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The humaneness of EU asylum law and policy

Dallal Stevens

The Introduction to this book poses the questions ‘Should law not exist *for* people, for the *sake* of people?’ and ‘What values should law promote?’. It proposes the adoption of a human-centred analysis of European Union (EU) law and policy, which has at its heart the humane treatment of the person. In so doing, the collection seeks to move away ‘from the orthodox socio-economic dialectics and rights-centredness in the debates around the adequacy and effectiveness of EU law and policy’.

Such an approach is radical. After all, as the introductory chapter reveals, there are myriad ways of understanding the meaning of humaneness and the context in which it operates. We may have conflicting views as to the purpose of law and may challenge the proposition that law, and EU law in particular, should be humane or achieve humane outcomes. Notwithstanding any such misgivings, this chapter, which considers the impact of EU law on asylum seekers and refugees, will seek to show that refocusing on “the human” provides a unique and potentially revolutionary framework to address the complex issues of (forced) migration. Perhaps, of all the areas of concern to EU institutions, the plight of the asylum seeker/refugee might seem the most likely to engender a humane response. But, as will be shown, this is not necessarily the case. The EU, comprised as it is of Member States, reveals clearly the tension that exists in the asylum context: that international refugee law is founded upon an apparent “humanitarian imperative” but remains “resolutely statist”.¹ How far the EU as an entity has sought to move away from statist tendencies towards greater humanitarianism or humaneness – or, indeed, has succeeded in so doing – is a key focus of this chapter.

A brief historical context to the international refugee law regime is provided, which considers in particular whether its development was motivated by compassion and the desire to ease suffering, or by political and practical imperatives. The discussion then proceeds to examine the extent to which EU law and policy on asylum is driven by humanitarian² or humane sensibilities. The final section explores what a humane EU asylum law might look like and whether it is realisable. For the purposes of this chapter, I shall draw on the *Oxford English Dictionary*, which defines the adjective “humane” as ‘characterized by sympathy with and consideration for others; feeling or showing compassion towards humans or animals; benevolent, kind’.³

¹ Colin Harvey, ‘Is humanity enough? Refugees, asylum seekers and the rights regime’ in Satvinder Singh Juss and Colin Harvey (eds), *Contemporary Issues in Refugee Law* (Cambridge: Cambridge University Press, 2013), 72.

² Defined as: ‘Concerned with humanity as a whole; *spec.* seeking to promote human welfare as a primary or pre-eminent good; acting, or disposed to act, on this basis rather than for pragmatic or strategic reasons’ (*Oxford English Dictionary*, 2014).

³ *Oxford English Dictionary*, 2014.

A History of Humaneness?

We start our exploration of the central issue of whether EU asylum law and policy are, or should be, humane with a brief foray into the historical rationale for the international refugee law system.

For many, and this might include the EU itself, the need for asylum is regarded as obvious. Asylum has a long history – whether it be in the European tradition of providing a place of sanctuary for victims of religious or political persecution – or whether it relates more to Islamic notions of hospitality and *aman*.⁴ But why do humans feel the need to offer sanctuary to others? Is it due to our empathetic concern for victims of war, persecution or, to use modern terminology, human rights violations? This is perhaps one of the most striking paradoxes of asylum law. There is a general presumption that the establishment of a refugee protection framework, and the grant of refugee status to the lucky few, is based on humanitarian objectives – that is, we the citizenry of a particular state have decided that there are certain individuals whom we should protect for humanitarian reasons. This suggests a humane element to asylum; that, at some fundamental level, we truly *care* about the individual as a person rather than viewing him or her purely as a political entity, a “body” subject to legal process, or an irritating problem.

Sadly, history teaches us otherwise. For Matthew Price, asylum was viewed in the Western context as a political rather than a humanitarian act.⁵ ‘Asylum’s function’, he argues, ‘was to protect unfortunates from specifically political harms; granting asylum reflected the judgment that the state of origin had abused its authority; and asylum was connected to other tactics for reforming or challenging abusive regimes’.⁶ Asylum’s initial role as a defence to extradition, while not focused wholly on a desire to assist the vulnerable, is still motivated by a need to protect the innocent from injustice, and unjust punishment in particular.⁷ In this sense, despite any political roots of asylum, it does carry with it a humanitarian imperative: the innocent should not suffer at the hands of an abusive state. Thus Grotius, citing Dio Chyrsostom favourably, claims that ‘[i]t is possible for those who have done wrong to one state to flee for refuge to another’.⁸ But what should be noted here is that hospitality was – and continues to be – offered very much on the terms of the recipient state. The emphasis was on the power of the state to permit entry, not on the misfortune of the individual. Those seeking asylum were in the main regarded as aliens, strangers, foreigners, and were handled as such. Thus, Vattel argues, ‘[b]y reason of its natural liberty it is for each Nation to decide whether it is or is not in a position to receive an alien. Hence an exile has no absolute right to choose a country

⁴ See, for a brief discussion, Dallal Stevens, ‘Shifting conceptions of refugee identity and protection: European and Middle Eastern approaches’ in Susan Kneebone; Dallal Stevens; and Loretta Baldassar (eds) *Refugee Protection and the Role of Law: Conflicting Identities* (Routledge, 2014), ch 5.

⁵ Matthew Price, *Rethinking Asylum: History, Purpose, and Limits* (Cambridge: Cambridge University Press, 2009), 25.

⁶ *ibid*, 57.

⁷ *ibid*.

⁸ Hugo Grotius, *De Jure Belli ac Pacis* (1625), Book 2, Chapter 21, IV(6).

at will and settle himself there as he pleases. He must ask permission of the sovereign of the country, and if it be refused, he is bound to submit.⁹

That the state has the right to decide who enters its territory and who is expelled is a constant feature of political and legal discourse.¹⁰ Any suggestion that asylum superseded such a notion is not borne out historically. Periods of relatively liberal asylum policies do exist – such as in the United Kingdom during the 19th century – but the reasons for that are varied and complex, and both state and public generosity tended to ebb and flow.¹¹ As I have noted elsewhere, asylum to the UK at this time arose from a combination of four important elements: ‘the political expediency of maintaining liberal asylum laws; a sense of difference and superiority over continental neighbours; unusual economic growth and stability; and the numerical insignificance of refugees to Britain.’¹² It was unlikely that such circumstances would endure and so it proved with a hardening of attitude towards the end of the 19th and start of the 20th century, engendered by the arrival of comparatively large numbers of Jews from Eastern Europe and Russia.¹³ The increasingly restrictive position adopted by the UK to increased inward migration was not unique. With the outbreak of various wars and expulsions of people that blighted the early part of the 20th century, Europe faced an enormous crisis of mass flight. The reaction of many European states was to legislate or to impose restrictive entry policies, with a view to protecting nation-state interests. Such an approach could not last, however, and it soon became clear to states that some form of collaboration on the issue of refugees was needed.¹⁴ The result: appointment by the League of Nations of a High Commissioner for Russian Refugees, in the first instance, and, subsequently international agreements on specific groups of refugees.¹⁵

If, broadly, we can declare European states’ asylum and refugee policies to have been driven by self-interest rather than by the desire to alleviate human suffering, is this also true of the international efforts to protect refugees? The considerable efforts of the first League High Commissioner, Dr Fridtjof Nansen, helped to establish the independent Nansen International Office for Refugees that had a humanitarian remit. (The League remained responsible for the legal and political protection of refugees.) As such, there was recognition of the need to assist suffering people.

⁹ Emer de Vattel, *The Law of Nations or the Principles of Natural Law applied to the Conduct and to the Affairs of Nations and of Sovereigns* (1758), Book 1, §230.

¹⁰ See, for example, the Grand Chamber in *Saadi v UK* [2007] 44 EHRR 50, para 44, quoting the Chamber’s observation that it was a normal part of a State’s ‘undeniable right to control aliens’ entry into and residence in their country’.

¹¹ See Dallah Stevens, *UK Asylum Law and Policy - Historical and Contemporary Perspectives* (Sweet & Maxwell, 2004), 23-32.

¹² *Ibid*, 31.

¹³ See Michael Marrus, *The Unwanted - European Refugees in the Twentieth Century* (New York: OUP, 1985).

¹⁴ See Claudia Skran, *Refugees in Inter-War Europe - The Emergence of a Regime* (Clarendon Press, 1998) for a full discussion of causes and consequences in the inter-war period.

¹⁵ For example, Convention Relating to the International Status of Refugees, 1933 (regarding ‘Russian, Armenian and assimilated refugees’) and Convention Concerning the Status of Refugees coming from Germany, 1938.

However, one can equally argue that the initiatives undertaken by the League of Nations in the 1920s and 30s, and the post-World War II development of an international refugee law regime by the United Nations (UN), were also products of states' self-interest. Without inter-state co-operation by the so-called "international community", "the refugee problem", so evident in the post-war periods, would have persisted without the prospect of resolution. Increasingly, law began to play a role in delivering solutions. Hathaway puts it thus: 'In its initial form [in the period 1920-1938], refugee law ... constituted a largely humanitarian exception to the protectionist norm, with the screening of immigrants eliminated for large groups of fleeing persons.'¹⁶ This humanitarian-inspired refugee law is described as including:

the establishment of a general commitment to, at the least, meeting the basic human needs of refugees, whether by the provision of temporary material assistance, the facilitation of return to their country, or the grant of asylum abroad. Humanitarian principles would require states to make a meaningful and needs-based contribution to the human welfare of all involuntary migrants, whatever the cause for their flight.¹⁷

However, as Hathaway goes on to clarify, 'the nation-state philosophy and promotion of national economic goals' were still very much in evidence and constrained 'this largely humanitarian phase of refugee law'.¹⁸

The promotion of human rights following the Second World War did not appear to alter the state-oriented policy significantly. Arguably, as numerous commentators have suggested, the emergent international legal framework, in the form of the 1951 UN Convention relating to the Status of Refugees ("the Refugee Convention"), did not, in fact, have the sole interests of refugees in mind.¹⁹ Rather, as suggested by the 2012 UK Supreme Court judgment of *European Roma Rights Centre*: '[The Refugee Convention] represented a compromise between competing interests, in this case between the need to ensure humane treatment of the victims of oppression on the one hand and the wish of sovereign states to maintain control over those seeking entry to their territory on the other.'²⁰ While humane treatment is seen here as a factor, the true driver was arguably pragmatism rather than humanitarianism; that humanitarianism was a by-product was an unintended but welcome consequence. Hathaway goes on to assert that '[t]he modern system of refugee rights was therefore conceived out of enlightened self-interest. To the pre-war understanding

¹⁶ James Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 31 *Harvard International Law Journal* 129, 137.

¹⁷ *ibid*, 131.

¹⁸ *Ibid*, 138.

¹⁹ See, for example, Aristide Zolberg, Astri Suhrke and Sergio Aguayo, *Escape from Violence: Conflict and the Refugee Crisis in the Developing World* (OUP, 1992), 25; Hathaway, note 16, 145-148.

²⁰ *R (Immigration Officer at Prague Airport and another), ex parte European Roma Rights Centre and others* [2004] UKHL 55, para 15. This was recently quoted in the Supreme Court case of *R (on the application of ST (Eritrea)) v SSHD* [2012] UKSC 12, para 29.

of assimilation as a source of internal stability were added concerns to promote burden-sharing and to set the conditions within which states could independently control problems of interstate dimensions.²¹

Such a statist-driven view of the refugee law regime may appear rather extreme. After all, both the 1948 United Nations Declaration on Human Rights (UDHR) (whose Article 14 caters for ‘the right to seek and to enjoy in other countries asylum from persecution’) and the Refugee Convention reinforce the centrality of “human dignity” and fundamental rights.²² The Convention itself is a list of “rights” – or obligations – owed to a “refugee” by the hosting state-party. While this might be true for the refugee, the Convention famously makes no reference to the asylum seeker or how he or she ought to be treated. The existence of such a lacuna has enabled states to adopt policies clearly devoid of compassion or empathy for the suffering and vulnerability of others. They have done so by exploiting the importance of a legal status in refugee law. On the one hand, the Convention enhances protection for the “refugee” by stipulating the responsibility of state-parties; but, on the other, the construction of a legal refugee leads to (perhaps) unintended and negative consequences.²³

The origins of the international refugee law regime, and its implementation in the 20th century, are revealing. At a time when humanitarianism and human rights were apparently in the ascendancy, refugee protection continued to be influenced greatly by politics, often at the expense of the refugee. What we find is that, as in previous centuries, pro- and anti-alien sentiment fluctuates. There have been times of great generosity, but equally significant periods of serious hostility. Equally, there are many examples of individual and group kindness as well as outright xenophobia. Kushner and Knox, in their excellent historical sweep, *Refugees In An Age Of Genocide*, summarise the position very well in relation to the UK: ‘the reality is that since 1905 the most “generous” moments of British refugee policy have been as much the result of guilt, economic self-interest and international power politics (including, to a lesser extent, international law) than of notions of “natural justice” *per se*’.²⁴ While their focus is on global refugee movements to Britain, such a conclusion would be equally applicable to many Western European countries in the interwar and post Second World War periods, and still holds true today.²⁵

European asylum and refugee law

²¹ James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005), 93.

²² Refugee Convention, Preamble, para 1.

²³ For further discussion of these points see Susan Kneebone, Dallal Stevens and Loretta Baldassar, *Refugee Protection and the Role of Law: Conflicting Identities* (Routledge, 2014), especially Chs 1 and 14.

²⁴ Tony Kushner and Katharine Knox, *Refugees In An Age of Genocide* (Frank Cass, 1999), 399

²⁵ See for example Michael Marrus, *The Unwanted* (Temple University press, 2002); Claudena Skran, *Refugees in Interwar Europe* (Clarendon press, Oxford, 1998).

The previous section provided a brief historical context to international refugee law. In the context of this chapter, it is important to reflect on the underlying impetus for the development of European asylum and refugee law and policy. Are there parallels to be drawn with the development of refugee (and asylum) law on a global scale? Were the incentives purely compassionate or did they arise from Member States' concerns about rising numbers of asylum applications to the EU territory? Is EU asylum law the consequence of a desire to be both humane and pragmatic?²⁶ To what extent did the members of the European Union institutions seek guidance from the founding instruments of international refugee law – the Refugee Convention and its 1967 Protocol –,²⁷ from the Convention's *travaux préparatoires*, or from the historical drivers of international refugee law? Such questions are central to understanding the relevance of any humanitarian underpinnings to EU asylum law.

Without doubt, the current Common European Asylum System (CEAS) – the basis for asylum in the EU – is the product of years of discussion and negotiation about asylum. Rising numbers of asylum applications from the 1970s onwards, together with moves towards greater integration and the creation of an internal market as an area “without internal frontiers”, spurred Member States to co-operation on the issues of asylum and immigration.²⁸ Key to their concept of a single market without internal frontiers was a Europe in which external borders were strong. Initial steps were halting, with a focus on criminalisation and securitisation, a reluctance to move beyond intergovernmental negotiations and the development of soft law options or Conventions outside the EU. As Vevstad puts it: ‘Taking the decisions which were made on an intergovernmental level during the pre-Maastricht period [i.e. before 1993], the 1980s and the 1990s can be characterized as decades of attempted cooperation between the Member States aimed at controlling and minimising the number of asylum seekers arriving on the territory of the Union.’²⁹ Nevertheless, to avoid the inevitable domestic “race to the bottom” and a competition of restrictive national asylum and immigration laws, Member States finally agreed to cede some sovereignty in favour of co-ordination or “harmonisation” at an EU level.³⁰

The move towards harmonisation – or communitarisation – of asylum laws was connected with the introduction of the Single European Act 1986 and the

²⁶ *R (Immigration Officer at Prague Airport and another), ex parte European Roma Rights Centre and others* [2004] UKHL 55.

²⁷ Protocol relating to the Status of Refugees, New York, 31 January 1967. UNTS, vol 606, 267.

²⁸ See Dallal Stevens, note 11, 368-370. See for further discussion of European asylum law and policy Ingrid Boccardi, *Europe and Refugees: Towards EU Asylum Policy* (Kluwer Law International, 2002); Dallal Stevens, note 11, ch 9.

²⁹ Vigdis Vevstad, *Refugee Protection – A European Challenge* (Tano Aschehoug, 1998), 30.

³⁰ A number of authors have written about this early period in the development of a European approach to asylum immigration: see for example Ingrid Boccardi, *Europe and Refugees – Towards an EU Policy* (Kluwer, 2002); Steve Peers and Nicola Rogers, *EU Immigration and Asylum Law – Text and Commentary* (Martinus Nijhoff Publishers, 2006); Samantha Velluti, *Reforming the Common European Asylum System – Legislative Developments and Judicial Activism of the European Courts* (Springer, 2014); Dallal Stevens, note 11, ch 9.

development of the single market.³¹ Noll and Vedsted-Hansen have suggested that there were three different approaches to harmonisation in evidence: (i) refugee protection was separated from immigration and “inherent control strategies”;³² (ii) “the interrelatedness of asylum and immigration policies” was recognised but there was a failure to take account of this interrelatedness in the measures adopted;³³ and (iii) asylum and immigration policies were merged.³⁴ The original approach – separation of immigration policy from that of asylum – changed in the 1990s with growing concerns about the prevention of “irregular arrivals”, and the control strategy associated with restricting immigration and monitoring external borders soon triumphed, it is claimed, over the demands for refugee protection.³⁵ Thus, for example, we see agreement at Community level to impose visa requirements for entry into the EU space, the implementation by Member States of carriers’ sanctions, the pre-screening of passengers at airports outside the EU and the associated use of “airline liaison officers” to train carriers’ personnel in the detection of fraudulent travel documents, the development of biometrics and fingerprinting, and the creation of Frontex.³⁶

It would be wrong, however, to imply a uniformly restrictive approach, one lacking any humane impetus and driven purely by a desire to exclude. Indeed, what is so fascinating about the issue of asylum in Europe is the very evident tensions and paradoxes that exist. While many European states have been keen to avoid an obligation to grant asylum (even from the earliest days of drafting of Article 14(1) UDHR on the right to seek *and enjoy*, as opposed to the right to seek *and be granted* asylum),³⁷ they have accepted from the 1970s onwards the need to recognise a *de facto* status with associated protection.³⁸ This suggests an acknowledgement by states that the Refugee Convention is not the last word on when protection should be granted. Indeed, protection is widely granted to non-refugees when they are at risk of death or ill-treatment (rather than persecution), that is, when there is a real risk of a breach of a fundamental human right if returned to the country of origin.³⁹

³¹ Gregor Noll and Jens Vedsted-Hansen, ‘Non-communitarians: refugee and asylum policies’ in Philip Alston (ed) *The EU and Human Rights* (OUP, 1999), pp 365; 366.

³² *Ibid*, 367.

³³ *ibid*, 368.

³⁴ *ibid*.

³⁵ *Ibid*.

³⁶ Frontex is the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union and promotes, coordinates and develops European border management. See the website for further information: <http://frontex.europa.eu/>.

³⁷ Famously, France urged the more generous wording of a ‘right to seek and be granted asylum’, but this was resisted by a number of states, with the UK leading the objections.

³⁸ This applies to those who do not meet the definition of a refugee as contained in the Refugee Convention, but who should not be returned to their country of origin for human rights or other reasons. In the UK, in the 1980s, such a status was known as ‘exceptional leave to remain’. It later became ‘discretionary leave’ or ‘humanitarian protection’: see Dallal Stevens, note 11, 301-302.

³⁹ This principle of complementary or subsidiary protection found its way into the Qualification Directive, Article 15: Council Directive 2004/83/EC on minimum standards for the qualification as refugees or persons needing international protection; Recast Qualification Directive, Council Directive 2011/95/EU of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection for a uniform status

There is a view, too, that the CEAS is not devoid of positive features. Rather, the co-operation on asylum law attempted to introduce “minimum standards”,⁴⁰ which, in the case of a few Member States, called for a much-needed levelling-up of law and practice, to the benefit of protection seekers. The shift in the second phase of the CEAS (2008-2012) to the adoption of “common high standards”⁴¹ was intended to ensure not only “fair and efficient procedures capable of preventing abuse”, but also an elevated level of protection.⁴² Such an aim is certainly laudable. That EU states apply the same principles to refugee law and asylum policy is eminently sensible. By setting out the definition of an “act of persecution”, of “serious harm” and the content of international protection, there is increased opportunity for consistency and certainty in asylum decisions.⁴³ Similarly, uniformity between states of the basic asylum reception conditions and procedures is an appropriate and rational objective. Little can be gained from a system in which the individual in search of international protection is at the mercy of geographical happenstance as to which state she or he manages to lodge the claim. And, it could be argued, there is a greater humaneness about a framework that guarantees asylum seekers an equivalent approach wherever they are based. The problem, of course, is the realisation of jurisprudential, as well as policy and procedural, homogeneity. Though seemingly trite, it is worth reiterating that textual agreement is not the same as actual implementation. Nowhere is this more starkly exposed than in the asylum field.

Rights, Asylum and the EU

In the EU context, there have been many expressions of commitment to fundamental human rights from the Single European Act,⁴⁴ through the Maastricht Treaty,⁴⁵ to the latest consolidated version of the Treaty on European Union (TEU).⁴⁶ Article 2 of the TEU states: ‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.’ More specifically, in relation to asylum and human rights, the linkage is long-standing, as revealed

for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

⁴⁰ During the first phase of the CEAS (1999-2005), the aim was to introduce and harmonise minimum standards in the asylum field.

⁴¹ This resulted in the recasting of the three Directives on: qualification for international protection (2011/95/EU); standards for the reception of applicants for international protection (2013/33/EU); common procedures for granting and withdrawing international protection (2013/32/EU); and the Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (‘Dublin III’)(604/2013).

⁴² *The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens* (2010/C 115/01), 4 May 2010.

⁴³ Qualification Directive (Recast), note 39 above, Articles 9 and 15 and Chapter VII.

⁴⁴ See Preamble.

⁴⁵ Treaty on European Union 1993. See for example Articles F.2 and K2(1).

⁴⁶ C 326/13, 26.10.2012.

clearly by Article 14 of the UDHR. This has been followed and furthered in EU law. Not only do the EU instruments of asylum and refugee law refer liberally to the importance of the Refugee Convention/1967 Protocol and of fundamental rights, but the more recent EU Charter of Fundamental Rights includes a seemingly more exacting obligation – an actual “right to asylum” in Article 18.⁴⁷

But the connection between asylum and human rights goes beyond law. Arguably, the high point of asylum policy development – and rights articulation – was the Tampere Extraordinary European Council, which met in October 1999. Heads of states came together and agreed to work towards the establishment of the CEAS, the plan for which had been set out in the Treaty of Amsterdam 1999,⁴⁸ and which was to be based on a full and inclusive application of the Refugee Convention and other human rights instruments.⁴⁹ Asylum was a key focus and human rights, as well as consideration of humanitarian needs, were highlighted. Asylum measures were no longer a means to bolster the internal market; they were, as Boccardi notes, ‘an independent objective rooted in the new Human Rights dimension of the Union’.⁵⁰

Such liberal reference to human rights and, on occasion, to human dignity is the EU’s nod to humanitarianism or the humane treatment of people. For example, Cecilia Malmström, the Commissioner for Home Affairs, suggests that any duty towards the “other” arises from the fundamental principles of the EU. She talks about “solidarity” in the refugee context in her blog.⁵¹ Malmström claims, unsurprisingly in view of Article 2, TEU, that ‘our European cooperation is founded on the values of human dignity, freedom, democracy, and human rights’,⁵² but also implied that there was a growing sense of duty in the EU towards asylum seekers:

The common legislation adopted in 2013, which is now being put in place in all Member States, aims to make sure that asylum seekers are treated fairly and humanely in the EU, wherever they arrive.⁵³

...

The EU is ... demonstrating that all Member States are willing to help those in need, and that we will do so in a dignified manner.⁵⁴

⁴⁷ Article 18: ‘The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as ‘the Treaties’).’ See, for further analysis, 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* 3, 33-52.

⁴⁸ In Article 73k, which became Article 63 of the consolidated version of the Treaty establishing the European Community 2006.

⁴⁹ Tampere European Council Presidency Conclusions, 15 and 16 October 1999, para 4.

⁵⁰ Boccardi, note 28, 174.

⁵¹ <http://blogs.ec.europa.eu/malmstrom/>, 25 September 2013 (last accessed 16 March 2015).

⁵² *Ibid*, 24 April 2013.

⁵³ http://ec.europa.eu/commission_2010-2014/malmstrom/my-work/achievements/index_en.htm#/c (archived 18 November 2014; last accessed 9 March 2015)

⁵⁴ <http://blogs.ec.europa.eu/malmstrom/>, 24 April 2013 (last accessed 16 March 2015).

Evidently, the assumption within the European Union (and internationally) is that adherence to a human rights framework is sufficient to address the needs of asylum seekers and refugees. One might also presume that a human rights approach is a humane approach.

This is a contestable proposition. Conor Gearty, for example, claims that '[a]t the centre of the plan for a new European landscape there is to be found a hard seat of hate',⁵⁵ while Andrew Williams argues in his book, *EU Human Right Policies – A Study in Irony*, that the Community's internal and external approaches to human rights have developed along different paths (which he terms 'bifurcation') and that 'the institutional narratives of the community in relation to human rights are consumed by irony'.⁵⁶ Williams concludes that discrimination is much more deeply entrenched than generally appreciated and that 'the identification of bifurcation indicates that discrimination attaches to those very precepts that purport to advance human rights (of which one would be the right not to be discriminated against).⁵⁷ He goes on to ask, rhetorically, whether the Community has 'truly attempted to combat the conditions of discrimination and exclusion that have scarred Europe over generations' or whether it has 'subconsciously and subtextually allowed its human rights policies to be constructed by a discriminatory and exclusionary ideology?'⁵⁸ While it is extremely difficult to establish such a subconscious and subtextual discriminatory ideology, there is ample evidence of the existence of exclusionary policies, which have been widely critiqued by commentators on the EU. Exclusion and discrimination are antithetical to humaneness and rights adherence does not necessarily result in humane outcomes. Consequently, in order to establish the true measure of commitment to rights (or humane treatment), it is necessary to consider the actual practice and impact of policies on the individual asylum seeker or refugee.

EU asylum law and policy in practice

The *MSS v Belgium and Greece* (2011) case is an admirable place to commence any analysis of the discord between the aims of refugee law, EU asylum harmonisation and the impact on the individual. The case revolved around the removal of an asylum claimant by Belgium to Greece under EU rules (the "Dublin II Regulation")⁵⁹ to face dreadful living conditions and periods in detention. The question before the Strasbourg Court was whether Belgium was entitled to transfer the claimant when fully aware of the systemic problems with Greece's asylum system. The Court highlighted the fact that Greece, a State party to the ECHR, and a Member State of

⁵⁵ Conor Gearty, 'The internal and external "other" in the Union Legal Order: Racism, Religious Intolerance and Xenophobia in Europe' in Philip Alston *et al* (eds) *The EU and Human Rights* (Oxford University Press, 1999), 327.

⁵⁶ Andrew Williams, *EU Human Right Policies – A Study in Irony* (OUP, 2004), 202.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, 203.

⁵⁹ Council Regulation No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. The Dublin Regulation sets out the criteria to establish which state should take responsibility for an asylum application for protection as a refugee or beneficiary of international protection (usually, the first Member State entered by the applicant).

the EU, manifestly was not adhering to the principles of fundamental rights within its own jurisdiction regarding the treatment and detention of asylum seekers:

... the Court considers that the Greek authorities have not had due regard to the applicant's vulnerability as an asylum-seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court considers that the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention.⁶⁰

Thus, both the detention conditions and the living circumstances of the claimant amounted to a breach of Article 3. This put an end to the notion that there was harmonised practice amongst EU Member States and that the minimum standards of reception of asylum seekers, as dictated by the Directives, were being collectively observed. Indeed, the whole notion of "mutual trust", on which so much of the CEAS depended, was clearly flawed. *MSS* was followed in the Court of Justice in the EU (CJEU) by *NS v Secretary of State for the Home Department; ME and Others v Refugee Applications Commissioner*, and the EU Court also noted the 'systemic deficiency in the asylum procedure and in the reception conditions of asylum seekers',⁶¹ concluding that a Member State must not transfer an asylum seeker where it could not be:

unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State [responsible under the Dublin Regulation] amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.⁶²

The majority of Member States suspended removals to Greece in light of these decisions. Yet, these cases expose a worrying truth: the patently inhumane treatment of asylum seekers in Greece (and elsewhere in the EU), long recognised by legal advisors as fact, had been tolerated for some considerable time by the EU and its Member States before judicial pronouncements finally recognised Greece's failings as more than a disinclination to implement EU law. Even then, reaction was

⁶⁰ *MSS v Belgium and Greece (Application No 30696/09)*, 21 January 2011, para 263.

⁶¹ Joined cases C-411/10 and C-493/10, para 89.

⁶² Para 94. Article 4 of the Charter is the equivalent of Article 3 ECHR.

not immediate. Reports by Amnesty International, amongst others, provided a bleak assessment of the handling of asylum seekers and refugees post *MSS* and *NS*, revealing that the desire to change is often slow where rights are concerned.⁶³

It is depressing to learn that the unacceptable conditions and ill-treatment of asylum seekers and refugees (indeed, of many migrants) are ongoing. The asylum system in Italy is frequently tested in court with varying degrees of success and conditions in Greece continue to be disquieting,⁶⁴ despite the latter's Action Plan on Asylum and Migration Management presented in 2010 and revised in 2013.⁶⁵ In light of the criticisms of Greece's policies, the European Commission monitored developments in the country and dramatically increased EU funding to Greece from €22 million to €56 million, as well as provided additional resources.⁶⁶ Disappointingly, the Action Plan itself has been criticised for focusing unduly on security and the Commission has had to admit that there continue to be many 'remaining flaws and deficiencies' in Greece's current migration, asylum and border management system.⁶⁷

The understatement of this conclusion is remarkable. One need only point to the treatment of Syrian refugees by the EU to recognise that portraying the system as having remaining 'flaws' and 'deficiencies' plays scant regard to the immense suffering that many have endured and continue to endure. As soon as Syrians began to flee the conflict, and attempted to enter EU territory, it became evident that the Union was not prepared to adopt a generous approach nor permit them to move to a Member State of choice. As a consequence, many found themselves either trapped in Greece, with all its problems of inadequate accommodation and asylum processing but prevented from moving on, or in the equally dire reception centres of Bulgaria.⁶⁸ Asylum seekers faced the possibility of no shelter or bedding, overcrowding, lack of food and freezing temperatures:

⁶³ See, for example, Amnesty International, *Greece - The End of the Road for Refugees, Asylum-Seekers and Migrants* (October 2012): <http://files.amnesty.org/archives/eur250112012eng.pdf> (last accessed 12 December 2014); *Into the Fire*: <http://intothefire.org/> (a documentary about the problems confronting refugees and migrants in Athens).

⁶⁴ See for example *Tarakhel v Switzerland* (Application no 29217/12) 4 November 2014 and *Sharifi v Italy and Greece* (Application no 16643/09) 21 October 2014.

⁶⁵ See, for example, Ministry of Public Order and Citizen Protection, Greek Action Plan on Asylum and Migration Management, Executive Summary Progress Report, Jan-May 2013: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/p4_progressreport_/p4_progressreport_en.pdf (last accessed 15 December 2014). See, for an assessment of achievement and on-going issues in Greece, European Commission, *Commission Staff Working Document on the Assessment of the implementation of the Greek Action Plan on Asylum and Migration management*, SWD(2104) 316 final, 6 October 2014.

⁶⁶ European Commission, *Commission Staff Working Document*, note 65.

⁶⁷ *Ibid*, 20.

⁶⁸ See, for example, UNHCR, 'Bulgaria's asylum centres bursting at the seams as Syrian refugees enter Europe', 17 September 2013: <http://www.unhcr.org/52384d359.html>; Amnesty International Briefing, 'Refugees in Bulgaria trapped in substandard conditions', December 2013: <http://www.amnesty.org/en/library/asset/EUR15/002/2013/en/cc94a827-ea7e-4807-96c6-6e107368280a/eur150022013en.html>.

Bulgaria failed to meet not only EU standards, but also minimal international standards for the treatment of refugees, asylum seekers, and migrants. As a result, at almost every stage of their efforts to seek refuge in Bulgaria, men, women and children fleeing such places as Syria, Iraq, and Afghanistan have faced physical and bureaucratic barriers, violent abuse, and hardship.⁶⁹

In time, Human Rights Watch reported that Bulgaria, clearly stunned by the sudden rise in asylum seekers from the annual 1,000 people per year to 11,000 in 2013, started to engage in illegal “pushbacks” at the Turkish border, some of which were violent.⁷⁰ That the Bulgarian police and border guards were bolstered by Member States and Frontex indicates that the EU sanctioned the desire to limit arrivals and minimise the potential effect on the wealthier States.⁷¹ In December 2013, the Council of Europe’s Commissioner for Human Rights, Nils Muižnieks, accused Europe of having failed in its challenge:

European countries must support all Syrians in need of aid and international protection. They must respond generously to UNHCR’s appeals not only for funding but also for resettlement of refugees from countries neighbouring Syria to their own territory. They must abide by their human rights and refugee law obligations emanating notably from the European Convention on Human Rights and the UN Refugee Convention.⁷²

He appealed to European states to keep their borders open, to stop expulsions of Syrians at the borders contrary to the principle of *non-refoulement*, introduce a moratorium on returns to Syria, refrain from returning Syrians to countries neighbouring Syria, and refrain from returning Syrian refugees under the Dublin Regulation to those Member States with overstretched asylum systems such as Bulgaria, Greece and Italy.⁷³

Whereas others have described the European response to the Syrian refugee crisis as a ‘study in contrasts’, with both positive and negative aspects,⁷⁴ the overwhelming sense is of a Union that seeks to absolve its perceived international duty towards the needy “other” through financial inducements rather than by territorial admission. Billions of dollars have been pumped into Middle Eastern countries hosting refugees, either in the form of humanitarian or development aid.⁷⁵ Despite the clear need of

⁶⁹ Human Rights Watch, “*Containment Plan*”: *Bulgaria’s Pushbacks and Detention of Syrian and Other Asylum Seekers and Migrants* (April 2014), 2.

⁷⁰ *Ibid*, 2, 20.

⁷¹ *Ibid*, 2.

⁷² ‘Syrian refugees: a neglected human rights crisis in Europe’, 20 December 2013: <http://www.coe.int/en/web/commissioner/-/syrian-refugees-a-neglected-human-rights-crisis-in-euro-2> (last accessed 20 December 2014).

⁷³ *Ibid*.

⁷⁴ Cynthia Orchard and Andrew Miller, *Protection in Europe for refugees from Syria* (Refugee Studies Centre, University of Oxford, September 2014), 34.

⁷⁵ *Ibid*.

many Syrian refugees to find a safe haven outside the Middle East, and the persistent urgings of the UNHCR and international organisations to unlock their doors, the majority of EU Member States have refused either to implement the Temporary Protection Directive (expand opportunities for humanitarian admission) or to offer resettlement in meaningful numbers.⁷⁶ Even Germany's pledge, which is to accept a total of 30,000 refugees, is a drop in an ocean of misery; in January 2015, over 3.3 million Syrians had fled to neighbouring countries in the region. The belief by many is that financial aid and containment in the region is the best course of action, in contradiction to the caveat delivered by António Guterres, the High Commissioner for Refugees:

It is not only financial, economic and technical support to these [neighbouring] states which is needed - it is also effective burden-sharing in receiving refugees, which means keeping all borders open for Syrians seeking protection in other parts of the world. It also includes receiving through resettlement, humanitarian admission, family reunification or similar mechanisms, refugees who are today in the neighbouring countries but who can find a solution outside the region.⁷⁷

As a consequence, millions of displaced Syrians have been forced to accept the offer of survival, reliant upon the grace of neighbouring, often poor, Arabs and Turks, rather than a life enhanced by dignity and opportunity. Such an approach, alongside the minimal reporting of conditions faced by Syrians both in and outside the EU, is lacking in true compassion and is, at times, inhumane.

Sadly, the treatment of Syrian asylum seekers and refugees is not unique. As EU and Member States developed their asylum laws and policies in the 1980s and 1990s, it became normal for academic and NGO commentators to describe the outcome as the creation of a "fortress Europe" and a "*cordon sanitaire*".⁷⁸ While such terms have now become somewhat trite, they still reflect a worrying reality: penetration of the EU by the persecuted and abused is not simple and the treatment of those who

⁷⁶ The UNHCR has struggled to obtain pledges by states to resettle. By December 2014, the global figure for resettlement of Syrian refugees was 67,638 places pledged. Within the EU, the majority was offered by Germany (20,000 humanitarian admission and 10,000 individual sponsorship) and Sweden (2,700 resettlement): UNHCR, *Resettlement and other forms of admission for Syrian refugees*, (11 December 2014): <http://www.unhcr.org/52b2febafc5.pdf>. The rest of the EU totalled about 5,000 pledged places, with the UK notably refusing to participate in resettlement and offering, instead, its own Vulnerable Persons Relocation Scheme in January 2014. Under the VPRS, only 90 people had been admitted by December 2014. Sweden and Germany have also received the vast majority of asylum applications (that is, outside the humanitarian admission/resettlement programmes) in the EU - a total of about 100,000. See, for further discussion, Amnesty International, *Left out in the cold - Syrian refugees abandoned by the international community* (December 2014). See also Orchard and Miller, *Protection in Europe*, note 74.

⁷⁷ High Commissioner's Closing Remarks to the High Level Segment on Solidarity and Burden Sharing with Countries Hosting Syrian Refugees, 64th Session of UNHCR's Executive Committee (Palais des Nations, Geneva, 1 October 2013), 2: <http://www.unhcr.org/excom2013/HC-closing-statement-HLSFINAL.pdf> (last accessed 2 January 2015).

⁷⁸ See, for example, Michael Spencer, *1992 and All That* (Civil Liberties Trust 1990); Boccardi, note 28.

succeed is often contentious. Recent events in the Mediterranean, in which hundreds of people have drowned in attempting to reach Europe, have highlighted some of the issues.⁷⁹ But this problem is not new. Amnesty International, for one, estimates that between 1988 and September 2014, 21,344 people died in the waters between Africa and Europe.⁸⁰ Yet, it is only the number of shipwrecks and scale of deaths that occurred in October 2013, and the high-profile media reporting, that prompted a public outcry and a political response. There were two elements to the latter: the launch by Italy of Operation *Mare Nostrum*,⁸¹ whereby the Italian navy assumed significant responsibility for searching for and rescuing migrants at sea, and the increase by the European Commission of the budget of Frontex by over €8 million with the aim of improving the EU's own search capabilities.⁸²

With 150,000 people rescued in a 12-month period (though 2,500 are still said to have died at sea), *Mare Nostrum* can be viewed as a successful venture for the Italian government.⁸³ However, its cost (claimed to be €9 million per month) and 'unsustainability', due to the unwillingness of other Member States to assist sufficiently, forced Italy to announce that it was ceasing operations on 1 November 2014; the EU has failed to replace *Mare Nostrum*, preferring, instead, to rely on Frontex's border control function under a new operation named 'Triton'.⁸⁴ Since Frontex has few ships of its own and is reliant on the goodwill of Member States to provide aircraft and vessels, it is unlikely to be effective either in border control or preventing death, especially as it is concentrating on surveillance rather than rescue.⁸⁵ Furthermore, some countries, such as the UK, have refused to participate in Operation Triton, claiming that search and rescue initiatives in the Mediterranean act as a 'pull factor' to would-be migrants.⁸⁶ However, in an interesting twist to events, the Italian navy's commander in-chief, Admiral Filippo Maria Foffi, appeared to be challenging the stated position when he declared in October 2014 that '[w]e are still waiting for orders from our government. *Mare Nostrum* is not finished yet. We will fulfil our mission until the end.'⁸⁷ This promise was upheld when the Italian navy rescued about 1,000 migrants on Christmas Eve off the coast of Sicily and 1,300 on Christmas Day.⁸⁸

⁷⁹ Nick Squires, 'Up to 700 migrants drown in Mediterranean as people smugglers accused of deliberately capsizing boat', *The Telegraph*, 15 September 2014.

⁸⁰ Amnesty International, 'The death toll in the Mediterranean rises while Europe looks the other way', 30 September 2014: <http://www.amnesty.org/en/news/death-toll-mediterranean-rises-while-europe-looks-other-way-2014-09-30> (last accessed 12 March 2015), and see its report, *Lives Adrift: Refugees and Migrants in Peril in the Central Mediterranean*, September 2014.

⁸¹ 'Our sea' - the Roman name for the Mediterranean Sea.

⁸² *Lives Adrift*, note 80, 7.

⁸³ Alan Travis, 'UK axes support for Mediterranean migrant rescue operation', *The Guardian*, 27 October 2014.

⁸⁴ *Ibid.*

⁸⁵ Lizzy Davies, 'Italy: end of ongoing sea rescue mission "puts thousands at risk"', *The Guardian*, 31 October 2014.

⁸⁶ *Ibid.*

⁸⁷ Arthur Nelsen, 'Italian navy says it will continue refugee rescue mission despite plan to scrap it.', *The Guardian*, 28 October 2014.

⁸⁸ 'At least 1,300 migrants saved off Italian coast on Christmas Day', *The Guardian*, 26 December 2014.

The plight of Syrian refugees in Europe and the mounting death toll in the Mediterranean sea are very striking and visible examples of an asylum policy that is failing in what one might assume is a primary principle: the humane treatment of people. But these are just two cases in point amongst many, less obvious areas of concern about EU asylum law. It is also possible to point to the use of administrative and fast track detention for many asylum seekers, some of whom have suffered torture;⁸⁹ the long delays in asylum processing, stretching in many cases to years, in which claimants are left living in limbo, unable to plan for a future, unable or unwilling to return to their home country;⁹⁰ the employment of “credibility criteria” in an attempt to find “the truth”, which have been widely critiqued, if not condemned;⁹¹ the persistent poor first instance decision-making resulting in unnecessary appeals and consequent distress for applicants;⁹² and the questionable treatment of young asylum seekers.⁹³ These are a few of the many criticisms that can be voiced against Member States’ asylum policies and the EU either actively condones or is unwilling to condemn such policies. This is unsurprising as many Member State asylum laws and policies owe their existence to discussions that took place in the European Community from the early 1990s onwards.

The face of humaneness?

Much of the discussion in this chapter has challenged the notion that EU asylum policy is, in fact, humane. In this concluding section, it is important to reflect further on this proposition and to consider what would constitute a humane EU asylum policy.

Let us start with a viewpoint that, hitherto, the analysis has been overly bleak. After all, it might be argued, “it cannot be all bad” and the aims and objectives of EU asylum policy are underpinned by historical humanitarian and human rights imperatives. Indeed, to quote Cecilia Malmström once more, ‘our European cooperation is founded on the values of human dignity, freedom, democracy, and human rights’;⁹⁴ consequently, it respects all humans, irrespective of origin. As discussed above, harmonisation of EU asylum laws and the developments of an EU

⁸⁹ Detention Action, *Fast Track to Despair – The Unnecessary Detention of Asylum Seekers* (2011)

⁹⁰ Oliver Wright, ‘More than 10,000 asylum-seekers “left in limbo”’, *The Independent*, 29 October 2014.

⁹¹ See, for example, Amnesty International, *A Question of Credibility – Why so many initial asylum decisions are overturned on appeal in the UK*, April 2013; UNHCR, *Beyond Proof - Credibility Assessment in EU Asylum Systems*, May 2013; Irish Refugee Council, *Difficult to believe - The assessment of asylum claims in Ireland*, 2012; Robert Thomas, ‘Assessing the credibility of asylum claims: EU and UK approaches examined (2006) *European Journal of Migration and Law* 8, 79-96; James Sweeney, ‘Credibility, proof and refugee law’ (2009) 21 *International Journal of Refugee Law* 4, 700-726.

⁹² See, for example, Asylum Aid, *Unsustainable: The Quality of Initial Decision-Making in Women’s Asylum Claims* (January 2011).

⁹³ See for example Richard Warren and Sheona York, ‘How children became “failed asylum-seekers”: Reflections on the experiences of young unaccompanied asylum-seekers in Kent from 2006-2013, and how “corrective remedies” have failed them’ (2014) 28 *Journal of Immigration, Asylum and Nationality* 2, 123-145.

⁹⁴ Note 52.

asylum policy have established the “standards” that Member States are expected to meet. Communitarisation is intended to iron out any discrepancies, while the Directives and the EU Charter of Fundamental Rights promote the significance of human dignity.⁹⁵ A few EU governments have undoubtedly improved their procedures and sought to adhere to the basic principles of refugee law as set out in the Directives, to the benefit of the asylum seeker.⁹⁶ The emergence of the CJEU as the first supranational court deciding matters of asylum and refugee law is also a major step towards ensuring greater certainty and consistency in the interpretation of legal principles. There has been a notable generosity in improving access to complementary protection for those who are not deemed to meet the stringent determination criteria of the “refugee”. These might all be perceived as “good”, even as humane. After all, a system in which the individual receives significantly different treatment and outcomes depending on where he or she lodges a claim for asylum is neither just nor humane.

Yet, there are two major problems with such a line of argument. The first relates to the construction of the CEAS itself. Notwithstanding over two decades of concerted effort on the part of the EU institutions, the consistency aimed for by an EU-wide asylum policy is a myth; an asylum lottery still lies at the heart of the EU and it will persist so long as individual states maintain the right to determine asylum cases and have the freedom to interpret refugee law, with all its complexity. The Directives provide partial guidance but are not definitive; the Court’s jurisprudence, though helpful from a certainty perspective, is somewhat nascent. Neither the CEAS nor the Court can control the attitudes of an individual (the policeman, the case-worker, the judge) towards another (the asylum seeker). If a state’s case-workers and/or immigration judges adopt a “culture of disbelief” in their decision-making, it is very difficult to challenge or reverse the decisions produced.⁹⁷ And if a government or the media of an EU country demonises migrants, including asylum seekers and refugees, there is often a strong political incentive to (a) keep all migrants out, irrespective of their need, and (b) adopt deterrent and restrictive laws and policies as far as possible.

⁹⁵ See, especially, Charter, Article 1: ‘Human dignity is inviolable. It must be respected and promoted’ and Qualification Directive 2011/95/EU, preamble (16): ‘... this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum...’; similarly, Reception Standards Directive 2013/33/EU, preamble (35) and Procedures Directive 2013/32/EU, preamble (60).

⁹⁶ See, for example, Odysseus Academic Network, *Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 Laying down Minimum Standards for the Reception of Asylum Seekers in the EU Member States* (October 2006), 114, available at: http://ec.europa.eu/dgs/home-affairs/e-library/docs/pdf/odysseus_synthesis_report_2007_en_en.pdf (last accessed 16 March 2015).

⁹⁷ The “culture of disbelief” is a term that has long been used in the asylum context to describe the reluctance of decision-makers to give asylum seekers the “benefit of the doubt” and the apparent tendency towards rejection of asylum claims. See, for discussion of some of the issues, Jessica Anderson, Jeannine Hollaus, Annelisa Lindsay and Colin Williamson, *The Culture of Disbelief – An Ethnographic Approach to Understanding an under-theorised concept in the UK asylum system* (RSC Working Paper, July 2014); James Souter, ‘A culture of disbelief or denial? Critiquing refugee status determination in the UK, (2011) 1 *Oxford Monitor of Forced Migration* 1, 48-59.

The second dilemma returns to the issue of the relationship between humaneness and human rights. European representatives appear at times to regard the reiteration of adherence to human rights and the fundamentality of human dignity as sufficient. However, the linkage between humaneness and human rights is not altogether clear. For example, one might question whether adherence to human rights is a precursor to humane treatment? After all, people do behave (in)humanely irrespective of a human rights framework. The danger of assuming that human rights will lead to humane outcomes is highlighted by this chapter. Indeed, part of the rationale for this collection is the belief that there are limitations to the human rights discourse. It argues that ‘... the current human rights check undertaken by EU institutions in their law and policy-making activities is beset by several shortcomings, and is not sufficient to provide humane outcomes across the board’.⁹⁸ This is not to underplay the importance of rights to society, but simply to caution against an automatic assumption that the rhetoric, and even practice, of human rights truly values the individual.

One of the paradoxes of EU asylum policy is that the restrictive approach and deterrent ideology have created a situation in which the EU is increasingly being forced by external events, rather than internal decision-making, to adopt a more humane approach. For example, it is the irregular arrival of boats and ships carrying Syrian (and Eritrean) refugees that is forcing the suffering of these people on to the conscience of the European populace rather than the proclivity of EU policy to admit those in need of temporary or protection. One needs only to point to the worrying developments of January 2015, when two cargo ships were recklessly abandoned by smugglers and which resulted in yet another rescue by the Italian coastguard of 1160 “passengers”.⁹⁹ With the majority on board being Syrian, and having faced days without food or water, there is no alternative but to treat such people with compassion and to offer them the opportunity of a safe haven. That refugees should have to follow such a course of action to obtain protection and the opportunity to flourish is shameful and starkly reveals how far removed current EU asylum policy is from the European origins of international refugee law.

A second paradox is that refugee law, born, as suggested, out of a desire to be humanitarian, constructed a legal status for the refugee which not only determines who is to be included within that status, but also sanctions exclusion. Thus, anyone who fails to meet the specific “refugee” criteria is often regarded as undeserving, bogus or unwanted – and therefore subject to potentially inhumane treatment, in the broadest sense. In other words, it is not so much the refugee that is the issue but those who are outside refugee status – such as the refused asylum seeker – who cannot always appeal to the state to be treated more humanely. The construction of a legal refugee has led, therefore, to greater inhumanity towards those who do not meet the definition. This can be described as an “unintended consequence” of

⁹⁸ Introduction, page no ??? **Check final proof**

⁹⁹ John Hooper, ‘Migrants give thanks after “ghost ship” Ezadeen rescued in Mediterranean’, *The Guardian*, 3 January 2015.

refugee law.¹⁰⁰ As Catherine Dauvergne puts it: those excluded from refugee law are ‘pushed outside of politics, beyond even surrogate protection into a negative space of no access to human rights’, and, one might add, humane treatment.¹⁰¹

What, then, should be the features of a truly humane asylum law and policy? And who would decide? This, surely, is the crux of the problem. Some might argue that processing asylum applicants very quickly, with the likelihood of fast-track detention, avoids living with uncertainty for long periods in the putative asylum state and is, consequently, a much more humane option; the recipient of such treatment is likely to believe otherwise if he or she is in fear of return or does not regard a super-fast asylum determination system as capable of producing fair outcomes. Others could question whether it is humane to provide only temporary residence to refugees and beneficiaries of protection, as catered for in the Qualification Directive, particularly when, as in the latter case, they are not entitled to family reunification?¹⁰² In seeking to improve the humaneness of EU asylum law, does consideration need to be given to the consequences for EU *citizens* who may perceive a rise in admissions to their state’s territory as ignoring *their* concerns? Or should a humane asylum policy only pay regard to seekers of protection?

The introduction of simple, immediate changes could make a major difference: where individuals are manifestly forced to flee on account of persecution, human rights violations or civil wars, it is surely incumbent on Member States to reflect on the origins of refugee law and, in so doing, to assist and make provision for those who wish to enter the territory of the European Union in search of sanctuary. Such reflection must go hand in hand with a shift in attitudes and understanding, and, here, linguistics could play a role. One possible avenue to rekindle the sadly waning compassionate instincts¹⁰³ might be to refocus on “vulnerability”. In the EU context, the Directives and Dublin Regulation do not define asylum seekers or refugees, as a group, as vulnerable; rather, there are specific subgroups that are seen to be particularly vulnerable – set out in the Directives themselves.¹⁰⁴ A global trend has emerged whereby it is often these sub-groups – survivors of sexual violence, children, the elderly – that are prioritised for admission, with the risk that others are

¹⁰⁰ See, for discussion, of intended and unintended consequences of refugee law in Kneebone, Stevens and Baldassar (eds), *Refugee Protection and the Role of Law*, note 23, ch 14.

¹⁰¹ Catherine Dauvergne, ‘Refugee law as perpetual crisis’ in Satvinder Juss and Colin Harvey (eds) *Contemporary Issues in Refugee Law* (Edward Elgar, 2013) , 26.

¹⁰² Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. The Qualification Directive mandates the grant to refugees of a resident permit for at least three years, renewable; in the case of beneficiaries of subsidiary protection, the period is one year (Article 24).

¹⁰³ For further discussion of “compassion”, see Martha Nussbaum: ‘Compassion: Human and Animal’ in N. Ann Davis, Richard Keshenn and Jeff McMahan (eds), *Ethics And Humanity: Themes From The Philosophy Of Jonathan Glover* (OUP, 2010); Martha Nussbaum, ‘Compassion: The basic social emotion’ (1996) 13 *Social Philosophy and Policy* 1, 27-58.

¹⁰⁴ Article 17 of the Reception Conditions Directive defines them as “minors, unaccompanied minors, persons with disabilities, elderly people, pregnant women, single parents with minor children and persons who have been subject to torture, rape or other serious forms of psychological, physical or sexual violence”.

not regarded as deserving of admission, or not quite yet.¹⁰⁵ The idea of protecting the asylum seeker or the refugee *per se* does not arise from an obligation based on vulnerability (or at least, it is not stated as such). In the *MSS* case, however, the Strasbourg court drew upon the idea of group vulnerability, suggesting that it was through the ascription of increased vulnerability that the obligation to protect individuals emerged. It was not sufficient that the applicants were simply “asylum seekers”:¹⁰⁶

The Court attaches considerable importance to the applicant’s status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection It notes the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the Reception Directive.¹⁰⁷

Perhaps, then, to encourage a more humane EU asylum law, a fundamental change needs to occur in the perception of *all* asylum seekers and refugees as suffering others. Reemphasising their vulnerability – their humanity – could be a starting point in bridging the divide between “us and them”.¹⁰⁸ Failure to do so will have enormous implications for citizen, refugee and Europe as a whole.

¹⁰⁵ An example of such an approach is provided by the UNHCR – see, for example, Ex Com, Standing Committee 54th Meeting, *Age, Gender and Diversity Approach*, EC/63/SC/CRP.14, 5 June 2012.

¹⁰⁶ See, for discussion of the emergence of a concept of “vulnerability” before the Strasbourg Court, Lourdes Peroni and Alexandra Timmer, ‘Vulnerable groups: the promise of an emerging concept in European Human Rights Convention Law’ (2013) 11 *International Journal of Constitutional Law* 4, 1056-1085.

¹⁰⁷ *MSS v Belgium and Greece (Application No 30696/09)*, 21 January 2011, para 251.

¹⁰⁸ See Martha Fineman and Anna Gear (eds) *Vulnerability* (Ashgate, January 2014).