

ASYLUM IN A EUROPEAN COMMUNITY WITHOUT  
INTERNAL BORDERS

by

A. MAMANGAKIS (Greece)

Tutor: Dr. LUISE DRUKE

# ASYLUM IN A EUROPEAN COMMUNITY WITHOUT INTERNAL BORDERS

## INDEX

- I. Introduction.
- II. Protection Internationally Interdependent.
  - a. Preventive Measures.
  - b. Institutional balance.
- III. Compatibility with the internal Market.
  - a. Distinction between Refugees-Immigrants.
  - b. Harmonization of Procedures.
- IV. Key instrument for the Political Union.
  - a. Legal framework.
  - b. Practical applications: Information's exchange system and the role of the European Court of Justice.
- V. Conclusions.

# ASYLUM IN A EUROPEAN COMMUNITY WITHOUT INTERNAL BORDERS

## I. INTRODUCTION

"Europe stands at a cross-roads. The risks are evident, the opportunities are abundant. The path we follow will determine the kind of World we bestow on future generations".

By this closing point of statement on the subject "Refugees: a comprehensive European strategy", made by Mrs. Sadako Ogata, United Nations' High Commissioner for Refugees, in the Hague Peace Palace, on 24 November 1992, a clear indication of the current European challenges in the domain of asylum is given out. The end of the Cold War and the subsequent collapse of its inherent bipolar mechanism of settling up international disputes, brought European Community on the foreground of the so called "New World's Order". European Community has revealed to be the leading in the continent effective-mechanism for the guarantee of both democracy and prosperity, whose further promotion lies entirely on the decisive protection of human rights. Because of the continuation of political, religious and ethnic persecutions in many parts of the World, E.C. Member States registered in 1992, 552.829 asylum applications, according to the statistics provided by the UNHCR Regional Office in Brussels on May 1993. Due to the obvious inability of the E.C. Member States to respond individually to that vast number of asylum-seekers, who virtually challenge the democratic bases of E.C., as it is clearly shown up by the acute current phenomena of xenophobia, the claim for harmonization of asylum policies as well as the relevant entire legislation of E.C., has become an urgent and heated matter of common interest.

So long as the content of refugee protection in general is concerned, the Executive Committee of the High Commissioner's points out that<sup>1</sup> "its objective is not fulfilled until refugees once again enjoy protection as full-fledged members of a national community". The essential realization of such an aim requires effective international cooperation of all competent organs and mechanisms in charge.

---

<sup>1</sup> Executive Committee of the High Commissioner's programme. Forty-fourth session. Note on International protection. General Assembly, A/A.C. 96/815 31 August 1993, point 3.

## II. PROTECTION INTERNATIONALLY INTERDEPENDENT

According to Article 35 of the 1951 Geneva Convention relating to the status of refugees:

"1. The contracting states undertake to cooperate with the Office of the United Nations High Commissioner for Refugee or any other agency of the United Nations which may succeed it, in the exercise of its functions and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.

2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning:

- (a) the condition of refugees
- (b) the implementation of this Convention, and
- (c) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees".

Article 35 of the Geneva Convention, which is ratified by all Member States of the B.C., provides, therefore the necessary legal foundations for close cooperation between B.C. and UNHCR on taking effective preventive measures (a) and keeping the balance in the function of local competent authorities (b).

### *a. Preventive Measures*

The special political role that the B.C. is expected to play, in the field of international protection of Human Rights, is first of all a preventive one, namely through a rigorous attempt for the elimination of the conditions and factors that force people to seek assistance and protection outside the country of origins, on the grounds that "the Member States bear a measure of responsibility, in the light of their colonial past and their current foreign and external economic policy".<sup>2</sup>

---

<sup>2</sup> European Parliament, Report of the Committee on Civil Liberties and Internal Affairs on the harmonization within the European Communities of Asylum Law and Policies A3-0337/92.

The European Parliament in its Opinion of 23 September 1992 drew up the guidelines of the preventive measures that B.C. should take:<sup>3</sup> "The Community clearly has a duty to attempt to put an end to armed conflicts, non-democratic regimes, human violations and structural imbalances, leading to political and social instability, particularly in those countries with which it has association agreements".

Similarly the Economic and Social Committee of the European Communities in its own initiative Opinion<sup>4</sup> of 20 November 1991 on immigration policy, clearly points out the necessity of a creative dialogue between E.C. and third countries so that immigration problems be effectively confronted through the development of political, social and financial infrastructure on the countries of origin.

While the main field in which European Community has the possibility of imposing preventive measures is the stage of concluding and inspecting the application of international agreements, mainly on commercial affairs, effective political preventive measures, which in the long term can satisfactorily combat the underlying causes resulting in refugee problems on a global scale, ought to be taken in close cooperation with UNHCR.

Supplementarily, the European Parliament has proposed that a Handbook on Procedures and criteria for determining refugee status, should recourse to the UNHCR, as well as a Book of Precedents of Cases relevant to asylum matters, should be compiled and revised regularly and be available not only in the hands of all officials, dealing with asylum applications, but also to human rights organizations and organizations for the defense in asylum seekers interests. In this content the right for protection of privacy must be guaranteed.

### *b. Institutional balance*

The role of UNHCR in the operation of E.C. asylum policies may function not only as a legitimitative factor to this policy, so far as the preventive measures are concerned, but from the inter-institutional point of view, as a guarantee factor of counter-balance towards potential abuse of the competent national authorities.

---

<sup>3</sup> European Parliament, Opinion of the Committee on Social Affairs, Employment and the Working Environment for the Committee on Civil Liberties and Internal Affairs Draftsman Mr. Ferruccio Pisoni, PE 201.540/A/fin, Introduction paragraph 3.

<sup>4</sup> C.E.S. 645/91 fin, G/AA/NP/ax, Rapporteur Mr. Roscigrave, points 4.4-6.

Thus UNHCR or a local representative should especially:<sup>5</sup>

1. Have access to all asylum-seekers and be enabled, on explicit competent grounds, to take active role in the process of the various stages in the examination of an asylum application. While in the stage of the initial hearing, the provision of preliminary counseling and assistance in submitting written documents are of certain importance, the participation of the local representative of UNHCR in the appeal stage should be considered as a *conditio sine qua non* for a fair and just outcome of the same examination.
2. Follow up the factors on which "safe country of origin" and the "first asylum country" are employed as well as monitor that the minimum agreed conditions of return on a rejected case are present and fulfilled.
3. Cooperate for the application of the 1951 Convention on matters of admissibility (i.e. irregularities in entry such as false documents or misrepresentation to officials) as well as of burden and estimation of proof (i.e., onus on the States to demonstrate carrier's negligence in bringing in individuals, uncorroborated testimonies e.t.c.). and
4. Play an operational role so as to extend on humanitarian grounds protection even on persons who are in need of, although not qualified as refugees under the 1951 Convention or other legal instruments because "regardless of whether a person is a refugee or an economic migrant, a citizen or a non-citizen, whether he or she is fleeing persecution, armed conflict, threats to his or her life or abject poverty, that person is entitled<sup>6</sup> to minimum human rights and minimum standard of treatment".

### III. COMPATIBILITY WITH THE INTERNAL MARKET

The measures intended to establish a common market without internal frontiers, under Article 8A of the Treaty of Rome as amended by the Single European Act, has usually been criticized on the grounds that a special protection is given to the nationals of B.C. Member States, who enjoy the well known four fundamental freedoms, while nationals coming from outside community territories are exempted and therefore discriminated. Under the perspective of the freedom of

---

<sup>5</sup> Further (precise) analysis of UNHCR, Regional Office for the European Institutions, Working Paper on Harmonization in Europe, March 1992.

<sup>6</sup> United Nations, Human Rights and Refugees. Pact sheet No 20. Geneva 1993, p. 15.

movement of persons, B.C. harmonized policy on asylum must have a standardized concept for admission of asylum seekers to Europe and therefore for sameness of recognition throughout B.C.

*a. Distinction between Refugee-Immigrant*

Although Universal Declaration of Human Rights in Article 14 provides that "every one has the right to seek and to enjoy in other countries asylum from persecution" its inadequacy is obvious "for no one can be prevented from seeking asylum and only what is already granted can be enjoyed".<sup>7</sup>

The Commission of the European Communities in its Communication to the Council and the European Parliament on the right of asylum<sup>8</sup> declares that "the right of asylum is first and foremost a right and a humanitarian challenge".

It is of absolutely vital importance for the establishment of the common market to distinguish clearly the criteria upon which a refugee bears the asylum status (a humanitarian right for the protection of which countries have entered into international commitments) and immigration (an economic and social phenomenon to which countries may respond individually and over which have discretion).

Harmonization of asylum legislation of the E.C. Member States, so that identical criteria upon which a refugee would enjoy the status of asylum, would protect the function of the internal market from potential negative side effects of uncontrolled immigration namely in the fields of labours demand, social security policies, distortions of competition e.t.c.

Under the above mentioned perspective, Geneva Convention relating to the status of refugees of 1951 and the New York supplementary Protocol of 1967, also ratified by all Member States, abolished the geographical reservations for non-european refugees and have already taken a crucial step towards harmonization. The main instrument in Geneva Convention is the definition of refugee which is included in Article 1 according to which:

"For the purposes of the present convention the term "refugee" shall apply to any person who: ... 2. owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political

---

<sup>7</sup> J.E.S. FAWCETT, *The application (if the European Convention of Human Riskta*. Oxford Clarendon Press 1969, p.59 footnote 2.

<sup>8</sup> Commission of the European Communities Sec (91)1857, Final, Brussels, 11 October 1991

opinion, is outside the country of his nationality and is unable to or owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or owing to such fear, is unwilling to return to

By ratifying the Convention, the Member States entered into basic humanitarian commitments aimed at affording protection to individuals who fulfill the criteria set out by it. A striking feature of this definition is the importance of the criterion of persecution. An asylum seeker can not be recognized as a refugee if the only reason for fleeing his country is the existence of political disturbances or tensions e.t.c.

Similarly, the Council of Europe recommends that governments of Member States, without prejudice to the exceptions provided for in Article 33, paragraph 2, of the Geneva Convention, ensure that the principle according to which no person should be rejected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to, or remain in, a territory where he has a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, shall be applied regardless of whether this person has been recognized as a refugee under the 1951 Convention (Recommendation No. R(84) on the protection of persons satisfying the criteria in The Geneva Convention who are not formally recognized as refugees adopted on the 25 January 1984).

The 1951 Geneva Convention therefore, lays down merely a common minimum standard of protection, in other words Member States law may go further and grant refugees more rights than those provided in the Convention, which in any case does not include procedural provisions for the examination of asylum requests, As a result Member States apply a wide variety of procedures<sup>9</sup> ranging from a non-applicable decision of an independent Committee to a highly formalized procedure subject to very strict judicial control. Only the Federal Republic of Germany recognizes a constitutionally guaranteed legal right of asylum for those who qualify. The other B.C. countries provide asylum if the conditions of refugee status are complied with either on the grounds of a legal right of the individuals, on the

---

<sup>9</sup> Comparison of the rules concerning right of asylum in the countries of Europe, Text by Dr. Peter Schoenemann, Published by the Ministry of the Interior of the Land of North Rhine-Westphalia, Press and Public Relations Department, Dusseldorf, October 1992, p. 32.

grounds of a national commitment, or on the grounds of an optional regulation for humanitarian or other reasons.

*b. Harmonization of Procedures*

The desired procedural harmonization of asylum policy in the E.C. Member States should take into consideration and further improve the following so far common to all Member State provisions of:

1. Some form of appeal against refusal of asylum, so that individuals be able to defend themselves.
2. Unrestricted residence to recognised refugees over and above that prescribed by the Geneva Convention, at least until the reasons for persecution do no longer exist.
3. The right of asylum seekers to be heard and be legally represented in both accelerated and standard asylum procedures.
4. The possibility of appeal against refusal of entry and refusal to access to asylum procedure (with the exception of Greece).
5. The involvement of independent examination organizations (with the exception of Ireland).
6. Temporary residence on humanitarian grounds either as an individual right (Denmark) or exclusively on exceptional cases (Belgium, France, Greece, Ireland, Italy, Luxembourg).

Negative impact of the so called "European Portress" may be limited in the view of the adoption of the following proposed by the European Parliament legal code<sup>10</sup> for the harmonization of notions and procedures of E.C. asylum policy which will aim to:

- 1) Ensure unfettered access to the territory and (unfettered) automatic access to the procedures, even if the states concerned have arrangements based on a list of "safe countries of origin".
- 2) Ensure a full and fair initial hearing.

---

<sup>10</sup>

Same as footnote number 2

- 3) Ensure the availability of free legal representation as a matter of course.
- 4) Ensure that the asylum seeker and his legal representative have access to the relevant documents.
- 5) Arrange for interpretation facilities.
- 6) Provide an appeal procedure on law of fact to an independent tribunal and where the latter is not judicial, to the court of Law, and pending determination of same, the applicant shall not be removed.
- 7) A decision at first instance may not take longer than six months.
- 8) Ensure that legal remedy remains open and that no restrictions are placed on the guarantee of legal remedy.
- 9) Ensure access to UNHCR and to representatives of human rights organizations and those designated by the asylum seeker as trustworthy persons.

### III. KEY INSTRUMENT FOR THE POLITICAL UNION

#### *a. Legal framework*

Before coming to the relevant provisions of the Treaty on the European Union, two multi-state regional conventions should be particularly mentioned, namely the Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member State, commonly known as the Dublin Convention addressing which country is responsibly for considering an asylum claim, and the Convention on the Application of the Schengen Agreement of 14 June 1985 relating to the Gradual Suppression of Controls at Common Frontiers (Schengen Convention), which deals with border controls in addition to refugee and asylum issues, such as drug trafficking.

UNHCR considers<sup>11</sup> such co-operation to be one of the very "measures calculated to improve the situation of refugees and to reduce the number requiring protection" in the following aspects:

---

<sup>11</sup> United Nations High Commissioner for Refugees, Dublin and Schengen Conventions: UNHCR'S Position. Memorandum from Michel Moussalli, Director of International Protection, 16 August 1991.

1. The intention to guarantee prompt review of claims, in accordance with the applicable international instruments and assign clear responsibility for protection and return of those claimants deemed not to be refugees.
2. The reaffirmation of the obligations of parties under the 1951 Convention and the 1967 Protocol.
3. The recognition of the necessity of continued cooperation and coordination with UNHCR.
4. The willingness of States to share with each other and with UNHCR statistical information and data concerning refugee trends.
5. The exchange of information by computer takes place only among countries that are party to the 1981 Council of Europe Convention for the Protection of individuals with regard to Automatic Processing of Personal Data.

So long as the Schengen Convention, which operates as a "laboratory"<sup>12</sup> of the political Union in the field of asylum legislation is concerned, the following issues have been and are expected to be further discussed:<sup>13</sup>

- a) Readmission agreements with third countries.
- b) Measures necessary for the actual implementation of the Schengen Information System.
- c) Completion of the Common Handbook and its annexes relating to external border controls and visa policies.

According to Article 100C of the Treaty on the European Union:

- a) The Council shall determine by unanimity until 31 December 1995 and by qualified majority after that date and in cases of emergency a list of third countries whose nationals need a visa for crossing the external orders. The Council shall act on a proposal from the Commission and after consultation with the European Parliament.

---

<sup>12</sup> LAURENCE WATTIER, *Immigrés et demandeurs d'asile: L'Europe se barricade*, ADBK; Bulletin 44, p. 43.

<sup>13</sup> LUISE DRUKE, *Asylum Policies in a European Community without internal borders*, Churches Committee for Migrants in Europe, Briefing Paper No. 9, p. 12.

b) Acting by qualified majority, the Council on a proposal from the Commission and after consulting the European Parliament, shall introduce a uniform model of visa.

In the framework of intergovernmental co-operation:

a) The Council may either adopt joint positions or joint actions or draw up conventions (Art K-3) on nine matters of common interest, namely:

K-1 asylum

K-2 crossing the external borders

K-3 immigration

K-4 drugs

K-5 international crime

K-6 judicial cooperation in civil matters

K-7 judicial cooperation in criminal law

K-8 cooperation between customs services

K-9 police co-operation, including the creation of Europol a system of exchange of police information.

According to the Title I Article F of the Common Provisions of the Treaty, the Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedom signed in Rome on the 4th November 1950. Actions within the framework of intergovernmental cooperation in the field of Justice and Home Affairs (Title VI) shall be taken in accordance with this Convention. The interpretation<sup>14</sup> of the provision could mean that the European Convention on Human Rights and the 1951 Convention relating to the status of refugees (mentioned in Article K-2) has precedence over other Conventions in this area between Member States,

*b. Practical applications: Information exchange system and the role of the European Court of Justice.*

The above mentioned legal framework of the harmonization of asylum policies in respect to the European Political Union may further be promoted and actually implemented through the establishment of an intercommunal system of

---

<sup>14</sup> LUISE DRUKE, *Asylum Policies in a European Community without internal borders. Perspectives, Priorities and Proposals for a European strategy*; Working Document, UNHCR Regional office in Brussels, October 1992, p. 21.

exchanging information throughout the territory of B.C. as well as through the acceptance of the active integrative<sup>15</sup> role of the European Court of Justice.

The development of an intercommunal system of exchanging information would first of all strengthen the investigative procedures and therefore the imposition of criminal sanctions against clandestine immigration networks. Uniformity in the application of harmonized asylum procedures would be monitored and guaranteed through the exchange of information concerning the conditions prevailing in the country of origin of any asylum seeker and potential advantageous objective situations for any asylum seeker, such as the existence of family e.tc.

Through such close-cooperation of the competent administrative authorities the actual European Political Union will gain undeniable grounds.

So far as the role of the European Court of Justice is concerned, the Commission in its above mentioned communication on the right of asylum<sup>16</sup> doubts the role of it on the snowball effect which a lengthy procedure may create, that is to say the attraction to even greater number of asylum seekers as they have a right to stay while the procedure is pending. The Commission says on point 28:

"If the information exchange machinery did not lead to common practice in asylum matters, the creation of common judicial could be considered.

In the current state of discussion, it would be extremely difficult to form a precise idea of how such machinery could be structured and how it could operate. It is appropriate, however, to define the essential objectives to be pursued:

- reducing disparities between Member States in the interpretation of the law on asylum.
- as an indirect effect, harmonizing administrative practice".

On the other hand European Parliament in its also above mentioned report<sup>17</sup> on the harmonization of Asylum Law and Policies of 5 November 1992 within the European Communities takes without any reservation the attitude that:

---

15 For the institutional role of the European Court of Justice see the eminent, study of BREDIMAS ANNA, *Methods of interpretation and Community law*, EUROPEAN STUDIES IN LAW, Amsterdam, North Holland 1978, p. 181.

16 Same as footnote number 8.

17 Same as footnote number 2.

"ultimate power of decision on the interpretation of asylum law provisions in the Community Member States and the interpretation of the various conventions (the European Convention on Human Rights and the Geneva Convention on Refugees) be transferred to the European Court of Justice; this would make uniform treatment for asylum seekers in the various Member States possible in the long term".

By doing so the European Parliament entrusts the European Court of Justice to be an integrative institution of the Communities, whose role in the harmonization of legislation as well as in the uniformity of implementation remains irrevocable.

## V. CONCLUSIONS

The ambition of the European Community to play an active and actually effective role in the global political foreground, as implied by the decision of the Member States to share a common destiny, makes the proposed harmonization of asylum policies the necessary instrument for controlling cross-border population movements in respect to the international humanitarian commitments. The strengthening of the European Community through the establishment of the common market and the Political Union, will relatively strengthen its preventive power to combat the causes of refugee problems globally.

Under this perspective harmonization of law and policies concerning asylum as well as the close cooperation with UNHCR will also legitimate the decisions taken by the competent national authorities and it will therefore contribute, as a safeguard, to extinguish the current acute phenomena of xenophobia and racism, which condemned by the vast majority of the European Citizens, remain incompatible with their spirit. As the Treaty of European Union has now entered into force on 1 November 1993, European Community is advanced equipped by the above mentioned legal framework to enact the said ambition.

## **BIBLIOGRAPHY**

- (1) United Nations Fact Sheet No. 20, *Human Rights and Refugees*, Geneva 1993.
- (2) KAY HAIBROMER, *Asyl-und Einwanderungsrecht in der Europäischen Gemeinschaft*, Universität des Saarlandes, Europa-Institut, 1992.
- (3) J.E.S., FAWCETT, *The application of the European Convention on Human Rights*, Oxford Clarendon Press, 1969.
- (4) DR. PETER SCHOENEMANN, *Comparison of the rules concerning right of asylum in the countries of Europe. A common right of asylum in Europe. Cornerstones for future harmonization*. Ministry of the Interior of the land of North Rhine-Westphalia, Dusseldorf, 1992.
- (5) LUISE DRUKE, *Asylum Policies in a European Community without internal borders*. Churches Committee for Migrants in Europe, Briefing Paper No. 9.