National Security and Political Asylum

Elena Baylis
Associate Professor,
University of Pittsburgh School of Law
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National Security and Political Asylum

Elena A. Baylis*

Since September 11, 2001, the United States has made significant changes in its political asylum policy, restricting access to asylum for many applicants in the name of the war on terror. The debate over these reforms draws from two competing visions of national security. The first views national security as essentially aligned with international human security and emphasizes the need to assure protection to asylum applicants by granting legitimate claims. The second views national security as dependent primarily on defending a domestic safe zone against threats that are primarily foreign, identifiable, and excludable, so long as sufficiently stringent measures are adopted. The current predominance of the second view puts U.S. policy at odds with its international legal obligations, with some European Union practice, and with the internal structure and realities of the U.S. asylum system itself.

<H2>A. Links Between Asylum and Security

<H3>1. International Links

The international asylum and refugee systems were founded in the recognition of the link between international and human security, initiated to address the humanitarian

* Associate Professor, University of Pittsburgh School of Law. Thanks to Jeremy Seeman and Chris Belasco for their research.

crisis of displaced peoples following World War II.[1] The 1951 Refugee Convention, the fundamental legal document establishing the rights of refugees, recognized the cyclical pattern of refugee movements as both a response to and a catalyst of conflict. It accordingly urged states "recognizing the social and humanitarian nature of the problem of refugees, to do everything within their power to prevent this problem from becoming a cause of tension between states."[2] The very definition of a refugee—one who "owing to well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, is outside the country of his nationality and is unwilling or, owing to such fear, unable to avail himself of its protection"—points to situations of dire human insecurity as the source of asylum seeking populations.[3]

Today, the connection between international and human security manifests itself in the correspondence between flows of refugees and asylum seekers, and the failed states, political oppression, and conflict areas that pose threats to international security. According to UNHCR, in the first half of 2006, the most significant sources of asylum seekers (those who have "left their country of origin . . . [and] applied for recognition as a refugee in another country," [4]) were China, Iraq, Serbia and Montenegro, Russia, Turkey,

[1] The United States is a party to the 1967 United Nations Protocol Relating to the Status of Refugees, which incorporates the 1951 United Nations Convention relating to the Status of Refugees. United Nations. Treaty Series. United Nations Protocol Relating to the Status of Refugees, 267, no. 8791, vol. 606.

[2] Convention Relating to the Status of Refugees, adopted 28 July 1951, entered into force 22 April 1954, Preamble.

[3] 1951 Refugee Convention, art. 1(A)(2). 1967 Protocol, art. 1(2).

[4] UNHCR, "Definitions and Obligations: Basic Definitions," http://www.unhcr.org.au/basicdef.shtml.

Haiti and Iran.[5] In 2004, the primary source countries for refugees (those whose applications to be recognized as such have been granted and who are therefore entitled to all the rights corresponding to refugee status under national and international law)[6] were Afghanistan, Sudan, Burundi, Democratic Republic of Congo, Somalia, Palestinian populations, Vietnam, Liberia, Iraq and Azerbaijan.[7] As when the Refugee Convention was drafted, the relationship between national and international security, human security, and refugee movements continues to be cyclical and dynamic. In a 2006 report, UNHCR describes spikes in refugee and asylum seeker numbers in regions that are hot spots for the war on terror, specifically identifying new refugee populations created by counter-terrorist military offensives in regions such as Chechnya and Pakistan.[8]

<H2>B. National Links

On a national level, while September 11th is often identified as a watershed moment refocusing America's attention on security issues, national security and foreign policy have long been defining concerns in U.S. asylum and refugee law. Throughout the Cold War, the United States used political asylum as a tool of foreign policy, granting asylum primarily to refugees from communist states as part of a deliberate national security strategy, whereby "U.S. intelligence services engaged in a campaign to

[5] UNHCR, "Asylum Levels and Trends in Industrialized Countries: First Quarter 2006," (September 2006),

6 UNHCR, "Asylum Levels and Trends in Industrialized Countries: Second Quarter 2006," (July 2006), 5.

[6] UNHCR, "Basic Definitions."

[7] The 2004 data is the latest provided. United Nations High Commissioner for Refugees, *The State of the World's Refugees 2006* (Oxford University Press, 2006), 16, http://www.unhcr.org/cgi-bin/texis/vtx/template?page=publ&src=static/sowr2006/toceng.htm..

[8] UNHCR, *World's Refugees 2006*, 10.

encourage defections from behind the Iron Curtain as a means of destabilizing communist regimes."[9] Similarly, national security and foreign policy concerns were at work in the changing treatment of Cuban refugees as U.S.-Cuban relations shifted, and in the contrast between the warm welcome of asylum seekers from Cuba and the cooler reception of those from Haiti, in light of the lack of a perceived U.S. national security interest in Haiti.[10]

The need to address influxes of asylum seekers has often been in the first instance an unintended consequence, rather than a deliberate strategy, of U.S. foreign policy, as when U.S. policy in Central America in the 1980s contributed to sharply increased refugee flows to the United States from that region.[11] However, just as refugee movements operate cyclically, both in response to and in catalyst of conflict, so have foreign policy concerns historically affected both the initial development of refugee movements and also the eventual granting or denial of refugee status. In the 1980s, "the rate of acceptance of asylum claims from Nicaragua, El Salvador and Guatemala continued to reflect foreign policy considerations," with 26 percent of Nicaraguan claims

[9] Kenneth J. Franzblau, "Immigration's Impact on U.S. National Security and Foreign Policy," (Research Paper, U.S. Commission on Immigration Reform, October 1997), 12; Michael J. McBride, "Migrants and Asylum Seekers: Policy Responses in the United States to Immigrants and Refugees from Central America and the Caribbean," *International Migration* 37 (1999): 289-317, 289; Mark Krikorian, "Who Deserves Asylum?," *Commentary* 52, June 1996, 101.

[10] Franzblau, 12-13; McBride, 293-95.

[11] Franzblau, 13-14; McBride, 295-96.

being granted in contrast to 2.6 percent of Salvadoran and 1.8 percent of Guatemalan claims.[12]

However, treating asylum as a means to securing U.S. foreign policy goals through strategic admissions has proved to be a double-edged sword, as it inevitably entails favoring applicants from what are often, by virtue of the purpose and definition of asylum itself, hostile or even enemy states.[13] These conflicting interests can play out in ironic and counterproductive ways, as when members of the Iraqi opposition, who were brought to the United States by the U.S. government to seek asylum after their CIA-encouraged plot to overthrow Saddam Hussein failed, found themselves instead detained and initially ordered deported based on secret, classified evidence that they were threats to national security.[14] As the latest development in this convoluted and ever-shifting relationship between political asylum and foreign policy interests, the emphasis on security since September 11th, 2001 has further exposed and legitimized the expression of security concerns in the rhetoric about asylum policy.

<H1>II. Convergences in U.S. Asylum Policy Before and After September 11th

<H2>A. Pre-September 11th Security Measures in Asylum Policy

The post-September 11th reforms in U.S. asylum law do not represent a sea change in asylum policy, but rather, follow upon earlier measures directed at limiting

[12] McBride, 296.

[13] Bill Ong Hing, *Defining America Through Immigration Policy* (Philadelphia, PA: Temple University Press, 2004), 233-35; Franzblau, 3-6.

[14] Federation for American Immigration Reform, "National Security Considerations in Asylum Applications: A Case Study of 6 Iraqis," October 8, 1998, http://www.fairus.org/site/PageServer?pagename=leg_.

access to political asylum and incorporate the long-standing though fluctuating linkages between asylum and security. Concerns that fraudulent claims were overwhelming a too permissive asylum system instigated a round of regulatory reforms that began in 1993 and were finalized and implemented in 1995.[15] This was followed in 1996 by another round of changes, this time catalyzed by the bombing of the World Trade Center and the murders of several CIA agents by asylum seekers, and by the unrelated but nonetheless galvanizing Oklahoma City bombing, which was carried out by an American citizen.[16] The role of the Oklahoma City bombing in spurring immigration reform in the mid-1990s reveals the complexity of the relationship between security fears and immigration reform, and in particular the tendency to conflate even domestic attacks with foreign threats. The Anti-Terrorism and Effective Death Penalty Act, which Congress hastily passed on the one year anniversary of the bombing, contained numerous measures restricting the rights of immigrants, although the Oklahoma City bombing had no foreign connection.[17]

The effectiveness of these prior measures and the security concerns that fueled them have become a focal point for renewed debate now. The overall effect of these changes was to make the asylum process a considerably more lengthy and difficult mechanism for entering the United States than it had been in the previous decade, by means of measures including detention of arriving asylum seekers, new limits on eligibility to apply for asylum, waiting periods for employment authorization, and

[15] "Asylum and Withholding of Removal," 8 Code of Federal Regulations § 208.

[16] *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Public Law 104-208, Div. C. (1996) (IIRIRA); *Anti-Terrorism and Effective Death Penalty Act of 1996*, Public Law 104-132, 110 Stat. 1214 (1996) (AEDPA).

[17] AEDPA.

exclusion of those associated with designated foreign terrorist organizations from applying for asylum.[18] Supporters of further restrictions argue that terrorists nonetheless continue to enter the United States through the asylum system,[19] while opponents contend that the security hole was plugged by the earlier round of reforms and that further restrictions will come at the cost of legitimate asylum seekers, not would-be terrorists.[20] Here, each side has anecdotes to offer, either of terrorists who slipped through the asylum system or of persecuted refugees whose claims were denied.[21] Notably, while several of the prominent terrorist attacks that took place before the reforms of the mid-1990s were carried out by asylum seekers or refugees, not one of the September 11th attackers had entered the United States through the asylum system.

<H2>B. Post-September 11th Changes in U.S. Asylum Policy

The post September 11th changes to asylum law have taken several forms.[22] Perhaps the most sweeping and telling change was the transfer of immigration authority, including the asylum processing system, from the former Immigration and Naturalization

[18] IIRIRA; 8 CFR § 208.

[19] Janice L. Kephart, "Immigration and Terrorism: Beyond the 9/11 Report on Terrorist Travel," Center for Immigration Studies Paper 24 (September 2005).

[20] Marisa Silenzi Cianciarulo, "Terrorism and Asylum Seekers: Why the REAL ID Act is a False Promise," *Harvard Journal on Legislation* 43 (forthcoming 2006): 101-38.

[21] Kephart; Cianciarulo.

[22] A comprehensive review of the anti-terrorism measures since September 11, 2001 is well beyond the scope of this paper. Dinah Shelton has provided an excellent analysis of a broader range of these measures in light of international human rights standards in her chapter, "Shifting the Focus of U.S. Law from Liberty to Security," in *September 11th, 2001: A Turning Point in International and Domestic Law?*, ed. Paul Eden and Thèrése O'Donnell (Ardsley, NY: Transnational Publishers, 2005), 497-532.

Service to the Department of Homeland Security, and thereby integrating asylum adjudication into the heart of the federal government's security apparatus.[23] Critics have decried this move for putting asylum adjudication in the hands of an agency with a mission unrelated to the purposes of political asylum, and for dividing asylum processing into three different bureaus, making effective coordination and application of uniform legal standards difficult.[24]

Some measures have been targeted directly at the issue of identifying and excluding terrorists, building on the laws of the mid-1990s. In 2001, the USA PATRIOT Act expanded the existing definitions of terrorist organizations and of the relevant associations with them that would bar applications for asylum. Under the USA PATRIOT Act definitions, an asylum seeker could be found to have provided material support to a terrorist organization even if that organization had never been officially designated as such. So long as an organization had ever used, or threatened, or attempted, or conspired to use a weapon or "dangerous device" for any reason other than "mere personal monetary gain," with the intent to endanger personal safety or cause substantial property damage, it could be deemed a terrorist organization, and an asylum seeker could be barred from seeking asylum for having provided it with support.[25]

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[23] Eleanor Acer, "Refuge in an Insecure Time: Seeking Asylum in the post-9/11 United States," *Fordham International Law Journal* 28 (May 2005): 1361-96, 1362; U.S. Department of Homeland Security website, "Immigration and Borders," www.dhs.gov/dhspublic/theme_home4.jsp.

[24] Acer, 1373-74.

[25] *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001*, Public Law 107-56, 115 Stat. 272, codified at INA

In 2005, the REAL ID Act extended these definitions even further, so that a terrorist organization" no longer has to be "organized" at all, but can be any "group of two or more individuals, whether organized or not," that engages in the broad definition of terrorist activity described above. It also expands the kind of relationship that renders an applicant inadmissible, to include not only members of terrorist organizations and those who have supported such, but also those who have provided support even to members of terrorist organizations, unless the asylum seeker has clear and convincing evidence that s/he "did not know and should not reasonably have known" of the person's association with the organization in question.[26]

Numerous critics have objected to the sweeping breadth of these provisions. Perhaps the most adverse and counterproductive aspect of these standards is that they encompass not only willing, but even unwilling supporters of terrorist organizations in their home countries, those who are forced in fear of their lives to aid such groups and are themselves victims of terrorism. While it sounds fantastical, commentators cite instances of applicants statutorily barred from asylum for such support as providing money, food, shelter, or housework to terrorist groups who had either violently attacked them and their families, abducted them, or extorted this aid from them under threat of their lives.[27] In her

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§ 212(a)(3)B); Anwen Hughes, "Asylum and Withholding of Removal—A Brief Overview of the Substantive Law," 158 PLI/NY 289 (Practising Law Institute, March 2006): 300-42, 318.

[26] Hughes, 319; *REAL ID Act of 2005*, 119 Stat. 231, PL 109-13 (HR 1268), Div. B, Title I, §§ 103 & 105 (May 11, 2005).

[27] Gregory F. Laufer, "Admission Denied: In Support of a Duress Exception to the Immigration and Nationality Act's 'Material Support for Terrorism' Provision," *Georgetown Immigration Law Journal* 20

2006 report on the subject, Jennie Pasquarella pointed to 512 asylum cases "on indefinite hold at the Asylum Office because of material support concerns."[28]

Other measures are not specifically security oriented, but rather, alter the basic standards under which asylum will be granted.[29] These changes build on pre-September 11th asylum policy in a very direct way: several of the specific provisions adopted represent previously contested standards that gained new currency under the pressure of the terrorist threat. For example, a central question presented by the asylum standard, and one of the elements addressed by the 2005 REAL ID Act, is the notoriously difficult issue of motive: the adjudicator must assess not merely the facts establishing whether the applicant was persecuted or has a fear of future persecution, but also the reason for that persecution.[30] Before the REAL ID Act, the case law had coalesced around a standard that required claimants to offer some proof of the reason for their persecution, but recognized and tolerated the potential for persecutors to have multiple motives: applicants need not prove that a prohibited category was the sole motive for

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(2006): 437-81, 437; Jennie Pasquarella, "Victims of Terror Stopped at the Gate to Safety: The Impact of the 'Material Support to Terrorism' Bar on Refugees," *Human Rights Brief* 13:3 (2006): 28-33, 28.

[28] Pasquarella, 32.

[29] *REAL ID Act*, §§ 101(a)(3) & (e). The Act also vests discretion over asylum decisions in the Director of Homeland Security in addition to the Attorney General; eliminates a planned study on vulnerabilities in the asylum system; and, in a pair of changes benefiting asylum applicants, lifts the caps on applicants whose claims are based on coercive population controls and on the number of asylees permitted to change status to permanent residents each year. *Ibid.*, §§ 101(b)-(d) & (f)-(h).

[30] "Aliens and Nationality: Immigration and Nationality: General Provisions: Definitions," 8 United States Code Annotated § 1101(a)(42)(A).

their persecution, but only that this was one of the motives for it.[31] The REAL ID Act, in contrast, requires that asylum applicants prove that race, religion, national origin, political opinion, or membership in a social group was not just a reason but a "central" reason for their persecution, drawing on language from regulations that were proposed but never adopted in December 2000, and which the Department of Homeland Security itself subsequently failed to support.[32] Similarly, before 2005, U.S. courts were divided on the questions of when corroborating evidence should be required and on the extent of the fact-finder's discretion in assessing credibility.[33] In both instances, the REAL ID Act adopted the most demanding of the standards presented in the case law.

Supporters of these and other reforms argue that they represent "narrow" changes intended to "ensure that all courts better scrutinize asylum claims so that legitimate claims survive and fraudulent claims get thrown out,"[34] while opponents argue that the

[31] E.g., *Osorio v. INS*, 18 F.3d 1017 (2d Cir. 1994); *Singh v. Ilchert*, 63 F.3d 1501 (9th Cir. 1995); *Yazitchian v. INS*, 207 F.3d 1164 (9th Cir. 2000); *Eduard v. Ashcroft*, 379 F.3d 182 (5th Cir. 2004); *Matter of Fuentes*, 19 I&N Dec. 58 (BIA 1988).

[32] *REAL ID Act*; Immigration and Nationality Act § 208; 65 Federal Register 76,588, 76,598 (proposed December 7, 2000); Hughes, 317.

[33] On corroborating evidence, compare *Ladha v. INS*, 215 F.3d 889 (9th Cir. 2000) and *Sidhu v. INS*, 220 F.3d 1085 (9th Cir. 2000) with *Alvarado-Carillo v. INS*, 251 F.3d 44 (2d Cir. 2001), *Abdulai v. Ashcroft*, 239 F.3d 542 (3d Cir. 2001), and *Mukanusoni v. Ashcroft*, 390 F.3d 110 (1st Cir. 2004). On credibility, see *Damaize-Job v. INS*, 787 F.2d 1332 (9th Cir. 1986); *Dia v. Ashcroft*, 353 F.3d 228 (3d Cir. 2003)*; In re S-S-*, 21 I. & N. Dec. 121 (BIA 1995); *Balasubramanrim v. INS*, 143 F.3d 157 (3d. Cir. 1998); *Singh-Kaur v. INS*, 183 F.3d 1147 (9th Cir. 1999); *Matter of A-S-*, 21 I. & N. Dec. 1106 (BIA 1998).

[34] Kephart, 26.

law is "potentially detrimental to legitimate asylum seekers."[35] The rhetoric of both camps has converged upon this question of "legitimacy" and upon a basic, unanswered question of fact: do U.S. asylum procedures effectively distinguish genuine from fraudulent asylum seekers? From the terms of the debate, one would think that everyone agrees on the line that should be drawn by the asylum system between authentic and inauthentic asylum seekers, and that the disagreement concerns only the question of whether that line is in fact properly drawn now.

But while both sides in the current debate deploy the concept of legitimacy to promote their policy goals, in the past, other critics have problematized the very concepts of legitimacy and genuineness, arguing that the motive aspect of the asylum test is at odds with the nature of much political violence and therefore fails to legitimize claims and applicants who need protection. Considering the case studies of asylum seekers fleeing the Salvadoran and Guatemalan civil wars, Susan Bibler Coutin concluded that "continual violence, surveillance and interrogation made the causes of persecution unclear and defined average people as potentially subversive,"[36] creating a "gap between legal definitions of persecution and the repressive tactics that are directed at suspect populations."[37] Similarly, the new standards imposed by the REAL ID Act "allow adjudicators to base an adverse credibility determination on inconsistencies, inaccuracies

[35] Coanciarulo, 115.

[36] Susan Bibler Coutin, "The Oppressed, the Suspect and the Citizen: Subjectivity in Competing Accounts of Political Violence," *Law and Social Inquiry* 26 (2001): 60-94, 75.

[37] Coutin, 65.

or falsehoods . . . that are not material,"[38] that is, not related to the legitimacy of the plaintiff's claim for asylum at all.

Although the current discussion props up the illusion that asylum seekers have a fixed identity as genuine or fraudulent, terrorist or non-terrorist—in short, that all would agree on which claimants were eligible for asylum if only the proper procedures were followed and the correct standards applied—there is little reason to think that this is so. The motives of applicants for asylum may or may not map on to the relative strength of their legal claim. Applicants with terrorist intentions may in fact have been persecuted in their home countries, whereas innocuous and genuinely fearful applicants may have been persecuted on a basis not recognized by the law or may lack essential evidence for their claims. Applicants with mixed motives for their migration may have some aspect of their personal history that strongly grounds an asylum claim. Furthermore, the motives of an applicant may change over time. Applicants who applied in good faith, for example, may later develop hostile intentions, or vice versa. The question of legitimacy thus obscures more than it reveals, operating as a stratagem for claiming the high ground in the debate rather than as an actual point of debate in itself, and obscuring the fundamental philosophical differences dividing those who focus on the harm done by "illegitimate" claimants who are granted asylum and those who focus on the harm done to "legitimate" claimants who are denied.

Finally, pro-asylum advocates have long contended that economic and social concerns are at work under asylum policy discussions that ostensibly concern security,

[38] Hughes, 318.

fraud, and other issues.[39] On the national level, Eleanor Acer contends that security fears have provided "a new vocabulary" for immigration opponents to use "to advance long desired objectives," pointing to policies disfavoring Haitian asylum applicants as an example of anti-immigration measures with no clear security objective but nonetheless put forward under a national security guise.[40] The UNHCR observes that the currently heightened security rhetoric has converged with public fears of "pressure on scarce resources such as jobs, housing, education and healthcare" and on government funds, illegal entries and overstays, and "'bogus' claims" to constitute a world-wide trend toward "a growing degree of public suspicion and . . . increasingly rigorous state controls" on asylum seekers.[41]

<H1>III. Divergences of U.S. Policy From International and National Norms and Practices

It is of course too early to do more than speculate about the long-term effects of these reforms. However, they do pose several immediate divergences with other policies and principles that raise red flags about their likely ineffectiveness in promoting national security and their possible detrimental effect on the asylum system itself: namely, their divergences from the United States' international obligations, from the direction of European Union reform, and from the observed limits that legal processes face in assessing asylum claims in practice.

<H2>A. International Legal Obligations

[39] McBride, 289.

[40] Acer, 1362-63.

[41] UNHCR, *World's Refugees 2006*, 33.

As a party to the 1967 Protocol, the United States has international legal obligations to refugees and asylum seekers, in addition to its domestic legal responsibilities. States parties to the 1951 Convention and the 1967 Protocol that incorporates it promise a range of rights to refugees within their borders, including, most importantly, the prohibition on refoulement, that is, returning a refugee to a state where he would face persecution on one of the prohibited grounds.[42] These responsibilities are, of course, in addition to the obligations the United States bears under other international human rights treaties, such as the Convention Against Torture, which specifically forbids returning an individual to a state where "there are substantial grounds for believing he would be subjected to torture," as well as its obligations under domestic law.[43]

It is a foregone conclusion under international law that asylum applicants who pose a threat to national security have no right to refugee status. Since the very foundation of the international refugee system in the 1951 Refugee Convention, even the core right of non-refoulement can be denied to "a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is."[44] A crucial question, of course, is whether the legal standards established in post-September 11 legislation constitute such "reasonable grounds."

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[42] 1951 Refugee Convention, art. 33(1); 1967 Protocol, art. 1(1).

[43] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, *entry into force* 26 June 1987, in accordance with article 27(1), art. 3(1), http://www.unhchr.ch/html/menu3/b/h_cat39.htm.

[44] 1951 Refugee Convention, art. 33(2).

Here, asylum advocates contend that the recent changes in U.S. asylum law may put it in contravention of its Convention duties. Anwen Hughes has suggested that the REAL ID Act's expansion of the "grounds of deportability related to terrorism [to be] coextensive with the grounds of admissibility" may "conflict with U.S. obligations under the Refugee Convention."[45] Likewise, Eleanor Acer has argued that the Department of Homeland Security's "sweeping approach" to barring asylum applicants on the basis of such remote associations with terrorist organizations as making payments garnered only by extortion is "not consistent with the Refugee Convention's precise approach in assessing whether an individual refugee should be excluded from its protection."[46]

The lack of a duress exception to the U.S. provisions making asylum applicants ineligible for associations with terrorist organizations is particularly problematic. As discussed above, under the new, broader definitions of terrorist associations, people who have been persecuted by terrorist organizations in their home country may be deemed ineligible for asylum due to their unwilling associations with those organizations. Gregory Laufer has argued that "the lack of a duress exception violates the Convention Relating to the Status of Refugees . . . and its successor, the Protocol Relating to the Status of Refugees."[47] This failing is certainly at odds with the UNHCR's own interpretation of the grounds of inadmissibility under the Refugee Convention. While the Refugee Convention provides that "serious non-political crimes" such as support for terrorism are grounds for excluding an otherwise eligible refugee from the Convention's protections, "the Article 1(F) exclusion does not apply 'where the act in question results

[45] Hughes, 319.

[46] Acer, 1365.

[47] Laufer, 437, note 12.

from the person concerned necessarily and reasonably avoiding a threat of imminent death, or of continuing or imminent serious bodily harm to him or herself or another person.'"[48]

Similarly, under the new broader definitions of terrorism, those persecuted by their governments may find themselves excluded from seeking asylum in the United States. Such restrictions could be based not on the basis of associations with terrorist organizations with any ill will against the United States, nor even on the basis of associations with designated terrorist organizations, but because of their involvement with predominantly peaceful organizations that have at any time used any violent means against oppressive regimes.[49] In the same vein, the UNHCR has noted that, ironically, refugees who have been displaced by military offensives in the name of the war on terror also find it more difficult to seek asylum on account of anti-terrorism efforts, as many have faced "accelerated and/or involuntary returns due to 'anti-terror' measures in asylum states."[50] To the extent that any or all of these measures put those who ought, under international law, to be designated as refugees, at risk of being returned by the United States to countries where they have a genuine fear of persecution, these policies

[48] Pasquarella, 31, note 56, quoting UNHCR, Guidelines on International Protection: Application of the Exclusion Clause: Article 1F of the 1951 Convention Relating to the Status of Refugees, HCR/GIP/03/05 (September 4, 2003) at ¶ 12; Refugee Convention, Art. 1(F)(b); UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, HCR/IP/4/Eng/REV1, Reedited, Geneva, January 1992, UNHCR 1979, http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=PUBL&id=3d58e13b4.

[49] Acer, 1365.

[50] UNHCR, *World's Refugees 2006*, 10.

put the United States in contravention of its international legal obligation to harbor refugees within its borders.

<H2>B. European Union Practice and Rhetoric

At the European Union level, the role of security in influencing asylum law and policy diverges considerably from that in the United States. In the United States, the security threat posed by asylum seekers is conceptualized in the context of terrorism as the risk of individual terrorists penetrating the country through the asylum system and perpetrating violent attacks. In Europe, in contrast, discussions of security and asylum take place primarily in the context of migration, rather than terrorism, and with a broader understanding of security.

Specifically, European discussions seem to focus on the threat to European social, cultural, and economic security and security from crime and criminal networks, posed by large scale patterns of migration across European borders, of which asylum seekers are a part. It is striking, for example, that EU asylum policy documents refer all in one breath to "the ongoing development of European asylum and migration policy" and "development of a common policy in the field of asylum, migration and borders," conceptualizing asylum as an aspect of migration policy, rather than as an aspect of the war on terror.[51] Accordingly, much of the asylum related legislation in the European Union has focused on questions of coordination, harmonization and burden-sharing. Since 2001, European Council Directives and Regulations have, for example, established

[51] The Hague Programme: Strengthening Freedom, Security and Justice in the European Union," *Official Journal C 053, 03/03/2005 P. 0001 – 0014*, 52005XG0303(01), (2005/C 53/01): : "1.2 Asylum, Migration and Border Policy," 4, http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:52005XG0303(01):EN:HTML.

minimum standards for receiving asylum seekers[52] and criteria for determining which member state has responsibility for adjudicating an asylum seeker's claim.[53] Most recently, a European Commission Communication on Strengthened Practical Cooperation issued in February 2006 promotes increased harmonization and interaction amongst member states.[54]

In the same vein, terrorism, while a serious concern in its own right, is not one that crops up nearly so frequently in European discussions of asylum as in the American context. Terrorism concerns seem to be addressed primarily through a set of measures directed specifically at interdicting that phenomenon, rather than operating indirectly through the asylum system.[55] Of course, in the European context as in the American, neither terrorism nor counter-terrorist measures are new developments. The continuity between pre-and post-September 11th policies is, however, perhaps better recognized in Europe, where terrorism was far more prominent in the public eye before

[52] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [Official Journal L 31 of 06.02.03].

[53] Council Regulation (EC) 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 [Official Journal L 50 of 25 February 2003].

[54] Commission of the European Communities, Communication from the Commission to the Council and the Parliament on Strengthened Practical Cooperation, SEC(2006) 189, Brussels 17.2.2006, COM(2006) 67 Final, http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0067en01.pdf#search=%22communication%20on%20strengthened%20practical%20cooperation%22.

[55] European Union, Justice and Home Affairs, "EU Fights Against the Scourge of Terrorism," http://ec.europa.eu/justice_home/fsj/terrorism/fsj_terrorism_intro_en.htm.

September 11th, and where post-September 11th events such as the Madrid and London attacks both extend the impact and blunt the singularity of the September 11th attacks.[56]

This is not to say, of course, that national and regional security and terrorism are of no concern whatsoever in European immigration policy—both are, for example, mentioned in the introduction to the 2005 Hague Programme[57]—but rather, that the emphasis of the security debate is different. For example, the Eurodac database of asylum applicant fingerprints is intended to promote European security, but security from the overall effect of asylum seekers moving across and within European borders for purposes of evading adverse decisions or "asylum-shopping," not security from terrorist attack.[58] Use of the database is limited to its designated purpose of "comparison of fingerprints of asylum applicants" to "identify[] third country nationals who ha[ve] already lodged an asylum application in another Member State," and is not available for counter-terrorist activities.[59]

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[56] Hague Programme, "I. Introduction," at 2.

[57] Ibid.

[58] Commission of the European Communities, Commission Staff Working Paper, Second Annual Report to the Commission and the European Parliament on the Activities of the EURODAC Central Unit, Brussels 20.6.2005, SEC(2005) 839: 5-7.

[59] Commission of the European Communities, Commission Staff Working Paper, First Annual Report to the Commission and the European Parliament on the Activities of the EURODAC Central Unit, Brussels 5.5.2004, SEC(2004) 557: 4; Europa, Press Release, "Eurodac: A European Union-wide Electronic System for the Identification of Asylum-Seekers," MEMO/06/334, Brussels, September 19, 2006, http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/334&format=HTML&aged=0&language=EN&guiLanguage=en.

In another sense, however, the concepts of security in the EU and US debates converge: in the tension between the two competing visions of national security outlined at the outset of this paper. Undoubtedly the prominence of the first vision, which emphasizes human security as necessary to national security, is far greater in European rhetoric and policy than in the United States. The 2005 Hague Programme which, among other things, established a plan for developing and implementing the European Common Asylum System, offers a focal point for illumination and critique of the perceived links between immigration and security in Europe.[60] In its introduction, the Hague Programme sets forth a list of goals, in which obviously security oriented aims—"to control the external borders of the Union, to fight organized cross-border crime and repress the threat of terrorism"—stand side by side with other concerns—"to guarantee fundamental rights, minimum procedural safeguards and access to justice," for instance.[61] Here, the tension between the two visions of national security in the asylum context is evident in the juxtaposition of two contrasting goals: the intention "to provide protection in accordance with the Geneva Convention on Refugees and other international treaties to persons in need" is followed immediately by the aim "to regulate migration flows and to control the external borders of the Union."[62] Thus, as Didier Bigo has noted, the "European agenda is a lighter-handed version of the US homeland security strategy, with more

[60] Hague Programme.

[61] Ibid., "I. Introduction," at 2.

[62] Ibid.

considerations concerning the dignity of the 'others,' their humane conditions, and with less antagonism."[63]

This divergence on the level of theory also finds its way into practice, as some of the counter-terrorist measures the United States has deployed within its asylum system are at odds with both EU and European national practices. Specifically, in contrast to the U.S. practice of disregarding evidence of duress when assessing an individual's connections to terrorist organizations, Gregory Laufer notes that "while vigorously combating terrorism, the Commission of the European Union has promoted considerations of duress in assessing an asylum applicant's case," and "Belgium, Denmark, the Netherlands, Switzerland and the United Kingdom all focus on the individual's intent and actual role in light of a terrorist organization's activities."[64]

But although there seems to be more of an interplay between the two visions in Europe than in the United States, on both the theoretical and pragmatic levels, the role of the defensive, dichotomized vision of national security is not insignificant in Europe. In his critique of the Hague Programme, Didier Bigo identifies the image of "an 'essentialized' us under threat by unknown others" who must be defended through "the creation of a 'safe area without intruders'" that emerges not only in the context of asylum, but throughout the discussion of migration and border policy.[65] In the asylum context, two developments in particular highlight the contrast between the European security concern with large scale migration and the American fear of individual terrorists:

[63] Didier Bigo, "Liberty? Whose Liberty? The Hague Programme and the Conception of Freedom," http://www.libertysecurity.org/article339.html#nb2, posted July 20, 2005.

[64] Laufer, 475-76.

[65] Bigo.

the European Union's new minimum standards for asylum procedures and its efforts to externalize asylum restrictions to third countries.

On December 1, 2005, the European Council adopted a long-debated Asylum Procedures Directive, setting minimum standards for member states' asylum processing procedures.[66] Observers within and without the EU have critiqued the Directive, in draft and final form, for its lowest common denominator approach. UNHCR has expressed concerns that the Directive does not offer adequate protections for asylum seekers, raising the risk of refoulement of refugees and thus violation of their fundamental rights under the Refugee Convention.[67] Critiquing the draft proposed by the Hague Programme, the Immigration Law Practitioners Association pointed to the "safe countries of origin" list as creating particular risks where there are in fact "serious human rights concerns in the countries concerned," and posited that mandating universal use of such a list represents an illegal dilution of standards in member states that did not currently use such lists.[68]

In this context, observers contend that efforts at creating common procedures have catalyzed already intense national debates over asylum[69] and have legitimized and

[66] Asylum Procedures Directive, Council Directive 2005/85/EC of 1 December 2005 on minimum standards in procedures in Member States for granting and withdrawing refugee status, *Official Journal of the European Union* L326/13, 13.12.2005.

[67] UNHCR, *World's Refugees 2006*.

[68] Immigration Law Practitioners Association, "ILPA Response to the Hague Programme: EU Immigration and Asylum Law and Policy," http://www.libertysecurity.org/article72.html, posted December 20, 2004.

[69] "02-09-2005—Commission proposes new rules on asylum and immigration," Europa website, http://eupra.edu.int/comm/justice_home/news/intro/news_intro_ent.htm; Ariel Meyerstein, "Retuning the

reinforced a defensive, border-focused view of European social, economic, and cultural security that emerged much earlier.[70] Ariel Meyerstein describes a growth in asylum rates in the 1980's and 1990's that catalyzed more restrictive national level policies on asylum, particularly in those states that received a disproportionate share of asylum seekers.[71] These legal shifts were followed by a sharp drop in the number of asylum applications, "from a high of nearly 700,000 in 1992 to 288,000 in 2004," which she attributes to "restrictive measures" at the national and European Union level.[72] Without the political will amongst member states to accept higher asylum application levels, the "lowest common denominator" approach observed in the Hague Programme and the Asylum Procedures Directive is the only way to accommodate the pre-existing restrictive national policies on asylum in some member states, policies that seem to stem from these ongoing economic and social concerns.

The European goal of externalizing asylum policy illustrates both the severity of the external-internal approach to security that it shares with the United States and the emphasis on mass rather than individualized deterrence of migration in which it diverges from U.S. security concerns. This externalization takes several forms, of which the most directly focused on asylum is the externalization of asylum determinations to third countries: the Hague Programme calls for a study to "look into the merits, appropriateness and feasibility of joint processing of asylum applications outside EU

Harmonization of EU Asylum Law: Exploring the Need for an EU Asylum Appellate Court," *California Law Review* 93 (October 2005): 1509-55, 1509.

[70] Bigo.

[71] Meyerstein, 1512.

[72] Ibid., 1516-17.

territory, in complementarity with the Common European Asylum System."[73] Other forms include partnerships with "countries and regions of origin" and "countries and regions of transit" to provide funding and support to source and transit countries for better migration management.[74]

Although the Hague Programme asserts that such measures should be carried out "in compliance with the relevant international standards"[75] and that partnerships with third countries should include "[s]upport for capacity-building in national asylum systems" as well as in "border control and wider cooperation on migration issues,"[76] advocacy groups object that these measures will outsource asylum processing to states known to have inadequate opportunities for seeking asylum and will thus in effect deny the right to seek asylum to many refugees. The Immigration Law Practitioners Association has raised concerns that "[c]alling upon non-EU States to ratify and adhere to the Geneva Conventions" may serve as "a justification for making expulsions to these countries easier," without actually ensuring protection for asylum seekers in those states.[77] Whatever the risks for asylum applicants, the contrast in strategy between the externalized European approach and the policy in the United States, where asylum determinations have been internalized deep in the heart of the federal government's homeland security apparatus, could not be starker.

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[73] Hague Programme, "1.3 A Common European Asylum System," 4.

[74] Ibid., "1.6 The External Dimension of Asylum and Migration," 5-7.

[75] Ibid., "1.3 A Common European Asylum System," 4.

[76] Ibid., "1.6.3 Partnerships with Countries and Regions of Transit," 7.

[77] ILPA, "The External Dimension of Asylum."

Most recently, the designation of funding for Libya to manage migration across its borders illustrates the contrasting dynamic of security and asylum concerns in the European Union vis-à-vis the United States. In late 2005, the European Commission announced a "joint EU-Libya action plan" to address, not the risk of terrorist entry, but "migration pressure on the EU."[78] This pressure was illustrated, not by terrorist activity or threats, but by the deaths of migrants at Ceuba and Melilla, Spanish enclaves that provide prominent entry points for "Africans who pour into Morocco from all over the continent in an effort to enter the European Union," and where, in 2005, a number of migrants were crushed and others were shot in mass efforts to push through border fences.[79] Human Rights Watch has long protested that "Italy, the country most affected by migration from Libya . . . egregiously flouted international laws intended to protect migrants, asylum seekers, and refugees" by "collectively expel[ling] groups of people back to Libya, . . . conduct[ing] thousands of expulsions since 2004 in a hasty and indiscriminate manner" and without "provid[ing] all individuals with an opportunity to present an asylum claim," as well as permitting its navy to force migrant ships out of its territorial waters with "no consideration for identifying asylum seekers."[80] Now,

[78] Franco Frattini, Vice President of the European Commission Responsible for Justice, Freedom and Security, "Recent Developments of immigration and integration in the EU and on recent events in the Spanish enclave in Morocco," SPEECH/05/667, Konrad Adenauer Foundation, Brussels, November 3, 2005.

[79] BBC News, "Africans Die in Spanish Enclaves," September 29, 2005, http://news.bbc.co.uk/2/hi/africa/4292490.stm.

[80] Human Rights Watch, "Stemming the Flow: Abuses Against Migrants, Asylum-seekers and Refugees," vol. 18, no. 5(E) (September 2006): 5, http://www.libertysecurity.org/IMG/pdf/libya0906web.pdf.

Amnesty International has raised new concerns about the European Union's decision to provide funding to Libya, "without seeking any guarantees that the rights of asylum seekers and migrants will be upheld in the process."[81]

What is striking about these measures is not a contrast to actions taken under U.S. policy, for certainly the United States has similarly been criticized for turning back potential asylum seekers en masse. Rather, it is the divergence in the justifications offered for these choices that is remarkable. Contrast the "migration pressure" rationale deployed by the European Union with the rhetoric used by Attorney General John Ashcroft when faced with an influx of Haitian refugees in 2003: national security. Attorney General Ashcroft justified deterring potential asylum seekers from departing Haiti for the United States on the grounds that intercepting migrant boats would "divert valuable Coast Guard and [Department of Defense] resources from counterterrorism and homeland security responsibilities" and on the basis of the "national security interest in curbing use of this migration route" by "third country nations (Pakistanis, Palestinians, etc.)."[82] While there is some overlap between security concerns in the United States and the European Union, the emphasis is entirely reversed, with national security playing the role of a trump card in U.S. but not E.U. asylum policy and rhetoric.

<H2>C. U.S. Legal Structure and Processes

Asylum applications are particularly challenging cases for legal adjudication, even apart from the problem of deterring terrorism. To some extent, this is inherent in the

[81] Amnesty International, "JHA: Closing eyes to human rights leaves asylum seekers and migrants at risk," 4/10/2006, http://www.amnesty-eu.org/.

[82] *In re D-J*, Respondent, decided April 17, 2003, U.S. Department of Justice, Office of the Attorney General, Interim Decision #3488, 23 L&N Dec. 572 (A.G. 2003): 579.

legal questions at the heart of the refugee definition and in the acute circumstances in which asylum cases arise. Returning to the example discussed above of the REAL ID Act's change in the motive requirement, the effect of this change depends on the strength of the evidence that can be offered to meet it. As Anwen Hughes has noted, "[p]ersecutors often fail to make their motivations clear, creating evidentiary obstacles for their victims as they seek protection in this country."[83] Similarly, David Martin contends that "the unique elusiveness of the facts" in asylum cases complicates the adjudicator's evaluation of evidence, as genuine as well as non-genuine claims are likely to lack extensive evidentiary support.[84] Because the key events took place in other countries and often in situations of great turmoil, and because the applicant is likely to have left her home country in something less than a deliberate and measured fashion, corroborating evidence tends to be in short supply in legitimate as well as illegitimate claims. Efforts to assess credibility are made more difficult by the often horrific nature of the experienced atrocities, which may affect the applicant's perception and memory of the events in question. Credibility judgments are also complicated by the cultural and language differences dividing the adjudicator from the applicant, which create uncertainty concerning the internal consistency or inconsistency of an applicant's testimony as well as other, less tangible characteristics such as the meaning of the applicant's demeanor.[85]

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[83] Hughes, 300.

[84] David Martin, "The 1995 Asylum Reforms: A Historic and Global Perspective," Backgrounder, Center for Immigration Studies, at 3 (May 2000); Cianciarulo.

[85] Dr. Gregor Noll, "Proof and Credibility," The Danish Institute for Human Rights, www.humanrights.dk/departments/research/rrp/repr.doc/proofandcred.doc.

Arguably, this degree of factual "elusiveness" constrains the fact-finding processes to such a degree that any adjudicative process, however designed, can assess such claims only with some margin of error. If so, within this margin of error the choice of legal test and evidentiary standard will serve primarily to determine where the cost of error will fall. In the asylum context, some critics have identified lax evidentiary standards as presenting an avenue for fraudulent claims and abuse of the process by would-be terrorists, among others.[86] Counterbalanced against the risks posed by granting fraudulent and particularly terrorist claims is the grave risk of harm posed by the denial of genuine claims for applicants deported to face a threat of renewed persecution in their home countries.[87]

Accordingly, these questions of line-drawing return us to the fundamental question of core visions of national security and the relationship between national security and international human security. The heightened refugee definition and evidentiary standards promulgated since September 11th will almost certainly result in diminished numbers of successful asylum claims in the aggregate. If the only goal of these reforms is to increase the raw numbers of denied terrorist claims, these changes seems likely to produce at least some improvement, so long as there are any terrorists amongst those applicants who could have met the previous standards but cannot meet these. But if we take into account other concerns, such as the effect of these changes on genuine claimants or on the integrity of the adjudication system, it is far less clear

[86] Krikorian, 52.

[87] Martin, 3.

whether the new standards will produce any marginal improvement in the system's ability to identify fraudulent or dangerous applicants.[88]

Here, UNHCR has argued vigorously for the "need to safeguard the principle of asylum" in this "context where governments and electorates are unable to draw a clear distinction between the victims of persecution and the perpetrators of terrorist violence."[89] The most optimistic assessment by asylum advocates have been that, if interpreted in the light most favorable to asylum applicants, many of these standards could represent only minor changes in the law that will not affect most claims.[90] However, even under this view of the matter, at least some of the changes seem likely to "provide statutory cover for shoddy decision-making."[91]

Finally, as David Zaring and I have argued elsewhere, the post-September 11th legislation diverges sharply from basic principles of administrative law and from the underlying structure of the asylum system, in ways that are likely to undermine its effectiveness, both as a matter of improving national security and as a matter of the

[88] In assessing incentives and effectiveness, other considerations are of course also at play, including, for example, incentives for forum-shopping, the risks and effects of backlogs, and costs of adjudication in comparison to costs of other interventions. E.g., Charles K. Keely and Sharon Stanton Russell, "Response of Industrial Counties to Asylum-Seekers," *Journal of International Affairs* 47 (1994): 399; Jonas Widgren and Philip Martin, "Managing Migration: The Role of Economic Instruments," *International Migration* 40 (2002): 213; Matthew J. Gibney & Randall Hansen, "Asylum Policy in the West," Discussion Paper No. 2003/68, World Institute for Development Economics Research (September 2003).

[89] UNHCR, *World's Refugees 2006*, 33.

[90] Hughes, 315-322; Cianciarulo.

[91] Hughes, 318.

successful functioning of the asylum system itself. [92] Here, a cardinal error made in these changes in asylum standards was to expand dramatically the discretion of the weakest link in the asylum processing chain: immigration judges. Compounding the effects of this shift, the Board of Immigration Appeals has substantially reduced its review of immigration judge decisions, moving from review by three judge panels to review by individual judges who issue one sentence decisions affirming or denying the opinion. The result has been a dramatic drop in the effectiveness of the review of immigration judges provided by the BIA.[93]

The results can be measured according to several criteria, but by any standard they are dire. Looking at the numbers, the range of grant and denial rates amongst immigration judges is so broad as to create the appearance of arbitrariness in the system. A study based on data from the Executive Office of Immigration Review found that the denial rates in asylum claims for 208 immigration judges hearing asylum claims between 2000 and 2005 ranged from 10 to 98 percent. Even when attempting to account for potential regional differences in the sources and strengths of asylum claims by narrowing the data to focus solely on claims from Chinese applicants, the study still found a range of 6.9% of claims denied by one judge to 94.5% denied by another.[94]

By the measure of the response of those who have been in a position to observe this trend, this response has been highly critical as well. Federal judges have deplored the

[92] David Zaring & Elena Baylis, "Sending the Bureaucrats to War," 92 *Iowa Law Review* (forthcoming 2007).

[93] Acer, 1384-86.

[94] Transactional Records Access Clearinghouse, Syracuse University, TRAC Immigration Report, "Immigration Judges," http://trac.syr.edu/immigration/reports/160/.

repeated incompetence displayed by immigration judges in the asylum cases they have reviewed, with the Seventh Circuit's Judge Posner finding in 2005 that "the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice."[95] Now, the U.S. government itself has been forced to confront and admit these lapses in immigration judge performance. Following upon the outcry from the federal judiciary, Attorney General Gonzalez called for reforms, "voicing concern about "intemperate or even abusive" conduct" by Immigration Judges.[96] In this context, vesting greater discretion in immigration judges to promote delicate matters of national security seems less than prudent.

Another glaring problem with these reforms is that raising standards within the asylum process is a highly inefficient way to find terrorists. On average, more than 64,000 people apply for asylum every year, and few, if any, of those who apply each year are terrorists.[97] While it certainly makes sense to subject asylum applicants to standard security screenings, scrutinizing each claim according to heightened standards in hopes of catching a marginally greater number of terrorists through the process is the

[95] Adam Liptak, "Federal Courts Criticize Judges' Handling of Asylum Cases," *New York Times*, December 26, 2005. Other sharp critiques are found in *Pasha v. Gonzales*, No. 04-4166 (7th Cir. 2005); *Sukwanputra v. Gonzales*, at 17 (3d Cir. 2006).

[96] ABC News, Jason Ryan, "Attorney General Chastizes Immigration Judges," January 11, 2006, http://abcnews.go.com/US/LegalCenter/story?id=1492671.

[97] United States Citizenship and Immigration Service, 2003 Yearbook of Immigration Statistics, 45-46 & 56, http://uscis.gov/graphics/shared/aboutus/statistics/Asylees.htm. The 9/11 Commission itself noted that "very few people" amongst all the immigrants to the United States pose a threat to national security. National Commission on Terrorist Attacks Against the United States, The 9/11 Commission Report, National Printing Office, 2004: 383.

quintessential search for a needle in a haystack. Here, it is worth noting that a 2005 report identified only 16 people with purported terrorist associations among the more than one million people who have applied for asylum in the United States between 1980-2005. To reach even this number, it included several "friends" of accused terrorists who were themselves never accused of any terrorist involvement, as well as several others who entered the United States through other means and filed asylum claims only as defensive measures after already in deportation proceedings.[98] All in all, by focusing on the asylum process as a point for interdicting terrorists, the U.S. government is operating in opposition to the observed limits of the asylum process in adjudicating individual claims, against basic principles of administrative laws, and against the known weaknesses in the structure of its asylum system.

<H1>IV. Conclusion

Within and without the United States, two visions of national security compete in forming asylum policy: one that links national security to broader human security, and another conceptualizing internal security at odds with distinct external threats. While September 11th is often treated as a turning point between the two perspectives, in fact the second view has distinct roots in pre-September 11th policies, and the first view continues to carry some weight, although more in Europe than in the United States itself. A comparison of U.S. and European policies reveals a second dichotomy in conceptualizations of security threats, between the narrow American focus on terrorism and the broader European fear of disruption of social, economic and cultural norms. Whether by comparison with international norms, European practices, and practical

[98] Kephart, 27.

experience within the U.S. asylum system, the security strategy implemented in U.S. asylum policy since September 11th appears at best to fail to promote, and at worst to risk undermining the human security goals for which the international political asylum system was founded.

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