEE launched Minimum Standards for Education in Emergencies, Chronic Crises and Early Reconstruction (MSEE). This is a comprehensive program that supports "project planning, assessment, design, implementation and monitoring and evaluating of projects" for refugee education around the world, and has been used in 60 countries. The MSEE represents the latest stage in an worldwide, evolutionary learning process regarding the most effective ways to deliver education to refugees. Over the last 10 years, a number of international frameworks for education provision in emergencies have been produced; these have developed and disseminated new principles and best practices. The most definitive practical guide to promoting effective education for refugees in emergencies, entitled Rapid Educational Response in Complex Emergencies: A discussion document, was jointly published by UNESCO, UNICEF and UNHCR in 1998 (Aguilar and Retamal 1998). A core element of their rapid response framework is the three-phase
approach to handling emergencies: first, a recreation and preparatory phase, followed by non-formal schooling and the re-introduction of a curriculum (Aguilar and Retamal 1998, 9). Recreational kits (RECREATE), including toys, games and musical instruments, are produced and distributed to accompany the first phase. These kits are especially popular with refugees, and help children to release stress and to build stability, thereby developing a better mental state in which to learn. In 1993, UNESCO developed a Teacher Emergency Package (TEP) for Somalia under its Program for Education for Emergencies and Reconstruction (PEER). The TEP consisted of school materials and a proven methodology for teaching literacy and numeracy at a basic level in the mother language of the children in the school. Refugees often transport their sturdy and portable TEP kits back to their countries of origin on repatriation, which demonstrates their value to refugee communities (Aguilar and Retamal 1998). Equivalent kits have now been developed in other African countries and worldwide.

**Situation Description**

It is very difficult to evaluate education provision to refugees across African countries in a reliable way. The only statistical data for education that specifically covers refugees within Africa originates from the UNHCR. Although the UNHCR has improved its statistical reporting on educational provisions in its refugee camps worldwide, there are no comparable statistics for non-camp education provision, except where refugees are included within overall host country statistics (UNHCR August 2004).

The following analysis is limited because UNHCR data is incomplete: not all camps filled in every question, and the 2003 Camp Indicator report is the only complete publication that has been widely released. Thus, there are no previous or more recent data in the same format, precluding time series data analysis, although, usefully, some preliminary data have been released for 2005.

The Camp Indicator Report for 2003 "contains five indicators considered critical to the quality of UNHCR educational programmes." These are:

1. Percentage of the population aged 5 to 17 enrolled in school (M/F) [UNHCR standard: 100 percent]
2. Percentage of students who successfully completed the school year (M/F) [standard: 90 percent]
3. Teacher to student ratio [standard is 1:40]
4. Percentage qualified or trained teachers (M/F) [standard: 80 percent]
5. Percentage of schools with structured retention initiatives for girls [standard: 80 percent]

(UNHCR August 2004).

Comparatively, the refugee camps in Africa performed worse than the world average on all five indicators, missing target standards by a substantial margin. Nearly 127,000 refugee children in the recorded African camps aged between 5 and 17 are not enrolled in school, and 57,700 of these are housed in camps in the Central Africa/Great Lakes region, which indicates the scale of the problem (UNHCR August 2004). On average, only 15 percent of African camps achieved school enrollment of 100 percent of the population aged between 5 and 17, even though school enrollment is the most important performance indicator. The percentage of qualified or trained teachers was the indicator most frequently achieved, on average, in African camps: 60 percent of all camps that responded to the question met the 80 per-
Table 1: Performance Against UNHCR Refugee Education Indicators

<table>
<thead>
<tr>
<th>UNHCR Refugee Education Indicators 2003</th>
<th>% of students aged 5 to 17 enrolled in school</th>
<th>% of students who successfully completed the school year</th>
<th>% of camps meeting student-teacher ratio</th>
<th>% of qualified or trained teachers</th>
<th>% of schools with structured retention initiatives for girls</th>
</tr>
</thead>
<tbody>
<tr>
<td>World camp average</td>
<td>100</td>
<td>90</td>
<td>1:40</td>
<td>80</td>
<td>80</td>
</tr>
<tr>
<td>[N=108 camps max]</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Central Africa/Great Lakes</td>
<td>76</td>
<td>67</td>
<td>75</td>
<td>69</td>
<td>59</td>
</tr>
<tr>
<td>[N=25 max]</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>East Horn of Africa</td>
<td>12</td>
<td>15</td>
<td>52</td>
<td>74</td>
<td>26</td>
</tr>
<tr>
<td>[N=19 max]</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Southern Africa</td>
<td>0</td>
<td>100</td>
<td>33</td>
<td>37</td>
<td>38</td>
</tr>
<tr>
<td>[N=7 max]</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>West Africa</td>
<td>29</td>
<td>71</td>
<td>57</td>
<td>50</td>
<td>86</td>
</tr>
<tr>
<td>[N=9 max]</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Africa total</td>
<td>38</td>
<td>17</td>
<td>25</td>
<td>78</td>
<td>60</td>
</tr>
<tr>
<td>[N=60 max]</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: Refugee Education Indicators 2003, UNHCR, August 2004

Second, no region has consistent provision of all the desired outcomes. The best performer in the region was Southern Africa including Namibia and Zambia, which had an average of 59 percent overall on all five targets. Conversely, the worst regional performer was Central Africa/Great Lakes region (Central African Republic, Congo, DRC, Rwanda and Tanzania), with only 36 percent of targets met overall. However, comparisons are hampered by the difference in size of the regions - the Central Africa/Great Lakes region has more than three times the number of schools of the Southern Africa region.

UNHCR broke down the overall regional analysis into separate countries and, within countries, to camps. They particularly drew attention to the following observations:

-- In two African camps, there were significant levels of out-of-school children: 14,700 in the Impfondo camp in the Republic of Congo, and 10,300 children in Meheba, Zambia. At the country level, Ethiopia had the overall greatest proportion out of school, with 35 percent of children out of school in 2003.

-- The repatriation of refugees back to DRC and Guinea meant that fewer children originating from those countries successfully completed the school year, which negatively impacted the figures of refugee camps where they were hosted.
Table 2: Performance Against UNHCR Refugee Education Indicators by Region

<table>
<thead>
<tr>
<th>Region</th>
<th>% of UNHCR targets achieved in 2003</th>
</tr>
</thead>
<tbody>
<tr>
<td>Central Africa/Great Lakes</td>
<td>36</td>
</tr>
<tr>
<td>[N=25 max]</td>
<td></td>
</tr>
<tr>
<td>East Horn of Africa</td>
<td>41</td>
</tr>
<tr>
<td>[N=19 max]</td>
<td></td>
</tr>
<tr>
<td>Southern Africa</td>
<td>59</td>
</tr>
<tr>
<td>[N=7 max]</td>
<td></td>
</tr>
<tr>
<td>West Africa</td>
<td>44</td>
</tr>
<tr>
<td>[N=9 max]</td>
<td></td>
</tr>
<tr>
<td>Africa total</td>
<td>45</td>
</tr>
<tr>
<td>[N=60 max]</td>
<td></td>
</tr>
</tbody>
</table>

Data source: 'Refugee Education Indicators 2003', UNHCR, August 2004

However, repatriation itself is generally considered to be positive.

-- The largest worldwide gap in the number of refugee teachers is in Central Africa and the Great Lakes region (27 percent). At the country level, Kenya requires the largest absolute number of new teachers - with a sizable 290 more teachers required in the Kakuma camp to meet the target 1:40 ratio.

-- Training of teachers in Africa is particularly required in Ethiopia, Tanzania and Uganda.

-- Camps with few or no structured retention initiatives for girls are primarily located within the DRC and Ethiopia.

(UNHCR August 2003)

It is not clear what specific actions UNHCR field offices have taken in light of these observations to remedy delivery problems in the camps. However, UNHCR headquarters has attempted to improve the quality of its reporting since 2003. According to Fry, Meynet and Morlang, this process has included headquarters staff training field officers on data collection, and reiterating the importance of data collection and reporting. UNHCR has also revised its indicators for 2005 in an attempt to create more meaningful analysis of education delivery. The new set of indicators consists of:

1. Percentage of refugee children aged 6-11 enrolled in primary school [UNHCR standard: 100 percent]
2. Percentage of refugee adolescents aged 12-17 enrolled in secondary school [Standard: 100 percent]
3. Gender parity at the primary and secondary levels, determined from analysis of the first two indicators [Standard is 50:50, equal gender enrollment]
4. Teacher to student ratio [Standard is 1:40]
5. Percentage of qualified or trained teachers [Standard: 80 percent]
6. Percentage of female and male teachers [Standard is 50:50, equal percentage]
7. Percentage of adolescents aged 15-24 enrolled in non-formal education, such as vocational training. [No definitive standard has been set, as adolescents may not be enrolled in vocational training because they attend secondary school or university, according to Fry, Meynet and Morlang.]

There is no change in the indicators from 2003 that measure teacher to student ratios or the percentage of qualified or trained teachers. The breakdown of the indicator of overall school enrollment into enrollment in primary and secondary education is much more useful: this will enable better analysis of the main problems by sector. In addition, the inclusion of a perform-
ance indicator to monitor non-formal education is intended to draw focus to critical provision for especially vulnerable adolescents. Rather than measuring structured retention initiatives for girls, UNHCR now measures gender parity at both levels, because unemployed male youths who are not at school are also very vulnerable.

Using the provisional 2005 data, UNHCR reports some improvements in education provision (UNHCR 2006). Provisional analysis of the 2005 education indicators in 18 African countries, covering 66 camps, shows that 75 percent of refugee children, on average, are enrolled in primary education: the lowest average is in the Central Africa Region (72 percent) and the highest is in Southern Africa (80 percent), which reflects overall differences in aggregate performance from 2003. These figures are not directly comparable with 2003 data because they measure primary education rather than both primary and secondary education. In addition, even though gender problems persist, with higher dropout rates for girls and harassment from teachers and peers, there has been progress over the last five years towards gender parity (UNHCR 2006).

The improvements in gender parity and the increases in primary-level enrollment are not transferred into secondary-level education. The drop out rate for refugee children between primary and secondary education is high and affects both boys and girls, though it is higher for girls (UNHCR 2006). As the UNHCR points out, only one quarter of adolescent refugee girls in Africa are enrolled in secondary education. This demonstrates "insufficient focus on youths" (UNHCR 2006). The gap in secondary education is partly a consequence of the focus on primary education: the MDG target on primary education is reinforced in UNHCR country-based prioritization, and subsequently negatively affects resource allocation for secondary education (UNHCR 2006).

**ISSUES AND CASE STUDIES**

Several other factors besides lack of funding and refugee numbers adversely affect delivery of refugee education. In Africa, hundreds of thousands of refugees are hosted in large-scale camps, and the pitiful conditions in these camps worsen over time. Such conditions include frequent food shortages and long-term destitution. Long-term camp residents suffer increased incidences of domestic violence and family breakdown, substance abuse (especially alcohol), indolence and long-term psychological damage (Harrell-Bond 2001). Inadequate security is also a major barrier to education: refugee children are not allowed to attend school in camps unless they are secure. Although the primary justification for establishing camps is because of the security that they provide, the validity of this claim is often undermined by reality. Notoriously, the Lord's Resistance Army was very violent to Sudanese refugees in northern Uganda in the Alchol-Pii settlements, leaving 140 refugees dead during two raids in 1996 and 2002 before the camp was finally closed (Bagenda and Hovil 2003). Unfortunately, international donors tend not use their political might to lobby host countries to respect the rights of refugees or to provide secure camp locations (Norwegian Refugee Council 2005, 17). Moreover, refugee camps can also become recruitment pools for militias in their search for gunmen, foot soldiers and sex slaves. The inadequate level of security is often compounded by the lack of alternative opportunities for refugees to earn a living, to be educated, and to be trained (UNHCR 2003). Thus camps often fail to be environments that are conducive to effective learning.

Education provision is further hampered by the challenges of reconstruction after violent and bitter conflict. The use of
Table 3: Gender Parity at Primary Level, 2000-2005

Achieving gender parity at the primary level, 2000-2005

<table>
<thead>
<tr>
<th>Region</th>
<th>% Female students at primary level</th>
<th>2000</th>
<th>2005</th>
</tr>
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<tbody>
<tr>
<td>Central Africa/Great Lakes</td>
<td></td>
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<td>East Horn of Africa</td>
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<td>Southern Africa</td>
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<tr>
<td>West Africa</td>
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<tr>
<td>Africa total</td>
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<td></td>
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</tbody>
</table>

Data source: Africa Newsletter, Africa Bureau UNHCR, Third Quarter 2006

Table 4: Primary and Secondary Enrollment 2005, by Region and Gender

<table>
<thead>
<tr>
<th>Region</th>
<th>% Primary and Secondary Enrollment</th>
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<tbody>
<tr>
<td>Central Africa/Great Lakes</td>
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<td>East Horn of Africa</td>
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<td>Southern Africa</td>
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<td>West Africa</td>
<td></td>
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<tr>
<td>Africa total</td>
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</table>

Data source: Africa Newsletter, Africa Bureau UNHCR, Third Quarter 2006
child soldiers in African wars results in significant barriers to their rehabilitation, as former child soldiers "are harder to demobilize and bring back into routine life than grown-up fighters," traumatized and frequently violent (Machel 1996; Kalashnikov Kids). As such, these children are difficult to educate within a structured school environment, where there is little or no specialist psychological support. Likewise, after civil wars and genocide have fueled ethnic tensions - the former a common phenomenon on the continent - it is very problematic to educate refugees of multiple ethnicities together. Ideally, trained specialists with conflict-resolution skills would be deployed to support teachers, pupils and communities throughout the process of reconciliation. Additionally, meticulous care is needed in order to depoliticize textbooks and lessons and to deliver peace education deploying formal and informal learning methods. For example, in Kenya, 42,000 children have received a weekly peace education lesson using UNHCR peace education materials, and more than 3,000 young people and adults have taken community training. This training consists of 12 half-day sessions and occasional follow-up reviews, and has been evaluated by the UNHCR as effective (Sinclair 2002). However, such trained specialization is difficult to provide, both because it is expensive and because it is Unfeasible to find enough specialists able to cover all of the areas in which they are needed.

Trained teachers are a scarce resource in Africa, and while there are shortages in both refugee and non-refugee contexts, it is especially difficult to find and to train enough teachers to work in tough camp environments. Levels of teacher compensation also need to be realistic to attract and retain teachers, and teachers need ongoing training and mentoring to improve their skills. Internationally-devised incentives for teachers, agreed to by NGOs and United Nations organizations in early 2005, are set too low. Teachers in Chad, for example, received 15,000 Chadian francs per month while security guards were paid 80,000 (Heninger and McKenna 2005). Given the gap between the available and the desired number of teachers, as highlighted in the UNHCR performance indicator data, the opportunity cost for teachers should be carefully reviewed. Pay offers should ensure that teachers are able to earn an adequate wage compared with their other options. Beyond pay, it is also important that the community of refugees support their teachers. A community-based approach to education provision is vital, ensuring that children and other community members are persuaded to attend school regularly, maintaining school standards and ensuring that school equipment is not expropriated. This approach should extend to host communities, and NGOs have a special role to play here. For example, in 2001-2, FilmAid launched a film that surpassed "all expectations, drawing in average audiences of 10,000 people a night in Kenya, and up to 27,000 at a single screening in Tanzania." The poor, rural communities of Kenya and Tanzania, which have hosted refugees for years, are invited to screenings, thus promoting more cordial relations and providing incentives for ongoing support (FilmAid International). Such activities should be encouraged and extended to more camps and communities.

"Additionally, meticulous care is needed in order to depoliticize textbooks and lessons and to deliver peace education deploying formal and informal learning methods."
Gender discrimination in education is another barrier, and refugee girls suffer double discrimination as refugees and as females. Traditional gender roles that reinforce domestic duties of girls mean that they are often required to support their mothers to gather firewood, cook, clean and collect food rations. This significantly limits their availability to attend school. As demonstrated by the performance indicators, refugee girls are less likely to access education and are more likely to drop out of school than boys, especially at higher levels of schooling. This is compounded by cultural values, as “more traditional families withdraw their daughters from school before puberty” (Sinclair 2002). According to Fry, Meynet and Morlang, UNHCR specialists believe that cultural values interplay with poverty, and that if poverty were not so prevalent, the choice to remove girls from school would be made much less frequently: poverty rather than principle is the primary issue here. There have been several recent efforts to improve enrollment and retention of girls in the refugee education system. For example, in northern Uganda, the Jesuit Refugee Service has introduced a cost-sharing scheme as an incentive for female students to attend secondary school in the Rhino Camp. Criteria for selection include both financial need and regular attendance in school. Initial results of this program have been positive (Howgego 2005). However, although such programs are an important step forward, they are in the pilot stage in only a small numbers of camps, and the overall approach to incentives is ad-hoc. These incentives should be scaled up in a structured, comprehensive way to encompass more camps and a larger number of beneficiaries.

The choice of language for instruction can also become a major area of controversy. Should schools teach in the language of the refugees’ original country, of their host country or in an international language? Occasionally, host countries will intervene and make the decision. For example, in DRC, students from Angola and from southern Sudan were required to follow DRC’s Francophone national curriculum, although their prior education was based upon Portuguese and English respectively (Sinclair 2002, 26). This issue is made more complicated and controversial because of the number and variety of different languages and dialects on the continent, and because of the way in which identity and language intertwine.

The logistical difficulties inherent in delivering services across Africa’s often remote and difficult terrain also form a practical barrier to refugee education. Logistical support for emergency education includes providing temporary shelters, school materials, toys and games, and transporting them to inhospitable and distant refugee locations in host territories. Ongoing support encompasses the provision of more permanent school buildings and a steady stream of school supplies including textbooks, paper and writing implements (Aguilar and Retamal 1998). This high level of logistical support is hard to deliver, especially over the long-term, as funding and support are diverted to new refugee emergencies. Delivery is further undermined by the lack of integration between the many NGOs, international organizations and the host countries in the humanitarian sector. For example, The Women’s Commission for Refugee Women and Children, having visited 10 of the 11 refugee camps in eastern Chad, concluded that UNICEF “had not provided adequate shelters for schools, school supplies or guidance to teachers or camp management” (Heninger and McKenna 2005). Yet, the organization had not reached out for support from other UN agencies or from NGOs.
tion is important as a building block for learning, but all the other levels (pre-primary, secondary, tertiary formal levels in addition to vocational training) are consequently neglected. Secondary education provision is inadequate, as demonstrated by the UNHCR performance indicators. Tertiary education is extremely limited, with only few areas of excellence such as the long-established camps in Western Sahara, from which hundreds of students move to study for degrees abroad (Farah 2003). There is also a significant problem with the UNHCR's current approach that focuses on outputs for formal sector education, such as student teacher ratios and attendance. UNHCR does not measure the quality of education provision, and does not have the capacity to do so, given the difficulties and costs in measuring quality learning outcomes. Therefore, it is probable that quality of teaching and of learning varies widely across camps and across countries. In terms of informal learning, there has been increased focus on the need to expand vocational training and opportunities for entrepreneurial activity, with some reportedly successful programs. In Jembe, Sierra Leone, the Refugee Education Trust (RET) supports a program combining training in carpentry, bakery, tailoring, soap making and tie-dyeing alongside sports and other activities intended to promote improved social interaction and confidence (Sesan and Wood et al. 2004). Additionally, in northwest Ugandan refugee camps, the organization Echo Bravo has successfully established drop-in 'education bases' for young people in refugee camps, where they can take courses, congregate, play sports and listen to music (id21 insights). Adolescent education provision has benefited from increased attention over the last couple of years, but much more effort is required to deliver post-primary education and to provide skills transfer and job opportunities for adolescents.

Substantial scaling and transposing of these 'islands of excellence' is required if new approaches and innovation are to improve education provision for refugees on mass scale.

DISCUSSION

In sum, existing delivery mechanisms are simply not working - tens of thousands of refugees in Africa are not even enrolled in school. A new approach is required. A comprehensive, harmonized incentive structure should be developed by the UNHCR in conjunction with its delivery partners (UNESCO, UNICEF, NGOs, the World Bank) to determine which incentives to offer to stakeholders in order to engender explicit desired education outcomes - including delivering EFA and MDG II. Embryonic incentive structures for teacher pay and for promoting the retention of girls in schools have demonstrated success, but have been too patchy, which limits their effectiveness overall. Incentives for one stakeholder should be carefully analyzed against incentives provided to other stakeholders, aiming to ensure complementary stakeholder behavior. If providing incentives for one stakeholder would cause a negative impact on education provision in another area, these should be discarded. Potential policies and incentives are outlined below: given the lack of direct field research, some of these may be impractical; however, the overall framework should remain valid.

Incentives for host governments need to be targeted to ensure that camps are located in more secure areas in which refugees are able to earn a living. Increased access to funding is the primary incentive for increased support for refugees. Consequently, donors could fund development projects within the host country that were tied to certain refugee outcomes being met. These outcomes could include the numbers of refugees enrolled in the host
country’s primary and secondary schools, and adequate levels of security in camps. Education provision for refugees should be tied into local host population provision wherever possible to create incentives for local support of refugees. However, whether joint provision is feasible on whether refugees and the host community use the same language.

Incentives for host home governments should not be high on the agenda, because home governments either initiated violence and/or discrimination towards their citizens or were powerless to stop non-state actors from doing so. Yet, home governments should be engaged in post-conflict reconstruction, and aid provision should be linked to specific commitments in education - e.g. depoliticizing curricula, supporting peace education and disarmament initiatives, and recognizing education attainment by refugees achieved in a host country and/or in UNHCR schools.

Aligning donor incentives is especially important. Potentially, on an international scale, specific donations to support the MDGs could be traded off against other state commitments, like an emissions trading scheme within a global context. Additionally, substantial support could be obtained from individual donors more easily, especially if tangible products were packaged for purchase. For example, provision of basic kits and materials for refugee and combined local/refugee schools could be well within the price range of people who are sourcing wedding and Christmas presents. Experience in the UK indicates that NGOs are making substantial progress in this area, with sizable and rapid growth in the purchase of ‘post-materialistic’ presents.

Generally, refugees are not well funded, but philanthropic giving for disasters can be substantial: in 2005, US philanthropic funding for disaster relief (including donations to combat destruction from the Asian Tsunami and Hurricane Katrina) was an estimated $7.34 billion (Sullivan 2006). The new wave of philanthropic giving should be harnessed as a core component of funding refugee education. Philanthropic support could extend to services, so that schools in refugee camps could be linked with specifically trained mentors from schools in other countries to improve quality and motivation.

Companies could also fund and provide volunteer support for host government capacity building to support refugee education provision as part of their corporate social responsibility strategy, for example.

Incentives for refugee communities are less critical, as most communities already prioritize education. Yet, incentives are valuable to promote consistent attendance in three particular cases. First, to maintain regular attendance of girls; second, across key transition periods between school years and particularly in the move from primary to secondary school; and, finally, when key messages need to be transmitted - for example, about the danger of landmines, malaria or HIV. Explicit transfers of money or useful goods could be made to promote attendance. For example, in Pakistan, the World Health Organization provided a tin of edible oil on a monthly basis to Afghan refugee girls with regular school attendance, which had a “dramatic positive effect on girls’ attendance” (Sinclair 2002).

Teacher incentives are useful in attracting and retaining high quality staff. Teachers must at least earn wages that are comparable with other employment opportunities other-
wise the opportunity cost of being a refugee teacher will be prohibitive. Teacher scholarships could be funded through combinations of remittances from Diaspora or international donors; scholarships could be linked to commitments to work for the refugee community, even if this were capped at a few years.

Coordination of international relief and humanitarian efforts is, and has historically been, difficult in spite of coordinating networks. However, earlier planning for crises would not only benefit the handling of a crisis if it occurred, but would also reduce stress on NGO and international staff. There are examples where textbooks from troublesome potential ‘hot spots’ have been stored in advance, to be used in the event of an escalated conflict generating refugees, but these examples are rare. Forward-looking planning could be much improved.

These examples highlight some of the potential incentives that could be used to increase the likelihood of effective delivery of education for refugees. It is probable that not all of these incentives would be practical, either in certain local contexts, or more broadly. Each individual incentive is less significant in itself than the concept of using incentives in a structured and systematic way. This would require much greater donor and delivery harmonization than takes place currently. However, the increasing focus on partnership working in both the development and humanitarian arenas and the development of OCHA and INEE indicate that greater collaboration is possible. There is broad agreement on the framework for, and content of, education provision for refugees between UN organizations and the NGOs working in the field. Now the real opportunity for improvement is to develop appropriate, agreed upon mechanisms with which to deliver it. This paper contends that an incentive-based approach should be a core element to secure delivery of the framework.

There are supplementary questions that arise from this research paper and areas that would benefit from further research. First, are the UNHCR refugee camps in Africa less successful in providing education than their counterparts in other regions? And, second, does the poor performance in refugee camps in Africa reflect generally disadvantaged conditions for education provision within the continent? Neither question is easy to answer. The 2003 UNHCR data show that the refugee camps in Africa were performing worse than the world average in all five indicators. However, although more recent statistics have not been published, Fry, Meynet and Morlang of UNHCR’s education team indicated in the 2006 interview that other countries and camps that were previously performing better than the African average in 2003 are performing worse than the African average two years’ on. As these indicators are a very new form of measurement and there is limited comparable data, these statistics need to be treated with caution. In addition, it is difficult to make comparisons of provision across countries, as the education provision is decentralized: the country offices make the decisions about education needs, and base their judgements on a local rather than a regional or global context. Fry, Meynet and Morlang also pointed out that the regular turnover of refugees, substantial security problems, political tensions and intemperate weather all have a disproportionate negative effect on the provision of refugee services in Africa. Therefore, direct comparisons between African and other regions worldwide are unhelpful and lacking in relevance. For example, long-term stable camps such as Thailand’s camps for Myanmar refugees have long-established education programs, and operate with different links into the host community provision than many African camps.

After reviewing refugee and non-
refugee education provision in Africa, it seems likely that some of the poor refugee education outcomes in Africa are exacerbated reflections of problems that are also evident in local education systems. In the five-year review of the EFA goals in June 2005, the Sub-Saharan Africa regional forum starkly articulated that: "Achieving the goals of Education for All will not become reality unless there is a considerable change in scale in the progress made" [their emphasis]. The forum reports considerable progress in securing basic access to education since 2000, as nine out of ten African children now have access to the first grade primary education. However, 40 percent of African children in 2005 did not complete primary education, let alone progress to secondary or tertiary education. The overall goal on gender parity in primary and secondary education will not be reached, at least over the medium-term. The scale of HIV/AIDS and armed conflict in general in Africa results in high numbers of orphaned children and absenteeism from schools. It is also doubtful that Sub-Saharan Africa will be able to fund and train an extra million primary school teachers (from a 2005 base of three million), or to allocate a "minimum of 20 percent of domestic budget funds to education. Current projections indicate that two-thirds, or 31 out of 53, African countries will not achieve the EFA goals by 2015 (Regional Forum Education for All - Dakar +5 2005).

It is difficult to draw any substantiated performance comparisons between UNHCR camps in Africa, refugee provision external to the camps, and the African local education provision. For example, UNHCR camps are largely, but not always, run separately from the local provision. Tens of thousands of refugees are not housed or supported by the UNHCR: if these refugees have illegally refused to enter camps and are squatting in cities, they are unlikely to access any type of formal education in Africa and are thus worse off. Refugees who are hosted and educated by local communities are subject to the local education conditions; some countries have better performance than the UNHCR camps and others have worse.

Further research is necessary in this area to enable more in-depth statistical analysis of education provision. Once the data for 2005 has been released from the UNHCR, it would be useful to conduct a cross-sectional study at the camp level. This could be supplemented by analysis in the field to provide more information about the integration of the camp and the host country, community approaches, teacher remuneration, and other aspects of the provision of refugee education. The production of in-depth country case studies would also improve our understanding of education provision.

CONCLUSIONS

Ruud Lubbers, then UNHCR High Commissioner, stated in 2002 that:

A refugee who goes without education cannot look forward to a more productive and prosperous future. A refugee who is unable to attend school or a vocational training course is more likely to become frustrated and involved in illegitimate or military activities. A refugee who remains illiterate and inarticulate will be at a serious disadvantage in defending his or her human rights (UNHCR January 2002).

Education is a universal human right, enshrined in international law. It has also been reiterated as an important development activity under the EFA and the MDGs. In spite of this strong international legal and developmental framework, the reality of refugee education provision is weak. Using 2003 UNHCR performance indicators, on average, all five UNHCR targets were sub-
substantially missed by African refugee camps. For refugees living outside of camps, the education provision is not likely to be any better, given that Sub-Saharan Africa is a long way from attaining its 2015 EFA goals.

The gap between desired outcomes and current levels of provision is not unexpected given the enormity of the challenges in delivering refugee education in Africa. The conflicts from which refugees flee are especially complex and vicious in the African context, which has major political and cultural implications for education delivery. This is further compounded by inadequate funding and by ambivalent political and practical support from host countries and the international community.

Efforts must continue to improve delivery of the EFA, MDGs and UNHCR’s key indicators for refugee education. It is critical to support refugees in exercising their right to education by pressuring host states to improve their support of refugee education provision. Increased donor and state pressure should be accompanied by the provision of incentives to host country governments to encourage them to fulfill their legal obligation to educate refugees. This incentive-based approach could be used to encourage stakeholders to deliver the desired outcomes in an efficient manner: in particular, developing incentives to promote increased attendance and retention of girls and adolescents in school, delivering refugee provision though host country infrastructure, and funding secondary and tertiary scholarships. These incentives should not be related only to primary education, although primary education is important. Instead, they need to promote more consistent access and support for refugee education across the whole spectrum, from pre-school education to tertiary education, adult education, vocational training and promotion of entrepreneurial activity. Unless education is prioritized in practice, its role in sustaining and saving lives for all refugee groups will be continue to be impeded, with an adverse effect on personal and societal development.

ENDNOTES

1 INEE delineates the positive roles of education for refugees (and IDPs) into two main categories, sustaining lives and saving lives.
2 Figures are based upon country of origin and asylum reports.
3 In Djibouti, local authorities refused to allow integration of young Somalis into their high schools “fearing that if they learned to speak or write French, they would ‘disappear’ into the local Francophone population.” They also have opposed provisions to establish a refugee-only school (Williams and Kewpyh 1999).
4 Examples of OCHA’s field activities in Africa relating to education include in the Central African Republic, Somalia and Uganda (OCHA).
5 Five years’ on, its membership includes 100 organizations. It creates and disseminates best practice, teaching and learning resources (INEE January 2005).
6 The other two key documents are: a Mary Pigozzi UNICEF report in 1999 that stressed the importance of viewing education provision as a development activity and Margaret Sinclair’s Education in Emergencies chapter of a UNHCR report in January 2002, which developed concepts such as the importance of including special needs and minority children in emergency provisions (Pigozzi 1999; Sinclair 2002).
7 For example - Somalia, Afar and Rwanda.
8 The Education Statistical Report was tested in 2002 and 2003, and the organization introduced the Camp Indicator Report for all large refugee camps in 2003. No survey was carried out in 2004, and the 2005 data was in the final stages before publication. Also: Lisa Fry, Nathalie Meynet, and Claas Morlang, interview by author, November 9, 2006, UNHCR’s education unit, Geneva.
9 It is not clear exactly how many camps are included within the regions for 2005 data. This will be clearer when the full report is published by the UNHCR.
10 It is not possible to know how much the split in variables has affected this, without reviewing the data in detail.
11 The date of the camp closure is not specified in the article.

12 Textbooks represent a particular challenge: frequently, education materials from previous regimes are no longer acceptable or cannot be sourced. UNESCO especially supports the redevelopment of textbooks.

13 This issue was noted in many of the articles, plus it is an explanation for the formation of the INEE amongst other co-ordinating arrangements that are normally established by the OCHA and/or by the United Nations agencies through partner agreements with NGOs.

14 In contrast to normal operating procedures, the World Bank should also fund and support UNHCR to deliver education in recognition of its critical implementation role. According to Jonathan Brown, Operations Adviser, Global HIV/AIDS program, ATHGO symposium, Washington DC, July 5 2006, this had already begun. It should be maintained and escalated.

15 Clearly, this would involve larger collaboration with other international organizations and especially international financial institutions.

16 Arguably, the language difference is hard to overcome. If the refugees are likely to return to their country, then they should be taught primarily in their native language. However, if there are no language differences, ethnic differences between two groups should not be insurmountable in designing appropriately sensitive curricula, especially because basic mathematics and literacy can be depoliticized far more than, the teaching of history and political science, for example.

17 Host governments are the governments of the countries in which the refugees are taking refuge, home governments are the governments of the countries of refugee origin and third settlement governments are of eventual resettlement countries for refugees.

18 In the UK, “Oxfam made £3 million [US$5.87m] from the sale of Christmas goats, which paid for the distribution of 30,000 animals in 70 countries; Cafod has raised £1.1 million [US$2.15m] and distributed 18,000 goats in Eritrea and Kenya… this year’s catalogues have extended the themes further: Oxfam, for example… also offers… the chance to help build a classroom (€1700) [US$3330]. Aida Edemariam. “Getting your Goat,” The Guardian, November 8, 2005.

19 Clearly, short timescales of provision and/or barriers of language would restrict the possibility of this in certain situations, but given the challenge that teachers face as key providers of refugee education in difficult circumstances, this could be a relatively low-cost and helpful development, especially if teachers in both countries had easy access to computers and email.

REFERENCES


Education in emergencies: learning for a peace-


Pigozzi, Mary Joy. Education in emergencies


Alice Poole is British, and is currently studying for both an International Organization Masters in Business Administration in Haute Ecole de Commerce (HEC), Geneva, Switzerland, and a Masters in Public Policy at Georgetown University. Her research interests are in the humanitarian and development fields: principally refugees, human rights, and post-conflict reconstruction. This article is dedicated to her history professors and to the Vice-Principal, Professor Michael Clarke, at the University of Birmingham, Great Britain.
Immigration and Asylum Policies in the European Union and the European Convention on Human Rights
Questioning the legality of restrictions

MARAT KENGERLINSKY

Whereas freedom of movement for EU nationals means the lifting of internal borders, elimination of control and facilitation of traveling, freedom of movement for non-EU nationals is associated with more immigration control, more identity checks and fewer arrivals at EU external borders. In recent years, immigration and asylum policies in the EU have become expansive and absorptive of the idea of a “fortress Europe.” The territorial expansion of the EU has been inextricably associated with certain repressive measures used to control the external borders of the Union from unwanted threats of migration, as well as with security considerations. This paper analyzes the legality of restrictions in light of the principles of protection of human rights in Europe. It examines the extent and scope of the protection regime rendered to immigrants and asylum seekers by the European Convention on Human Rights. It then argues that, despite their international human rights commitments, the EU Member States, to a certain extent, fail to ensure the full realization of immigrants’ and asylum seekers’ human rights.

The protection of human rights is seen as one of the main casualties of the politics of migration in both old and new EU Member States (Doomernik et al 1997, 14, 89). Indeed, when it comes to international standards on human rights, the situation becomes complicated as the EU Member States are caught between the goal of upholding human rights and the demand to tighten up immigration and EU external border control. Migration is seen, on the one hand, as a humanitarian or human rights issue because states are obliged under international law to render protection to all those who are within their jurisdictions. On the other hand, it is seen as an immigration matter which might place a strain on the labor market and social facilities, such as housing, education, and medical facilities (Brinkmann 2004, 184). This leads to a continuing tension between international law to protect human rights and national policies where the primary concern is to protect and promote the rights and welfare of citizens. Regrettably, unless specifically protected under national law and practice, immigrants remain more vulnerable to human rights abuses relative to the nationals of the state (Ghosh 2003, 4).

As a matter of fact, the Member States’ power to restrict immigration and asylum is neither absolute nor unlimited, but is molded by the states’ international obligations and individual humanitarian traditions.
States should abide by international rules designated to protect and promote human rights of immigrants and asylum seekers. Moreover, the protection of fundamental rights is a founding principle of the EU and an indispensable prerequisite for the legitimacy of any action taken within the framework of EU law. The EU is an organization founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law.

One can therefore legitimately wonder to what extent the European human rights regime includes non-nationals within its realm of protection and what effect it has on immigrants’ rights at the national level. How far are restrictions in immigration and asylum justifiable vis-à-vis the system of human rights protection? Is there enough respect for human rights traditions in immigration and asylum policies to make the legitimacy of restrictions indisputable?

This paper seeks to answer these questions with an analysis of international human rights standards in the area of migration. It refers to EU Member States’ obligations when determining migration policies in light of international legal instruments for the protection of human rights. Though there are many such instruments developed at both the international and regional levels (Plender 1999), this paper looks at one of the most important in Europe - the European Convention on Human Rights (ECHR). Currently, all 27 EU Member States are parties to the ECHR and are therefore obliged to observe its provisions. This convention plays a key role in the determination and application of human rights standards by EU Member States. It is, therefore, necessary to scrutinize migration-related case law of the European Court of Human Rights (ECHR), which was established under the Convention as its watchdog and guardian. Based on the court experience, this study examines the general status in international law of certain fundamental human rights available to immigrants, such as the right to family life, freedom from torture and inhuman treatment, and the right to liberty.

This paper argues that, despite their international human rights commitments, the EU Member States fail to ensure the full realization of immigrants’ and asylum seekers’ human rights. Even though there are some documents adopted at the EU level that propose laws, policies, and amendments to enhance human rights standards, they do it inconsistently and selectively, while often ignoring standards that are needed for immigrants’ maximum protection. The legal protection of the latter in immigration matters, in particular with respect to refusal of admission and expulsion, is largely dictated by national legislative and administrative rules which generally lack international standards of protection. Several cases of the processing of asylum claims and the treatment of immigrants in detention centers of the Member States are provided in the paper in order to demonstrate that restrictive immigration and asylum policies result in breaches of human rights and fundamental freedoms. The aim is to demonstrate that restrictions in immigration and asylum policies are against the principles of protection and promotion of human rights in Europe and are, therefore, illegitimate from a human rights point of view. However, in order to understand better EU policies on immigration, it is important first to contextualize these policies within the wider world of international immigration policy.

Migration challenges: The US and Europe

The United States, with its large and changing immigrant population, has an enormous stake in international migration. Equally important is the impact that US immigration policies have on the rest of the
### Table 1: Inflows of Immigrants (I) and Asylum Seekers (A) into Selected EU Countries, 1990-2000 (thousands)

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* Immigrants and asylum seekers.

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Table 2: Inflows of Immigrants (I) and Asylum Seekers (A) into Selected EU Countries, 1990-2000 (in thousands)

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<td>France</td>
<td>303.4</td>
<td>95.3</td>
<td>114.8</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>2.1</td>
<td>0.9</td>
<td>3.9</td>
</tr>
<tr>
<td>Netherlands</td>
<td>4.2</td>
<td>9.6</td>
<td>26.7</td>
</tr>
<tr>
<td>Sweden</td>
<td>10.6</td>
<td>24.6</td>
<td>6.9</td>
</tr>
</tbody>
</table>

Note: Immigration minus emigration.

world. Immigration, perhaps more than any other social, political, or economic process, has shaped the United States over the past century. As the 21st century unfolds, security concerns and immigration reform will continue to shape who enters the community and how they do so. In short, America's profound demographic and cultural transformation continues - and the policies that govern who can enter the US and how they can enter, will affect every aspect of American life in the new century. How to minimize the challenges confronting this "nation of immigrants," while maximizing the benefits of immigration, will continue to characterize US immigration policy discourse in the years to come.

Europe now matches North America in its significance as a region of immigration. Net immigration in Europe in 2001 stood at 3.0 per 1,000 inhabitants, compared to 3.1 in the United States (OECD 2004). The region now hosts a population of 56.1 million immigrants, compared to 40.8 million in North America (IOM 2003). There is every indication that Europe's importance as a region of destination will increase. All European states are now net immigration countries (see Table 1). Immigrants come from a variety of regions, such as North Africa, Middle East, India, Pakistan, China and Eastern Europe. For more established host countries, such as France, Germany, the United Kingdom (UK), Benelux countries, Austria, Switzerland, Sweden and Denmark, this has been the case since at least the 1960s (see Table 2). Despite a decline in migration after recruitment stops in 1973-4, immigration flows have been continuous, for the most part taking the form of family reunion, refugee flows and labor migration (see Table 3).

In the early 1990s, the European Community became involved in ever-deeper and more complicated migration-related problems. There was a resurgence of migration to Western European countries, including those countries in the south of Europe, and the intensity of East-West migration increased dramatically (Lahav 2004, 31). Fears of uncontrolled migration influxes from the East were prevalent in the minds of European policy-makers, and migration became a major concern for the European Community. The new East-West migration significantly changed the character of the traditional ethnic and geographical pattern of migration. The beginning of the 1990s saw a substantial increase in the number of refugees, asylum seekers, returnees and internally displaced persons. The process of economic restructuring and adjustment to a market economy, which resulted in numerous privatization measures, a dramatic
Table 3: Estimated Number of Immigrants and Asylum Seekers Arriving in EC Member States (1980-1990)

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>2,700</td>
<td>5,300</td>
<td>7,650</td>
<td>6,000</td>
<td>5,100</td>
<td>8,100</td>
<td>12,950</td>
</tr>
<tr>
<td>Denmark</td>
<td>50</td>
<td>8,700</td>
<td>9,300</td>
<td>2,750</td>
<td>4,650</td>
<td>4,600</td>
<td>5,300</td>
</tr>
<tr>
<td>Germany</td>
<td>107,800</td>
<td>73,850</td>
<td>99,650</td>
<td>57,400</td>
<td>103,100</td>
<td>121,300</td>
<td>193,050</td>
</tr>
<tr>
<td>France</td>
<td>13,700</td>
<td>25,800</td>
<td>23,500</td>
<td>24,900</td>
<td>31,700</td>
<td>58,750</td>
<td>49,750</td>
</tr>
<tr>
<td>Greece</td>
<td>1,800</td>
<td>1,400</td>
<td>4,250</td>
<td>6,950</td>
<td>8,400</td>
<td>3,000</td>
<td>6,200</td>
</tr>
<tr>
<td>Italy</td>
<td>7,450</td>
<td>5,400</td>
<td>6,500</td>
<td>11,050</td>
<td>1,300</td>
<td>2,250</td>
<td>4,750</td>
</tr>
<tr>
<td>Netherlands</td>
<td>3,700</td>
<td>5,650</td>
<td>5,850</td>
<td>13,450</td>
<td>7,500</td>
<td>13,900</td>
<td>21,200</td>
</tr>
<tr>
<td>Portugal</td>
<td>-</td>
<td>100</td>
<td>250</td>
<td>450</td>
<td>350</td>
<td>150</td>
<td>100</td>
</tr>
<tr>
<td>Spain</td>
<td>-</td>
<td>2,350</td>
<td>2,300</td>
<td>2,500</td>
<td>3,300</td>
<td>2,850</td>
<td>6,850</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>9,950</td>
<td>5,450</td>
<td>4,800</td>
<td>5,150</td>
<td>5,250</td>
<td>15,550</td>
<td>25,250</td>
</tr>
<tr>
<td>Total</td>
<td>147,150</td>
<td>134,000</td>
<td>164,050</td>
<td>130,600</td>
<td>170,650</td>
<td>230,450</td>
<td>325,400</td>
</tr>
</tbody>
</table>

Source: UNHCR Regional Office for the European Institutions (October 1992).

decrease in subsidies, severe budget restrictions, and a gradual decline in industrial production, led to a dramatic increase in unemployment in Central and Eastern Europe (Ardittis 1994, 12) and was a cause for the westward economic migration. The "push" factor, however, was not only economics, but also the existence of political problems in the countries of origin. New immigrants came not only as labor immigrants (whether legal or illegal), but also as refugees fleeing young Central and Eastern European democracies that lagged behind the Western standards in democratic institutions, human rights and the rule of law.

After 10 Central and Eastern European states became members of the EU, the status of their citizens formally changed from non-EU to EU nationals. Now their westward movement has ceased to be international migration, as the EU represents a common area of free movement of persons. Nevertheless, it remains substantial due to imbalances in economic and social conditions between Europe's East and West. In addition, passport control and physical borders between the old and new EU Member States, where the citizens need to prove their identity with a valid document, have not disappeared. Even if they may already enjoy the simplified procedure of checks for EU-passport holders at international airports, control over EU-Central and Eastern European land borders, which became EU internal frontiers after accession, continues. Moreover, the application of labor restrictions on Central and Eastern European workers makes their freedom of movement to the EU-15 highly conditional. Some of the old EU Member States have sought a transitional period before giving new EU Member States' migrant workers the possibility to fully exercise their freedom of movement.¹

Conversely, migration pressures from Africa and Asia have not lessened. In fact, the new pressure from the Central and Eastern Europe comes at a time when the number of asylum seekers as well as unauthorized migration from developing countries have reached their highest levels in the Community since the mid-1970s (Geddes 2003, 14). The opening of East-West relations has created new conditions for immi-
grants from the poorest parts of the world to use the territory of the Central and Eastern Europe and the former Soviet Union as a transit zone for further migration to Western Europe. Let us now consider what rights those who have arrived in the EU in search of work and better life enjoy and how such persons should be treated by looking at Articles 3, 5 and 8 and Article 2 of Protocol 4 to the European Convention on Human Rights.

**European Convention on Human Rights and the Rights of Immigrants and Asylum Seekers**

Throughout its early case law, the ECHR, and the Commission of Human Rights (Commission), extended to state authorities a wide margin of discretion in maintaining immigration controls, thus affording individuals only limited protection. In line with established principles of international law, the ECHR has traditionally recognized that immigration controls are essentially a matter of domestic policy (Rogers 2003, 53). In *Abdulaiez CabaIes and Balkandali v UK*, the ECHR granted control over immigration policy to individual states - “[A] matter of well-established international law, the ECHR has traditionally recognized that immigration controls are essentially a matter of domestic policy” (ECHR, 1985).

However, in *Gül v Switzerland*, concerning a Turkish national who unsuccessfully sought political asylum in Switzerland, the ECHR acknowledged the state’s interests in maintaining immigration and residence controls as a “particularly sensitive subject” for Switzerland but underlined the fact that the Court has to ensure that state interests do not crush those of the individual (ECHR 1996-V). While decisions such as *Gül* have inspired much criticism of the ECHR, much of the jurisprudence of the 1980s and 1990s was developed not so much by the Court as by the Commission. Indeed, many of the cases never went beyond the admissibility stage and were declared manifestly ill-founded before being considered fully on their merits (ECHR, 1987).

By the end of the 1990s, however, the ECHR became more active in dealing with migration issues. In fact, the number of applications to the Strasbourg Court rose substantially, as did migration-related complaints. Most plaintiffs appealed against expulsion decisions or administrative refusals of entry and residence permits. They generally claimed that, in the handling of their cases, public authorities had violated rights guaranteed under Article 3 and Article 8 of the ECHR (ECHR, 2005).

Article 3 of the ECHR - the prohibition of torture, inhuman or degrading treatment or punishment - is often invoked in cases of asylum seekers who claim that they will suffer inhuman or degrading treatment if they are sent back to their countries of origin, but whose demands for refugee status have been rejected. At first, the ECHR did not find that Article 3 was violated in the individual cases that were submitted (ECHR 1991). Later, however, the ECHR stated that the absolute character of this provision means that protection cannot be ruled out by considerations relating to the public security of the state. If an expelled asylum seeker does face a real risk of being subjected to treatment contrary to Article 3 in the country of his or her origin, then the ECHR places the obligation on the State not to expel the person in question to that country (ECHR 1996-V). This principle of international protection, most frequently called the principle of non-refoulement, obligates the states not to send back a person to a country where he or she will be subjected to torture, inhuman or degrading treatment or punishment.

In three cases, the ECHR found that Article 3 would be violated if the applicants
were to be deported or extradited (ECHR 1996-VI). Although the Court recognizes different kinds of "inhuman treatment," applicants must show that they will face a "real risk" if they are sent back. In the cases of Nasri v France, and Beldjoudi v France, concerning forcible removal of French nationals of Arabic origin from France to Algeria, judges José María Morenilla (ECHR, 1995-A, 320) and Arnoud de Meyer (ECHR 1992), went further and expressed the view that the deportation of an integrated migrant per se would constitute a breach of Article 3 of the Convention. Judge Morenilla took this view in principle, because he considered it "cruel and inhuman and clearly discriminatory" for a state to rid itself of "undesirable" immigrants when it had, for reasons of its own economic or political convenience, authorized them to enter and remain on its territory in the first place (ECHR 1995-A 320).

The ECHR also has many rulings concerning violations of Article 8 - the right to respect for family life. In cases involving immigrants who had lived in the host country since childhood and had only tenuous ties to their countries of origin, the Commission and the ECHR considered expulsion from their non-native countries unacceptable even if they had serious criminal records (ECHR 1991). In Berrehab v Netherlands, which involved a divorced foreign father of a Dutch girl, the Court ruled that the applicant could not be denied entry or residence in the Netherlands in order to see his daughter (ECHR 1988). It appeared, however, that it was not the integration of such immigrants that protected them from expulsion or prohibition of entry, but the extent to which such expulsion or prohibition of entry constituted an interference with their right to family life (Peers 2005, 3). Judge Sibrand Martens pointed out that, even if migrants lacked family, they could have developed other social ties in a country in which they had lived for years. For this reason, he advocated classifying the expulsion of integrated immigrants as an interference of their private lives (ECHR 1992).

Though not specifically enumerating immigrants' rights, Articles 3 and 8 remain the ECHR's most developed provisions for migrants' protection and are frequently invoked by immigrants and asylum seekers.

Article 5(1)f of the ECHR also expressly relates to migration in two situations:

1) detention to prevent a person entering a country unlawfully; and

2) detention while a person is awaiting the execution of a decision for deportation or extradition. (UNTS, 1953)

Furthermore, the arrest must be lawful according to domestic law and cannot be arbitrary. The ECHR found a violation of this provision in the case of Bozano v France (ECHR 1986-A, 111). The French police forcibly took an Italian citizen - who had been convicted in absentia for murder by an Italian court - to the Swiss border during the night. He was handed over to Swiss authorities following an unlawful deportation order that had been drawn up to circumvent the French court's ruling that extradition could not take place. The ECHR held that this action was arbitrary in motivation and unlawful. The detention appeared to be for deportation but was actually an attempt to disguise an illegal extradition.

Article 5(1)f does not require that detention be considered reasonably necessary, for example, to prevent the commission of an offense or to prevent a person from fleeing. The ECHR held in the case of Chahal v. the United Kingdom (ECHR 1996-V) that the only requirement is that action be taken with the intent to deport. Detention under this provision, however, does require
deportation proceedings to be in progress and prosecuted with due diligence. In *Quinn v. France* (ECtH, 1995-A 311), the ECHR found that Article 5 was violated, because detention was not enforced for the purpose of extradition, and the State had not conducted the relevant proceedings with due diligence.

Another relevant provision of the ECHR directly concerning migration is Article 2 of Protocol 4 - the right to freedom of movement. It stipulates that anyone lawfully within the territory of a state shall have the right to freedom of movement, and that people shall be free to leave any country (UNTS 1953). This is a "qualified right" under the Convention, meaning that states are allowed to interfere with this right under certain circumstances. Freedom of movement, though, applies only to persons lawfully within the territory; those unlawfully within the territory have no such right. As with all qualified rights in the Convention, such as the rights enshrined in Articles 8 through 11, the ECHR is guided in its interpretation of this provision by specific procedure.

Firstly, the ECHR examines the nature of the right, namely if the provision is applicable to the present situation. Secondly, the Court establishes whether there has been an interference with that right. Thirdly, if there has been interference, the ECHR examines whether such interference can be justified. In order for the interference to be justified, it has to be in accordance with the law (which in itself must be set up by a legitimate law-making body and contain clear-cut normative provisions understandable and assessable by ordinary citizens). Fourthly, such interference has to pursue a legitimate aim, such as national security. Lastly, the interference must be necessary in a democratic society. This means it has to correspond to a pressing social need and, most importantly, be proportionate to the legitimate aim pursued (ECHR 1983, No. 61).

The ECHR has little case law on Article 2 of Protocol 4. Some recent cases have successfully passed the admissibility decision, but are awaiting a final judgment. The standing precedents concern citizens, though, and the restrictions imposed have generally been found to be justified. For instance, the decision by the Commission against Finland (ECHR, 2003) found that the refusal by Finland to issue a passport to a Finnish citizen residing in Sweden went against Article 2 of Protocol 4, but was justified as necessary in the interests of national security and the maintenance of the public order. The applicant had failed to report for his military service, and the Commission noted that states were entitled to a wide margin of appreciation in organizing their national defense (Mole and Harby 1999, 12-13).

In the case of *Sulejmanovic and others v. Italy* (ECHR 2002), the applicants were unable to benefit from comparable provisions relating to lawful residence, as they had not made a request for refugee status to be recognized. Since the right to seek and enjoy asylum from persecution is a right enshrined in international law, it is unclear why the residence asylum applicants is deemed unlawful until a decision is made about their applications.

Some cases in the ECHR raise the issue of human rights violations as specifically applicable to immigrants (regardless of legal status). These are the prohibition of expulsion (Article 1, Protocol No. 7) and the prohibition of collective expulsion of aliens (Article 4, Protocol No. 4). Most of these types of complaints, however, have been declared inadmissible and have not reached the ECHR’s final judgment.

Unfortunately, the ECHR has only been able to act on a narrow range of immigrants’ rights. The ECHR jurisprudence has been circumscribed to very specific areas of rights with respect to the protection of immi-
grants. Even in such cases, the ECHR has clearly defined the conditions under which the right protected is deemed violated. In all their decisions, judges reaffirm that they do not forbid states from regulating the entry and stay of immigrants nor do they render judgment on national immigration policy. In fact, these decisions discuss a number of legitimate reasons why a state may want to limit entries, such as the economic well being of a country and the expulsion of individuals because of threats to public order. These restrictions are vaguely defined as applicable if they are “necessary in a democratic society.” The judges assess the proportionality between the legitimate aim of a measure or of a law, the means used to achieve this goal, and the damage done to the individual by the violation of Convention rights.

Restrictive Policies and Violations of Human Rights of Immigrants and Asylum Seekers

To illustrate the presence of restrictive, human rights-engendering attitudes in EU policy-making, let us consider a selection of examples that reflect how some restrictive immigration and asylum policies in the EU fail to adequately address the human rights dimension.

The Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Official Journal 2005) may be severely criticized for its lack of human rights guarantees. It is doubtful whether the provisions of this document ensure that asylum procedures in the EU are in agreement with the ECHR. The Standing Committee of experts on international immigration, refugee and criminal law expressed its relevant concerns and questioned the legality of the Directive (State Watch Observatory, 2005). In particular, the Committee pointed to Article 36(1) of the Directive that allows Member States, without any previous examination of their applications, to expel to bordering third countries persons who apply for asylum, if the applicants enter illegally or tries to do so. It should be mentioned that the ECHR case law requires that “a rigorous scrutiny must necessarily be conducted of an individual’s claim that his or her deportation to a third country will expose that individual to treatment prohibited by Article 3 [of the ECHR]” (ECHR, 2000, 39). The Committee observed that, in allowing Member States to expel applicants without any such prior examination, the Directive does not secure compliance with Article 3 of the ECHR.

Another EU legal document containing certain provisions not fully compatible with international human rights requirements is the Regulation on the Schengen Borders Code (Code) adopted on March 15, 2006 (PE-CONS 3643/2/05 REV 2). The Code sets the detailed procedures for crossing the EU external border. In the implementation of the Code, Cholewinski distinguishes three problematic areas regarding the legal protection of third country nationals at the external border: 1) the non-application of the non-discrimination principle; 2) the extensive discretion granted to officials with regard to decisions concerning the entry of third country nationals; and 3) the absence of effective legal remedies regarding refusal decisions at the external border (Cholewinski 2005, 245).

Article 6(2) of the Code stipulates that “[w]hile performing border checks, border guards shall not discriminate against persons on any of the following grounds: sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation” (PE-CONS 3643/2/05 REV 2). This represents the first non-discrimination provision actually included in the main text of an EU migration or asylum measure, though it does not apply to the whole regulation, but only to the performance of border checks (Peers...
The list of prohibited grounds of discrimination in the Code does not include discrimination on the basis of nationality. While distinctions between EU citizens and third country nationals are one rationale of EU law, discrimination based on nationality is clearly unlawful under international law, in particular Article 14 of the ECHR and Protocol 12 to the ECHR.

"Many of the detainees remain in detention for lengthy periods of time - one man for over a year..."

Many national policies and practices of the EU Member States also fail to meet the requirements of international protection of human rights. National governments very often try to pursue their own agendas in the interest of state, public and security. Thus, basic human rights and fundamental freedoms of developing country nationals remain for them a secondary issue. The following country cases illustrate selected national practices based on the reports of major human rights organizations, such as the Human Rights Watch and the Amnesty International. Although prepared for selected countries, these reports point to the challenges that most, if not all, EU Member States face. The section below exemplifies the most vicious and widespread violations of immigrants' human rights in the EU during their arrival and asylum application.

Access to an asylum procedure

Austria

In Austria, a number of bureaucratic provisions circumvent access to asylum procedures. One allows asylum seekers to be deported before decisions have been made on their appeals. Another limits the possibility of presenting new evidence during a hearing, and the third allows detention to be prolonged if an application is resubmitted. There have been continuing concerns about a lack of both quality care and access to translators during medical examinations of asylum seekers. It is also unclear under the national asylum law which party has responsibility for the representation of unaccompanied minors seeking asylum (Amnesty International 2005).

Greece

One of the most striking examples of
the denial of the right to asylum is the Greek practice of "interrupting" the examination of asylum applications since early 2004 (Papadimitriou and Papageorgiou 2005). The basis of this action is found in Article 2(8) of the Presidential Decree 61/99, which allows the Ministry of Public Order to interrupt the examination of an asylum claim when the applicant arbitrarily leaves his or her stated place of residence. In practice, Greek authorities use this provision to deny these individuals access to an asylum procedure. Such state practice is in conflict with the objective of ensuring full observance of the right to asylum guaranteed by international human rights law.

**Detention of immigrants**

**Greece**

On the islands of Crete and Samos in Greece, immigrants are held in squalid, severely overcrowded, roach-infested police detention facilities. Detainees are not permitted access to counsel, basic health care, fresh air or adequate nutrition. The conditions amount to cruel, inhuman and degrading treatment in violation of Article 3 of the ECHR. Many of the detainees remain in detention for lengthy periods of time - in one man's case, for over a year - because their home countries could or would not provide approval or the requisite documents for them to return (Human Rights Watch 2000). This detention without charge, with virtually no avenue for appeal to an independent authority, and without an active deportation process also amounts to arbitrary detention prohibited by Article 5 of the ECHR.

**Spain**

In Spain, Human Rights Watch research revealed similar conditions on the Canary Islands. Immigrants detained there are held in two overcrowded old airport facilities on Fuerteventura and Lanzarote. At times, more than 500 immigrants have been kept in a space that the Spanish Red Cross has determined to be designed to accommodate fifty people. Detainees are cut off from the outside world; there are no telephones; visits are not permitted; detainees can never leave the premises; they cannot exercise; and they have no exposure to fresh air or sunlight. The state of medical care and sanitary conditions in the facilities also raise serious concern. Furthermore, detainees receive virtually no information about their rights and are rarely provided with translators, even when asked to sign documents authorizing their deportation. They have inadequate access to meaningful legal representation and individualized judicial oversight of their cases. All this contradicts international human rights law, in particular the provisions of the ECHR (Human Rights Watch, Spain 2002).

**United Kingdom**

In December 2001, the United Nations Human Rights Committee, which monitored states parties' compliance with the International Covenant on Civil and Political Rights, issued its concluding observations on its report on the United Kingdom. The Committee expressed concern that asylum seekers have been detained in various facilities on grounds other than those legitimate under the Covenant, including reasons of administrative convenience (when a person is held in detention for a long time for an identity check, verification of documents or clarification of personal circumstances). Moreover, the Committee noted that some rejected asylum seekers are held in detention for an extended period when deportation might be impossible for legal or other considerations (UN Human Rights Committee 2001). As noted above, the prolonged detention of immigrants and asylum seekers who cannot be returned to their countries of origin frequently results in arbitrary detention. Human Rights Watch, in a commentary
regarding proposals in a UK white paper on immigration and asylum policy (Human Rights Watch 2002), expressed concern that the current detention regime in the UK, which the white paper proposes to continue, would violate the UK’s obligations under international law as described in the authoritative conclusions of the UN Human Rights Committee noted above. Moreover, continuing the UK’s policy of detaining asylum seekers solely for administrative reasons amounts to a violation of article 5 of the ECHR (Official Journal 1997).

CONCLUSION

The EU human rights legal order, inspired by the ECHR authority, provides certain, though not comprehensive, mechanisms for the realization of human rights of immigrants and asylum seekers against the background of restrictions and limitations. Human rights must take precedence over any restrictive policies and are central to any decision in the immigration and asylum body of law. Human rights represent the strongest case against restrictive immigration and asylum policies, because migration control and exclusion impose increasingly harsh suffering on immigrants and asylum seekers (Guiraudon 1998, 6) and negatively affect their fundamental rights. EU Member States have a responsibility to protect human rights of all those within their territory and jurisdiction, whether natives or nationals of other countries. There is an individual and a collective duty of EU states to protect the persons moving across borders. It is incumbent on them to co-operate to achieve this purpose (Goodwin-Gill 2000, 196).

This paper, however, has established that EU Member States have been utilizing tight restrictions to deter the entry and stay of non-nationals in their territories (Borchelt 2002, 475-476). In addition to the infringement on the freedom of movement, restrictive policies on European and national levels tend to undermine other human rights, such as the right not to be subjected to inhuman and degrading treatment, the right not to be arbitrarily arrested and detained, and the right to family life. Despite the international human rights regime set out by the ECHR, the EU Member States still fail to ensure the full realization of immigrants’ and asylum seekers’ human rights. Their legal protection in immigration matters with respect to refusal of admission or expulsion is largely dictated by national legislative and administrative rules (Cholewinski 2005, 238). Such restrictions run counter to the principles of international human rights law, especially the requirements of the ECHR, and therefore are illegitimate from a human rights point of view.

The above-mentioned observations are not attempts to undermine the significance of proper regulation of migration management and cross border regimes, but rather serve to underline the fact that restrictions are not in accordance with international law. It is true that the governments can justify the restrictions in immigration and asylum policies by referring to issues such as security, public order or public health, but each such justification undermines, not reinforces, the principles of protection and promotion of human rights in Europe. Restrictions on immigration and asylum will continue to threaten the supremacy of liberal freedoms and fundamental human rights for the individuals in question.

Immigration and asylum policies in the EU can and should be regulated. Approaches to border management and immigration control must change. In rethinking and reassessing its restrictive policies, the EU has to decide on the image of Europe it wants to project, and choose and develop its policies accordingly. If the EU’s primary strategic objective is the reduction of inequality, division and exclusion in post-
Cold War Europe, policies hardening immigration and asylum rules are likely to under-mine, rather than enhance, this objective, regardless of any noble reason or purpose.

ENDNOTES

1 Exceptions are the UK, Ireland and Sweden and, as of May 2006, also Greece, Finland, Portugal and Spain.

2 Right to family life, freedom of conscience, freedom of expression, freedom of assembly.

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