PROTOCOL NO. 24: FACT OR FICTION FOR EU ROMA?

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Abstract

The legal systems of the European Union (EU) and the United States (U.S.) are premised upon common norms, resulting in very similar bodies of jurisprudence. Due to these shared legal principles, one would expect the EU and the U.S. to use similar standards in the adjudication of asylum claims. For the most part, this expectation holds true. However, a glaring difference exists when an applicant's country of origin is an EU member state.

Asylum adjudicators in the U.S. examine the individual merits of a claim, regardless of the applicant's country of origin. On the other hand, EU adjudicators are required to 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), the main subject of this paper.

Protocol No. 24 eviscerates the asylum claims of Roma who are persecuted in the EU. It creates an almost irrebuttable presumption against EU asylum applicants, stating that EU member states are "safe countries of origin" and EU-origin asylum claims are deemed "manifestly unfounded." Protocol No. 24 is discriminatory and conflicts with the reality faced by many EU Roma.

The multi-faceted approach of the U.S. asylum regime provides a more thorough and meaningful review of Roma asylum claims. Cases are assessed on an individual basis, with little (if any) legal presumptions against the applicant. The EU should adopt a similar asylum regime and reject the exclusionary mandate of Protocol No. 24.

Keywords: *Roma, EU, Asylum, Protocol, ECHR*

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PROTOKOL NO 24: AB ROMANLARI İÇİN GERÇEK VEYA KURGU?

Özet

Avrupa Birliği'nin ve ABD'nin hukuk sistemleri, birbirine çok benzeyen içtihatlar oluşturan, ortak normlar üzerine inşa edilmiştir. Bu ortak hukuk ilkeleri nedeniyle, AB ve ABD'nin sığınma taleplerinin karar verilmesinde benzer standartların uygulanması beklenilebilir. Çoğunlukla, bu beklenti doğru çıkmaktadır. Bununla birlikte, başvuranın menşe ülkesi AB üyesi bir devlet olduğunda göz kamaştırıcı bir fark var olmaktadır.

ABD'deki sığınma hakimleri, başvuranın menşe devletini dikkate almadan, bir talebin bireysel olarak esasına bakmaktadır. Diğer taraftan, AB vatandaşları tarafından oluşturulan sığınma taleplerinin gerçekliği olmadığının AB hakimleri tarafından karine olarak kabul edilmesi gerekmektedir. Bu karine esasen bu makalenin de başlıca konusunu oluşturan, AB Üyesi Devlet Vatandaşları İçin Sığınma Hakkında Protokol (Protokol No.24)'den kaynaklanmaktadır.

Protokol No.24 AB'de zulme uğramış Romanları sığınma taleplerinden mahrum bırakmaktadır. AB üye devletlerinin "menşe ülke olarak güvenli" ve AB menşeli sığınma taleplerinin de "açıkça temelsiz" olduğunu belirten bu Protokol, AB sığınma başvurucularına karşı adeta reddedilemez bir karine oluşturmaktadır. 24 numaralı Protokol ayrımcı niteliktedir ve birçok AB-Romanları'na yönelen gerçeklikle bağdaşmamaktadır.

ABD sığınma rejiminin çok boyutlu yaklaşımı Roman sığınma taleplerinin daha titiz ve anlamlı şekilde değerlendirilmesini sağlamaktadır. Davalar, başvurana karşı (eğer varsa) cüzi hukuki karinelerle, bireysel esaslara göre değerlendirilir. AB benzer bir sığınma rejimi benimsemeli ve 24 nolu Protokolün dışlayıcı yetkisini reddetmelidir.

Anahtar Kelimeler: *Roma, AB, İltica, Protokol, AİHM*

Introduction

The European Union (EU) and the United States (U.S.) have long histories of promoting human rights and assisting asylum-seekers. Both are parties to international agreements that define and protect universal human rights. Each has enacted domestic and/or 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]

The legal systems of the EU and the U.S. are premised upon many common norms, resulting in very similar bodies of jurisprudence. The EU system is dominated by the civil law tradition (a notable exception is the UK's common law approach), while the U.S. is grounded in common law.[2] Civil law and common law belong to what is commonly known as the "Western Law" family.[3] Both emphasize individualism, liberalism, and personal rights.[4] Both are characterized by the use of abstract legal constructs such as contractual rights, property ownership, and corporations.[5] It has been noted that the differences in these systems are primarily technical or procedural, rather than substantive.[6]

Due to the shared principles of the civil law and common law systems, one would expect the EU and the U.S. to use similar standards in the adjudication of asylum claims. For the most part, this expectation holds true. For example, EU asylum law defines 'refugee' as a "third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country…"[7] Similarly, in the United States a 'refugee' is defined as "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.[8]

The EU and the U.S. also have comparable asylum application procedures. For example, both ensure the right to a personal and non-adversarial interview, the right

[1] In 2011, the U.S. granted asylum to 24,988 individuals and the 27 EU member states collectively granted refugee status to 42,700 individuals. Sources: U.S. Department of Homeland Security-Office of Immigration Statistics, *Annual Flow Report* (May 2012); Eurostat, *News Release 96/2012* (June 19, 2012).
[2] Tetley, W. (2000), *Mixed Jurisdictions: common law vs. civil law (codified and uncodified)*, 60 La. L. Rev. 677-738.
[3] David, R. and Brierley, J. (1985), *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law,* Stevens & Sons: London
[4] Tetley, *supra* note 2.
[5] Smith, J.C. (1968), The Unique Nature of the Concepts of Western Law, The Canadian Bar Review (46:2), pp. 191-225.
[6] David & Brierley, *supra* note 3.
[7] Chpt. 1, Art. 2(c) of Council Directive 2004/83/EC (on minimum standards for the qualification and status of third country nationals…as refugees…and the content of the protection granted), OJ L 304/12 (29 Apr. 2004).
[8] U.S. Immigration and Nationality Act (INA), §101(a)(42).

to a written decision, the right to appeal, and the right to remain while the asylum claim is pending.[9,10]

Upon initial examination, the substantive and procedural aspects of EU and U.S. asylum law appear fairly homogenous. However, a glaring difference arises when one focuses on the applicant's country of origin -- specifically, when the applicant is an EU national. Asylum adjudicators in the U.S. employ a case-by-case approach, regardless of the applicant's country of origin. On the other hand, EU adjudicators are legally required to presume that asylum claims filed by EU nationals are without merit. This legal presumption comes primarily from the *Protocol on Asylum for Nationals of Member States of the European Union* (Protocol No. 24).[11] The Protocol effectively renders such applications dead in the water.

1. The Origins of Protocol No. 24

Protocol No. 24 was the result of intense lobbying by former Spanish Prime Minister, José María Aznar.[12] Spain was agitated over the protection of certain *Euzkadi ta Askatasuna* (ETA) members in France and Belgium.[13] 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.[14] Spain wanted to eliminate the possibility of asylum for ETA members within the EU. Not only was Spain's goal realized, but Protocol No. 24 ultimately "eliminated asylum within the Union for its own nationals."[15]

Prior to the adoption of Protocol No. 24, the EU Council of Ministers issued a non-binding Resolution which addressed asylum claims made by EU nationals.[16] The Resolution provided for a simplified and rapid procedure for such claims, but maintained that "Member States *continue to be obliged to examine individually*

[9] Council Directive 2005/85/EC (on minimum standards on procedures in Member States for granting and withdrawing refugee status), OJ L 326/13 (1 Dec. 2005).
[10] U.S. Code of Federal Regulations, 8 C.F.R. § 208.
[11] OJ C 340/103 (10 Nov. 1997). Protocol No. 24 is also known as the "Aznar Protocol" or "Spanish Protocol."
[12] Mr. Aznar served as Spain's Prime Minister from 1996-2004.
[13] Jebb, C. (2003), *The Fight for Legitimacy: Liberal Democracy v. Terrorism*, The Journal of Conflict Studies (Vol. XXIII, No. 1); *see also* Twomey, P. (1999), *Constructing a Secure Space*, Legal Issues of the Amsterdam Treaty, Hart Publishing (at 368).
[14] *Memorandum From Spain on the Inadmissibility of Asylum for Citizens of the Union*, CONF 3826/97 (ANNEX), Brussels (24 Feb. 1997).
[15] 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 (June 1999).
[16] OJ C 274/13 (20 June 1995).

every application for asylum, as provided by the Geneva Convention…"[17] [emphasis added].

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."[18] At Spain's urging, the Council's Resolution was eventually replaced by Protocol No. 24.

Protocol No. 24 was officially adopted as part of the 1997 Treaty of Amsterdam,[19] which amended the earlier Maastricht Treaty on European Union. The Protocol was reaffirmed in the subsequent 2007 Lisbon Treaty.[20] Two highly controversial concepts are embedded within the language of Protocol No. 24.[21] 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*"[22] [emphasis added].

Although asylum claims by EU nationals are feasible under Protocol No. 24, the Protocol creates numerous impediments that 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;

[17] Id. at para. 20

[18] *Memorandum From Spain on the Inadmissibility of Asylum for Citizens of the Union, supra* note 14.

[19] The Treaty of Amsterdam formally entered into force on May 1, 1999.

[20] The Lisbon Treaty was signed by 27 EU members on December 13, 2007 and became effective on December 1, 2009.

[21] Objections to these controversial concepts are discussed in Shawcross, William, "A Disgraceful EU Asylum Proposal" (14 June 1997), International Herald Tribune; and McAdam, J. (2007), *Regionalising International Refugee Law in the European Union: Democratic Revision or Revisionist Democracy?*, 38 VUWLR 255-280 (Aug. 2007).

[22] Belgium formally rejected this presumption in favor of a case-by-case approach (see "*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."[23] 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.[24] The Protocol "was not put to democratic vote, nor was it drafted or shared in a transparent manner."[25]

Protocol No. 24 should be abandoned or significantly revised. As discussed in the second half of this paper, not only does it conflict with international asylum/refugee law, but it does not match the reality of certain EU minorities. For example, the Roma[26] in some EU member states are subject to racist attacks, marginalization, arbitrary arrest, prolonged detention, police beatings, and a largely complacent police and judicial system. Unfortunately, modern EU asylum law eviscerates the valid claims of Roma who live within the EU. Bulgaria, Romania, and Hungary are three EU countries often criticized for hardships faced by their Roma citizens. These nations are examined later in this paper.

2. The EU's Human Rights Regime: An Overview

In general, the EU's reputation as a promoter and defender of human rights is well-deserved. In 1953, the EU promulgated the Convention for the Protection of Human Rights and Fundamental Freedoms (now known as the European Convention on Human Rights, or ECHR).[27] All EU member states are signatories. Article 1 of the ECHR requires signatories to respect human rights, Article 13 guarantees an effective remedy when those rights are violated, and Article 14 states

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[23] Landgren, *supra* note 15 (p. 13).
[24] Id. at p. 14.
[25] Id. at p. 12.
[26] 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."
[27] The Convention was opened for signature on Nov. 4, 1950 and entered into force on Sept. 3, 1953.

that the enjoyment of these rights shall be secured without discrimination on the basis of national origin (among other grounds). These provisions are discussed in more detail in the second half of this paper.

Pursuant to the ECHR, the European Court of Human Rights was created in 1959. Although the Court is not formally part of the EU, it is charged with enforcing the ECHR. Under the Court's jurisdiction, individuals can sue nation-states for alleged violations of human rights.

A more recent expression of EU 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.[28] Of particular interest is Article 18 of the Charter, which specifically guarantees the right to asylum.[29] Under Article 18, the EU's current policy of excluding EU-origin asylum claims is a legal aberration.

Protocol No. 24 is the primary roadblock to claims filed by EU nationals. However, the rationale and principles of Protocol No. 24 have been reaffirmed by subsequent EU Directives: the 2004 Qualifications Directive,[30] and the 2005 Asylum Procedures Directive.[31]

The 2004 Qualifications 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 Amsterdam Treaty. Among other things, the Directive defines the term 'refugee' and gives various grounds for protection. It excludes EU nationals from the definition of 'refugee.'[32] The Directive refers only to 'third country nationals' and 'stateless persons' (i.e., excluding all EU nationals). In other words, the Directive envisions no circumstances in which an EU national might be a legitimate refugee. The UNHCR later expressed concern that the Directive's definition of 'refugee' does not coincide with the 1951 Geneva Convention's definition of 'refugee.'[33]

The 2005 Asylum Procedures Directive also stems from the 1997 Amsterdam Treaty. The 2005 Directive confirms that 'refugees' do not include EU nationals. It also declares that Bulgaria and Romania (whose Roma populations are plagued

[28] This coincides with the date the Lisbon Treaty entered into force.
[29] Article 18 states that "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of…1951 and the Protocol of…1967 relating to the status of refugees..."
[30] Council Directive 2004/83/EC (on minimum standards for the qualification and status of third country nationals…as refugees…and the content of the protection granted), OJ L 304/12 (29 Apr. 2004).
[31] Council Directive 2005/85/EC (on minimum standards on procedures in Member States for granting and withdrawing refugee status), OJ L 326/13 (1 Dec. 2005).
[32] Art. 2(c).
[33] UNHCR, *Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004*, OJ L 304/12 (30 Sept. 2004).

by abuses which are thoroughly documented) should be regarded as "safe countries of origin."[34] This declaration was included because of Bulgaria's and Romania's then-pending status as candidates for accession to the EU.[35]

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."[36] 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."[37] The UNHCR and ECRE correctly predicted that the legal impact of the EU Directives and Protocol No. 24 would be profound.[38]

2.1 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 completely appropriate, as the Geneva Convention's refugee provisions cannot be derogated by treaty and are generally accepted as universal in scope.[39] However, the Protocol's substantive provisions contradict the language of the Preamble and unquestionably violate the Geneva Convention.

Protocol No. 24 has been scrutinized from within and outside the EU.[40] In fact, the EU's own European Commission expressed "personal regret" that the Protocol was included in the Amsterdam Treaty.[41] The United Nations High Commissioner

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[34] Id. at Preamble, Section 20.
[35] Ibid.
[36] *ECRE Information Note on the Asylum Procedures Directive (2005/85/EC),* IN1/10/2006/EXT/JJ.
[37] Id. at p. 6.
[38] 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 3 Feb. 1997 from Director, UNHCR Division of International Protection to Michiel Patijn, Secretary of State, Ministry of Foreign Affairs of the Netherlands); *see also ECRE Information Note on the Asylum Procedures Directive, supra* note 36.
[39] UN Office of Legal Counsel, Memorandum from Paul Szasz, Acting Director & Deputy (21 May 1997).
[40] Carrera, Guild & Merlino, *The Canada-Czech Republic Visa Dispute Two Years On: Implications for the EU's Migration and Asylum Policies* (Oct. 2011).
[41] EU Parliamentary Session Debate (Commissioner Gradin's response to question H-600/97 presented by Mr. Sjöstedt), *Debates of the European Parliament*, Official Journal of the European Communities, No. 4-505/76 (16 Sept. 1997).

for Refugees (UNHCR) also voiced opposition to Protocol No. 24 while the matter was being considered by EU Foreign Ministers.[42] The UNHCR concluded that the Protocol would be "at variance with international obligations that all Member States of the Union have undertaken," and advised the EU President against adopting it.[43]

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.[44] Amnesty International stated that the Protocol lays down standards which fall short of international standards.[45] 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."[46]

Noted British writer and commentator William Shawcross vehemently attacked Protocol No. 24, describing it as "disgraceful" and "insidious."[47] 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."[48] 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."[49] Under international law, discrimination on the basis of national origin is the Protocol's most serious defect.

2.2 Non-Discrimination Standards under International Law

A substantial body of international law prohibits discrimination on the basis of national origin. The Universal Declaration of Human Rights affirms that "*Everyone* is entitled to all the rights and freedoms set forth in this Declaration, without distinction of a kind, such as race, color, sex, language, religion, political or other opinion, *national or social origin*, property, birth, or other status."[50] Article 7 adds that "All are equal before the law and are *entitled without any discrimination* to equal protection of the law. All are *entitled to equal protection against any discrimination* in violation of this Declaration…" Finally, Article 8 declares that "*Everyone has the right to an effective remedy* by the competent national tribunals

[42] UNHCR, *Position on the Proposal of the European Council Concerning the Treatment of Asylum Applications from Citizens of European Union Member States, supra* note 38.
[43] Ibid.
[44] Human Rights Watch Press Release (12 June 1997).
[45] Amnesty International: The Amsterdam Treaty and the Protection of Refugees (7 Nov. 1997)
[46] ECRE, *Analysis of the Treaty of Amsterdam in so far as it Relates to Asylum Policy* (10 Nov. 1997).
[47] Shawcross, William, *A Disgraceful EU Asylum Proposal*, *supra* note 21.
[48] Ibid.
[49] Ibid.
[50] Article 2.

for acts violating the fundamental rights granted him by the constitution or by law" [emphasis added].

The United Nations Convention Relating to the Status of Refugees (1951 Geneva Convention) also upholds the principle of non-discrimination on the basis of national origin. Article 3 states that its provisions shall be applied "without discrimination as to race, religion or *country of origin*" [emphasis added]. Article 1 of the Convention specifically defines a refugee as "any person" who has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." Although the EU itself is not a party to the 1951 Geneva Convention (as 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."[51]

Ironically, Protocol No. 24 also violates non-discrimination standards developed within the EU. For example, the Charter of Fundamental Rights of the European Union[52] declares that "everyone is equal before the law" (Art. 20), and prohibits "any discrimination based on any ground such as sex, race, color, 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..." (Art. 21). Finally, 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" [emphasis added].

Protocol No. 24 also conflicts with Article 14 of the European Convention on Human Rights (ECHR).[53] The ECHR specifically prohibits discrimination based on "sex, race, color, language, religion, political or other opinion, *national or social origin*, association with a national minority, property, birth or other status" [emphasis added].

Despite the clear language of the Universal Declaration of Human Rights, the 1951 Geneva Convention, the EU Charter, and the ECHR, Protocol No. 24 was pushed through under a barrage of political pressure. The unfortunate result is *de facto* foreclosure of the asylum process for EU nationals.

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[51] European Parliament's Committee on Civil Liberties, Justice and Home Affairs, *Setting up a Common European Asylum System-2010 Study* (at p. 443).

[52] 2000/C 364/01 (Dec. 7, 2000). The EU officially recognizes the Charter as equivalent to a treaty under Art. 6 of the Treaty on European Union (TEU).

[53] Formerly known as The Convention for the Protection of Human Rights and Fundamental Freedoms, which was opened for signature on Nov. 4, 1950 and entered into force on Sept. 3, 1953.

3. 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.[54] Police "were more likely to use excessive force on persons of Romani origin" and "sometimes arrested suspects for minor offenses and physically abused them to force confessions, especially in cases involving Romani suspects."[55]

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 activities, and failure to investigate and prosecute Skinhead 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."[56] Moreover, police brutality was fairly routine. Even 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.[57] 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).[58]

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.[59] "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

[54] *U.S. Dept. of State's Country Report on Human Rights Practices for 2011 (Bulgaria).*
[55] Id. at p. 2.
[56] *U.S. Dept. of State's Country Report on Human Rights Practices for 2011 (Romania)*
[57] Id. at p. 24.
[58] Id. at pp. 24-25.
[59] *U.S. Dept. of State's Country Report on Human Rights Practices for 2011 (Hungary).*

intimidate and incite hatred against Roma and other minorities, increased."[60] Other human rights problems during the year included the 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.[61]

European government officials have acknowledged the abuse of Roma inside the EU. For example, the Parliamentary Assembly of the Council of Europe has discussed the 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."[62] 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."[63]

Germany has likewise admitted that Roma are not well-treated 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."[64] Despite being EU citizens, the Romanians and Bulgarians were last in the "ranking order" of the nationalities represented in Neukölln, the report concluded.[65]

4. 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.

[60] Id. at p. 1.
[61] Id. at p. 34.
[62] Council Resolution 1740, Section 2 (22 June 2010).
[63] Id. at Section 7.
[64] Özlem Gezer, *Out of Bulgaria and Romania: Wave of Immigrants Overwhelms German System* (May 2012) (citing the Neukölln report).
[65] Ibid.

Despite somewhat inconsistent approval ratings on a country-wide basis,[66] Roma have a strong chance of obtaining asylum in the United States. This is partially due to a lack of nationality-based presumptions in the U.S. asylum regime. U.S. asylum law rejects the notion that certain countries of origin are presumed 'safe.' Each asylum case is examined on the individual merits, regardless of the applicant's country of origin. Moreover, the definition of 'refugee' is broad and based directly on the definition from the 1951 Geneva Convention.[67]

Eligibility for asylum is governed by the Immigration and Nationality Act (INA).[68] In its most basic form, U.S. 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 U.S. and not in removal proceedings. The application is filed with a regional Asylum Office, under the jurisdiction of U.S. 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 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). The 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 U.S. Circuit Court of Appeal. Finally, even if an asylum applicant is statutorily ineligible for asylum,[69] he or she may qualify for some other form of relief, such as: 1) withholding of removal,[70] or 2) relief under the United Nations Convention Against Torture.[71]

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[66] Ruth Ellen Wasem, *Asylum and "Credible Fear" Issues in U.S. Immigration Policy*, Congressional Research Service (29 June 2011).

[67] INA §101(a)(42). 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*).

[68] INA §208; 8 U.S.C. §1158.

[69] E.g., failing to file within 1 year of entry, conviction of a particularly serious crime, or prior firm resettlement in a third country. INA §208(a)(2)(B), INA §208(b)(2)(A)(ii), and INA §208(b)(2)(A)(vi), respectively.

[70] INA §241(b)(3); 8 U.S.C. §1231

When compared to other countries, Bulgaria is not a top source country for U.S. asylum applications.[72] 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 U.S., and the difficulty in entering U.S. territory.[73] From 2005-2011, the number of Bulgarian applications approved by the USCIS Asylum Offices was 217.[74] During the same period, 349 additional applications were approved by the EOIR's Immigration Courts.[75]

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.[76] In fiscal year 2011, the approval rate for Bulgarians climbed to fifty-six percent (56%) and the denial rate dropped to twenty-seven percent (27%).[77] The remaining seventeen percent (17%) were withdrawn or otherwise disposed of.[78] In short, a Bulgarian Roma applicant has about a 50-50 chance of winning asylum in the United States.

The U.S. system encourages robust and thorough review, which is untainted by presumptions based on nationality. Unlike EU adjudicators, U.S. Immigration Judges and Asylum Officers routinely consider evidence which suggests that certain EU countries are not in fact 'safe' for Roma.

Conclusion

Protocol No. 24 is an anomaly 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 national origin. The Protocol's misguided concepts have been reinforced by the 2004 and 2005 Asylum Directives.

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[71] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984); *codified at* 8 U.S.C. §1231; 8 C.F.R. §208.16.

[72] Ruth Ellen Wasem, *supra* note 66 (at Appendix Tables A-1 and A-2).

[73] 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.

[74] Office of Immigration Statistics, 2011 Yearbook of Immigration Statistics: Refugees and Asylees, Table 17 (May 2012).

[75] Id. at Table 19.

[76] U.S. Department of Justice, Executive Office for Immigration Review (Office of Planning, Analysis, and Technology), *FY 2010 Statistical Yearbook* (January 2011)

[77] U.S. Department of Justice, Executive Office for Immigration Review (Office of Planning, Analysis, and Technology), *FY 2011 Statistical Yearbook* (February 2012)

[78] Id. at p. 22.

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 the legal barriers created by Protocol No. 24. Finding relief in non-EU European nations is also unrealistic. 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 in Canada.[79]

These international quests for asylum will cease if Protocol No. 24 is repealed and the EU begins protecting its Roma minority. The Roma of certain EU member states are victims of endemic and systematic human rights violations. It is time for the EU to reject presumptions based upon national origin, especially the concept of "safe country of origin." The demands of international asylum law require a major substantive shift in EU policy -- sooner, rather than later.

[79] 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*; Mary Sheppard, *Refugee System a Disgrace, Advocate Says*, CBC News (12 Mar. 2012); Tobi Cohen, *Hungarian Asylum Seekers Flood Canadian Shores in 2011*, Postmedia News (12 Feb. 2012); Don Butler, *Most Roma Asylum-Seekers Being Denied Legal Aid, Refugee Lawyer Says*, The Ottawa Citizen (16 Jan. 2012).

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