

**RETHINKING ASYLUM:**  
THE FEASIBILITY OF HUMAN SECURITY AS  
NEW RATIONE PERSONAE PROTECTION

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**INTRODUCTION**

This paper puts forward a framework for reconceptualizing refugee law by introducing a new field of application—the human security basis—as the criteria for refugee status determination. The argument for the human security construct is made through a comparison with the Common European Asylum System (the “CEAS”)—the protection mechanisms currently being set up in the European

Union.<sup>1</sup> The European system is a particularly interesting case study as it reflects the various strands of protection offered to third country nationals by the 1951 Geneva Convention Relating to the Status of Refugees and its 1967 Protocol (“Geneva Convention”)<sup>2</sup>, as well as national policies as they have developed over the years. The purpose of this paper is to highlight the gaps and deficiencies within (and between) each category of protection and to unveil the reasons for their disengagement with reality. It is within this analysis that human security will be presented as an umbrella category unifying the various protection mechanisms.<sup>3</sup> In order to demonstrate the advantages of this unified system I will critically assess the different qualities of protection available via the Geneva Convention, subsidiary protection,<sup>4</sup> and the distinct temporary protection regime.<sup>5</sup> I will highlight the loopholes that exist not only within each mechanism but that are created by the gaps between them. I will then go on to defend the use of human security as a legal threshold in the refugee determination procedure and define the types of harm that affect one’s human security (Part II). The crucial

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<sup>1</sup> The CEAS was cemented in Article 63 of the Treaty of the European Communities (Amsterdam 1999). The Treaty of the European Communities added a new title IV (Articles 62 and 63, dealing with "visa, asylum, immigration and other policies related to free movement of persons") to the first pillar and therefore “communitarized” major parts of the previous intergovernmental cooperation of EU member states in the fields of Justice and Home Affairs. The new Articles 61 to 69 of the EC Treaty are designed to progressively establish an area of freedom, security and justice of which asylum and immigration matters form an integral part.

<sup>2</sup> Geneva Convention, 189 U.N.T.S. 137, July 28, 1951, art.33.

<sup>3</sup> Excluded from the analysis are third country nationals as long term residents.

<sup>4</sup> COM(2001) 510 final. The Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees and as persons otherwise in need of international protection.

<sup>5</sup> COM(2001) 55 EC. Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

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distinction from the current system will be that these harms will all be on equal footing<sup>6</sup> and the burden of proof will be shared with the host State.<sup>7</sup>

My interest in using human security as justification for providing international protection to third country nationals is partially due to the expansive and fluid nature of the term and the fact that it places the individual at the center of its concern. On a more strategic level, using the human security debate to the advantage of the protection seeker helps dismantle the stereotype of migrants and asylum seekers as security threats.<sup>8</sup> In an attempt to rethink “asylum” on the conceptual level it is important to unveil, to some extent, the environment in which it is framed. My argument is that the concepts of asylum and migration have evolved in an environment where “difference” is handled with caution and fear (with respect to national sovereignty, societal cohesion, cultural unity and economic prosperity). This unease in turn perpetuates a hostile and cynical attitude towards the “humanitarian” nature of asylum. Using the human security threshold to benefit asylum seekers is an attempt to reconsider the validity of this negative environment.

It is worth noting that this paper is primarily concerned with the normative grounding of the human security basis rather than the procedural justification of an all encompassing protection regime.

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<sup>6</sup> Maintaining the primacy of the Geneva Convention, and downgrading any subsequent protection systems, ignores the changing circumstances of flight and therefore creates a paralyzed asylum system that is not in line with modern political realities.

<sup>7</sup> The benefit of this can, of course, be contested as it directly impinges upon state sovereignty. However, I argue that placing part of the burden on the host state is a natural consequence of a system that does not substantially distinguish between, for example, persecution, torture or gender based violence standards. It is reasonable to require the host state to explain why certain protection seekers, claiming violence, do not fulfill the said requirements.

<sup>8</sup> There are several levels to this threat which I will explore later in this paper, but in brief—the protection seeker is seen as a threat to the sovereign power of the State, to the cohesion and integrity of societies within the State, and perhaps as direct competitors to welfare claims of the citizens of the State.

## **I. DEFICIENCIES IN CEAS, THE CURRENT PROTECTION SYSTEM**

The CEAS consists, in principle, of a harmonization of the rules of recognition of refugee status of the various EU member states and is premised on a full and inclusive application of the Geneva Convention. In addition, and as elaborated at the Tampere European Council<sup>9</sup> in 1999, the CEAS codifies subsidiary forms of protection to any person in need of international protection. Both strands are covered by a single Council Directive (the Qualification Directive),<sup>10</sup> formally adopted by the Council on April 29, 2004. At first glance, this codification appears to expand the Geneva Convention definition of refugee status by extending the principle of non-refoulement (which ensures that individuals are not sent back to persecution) to other situations of ill treatment. However, subsidiary protection, as its name indicates, is a protection mechanism which is inferior to Convention protection both with respect to its temporary nature and the quality of social rights and benefits provided during the period of stay. Although the formal introduction of a harmonized complementary protection scheme is a considerable advancement in the traditional understanding of asylum, this particular scheme has been restricted to the pooling together of the most commonly accorded forms of complementary protection in national jurisdictions (requirements derived from international obligations). It has not created new *ratione personae* protection obligations.<sup>11</sup> A further protection mechanism, temporary protection, exists but is outside of the traditional asylum application procedure. Temporary protection is provided to groups of third country nationals in situations of mass influx.<sup>12</sup> The conditions of protection are considered independently of the Qualification Directive, even though application

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<sup>9</sup> Conclusion 14 (Oct. 1999).

<sup>10</sup> *Supra* note 5.

<sup>11</sup> In effect the Directive does not cover all the forms of persecution that have, in some jurisdictions, been proven to necessitate international protection.

<sup>12</sup> *Supra* note 6.

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for asylum or subsidiary protection is allowed at any time during the temporary period of stay. The primary purpose of this emergency measure is to alleviate the administrative burden on member states when large groups of displaced persons request shelter in their territories. The following three sections will unpack the contents of each protection status to demonstrate their inconsistencies and overlap.

### **II. REFUGEE STATUS UNDER THE GENEVA CONVENTION**

Article 1A(2) of the Geneva Convention states that a refugee is a person who “owing to a well founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or, owing to such fear, unwilling to avail himself of the protection of the country of his nationality.”

There are several hurdles to overcome when applying for refugee status under the Convention. First, the original intent of the phrase “well founded fear” was to focus attention on the conditions in the state of origin and thus on the possibility of an individual encountering ill treatment upon return. The test for deciphering “well foundedness” was said to be an objective one. However, it has since been established that the experiencing of fear is usually a subjective phenomenon. Thus, the determination of refugee status primarily requires an assessment of the applicant’s statements which in turn need to be backed up by an objective element.<sup>13</sup> Second, the applicant must meet the persecution standard, by far the most important section of the refugee definition. It is the seriousness of the nature of the ill treatment which allows the individual to qualify as a refugee.

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<sup>13</sup> OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES Ch. II B (Reedited 1992, 1979) [hereinafter UNHCR HANDBOOK].

The term is infamously difficult to interpret in the abstract since it is difficult to classify the types of treatment severe enough to merit the term “persecution.” James Hathaway suggests a definition of persecution that has since been accepted universally. According to Hathaway, persecution is the “sustained and systemic violation of basic human rights demonstrative of a failure of state protection.”<sup>14</sup> Thus, the threat must be directed to an individual’s basic human rights. It must also be conducted in a manner which demonstrates a high degree of harm and be constitutive of a *long term violation* (rather than short spells of ill treatment). Furthermore, Hathaway reiterates the necessity of a link to the state of origin even though the persecution need not stem from the state.<sup>15</sup>

The emphasis on basic human rights is problematic. Although it is unquestionable these rights ought to be of primary concern, they are not alone in creating the substantial fear or suffering which justifiably leads persons to flee their homes. The issue of persistence is the other important limitation to the persecution threshold and is one of the most commonly used factors to prevent entry and protection.<sup>16</sup> Finally, under the Geneva Convention, “the individual or group must show a well founded fear of persecution *over and above the risk to life and liberty inherent in civil war* (emphasis added).”<sup>17</sup> This need to show a differential impact goes against any sensible understanding of the conditions affecting a person’s safety. Nevertheless, individuals fleeing from armed conflict or natural disasters are excluded from the refugee definition.

The third and final element comprising the refugee definition is the need to establish a well founded fear of persecution based on the reasons given in

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<sup>14</sup> JAMES HATHAWAY, *THE REFUGEE LAW AND STATUS* 101 (1999).

<sup>15</sup> UNHCR Handbook, paragraph 51 established that the persecution did not have to emanate from the state. This has been cemented in the CEAS by articles 9(1) and 11(2)(a).

<sup>16</sup> *See e.g.*, *Ravichandran v Sec’y of State for the Home Dep’t* [1996] Imm AR 97 (emphasizing the persistence of harassment despite the acceptance that a considerable threat of violation existed).

<sup>17</sup> *See e.g.*, *Ex parte Adan*, (1998) 2 All ER 453, 455 (H.L.) (appeal taken from Eng.).

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article 1A(2) of the Geneva Convention. The protection seeker cannot merely establish the occurrence of persecution per se—the persecution must be caused by his or her race, religion, nationality, membership to a particular social group or the holding of a political opinion. “It is immaterial whether the persecution arises from any one of these categories or from a combination of two or more of them. Often the applicant himself may not be aware of the reasons for the persecution feared.”<sup>18</sup> This is an exhaustive list of which the first three are concrete and precise categories leaving no leeway for expansive interpretation. The latter two have, however, been expanded over the years to include those persons that technically fall outside Convention grounds but to whom it would be unconscionable not to provide protection. Membership to a social group normally comprises of persons of similar background, habits or social status and can frequently overlap with the race, religion and nationality grounds. It may also constitute a group which displays disloyalty to the Government due to its political outlook or economic activity. It is, however, not enough to simply substantiate belonging to a particular group. The asylum seeker must also prove that this membership constitutes a sufficient ground to fear persecution.<sup>19</sup>

In deciding who merits categorization as a refugee, some commentators have argued that, on the one hand, the list provided in the Geneva Convention should be seen as “clarifying certain elements in the more traditional grounds for persecution.”<sup>20</sup> Others contend that it should provide a safety net for cases relating to gender, sexual orientation, and voluntary associations that cause one to be subjected to (or fear) persecution. The political opinion ground tends to

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<sup>18</sup> UNHCR HANDBOOK, *supra* note 14, ¶¶ 66 & 67. It is worth noting that it is up to the agents investigating the facts of the case to ascertain whether one or more of the Convention grounds are fulfilled.

<sup>19</sup> *Id.*, ¶¶ 77-79.

<sup>20</sup> Guy Goodwin Gill, *Entry and Exclusion of Refugees: The Obligations of States and the Protection Function of the Office of the UNHCR*, 3 MICH. Y.B. INT’L LEGAL STUD. 291, 297 (1980).

overlap with the “clarifying argument.” It requires an individual to prove that he or she not only holds a political opinion distinct from the one held by the government, but that such an opinion is known to, and not tolerated by, the Government.<sup>21</sup> The beneficiaries of this provision have increased considerably over time with attempts to loosen Geneva Convention criteria.<sup>22</sup>

In addition to the various difficulties with regard to proving refugee status under the Geneva Convention outlined above, there is a further complication: the onus lies with the protection seeker alone. The desire to maintain the exceptional nature of refugee status is thus apparent. It has been suggested by many that refugeehood should be recast in a manner which is consonant with modern political realities and which genuinely enables national governments to conceive of refugee protection as a necessary humanitarian act.

### **III. A THIRD COUNTRY NATIONAL UNDER THE SUBSIDIARY PROTECTION REGIME**

Two decades ago, two leading scholars of international refugee studies disagreed as to the relevance of the state practice where protection was provided to non-Convention refugees (defined at the time as *de facto* refugees). Kay Hailbronner<sup>23</sup> characterised the debate as “wishful legal thinking.” He argued that the practice was neither extensive nor uniform enough to be described as providing international protection for persons outside the scope of the Geneva Convention. In sharp contrast, Guy Goodwin Gill foresaw a new class of refugees being recognized via customary international law. He was of the opinion

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<sup>21</sup> UNHCR HANDBOOK, *supra* note 14, ¶¶ 80-86.

<sup>22</sup> This has been captured in Article 11(2)(b) of the Qualification Directive where it states that it may be sufficient for the persecutor to believe that an individual holds a particular political opinion, regardless of the truth of the matter. Thus whether the grounds of persecution are genuine or not is immaterial.

<sup>23</sup> Kay Hailbronner, *Non-refoulement and Humanitarian Refugees: Customary International Law or Wishful Legal Thinking?* 26 VA. J. INT'L L. 857, 869 (1986).

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that the principle of non-refoulement implied a level of commitment (albeit low) to providing (at least) temporary refuge to those non-Convention displaced persons facing imminent danger.<sup>24</sup> The crux of this dispute lay in the national and administrative discretion with regard to according humanitarian and de-facto assistance. Hailbronner saw this discretion as reason enough to deny that the refugee definition had been broadened. Goodwin-Gill claimed that the very existence of the de facto system demonstrated a growing awareness (and ad hoc implementation) of a non-Convention protection mechanism.

The European Union, since the adoption of the Qualification Directive, seems to have opted for the latter understanding by promoting minimum standards of subsidiary forms of protection. It has set out, along the same lines as the Geneva Convention, the scope, reception conditions and cessation clauses of a complementary protection regime in an attempt to: (a) harmonize European Union member state legislation in the field of asylum; and (b) (perhaps more implicitly) remedy the narrowness of the Geneva Convention regime. This being said, the Explanatory Memorandum of the Qualification Directive specifies that such complementary protection assumes the primacy of the Geneva Convention because it considers the latter suitable and flexible enough to provide protection in line with the displacement flows of today. In the same breath, it holds that the purpose of the Directive is to account for the needs of all persons requiring international protection, therefore implying, on some level, the inadequacy of the Geneva Convention.

At first glance there seems to be a certain malaise in the very construction of a subsidiary protection regime. By asserting the primacy (and said adequacy) of the Geneva Convention and according a lower status to the subsidiary regime,

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<sup>24</sup> Guy Goodwin Gill, *Non Refoulement and New Asylum Seekers Commentary*, 26 VA. J. INT'L L. 897, 898 (1986). "The central thesis of this paper is that the essentially moral obligation to assist refugees and provide them with refuge or safe haven has, over time and in certain contexts, developed into a legal obligation (albeit at a relatively low level of commitment)."

the Council has managed to protect national territories from an increase in successful applications for refugee status (the highest level of protection available) while complying with international humanitarian obligations by harmonizing an alternative, albeit secondary, protection system.<sup>25</sup>

The defining feature of the subsidiary protection regime is that it does not create a new field of application but simply codifies existing international provisions (predominantly article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and article 3 of the UN Convention Against Torture)<sup>26</sup> which relate to asylum and, more importantly, have been used by European member states to provide complementary forms of protection. What remains to be seen is the Directive's level of adherence to international obligations with regards to the degree and types of harm suffered and the level of protection provided.

Article 2(e) of the Directive sets out the scope of protection: "Person eligible for subsidiary protection means a third country national...who *does not qualify as a refugee* but in respect of whom *substantial grounds* have be shown

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<sup>25</sup>Thomas Spijkerboer, *Subsidiarity in Asylum Law. The Personal Scope of International Protection*, in *SUBSIDIARY PROTECTION OF REFUGEES IN THE EUROPEAN UNION: COMPLEMENTING THE GENEVA CONVENTION?* 29 (Daphne Bouteillet-Paquet ed., 2002) (arguing that the system of subsidiary protection as it is developing in the EU consists of reinventing the Geneva Convention by defining *in* to another protection category, those categories that have traditionally been defined *out* of the scope of the Convention over the course of the past five decades. The total scope of protection remains roughly the same, the scope of administrative discretion and the level of rights accorded to protected persons changes).

<sup>26</sup> See European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Mar. 19, 1985, Europ. T.S. No. 005 ("No one shall be subject to torture or to inhuman or degrading treatment or to punishment."). Article 3 establishes a predominantly negative right backed up by a positive obligation in Article 1: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention." See also Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Nov. 26, 1987, G.A. Res. 39/46, U.N. GAOR, 39th Sess. at 85, U.N. Doc. A/39/51 (1984) ("No state party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." This is the only explicit prohibition of refoulement relevant to subsidiary protection.).

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for believing that the person concerned, if returned to his/her country of origin . . . would face a *real risk of suffering serious harm* as defined in article 15 . . . and is unable, or owing to such risk, is unwilling to avail himself or herself of the protection of that country (emphasis added).”

Article 15 outlines the three forms of “serious harm” that can mobilize subsidiary protection: (a) death penalty or execution; (b) torture or inhuman or degrading treatment or punishment in his or her country of origin, or in the case of a stateless person, in his or her country of habitual residence; or (c) serious or individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

It is important to note that a protection seeker needs to exhaust his or her Geneva Convention rights before being considered for subsidiary protection status. Thus, the complementary protection regime is in fact constructed as a default measure for an individual not falling within the refugee category. There are several important disadvantages to such a hierarchical system. First, by pronouncing the primacy of the Geneva Convention, and, thus, the secondary nature of subsidiary protection, justification has been provided for according lesser rights to “subsidiary protectees.” The quality of rights provided is somewhat lower than those given to refugees, especially with regard to the right to employment and cessation of protection. Such a distinction guarantees an exasperation of the social exclusion of the subsidiary protectees. Subsidiary protection is a temporary measure where stay is initially permitted for one year and renewable only if qualifying conditions persist (art 16). Subsidiary protection, therefore, in contrast with the five year residence permit (renewable automatically) provided for refugees under the Geneva Convention, is a considerably different (and greatly downgraded) protection status. Not only does such a measure trivialize the genuine protection needs of a non-Convention protection seeker, but it also permits national jurisdictions to feed most

applications through the subsidiary protection procedure in order to lower obligations towards the individuals and enforce a policy of return.<sup>27</sup>

On one level there is a need to caution against downgrading traditional refugee status at the expense of the subsidiary protection regime exactly because of the difference in the rights provided. On another level it is crucial not to view non-Convention protection seekers as less worthy of protection than qualifying refugees. The European Union should ensure that both regimes are set on equal footing in order to do justice to the very nature of a complementary system and to ensure that the subsidiary protection system does not become the short cut measure for member states avoiding the provision of adequate protection to deserving candidates. Moreover, creating two unequal systems, premised on the latter being applicable only once the former is not, further exasperates the administrative burden on states trying to process applications in an efficient and effective manner.

A second critique relates to the the burden of proof as set out by article 2(e), which uses the standard of “*real risk of suffering serious harm*” to accord protection. This is directly derived from the ECHR’s jurisprudence on article 3 of the ECHR and is said to be stricter than the “well founded fear” test<sup>28</sup> by requiring a higher threshold of proof. Remaining somewhat unclear is whether the added requirement of providing “substantial grounds” for the risk of harm constitutes an objective test alone or whether there is still a subjective element to the assessment. The absence of the “fear” criterion (which formed the basis for the subjective test) suggests the test is solely objective. However, the “substantial

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<sup>27</sup> The Qualification Directive allows for an early cessation of refugee status if the Council decides that the conditions of protection have ceased to exist. *See* Qualification Directive, *supra* note 8, art. 13. This is a new and somewhat controversial development in the creation of a CEAS. I intend to use this development in reconceptualizing the definition of refugee in the second half of this paper.

<sup>28</sup> The initial proposal contained the latter criterion (article 5(2)) but it was cut out during the latest round of amendments.

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grounds” requirement is borrowed from article 3(2) of the 1984 UN Convention Against Torture and Other Inhuman or Degrading Treatment or Punishment, and is defined as requiring “the competent authority to take into account all relevant considerations, including . . . a consistent pattern of gross, flagrant or mass violations of human rights.” Thus, the need for persistent harassment as well as harm to basic human rights (as per the persecution standard of the Geneva Convention) remains intact. Perhaps “all relevant considerations” will allow for a more flexible interpretation of risk—one that includes subjective fears. It is also unclear whether an individualized threat of harm is a necessity. Thomas Spijkerboer claims that no persecution standard is required and thus no individualized threat is necessary.<sup>29</sup> This new and stricter standard of proof will only complicate and add to the inefficiency of a hierarchical common asylum system.

A third element of concern is article 15’s list of what constitutes “serious harm.” Reducing the scope of protection to such narrow and overly precise categories limits the scope of the complementary protection regime. Not only does it fall short of existing international obligations (see below) but it also ends any hope of interpreting the subsidiary status expansively. The first category, death penalty and execution, replaced the “violation of a human right” category in the original proposal. The latter, of course, touches on a wider and more flexible range of non-derogable rights. The second category of “torture, etc.” is directly drawn from article 3 of the ECHR and constitutes the most commonly invoked ground for providing complementary protection in national jurisdictions where there is leeway to interpret broadly. The final category of “serious and individual threats to civilian life or person due to indiscriminate violence in situations of international or internal armed conflict” replaces the more expansive definition in

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<sup>29</sup> Spijkerboer, *supra* note 27, 39.

the original proposal where threat to freedom was included and an individualized threat was not necessary.<sup>30</sup>

The reduction in scope of the grounds constituting serious harm reflects the uneasiness states feel toward broadening protection. This uneasiness is felt despite the fact that persons falling outside the narrow scope of the Geneva Convention may be equally deserving of equitable protection.<sup>31</sup>

The fact that the Qualification Directive has not created new *ratione personae* protection for subsidiary measures, and that it has not rethought the scope nor the relationship between the different strands of protection, will cause a great number of practical difficulties and injustices in the future. One of the main concerns of the UNHCR<sup>32</sup> was that certain categories of protection seekers that it deemed to be Convention refugees would be accorded complementary and thus secondary protection due to the unnecessary distinction between Convention and non-Convention status. For example, those persons fleeing *persecution* in areas of ongoing conflict will most probably be treated as “victims of indiscriminate

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<sup>30</sup> Ironically, the three categories of the Original Proposal of July 2001 also failed to meet international obligations—despite ECRE and Human Rights Watch cautioning in this regard, the members of the Council chose to further reduce the scope of article 15.

<sup>31</sup> The essential changes that took place between the Proposal for protection and the re-negotiated and adopted version demonstrate the lack of understanding of the need for complementary protection. The amended text on the whole reduces the scope of beneficiaries of subsidiary protection in comparison with the original Proposal: In particular article 5(2) of the original Proposal has been deleted from the final Directive and replaced in part by article 2(e). Article 5(2) read: “... subsidiary protection *shall be granted* to any third country national or stateless person who does not qualify as a refugee ... and who owing to a *well founded fear of suffering serious and unjustified harm* as described in article 15, has been forced to flee ...” Thus, by using the words “shall be granted” the original proposal made clear that Member States are under an obligation to codify existing international human rights obligations and the best practice elements of different systems in MS’s. Article 2(e) refers only to persons “*eligible for subsidiary protection*” which is distinct from the obligation in article 5(2) to grant protection.

<sup>32</sup> *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime*, U.N. HCR Standing Comm., 18th mtg., at 18, U.N. Doc. EC/50/SC/CRP (2000) (commenting on the general status of complementary protection prior to the proposal for the Council Directive being written).

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violence”(as per art 15(c) of the Directive) and only accorded subsidiary protection status.<sup>33</sup>

This overlap will be further aggravated with the introduction of article 7(d) (which allows for gender-related persecution or serious harm) and article 9 (which allows for the persecution or serious harm to be caused by non-state agents). Both these areas constitute the main ousting clauses for denying Convention status. Although it is good news that such expansions in according refugee status have been codified, the fact that they are within subsidiary protection status is troubling because they are likely to cause a further shift in qualification from refugee status to subsidiary status.<sup>34</sup>

What can be seen to be developing in the European Union, therefore, is a partially harmonized regime of minimum standards for granting refugee or subsidiary protection status. What remains outside the bounds of this Directive and, therefore, outside the Common European Asylum system is protection on compassionate grounds.<sup>35</sup> These are grounds left up to national jurisdictions (“residual domestic competency.”)<sup>36</sup> The national jurisdictions have the

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<sup>33</sup> A further problem would be the confusion in trying to distinguish between political persecution (as per the refugee status) and inhumane treatment (as per the subsidiary status).

<sup>34</sup> Empirical research conducted by the UNHCR shows that most EU states grant complementary protection much more readily than Geneva Convention status. Between 1997-1999 the following countries accorded complementary protection more often than refugee status: Denmark, Finland, Germany, Greece, the Netherlands, Portugal, Spain, and Sweden. See JANE MACADAM, *NEW ISSUES IN REFUGEE RESEARCH* at 7, UNHCR Working Paper No. 74 (2002). This divergence not only illustrates the different interpretations of the Geneva Convention article 1A(2)’s meaning of refugee but also the desire to protect outside of the burdensome Geneva Convention regime.

<sup>35</sup> This is clearly stated in the Preamble: “Whereas those third country nationals or stateless persons, who are allowed to remain on the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate grounds or humanitarian grounds, fall outside the scope of this Directive.” Qualification Directive, *supra* note 8, at point (9), p L304/12.

<sup>36</sup> GREGOR NOLL, *FIXED DEFINITIONS OR FRAMEWORK LEGISLATION? THE DELIMITATION OF SUBSIDIARY PROTECTION RATIONE PERSONAE* at 1, UNHCR Working Paper No 55 (2002) (adding cautiously that such a distinction between systems is only problematic where the “compassionate” grounds engage international obligations and are left to domestic implementation. This viewpoint only reconfirms the status of the EU protection being about “minimum standards” and about codifying, rather than creating, alternative forms of protection).

discretion to decide whether individual cases merit protection as a result of moral or practical considerations rather than international obligations.<sup>37</sup> The problem with having competence divided in such a manner is that the harmonized grounds may, in certain member states, have a smaller scope of application than the additional measures of protection already in place in national jurisdictions. The main concern, therefore, is that minimum standards of the Qualification Directive may be seen by member states as ceiling limits and their implementation may consequently lower the current standards of protection.

A survey conducted by the Council of the European Union has indicated that a number of member states offer protection on grounds, broadly categorized as complementary protection, which are not covered by the Directive. However, the meaning of subsidiary protection is diverse, making comparisons between national regimes difficult.<sup>38</sup> What is evident is that almost all forms of additional

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<sup>37</sup> See UNHCR Executive Committee on Complementary Forms of Protection, U.N. Doc. EC/50/SC/CRP.18, at 1, (2000) (defining "compassionate grounds" to be those based on practical considerations such as age, medical reasons, and family connections. In these cases removal is not possible because transportation is not feasible for one reason or another. Such persons are normally not asylum seekers, or have had their applications rejected. However, when I use the term "compassionate grounds," I mean to include all those persons in need of protection including those that are not covered by the Qualification Directive but should be protected under international law. In theory these areas should not exist since the Directive should not fall short of such international obligations – however the fact that they do should be reason enough to allow for them to be considered).

<sup>38</sup> See e.g., Council of the European Union, *Compilation of Replies Received to a Questionnaire on Alternative Forms of Protection to Refugee Status Under the Geneva Convention*, 12261/00 CIREA 64 (Oct. 12, 2000). No information was provided for Ireland or the Netherlands. Belgium: temporary protection to Bosnians or Kosovars or persons from regions where conflict is in progress; Denmark: temporary protection for reasons similar to those referred to in the Geneva Convention or for other serious reasons which give rise to a well founded fear of persecution or similar injustice; Germany: temporary protection to persons fleeing regions of war or civil war, deportation not allowed when threat of torture, risk of death penalty or for reasons pursuant to the ECHR, also discretionary power to grant relief from deportation on humanitarian grounds (real substantial risk to person, life or liberty) or for reasons of international law; Greece: temporary protection on humanitarian grounds and for persons who have fled to Greece for reasons of force majeure; Spain: protection to rejected Convention applicants who are fleeing from serious conflicts or disturbances of a political, religious or ethnic nature, or on humanitarian and article 3 ECHR grounds; France: territorial asylum (victims of non-state persecution) or protection to persons fleeing from states of conflict or being subjected to inhumane or degrading treatment;

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protection are of a temporary nature. In fact, this desire to keep the subsidiary protection regime secondary (and thus temporary) to the Geneva Convention was the crux of negotiations. These negotiations took place for two and a half years and came to a head at the 30<sup>th</sup> March, 2004 Council meeting, at which point the Qualification Directive was fully realized. Germany indicated that it was willing to drop its objections on the condition that those people granted protection under subsidiary protection regimes would enjoy lesser rights than Convention refugees in terms of the length of residence permits and access to employment and health care.<sup>39</sup>

The issue of permanent residency is not without controversy in law. Nowhere in the Geneva Convention is it explicitly stated that refugee status is to be of infinite duration. The obligation is for states not to refoule back to persecution (article 33). For example, the Convention states that a change of circumstances in the country of origin would allow for the return of refugees (article 1C).<sup>40</sup> The practice in northern states to grant permanent admission has, therefore, been made notwithstanding the legal framework. It should be noted that the lesser developed southern states do not accord such long term status. As

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Luxembourg: temporary protection scheme for persons coming from regions of armed conflict, war or widespread violence; Austria: temporary protection for rejected applicants on the basis of non refoulement (discretionary) for reasons of inhumane or degrading treatment, or a threat to life or freedom; Portugal: temporary protection where serious insecurity owing to armed conflicts or systematic violations of human rights, and in situations of mass influx; Finland: protection for persons coming from states of conflict, inhumane or degrading treatment, human rights violations, and other humanitarian grounds; Sweden: protection for those who have a well founded fear of being a) sentenced to death or corporal punishment, b) subjected to torture or inhuman or degrading treatment, or c) in situations of external or internal armed conflict; UK: temporary protection as an "exceptional leave to remain" on art 3 ECHR grounds or for exceptional and/or compassionate circumstances.

<sup>39</sup> See *Ministers Agree on Common EU Asylum Policy*, Europa World (Feb. 4, 2004), at <http://www.europaworld.org/week171/ministers2404.htm>.

<sup>40</sup> See James Hathaway & Manuel A. Castillo, *Temporary Protection*, in *RECONCEIVING INTERNATIONAL REFUGEE LAW* 1-34 (James Hathaway ed., 1997) (presenting a full account of this argument). *But see* B.S Chimni, *From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems*, (UNHCR Working Paper No. 2 1999) (presenting a counter argument when considering the grounds for repatriation).

Hathaway and Castillo correctly note, “[t]hese shifts reflect the fact that the historical willingness of the North to equate refugee status with permanent admission has more to do with ideological solidarity and consistency with domestic immigration laws than with any principled view that permanent residence is the preferred answer to refugeehood.”<sup>41</sup> It is perhaps with these considerations in mind that the Qualification Directive has introduced this possibility of return for Convention refugees (article 13) should the circumstances in the countries of origin change.

#### **IV. STATUS OF PERSONS ACCORDED TEMPORARY PROTECTION IN SITUATIONS OF MASS INFLUX**

The third and final protection mechanism awarded by the CEAS is the right to temporary protection in situations of mass influx of displaced persons from third countries who are unable to return to their country of origin. The Temporary Protection Directive,<sup>42</sup> one of the first measures adopted after the Tampere European Council, has been set up as an emergency provision. It is independent of the Qualification Directive, as it is primarily concerned with the alleviation of the administrative burden on national jurisdictions in cases where it is simply not feasible to go through each individual application.<sup>43</sup> The beneficiaries of this protection scheme are, in particular, persons that have fled areas of armed conflict or endemic violence or those that are at a serious risk of systematic or generalized violations of their human rights (article 2(c)). However, it is important that such persons are seen to fall within the “mass influx” category—this can only be established by a Council Decision after

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<sup>41</sup> HATHAWAY & CASTILLO, *supra* note 41, at 3.

<sup>42</sup> See Temporary Protection Directive, *supra* note 6.

<sup>43</sup> See *id.* art. 2(a) (stating that this is particularly true “if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation”).

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examination of the scale of movements and a description of the specific groups of persons to whom the temporary protection shall apply (article 5). Thus, the burden of proof on the individual is fairly straightforward once it is proven that he or she falls within the identified group of individuals.

The duration of the protection is one year (article 4) unless the Council decides that the situation in the country of origin permits safe return prior to the expiration of the one year period (article 6(1)(b)). On the other hand, the Council may decide to extend the protection period for a maximum length of one year, should the reasons for fleeing persist. The conditions of reception are largely the same as those provided under the subsidiary protection scheme, except for the provision on the right to employment or self-employment (article 12). This article clearly states that “for reasons of labour market policies, Member States may give priority to EU citizens . . . who receive unemployment benefits.” The Directive also stipulates that the persons enjoying temporary protection may lodge applications for asylum at any time (article 17).

There is little substantive criticism to be made in relation to the provisions of this Directive. However, its very existence demonstrates, yet again, the need to create a more efficient and unified administrative system of asylum. Joan Fitzpatrick<sup>44</sup> outlines four reasons why a temporary protection regime is beneficial in the field of asylum. First, temporary protection serves as an interim response to large influx situations, thereby providing shelter and safety while a more durable solution is sought. Second, it entrenches a much needed gap-filling mechanism made necessary because the Geneva Convention does not recognize all forced migrants that should be granted international protection. Third, the fact that temporary protection is often associated with effective responsibility sharing and financial assistance for host states is a considerable pull factor in

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<sup>44</sup> Joan Fitzpatrick, *Temporary Protection of Refugees: Elements of a Formalised Regime*, 94 AM. J. INT’L L. 279, 287 (2000).

implementing such a scheme. Fourth, because of the possibility of obtaining assistance from other states, the temporary nature of the protection tends to be perceived as a strategy to shift refugee protection from the realm of law to that of politics. States find in temporary protection schemes a compromise between their obligation to provide humanitarian assistance and the necessary policy of return.<sup>45</sup> The temporary element is also present in the subsidiary protection scheme, which only accentuates the desire of host states to avoid providing long term protection. In practice, however, the possibility of applying for asylum or subsidiary protection status can promote the idea that temporary protection is just a “slow way of saying yes.” On the other hand, the beneficiaries of temporary protection in situations of mass influx would have to prove an individualized harm to fall within the category of subsidiary protection—in other words, fulfil the requirements of article 15 (c) of the Qualification Directive, which is very difficult to prove. This requirement was placed in the amendments to the original proposal because the ability of states to use the 1-2 year protection mechanism for large scale influx situations would be undermined if all beneficiaries could apply for subsidiary protection.

It is my argument that combining the three areas of protection demands a reconsideration of the priorities of providing assistance, which to date are temporality over the need for protection. The combination also enhances the necessity of creating a just system premised on a balancing of efforts within the Union. What this means in practice is that there is a need to reconsider the finality of the Geneva Convention status. If temporality is a bargaining factor then it ought to be used equitably within all three protection mechanisms. The absolute need to protect persons genuinely in need ought to be the topmost

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<sup>45</sup> See Council Directive 00/596/EEC, 2000 O.J. (establishing a European Refugee Fund as a solidarity measure to promote a balance in the efforts made by Member States in receiving and bearing the consequences of receiving refugees and displaced persons).

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priority in the creation of a common asylum system. Thus, the subsequent termination or continuation of this protection should be assessed equally for all protected third country nationals.

In terms of solidarity between states, it is important to assess how to distribute equal (but differentiated) responsibility between member states for all three systems of protection, and not just to situations of mass influx. Fitzpatrick has said that “a pivotal criteria should be, in addition to sheer numbers, the solidity and resiliency of the host states’ status determination system, its economic vibrancy, its absorptive capacity, and its social and cultural links to arriving migrants.”<sup>46</sup> It is also crucial to then analyze, define and justify in what circumstances, and under which exceptions, return needs to occur. One would assume that return in safety and with dignity would presuppose the existence of the following conditions<sup>47</sup>: respect for and compliance with the right to return by the country of origin; the existence of conditions which ensure the physical and legal safety of returnees; existence of an adequate infrastructure to allow the return to be sustainable, and allow for the availability of the basic necessities of life, including food, shelter and basic sanitary and health facilities; assurance of non-discrimination and respect for other fundamental rights of returnees; and, finally, that return would form part of an international process or mechanism.<sup>48</sup>

If the creation of a harmonized system of asylum in the European Union is premised on the need to control forum shopping (where some member states are more attractive than others due to the quality of protection they provide), it is also, and more explicitly, based on the desire to provide protection for a reduced amount of time. Creating a system of asylum that only acknowledges the

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<sup>46</sup> NOLL, *supra* note 37, at 10.

<sup>47</sup> *Id.* at 14.

<sup>48</sup> *Id.* (forming the basis of a following chapter on the conditions of returning third country nationals).

insufficiency of the Geneva Convention with temporary gap-filling measures not only undermines the overall protection needs of all displaced persons, but also provides an unfair advantage to those lucky enough to fall within the narrow Convention criteria. Would it not be more just and equitable to put forward a system that considers the circumstances of all protected persons and decides which meet the requirements of remaining under protection and which are able to return?

It is my understanding that the human security threshold will not only bring together the protection systems so as to allow equal consideration and protection measures for all persons in need of it, but it will also end consideration of the Geneva Convention as the “once and for all” protection regime.

## **V. INTRODUCING THE “HUMAN SECURITY” BASIS**

I propose to use the human security construct as the legal basis for providing asylum<sup>49</sup> by introducing a two-track approach for according protection. The first track consists of *specific provisions* which prohibit refoulement and derive from those human rights that are most frequently invoked in the context of asylum. The second track offers a *framework provision* which guides the decision-maker’s assessment with regard to rights other than those catered to in the specific provisions. The former will simply be a concrete manifestation of the latter and thus the quality of right provided will be the same.<sup>50</sup>

The specific provisions will, of course, directly relate to the Geneva Convention as well as subsidiary forms of protection. Subsidiary protection, in

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<sup>49</sup> For the purpose of this section, I intend asylum to be interpreted holistically—that is to say that it includes the Geneva Convention definition, the mass influx circumstance as well as complementary forms of protection.

<sup>50</sup> This approach has been borrowed from Gregor Noll in his analysis of the construction of a subsidiary protection scheme. NOLL, *supra* note 37, at 4-5.

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this context, will be interpreted beyond the provisions put forth in the Qualification Directive. Temporary protection in cases of mass influx will remain distinct from the “specific provisions” of asylum as it is more of an administrative measure. The framework provision, will consist of clear guidelines relating to the assessment of alternate situations. Generally speaking, it is the danger of a violation of the protection seekers’ “human security” in the state of origin that constitutes the necessary condition for granting asylum.

The purpose of this change will be to further the principle of non-refoulement by putting forward a more expansive admission policy and placing the burden to disprove the need for protection on the state. The individual protection seeker will simply need to prove that he or she has been subject to, or is at the risk of being subject to, a violation which impinges on his or her human security. It is, therefore, up to the Member State to demonstrate why the protection seeker does *not* fall within the specific provisions and is not protected under the guidelines provided in the framework provision.<sup>51</sup> As such, the human security threshold transforms the negative obligation not to refole into a positive obligation to protect unless proven otherwise.

I will begin my analysis by defining “human security” within the security studies discourse to demonstrate the lucidity and malleability of the term. I will then outline the evolution of asylum within the security construct to demonstrate how asylum has often been unfairly perceived. Next, I will argue that using the human security basis to reverse this bias is justified. I will end my analysis with a more coherent outline of the two-track approach. My overall aim is to demonstrate that the new threshold is not intended to increase the number of protection seekers accorded refugee status (although this will invariably be an outcome). Rather, its goal is to avoid the scattering and abuse of third country

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<sup>51</sup> I will deal with this more thoroughly in the last section of this paper. *See infra* Part IX.

nationals by an uneven and inequitable distribution system that is divided into different areas of protection and competence (domestic or European).

## **VI. THE SCOPE OF HUMAN SECURITY**

The point I wish to make here is quite simple. On the one hand, I want to define human security as a construct that incorporates all forms of threats to individuals. This does not mean that all forms of harm will necessarily result in protection. I simply argue that it is important to deliberate more freely on the personal circumstances that may cause sufficient harm and instigate departure. On the other hand, I want to justify the use of the security discourse in this context (as opposed to, for instance, using a “human rights” threshold) by explaining the dynamics in which asylum has been securitized to date (to the disadvantage of the asylum seeker), and how the use of the security construct to advantage asylum seekers will force this presupposition to be reconsidered in a more positive light.

Human security makes the individual the referent object. The concerns it takes on board, however, are difficult to define in absolute terms since it touches upon a very large range of issues. The term “human security” has been used in an ad hoc manner to define the inward moving trend of humanitarian development mandates from “security through armaments to security through human development, from territorial security to food, employment and environmental security.”<sup>52</sup> The pursuance of security through state authority has been shifting to a more textured understanding of the role of societies, communities and cultures in shaping a more secure environment for individuals. Furthermore, individual interests are no longer being muted. It is no longer acceptable to think that the

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<sup>52</sup> *United Nations Development Programme, New Dimensions of Human Security*, U.N. Development Programme, Human Development Report 1993 at 24 (1993).

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protection of the prerogatives of a state or a community equates the protection of its citizens. Thus, the individual has come to the forefront of the debate, to be considered on his own merit.

The academic community is, however, reluctant to embrace the concept out of fear that doing so might blunt the edges of an otherwise sharp analytical tool. Security concerns have traditionally been premised on the maintenance of national sovereignty and territorial integrity (the basic principles of international relations). The expansion of the security discourse to include societal security concerns (with nations or societal groups as referent objects and the preservation of identity as the value at risk) is a result of the perception that nations and states are no longer coterminous<sup>53</sup> and that there is, therefore, a need to rethink the primacy of national security concerns. Securitization is concerned with the presentation of a particular valued object as threatened. It is the product of social processes rather than predetermined objective standards. “It brings out the changes that take place in the world as well as in us, in what we think and how we perceive things.”<sup>54</sup> Thus, more recently, the individual has been considered as a relevant actor in the security discourse.

Despite the emergence of a strong consensus on the need to widen the concept to include human security, disagreement persists about where to draw the line. To expand the notion of security too far, to include the absence of all types of problems, for example, would be impractical. To dissolve the accuracy of the security discourse to include an all encompassing focal point would be dangerous.

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<sup>53</sup> This discourse was most successfully promulgated by the Copenhagen Peace Research Institute where societal security was posited in discussion of identity politics and the idea of trust. There is a shift in focus from abstract individualism and contractual sovereignty to culture, civilization and identity. Thus, the societal security discourse moves away from an objectivist and rationalist approach to more interpretative modes of analysis. See OLE WEAVER, ET AL., *IDENTITY, MIGRATION AND THE NEW SECURITY AGENDA IN EUROPE* (1993).

<sup>54</sup> Ken Booth, *Security and Self—Reflections of a Fallen Realist*, in *CRITICAL SECURITY STUDIES* 105 (Keith Krause & Michael C. Williams eds., 1997).

What, then is actually understood by human security? One interpretation has been provided by Barry Buzan, in which he outlines four basic areas of threat: physical threat (e.g. pain, injury, death, etc.), economic threat (e.g. seizure or destruction of property, denial of access to work, etc.), threat to rights (e.g. imprisonment, denial of normal civil liberties, etc.) and threat to position and status (e.g. demolition, public humiliation, etc.).<sup>55</sup> Ramesh Thakur, on the other hand, links human security with quality of life and states that it is a core element of human rights.<sup>56</sup> Expanding the term to include the maintenance of “quality of life” suggests a focus on economic issues. Thus, concerns such as demographic pressures or diminished access to work would be included in Thakur’s definition. Other interpretations have concentrated on the tools available to individuals for maintaining their security: “human security is achieved when and where individuals and communities have the options necessary to end, mitigate or adapt threats to their human, environmental and social rights.”<sup>57</sup> Furthermore, some have preferred to narrow the scope by relating human security to human dignity.<sup>58</sup> Others have opted for all encompassing definitions: “all types of security which involve human individuals and/or groups protected by, or protecting against, all kinds of threat found in their human environments.”<sup>59</sup> Amartya Sen, in a report presenting his preliminary findings for a project on “Human Security and Development” coordinated by the United Nations Commission on Human Security, claimed that “Human Security was seen as indivisible with the element of dignity . . . and having a universal dimension. Human Security can be

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<sup>55</sup> BARRY BUZAN, *PEOPLES, STATES AND FEAR* 37 (Harvester Wheatsheaf ed., 1991).

<sup>56</sup> Ramesh Thakur, *Human Security Regimes*, paper prepared for the workshop on Human Security, University of Queensland, Brisbane, September 3-4, 1998, at 16, available at [http://www.hsph.harvard.edu/hpct/events/hsworkshop/comparison\\_definitions.pdf](http://www.hsph.harvard.edu/hpct/events/hsworkshop/comparison_definitions.pdf).

<sup>57</sup> Steven Lonergan et al., *The Index of Human Insecurity*, VISO Bulletin Issue No. 6 (Jan. 2000).

<sup>58</sup> Hans Van Ginkel & Edward Newman, *In Quest of “Human Security,”* 14:1 JAPAN REV. OF INT’L AFF. 79 (2000). Human dignity may, in effect, be threatened by factors such as fear, conflict, ignorance, poverty, social and cultural deprivation and hunger.

<sup>59</sup> ELLEN LAMMERS, *REFUGEES, GENDER AND HUMAN SECURITY* 55 (1994).

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understood as the protection and preservation of human survival and daily life . . . and also the avoidance of indignities that can result in injury, insult and contempt as well as the participation and empowerment of individuals and communities.”<sup>60</sup>

The United Nations Development Program’s (UNDP) Human Development Report proposed a unique definition based on the pillars of “freedom from fear” and “freedom from want,”<sup>61</sup> thus continuing the trend of expansive interpretations. This was criticized as being “too vague, not objectively measurable, too woolly, too encompassing and lacking specification.”<sup>62</sup> The UNDP has since attempted a more refined definition in the 1994 Human Development Report<sup>63</sup> in an attempt to capture the post-Cold War peace dividend and redirect resources towards the development agenda. The definition itself is an ambitious summation of seven dimensions of security: economic, food, health, environment, personal, community, and political. These seven areas constitute the most commonly construed understanding of human security.

Disagreement on the precise scope of human security is apparent. When speaking generally, the consensus seems to be to define the term as widely as possible. However, the scope of human security tends to be reduced, and become more precise, when considered with regard to a particular situation. In the case of asylum, it is the transition from the primacy of “threats to basic human rights” to

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<sup>60</sup> Report: Third Meeting of the Commission on Human Security, U.N. Comm’n on Human Security, 3d mtg. (2002), Haga Castle, Stockholm (June 9-10, 2002) at 4. By way of background information, the Commission on Human Security convened to discuss issues on the relationships between human security, human rights and democracy. The findings of two main research projects were presented: Amartya Sen’s on “human security and development” and Sadako Ogata’s (former UNHCR) on “human security in conflict situations.”

<sup>61</sup> Millennium Report of the Secretary-General of the United Nations Chs. 3-4, (2000), *available at* <http://www.un.org.millennium/sg/report/full.htm>.

<sup>62</sup> Raquel Freitas, *Human Security and Refugee Protection After September 11: A Reassessment*, 20 REFUGEE 4, 36 (2002).

<sup>63</sup> UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1994, at Chapter 2, p24/5.

the more refined understanding of the circumstances that affect one's security which interests me.

I am, of course, fully aware of the importance of distinguishing those areas that necessarily fall outside the realm of asylum, despite their effect on the security of an individual. For instance, persons in absolute and immediate need of protection are distinct from those economic migrants that wish to better their financial opportunities. Such divisions need to be made very clear in the framework provision of the proposed system, bearing in mind that the purpose of an expanded refugee definition is assessment of the circumstances of departure without prejudice. Thus, notice should be given to the fact that certain economic conditions affecting a person's livelihood are often linked with, or the result of, the forces of nationalism, ethnic intolerance, widespread violations of human rights, and undemocratic governance. These should not be ignored when assessing an individual's plight.

The subtlety lies in the ability to assess the circumstances that affect individual security because factors such as life, health, status, wealth, and freedom are far more complicated than the security of objects. They require global and contextual underpinnings. In truth, the aim of most definitions of human security is to transcend the dominant orthodox paradigm that views critical concerns regarding basic needs or human rights as problems of interstate politics. Definers of human security would like to reinstate these concerns within the realm of the ethical and the moral.<sup>64</sup>

The challenge is to move beyond abstract, all encompassing exhortations of human security and focus on specific solutions for specific political issues. If securitization is confined to vulnerabilities that threaten state structures alone, then problems such as civil unrest, famine, ecological disasters, and cultural disparity

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<sup>64</sup> See Jef Huysmans, *The European Union and the Securitisation of Migration*, 38 J. COMMON MKT. STUD. 751, 760 (2000).

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would not be given weight. (Unless they had political outcomes that affected the survivability of state boundaries.)<sup>65</sup> In relation to the very purpose and cause of asylum, such a rupture from the reality of problems would be fatal to the progression towards an equitable asylum regime. An all inclusive definition of human security (with the necessary caveats) would, contrary to fostering obscurity, be advantageous to understanding refugee issues. It would clarify the rigid separation between material and non-material dimensions of insecurity. It is particularly applicable in contexts of transition and change and, thus, can be seen as a dynamic concept which allows for the study of how past, present, and future are tied together in people's perceptions of (in) security.

### **VII. THE JUSTIFICATION OF HUMAN SECURITY: THE SECURITIZATION OF ASYLUM**

In mobilizing asylum seekers as referent objects in the security dialogue, attention needs to be paid to the preconceptions of asylum being a *cause* of insecurity. In this section I clarify why asylum seekers are perceived as security threats. The benefit of such an analysis is to provide a better understanding of the reasons for restrictions in the field of asylum. This analysis in turn will help in the construction of a system which balances the needs of protection seekers with those of the host state, its society, and its citizens.

Security, as traditionally understood, is premised on the need to maintain an ordered and integrated environment within the territorial boundaries of a nation-state. It is the role of the state to protect the economic, social, and cultural welfare of its citizens. In doing so it is necessary to define a community of citizens and its entitlements. As a result, state-centric conceptions of security

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<sup>65</sup> See Mohammed Ayoob, *Defining Security: a Subaltern Realist Perspective*, in IDENTITY, MIGRATION AND THE NEW SECURITY AGENDA IN EUROPE (1993), *supra* note 54.

necessarily perpetuate the inclusion-exclusion dichotomy where identity is premised on sameness. The State is therefore engaged in undertaking policing functions to protect its political community from real or imagined threats. This form of political organization presumes the threat to originate from other states (national security concerns) and non-citizens or aliens (societal security concerns). Thus, asylum has emerged in this arena as a system which impinges upon the sovereignty of a state (in relation to rules on citizenship) and is perceived as a threat to the very foundations of a state. Furthermore, and perhaps more critically, asylum seekers have become threats to the community on an economic, social, and cultural level. Their “forced” entry, protection, and integration throw off the feeling of oneness.

The development of the security discourse in relation to asylum was a reaction to the challenge asylum regulation posed to public order and domestic stability. An expansive asylum regime is, therefore, seen as an antithesis to the traditional understanding of the “Political” within a Westphalian state structure. Asylum seekers disrupt the supposed harmony of a national community presumed to be culturally homogenous and ethnically cleansed. The concept of asylum encroaches upon welfare issues (maintenance of social and economic conditions for its citizens) as well as identity politics in relation to the upkeep of cultural unity. In effect, the security discourse allows the asylum construct to be combined with internal security issues and political questions on the preservation of cultural and racial identity. Asylum is represented as a threat to the foundations of the modern political world and the security discourse is used to accentuate this danger.

A precursor to the declaration of the negative impact of asylum is the ongoing politics of terror present in the backdrop of any policy-making process. As Huysmans correctly notes, an attempt to classify the types of threats provoked by asylum quickly runs into the distinction between real and perceived threats.

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The latter tend to be absurdly paranoid notions of threats or anxiety that can, at best, be described as xenophobic, and, at worst, outright racist.<sup>66</sup> It is, therefore, necessary to find an analytical stance that does not neglect or undervalue these fears while at the same time remains objective. It becomes vital to distinguish between those fears that justify securitization and those that do not. Jef Huysmans believes that the security logic seeps through the boundaries of reason by associating all types of problems with migrants, which is part of the propaganda of false perceptions that is very present in Western states. “The security continuum is an institutionalized mode of policy-making that allows the transfer of the security connotations of terrorism, drug trafficking, and money laundering to the area of migration.”<sup>67</sup> Refugees and asylum seekers provoke feelings of insecurity, particularly when presented through the media, as the threat is then not only perceived by individuals but by the “us.” As a result, threat perception becomes a story about instilling fear.

Societal insecurity is the main contributor to the negative publicity that surrounds asylum seekers. The security construct enters a world of already constituted identities and it is from the point of view of these threatened identities (the referent objects) that the world is viewed. It is from this subjective standpoint that the importance of states and societies is not only created but premised as an unquestionable given. What seems to be at stake for these characters is the continuation of their identity.

The particular problem with identity is that it is construed as static. The mutually constitutive relationship between the logic of security and the production and reproduction of identity has not been understood nor dealt with. “Agents are created by a unification of smaller units into a bigger one. The smaller ones set

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<sup>66</sup> Jef Huysmans, *Migrants as a Security Problem: Dangers of Securitising Societal Issues*, in *MIGRATION AND EUROPEAN INTEGRATION* 61 (Robert Miles & Dietrich Thränhardt eds., 1995).

<sup>67</sup> Jef Huysmans, ‘The European Union and the Securitisation of Migration,’ *Journal of Common Market Studies*, 38:5(2000), pp 751-777, at p760.

their differences and conflicts aside to become one agent.”<sup>68</sup> Conflicts are moved to the external environment, thus promoting internal harmony. “Hence identity involves the localization of harmony (inside) and disharmony (outside).”<sup>69</sup>

This circular security tale demonstrates the role of the security discourse in creating and maintaining national identity. Thus, by securitizing asylum in a negative light (with asylum seekers as a necessary Other), the national, societal, and individual Self is created. “[I]n the modern security story, threat definition creates identity, and this creation of identity is constituted within a particular social construct. This construct first centers the world upon an identity which defines itself as being threatened. The threat itself is located outside the identity—in the periphery. Another identity is created as the source of the threat. So threat definition creates a self and an other in a process in which the definition of the self depends on the definition of the other. Thus, the creation of the center and the periphery are interlocked. And, finally, the construct puts the center in a position of control. If the center wants to survive it has to control the periphery.”<sup>70</sup>

The dialectic of inclusion and exclusion is thus reduced to a dialectic of trust and fear and a two-tiered exclusion mechanism is set up for asylum seekers: (a) they are not allowed a positive identity in the host community; and, (b) they are also annihilated of their worth. Their identity being different from the majority, it is stripped of value.

The security discourse has been used as a tool to justify the exclusion of difference, not because of the quality of the difference, but because of the instability of sameness. Societal insecurity is thus a defensive weapon used to

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<sup>68</sup> *Id.* at 56.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 59.

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ensure that the Other remains posited outside the realm of understanding of the fearful community.

The premise so far has been that security is a social construct which varies in meaning depending on the society in which it is transposed. So, an ethnically homogenous society may place a higher value on preserving its ethnic character than a heterogeneous society, and, as a result, asylum will be regarded as more of a threat in some societies than in others. The impact of the Europeanization process has been to create further insecurities in relation to the identity crisis. The gradual degeneration of national identities is further exacerbated by this idea of a European Identity which cannot as yet be wholly defined. Thus, the European Union's struggle to unite in its diversity is not helped by the added burden of integrating euro-foreigners.

Asylum has been securitized in the European Union as a result of ongoing worries about European Union integration, particularly in the fields of cultural security and internal security (economic and social), and with regard to the crisis of the welfare state.<sup>71</sup> In effect, the securitization of asylum in the European Union not only portrays asylum seekers as the worthless Other but also sees the European Union as a synonym for threat. The securitization of the European Union is occurring independent of the asylum story. The European Union is being represented as a threat to ontological and existential security in the lives of Europeans and non-Europeans. European states are being forced to balance the security concerns of border conflicts with internal structural security concerns arising within their citizenries. "Traditional forms of identity are no longer taken for granted. There is much at stake in the present Europe because there is a certain openness to fundamental changes in the organization of that Europe . . .

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<sup>71</sup> *Id.*

other aspects of instability are that modernity is at stake and that a process of globalization considerably questions given forms of identity.”<sup>72</sup>

Seen from this angle, asylum and security have a tense relationship where security primarily is used to promote protection seekers as the Enemy. The security discourse has, therefore, been used to highlight (and exaggerate) merely one angle of the asylum issue. The protection seeker has yet to be recast as the primary subject of the security debate, and, thus, the full potential of the debate has yet to be realized.

By maintaining a wide scope of application, a fair chance is provided to third country nationals to acquire just protection. At the same time, such a wide ranging definition would also allow for a clear framework of rebuttal. This is where the use of the security discourse becomes interesting in the construction of an asylum regime. Those that would refuse an application for protection would do so on the grounds of national or societal security concerns in relation to the welfare of their citizens. These host community counterclaims must prove either: (a) that an asylum seeker does not fall within the guidelines of the framework provision (see below); or (b) that the host state finds the application worthy of protection but feels that such protection cannot be provided within its territory (either for financial reasons or for reasons relating to the nationality of the asylum seeker and the composition of its national communities or minorities).<sup>73</sup>

The outcome of this balancing exercise would, of course, be dependent on the circumstances and the environment at hand. The burden of proving the gravity of the threats or violence suffered would no longer lie with protection seekers alone, but be shared with the host state. This simply renders the balancing process more equitable, since the host state has the time and means to substantiate

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<sup>72</sup> *Id.* at 63.

<sup>73</sup> This latter point merits greater consideration in relation to the responsibility—sharing scheme that will allow for such rebuttals and accommodate within other European member states.

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its rebuttal. Compare these resources to those of the asylum seeker, who may not be aware of the requirements, nor have the time to address the host community properly and, consequently, may suffer the detriment of detention or return.

### **VIII. THE STRUCTURE OF THE HUMAN SECURITY THRESHOLD**

The final part of this analysis details the two-track approach. First, the specific provisions that trigger asylum are listed. Second, an explanatory framework for host states to assess new circumstances is provided.

#### ***A. Specific Provisions***

Obligations arising from international instruments:

The following is a list of provisions drawn from the 1950 European Convention on Human Rights and Fundamental Freedoms (“ECHR”), the 1984 Convention Against Torture (“CAT”) and the 1966 International Covenant on Civil and Political Rights (“ICCPR”), all of which promote third country national protection.

A host state is obligated to provide protection if the asylum seeker has a well founded fear of:

- (a) Persecution on the grounds of race, religion, nationality, membership of a particular social group, political opinion—as per article 1(A)(2) of the Geneva Convention.<sup>74</sup>

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<sup>74</sup> There seems to be little need to extend this definition to persecution for non-Convention grounds because such an applicant would most probably fall within one of the other categories.

(b) Being subject to torture or to cruel, inhuman or degrading treatment or punishment.

These obligations are included in article 15(b) of the Qualification Directive and have been established by article 3 of the ECHR, article 3 of the CAT and article 7 of the ICCPR. I have introduced the term “cruel” from article 7 of the ICCPR because it renders the whole construct more flexible than article 3 of the ECHR by focusing more on the way the individual has been treated rather than whether the treatment falls within the torture, etc. threshold.<sup>75</sup>

Ryzard Piotrowicz has enumerated a number of circumstances that will instigate protection, under the “inhuman or degrading treatment category,” which are worth mentioning here: depending on the circumstances, persons subject to death row or execution; persons who are frequently subject to unsuccessful attempts at expulsion or persons in orbit; persons who are refused admittance to a territory as a result of racial discrimination; persons infected with HIV and who may be deprived of adequate medical care if expelled, thus amounting to physical suffering; and, persons facing normal punishment for an offense according to the legislation of the country concerned, where this punishment is arbitrary, discriminatory, cruel or excessive.<sup>76</sup>

It is important to note that these areas of protection, drawn from international instruments, provide for protection against expulsion but no formal obligation to grant specific rights. Specific rights should be included as the necessary consequence of fulfilling the application criteria in the same way as the cessation clauses are set out.

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<sup>75</sup> See Ryzard Piotrowicz & Carina Van Eck, *Subsidiary Protection and Primary Rights*, 53 INT'L & COMP. L. Q. 107, 120 (2004) (“[T]he scope of the protection required goes far beyond torture as normally understood. It may not be necessary to draw sharp distinctions between the various prohibited forms of treatment or punishment. These distinctions depend on the kind, purpose and severity of the particular treatment.”) (quoting General Comment 7, Apr. 30, 1982, available at <http://193.194.138.190/tbs/doc>).

<sup>76</sup> *Id.* at 121.

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### (c) A violation of a human right

The Qualification Directive, as adopted, deletes the category of “serious and unjustified harm” (proposed draft Com (2001) 510 final, Art. 15(b)) and replaces it with two particular instances. Article 15(a) states that serious harm consists of the death penalty or execution. There are, however, other human rights violations that need to be mentioned here.

First, those *non-derogable human rights* that are so fundamental that they would legitimate a claim for non-refoulement and further protection. These include those with respect to which derogations are never permitted: article 4 (prohibition of slavery and servitude); and article 7 (no punishment without law).<sup>77</sup> These have not been mentioned in the Qualification Directive and need to be included, especially considering the fact that human trafficking comes within the scope of the Convention article 4. The European Union has recognized people trafficking as an important immigration issue, as well as a serious crime posing grave threats to basic human rights.<sup>78</sup> Article 7 of the ECHR incorporates the principle of legality, which prohibits holding anyone guilty of a criminal offence on account of any act or omission that was not a criminal offence under national or international law at the time of commission. This provision may have few applications, but it still ought to be included in order to comply with international obligations.

The second area that should be covered is that of serious and unjustified harm over and above non-derogable human rights. This should be construed restrictively, but the possibility of applying for asylum in such circumstances

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<sup>77</sup> Other non-derogable rights such as article 2 (the right to life—except where lawful acts of war), and article 3 are already covered. Article 8 (the right to family life) has been included in the Qualification Directive (article 6).

<sup>78</sup> See e.g., Treaty on the European Union, art. 29; Tampere European Council 1999, conclusion 23; Laeken European Council 2001, conclusion 42; Council Framework Decision of 19 July 2002 on combating trafficking in human beings.

should remain open, for instance, when there is a risk of flagrant denial of right to a fair trial (ECHR art. 6).<sup>79</sup> However, the violation has to reach a certain level of magnitude to give rise to protection.

(d) A risk to life, safety or freedom from situations of indiscriminate violence in situations of international or internal armed conflict.

The Qualification Directive requires an individual risk amidst indiscriminate violence.<sup>80</sup> Although this is very difficult to establish in situations of mass violence or disruption, the Directive was amended to individualize the requirement due to the existence of a distinct temporary protection regime in situations of mass influx. Considering that persons falling within this category will be able to seek protection for a maximum period of two years (Temporary Protection Directive, art. 4), during which time they will be able to apply for asylum (art. 17), this reduction in scope seems (in theory) reasonable. However, two problems remain: first, the establishment of a mass influx regime is dependent upon a Council decision—it will have to be seen how readily and efficiently such decisions are taken to know whether the individual angle can suffice; second, two years may not be a sufficient amount of time for the conditions of return to be appropriate, and should the asylum seeker not be able to apply due to lack of an individuated risk, he or she will be sent back to violence.

Thus, this provision should allow for a non-individuated scope while reading the circumstances as a whole. Furthermore, it should be understood that all of the above provisions are to include harm inflicted by non-state agents (as per article 6(c) of the Qualification Directive) and the assessment criteria put forth

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<sup>79</sup> See *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439, 441 (ser. A) (1988).

<sup>80</sup> Article 15(c) addresses serious and individual threats to civilian life or person due to indiscriminate violence in situations of international or internal armed conflict.

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in article 4 of the Directive which take into account the applicant's personal circumstances, (including background, age, gender, health, and disabilities).

Obligations arising over and above those put forward in international instruments:

The specific provisions ought to include some mention of obligations to provide protection on compassionate grounds. This is especially due to the fact that such areas of protection should not be left to national discretion simply because such grounds are not commonly invoked or have not yet been recognized.

Those most commonly used compassionate grounds are the age of the applicant, the medical condition of the applicant, and the practical issues relating to the availability of travel documents which render expulsion unacceptable and contrary to the spirit of humanitarian protection. Compassionate grounds ought to be perceived as a catch-all which include humanitarian grounds for assistance. This should be broadly highlighted in the proposed framework provision.

### ***B. The Framework Provision***

The framework provision is premised on the following statement: *No member state shall expel, return ("refouler") or extradite a person to another state where there is a well founded fear that the person would be subjected to a violation of his or her human security and that such a violation would engage the Member State's obligation to secure that right*

Two aspects should be considered when assessing the extent of this obligation. There should be recourse to certain qualifying conditions and exceptions. In both cases, the crux is the ability to address the spirit of asylum as put forth through the human security standard. Thus, the following factors should be taken into consideration in analyzing those cases that do not fall within the specific provisions discussed above:

- the severity of the feared violation must be weighed against the probability of its materialization. In other words, the greater the violation, the lesser the probability of its materialization should be necessary to trigger member state obligation;
- the precise reasons why an individual may face persecution should be irrelevant for finding that there is a (well founded fear of) persecution;
- host states should consider their positive obligations under indirect refoulement. These are situations where there is a reasonable likelihood that an asylum seeker (either rejected or sent to a safe third country) will be sent back to persecution by another state.<sup>81</sup>

The purpose of the framework provision is to provide some guidance and to promote a sense of obligation for those cases not covered by the specific provisions. This is in line with the fact that the causes of fleeing are neither static nor completely documented. Thus, it is vital to promote an intelligent system that is able to adapt to changing political realities. Leaving such guidelines out of the framework would render the introduction of the human security basis ineffective, as new circumstances would again be at the mercy of national interests and discretion.

A second role of the framework provision is delineate those cases that do not fall within the human security threshold. A line needs to be drawn somewhere—those that do not fall within the threshold would be economic migrants who either suffer a degree of harm that does not give rise to protection (i.e., unemployment), or other migrants who invent (or exaggerate) the effect of conditions in their home state to allow themselves to seek refuge (“bogus

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<sup>81</sup> This was recommended by the Human Rights Committee in *A.S. v Sweden*, Communication No. 149/1999, (2001) 8 International Human Rights Reports 970, ¶ 9. This is particularly important for preventing the burden-shifting phenomenon that seems to be occurring in relation to alternative options, such as the principle of “safe third country,” and (more indirectly) the “internal flight alternative.”

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claims”). These exceptions should be stated clearly so as not to provide a loophole for states to avoid their obligations. However, it should be borne in mind that the construction of security is one which entails a construction of risk perceptions which depend on the subjectivity of different social groups. Thus, the applications of “bogus refugees” should not be rejected without a clear overall understanding of their circumstances and causes of their flight.

### **CONCLUSION**

This paper has attempted to confront the challenge of rendering human security practical and solution specific. However, part of the ethic of the human security movement is to emphasize the inclusiveness and holism of the term, which in practice seems to mean treating all interests and objectives alike. By introducing a two-track approach I have tried to narrow its scope of application to fit this particular conceptualization of asylum. Using “human security” to envelop the current asylum system allows for a coherent complementary protection regime to exist side by side with the Geneva Convention. The very need for complementary protection questions the primacy of the Geneva Convention. As such, a new mechanism of protection must not be limited to gap-filling but should rather embrace the evolving causes of asylum. Moreover, a new mechanism, with an overarching single procedure, ought to reduce the possibility of states legislating out of their humanitarian obligations and into carefully camouflaged deflection policies. The temporal scope of protection is crucial. If such a system is to be effective, then the right of return needs further exploring. The moral dilemma lies in assessing what circumstances will render return to country of origin acceptable.

In analyzing the manner in which asylum has been securitized in the European Union, it is particularly apparent that national and societal security issues have been used against the promotion of a more flexible asylum system. In my analysis I have not denied the relevance of the national and societal perspective, but have simply tried to emphasize that asylum as a security issue has been understood in contra-distinction to asylum as a human right. In this way, I hope to have clarified why human security would be the most suitable option for understanding refugees and asylum seekers as valued objects rather than threats. My analysis is a deconstructive one and rests on the assumption that we scholars are not looking at the world from the outside but are rather fully inside it. In being the story teller, I am presupposing that by telling a story in a particular way I will contribute to the production or reproduction of the social world. Thus, it is my belief that to securitize asylum in the manner that I have attempted here is to engage in the reality of the asylum crisis. Furthermore, in vesting the human security construct within a competitive environment (asylum seekers' claims versus States' counterclaims) I am promoting (or perhaps provoking) a more transparent debate on what is actually at stake in regulating refugee law.