

EU ACCESSION TO THE ECHR AND THE STUMBLING BLOCK OF ASYLUM PROTOCOL NO. 24

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Abstract

The EU and the U.S. share common standards in substantive asylum law. However, a significant point of divergence occurs when asylum is requested by an EU national. U.S. adjudicators examine asylum claims on a case-by-case basis, regardless of country of origin. On the other hand, EU adjudicators presume that asylum claims filed by EU nationals are without merit. This presumption comes primarily from the Protocol on Asylum for Nationals of Member States of the European Union (Protocol No. 24). Protocol No. 24 discriminates on the basis of nationality, which is prohibited under international law. The EU is now poised to accede to the ECHR. EU accession to the ECHR should not be finalized unless Protocol No. 24 is repealed.

Öz

AB ve ABD sığınma hukukunun maddi alanında ortak standartları paylaşmaktadır. Ancak, iki sistem arasındaki önemli bir farklılık bir AB vatandaşı tarafından sığınma talep edildiğinde ortaya çıkmaktadır. ABD sisteminde sığınma başvuruları menşe ülkesinden bağımsız olarak somut talep çerçevesinde incelenir. Öte yandan, AB sisteminde ise AB vatandaşı tarafından yapılan sığınma başvuruları mesnetsiz olarak kabul edilmektedir. Bu varsayım Avrupa Birliği (Protokol 24) Üye Devletlerin Vatandaşları için İltica

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Protokolünden kaynaklanmaktadır. Bu bağlamda, Protokol 24 milliyet temelinde ayrımcılığa yol açmaktadır,. Ancak bu tür bir ayrımcılık, uluslararası hukuk tarafından yasaklanmıştır. AB halen AİHSe taraf olma yönünde hazırlıklarını sürdürmektedir. Protokol 24 yürürlükten kaldırılmadan AİHS'e katılım gerçekleşmemelidir.

Keywords: Roma, EU, Asylum, Protocol, ECHR

Anahtar Kelimeler: Roma, AB, İltica, Protokol, AİHS

INTRODUCTION

The European Union (EU) and the United States (US) have long histories of promoting human rights and assisting asylum seekers. Both are parties to international agreements which recognize and protect basic human rights. Each one has enacted domestic and regional laws which aim to protect victims of human rights abuses. Finally, both have welcomed large numbers of refugees and asylees into their respective territories.¹

Procedurally, EU and US asylum laws are very similar. Both systems offer an interview or hearing before an impartial officer, interim work permission, a formal written decision, and appeal procedure. The EU and the U.S. also share common standards in substantive asylum law. They both offer relief to 'refugees' who fear persecution on grounds of race, religion, nationality, political opinion, or membership in a particular social group. However, a significant point of divergence occurs when asylum is requested by an EU national.

Asylum adjudicators in the US examine each claim individually, regardless of an applicant's country of origin. On the other hand, EU adjudicators must legally presume that EU-origin claims are without merit. Such cases are effectively dead in the water. The EU presumption comes primarily from the Protocol on Asylum for Nationals of Member States of the European Union (Protocol No. 24).²

¹ In 2011, the U.S. approved 24,988 asylum cases and the 27 EU member states granted refugee status to 42,700 individuals. U.S. Department of Homeland Security-Office of Immigration Statistics, *Annual Flow Report* (May 2012); Eurostat, *News Release 96/2012* (June 19, 2012).

² Text is as follows:

Given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters. Accordingly, any application for asylum

Protocol No. 24 eviscerates the asylum claims of groups such as the Roma,³ who are systematically abused in certain EU member states. It creates an almost irrebuttable presumption against them, stating that EU member states are “safe countries of origin” and that EU-origin asylum claims are presumed to be “manifestly unfounded.”

I. THE HARSH REALITY OF EU ASYLUM POLICY

As a former U.S. immigration attorney, this author represented nearly one hundred (100) asylum applicants from Bulgaria. Without exception, the applicants had suffered past persecution or had a well-founded fear of persecution, due to their Roma ethnicity or Roma rights activities. Approximately seventy-five percent (75%) of these cases were approved, either by asylum officers or federal immigration judges.

At the time, this author gave little thought as to why a US law firm would receive such a large number of EU Roma applications.⁴ The intense caseload required a focus on practicalities such as interviewing clients, obtaining

made by a national of a Member State may be taken into consideration or declared admissible for processing by another Member State only in the following cases:

(a) if the Member State of which the applicant is a national proceeds after the entry into force of the Treaty of Amsterdam, availing itself of the provisions of Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms, to take measures derogating in its territory from its obligations under that Convention;

(b) if the procedure referred to in Article F.1(1) of the Treaty on European Union has been initiated and until the Council takes a decision in respect thereof;

(c) if the Council, acting on the basis of Article F.1(1) of the Treaty on European Union, has determined, in respect of the Member State which the applicant is a national, the existence of a serious and persistent breach by that Member State of principles mentioned in Article F(1);

(d) if a Member State should so decide unilaterally in respect of the application of a national of another Member State; in that case the Council shall be immediately informed; the application shall be dealt with on the basis of the presumption that it is manifestly unfounded without affecting in any way, whatever the cases may be, the decision-making power of the Member State.

Protocol on Asylum for Nationals of Member States of the European Union, 1997 OJ (C340) 103 (10 November 1997). It is also known as the “Aznar Protocol” or “Spanish Protocol.”

³ The Roma (or Romani) originated in Northwest-India and migrated to Europe about 600 to 800 years ago. They are often referred to pejoratively as ‘Gypsies’ or ‘Travelers.’

⁴ Canadian law firms are similarly inundated with EU Roma asylum claims.

supporting evidence, submitting applications, and preparing clients for their eventual interview or hearing.

A subsequent examination of EU Roma asylum cases from an academic perspective led to a startling revelation: EU Roma file so many cases in the U.S. (and Canada) because they cannot get asylum in the EU. They are effectively barred from relief in the EU, solely on the basis of their nationality. From a Western legal perspective, the concept is so outrageous that it is hard to believe.

Imagine a Macedonian Rom and a Bulgarian Rom who are both beaten and sodomized while in police custody (while officers hurl racial slurs). Both have endured attacks by skinheads who operate with impunity. Both have children who are segregated from the ethnic majority in school. They each escape and apply for asylum in France, an EU member state. The Macedonian Rom's case is reviewed under international standards relating to refugees, while the Bulgarian Rom's case is presumed to be 'manifestly unfounded.' This is the current state of asylum law in the EU, where Protocol No. 24 is the backbone of the discriminatory policy.

Under the principle of the 'free movement of people,'⁵ Roma in troubled EU countries can theoretically move to safer EU countries. However, many are limited to a 90-day stay because they cannot provide proof of adequate financial resources, employment, student status, and/or medical insurance.⁶ Finally, the 'free movement of people' concept is beside the point – it does not address the underlying issue of denying asylum (a guaranteed right) to an entire group of people on the basis of nationality.

The EU is now poised for accession to the European Convention on Human Rights (Convention).⁷ EU accession is permitted by Protocol 14 of the Convention⁸ and mandated by Article 6(2) of the Treaty of European Union

⁵ See Treaty on Functioning of the European Union (TFEU), art. 45.

⁶ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 2004 O.J. (L158) 77 (30 April 2004).

⁷ Tobias Lock, *EU Accession to the ECHR: Consequences for the European Court of Justice* (EUSA Conference 2011).

⁸ "The European Union may accede to this Convention." Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 17 (13 May 2004).

(TEU).⁹ However, formal accession would place EU asylum policy squarely at odds with key provisions of the Convention. For example, Protocol No. 24 is incompatible with the Convention's guarantee of "an effective remedy" when its rights or freedoms are violated.¹⁰ The Protocol also conflicts with the Convention's prohibition of "discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."¹¹ Therefore, EU accession to the ECHR should not be finalized unless Protocol No. 24 is repealed.

II. THE ORIGINS OF PROTOCOL NO. 24

Protocol No. 24 was the result of intense lobbying by former Spanish Prime Minister, José María Aznar.¹² Aznar was furious over the protection of certain *Euzkadi ta Askatasuna* (ETA) members in France and Belgium. The rationale used by Spain to advance Protocol No. 24 was that human rights were so well-established and protected in the EU that giving asylum to EU nationals would be contradictory and redundant.¹³ Spain wanted to eliminate the possibility of asylum for ETA members in the EU. Not only was Spain's goal realized, but Protocol No. 24 ultimately "eliminated asylum within the Union for its own nationals."¹⁴

Prior to the adoption of Protocol No. 24, the EU Council of Ministers and of Justice and Home Affairs issued a non-binding resolution which addressed

⁹ "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms." Treaty on European Union, art. 6(2) (7 February 1992). Article 6(2) entered into force under Article 2 of the Treaty of Lisbon. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, OJ 2007 (C306) 13 (17 December 2007).

¹⁰ Convention, art. 13.

¹¹ Id., art. 14.

¹² Mr. Aznar served as Prime Minister from 1996-2004. Barcelona Center for International Affairs, "José María Aznar López," at http://www.cidob.org/en/documentacion/biografias_lideres_politicos/europa/espana/jose_maria_aznar_lopez (last visited mar. 20, 2013).

¹³ *Memorandum espagnol sur la non-reconnaissance du droit d'asile pour les citoyens de l'Union*, CONF/3826/97 ANNEXE, Brussels (Feb. 24, 1997).

¹⁴ Karin Landgren, *Deflecting International Protection by Treaty: Bilateral and Multilateral Accords on Extradition, Readmission and the Inadmissibility of Asylum Requests* (New Issues in Refugee Research Series Working Paper No. 10, UNHCR June 1999).

asylum claims made by EU nationals.¹⁵ The resolution provided for a simplified and rapid procedure for such claims, but maintained that “Member States continue to be obliged to examine individually every application for asylum, as provided by the Geneva Convention....”¹⁶

Spain’s response to the Council’s resolution was chilling: “Experience shows that as a result of delaying tactics in various proceedings and appeals, this accelerated procedure can in fact take several years. It therefore serves no useful purpose. The only valid solution is for the application to be rejected at the outset and not accepted for processing.”¹⁷ At Spain’s urging, the Council’s Resolution was eventually replaced by Protocol No. 24.

Protocol No. 24 was adopted as part of the 1997 Treaty of Amsterdam,¹⁸ which amended the earlier Maastricht Treaty on the European Union. The Protocol was reaffirmed in the subsequent 2007 Treaty of Lisbon.¹⁹ Two highly controversial concepts are embedded within the language of Protocol No. 24. First, the Protocol asserts that EU member states “shall be regarded” as “safe countries of origin.” Second, an asylum claim made by an EU national shall be “dealt with on the basis of the presumption that it is manifestly unfounded.”²⁰

Although asylum claims by EU nationals are feasible under Protocol No. 24, the Protocol creates numerous impediments which make the process virtually inaccessible. According to the Protocol:

Any application for asylum made by a national of a Member State *may be* taken into consideration...*only in the following cases:*

(a) If the *Member State of which the applicant is a national proceeds...to take measures derogating...from its obligations under the Convention [for the Protection of Human Rights and Fundamental Freedoms];*

(b) If the *procedure referred to in Article F.1(1) of the Treaty on European Union has been initiated and until the Council takes a decision in respect thereof;*

¹⁵Council Resolution on Minimum Guarantees for Asylum Procedures, 1995 OJ (C274) 13 (June 20, 1995).

¹⁶*Id.* at para. 20.

¹⁷*Memorandum espagnol sur la non-reconnaissance du droit d'asile pour les citoyens de l'Union*, CONF/3826/97 ANNEXE, Brussels (Feb. 24, 1997).

¹⁸The Treaty of Amsterdam formally entered into force on May 1, 1999.

¹⁹The Treaty of Lisbon was signed on December 13, 2007 and became effective December 1, 2009. EU 2007 OJ (C306) 1 (17 December 2007).

²⁰Belgium formally rejected this presumption in favor of a case-by-case approach. Declaration by Belgium on the Protocol on Asylum for Nationals of Member States of the European Union, annexed to Protocol No. 24.

(c) *If the Council ...has determined, in respect of the Member State [of] which the applicant is a national, the existence of a serious and persistent breach by that Member State of principles mentioned in Article F(1);*

(d) *If a Member State should so decide unilaterally in respect of the application of a national of another Member State...the Council shall be immediately informed; the application shall be dealt with on the basis of the presumption that it is manifestly unfounded...* [emphasis added].

Subsection ‘d’ of the Protocol creates a formidable presumption against EU asylum applicants, while subsections ‘a-c’ establish politically cumbersome and bureaucratic processes. As noted by Columbia University professor Karin Landgren, the Protocol “erects ponderous political obstacles to the processing of such requests. States are proffered many bases on which to refuse to process these requests; they retain an option to decide unilaterally to do so. The unilateral decision must also be communicated to a political organ of the EU, the Council.”²¹ The Protocol has also been criticized for being the “product of a political decision-making process” in which Foreign Ministers engaged in reciprocal trade-offs.²² The Protocol “was not put to democratic vote, nor was it drafted or shared in a transparent manner.”²³

Protocol No. 24 should be abandoned or significantly revised, not only because it conflicts with international law, but because it does not match the reality faced by some EU minorities. For example, the Roma in certain EU member states are subject to racist attacks, marginalization, arbitrary arrest, prolonged detention, police beatings, and a largely complacent police and judicial system. Bulgaria, Romania, and Hungary are three EU countries often criticized for hardships faced by their Roma citizens. These issues are addressed in more detail in the second half of this article.

III. THE DEVELOPMENT OF EUROPEAN HUMAN RIGHTS LAW

In general, Europe’s reputation as a promoter and defender of human rights is well-deserved. For over half a century, various European bodies have created a comprehensive human rights regime. In 1950, for example, the Council of Europe drafted the Convention for the Protection of Human Rights and Fundamental Freedoms (now known as the European Convention on

²¹ Landgren, *supra* note 14.

²² *Id.*

²³ *Id.*

Human Rights, or Convention). The Convention became effective in 1953 and all 47 Council of Europe members are parties.²⁴ It is accession to this particular Convention which is problematic for the EU.

Pursuant to the original 1950 Convention, the European Court of Human Rights was created in 1959. While not formally part of the EU, the Court is entrusted with enforcement of the Convention. Under the Court's jurisdiction, individuals can sue states for alleged violations of human rights, as defined by the Convention.

A more recent expression of European human rights law is the Charter of Fundamental Rights of the European Union, which was proclaimed on December 7, 2000 and became legally binding on December 1, 2009.²⁵ The Charter was promulgated by the Council of the EU. Of particular interest is Article 18 of the Charter, which specifically guarantees the right to asylum. This right is addressed in more detail below.

IV. PROTOCOL NO. 24 HAS BEEN REAFFIRMED IN EU DIRECTIVES.

Protocol No. 24 is the primary roadblock to claims filed by EU nationals. However, its basic principles have been reaffirmed in subsequent EU Directives: namely, the 2004 Qualification Directive²⁶ and the 2005 Asylum Procedures Directive.²⁷

The 2004 Qualification Directive is a cornerstone in the development of the EU's Common European Asylum System (CEAS). It flows directly from the asylum agenda of the 1997 Treaty of Amsterdam. Among other things, the Directive defines the term 'refugee' and gives various grounds for protection. However, it excludes EU nationals from the definition of 'refugee.'²⁸ The Directive refers only to 'third country nationals' and 'stateless persons'

²⁴ Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms CETS No.: 005*, at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=16/04/2013&CL=ENG> (last visited Apr. 16, 2013).

²⁵ This coincides with the date the Treaty of Lisbon entered into force.

²⁶ Council Directive 2004/83/EC on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 2004 O (L 304) 12-23 (30 September 2004).

²⁷ Council Directive 2005/85/EC on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 2005 OJ (L326) 13-34 (13 December 2005).

²⁸ Treaty of Amsterdam, art. 2(c).

(excluding all EU citizens, even if they might be in need of protection). In other words, the Directive envisions no circumstances where an EU national might be a legitimate refugee. The UNHCR has expressed concern that the Directive's definition of refugee does not coincide with the 1951 Geneva Convention's definition of refugee.²⁹

The 2005 Asylum Procedures Directive also stems from the Amsterdam Treaty. The 2005 Directive confirms that 'refugees' do not include EU nationals. Moreover, it deems Bulgaria and Romania to be "safe countries of origin."³⁰ This was prompted by Bulgaria and Romania's then-pending status as candidates for accession to the EU.

The European Council on Refugees and Exiles (ECRE) criticized the 2005 Directive's provisions on safe countries of origin, "which are inconsistent with the proper focus of international refugee law on individual circumstances."³¹ The ECRE also noted that the Directive "restricts the refugee definition to third country nationals and stateless persons, thus excluding EU citizens from the definition. This is not consistent with Member States' obligations under Article 1A of the 1951 Geneva Convention. Not only is this restriction discriminatory and therefore in breach of Article 3 of the 1951 Geneva Convention, but the potential repercussions may be greater as the EU enlarges. Given the export value of EU asylum policies, it also sets a very bad precedent for other regions of the world."³²

V. PROTOCOL NO. 24 IS CONTRARY TO INTERNATIONAL LAW RELATED TO ASYLUM AND REFUGEES.

Numerous international documents define common norms regarding asylum, refugees, and protection of human rights. Some of them define the term 'refugee,' others address the right to asylum, and one mandates an 'effective remedy' when human rights are violated. Following is a short catalogue of instruments which contradict the exclusionary language of Protocol No. 24:

²⁹ UNHCR, *Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004*, published in 2004 OJ (L304) 12 (30 September 2004).

³⁰ *Id.* at Preamble, Section 20.

³¹ ECRE *Information Note on the Asylum Procedures Directive (2005/85/EC)*, IN1/10/2006/EXT/JJ (Oct. 2006).

³² *Id.*

- **The Universal Declaration of Human Rights**³³ – Article 14 establishes a right to seek asylum. Specifically, “everyone has the right to seek and to enjoy in other countries asylum from persecution.”
- **Convention Relating to the Status of Refugees** (1951 Geneva Convention)³⁴ – This UN Convention was designed to assist victims of World War II who had a well-founded fear of persecution. As such, its scope was limited to events occurring within Europe prior to January 1, 1951. Article 1 states that “the term ‘refugee’ shall apply to any person who...owing to well-founded fear of being persecuted 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, is unwilling to avail himself of the protection of that country... .
- **1967 Protocol Relating to the Status of Refugees**³⁵ – The 1967 Protocol removed the Geneva Convention’s geographic and temporal restrictions, but maintained its broad definition of “refugee.” Article 1, paragraph 2 confirms that “the term ‘refugee’ shall...mean any person within the definition of Article 1 of the [1951] Convention.”
- **Charter of Fundamental Rights of the European Union**³⁶ – The EU officially recognizes the Charter as equivalent to a treaty.³⁷ The Charter pays homage to the 1951 Geneva Convention and 1967 Protocol, and explicitly guarantees an EU citizen’s right to asylum. Article 18 states that “the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees.” It is therefore baffling how Protocol No. 24 has been allowed to survive.
- **European Convention on Human Rights** (Convention)³⁸ – As mentioned above, the EU is in the process of acceding to the Convention. However, Protocol No. 24 is an obstacle to meeting

³³ G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948).

³⁴ G.A. Res. 429 (Dec. 14, 1950).

³⁵ G.A. Res. 2198 (Dec. 16, 1967).

³⁶ 2000 OJ (C 364) 1 (7 December 2000).

³⁷ Treaty on the European Union, art. 6.

³⁸ CETS 005; opened for signature on Nov. 4, 1950 and entered into force on Sept. 3, 1953. Council of Europe, *Treaty Office*, at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CM=8&DF=16/04/2013&CL=ENG> (last visited Apr. 16, 2013).

certain Convention requirements. Article 1 requires signatories to respect human rights (including right to life, prohibition of torture, prohibition of discrimination, right to liberty and security, and respect for private and family life). In addition, Article 13 grants the “right to an effective remedy” when those rights are violated. EU Roma who suffer persecution are effectively denied their right to an effective remedy (namely, asylum on a fair basis which complies with international standards).

VI. PROTOCOL NO. 24 IS INCOMPATIBLE WITH NON-DISCRIMINATION STANDARDS UNDER INTERNATIONAL LAW

A substantial body of international law prohibits discrimination on the basis of nationality. Most of the juridical documents noted above not only define and protect victims of persecution, they also require equality under the law:

- **The Universal Declaration of Human Rights** – Article 2 states that “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of a kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.” Article 7 adds that “All...entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration...”
- **Convention Relating to the Status of Refugees** – This Convention also upholds the principle of non-discrimination on the basis of nationality. Article 3 states that its provisions shall be applied “without discrimination as to race, religion or country of origin” [emphasis added]. Although the EU itself is not a party to the Geneva Convention (all EU member states are), the existence of Protocol No. 24 “poses an obvious problem that could thwart [the EU’s potential] membership...to the Geneva Convention.”³⁹
- **Charter of Fundamental Rights of the European Union** – Article 20 declares that “everyone is equal before the law,” and Article 21 prohibits “any discrimination based on any ground such as sex, race,

³⁹ European Parliament Directorate-General for Internal Policies, Policy Department, Citizens Rights' and Constitutional Affairs, SETTING UP A COMMON EUROPEAN ASYLUM SYSTEM STUDY 443 (EU, 2010).

colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation...”

- **European Convention on Human Rights** (Convention) – Finally, Article 14 of the EU’s own European Convention on Human Rights specifically prohibits discrimination based on "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Despite the clear language of the ECHR and other international provisions noted above, Protocol No. 24 was pushed through under a barrage of political pressure. The result has been *de facto* foreclosure of the asylum process to EU nationals.

VII. INTERNATIONAL CRITICISM OF PROTOCOL NO. 24

The Preamble of Protocol No. 24 states that it "respects the finality and the objectives of the Geneva Convention...relating to the status of refugees." This assertion is appropriate, as the Geneva Convention’s refugee provisions cannot be derogated by treaty and are generally accepted as universal in scope.⁴⁰ However, the Protocol’s substantive provisions contradict the Preamble and unquestionably violate the Geneva Convention.

Protocol No. 24 has been scrutinized from within and outside the EU.⁴¹ In fact, the EU’s own European Commission stated that it was “unfortunate” that the Protocol was included in the Amsterdam Treaty.⁴² The United Nations High Commissioner for Refugees (UNHCR) also voiced opposition to Protocol No. 24 while the matter was being considered by EU Foreign Ministers.⁴³ The UNHCR concluded that the Protocol would be “at variance with international

⁴⁰ UN Office of Legal Counsel, Memorandum from Paul Szasz, Acting Director & Deputy (May 21, 1997).

⁴¹ See, e.g. Sergio Carrera, Elspeth Guild & Massimo Merlino, *The Canada-Czech Republic Visa Dispute Two Years On: Implications for the EU’s Migration and Asylum Policies* (EC, 2011).

⁴² EU Parliamentary Session Debate (Sept. 1997).

⁴³ UNHCR, *Position on the Proposal of the European Council Concerning the Treatment of Asylum Applications from Citizens of European Union Member States* (appended to letter of February 3, 1997 from Director, UNHCR Division of International Protection to Michiel Patijn, Secretary of State, Ministry of Foreign Affairs of the Netherlands).

obligations that all Member States of the Union have undertaken,” and advised the EU President against adopting it.⁴⁴

Non-governmental organizations such as Human Rights Watch, Amnesty International, and the ECRE have all condemned Protocol No. 24. Human Rights Watch said the Protocol is an EU attempt to “exempt itself from the 1951 Refugee Convention” and that other countries will be encouraged to take similar steps.⁴⁵ Amnesty International stated that the Protocol lays down standards which fall short of international standards.⁴⁶ Finally, the ECRE maintained that the Protocol set a “very bad precedent for other regions of the world, linking the legal right to asylum to the political and economic alliance of neighboring countries.”⁴⁷

Noted British writer and commentator William Shawcross vehemently attacked Protocol No. 24, describing it as “disgraceful” and “insidious.”⁴⁸ According to Shawcross, the argument that human rights are so well protected in the EU that no EU citizen would want to apply for asylum “reeks of complacency.”⁴⁹ Shawcross hit the nail on the head when he identified the Protocol’s underlying legal problem: it denies “an entire group of people” access to the provisions of the 1951 Geneva Convention “on the basis of national origin.”⁵⁰ Under international law, discrimination on the basis of nationality is the Protocol’s most serious defect.

VIII. ROMA IN TODAY’S EU: BULGARIA, ROMANIA, AND HUNGARY

According to the U.S Department of State, the “marginalization of the Romani minority remained Bulgaria’s most pressing human rights problem” in 2011.⁵¹ Police “were more likely to use excessive force on persons of Romani origin” and “sometimes arrested suspects for minor offenses and physically

⁴⁴ *Id.*

⁴⁵ Human Rights Watch, *Press Release* (June 12, 1997).

⁴⁶ Amnesty International, *The Amsterdam Treaty and the Protection of Refugees* (Nov. 7, 1997).

⁴⁷ ECRE, *Analysis of the Treaty of Amsterdam in so far as it Relates to Asylum Policy* (Nov. 10, 1997).

⁴⁸ William Shawcross, *A Disgraceful EU Asylum Proposal*, INTERNATIONAL HERALD TRIBUNE (June 14, 1997).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ U.S. Department of State, *Bulgaria, 2001 Country Reports on Human Rights Practices*, at <http://www.state.gov/j/drl/rls/hrrpt/2011/> (last visited Apr. 16, 2013).

abused them to force confessions, especially in cases involving Romani suspects.”⁵²

This author has personally represented many Bulgarian Roma asylum applicants, most of whom presented compelling evidence of mistreatment. They endured racial slurs by government officials, humiliation and segregation of their children in school, arbitrary arrest, sexual assault while in custody, forced evictions, police intimidation, police interference with their Roma-rights groups, and failure to investigate and prosecute skin-head attacks against them.

The Roma of Romania fare no better than their Bulgarian counterparts. In a 2011 government report on Romania, it was noted that “significant societal discrimination against Roma continued, . . . and there were reports that police . . . mistreated and harassed detainees and Roma.”⁵³ Moreover, police brutality was fairly routine. Journalists and senior government officials made statements that were discriminatory against Roma. A notable example was Romanian President Basescu’s statement blaming Finland’s opposition to Romania’s accession to the Schengen area on the “Gypsies,” who “aggressively beg and steal” in Finland.⁵⁴ The 2011 report also cited the following events: Roma evictions in Bucharest, Buzau, Cluj Napoca, and other localities; NGO reports that Roma were denied access to, or refused service in, many public places; and discrimination by teachers and other students (Roma children were placed in the back of classrooms, some schools placed Roma students in separate classrooms or separate schools, teachers ignored Roma students, other children engaged in unimpeded bullying of Roma children).

Hungarian Roma also experience persistent human rights abuses. In 2011, major issues were societal discrimination and exclusion of the Roma population, and violent right-wing extremism.⁵⁵ “Discrimination against Roma exacerbated their already limited access to education, employment, health care, and social services. Right-wing extremism, including public campaigns by paramilitaries to intimidate and incite hatred against Roma and other minorities, increased.”⁵⁶ Other human rights problems during the year included use of excessive police force against suspects, particularly Roma. Human rights NGOs reported that Roma were discriminated against in almost all fields of life, particularly in employment, education, housing, penal institutions, and access to public places, such as restaurants and bars.

⁵² *Id.*

⁵³ *Id.*, Romania.

⁵⁴ *Id.*

⁵⁵ *Id.*, Hungary.

⁵⁶ *Id.*

European government officials acknowledge the abuse of Roma inside the EU. The Parliamentary Assembly of the Council of Europe has confirmed pervasive anti-Roma sentiment in certain EU member countries. In 2010, the Assembly said it was “shocked by recent outrages against Roma in several Council of Europe member states, reflecting an increasing trend in Europe towards anti-Gypsyism of the worst kind.”⁵⁷ The Assembly went on to state that the “situation is reminiscent of the darkest hours in Europe’s history.The Roma people are still regularly victims of intolerance, discrimination and rejection based on deep-seated prejudices in many Council of Europe member states.”⁵⁸

Germany has likewise admitted that Roma are mistreated within its borders. The Neukölln district of Berlin (well-known for a diverse immigrant population), published its second “Roma Status Report” earlier this year, finding that many Roma live under “precarious circumstances.” Neighbors often react to the new arrivals with “a lack of understanding, resignation, cries for help, fury, outrage and even hate.” Despite being EU citizens, the Romanians and Bulgarians were last in the “ranking order” of the nationalities represented in Neukölln, the report concluded.⁵⁹

Photographs of EU Roma communities are widely available on the Internet. Some are posted by independent photographers, some by white supremacist groups, and others by human rights organizations. Two particularly troublesome photos are from Hungary and Bulgaria. The first depicts a Hungarian Roma family in a camp-style community with the following captions:

Roma Gypsy savages now infest my town. A race of beggars and thieves...

Yeah...they are another bunch who supposedly went up the chimneys in the Third Reich holiday camps but mysteriously survived...with hardly a dent in their numbers.⁶⁰

The second photograph shows a Bulgarian Roma child perched in the opening of a concrete wall which separates two communities:

⁵⁷ Council of Europe, *The Situation of Roma in Europe and Relevant Activities of the Council of Europe* (Resolution 1740, 2010).

⁵⁸ *Id.*

⁵⁹ Özlem Gezer, *Out of Bulgaria and Romania: Wave of Immigrants Overwhelms German System*, DER SPIEGEL (May 7, 2012) (citing the Neukölln report).

⁶⁰ White Pride Worldwide, *Roma Problems in Hungary & Czech*, at <http://www.StormFront.org> (last visited Apr. 16, 2013).

A concrete wall has been erected in order to separate the Roma neighborhood in...central Bulgaria from the rest of the town. A child is sitting in one of the openings in the wall, which allow Roma to reach the main street.⁶¹

IX. THE U.S. APPROACH TO ASYLUM

As a former U.S. immigration attorney, this author represented a large number of asylum applicants from Bulgaria. Almost without exception, the applicants were persecuted or feared persecution because of their Roma ethnicity. An estimated 80-85% were granted asylum. If these applicants had requested asylum in the EU, their cases would most certainly have been denied.

Despite somewhat inconsistent approval ratings on a country-wide basis,⁶² Roma have a good overall chance of winning asylum in the United States. This is partially due to a lack of nationality-based presumptions in the US asylum regime. US asylum law rejects the notion that certain countries are presumed 'safe.' Each asylum case is examined on the individual merits, regardless of the applicant's country of origin. The definition of 'refugee' is broad and is based on the definition found in the 1951 Geneva Convention.⁶³

Eligibility for asylum is governed by the Immigration and Nationality Act.⁶⁴ In its most basic form, US asylum law allows an applicant to file an affirmative or defensive application. An affirmative application is filed by a claimant who is physically present in the US and not in removal proceedings. The application is filed with a regional asylum office, under the jurisdiction of United States Citizenship and Immigration Services (USCIS). After the requisite interview and background checks are completed, the case is either approved or referred to the Executive Office for Immigration Review (EOIR). If the case is referred to the EOIR, it means that removal proceedings have commenced in immigration court.

A defensive asylum application is filed by an applicant in removal proceedings. The person may be in removal proceedings for a reason unrelated

⁶¹ Commissioner for Human Rights, *Human Rights of Roma and Travellers in Europe* (Council of Europe, 2012)(photo on back cover with description on inside front cover).

⁶² Ruth Ellen Wasem, *Asylum and "Credible Fear" Issues in U.S. Immigration Policy* (Congressional Research Service Report for Congress R41753, June 29, 2011).

⁶³ The term "refugee" means...*any person* who is outside any country of such person's nationality...who is unable or unwilling to return to...that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion (*emphasis added*). 8 U.S.C. § 1101(a)(42).

⁶⁴ 8 U.S.C. § 1158.

to asylum (entry without inspection, visa overstay, commission of a crime, etc.), and may have a legitimate reason to request asylum as a defense. A defensive application may also be the renewal of an application which started in the Asylum Office (*i.e.*, an affirmative application was referred to the EOIR's Immigration Court). Therefore, a referred applicant effectively gets "two bites" at the asylum apple.

If an applicant's defensive asylum application is denied, he or she may appeal to the EOIR's Board of Immigration Appeals, and/or a regional US Circuit Court of Appeal. Finally, even if an asylum applicant is statutorily ineligible for asylum,⁶⁵ he or she may qualify for some other form of relief, such as withholding of removal,⁶⁶ or relief under the United Nations Convention against Torture.⁶⁷

When compared to other countries, Bulgaria is not a top source country for asylum applications.⁶⁸ Bulgarians are greatly outnumbered by applicants from China, the Middle East, Africa, India, and Russia. However, the number of Bulgarian applicants (mostly Roma) is impressive, especially considering Bulgaria's relatively small population, its physical distance from the US, and the difficulty in entering US territory.⁶⁹ From 2005-2011, the number of Bulgarian applications approved by the USCIS Asylum Offices was 217.⁷⁰ During the same period, 349 additional applications were approved by the EOIR's Immigration Courts.⁷¹

The EOIR publishes statistics on asylum approval rates by country. In fiscal year 2010, forty-three percent (43%) of defensive applications lodged by Bulgarians were approved, thirty-five percent (35%) were denied, and the rest were abandoned, withdrawn, or otherwise disposed of.⁷² In fiscal year 2011, the approval rate for Bulgarians climbed to fifty-six percent (56%) and the denial

⁶⁵ For example, not filing within 1 year of entry, conviction of a particularly serious crime, or firm resettlement in a third country. 8 U.S.C. § 1158(a)(2)(B), 8 U.S.C. § 1158(b)(2)(A)(ii), and 8 U.S.C. § 1158(b)(2)(A)(vi), respectively.

⁶⁶ 8 U.S.C. § 1231.

⁶⁷ 8 U.S.C. § 1231; 8 C.F.R. §208.16.

⁶⁸ Wasem, *supra* note 61, at Appendix Tables A-1 and A-2.

⁶⁹ An applicant commonly pays a bribe for a passport and Mexican visa, then hires a smuggler to take him/her across the border. Passports, money, and other valuables are often stolen by smugglers.

⁷⁰ Office of Immigration Statistics, *2011 Yearbook of Immigration Statistics: Refugees and Asylees* (DOJ, May 2012).

⁷¹ *Id.*

⁷² Executive Office for Immigration Review, *FY 2010 Asylum Statistics* (DOJ, January 2011).

rate dropped to twenty-seven percent (27%).⁷³ The remaining seventeen percent (17%) were withdrawn or otherwise disposed of.⁷⁴ In short, a Bulgarian Roma applicant has about a 50-50 chance of winning asylum.

The US system encourages robust and thorough review, which is untainted by presumptions based on nationality. Unlike EU adjudicators, US immigration judges and asylum officers routinely consider evidence which suggests that some EU countries are not 'safe' for Roma.

CONCLUSION

Protocol No. 24 is an aberration under international law. Not only does it arrogantly presume that asylum is rarely (if ever) needed for EU nationals, it effectively bans a class of applicants on the basis of nationality. The protocol's misguided concepts have been reinforced by the 2004 and 2005 asylum directives. The end result is a Common European Asylum System that is unresponsive to the most vulnerable victims: the Roma of Central and Eastern Europe.

Roma refugees from the EU have extremely limited options. They may visit another EU country temporarily, but cannot get asylum because of Protocol No. 24. Non-EU members are likewise unable or unwilling to assist Roma refugees. Accommodating a sizeable refugee population demands resources that many non-EU states do not have. Moreover, the attitude towards Roma in non-EU countries is often just as hostile as in EU-member states (perhaps even worse). Therefore, Roma who face persecution in the EU often seek asylum in distant jurisdictions, which helps explain the surprising number of claims filed in the United States and Canada.⁷⁵

Protocol No. 24 clearly discriminates on the basis of nationality, which is prohibited by various international instruments, including those related to refugees. Of particular relevance are the EU's Charter of Fundamental Rights (Charter) and the European Convention on Human Rights (ECHR). The

⁷³ Executive Office for Immigration Review, *FY 2011 Asylum Statistics* (DOJ, February 2012).

⁷⁴ *Id.*

⁷⁵ Canada has been clamping down on a flood of Roma asylum claims, which will likely lead to a higher number of applications in the United States. See Carrera, Guild, and Merlino, *supra* note 40; Mary Sheppard, *Refugee System a Disgrace, Advocate Says*, CBC NEWS (March 12, 2012); Tobi Cohen, *Hungarian Asylum Seekers Flood Canadian Shores in 2011*, POSTMEDIA NEWS (Feb. 12, 2012); Don Butler, *Most Roma Asylum-Seekers Being Denied Legal Aid, Refugee Lawyer Says*, THE OTTAWA CITIZEN (Jan. 16, 2012).

Charter guarantees a right to asylum for EU citizens, while the ECHR specifically prohibits discrimination on the basis of nationality.

EU accession to the ECHR must be challenged as a matter of principle. If the EU wishes to accede to the ECHR, it should be required to repeal Protocol No. 24. The international community has a duty to oppose Protocol No 24 with the same fervor as was expressed in the late 1990s. The Roma of the EU deserve no less.

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