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Chapter 10 Transnational Law and Refugee Identity: The Worldwide Effect of European Norms

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Since the mid-20th Century, the boundaries between the international and the domestic, and between state and non-state, have steadily eroded. This is not simply in terms of the proliferation of international rules with growing domestic effect, such as human rights law, it is also in terms of law and practice in one state shaping the laws and practice of other states through transnational connections. Horizontal links across state boundaries between legislators, regulators, judges, and interest groups are increasingly shaping how laws are framed, interpreted and applied. This has led some international law scholars, working from the American liberal tradition, to declare the emergence of a new world order based on a complex web of trans-governmental networks.² The European Union (EU) is often held as a prime example of this development, and indeed of the future trajectory of this world order.

This chapter examines the global influence of European asylum law.³ It discusses evidence of worldwide emulation of European asylum law through transnational and local actors, and considers EU's normative power in refugee protection. It draws conclusions on the role of transnational processes in shaping the construction of refugee identity around the world. Essentially, it argues that, historically, refugee

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² Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004).

³ In this paper, I use the term 'law' in a normative sense, interchangeably with 'norm', that is, as principles beliefs about appropriate action, shared by a community, which are embedded in practice and codified in rules (i.e., law).

identity was rooted in Europe, in that both refugee law and human rights law are European constructs in origin. The 1951 Refugee Convention was then emulated by states outside Europe, and what we may be witnessing today is a similar pattern of transnational diffusion of Western norms (the Common European Asylum System or CEAS) encoded in the now internationalized Refugee Convention and other human rights treaties. This chapter further argues that Europe's normative power in refugee law is clearly at work in this transnationalism.

Just to clarify, a transnational approach to law invites attention to the actions of and links between non-state actors, and the trans-border effect of national and regional legal institutions. This chapter therefore challenges the traditional approaches to European law ('European integration') and international law (the 'vertical approach'), which treat states as the central players. It takes forward the research agenda first laid out by Goodwin-Gill and Lambert in *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union*.⁴ The book examined the extent of transnational judicial dialogue within the EU and explained why there was less than might be expected. The empirical findings - that judges rarely use each other's decision on asylum within the EU, suggest that the transnational legal approach has limited applicability within the EU. In contrast, this chapter argues that the transnational legal approach is very relevant when we move outside of Europe. EU asylum law and protection practice is spreading and influencing countries around the world; transnational actors like UNHCR play an important role in this, but so do a variety of local actors. This chapter therefore continues the analysis in Chapter 5 on how refugee identities are constructed judicially and transnationally.

1. Global Engagement with European Asylum Law

⁴ Guy S Goodwin-Gill and H  l  ne Lambert (eds.), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge University Press, 2010). See also, H  l  ne Lambert, 'Transnational Judicial Dialogue, Harmonization and The Common European Asylum System' (1999) 58 *International and Comparative Law Quarterly* 519-543.

Europe has one of the most advanced regional refugee protection regimes in the world. The EU regime has emerged through a series of policy and legal agreement on asylum, and refugee law and human rights principles, aiming at achieving an ever-greater uniformity in the law and practice of its Member States. The second phase of the CEAS legislation has now concluded – this common legislation codifies over 20 years of state practice.⁵ A regime covering 25 countries,⁶ including some of the most developed and powerful in the world, is bound to exert considerable influence beyond Europe in matters of refugee law and practice.

The predicted impact of this body of EU norms has been widely identified in the academic literature as one of ‘ripple effect’ or ‘trickling effect’ beyond the EU.⁷ However, very few studies have noted the fact that this regime has already influenced the law and practice of states around the world, for some time.⁸ The implications of this are great in terms of understanding the transnational effect of European asylum law.

Approach: How to Study Worldwide Emulation of Europe?

This section draws on scholarship from International Relations, sociology and law to identify ‘why’ and ‘how’ European law and practice on refugee protection spreads and is being emulated worldwide. There exists a large body of literature on the possible global influence of the EU through transnational actors and processes,

⁵ Council of the European Union, ‘Final steps towards a Common European Asylum System’, Luxembourg 7 June 2013, 10411/13 PRESSE 230 – available at: http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/jha/137420.pdf

⁶ Denmark opted-out entirely of the asylum package; both the UK and Ireland opted-out of most of the second phase (recast) of EU legislation.

⁷ B S Chimni, ‘Reforming the International Refugee Regime: A Dialogic Model’ (2001) 14 *Journal of Refugee Studies* 151-68 at 157; Volker Türk and Frances Nicholson, ‘Refugee protection in international law: an overall perspective’, in Erika Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003) 6; Catherine Dauvergne, *Making People Illegal* (Cambridge University Press, 2008) 150-3; Guy S Goodwin-Gill, ‘The search for the one, true meaning...’, in Guy S Goodwin-Gill and Hélène Lambert (eds.), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge University Press, 2010) 238-9.

⁸ One such study to note this to be the case in Africa is Bonaventure Rutinwa, ‘The End of Asylum: The Changing Nature of Refugee Policies in Africa’ (2002) 21 *Refugee Survey Quarterly* 2-41 at 33. See also, Jean-François Durieux, ‘The Many Faces of “Prima Facie”: Group-Based Evidence in Refugee Status Determination’ (2008) 25 *Refugee* 151-163.

both in the socio-legal literature on the diffusion of law⁹ and in the area of political science/political sociology of the EU.¹⁰ Up to now, most European legal scholars have taken a 'European integration' approach to 'European asylum law' and have focused on EU institutional development and the effects of EU law on Member States.¹¹ At the same time, American scholars have for some time highlighted the global promise of European legal institutions.¹² International Relations scholars too have long been working on diffusion theories in organizational structures.¹³ The empirical data gathered by International Relations scholars reveals that from the mid-twentieth century onward, growing similarity in organizational form and function within a range of specific policy areas, including public healthcare, education, and managing the natural environment.¹⁴ Such similarity constitutes a puzzle. Why is there such a degree of worldwide homogeneity in how societies organize themselves, given the great difference in local conditions and requirements?¹⁵ Here, a particular school of International Relations called Constructivism is most useful in helping us understand

⁹ See, e.g., William Twining, *Globalisation and Legal Theory* (Cambridge University Press, 2000); see also 'Diffusion of Law: A Global Perspective' (2004) 49 *Journal of Legal Pluralism* 1-45; 'Social Science and Diffusion of Law' (2005) 32 *Journal of Law and Society* 203-40; 'Normative and Legal Pluralism: A Global Perspective' (2010) 20 *Duke Journal of Comparative & International Law* 473-517; Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11-32.

¹⁰ See e.g., Eiko Thielemann and Nadine El-Enany, 'Refugee protection as a collective action problem: is the EU shirking its responsibilities?' (2010) 19 *European Security* 209-229; Andrew Geddes, *Immigration and European Integration: Beyond Fortress Europe?*, 2nd edn., (Manchester University Press, 2008) 170-85; Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40 *Journal of Common Market Studies* 235-58.

¹¹ See, e.g., Elspeth Guild and Carol Harlow (eds.), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Hart Publishing, 2001); Anneliese Baldaccini, Elspeth Guild and Helen Toner (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Hart Publishing, 2007).

¹² Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 *American Journal of International Law* 1-27; Anne-Marie Burley and Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47 *International Organization* 41-76; Anne-Marie Slaughter and William Burke-White, 'The Future of International Law is Domestic (or, The European Way of Law)' (2006) 47 *Harvard International Law Journal* 327-52.

¹³ Emily Goldman and Leslie Eliason (eds.), *The Diffusion of Military Technology and Ideas* (Stanford University Press, 2003); Alexander Betts (ed.), *Global Migration Governance* (Oxford University Press, 2011); Manners, above n 10.

¹⁴ I am grateful to Theo Farrell for pointing me to this literature. John Meyer, David Frank, Ann Hironaka, Evan Schofer, and Nancy Tuma, 'The Structuring of a World Environmental Regime, 1870-1990' (1997) 51 *International Organization* 623-51; Francisco Ramirez and John Meyer, 'Comparative Education: The Social Construction of the Modern World System' (1980) 6 *Annual Review of Sociology* 369-99.

¹⁵ Paul J DiMaggio and Walter W Powell, 'The Iron Cage Revisited: Institutionalism Isomorphism and Collective Rationality' in Walter Powell and Paul DiMaggio (eds.), *The New Institutionalism in Organizational Analysis* (Chicago University Press, 1991) 63-82 at 64.

this puzzle, as it seeks to explain how ideas spread across borders and take effect in national policy communities. Constructivists see a world that is substantially shaped by the identities of actors and the ideas they hold about how they should organize and act (ie, norms). Thus, they emphasize the role of norm entrepreneurs and advocates in promoting new norms, and the role of transnational networks (eg, professional, legal or advocacy) in diffusing norms.¹⁶ Viewed through this lens, norm diffusion usually involves a process of *socialization* and *internalization*. Socialization is where states (or policy communities within them) are pressured and/or persuaded to adopt the new norm. Internalization is where the new norm is embedded in the laws, codes and practices of the adopting community.¹⁷ Crucially, constructivists find that when states adopt certain norms in a selective process, these specific norms are often ‘localized’ in this process.¹⁸ Much overlap exists between this body of work and socio-legal scholarship on the diffusion, reception or transplant of law. For instance, William Twining also emphasizes the importance of local context. He explains that ‘processes of diffusion are nearly always mediated through local actors’.¹⁹ He too sees diffusion as ‘typically a reciprocal rather than a one-way process’, hence early influences of ‘Western legal traditions lose their pre-eminence’.²⁰

Drawing on this combined literature, two main drivers can be identified behind the spread of norms, and help us explain ‘why’ a non-EU state would look elsewhere for ideas relating to asylum law and protection practice. The first driver for emulation is new challenges and uncertainty. This emulation driver draws on

¹⁶ Alexander Wendt, *Social Theory of International Politics* (Cambridge University Press, 1999). David Armstrong, Theo Farrell and H el ene Lambert, *International Law and International Relations*, 2nd edn., (Cambridge University Press, 2012) 100-10. Peter Haas, ‘Epistemic Communities and International Policy Coordination’ (1992) 41 *International Organization* 1-35; Thomas Risse, ‘Ideas Do Not Float Freely: Transnational Coalitions, Domestic Structures, and the End of the Cold War’ (1994) 48 *International Organization* 165-214; Preslava Stoeva, *New Norms and Knowledge in World Politics* (Routledge, 2010).

¹⁷ Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52 *International Organization* 887-917; Thomas Risse, Steven Ropp, and Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999).

¹⁸ Amitav Acharya, ‘How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism’ (2004) 58 *International Organization* 239-75.

¹⁹ Twining, ‘Diffusion of Law: A Global Perspective’ above n 9, 26. On the role of electoral mechanisms in shaping patterns of policy diffusion, see Katerina Linos, ‘Diffusion Through Democracy’ (2011) 55 *American Journal of Political Science* 678–695.

²⁰ Twining, ‘Social Science and Diffusion of Law’ above n 9, 215-16, referring to the work of Patrick Glenn.

rational processes and the need to succeed.²¹ Where states are faced with new challenges and are uncertain about how to tackle them, they go fishing for ideas; emulation offers a practical solution to a real problem.²² The second driver for emulation is normative and stems from reputation and the growing of transnational professional standards, through bilateral agreements with the EU, for instance. This emulation driver draws on social processes and the necessity to conform;²³ here the underlying motivation for emulation is its value.²⁴ In law, including refugee law, a transnational professional identity, composed of expertise and norms has developed that is shared by organizational actors the world over.²⁵ In the context of this chapter, the EU as a major source of new ideas and professional standards on refugee protection fulfills a leading role in this respect.

State emulation is also a process of norm diffusion: 'how' ideas travel and end being emulated. Here, the literature on constructivism points to three facilitating factors: the fit, the transmitter and the pusher. First, the fit; by this I mean the degree of fit between the foreign norm and local requirements, politics, laws and culture,²⁶ in other words, the 'context'.²⁷ The second is the transmitter, that is, the presence and role of transnational policy, legal or advocacy networks in 'transmitting' the foreign norms. The third facilitating factor is the role of advocacy groups and other stakeholders (eg, local NGO, courts, academics, judges) in 'pushing' for normative change from within the country in question.²⁸

²¹ DiMaggio and Powell, above n 15, 69-70.

²² Twining, 'Diffusion of Law' above n 9, 30.

²³ DiMaggio and Powell, above n 15, 70-73.

²⁴ Twining, 'Diffusion of Law', above n 9, 30.

²⁵ Alexander Betts, above n 13.

²⁶ Jeffrey Checkel, 'Norms, Institutions, and National Identity in Contemporary Europe' (1999) 50 *International Studies Quarterly* 83-111 at 86-7; Andrew Cortell and James Davis, 'Understanding the Domestic Impact of International Norms: A Research Agenda' (2000) 2 *International Studies Review* 65-90.

²⁷ Twining, 'Social Science and Diffusion of Law', above n 9, 211 discussing the work of Otto Kahn-Freund. See also the discussion on 'fit' and 'proximity' in Katerina Linos, 'When Do Policy Innovations Spread? Lessons for Advocates of Lesson-Drawing' (2006) 119 *Harvard Law Review* 1467-87. For different views on commonalities and distinctiveness between legal cultures, see, for instance, Roger Cotterrell, *Law, Culture and Society* (Ashgate, 2006); David Nelken, 'Puzzling Out Legal Cultures: A Comment on Blankenburg' in David Nelken (ed.), *Comparing Legal Cultures* (Ashgate, 1997) 58-88; Pierre Legrand, 'European Legal Systems are not Converging' (1996) 45 *International and Comparative Law Quarterly* 52-81.

²⁸ Anne-Marie Clarke, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms* (Princeton University Press, 2002); Anne Klotz, *Norms in International Relations* (Cornell University Press, 1995).

Method: How to Select Norms When Studying Emulation of European Asylum Law?

It is notoriously difficult to trace the precise origin of a legislative rule.²⁹ To overcome this difficulty, one may instead concentrate on trends or ‘patterns relating to law’ (e.g., a set of restrictive or liberal rules, practices or ideas) as opposed to specific rules.³⁰ The substantive and procedural rules that currently form the CEAS are impaired by exceptions and derogations to existing international standards. Whilst it is true that some of these rules and practices are still evolving, through recast instruments and judicial interpretation, we do have a clear sense of the existence of key norms of European refugee law, that originated over 20 years ago in state practice and asylum policies, and which are now squarely codified in the CEAS. Some of these are clearly positive, for instance, the recognition of a ‘right to asylum’ in the EU, which goes beyond protection from *refoulement*;³¹ the recognition of non-state agents of persecution, and gender-based persecution; the codification of subsidiary protection and temporary protection. All of which are based on state practice and/or national legislation.³²

Yet, significant gaps and shortcomings also characterize the CEAS, such as, a tendency towards more exceptions and derogations to established standards (e.g., limitation of the application of the Refugee Convention definition to third-country nationals,³³ the internal flight alternative concept, the safe third country, first

²⁹ Rosemary Byrne and Andrew Shacknove, ‘The Safe Country Notion in European Asylum Law’ (1996) 9 *Harvard Human Rights Journal* 185-228; Rosemary Byrne, Gregor Noll and Jens Vedsted-Hansen, ‘Understanding Refugee Law in an Enlarged European Union’ (2004) 15 *European Journal of International Law* 355-379.

³⁰ Twining talks about ‘patterns relating to law’ in Twining, ‘Diffusion of Law: A Global Perspective’, above n 9, 5.

³¹ Art. 18, Charter of Fundamental Rights of the European Union, and Recast Qualification Directive 2011/95/EU, Recital 16. See Maria-Teresa Gil-Bazo, ‘The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union’s Law’ (2008) 27 *Refugee Survey Quarterly* 33-52; UNHCR’s written observations in CJEU Joined Cases C-411/10 and C-493/10, para 31.

³² Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007).

³³ The Qualification Directive limits the scope of international protection to ‘third country nationals and stateless persons’ only. This led the House of Lords Select Committee on the EU to observe: ‘for a major regional grouping of countries such as the Union to adopt a regime apparently limiting the scope of the Geneva Convention among themselves would set a most undesirable precedent in the wider international/global context’. House of Lords Select Committee on the EU, *Defining Refugee*

country of asylum and safe country of origin principles, manifestly unfounded applications);³⁴ restrictive access to international protection through delocalized migration control (e.g., discussions on extra-territorial processing);³⁵ the Dublin rule (according to which only one Member State is responsible for determining an asylum application and corresponding transfers) and the Aznar rule (according to which EU citizens are presumed not to be needing asylum);³⁶ increased securitization (e.g., through detention, deportation and denaturalization procedures),³⁷ and a tendency, in some countries, to resort to granting subsidiary protection rather than refugee status,³⁸ with the former still providing less rights than the latter.³⁹

It is further *predicted* that other norms likely to spread worldwide are those which the Court of Justice of the European Union (CJEU) has ruled upon, particularly, where the ruling concerns a provision of EU law that enshrines a provision of the Refugee Convention (such as, cessation of refugee status⁴⁰ or exclusion from refugee status⁴¹) or a provision relating to subsidiary protection.⁴² Indeed, once the CJEU answers a reference for a preliminary ruling in a judgment, this interpretation carries great weight as EU law. This pioneering role by the CJEU is further amplified by the fact that while the International Court of Justice is competent, it has never been used by states in this way (and is unlikely to ever be). Whilst it is true that rulings of

Status and Those in Need of International Protection (The Stationary Office, 2002), para 54, cited in McAdam, above n 32, 60.

³⁴ Elspeth Guild, 'The Europeanisation of Europe's Asylum Policy' (2006) 18 *International Journal of Refugee Law* 630–51.

³⁵ Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalization of Migration Control* (Cambridge University Press, 2011); Madeline Garlick, 'The EU Discussions on Extraterritorial Processing: Solution or Conundrum' (2006) 18 *International Journal of Refugee Law* 601–629; Gregor Noll, 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones' (2003) 5 *European Journal of Migration and Law* 303–341.

³⁶ Elspeth Guild, 'Seeking Asylum: Storm Clouds between International Commitments and EU Legislative Measures' (2004) 29 *European Law Review* 198–218; Guild, above n 34.

³⁷ Elspeth Guild, *Security and Migration in the 21st Century* (Polity, 2009).

³⁸ This is the case, for instance, of Bulgaria, Italy, Cyprus, Malta, Poland, Slovakia, Finland and Sweden.

³⁹ Directive 2011/95/EU. This recast Directive is a considerable improvement from the original Directive of 2004 but still today the right to residence permits (Art 24) and the right to social welfare (Art 29) remain unequally protected.

⁴⁰ ECJ, Joined Cases C-175, 176, 178, 179/08, *Salahadin Abdulla and Others v. Germany*, ECR [2009] I-1493.

⁴¹ CJEU, Joined Cases C-57/09 and C-101/09, *Bundesrepublik Deutschland v. B and D*, judgment of 9 November 2010.

⁴² ECJ, Case C-465/07, *Mr and Mrs Elgafaji v. the Dutch Secretary of State for Justice*, judgment of 17 February 2009; CJEU, Case C-285/12, *Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides*, judgment of 30 January 2014.

the CJEU are authoritative in respect of EU law only (in the sense of their binding legal force),⁴³ it is less true of their general authority (persuasive or not) as rulings from the first, ever supranational court to have interpreted provisions of the Refugee Convention. These rulings will carry enormous weight in generally influencing the interpretation of the Refugee Convention – that is, in promoting an interpretation of what is ‘normal’ interpretation in 27 of the 144 countries signatories to the Refugee Convention/Protocol.

Most of the norms above pertain to who qualifies for asylum and under what conditions. In other words, these norms contribute to how a refugee is defined in the EU, as opposed to internationally. Insofar as these norms have already and are likely to continue to spread beyond Europe, they will impact on the construction of refugee identity in other parts of the world. This has obvious implications for the 1951 Refugee Convention, which defines an international status for refugees. As they grow in influence around the world, European norms may compete with international rules on refugee status.

Findings: Evidence of EU Influence on Refugee Law Worldwide

A recently completed empirical study finds evidence of the EU protection regime ‘naturally’ evolving transnationally and spreading internationally into the legal systems of non-EU countries.⁴⁴ The strength of evidence varies between countries. For example, EU law and practice on ‘subsidiary protection’ seems to have had an enormous influence on the codification of ‘complementary protection’ in Australia.⁴⁵ European influence can also be discerned with respect to the ‘safe third country’ concept, which has been borrowed in Australia. Both norms (complementary protection and safe third country) impact on state functions in granting refugee

⁴³ As commented by Advocate General Eleanor Sharpston in her Opinion of 4 March 2010 in the Case C-31/09 *Bolbol v. Bevándorlási es Állampolgársági Hivatal (Hungarian Office for Immigration and Citizenship)*.

⁴⁴ Lambert, McAdam and Fullerton, above n 1.

⁴⁵ Jane McAdam, ‘Migrating laws? The ‘plagiaristic dialogue’ between Europe and Australia’ in Lambert, McAdam and Fullerton, above n 1, 25-70.

status, and therefore creating refugee identity.⁴⁶ Interestingly, other proposed practices considered ‘bad’ in the EU, such as those relating to ‘transit processing centres’, also failed in Australia under pressure from national and international criticism.⁴⁷ McAdam’s discussion of these centres offers a striking illustration of the transnational phenomenon of refugee law-making. Indeed, there is clear evidence that Australia’s Pacific Solution, created in 2001, was in fact a source of inspiration for the UK’s proposal to create offshore processing centres in Europe, and the Pacific Solution was itself reminiscent of the United States’ offshore processing of Cuban and Haitian asylum seekers in Guantanamo Bay in the 1990s. Another example is Canada, which for many years has imposed visa requirements on arrivals from the Czech Republic (and Hungary, to a lesser extent) as a means of deterring large numbers of Roma seeking asylum in Canada. However, in 2012, Canada introduced a new ‘safe country of origin’ provision in its revised refugee law, which acts as an alternative option to visa. This was motivated by Canada wishing to conclude a free-trade agreement with the EU and therefore having to withdraw imposing visa on all EU nationals. The new provision on safe country of origin is directly traceable to the ‘white lists’ of safe countries introduced by several European countries in the 1990s, including the UK, as well as, crucially, the Aznar Protocol.⁴⁸ In Africa, strong evidence of past, historical emulation of the 1951 Refugee Convention was found (but not present). The evidence is clear and ‘can be traced back to an explicit objective of emulating the European approach in Africa’ facilitated by the OAU and UNHCR. Since then, elements of contemporary regional, sub-regional and national refugee protection frameworks have been found to reflect European approaches, especially restrictive ones (such as ‘safe third country’, ‘safe country of origin’ and ‘manifestly unfounded’ asylum applications), but explicit evidence of this process is hard to find.⁴⁹

⁴⁶ Colin Harvey, ‘Is humanity enough? Refugees, asylum seekers and the rights regime’ in Satvinder Juss and Colin Harvey (eds.), *Contemporary Issues in International Refugee Law* (Edward Elgar, 2013) 68-88.

⁴⁷ McAdam, above n 45.

⁴⁸ Audrey Macklin, ‘A safe country to emulate? Canada and the European refugee’ in Lambert, McAdam and Fullerton, above n 1, 99-131.

⁴⁹ Marina Sharpe, ‘The impact of European refugee law on the regional, subregional and national planes in Africa’ in Lambert, McAdam and Fullerton, above n 1, 178-200.

Thus, the overall picture is one of EU norms being emulated; some are clearly restrictive (e.g., accelerated procedures, safe third country, safe first country, safe country of origin), others are of a more liberal tradition (e.g., the protection approach to actors of persecution, subsidiary protection). Overall, however, a broad trend of European restrictive practices appearing in the law and practice of countries and regions outside the EU can be said to be identifiable. At first sight, this would suggest a European refugee identity that is restrictive and in some aspects non-compliant with the 1951 Convention refugee. However, as will be discussed below, Europe's unique human rights legal framework is 'keeping refugee law "in line"' in that region.⁵⁰

The general driver behind the spread of these norms appears to be 'new challenges and uncertainty'. For examples, Australia, Canada and Latin America found the challenges of having to cope with an increased number of mixed flows of refugees (be it from Africa, Asia or the Czech Republic) to be the principal reason for looking at the EU.⁵¹ The EU, as a major source of new ideas in asylum law, was also found to fulfill a leading role in nudging states to emulate its norms through its formal agreements with Israel and Switzerland.⁵² These agreements have led both countries to learn lessons from the EU, but the effect of these have been mostly of a restrictive kind.

The 'fit' or compatibility between the EU norm and the local context seems to be key in facilitating emulation. For example, the fit between Latin American and Spain in terms of legal systems and language has made Spain (an EU Member State since 1986) a direct source of inspiration in Latin America.⁵³ Other examples are the strong historical ties between the US and Europe and the cultural fit with the UK, and the shared common law tradition between Canada and the UK.⁵⁴ The role of

⁵⁰ Harvey, above n 46, 88.

⁵¹ McAdam, above n 45; Macklin, above n 48; David Cantor, 'European influence on asylum practices in Latin America: accelerated procedures in Colombia, Ecuador, Panama and Venezuela' in Lambert, McAdam and Fullerton, above n 1, 71-98.

⁵² Dallal Stevens, 'Between East and West: the case of Israel' in Lambert, McAdam and Fullerton, above n 1, 132-155; Vincent Chetail and Céline Bauloz, 'Is Switzerland an EU Member State? Asylum law harmonization through the backdoor' in Lambert, McAdam and Fullerton, above n 1, 156-177.

⁵³ Cantor, above n 51.

⁵⁴ Maryellen Fullerton, 'Stealth emulation: the United States and European protection norms' in Lambert, McAdam and Fullerton, above n 1, 201-224; Macklin, above n 48.

UNHCR and senior political or judicial figures, as ‘transmitter’ for emulation, seems to be particularly important. For instance, in Australia, submissions by UNHCR before Parliament in Committee hearings during the development of legislation and policy on complementary protection were found to play an important role; so too concerning discussions between the Australian Minister for Immigration and his/her counterparts, which can have significant influence on the direction of Australian practice.⁵⁵ UNHCR was also found to be a strong mediating actor in Africa, Latin America, and Israel. Finally, in all the countries/regions considered, the role of domestic courts, local NGOs, academics, judges have been identified as playing a crucial role in facilitating emulation of European norms. For instance, in Australia, note was made that ‘influence stems from personal interactions between the Immigration Minister and his or her counterparts in EU Member States; from research by the Department of Immigration and Citizenship (Immigration Department) into comparative practices when formulating policy; from the interventions of academics and non-governmental organizations (NGOs) in parliamentary inquiries, and more generally through their advocacy and scholarly writings; and through consideration of European jurisprudence by the courts’.⁵⁶

Yet, it is also the same domestic context or local requirements that are found to cause states to resist the influence of EU law and practice. Thus, in cases where emulation is occurring, this is never total; it can only be partial because the norms being emulated are deeply dependent on local conditions and requirements. As an example, in Australia, local conditions include the absence of a Bill of Rights or anything akin to a regional human rights treaty like the European Convention on Human Rights (ECHR), which means that emulation of EU norms can only be partial.⁵⁷ In Israel, local conditions or culture are powerful too, particularly the right of return for the Jewish diaspora and the ‘Holocaust discourse’. This means that Israel has learned some lessons from the EU but these have generally been of the restrictive kind.⁵⁸

⁵⁵ McAdam, above n 45.

⁵⁶ McAdam, above n 45, 28.

⁵⁷ Ibid.

⁵⁸ Stevens, above n 52.

In sum, it is argued that state's function in granting refugee status⁵⁹ is being shaped transnationally by European refugee law.

2. Europe's Normative Power in Refugee Law

Whilst drivers and facilitators are useful in helping us understand the transnational movement of norms between different legal systems, their role is limited when it comes to explaining why the EU is such a source of inspiration. The idea that the EU may be setting world standards in normative terms is not new and has been explored in the writing of numerous scholars.⁶⁰ But what the empirical evidence suggests is that EU's normative power is clearly at work in the emulation of European norms of refugee protection. The long-standing commitments of the EU to peace, liberty, democracy, the rule of law, human rights, and its aspirations to social solidarity, antidiscrimination, sustainable development and good governance provide the EU with a broad normative basis.⁶¹ In European refugee law more specifically, this normative basis is anchored in the 1951 Refugee Convention, the ECHR (now also the Charter of Fundamental Rights of the EU) and other human rights treaties. It is strengthened with a set of supranational institutions competent to legislate on refugee law and interpret provisions of refugee law. With this basis, the EU is able 'to define what passes for "normal"'⁶² in refugee law and international protection. Thus emulation of European refugee law involves more than a process of diffusion of an ideology or of a solution to a problem; it defines Europe's international identity in international protection and, it may also be argued, Europe's refugee identity. This power therefore challenges the view that 'the notion of "refugee" is internationalized precisely to ensure it is not captured by any one national or regional agenda or approach'.⁶³

⁵⁹ To read more on this state's function, see Harvey, above n 46.

⁶⁰ For a review of this literature, see Manners, above n 10, 235-258.

⁶¹ Manners, above n 10, 242-4.

⁶² Manners argues that '[T]he ability to define what passes for 'normal' in world politics is, ultimately, the greatest power of all'. Manners, above n 10, 253.

⁶³ Harvey, above n 46, 72.

There are problems associated with this exercise in 'normality', such as, the logic underpinning the CEAS (which is based on mutual trust and freedom of movement between the Member States) and the resulting 'vanishing', at least in Europe, of the 1951 Convention refugee. As argued by Durieux, 'the EU concept of asylum induces the phenomenon of a 'vanishing refugee', whereby the central character of the 1951 Convention regime, namely the refugee, is blurred, marginalized or ignored'.⁶⁴ The rules that are specific to the CEAS (eg, Aznar Protocol and the rules on inclusion and exclusions in the EU Qualification Directive) are creating a refugee identity that is narrower in its scope (eg, only applies to third country nationals, from non-safe countries) than the 1951 Convention refugee. The risk of this new identity influencing countries outside the EU is far from academic. Indeed, Canada's motive for emulating the restrictive EU safe country of origin concept, as an alternative to a visa requirement (as mentioned above), has been identified as being EU's power and influence as an international actor.⁶⁵ Since the EU has set the standards (all EU Member States regard themselves as safe), it can hardly complain if Canada adopts the same (restrictive) ones. Another risk in emulation is that whereas the EU has a normative 'safety mechanism' in place, namely the ECHR, many other countries do not. No matter how restrictive the law might be in Europe, its application in practice is subject to a double-judicial check that is unique to Europe: one by the CJEU, and the other by the European Court of Human Rights. Furthermore, EU norms are constantly evolving, and many of them are becoming more liberal under the influence of this double-check. This is true of EU asylum legislation, which continues to be revised, and both courts (the CJEU and the European Court of Human Rights) play a key role in the enhancement of the standards set in the legislation. There is a danger of non-EU countries emulating some of Europe's restrictive rules, practices and ideas without the more liberal 'interpretation package' that comes with it in a European context. It has been argued elsewhere that the refugee protection regime (ie, the 1951 Refugee Convention) 'is quite clear on the centrality it attaches to a legally endorsed status'; this is to be

⁶⁴ Jean-François Durieux, 'The vanishing refugee: how EU asylum law blurs the specificity of refugee protection' in Lambert, McAdam and Fullerton, above n 1, 225-257 at 228.

⁶⁵ Macklin, above n 48.

contrasted with the human rights movement that sees the human person first.⁶⁶ In this way, one effect that human rights law is having on refugee identity in the EU is to 'stand as a constant reminder that the status of "human persons" matters'.⁶⁷

3. Conclusion: The Role of Transnational Law in Shaping Refugee's Identity Across the World

This chapter has explored identity construction through transnational links between regions and countries. The approach it has used, to interrogate why and how certain norms of EU refugee protection are diffused worldwide and selectively adopted in countries outside the EU, is based on constructivist literature from International Relations and socio-legal scholarship. The picture that emerges is of a natural diffusion of European norms around the world, mostly of a restrictive character, by a range of actors and for a number of motives. EU asylum law and protection practice is spreading. Transnational actors like UNHCR clearly play a key role but so do a variety of domestic actors. The importance of local requirements (context) is also important in understanding the extent to which states outside the EU emulate European law and practice in this area.

The refugee law regime, and human rights more generally, are historically European constructs in origin. The 1951 Refugee Convention may be viewed as a Western model of legal organization that has been emulated by States outside Europe, in the late modern period. This chapter argues that the CEAS may be seen in terms of similar pattern of worldwide diffusion of Western norms encoded in the Refugee Convention and other relevant human rights instruments through transnational processes and local actors. As some of these European norms concern the definition of a refugee and who qualifies for asylum, the transnational legal approach helps us develop a better understanding of how refugee identities are constructed in domestic law the world over.

⁶⁶ Harvey, above n 46, 72.

⁶⁷ Harvey, above n 46, 88.