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E.U. ACCOUNTABILITY TO INTERNATIONAL LAW: THE CASE OF ASYLUM

*James C. Hathaway**

In one of his later published works, Eric Stein wrote that “[a]s in a modern administrative state, transparency in the Union is essential not only to inform member state parliaments and electorates, but also to help form an all-European debate and public opinion that are required to sustain advanced integration.”¹ In his usual prescient way, Professor Stein captured the dilemma of the European Union as it has shifted from an amalgam of states seeking consensus in a largely behind-closed-doors way to what many would see as an emerging federal state. With its undoubted ability to project power, will the European Union effectively transform its processes to ensure that its state-like power is subject to meaningful constraints and accountability, in particular those set by the rules of public international law?

In the field of refugee law, the signs were initially ominous. The earliest foray of the European Union in the field was the Dublin Convention² and its successor Dublin Regulation.³ These agreements purport to force most persons from outside the Union to seek asylum in only one designated E.U. country—whether or not that country applies the refugee definition faithfully, implements refugee rights with integrity, or has a process in place that meets the duty to ensure that refugees are both recognized and protected as required by international law.⁴ Despite the fact that each member state continues to have independent obligations under international refugee law, including to consider the protection needs of any refugee coming under its jurisdiction,⁵ the Dublin regime opts for efficiency within the European Union at the cost of willful blindness to international law. While the Refugee Convention allows a state to divest itself of presumptive protection

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1. Eric Stein, *Comments on the European Union: Transparency and Human Rights*, in *INTERNATIONAL TRADE AND HUMAN RIGHTS: FOUNDATIONS AND CONCEPTUAL ISSUES* 285, 285 (Frederick M. Abbott et al. eds., 2006).

2. Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities (Dublin Convention), June 15, 1990, 1997 O.J. (C 254) 1.

3. Council Regulation (EC) 343/2003 of 18 February 2003, 2003 O.J. (L 50) 1 [hereinafter Dublin Regulation].

4. See generally HEMME BATTJES, *EUROPEAN ASYLUM LAW AND INTERNATIONAL LAW* 419 (2006).

5. JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 160 (2005).

responsibilities only if the refugee's rights are not thereby compromised,⁶ the European Union's Dublin regime mandates no such inquiry. Instead, it usually requires that anyone seeking refugee protection be sent to the first E.U. state with which she had physical contact,⁷ whatever the strengths or weaknesses of that country's asylum system.

It was only when courts in the United Kingdom refused to authorize the sending of asylum seekers to France and Germany on the grounds that those states misapplied international refugee law—specifically, by refusing recognition of refugee status to persons at risk of nonstate persecution⁸—that the European Union at last felt the need to inject some measure of accountability to law into its asylum regime. Realizing that (at least British) courts would effectively trump the willful blindness model in ways that would cripple its efficiency, the Union negotiated and implemented a series of binding directives that codify baseline understandings of refugee status and establish a broader “subsidiary protection” class;⁹ define the rights of persons while seeking protection¹⁰ and once recognized as members of the protected class;¹¹ and stipulate the procedures by which protection is to be implemented.¹² Framed as “minimum standards,”¹³ and explicitly subordinate to Refugee Convention requirements,¹⁴ these directives have since 2009

6. *Id.* at 331–33; *cf.* Convention Relating to the Status of Refugees art. 33, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention].

7. Dublin Regulation, *supra* note 3, art. 10(1). The regulation sets out a hierarchy of responsibility determination criteria in Articles 6–13. The presence of family or issuance of a residence permit or visa, for example, will take precedence over first physical contact. *Id.* arts. 6–9.

8. *R v. Sec’y of State for the Home Dep’t (Ex parte Adan)*, [2001] 2 A.C. 477 (H.L.) 508–10, 518 (citing to the U.K. House of Lord’s adoption of the “protection” approach to nonstate persecution found in *Adan v. Sec’y of State for the Home Dep’t*, [1999] 1 A.C. 293 (H.L.), and contrasting that with the state-centric “accountability” approach employed by France and Germany). *See also R (Yogathas) v. Sec’y of State for the Home Dep’t*, [2002] UKHL 36, [9], [58]–[59], [2003] 1 A.C. 920 (H.L.) 927, 941 (conceding that only “significant differences” of interpretation can prevent removal to a partner state, while insisting that “the most anxious scrutiny” be applied before removal is authorized).

9. Council Directive 2004/83/EC of 29 April 2004, 2004 O.J. (L 304) 12 [hereinafter Qualification Directive].

10. Council Directive 2003/9/EC of 27 January 2003, 2003 O.J. (L 31) 18 [hereinafter Reception Directive].

11. Qualification Directive, *supra* note 9, arts. 20–34. Here, the term “refugee” is used to encompass both Convention refugees and persons who meet the Qualification Directive’s standards for subsidiary protection.

12. Council Directive 2005/85/EC of 1 December 2005, 2005 O.J. (L 326) 13 [hereinafter Asylum Procedures Directive].

13. Qualification Directive, *supra* note 9, art. 3; Asylum Procedures Directive, *supra* note 12, art. 5; Reception Directive, *supra* note 10, art. 4.

14. Consolidated Version of the Treaty on the Functioning of the European Union art. 78, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU] (requiring the development of “a common policy on asylum” that “must be in accordance with” the Refugee Convention). The E.U. asylum measures state as a primary aim “the full and inclusive application” of the Refu-

been interpreted and applied by the Court of Justice of the European Union (CJEU).¹⁵

If these directives faithfully implemented international refugee law—or at least, if the CJEU rendered interpretations that forced conformity between the directives and international standards—then the Dublin regime could be lawfully implemented. This is because, while international law allows each individual to determine for herself where to *engage* the protection process (based on accessibility, an assessment of safety, or simply personal preference),¹⁶ state parties are entitled to share-out among themselves the duty to *provide* protection.¹⁷ So long as all persons defined as refugees at international law are treated as such, and all rights that accrue under international law are honored, an assignment of protective responsibility effected before a refugee is lawfully present is legally sound.¹⁸ In short, refugee law is not

gee Convention. *See, e.g.*, Qualification Directive, *supra* note 9, pmb. paras. 2–3. The E.U. Charter of Fundamental Rights includes the right to asylum, “with due respect for the rules of” the Refugee Convention. Charter of Fundamental Rights of the European Union art. 18, Dec. 7, 2000, 2000 O.J. (C 364) 1.

15. As of mid-2011, the CJEU had rendered six decisions interpreting the E.U. asylum measures: Case C-19/08, *Migrationsverket v. Edgar Petrosian & Others*, 2009 E.C.R. I-00495 (addressing transfer time limits); Case C-465/07, *M. Elgafaji & N. Elgafaji v. Staatssecretaris van Justitie*, 2009 E.C.R. I-00921 (interpreting “serious and individual threat . . . by reason of indiscriminate violence”); Joined Cases C-175/08, C-176/08, C-178/08 & C-179/08, *Abdulla & Others v. Bundesrepublik Deutschland*, 2010 E.C.R. I-01493 (addressing cessation of status); Case C-31/09, *Bolbol v. Bevándorlási és Állampolgársági Hivatal*, 2010 ECJ EUR-Lex LEXIS 315 (June 17, 2010) (addressing exclusion due to protection by a U.N. agency other than UNHCR); Joined Cases C-57/09 & C-101/09, *Bundesrepublik Deutschland v. B & D*, 2010 ECJ EUR-Lex LEXIS 950 (Nov. 9, 2010) (addressing exclusion due to crime or acts against U.N. principles); Case C-69/10, *Diouf v. Ministre du Travail, de l’Emploi et de l’Immigration*, 2011 ECJ EUR-Lex LEXIS 1449 (July 28, 2011) (addressing the right to an effective remedy). Eight more cases have been lodged for review: Case 493/10, heard with Case C-411/10; Case C-620/10; Case C-4/11; Joined Cases C-71/11 & C-99/11; Case C-175/11; Case C-179/11; and Case C-277/11. These cases can be accessed at <http://eur-lex.europa.eu/>.

16. *See* U.N. High Comm’r for Refugees Exec. Comm. Conclusion No. 15 (XXX), *Refugees Without an Asylum Country*, ¶ h(iv) (1979), available at <http://www.unhcr.org/3ae68c960.html> (“[A]sylum should not be refused solely on the ground that it could be sought from another State.”).

17. *See* U.N. High Comm’r for Refugees Exec. Comm. Conclusion No. 74 (XLV), *General Conclusion on International Protection*, ¶ p (1994), available at www.unhcr.org/3ae68c6a4.html (“Acknowledg[ing] the value of regional harmonization of national policies to ensure that persons who are in need of international protection actually receive it . . .”); U.N. High Comm’r for Refugees Exec. Comm. Conclusion No. 85 (XLIX), *Conclusion on International Protection*, ¶ aa (1998), available at <http://www.unhcr.org/3ae68c6e30.html> (limiting lawful transfers to situations in which it is “established that the third country will treat the asylum-seeker (asylum-seekers) in accordance with international standards, will ensure protection against *refoulement*, and will provide the asylum-seeker (asylum-seekers) with the possibility to seek and enjoy asylum”).

18. Once lawful presence is established (e.g., by admission to a process for refugee status verification), the Refugee Convention permits nonconsensual transfers only “on grounds of national security or public order” and following a formal legal proceeding. Refugee Convention, *supra* note 6, art. 32(1)–(2). *See generally* HATHAWAY, *supra* note 5, at 663–64.

immigration law. But neither does it authorize the expulsion of refugees to some other state on the simplistic basis that the other country is a site of “first arrival,” or even that the destination country can be relied on not to send the refugee back to her country of origin (*non-refoulement*).¹⁹

Despite the promise of accountability to international refugee law obligations suggested by the advent of binding directives and CJEU oversight, there are in fact major gaps between the European Union’s minimum standards and international law, with the result that a proposed destination country meeting just these standards is not in fact a place to which a refugee may lawfully be removed. For example, the Qualification Directive purports to set a definition of the “membership of a particular social group” ground for refugee status that has no foundation in accepted understandings of the Refugee Convention, and which poses a real risk to the protection claims of women and members of sexual minorities;²⁰ it unlawfully authorizes the denial of *sur place* claims based on an applicant’s own actions taken since filing a first asylum claim;²¹ and it confuses the test for exclusion from refugee status with the grounds on which a genuine refugee may be denied the benefit of protection against *refoulement* under Article 33(2) of the Refugee Convention.²² The Asylum Procedures Directive moreover purports effectively to amend the Refugee Convention’s exclusion clauses by authorizing states to reject an application for perceived lack of cooperation²³ and obviates any meaningful notion of review or appeal by suggesting that member states need not allow rejected applicants to remain in their territory while appeals against negative decisions are pending.²⁴ Yet states have shown marked reluctance to amend the directives in order to bring them into line with international law.²⁵

19. See *infra* notes 34–35.

20. See Qualification Directive, *supra* note 9, art. 10(1)(d).

21. See Qualification Directive, *supra* note 9, art. 5(3).

22. See Qualification Directive, *supra* note 9, art. 14(4).

23. See Asylum Procedures Directive, *supra* note 12, arts. 12(6), 20(1).

24. See Asylum Procedures Directive, *supra* note 12, art. 39(3).

25. The Hague Programme of the European Council called for the proposal of a second phase of asylum measures by 2010. The European Commission tabled revised versions of the four main laws in 2008–2009. The recast Qualification Directive, while an improvement in some regards, would not redress the main misinterpretations of the refugee definition. *Proposal for a Directive of the European Parliament and of the Council on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection and the Content of the Protection Granted*, arts. 7, 10(1)(d), 14(4), COM (2009) 551 final (Oct. 21, 2009). The recast Qualification Directive was adopted by the European Parliament on October 27, 2011; final adoption by the Council of the European Union is expected by the end of 2011. European Parliament Legislative Resolution of 27 October 2011 on the Proposal [COM (2009) 551], EUR. PARL. DOC. P7 TA (2011) 0469; Press Release 16042/11, Council of the Eur. Union, 3121st Council Meeting, Justice & Home Affairs, Luxembourg 27 & 28 October 2011, at 14, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/125749.pdf.

It is also doubtful that the supervisory role of the CJEU can be counted on to remedy the accountability deficit. Most fundamentally, the CJEU has the power only to interpret the minimum standards, not to revise them. It may moreover acquire jurisdiction over an individual case only by way of a reference action from a court in one of the member states.²⁶ The jury is also still out on how determined the CJEU will be to ensure the fidelity of European norms to the rules of public international law. The court has clearly stated its commitment to the primacy of international refugee law in understanding the nature of E.U. directives,²⁷ and has, for example, ruled that mere membership in a listed terrorist organization does not justify exclusion from refugee status.²⁸ But it has also adopted a highly decontextualized understanding of the exclusion from refugee status of persons in receipt of U.N. protection,²⁹ and endorsed the legally unsound notion that individuals may be compelled to accept “protection” from nonstate actors in their country of origin.³⁰ The record to date, then, can only be described as mixed.

Most fundamentally, the fidelity of the European asylum regime to international refugee law remains compromised by the misguided yet unquestioned assumption that refugees may be shunted about nearly at will. True, the European Court of Human Rights has for many years constrained refugee removals by reliance on the prohibition of exposure to torture or to inhuman or degrading treatment or punishment³¹—including a recent

Disagreement on whether and how to amend the Asylum Procedures Directive is so pronounced that the Commission discarded its initial effort and presented a new proposal in June 2011. *Amended Proposal for a Directive of the European Parliament and of the Council on Common Procedures for Granting and Withdrawing International Protection Status (Recast)*, COM (2011) 319 final (June 1, 2011).

26. Courts in the member states may ask the CJEU to rule on questions of interpretation of E.U. law that arise during cases. TFEU, *supra* note 14, art. 267. Otherwise, the jurisdiction of the E.U. courts is largely limited to actions brought by or against the E.U. institutions themselves. *Id.* arts. 256, 258–260, 263–266, 268–273.

27. Joined Cases C-175/08, C-176/08, C-178/08 & C-179/08, *Abdulla & Others v. Bundesrepublik Deutschland*, 2010 E.C.R. I-01493, ¶¶ 52–53 (noting the Qualification Directive was adopted, *inter alia*, “to guide the competent authorities of the Member States in the application of” the Refugee Convention).

28. Joined Cases C-57/09 & C-101/09, *Bundesrepublik Deutschland v. B & D*, 2010 ECJ EUR-Lex LEXIS 950, ¶ 89 (Nov. 9, 2010).

29. Case C-31/09, *Bolbol v. Bevándorlási és Állampolgársági Hivatal*, 2010 ECJ EUR-Lex LEXIS 315, ¶¶ 49–53 (June 17, 2010). In this decision, the CJEU limited exclusion under Article 1(D) to persons who had actually registered for U.N. Relief and Works Agency assistance, taking no account of the intention of the Convention’s drafters to avoid a diaspora of Palestinians. *See, e.g.*, *El-Ali v. Sec’y of State for the Home Dep’t*, [2002] EWCA (Civ) 1103, [70], [2003] 1 W.L.R. 95, 125 (Eng.). Critically, the CJEU made no reference to the extensive body of refugee case law or scholarship before deciding this highly complex issue.

30. *Abdulla*, 2010 E.C.R. I-01493, ¶¶ 74–76. But as observed in the English Court of Appeal, “I see force also in the point . . . that protection can only be provided by an entity capable of being held responsible under international law.” *Gardi v. Sec’y of State for the Home Dep’t*, [2002] EWCA (Civ) 750, [37], [2002] 1 W.L.R. 2755, 2766 (Keene L.J.) (Eng.), *vacated on jurisdictional grounds*, [2002] EWCA (Civ) 1560, [2002] 1 W.L.R. 3282 (Eng.).

31. *See, e.g.*, *Saadi v. Italy*, App. No. 37201/06, 49 Eur. H.R. Rep. 730, ¶ 125 (2008).

decision insisting that subjection to dire economic conditions abroad may meet that test.³² But the continuing effort to “shoe horn” respect for refugee law norms into the limited jurisdiction of the European Convention on Human Rights³³ may actually be indirectly (if inadvertently) responsible for the pervasive belief in Europe that no more than minimal constraints (specifically, risk of *refoulement* or torture or cruel or inhuman treatment) restrict the authority of states to force refugees away.

In truth, as the High Court of Australia has recently made clear, respect for the duty of *non-refoulement* is only one part of the inquiry mandated by international refugee law:

[A sending state], as a party to the Refugees Convention and the Refugees Protocol, is bound to accord . . . the rights there identified. Those rights include, but are by no means limited to, rights relating to education, the practice of religion, employment, housing and access to the courts. If . . . the only relevant inquiry . . . is whether, as a matter of fact and regardless of legal obligation, there is a real risk that a person who is given refugee status in the country to which he or she is taken will be expelled or returned to the frontiers of a territory where that person’s life or freedom would be threatened on account of a Convention reason, that person may have none of the other rights which [the sending state] is bound to accord to persons found to be refugees.³⁴

This principled duty to ensure the internationally guaranteed rights of refugees delimits the scope of state authority to share the responsibility to protect:

The Refugees Convention is a pact between states. If [one country] decides not to process claimants to refugee status onshore, it must tell the other states who are parties to the Refugees Convention that it will process claimants offshore in places where the same standards apply. The same standards include not only the right of non-refoulement pursuant to Art[icle] 33 but many other rights such

32. *MSS v. Belgium & Greece*, App. No. 30696/09, 53 Eur. H.R. Rep. 28, ¶ 263 (2011) (noting the applicant’s destitution due to official inaction, the “prolonged uncertainty” of his situation, and “the total lack of any prospects of his situation improving” gave rise to a violation of Article 3 of the European Convention on Human Rights (ECHR)).

33. The court has occasionally prohibited expulsion on grounds other than the ECHR’s Article 3 prohibition on torture or inhuman or degrading treatment, albeit not in cases concerning refugee claims. *See e.g.*, *Boultif v. Switzerland*, 2001-IX Eur. Ct. H.R. 119, ¶¶ 55–56 (holding that Article 8’s protection of family life prevented the expulsion of an Algerian national convicted of a crime but married to a Swiss citizen). British jurisprudence suggests that articles other than Article 3 can indeed prohibit expulsion if a “high threshold test” is satisfied. *See R (Ullah) v. Special Adjudicator* [2004] UKHL 26 [49]–[50], [2004] 2 A.C. 323 (H.L.) 362 (Lord Steyn).

34. *M70/2011 v Minister for Immigration & Citizenship* (2011) 280 ALR 18 ¶ 119 (Austl.).

what were described as “basic survival and dignity rights, including rights to property, work and access to a social safety net,” rights not to be discriminated against, and rights to be guaranteed religious freedom. It follow[s] that the [sending government] ha[s] to be sure as a matter of fact that [the proposed destination state is] complying with all those standards.³⁵

By refusing to recognize this fundamental limitation and instead treating the prohibition of expulsion to face a risk of persecution as the only pertinent rule of the Refugee Convention,³⁶ the European Union has failed to create a structure that is capable of reconciling its legal commitments to refugees with its drive for administrative efficiency.³⁷ Indeed, the recent suggestion of the Advocate-General that even noncompliance with supposedly binding E.U. asylum directives does not itself pose a bar to refugee removals³⁸ makes clear just how far departure from law may be sanctioned in the Union’s single-minded pursuit of operational goals.

What would Eric Stein make of this situation? He would no doubt urge some measure of patience, recognizing the depth of Europe’s commitment to human rights and the relatively recent vintage of the directives and, in particular, the CJEU’s competence to oversee them. But as the consummate public international lawyer, he would surely also argue that European institution building be achieved in a manner that truly respects the rules of public international law. His insistence that European integration be predicated on transparency, and that the rise of new institutions is no excuse for a failure of legal accountability, should compel us to vigilance.

35. *Id.* ¶ 157 (Heydon J).

36. *See, e.g.*, Case C-411/10, *N.S. v Sec’y of State for the Home Dep’t* (Advocate General’s Opinion) (Sept. 22, 2011) ¶ 158, <http://curia.europa.eu/juris/cgi-bin/form.pl?lang=en> (search “Case Number” for “411/10”) (concluding that transfer pursuant to the Dublin Regulation “is, as a rule, incompatible with EU law where the asylum seeker is exposed . . . to the serious risk of expulsion to a persecuting State”). The opinion referred to “due respect for the rules of the Geneva Convention,” *id.* ¶ 154, but discussed the Convention purely in terms of the Article 33(1) prohibition on *refoulement*. *E.g., id.* ¶¶ 41, 114, 153–154.

37. *See id.* ¶¶ 125–126 (the main aim of the Dublin Regulation is to “determine rapidly” the member state responsible for evaluating an asylum application).

38. *Id.* ¶ 123. (“Serious risks of infringements of individual provisions . . . which do not also constitute a violation of the . . . Charter of Fundamental Rights, are not sufficient . . . to create an obligation on the part of the transferring Member State to . . . assume responsibility . . .”).