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978-0-521-19820-2 - The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union

Edited by Guy S. Goodwin-Gill and Helene Lambert

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## 1

Transnational law, judges and refugees in the  
European Union

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State authority and power have become diffused in an increasingly globalized world characterized by the freer trans-border movement of people, objects, and ideas.<sup>1</sup> This has led some international law scholars, working from the American liberal tradition, to declare the emergence of a new world order based on a complex web of transgovernmental networks.<sup>2</sup> The European Union (EU) is held as a prime example of this development, and indeed of the future trajectory of this world order. This volume explores the prospects for a transnational legal order in the context of refugee law in Europe.<sup>3</sup> Asylum is a policy area that, by its very nature, demands inter-state cooperation and the 1951 Convention Relating to the Status of Refugees (Refugee Convention)<sup>4</sup> is the basic instrument that provides for this. Within the EU, the imperative for deeper cooperation is

\* I wish to thank Roger Errera (Conseiller d'État Honoraire, Visiting Professor at CEU, Budapest), Vera Zederman (Director of the Legal Documentation Centre, National Asylum Court/Refugee Appeals Board), Zeta Georgiadou and Doede Ackers (Policy Officers, European Commission, DG Justice, Freedom Security, Directorate Immigration, Asylum Borders), for agreeing to be interviewed for the purposes of this chapter.

<sup>1</sup> M. Barnett and R. Duvall (eds.), *Power in Global Governance* (Cambridge University Press, 2005).

<sup>2</sup> A.-M. Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004); E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', *American Journal of International Law* 75 (1981), 1–27.

<sup>3</sup> Transnational law has been defined by the late Philip C. Jessup, Judge at the International Court of Justice, as 'the law which regulates actions or events that transcend National frontiers ... includ[ing] both ... public and private international law', in Philip Jessup, *Transnational Law* (New Haven: Yale University Press, 1956), p. 2. In a more global refugee law context, see H. Lambert, 'International Refugee Law: Dominant and Emerging Approaches', in D. Armstrong (ed.) *Handbook of International Law* (London: Routledge, 2008), pp. 344–54.

<sup>4</sup> UN Convention Relating to the Status of Refugees, signed in Geneva on 28 July 1951, 189 UNTS 150.

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[More information](#)

present, given the provision for the free movement of persons within the Union. EU member states have committed themselves to greater harmonization of their national laws on asylum, but interpretation and application of these new EC laws depend to a large extent on national judiciaries. Thus, the success of the harmonization, as a tool for international protection in the EU, substantially depends on the development of common judicial understandings, principles and norms concerning refugee matters.

As a general trend, judges are now commonly and increasingly paying attention to the law of foreign countries as a guide to their own decisions. It has even been suggested that we may be witnessing the emergence of a global jurisprudence, especially in the area of human rights.<sup>5</sup> This affinity with foreign sources of a domestic nature is particularly present in Commonwealth courts, due no doubt to shared legal cultures and a common allegiance, historically, to the Privy Council; hence, Lord Bingham suggests that we may be facing 'a new dawn of internationalism in the English legal world'.<sup>6</sup> In Europe this debate has traditionally focused on a three-dimensional dialogue: between national judges and European judges (for example, the European Court of Justice (ECJ) or the European Court of Human Rights (ECtHR)), between European judges themselves, and between national judges of the different member states (that is, the transnational dialogue). This volume focuses on the last dimension – namely, the dialogue between national judiciaries – as scholarship to date has focused on the dialogue between the European courts and the national courts,<sup>7</sup> and

<sup>5</sup> A.-M. Slaughter, 'A Typology of Transjudicial Communication', *University of Richmond Law Review*, 29 (1994), 99–137; 'Judicial Globalization', *Virginia Journal of International Law*, 40 (2000), 1103–24; 'A Global Community of Courts', *Harvard International Law Journal*, 44 (2003), 191–219; C. McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights', *Oxford Journal of Legal Studies*, 20 (2000), 499–532.

<sup>6</sup> Sir T. Bingham, "'There is a World Elsewhere': The Changing Perspectives of English Law", *International and Comparative Law Quarterly*, 41 (1992), 513–29, at 515. McGoldrick also observes: 'The overall effect of the HRA [Human Rights Act 1998] has been a significant increase in the use of comparative jurisprudence, with Canadian materials having the strongest influence', in D. McGoldrick, 'The United Kingdom's Human Rights Act 1998 in Theory and Practice', *International and Comparative Law Quarterly*, 50 (2001), 901–53.

<sup>7</sup> T. Koopmans, 'Comparative Law and the Courts', *International and Comparative Law Quarterly*, 45 (1996), 545–56. K. Lenaerts, 'Interlocking Legal Orders in the European Union and Comparative Law', *International and Comparative Law Quarterly*, 52 (2003), 873–906. V. P. Pescatore, 'Le recours dans la jurisprudence de la Cour de Justice des Communautés Européennes à des normes déduites de la comparaison des droits des Etats membres', *Revue trimestrielle de droit communautaire* (1980), 337. T. Franck and G. Fox, 'Transnational Judicial Synergy', in Franck and Fox (eds.) *International Law Decisions in National Courts* (New York: Transnational Publishers, 1996).

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Excerpt

[More information](#)

between judges in the European courts.<sup>8</sup> Some work has been done on the dialogue between national judiciaries<sup>9</sup> but not in the area of refugee law.<sup>10</sup> And yet what is so new about the liberal suggestion of an emerging transnational legal order is precisely the importance and role of horizontal networks (of policymakers, regulators, and judges).

### Transnational Law, policy harmonization and refugees in the European Union

The American liberal tradition in international law has long promoted the role of non-state actors and progressive values in the world legal order.<sup>11</sup> More recently, the emphasis has been on the role of transnational networks of government officials alongside the traditional place of states.<sup>12</sup> These transnational networks and processes clearly contribute to international normative activity, and to a changing conception of the world less dominated by a vertical notion of international law and domestic law.<sup>13</sup>

<sup>8</sup> Fr. Lichère, L. Potvin-Solis and A. Raynouard (eds.), *Le dialogue entre les juges européens et nationaux: incantation ou réalité?* (Brussels: Bruylant, 2004). Ch. L. Rozakis, 'The European Judge as Comparatist', *Tulane Law Review*, 80 (2005), 257–80.

<sup>9</sup> McCrudden, 'A Common Law of Human Rights?', 499. G. Canivet, M. Andenas and D. Fairgrieve, *Comparative Law Before the Courts*, London: British Institute of International and Comparative Law (2004). P. Legrand, 'European Legal Systems are not Converging', *International and Comparative Law Quarterly*, 45 (1996), 52–81. R. Sefton-Green, 'Compare and Contrast: Monstre à Deux Têtes', *Revue internationale de droit comparé*, 1 (2002), 85–95. B. S. Markesinis, 'Judge, Jurist and the Study and Use of Foreign Law', *Law Quarterly Review*, 99 (1993), 622–35; and 'A Matter of Style', *Law Quarterly Review*, 110 (1994), 607–28. B. S. Markesinis and J. Fedtke, 'The Judge as Comparatist', *Tulane Law Review*, 80 (2005), 11–167, and by the same authors, and very much based on that article, *Judicial Recourse to Foreign Law. A New Source of Inspiration?* (University of Texas at Austin and University College London Press, 2006).

<sup>10</sup> With one exception in the form of a report written by Gábor Gyulai, 'Country Information in Asylum Procedures – Quality as a Legal Requirement in the EU', Hungarian Helsinki Committee, 2007. And now see H. Lambert, 'Transnational Judicial Dialogue, Harmonization and the Common European Asylum System', *International and Comparative Law Quarterly*, 58 (2009), 519–43.

<sup>11</sup> H. D. Lasswell and M. S. McDougal, 'Legal Education and Public Policy: Professional Training in the Public Interest', *Yale Law Journal*, 52 (1943), 203–95; M. S. McDougal and H. D. Lasswell, 'The Identification and Appraisal of Diverse Systems of Public Order', *American Journal of International Law*, 53 (1959), 1–29; M. S. McDougal, 'Some Basic Concepts about International Law: A Policy Orientated Approach', *Journal of Conflict Resolution*, 4 (1960), 337–54.

<sup>12</sup> Slaughter, *A New World Order*.

<sup>13</sup> A. Boyle and C. Chinkin, *The Making of International Law* (Oxford University Press, 2007). J. E. Alvarez, *International Organizations as Law-makers* (Oxford University Press, 2005).

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Anne-Marie Slaughter, in particular, identifies the existence of a growing judicial globalization phenomenon whereby judges around the world are increasingly talking to each other and citing each other's decisions. This, she argues, means that we are witnessing 'the gradual construction of a global legal system'.<sup>14</sup> This global system is not just vertical as we used to know it (for instance, where the International Court of Justice (ICJ) or the ECJ gives a judgment or an advisory opinion which national courts then apply). Rather it is much more complex and messier, with vertical and horizontal networks of national and international judges.<sup>15</sup>

Refugee law offers a particularly interesting case-study because it has evolved mostly under the influence of judges – so it has 'become fundamentally judicialized'.<sup>16</sup> And this is reflected in the key role occupied by high courts as 'agents of normative change',<sup>17</sup> particularly in the area of refugees' rights.<sup>18</sup> Furthermore, refugee law lacks an international court competent to provide a common interpretation of the Refugee Convention (unlike the area of human rights law for instance),<sup>19</sup> thereby leaving it to each contracting state ultimately to interpret the Refugee Convention. In sum, refugee law provides tremendous opportunity in terms of seeking a greater transnational judicial role.

There is some evidence of such transjudicial activity in refugee law, among senior appellate judges in Commonwealth countries. James Hathaway notes:

Senior appellate courts now routinely engage in an ongoing and quite extraordinary transnational judicial conversation about the scope of the refugee definition and have increasingly committed themselves to find common grounds.<sup>20</sup>

<sup>14</sup> Slaughter, *A New World Order*, at 67.

<sup>15</sup> *Ibid.* Slaughter is not arguing that government networks will replace the existing infrastructure of international institutions, but will rather complement and strengthen them.

<sup>16</sup> J. C. Hathaway, 'A Forum for the Transnational Development of Refugee Law: The IARLJ's Advanced Refugee Law Workshop', *International Journal of Refugee Law*, 15 (2003), at 418.

<sup>17</sup> V. Guiraudon, 'European Court and Foreigners' Rights: A Comparative Study of Norms Diffusion', *International Migration Review*, 34 (2000), 1088–125, at 1107.

<sup>18</sup> D. Anker, 'Law, Gender, and the Human Rights Paradigm', *Harvard Human Rights Journal*, 15 (2002), 133–54.

<sup>19</sup> Slaughter, 'A Typology of Transjudicial Communication', at 121 and 127. On the use of comparative law in the UK since the HRA, see McGoldrick, 'The United Kingdom's Human Rights Act', at 901.

<sup>20</sup> J. C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005), at 1–2, referring in particular to Slaughter, 'A Typology of Transjudicial

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[More information](#)

Hathaway further observes:

Where no domestic precedent exists, courts are increasingly (and appropriately) inclined to seek guidance from the jurisprudence of other state parties to the Convention.<sup>21</sup>

Judges also refer more and more to the work of leading academic authorities.<sup>22</sup> However, this trend is less in evidence outside the Commonwealth. The International Association of Refugee Law Judges' (IARLJ) own estimate is that there is a problematic lack of referencing between European countries.<sup>23</sup> But, as yet, there has been no study on the precise extent of this problem. This volume therefore assesses the extent to which judges in the member states of the EU rely on each other's decisions on asylum and refugee status when making their own decisions. In so doing, it situates the use of foreign law in refugee law cases in the broader context of transnational European legal dialogue.

The imperative for dialogue between national judiciaries within the EU comes from the Tampere meeting of the European Council in October 1999, when the then fifteen member states agreed to develop the EU as a common area of freedom, security and justice. In order to do that, the member states agreed to work towards establishing a Common European Asylum System (CEAS) by making full use of the provisions in the 1997 Amsterdam Treaty. The effectiveness of this 'common' system will be in some ways dependent on commonalities. An obvious way of achieving this is through the adoption of common legislation. In this regard, the adoption of four key Directives and two Regulations on matters of asylum concluded the first phase of the establishment of a CEAS (this phase ended in 2005).<sup>24</sup> The European Commission's Green Paper on the Future Common European Asylum System started the second phase of this

Communication', 99–137, and to the University of Michigan's Refugee Caselaw Site and the establishment of the International Association of Refugee Law Judges in 1995.

<sup>21</sup> Hathaway, *The Rights of Refugees*, at 116.

<sup>22</sup> H. Storey, 'The Advanced Refugee Law Workshop Experience: An IARLJ Perspective', *International Journal of Refugee Law*, 15 (2003), at 423.

<sup>23</sup> Author's discussions with Mark Ockelton (Deputy President of the Asylum and Immigration Tribunal, and member of the IARLJ) and Dr Hugo Storey (Senior Judge, Asylum and Immigration Tribunal, and member of the IARLJ) during 2006/2007.

<sup>24</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in member states for granting and withdrawing refugee status (Official Journal L 326, 13/12/2005 p. 0013–0034); Council Directive 2004/83/EC of 29 April 2004 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 (Official Journal L 304, 30/09/2004 p. 0012–0023); Council

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[More information](#)

process<sup>25</sup> (due to end in 2012).<sup>26</sup> The European Commission is calling for fuller harmonization of both legislation and practice concerning asylum procedures, protection status and asylum decisions.<sup>27</sup> Thus, how this common legislation is interpreted and applied by domestic courts is equally important. A comparative approach by judges appears to be essential for the development of a system that is not only common but that is also coherent and built on trust; these are necessary elements for any common system to work, as clearly recognized by the European Commission.<sup>28</sup> For this to happen, a transnational judicial dialogue or process of communication, resulting in the use of each other's jurisprudence, must exist between European judges. This volume is testing: to what extent is the ground prepared for a common asylum system, and if it is not prepared, what are the obstacles that need to be addressed between now and 2012?

It is worth noting here that the adoption of the new EC legislation on asylum itself has already had some effect on the dialogue between refugee law judges and the use of comparative jurisprudence. Indeed, the adoption of new EC legislation has required the European Commission

Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third-country national (Official Journal L 050, 06/02/2003 p. 0001–0010); Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (Official Journal L 031, 06/02/2003 p. 0018–0025); Council Regulation (EC) No. 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No. 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention (Official Journal L 062, 05/03/2002 p. 0001–0005); and Council Directive 2001/55/EC of 20 July 2001 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 (Official Journal L 212, 07/08/2001 p. 0012–0023).

<sup>25</sup> Brussels, 06/06/2007, COM (2007) 301, final. See also the Hague Programme, 'Strengthening Freedom, Security and Justice in the European Union', Presidency Conclusions, Brussels, 4–5 November 2004.

<sup>26</sup> Note that the original, formal deadline was 2010 but this date has now been postponed to 2012. European Pact on Immigration and Asylum, adopted at the Council of European Union meeting in Brussels, 16 October 2008, D/08/4.

<sup>27</sup> Author's interview with Zeta Georgiadou and Doede Ackers (policy officers, European Commission, Directorate General Justice, Freedom and Security, Directorate Immigration, Asylum and Borders, 27 June 2007, Brussels).

<sup>28</sup> The Communication from the Commission to the Council and the European Parliament on 'Strengthened Practical Cooperation – New Structure, New Approaches: Improving the Quality of Decision Making in the Common European Asylum System', 17 February 2006, COM (2006) 67, recognizes just that, namely the need to 'build trust and confidence in each others' systems and achieve greater consistency in practice' (p. 3). See also, Lichère *et al.*, *Le dialogue entre les juges*, at 30.

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[More information](#)

to consult with different actors (for example, academics and senior court judges) to learn of the practice and jurisprudence of the member states. It has also forced the member states to reform their existing asylum legislation, and in doing so, an important process of inspiration by foreign practice and jurisprudence has taken place. For instance, the French Refugee Appeals Board (now the National Asylum Court) prepared an internal document aimed at guiding the work of the Board on the application of the new French asylum law of 2003 (particularly in the interpretation of key concepts in the EC Qualification Directive, such as 'internal protection', 'subsidiary protection' and 'state protection'). This document is largely inspired by foreign jurisprudence and contains strong comparative elements. Finally, the adoption of new EC legislation requires the national courts to adapt to what other member states are doing in seeking to match their own approaches with those adopted by other national courts and the ECJ when dealing with similar issues.<sup>29</sup> In this regard, information and best practice are being exchanged through face-to-face meetings and information networks, and the IARLJ is a perfect example of that.<sup>30</sup> The IARLJ was set up in 1995 to facilitate communication and dialogue between refugee law judges around the world in an attempt to develop consistent and coherent refugee jurisprudence. This need was felt particularly strongly in this area of law because of the lack of a supranational court competent to develop authoritative legal standards based on the Refugee Convention. Hathaway has described the IARLJ as 'one of the most exciting recent development in refugee law', in that it provides clear evidence of the existence of an 'ongoing transnational judicial conversation'.<sup>31</sup>

<sup>29</sup> H. Storey, 'EU Refugee Qualification Directive: A Brave New World?', *International Journal of Refugee Law*, 20 (2008), 1–49.

<sup>30</sup> There are currently 289 members of the IARLJ in 46 countries but membership varies greatly from country to country. In 2009 Belgium counted 3 members, Denmark 1, France 4, Germany 8, Ireland 32, Italy 0, Spain 0, Sweden 2, and the UK (including Scotland) 56. The IARLJ has its own database, set up by German judge Dr Dr Paul Tiedemann, in cooperation with the Europäische EDV-Akademie des Rechts in Merzig, Germany, and which offers free access to international case law on asylum. At present the following languages are available: Dutch, English, German, Finnish, French, Polish and Slovenian, and the database currently contains 190 decisions from 10 countries. It is entirely dependent on voluntary submissions and the goodwill of contacts (often judges) in different states. Available at: [www.iarlj.org/general/](http://www.iarlj.org/general/).

<sup>31</sup> Hathaway, 'A Forum for the Transnational Development of Refugee Law', at 418. In order to fulfil one of the main objectives of the IARLJ (i.e., the development of consistent and coherent refugee jurisprudence), Storey has called for the application of 'a principle of convergence' according to which 'tribunals and courts in different countries should seek



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[More information](#)

However, this volume shows that judges rarely *use* each other's decisions within the EU. The extent of this problem is remarkable. Ideally, the ECJ should be able to help in this process but, as things stand, its interpretative role is considerably limited under Article 68 EC Treaty (which restricts possibilities of references to the ECJ to 'a court or tribunal against whose decisions there is no judicial remedy under national law'),<sup>32</sup> and will continue to be so for a number of years.<sup>33</sup> Indeed, even if and when Article 68 EC is to be abolished and replaced with Article 234 EC (for example, with the ratification of the Treaty of Lisbon), it will take the ECJ some time to establish any clear foundational principles in this new area of law.<sup>34</sup> Furthermore, the ECJ is not always able or willing to review facts, and yet in refugee cases facts are often key elements in a decision.<sup>35</sup> Finally, it may be argued that the role of the ECJ in this area of law is seriously compromised by the lack of experts in refugee law at the ECJ and doubts are therefore expressed as to whether or not it will be able to interpret the necessary Directives in accordance with international law,

as far as possible to apply the same basic principles', in Storey, 'The Advanced Refugee Law Workshop Experience', at 423.

<sup>32</sup> Since the coming into force of the Qualification Directive (Directive 2004/83/EC) on 10 October 2006, three national courts have made a preliminary ruling reference to the ECJ. In October 2007 the highest administrative court (Raad van state) in the Netherlands sent a question to the ECJ concerning the interpretation of Article 15(c) (serious harm) of the Directive (C-465/07). In April 2008, the German Federal Administrative Court (Bundesverwaltungsgericht) sent a preliminary question concerning the interpretation of Article 11(1)(e) (cessation) of the Directive (C-175–179/08), and in January 2009 the Hungarian second instance administrative court (Fővárosi Bíróság) lodged a request for preliminary reference to the ECJ concerning the interpretation of Article 12(1)(a) (exclusion) of the Directive (C-31/08).

<sup>33</sup> The Commission Communication of 28 June 2006 (COM (2006) 346 final) proposes that Article 234 EC should also be applicable to the field of asylum, immigration and visas. In the interim, the urgent preliminary ruling procedure applicable to references concerning the area of freedom, security and justice should help towards simplifying the various stages of the proceedings before the ECJ in certain cases, but the existing limitations regarding which court/tribunal can submit a reference remain. Information Note on references from national courts for a preliminary ruling, O.J. 8.3.2008, C-64/1–2.

<sup>34</sup> C. Chenevière, 'L'article 68 CE – Rapide survol d'un renvoi préjudiciel mal compris', *Cahiers de droit européen*, 40 (2004), 567–90; and K. Lenaerts, 'The Unity of European Law and the Overload of the ECJ – The System of Preliminary Rulings Revisited', in I. Pernice, J. Kokott and C. Saunders (eds.), *The Future of the European Judicial System in a Comparative Perspective*, European Constitutional Law Network-Series Vol. 6 (Baden-Baden: Nomos Verlagsgesellschaft, 2006), 211–39, at 216.

<sup>35</sup> Lenaerts however points toward the ECJ's developing tendency to 'provide more "concrete", as opposed to "abstract", rulings warranting complex analysis of the facts, national legislation and other aspects of the main action'. Lenaerts, 'The Unity of European Law and the Overload of the ECJ', at 217.



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[More information](#)

in particular the Refugee Convention.<sup>36</sup> In summary, these particularities suggest that when the ECJ enters into a dialogue with national judges in this area of law, its role may not be as effective as in other areas of integration. It has been suggested that EC-wide guidelines, based on a selection of national case law<sup>37</sup> which the ECJ can then rely on, may therefore be a good idea to help deal with the problem of divergent interpretation.<sup>38</sup> This volume argues that the role of transnational jurisprudence (and therefore of national courts and tribunals as decision-makers) is in fact essential to the establishment of a truly 'common' European asylum system.

Our conclusion is that the transnational legal approach appears to have limited applicability in this new area of European law because, while a transnational dialogue between judges exists, it is having no real impact. This means that the influence of foreign law in this area is still minimal; that is, there is limited transnational legal activity. But the transnational legal approach is important in highlighting a central problem in the emergence of a common EC framework: the need for and yet lack of use of national jurisprudence across the EU. And here lies the usefulness of the transnational legal approach. The point is that whereas traditional international law focuses on the role of states in international law-making, in this case, in the creation of a CEAS, the transnational law approach highlights the kind of trans-state activities (based on trust and reciprocity between national courts) that need to occur in order for this system to work.

### Exploring transnational refugee law

This volume adopts a structured, focused comparison approach to examining a key element of the dialogue between refugee law judges,

<sup>36</sup> H. Lambert, 'The EU Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law', *International and Comparative Law Quarterly*, 55 (2006), 161–92.

<sup>37</sup> The terms 'case law' and 'jurisprudence' are used interchangeably throughout this book.

<sup>38</sup> This idea was advocated by the UNHCR (see UNHCR, *Asylum in the European Union: A Study of the Implementation of the Qualification Directive*, November 2007) and is supported by members of the IARLJ, European Chapter. In June 2008 the European Commission announced that it would put forward a legislative proposal for the creation of a European Asylum Support Office (Communication, COM (2008) 360). On 18 February 2009 the European Commission proposed a Regulation establishing a European Asylum Support Office. This will be 'a European independent centre for expertise in asylum' and it will 'help member states become familiar with the systems and practices of others, to develop closer working relations between asylum services at operational level, build trust and confidence in each others' systems and achieve consistency in practice' (Brussels, 18.2.2009, SEC (2009) 154).

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[More information](#)

namely the use of foreign law by national judges when making their own decisions on asylum, as an indication of transnational legal activity. It does so by examining nine EU member states (Belgium, Denmark, France, Germany, Ireland, Italy, Spain, Sweden and the United Kingdom) in separate chapters, and by focusing on specific aspects of each case. Each case analysis is structured around a common set of empirical and jurisprudential research questions.<sup>39</sup>

The nine countries included in this book were carefully selected on the basis of two criteria: the differences in legal tradition and culture within the EU particularly in terms of the civil–common law divide, and the existence of a substantive case law on asylum and reasonable access to this case law. For this reason, none of the EU member states which have joined most recently are included in this book because, when this project began (2006–7), either too little case law existed in these countries or relevant case law was simply not accessible (as in the case of Hungary until the law on the freedom of electronic information came into force on 1 July 2007).<sup>40</sup>

To begin with, each chapter provides an introduction to the decision-making process in the selected country, with a particular emphasis on the judicial authorities competent to deal with asylum cases, especially at the level of appeal; early on, it became quite clear that if a dialogue were going to take place, it would not be at first instance level but at the level of appeal. Each introduction also provides a useful insight into the specificities of each national asylum system with a view to identifying what is distinctive in each individual legal system.

Each chapter then follows on with an in-depth and systematic qualitative analysis of the jurisprudence relating to asylum in the selected country, in order to identify cases where decisions from other EU national courts were used (in the form of references or citations), with the realization of the existence of an ‘invisible traffic’ – through training, face-to-face meetings between judges and information networks (such as the IARLJ) – but which is so difficult to trace.<sup>41</sup> So, each chapter considers the

<sup>39</sup> A. L. George, ‘Case Studies and Theory Development: The Method of Structured, Focused Comparison’, in P. G. Lauren (ed.) *Diplomacy: New Approaches in History, Theory and Policy* (New York: Free Press, 1979), at 43–68. The normative relationship between municipal decisions and the international legal regime is explored in a conclusion to this book. The distinction between ‘empirical’, ‘jurisprudential’ and ‘normative’ questions is borrowed from McCrudden, ‘A Common Law of Human Rights?’, 499–532.

<sup>40</sup> I am grateful to Professor Boldizsár Nagy for this information.

<sup>41</sup> I am grateful to Hugo Storey for suggesting the concept of ‘invisible traffic’.