

Harmonization of Asylum Law<sup>24</sup>

# Justice and Home Affairs in the European Union

## The Development of the Third Pillar\*

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## HARMONIZATION OF ASYLUM LAW AND JUDICIAL CONTROL UNDER THE THIRD PILLAR

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### 1. Introduction

The interpretation and application of the term "refugee" as defined in the 1951 Convention Relating to the Status of Refugees has shown not to be uniform in the European Union Member States. Both the 1951 Geneva Convention and the European Convention on Human Rights provide the Community with a common legal framework in substantive asylum law which can be used to evaluate whether a person is eligible for protection or not. The marked differences between Member States when granting asylum for certain categories of refugees is due, to a large extent, to the fact that the application of asylum rules is related to differing national interests.

«A study in comparative law shows that even within the EEC there are different perceptions of how administrative proceedings should be organized, and how far judicial redress concerning negative administrative decisions should go.»<sup>1</sup>

In order to serve uniform application of laws, the establishment of a European judicial control authority is indispensable. However, European asylum rules as yet do not have the authority of European Community law, which does not, however, preclude the transfer of safeguarding uniform interpretation and application to the Court of Justice or another European body. Various possibilities are conceivable, and the preliminary ruling procedure analogous to Article 177 EC Treaty appears to be the most conceivable. In accordance with Community law, national courts have the possibility and sometimes the obligation to submit questions on the interpretation and application of Community law to the Court of Justice for preliminary ruling.<sup>2</sup> This alternative would of course require a further transfer of competences to the Community. But:

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<sup>1</sup> HAILBRONNER K., "*Perspectives of a Harmonization of the Law of Asylum after the Maastricht Summit*", in : **Common Market Law Review**, Vol.29. 1992. p.931.

<sup>2</sup> See BEUTLER B. *et al.* (eds). **Die Europäische Union, Rechtsordnung und Politik**, Nomos Verlag, 4. Auflage, 1993, pp.106-107; see also VON DER GROEBEN H., VON BOECKH H., THIESING H. & EHLERMANN C.D. (Hrsg.), **Kommentar Zum EWG-Vertrag**, Nomos Verlag, Baden-Baden, 1991, p.4623.

«if the granting of asylum is to become a "European affair", it would only be logical to transfer the examination of asylum decisions to a European level. As long as this requirement is not met, national control mechanisms cannot be abandoned, though».<sup>3</sup>

Consultation between EU Member States for the harmonization of asylum law has continued under the Belgian Presidency of the Council in the second semester of 1993 and under the Greek Presidency in the first semester of 1994, without arriving however, at an agreement on a harmonized interpretation and application of the term "refugee" in Article 1.A of the 1951 Convention. After the Council determined that priorities of common action in the field of asylum in 1994 should concentrate on the harmonized interpretation of Article 1A, the German Presidency of the Council in the second semester of 1994 has intensified its efforts with the other EU Member States on this priority.<sup>4</sup>

Since the entry into force of the Treaty on European Union and a reference made to the possible jurisdiction of the Court of Justice in Article K.3 TEU, the question of a harmonized system of judicial appeals has received fresh impetus. Securing uniform interpretation and judicial protection of the individual is best dealt with by a court. However, individuals, be it refugees or third country immigrants or their lawyers cannot bring their cases before the Court of Justice in the preliminary ruling procedure under Article 177 EC Treaty because the procedure for a preliminary ruling represents a specific form of cooperation between Judges. During the past thirty years, without counting social security cases, an average of five cases per year concerning free circulation of persons has been referred to the Court of Justice by national Judges.<sup>5</sup>

During a seminar on judicial and parliamentary control of European rules relating to asylum and immigration on 14 January 1994. presentations concentrated on exploring possibilities of extending competence to the Court of Justice. In the context of Schengen, the Dutch proposals consisted of two protocols to be submitted for ratification. The first protocol would establish that the twelve Member States of the European Union agree that the Court of Justice — being an institution of the Union — has the possibility of interpreting certain sectors of the Schengen Implementation Agreement and of settling any differences that could arise between the nine Schengen Member States.<sup>6</sup> By the second protocol<sup>7</sup> the nine Members of Schengen would establish the sectors for which the Court of Justice would be competent to settle any differences between the Member States (namely : Title I, definition of the notion applied in the Schengen Implementation Agreement; Title II, abolition of internal border controls and movement of persons; Title IV, chapter 3, protection and security of personal data of the Schengen Information System (SIS); Title VII, the Executive Committee). The sectors for which the Court of Justice would be called upon by a national court to provide its interpretation would include chapter VII on asylum and Title VIII, Article 134, on the compatibility of the Schengen Implementation Agreement with Community law.<sup>8</sup>

## 2. Proposals Made for Judicial Control

<sup>3</sup> HAILBRONNER K., *op.cit.*, note 1, at p.937.

<sup>4</sup> Objectives and key issues to be addressed by the German Presidency of the Council of the European Union, SN 2965/94, 1994.

<sup>5</sup> GROENENDUK C.A., "*The Competence of the EC Court of Justice*", in : MEIJERS H. *et al.*. **A New Immigration Law for Europe ? The 1992 London and 1993 Copenhagen Rules on Immigration**, Standing Committee of experts in international immigration, refugee and criminal law, Utrecht, 1993, p.49.

<sup>6</sup> "Proposal by the Dutch Standing Committee of Experts on a Protocol concerning the Competence of the EC Court of Justice", which can be found in the handout for the Seminar on Harmonization of Refugee Policies in Europe: "The Impact on Legal Counsellors", European Legal Network on Asylum (ELENA), Luxembourg, 07-10.05.1992. organized by ECRE, London.

<sup>7</sup> Dutch government proposal on a Protocol concerning the competence of the EC Court of Justice as regards the Schengen Convention. 06.11.1991, *ibid.*

<sup>8</sup> LOIACONO G., Presentation at the Seminar on judicial and parliamentary control, Brussels, 14.01.1994, p. 1-2.

Since 1991, most of the national parliaments and the European Parliament have been expressing their support for extending jurisdiction in this field to the Court of Justice. The Dutch Council of State supported the idea in its opinion on Schengen U,<sup>9</sup> the Belgian Council of State did so one year later<sup>10</sup> and later the Belgian and Italian Senate<sup>11</sup> and both Chambers of the Dutch parliament have added their voice in support of competence of the Court of Justice.<sup>12</sup> The leader of the parliamentary group of the Social Democrats in the German *Bundestag* received support from MP's from both the Christian Democrats and the Liberals in April 1992.<sup>13</sup>

The European Commission has stated in the discussions on this issue, that a role for the Court of Justice with regard to the 1990 Schengen Implementation Agreement is feasible in principle.<sup>14</sup> In fact, in the meantime the Commission published its first proposal, containing a reference to the Court of Justice based on Article K.3 TEU. Discussions on this proposal have so far shown opposition by the United Kingdom concerning the Court's competence. Other States are more favourable, especially the Netherlands and Italy.<sup>15</sup>

Some Member States might be reluctant to accept the jurisdiction of the Court on questions traditionally considered to be in the exclusive domain of the national jurisdiction, such as asylum and immigration. It appears, however, unlikely that one Member State would deny other Member States the possibility to have access to the Court of Justice for the settlement of disputes or for the interpretation of common rules agreed between those States, as this would be hard to reconcile with the adherence to the "rule of law" principle reconfirmed in the Single European Act of 1986 and the Treaty on European Union.<sup>16</sup>

The following eleven proposals made since 1987 by different actors show that the need for a harmonized review of European asylum rules has been recognized for years already.

1. In 1987, the European Commission, in a draft directive on asylum suggested the establishment of an Advisory Committee for Asylum Questions for «*giving opinions on cases referred to it by Member States' authorities fix to the approach most conducive to approximation in the application of the law of asylum in the Community*», the Advisory Committee would also engage in information exchange and consultation on the granting of asylum, on desirable adjustments of national and Community legislation on the right of asylum and on situations in countries of origin.<sup>17</sup>

2. In 1988, the European Council on Refugees and Exiles (ECRE)<sup>18</sup>, proposed that asylum seekers should be given access to the European Human Rights Commission and the European Court of Human Rights in Strasbourg, which should be given competence to interpret the refugee definition of the 1951

<sup>9</sup> Opinion of 08.04.1991, point 14(a), of the Dutch Council of State.

<sup>10</sup> Belgische Scaat BZ 1991.1992, nr.464-1, p.34.

<sup>11</sup> Eerste Kamer 1992-1993, 22140, nr.52c, p.5, in : GROENENDIJK C.A., *op.cit.*, note 5, p.51.

<sup>12</sup> Ibid.

<sup>13</sup> The statement reads as follows : «... Deshalb schliessen wir Sozialdemocraten uns dem Begehren des niederlandischen Parlaments an, das in finer Entschliessung die Keimpeteni des Europdischen Gerichtshofes gefordert hat, um die Im Schengen-Ahkommen geregette Materie M enveiern...ii, sec : **Deutscher Bundestag**. Plenarsitzung, Protokoll 12/89, 30.04.1993, p.7319.

<sup>14</sup> "Eerste Kamer 1992-93, 22615, nr.3041, p.1/2, in : GROENENDIJK C.A., *op.cit.*, note 5, p.52.

<sup>15</sup> <sup>11</sup> *O.I.* 1994, CII/05, 15.01.1994; proposal for a decision, based on Art.K.3 TEU establishing the Convention on the Crossing of the External Frontiers of the Member States, published by the European Commission, included in Art.29 of the proposed Convention the Jurisdiction of the Court of Justice as follows :

"The Court of Justice of the European Communities shall have jurisdiction :

- to give preliminary rulings concerning the interpretation of this Convention; references shall be made as provided in the second and third paragraphs of Article 177 of the Treaty establishing the European Community;

- in disputes concerning the implementation of this Convention, on application by a Member State or the Commissions, **COM(93) 684 final**, 10.12.1993.

<sup>16</sup> "•Cf. GROENENDIJK C.A., *ifp.cil.*, note 5.

<sup>17</sup> Commission Draft Proposal for a Council Directive to Approximate National Rules on the Grant of Asylum and Refugee Status, undated, and not adopted, (1987), 79p.

<sup>18</sup> " Before April 1994 ECRE was named European Consultation for Refugees and Exiles (ECRE).

Convention. In addition, ECRE suggested to include the right to asylum within the competence of the Council of Europe which would permit the utilization of the protection mechanisms previously created by the European Convention on Human Rights. Alternatively, the ECRE suggested creating a mechanism, requiring that national authorities, before reaching a decision, to submit questions concerning the interpretation of the definition of the term "refugee" to the Court of Justice.

3. 1991 — Dutch government proposal on a protocol concerning the competence of the EC Court of Justice as regards *inter alia* the Dublin Convention, 6 November 1991. Article 1 stipulated that:

«a) with regard to the Agreements referred in Article 2 (Dublin Convention and Schengen II) the Court of Justice of the European Communities shall have jurisdiction which it is allocated by the Protocols laid down, in respect of those agreements concerning the settlement of disputes between States and the interpretation by the Court of Justice of the European Communities at the request of national courts.

h) The protocol on the Statute of the Court of Justice of the European Communities and the Rules of Procedure of the Court of Justice shall, if necessary, be adjusted and supplemented in accordance with Article 755<sup>19</sup> of the Treaty establishing the European Community. »<sup>20</sup>

4. 1991 — Dutch government proposal on a protocol concerning the competence of the EC Court of Justice as regards the Schengen Convention, 6 November 1991. Article 1 stipulated that:

*"the Court of Justice shall have jurisdiction to give rulings on :*

*a. disputes which arise between parties to this Agreement in connection with the application of the provisions of the Agreement or the present Protocol...*

*b. the interpretation, at the request of the national courts, of the provisions of the Agreement referred to in Article 3 of this Protocol;*

*c. the interpretation, at the request of the national courts, of the present Protocol. »<sup>21</sup>*

5. 1991 — proposal by the Dutch Standing Commillee of Experts on a protocol concerning the competence of the EC Court of Justice. Article 1 provides that the :

*«Court of Justice of the European Communities shall have jurisdiction to give preliminary rulings on the interpretation of the Schengen Agreement of 4 June 1985, of the Implementation Agreement for the Schengen Agreement of 19 June 1990 and of the Agreement of 29 March 1991, between the Schengen countries and the Republic of Poland, and of the Protocols and declarations associated with these agreements, as well as of this Protocol. Further, the Court of Justice shall have competence to give preliminary rulings on the validity and the interpretation of acts emanating from any organ established by or in virtue of the aforementioned texts. »<sup>22</sup>*

6. Furthermore in 1991, Professor David O'Keeffe, submitted that a new judicial instance is needed like the Court of First Instance or the Court of Justice, with jurisdiction in refugee and immigration matters. Such a judicial system would be able to specialize, something which neither the Court of Justice nor the Court of First Instance would be in a position to do. The jurisdiction of the new court should cover asylum and immigration questions to decide the references by national courts. O'Keeffe proposes the institution of a form of preliminary ruling procedure analogous to Article 177 of the EC

<sup>19</sup> Art.188 EC Treaty : fThe Statute of the Court of Justice is laid down in a separate Protocol. The Council may, acting unanimously at the request of the Court of Justice and after consulting the Commission and the European Parliament, amend the provisions of Title 111 of the Statute. The Court of Justice shall adopt its Rules of Procedure. These shall require the unanimous approval of the Council.»

<sup>20</sup> *Op.cit.*. note 6, annex 9.

<sup>21</sup> *Ibid.*, annex 10.

<sup>22</sup> *Ibid.*, annex 8.

Treaty, whereby national courts charged with applying provisions established in the harmonization process, could submit questions for interpretation.<sup>23</sup>

7. In 1992, Professor Guy Goodwin-Gill made a proposal for an additional protocol of the European Convention on Human Rights.

Article 1 of this proposal provides that :

- «a) Everyone has the right to seek asylum within the territory of a State.  
b) The High Contracting Parties undertake to use their best endeavours, individually and in cooperation with Members of the Council of Europe, to provide permanent or temporary asylum to refugees who satisfy the criteria of Article 1 of the 1951 Convention/1967 Protocol relating to the Status of Refugees, and to other refugees who have valid reasons for not being required to return to their country of origin. »<sup>24</sup>*

Article 3(2) of this proposal, on the review of negative decisions, develops the principle of due process, drawing upon Committee of Ministers Recommendation No.R(SO) concerning, the exercise of discretionary powers by the administrative authorities, the general practice of States with respect to review of administrative decisions, and the developing jurisprudence of the European Court of Human Rights with respect to effective remedies, as required by Article 13 of the Convention.<sup>25</sup>

8. In 1992, the UK Select Committee on the European Communities of the House of Lords stated, in its report adopted in that year, the need for a machinery to ensure uniform interpretation of common rules and emphasized that with the entry into force of the Treaty on European Union the need for a harmonized system of judicial appeals would be even greater.<sup>26</sup>

9. In 1992, the European Parliament urged also :

«that a European Committee on Asylum and Refugees (ECAR) be established with the task of providing preliminary rulings on questions of country of origin, ECAR should be composed of representatives of the Council, the Commission, UNHCR and legal experts. It shall draw up an annual report on its activities and submit it to the European Parliament, which will deliver an opinion thereon. »<sup>27</sup>

<sup>23</sup> O'KEEFFE D., "The Schengen Convention : A Suitable Model for European Integration ?", in : **Yearbook of European Law**, Vol.11, 1992, pp.212-213.

<sup>24</sup> *Op.cit.*, note 6, annex 13.

<sup>25</sup> The European Convention on Human Rights, Proposal for an Additional Protocol, Summary Explanatory Notes, which can be found in : *ibid.*, annex 13.

<sup>26</sup> The report stated : «There is now developing a body of common rules which require a machinery to ensure uniform interpretation The Dublin Convention is likely to be the first element of these common rules, and with the entry into force of the External Frontiers Convention and the Maastricht Treaty, the need for a harmonized system of judicial appeals would be even greater. Such a system of appeals would need to cover not only refugee status but also the other rules and policies which Member States regard as matters of common interest, including visas, residence status for nationals of third countries. Rules on these subjects, adopted on a common basis by the Member States, are unlikely to be applied in a uniform and equitable manner in the absence of some common machinery for the resolution of differences between one Member State and another or between individuals and national authorities. We note that the European Court might be given jurisdiction in respect of such matters:but it might be necessary to set up a subordinate tribunal for these cases, in view of the potential volume of disputes and their specialized nature.» Select Committee on the European Communities: "Community Policy on Migration", in : **HL Paper** 35, Session 1992-93, 10th report, para.73.

<sup>27</sup> **EP Doc** No.A3-0337/92, Resolution on the harmonization within the European Community of asylum law and policies. Rapporteur COONEY P., December 1992. " EP Resolution of 19.11.1992, **O.J.** C337, 21.12.1992, p.214.

In the same year, the European Parliament in a resolution on the Schengen Agreements requested the national parliaments of the Member States to grant jurisdiction to the European Court of Justice to give preliminary rulings on the interpretation of Schengen analogous to the Article 177 procedure of the EEC Treaty.<sup>28</sup>

10. In 1993, Professor C.A. Groenendijk suggested that national courts of Member States may develop ways to allow a representative of UNHCR to act as *amicus curiae*. For this purpose Article 22 of the Statute on the Court of Justice<sup>29</sup> might offer solutions through appropriate amendments to the effect that such organization as UNHCR be granted the possibility to submit its opinion, in appropriate cases.<sup>30</sup>

11. In 1994, the European Parliament proposed that:

«in accordance with Article K.3 of the Treaty on European Union, the Court of Justice must have jurisdiction to interpret any provisions on asylum and to rule on any dispute regarding their application.»<sup>31</sup>

### 3. Analysis of the Proposals for Judicial Control

Proposal 1 of 1987 for a draft proposal for a Council directive on asylum, might serve as inspiration if and when Community competence is established in this field.<sup>32</sup> Proposal 2 of 1988 which grants competence to the European Court of Human Rights, remains a proposal to be considered. A major problem is that all the 32 Member States of the Council of Europe must agree, in order to extend jurisdiction under the European Convention on Human Rights for asylum and immigration matters.<sup>33</sup> In the light of efforts underway to see that the Community accedes to the European Convention on Human Rights, this proposal or a variation of it is unlikely to be considered again in the near future.<sup>34</sup> Proposals 3, 4, 5 and 7 still have a prominent place on the agenda of the Member States of the European Union as well as of the Member States of the Schengen Group. For implementing proposal 6, the appropriate legal basis would have to be created. Article K.3 THU provides for specific Court of Justice competence on the basis of conventions to be drawn up. There is no reference in the Treaty on European Union or elsewhere of establishing a new judicial instance such as the Court of First Instance with jurisdiction in refugee and immigration matters. Proposal 8 on the competence of the Court of Justice has gained some ground since the adoption of the Union Treaty, whereas proposal 9 on the establishment of an Advisory Committee on asylum and

<sup>28</sup> EP Resolution of 19.11.1992, **O.J.** C337, 21.12.1992, p.214.

<sup>29</sup> Art.22 of the Statute provides : "A tout moment, la Cour peut confier une expertise a toute personne, corps, bureau, commission ou organe de son choix", in : **Recueil de Textes, Organisation, competence et procedure de la Cour.** Luxembourg, ed. 1990. p.24.

<sup>30</sup> GROENENDIJK C.A.. *op.cil.*, note 5, p.46.

<sup>31</sup> Resolution on the general principles of a European refugee policy, para.21, (Rapporteur LAMBRIAS P.), Committee on Internal Affairs of the European Parliament, **O.J.** C44/1994, at p.106, PE 178.921. adopted almost by unanimity at the Plenary Session on 19.01.1994 (Total number of MEPs voting were : 257: for 236, against : 19, abstention : 2).

<sup>32</sup> According to the decision of the Council on Justice and Internal Affairs of 20.06.1994, it would be opportune to examine the question of applying Art.K.9 TEU (transfer of Art.K.1 TEU matters to Community competence under IOOC EC Treaty), *Communication a la Presse*, 1771e session du Conseil — Justice et Affaires Interieures — Luxembourg, le 20.06.1994, 7760/94 (Presse 128 - G).

<sup>33</sup> This proposal was presented at the Seminar of ECRE/ELENA in Luxembourg, April 1992.

<sup>34</sup> SEC(90) 2087 final, Commission Communication on Community accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms and some of its Protocols, Brussels, 19,11.1990

refugee questions is overtaken by the fact that the Union Treaty contains Article K.3 which provides a concrete legal basis for specific Court of Justice competence, Proposal 10, to amend the protocol of the Court of Justice, so as to give institutions such as UNHCR a status as *amicus curiae* seems very convincing (see section a) below). Proposal 11 corresponds to a possible scenario of asylum law in the European Union, in which the jurisdiction of the Court of Justice for asylum matters could only be established on the basis of specific agreements or conventions of all members to this effect.

The suggestion of incorporating asylum by way of a protocol to be ratified by all Member States of the Council of Europe deserves special mention before concluding this section. The proposal for allowing asylum seekers access to the supervisory machinery under the European Convention on Human Rights remains an option. Particularly in light of the plans to restructure the control machinery established by the Convention stated expressly by the States and governments in the "Vienna Declaration" of 9 October 1993 :

*«.. The purpose of this reform is to enhance the efficiency of the means of protection, to shorten procedures and to maintain the present high quality of human rights protection.»*

Article 6 of protocol 11 of May 1994 serves as a source for inspiration in this regard. Members of the Council of Europe might consider an amendment to the effect that principle setting asylum cases can be brought before the new single court system for violations of provisions under the European Convention on Human Rights. Experience shows that asylum lawyers see an increasing need to invoke Article 3 of the ECHR due to strict application of third safe country and safe country of origin rules, and problems of *refoulement* in Western Europe.

The proposal to extend jurisdiction of the Court of Justice to asylum matters has become a real possibility on the basis of the new legal framework provided by the Union Treaty discussed in the previous chapter.

Finally, to the extent that the Schengen and Dublin as well as other pro-communitarian instruments, such as the London Resolutions on Asylum, the Convention on the Crossing of the External Borders, and the Convention on the European Information System (EIS) permit governmental interference with the right of individuals, international and the basic rule of law requires that they be subject to effective judicial control.<sup>35</sup> As effective judicial protection is also a fundamental principle of Community law, the Court of Justice, with reference to Article 13, has held that:

*«the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right (for example free movement of Community nationals) is essential in order to secure for the individual effective protection for his right.»<sup>36</sup>*

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<sup>35</sup> *Art.8 of the Universal Declaration of Human Rights (1948) provides that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution of laws. Art. 13 of the ECHR provides the right to an effective legal remedy (not necessarily judicial) to those whose rights and freedoms provided in this Convention are violated»*

<sup>36</sup> *For the most recent formulations of the Court of Justice's adherence to the principle of effective judicial protection see. Case C-6/90 and 9/90, Francovich and Boniface v. Italian State [1992] ECR I-5357 and Case C-213. 89. The Queen v. The Secretary of State for Transport, exports : Factortame, [1990] ECR 2433; in : Actualités du droit. Revue de la Faculté de Droit de Liege, revue trimestrielle 1994.2, p.439.*

While ratifying the Schengen Implementation Agreement of 1990, contracting States, according to Article 26(2) of this Agreement were obliged to introduce carrier sanctions into their respective legislations. According to Article 14 of the proposal for a decision establishing the Convention on the Crossing of the External Frontiers of the Member States, Member States have to undertake to incorporate sanctions into their national legislations to take all necessary measures to ensure that persons coming from third countries are in possession of valid travel documents and visas, and to impose penalties on carriers failing to fulfill this obligation.

The Netherlands, in its amended legislation of 1 January 1994, has introduced legislation containing two new provisions of relevance to the issue of carrier sanctions. The first provision prescribes that carriers are to take a photocopy of the documents that allow the external borders crossing, and secondly specifically concerning asylum seekers :

*«La sanction ne peut pas être prise à l'encontre d'une compagnie qui a transporté un étranger dépourvu de papiers d'identité, mais qui allègue de manière suffisamment plausible l'introduction d'une demande d'asile.»<sup>37</sup>*

If the Council of Justice and Home Affairs adopts new legislative measures, such as the Convention on the Crossing of the External Borders or the Convention on the European Information System, third country nationals, who would fall under these instruments, should be entitled to the Court's protection of their fundamental rights.<sup>38</sup> In the long-term, due to the progressive incorporation of rules relating to persons from third countries into Community law (Article 100c EC Treaty and Article K.9 TEU), the interpretation of the notion of public order in this context could benefit from an interpretation by the Court of Justice. In addition, an interpretation could impose itself progressively concerning third country nationals to which the Community is bound by agreements Foreseeing the principle of non-discrimination.<sup>39</sup> It can be stated that:

*«Every agreement concluded by the Community, be it mixed or not can be interpreted by the Court of Justice, since for the Community, it constitutes an act of the Community, No Member State is forced to follow the mixed formula but acceptance by the Member State to choose this form necessarily implies that the Court of Justice can be asked to give an interpretation of provisions of the agreement.»<sup>40</sup>*

The next section will examine examples in which the different courts (of the Benelux, the European Union and the Council of Europe) have handed down judgments concerning Community and third country nationals in asylum and immigration related questions.

#### **4. Case Law Concerning Community and Third Country Citizens**

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<sup>37</sup> Union Européenne, Le Conseil, CIREA 9, 4540/94, "Modification de la loi néerlandaise sur les étrangers au 1er janvier 1994", 01.02.1994, p.4.

<sup>38</sup> O'LEARY S., "A case study of the Community's protection of Human Rights, with particular reference to the free movement of persons", in : **Actualités du droit**, *np.cit.*, note 36, p.454

<sup>39</sup> CARLIER J.Y., "Le droit de séjour des ressortissants des États Membres", in : *ibid.*, p. 164.

<sup>40</sup> MARESCAU M., "Nationals of third countries in agreements concluded by the European Community", in : *ibid.*, p.252: with Case 192/89, *Sevince* [1990] ECR I-3461; Case C-237/91. *Kaiir Km* [1993] ECR I-6781

Upon inquiring into the existing case law, it could be seen that the Court of Justice has so far dealt with more cases concerning free movement of persons than has the mechanism under the European Convention Human Rights in Strasbourg and the Benelux Court in Brussels.

a) *The European Court of Justice*

The case law of the Court of Justice on the free movement of persons illustrates an early concern for the protection of individuals and a liberal interpretation of Community law. Although, not being directly related to *asylum*, but to public policy and free movement of persons, the following cases show an early attention of the Court of Justice to these questions, which are interesting as public policy is often invoked in cases of asylum third country nationals<sup>41</sup> (cases *van Duyn*,<sup>42</sup> *Bonsignore*<sup>43</sup> and *Rutili*<sup>44</sup> to those in *Antonissen*<sup>45</sup> and *Giagounidis*<sup>46</sup>). This liberal interpretation can also be observed for the legal position of third country nationals under EEC third country agreements such as demonstrated in the cases of *Sevince*,<sup>47</sup> *Kziber*<sup>48</sup> and *Kus*<sup>49</sup> decisions.

The preliminary ruling procedure has been playing an essential role in the judicial order of the Community and the harmonization process in many areas of Community affairs, with the goal of assuming the uniform application of Community law within the territory of the Community. The problem of this procedure is that it normally takes from 15 to 18 months to complete, at a time most national courts or administrative review bodies are working towards reducing their procedural delays in rulings on asylum cases. Therefore it would be important to limit referral to the Court, if and when that is possible, to principle-setting asylum cases, where a Court of Justice judgment is, required to uphold appropriate protection standards.

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<sup>41</sup> See also GROENENDIJK C.A., *tip.cit.*, note 5, p.47

<sup>42</sup> Case 41/74, *Yvonne van Duyn v. Home Office* [1974] **ECR**, ECJ, 04,12.1974, p.1337, (Preliminary ruling requested by the Chancery Division of the High Court of Justice), "Public policy".

<sup>43</sup> Case 67/74, *Carmelo Angela Bonsignore v. Oberstadtdirektor der Stadt Köln* [1975] **ECR**, p.297, (Preliminary ruling requested by the Verwaltungsgericht Köln), "Public policy and public security".

<sup>44</sup> Case 36/75, *Roland Rutili v. Minister/or the Interior* [1975] **ECR**, p.1219, (Preliminary ruling requested by the Tribunal administratif Paris), "Public policy".

<sup>45</sup> Case C-292/89, *The Queen v. The Immigration Appeal Tribunal, ex parte Gustaff Deiderius Antonissen* [1991] **ECR**, p.I-745, Reference for a preliminary ruling from the High Court of Justice, Queen's Bench Division, London, "Freedom of movement for workers — Right of Residence — Seeking employment — Temporal limitation".

<sup>46</sup> Case C-376/89, *Panagioti Giagounidis v. Stadt Riiilingen* [1991] **ECR**, p.I-1069, (Reference for preliminary ruling from the Bundesverwaltungsgericht), "Freedom of movement for persons — Interpretation of Directive 68/360/EEC — Right of residence — identity document".

<sup>47</sup> Case C-192/89, 5.2. *Sevince v. Staatssecretaris van Justitie* [1990] **ECR**, p.I-3461, (Reference for a preliminary ruling from the Raad van State, The Netherlands), "EEC-Turkey Association Agreement — Decisions of the Association Council — Direct Effect".

<sup>48</sup> Case C-18/90, *Kziber* [1991] **ECR**, p. 199; *Zeitschrift für Ausländerrecht und Ausländerpolitik*, 1993, p.34, *Infonnationsbrief Ausländerrecht*, 1993, p.41, *Migrantenrecht*, 1993, p.39, in : GROENENDIJK C.A., *tip.cit.*, note 5, p.47.

<sup>49</sup> Case C-237/91, *Kailm Kus v. Landeshauptstadt Wiesbaden* [1992] **ECR**, p.I-6781, (Request for a preliminary ruling by the Hessische Verwaltungsgerichtshof), "EEC-Turkey Association Agreement —/Decision of the Association Council — Notion of regular employment — "right of stay"".

b) *European Commission/Court on Human Rights in Strasbourg*

The right to political asylum is not provided for by the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>50</sup> However, the decision by a contracting State to expel a rejected asylum seeker could raise issues in regard to Article 3 of the Convention tie individual concerned runs a serious risk of torture or inhuman or degrading treatment. Recent judgments of the European Court of Human Rights, however, show a less sympathetic attitude than expected towards requests of asylum seekers<sup>51</sup> for judicial protection under Article 3,<sup>52</sup> Article 8,<sup>53</sup> and Article 13.<sup>54</sup> This could in part be because of a fear that Judges would be overwhelmed by such cases if more liberal judgments were handed down. The European Court of Justice also referred to the European Convention on Human Rights in order to develop protection norms of human rights, as general legal principles common to the constitutions of the Member States, which are the basis of Community law. This jurisdiction started to be developed in 1974 with the judgment handed down in the case of *Rutili*,<sup>55</sup> in interaction with the jurisprudence of the German Federal Constitutional Court and the judgments of *cases Solange I* and *Solange II*<sup>56</sup> Since the joint declaration in 1977 of the European Parliament, the Council and the Commission concerning the European Convention on Human Rights,<sup>57</sup> reference to the fundamental rights in this Convention has been made in the Preamble of the Single European Act-m 1986 and again in Article K.2 TEU. With the incorporation of the European Convention on Human Rights into the internal Community legal order already well advanced, the accession of the Community is still necessary to submit the Community to the same supervisory machinery. The competence of the Strasbourg organs with respect to acts under Community law can only be established by the accession of the Community<sup>58</sup> to the European

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<sup>50</sup> The *European* Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 04.11.1950, came into force on 03.09.1953, after its ratification by eight countries; Denmark, the Federal Republic of Germany, Iceland, Ireland, Luxembourg, Norway, Sweden, and the United Kingdom. This Convention was drafted by the Council of Europe. 213 U.N.T.S. 221, E.T.S. 5, U.K.T.S. 71 (1953). The European Convention on Human Rights establishes what is not only the; world's most successful system of international law for the protection of human rights, but one of the most advanced forms of international legal process. Any State wishing to become a member of the Council of Europe, must adhere and ratify this Convention as a condition of acceptance. There are currently 32 Member States of the Council of Europe and the Convention. For a complete discussion, see : JANIS M.W. & KAY R.S., *European Human Rights Law*, The University of Connecticut Law School Foundation Press. 1990.

<sup>51</sup> See *Cruz-Varas v. Sweden*. ECHR, 20.03.1991, in : Publication of the ECHR.

Ser. .A. Vol.201; *Wvarajah v. United Kingdom*, ECHR, 20.10.1991, in : *ibid.*. Vol.125; *Vijayanathan and Pusparajah v. France*, in ; *ibid.*. Vol.241-B.

<sup>52</sup> European Convention on Human Rights. Art.3. *No one shall be subjected in torture to inhumane or degrading treatment or punishment.*"

<sup>53</sup> *Ibid.*, Art.8, *'Everyone has the right to respect for his family and family life. his ne mill his correspondence...'*.

<sup>54</sup> *Ibid.*, Art.13, *«Everyone whose rights and freedoms as set forth in this Convention ' violated shall have an effective remedy before a national authority withstanding that the violation has been committed by persons acting in an official capacity'.*

<sup>55</sup> *Op .cit.*, note 44, Judgement of the Court of 28.10.1975.

<sup>56</sup> Judgement of 29.05.1974 (*Solange I*), BVerfGE 37, p.271, and of 22.10.1986 (*Solange II*), BVerfGE 73, p.339. PIPKORN J., *"La Communaiite Eumpeenne et la Convention Eumpeenne des Omits de t'Homme"*. in : *Revue Trimestrielle Des Driots De l'Hoinme* n°14, 01.04.1993, p.221. 1. 1977, C103, p.1.

<sup>57</sup> O.J. 1977, C103, p.1.

<sup>58</sup> *Op.cit.*, note 34, at p.3, para.4, the term «Community accession to the ECHR...» is used.

Convention on Human Rights by way of negotiating between the Council of Europe and the Community an additional protocol to the Convention.<sup>59</sup>

The Treaty on European Union of 7 February 1992 consolidates and amplifies the "*acquis communautaire*" in human rights matters in general and with reference to the European Convention on Human Rights in Article K.2 in particular,<sup>60</sup> The reference to the European Convention on Human Rights contained in Article F TEU is reiterated in Article K.2,1, which also contains a reference to the 1951 Convention Relating to the Status of Refugees for all matters referred to in Article K.I on the cooperation in the fields of justice and home affairs :

*«The matters referred to in Article K.I shall be dealt with in compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Convention relating to the Status of Refugees of 28 July 1951 and having regard to the protection afforded by Member States to persons persecuted on political grounds.»<sup>61</sup>*

Member States of the Council of Europe can make a declaration recognizing the jurisdiction of the European Court of Human Rights under

Article 25<sup>62</sup> or under Article 46 of the Convention,<sup>63</sup> There is a similar possibility for Member States of the European Union to accept the jurisdiction of the Court of Justice by amending the Statute of the Court of Justice so as to give institutions such as UNHCR a status as *amicus curiae* in appropriate cases. Even if material guarantees of the European Convention on Human Rights are already applied in Community law, only the adherence to the Convention by the Community will ensure its procedural guarantees.

Objections to adhesion have been advanced : based on doubt whether the Community has the legal capacity to do so. Experts confirm that the Community has this capacity. The Community is participating in international life, and adhering or not to the Convention on Human Rights, this is not an element which affects its international capacity.<sup>64</sup> The other objections have been advanced especially by the United Kingdom : the accession of the Community to the Convention on Human Rights would produce effects in domestic law, although the Convention has not yet been incorporated into domestic British law. This has

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<sup>59</sup> PIPKORN I., *fp.cit.*, note 56, p.222

<sup>60</sup> O.J. 92/C224/01, 31.08.1992, Treaty on European Union, together with the complete text of the Treaty establishing the European Community

<sup>61</sup> An. K.2.1 TEU.

<sup>62</sup> European Convention on Human Rights, Art.25, *«The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organization or group of individuals claiming to be a victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.»*

<sup>63</sup> European Convention on Human Rights, Art.46, the first para. stipulates ; *«Any of the High Contracting Parties may at any time declare that it recognises as compulsory ipso facto and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention, »*

<sup>64</sup> PIPKORN I., *fp.cit.*, note 56, p.236.

not, however, stopped British subjects from invoking human rights violations, as for example in the Sunday Times cases of 1979, in which the Court of Human Rights ruled that there had been a breach of Article 10 (freedom of expression) of the Convention on Human Rights, a judgment by which the United Kingdom is bound.<sup>65</sup>

*c) The Benelux Court in Brussels*

The Benelux Court functions within the Benelux Economic Union, and principally handles civil law questions such as trademark law. On 11 April 1960 the countries of the Benelux Union signed a Convention Concerning the Transfer of the Control of Persons Towards External Borders of the Benelux Territory. This Convention has created a common policy in matters of the crossing of external borders. The Benelux bodies are working towards reducing their procedural delays in rulings on asylum cases. Therefore it would be important to limit referral to the Court, if and when that is possible, to principle setting asylum cases, where a Court of Justice judgement is required to uphold appropriate protection standards. Examples are, the decision handed down in a case from 1988<sup>66</sup> and the second judgment on the secret expulsion by train according to the so-called Roosendaal method in a case decided in 1992,<sup>67</sup> The Benelux Court has jurisdiction in the territory only of three EU countries, and its competence would of course be inapplicable for the purpose of this article.

## 5. Conclusions

The Court of Justice should ultimately be granted jurisdiction for securing uniform interpretation and a harmonized application of asylum rules in the European Union. The Treaty on European Union provides a new legal framework by stipulating in Article C that the Union bodies are working towards reducing their procedural delays in rulings on asylum cases. Therefore it would be important to limit referral to Court, if and when that is possible, to principle setting asylum cases, where a Court of Justice judgment is required to uphold appropriate protection standards.

Besides Denmark's declaration, unanimous agreement of all Member States is needed to bring asylum under the Community roof. Despite the intergovernmental nature of the text, the Treaty on European Union, on the basis of Title VI, dilutes the argument about exclusive national jurisdiction and brings the subject of asylum and immigration further within the field of Community law.

It might be difficult for some Member States to accept the jurisdiction of the Court on questions traditionally considered to be within the exclusive domain of national jurisdiction, such as asylum and immigration. It would appear unlikely, however, that one Member State would deny other Member States the possibility to have access to the Court of Justice for the settlement of their disputes or for the interpretation of common rules agreed between those States, as this would be hard to reconcile with the agreement to the rule of law reconfirmed in the 1986 Single European Act and the 1992 Treaty on European Union.

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<sup>65</sup> For the United Kingdom, it was the Queen who had ratified the Convention on Human Rights, without parliamentary approval. Therefore it is only self-executing in so far as there are national provisions in the legislation. Therefore, the adhesion to the Convention by the Community would be an indirect manner of incorporating the Convention into the domestic British legal system, in : PIPKORN J., *ibid.*, p.236.

<sup>66</sup> Benelux Court, 20.12.1988, Case A 87/6, *Karim v. Netherlands Minister of Foreign Affairs*, Jurisprudence de la Cour Benelux, 1988, p. 139; Case Abstract No.IJRL/ 0025. Judgements of the Benelux Court are published in both French and Dutch; an English translation appears in : Netherlands Yearbook of International Law n°2), 1990, p.339

<sup>67</sup> Benelux Court, 15.04.1992, Case A 90/5, *Medjari v. The Netherlands Rechtspraak vande Week/992*, n°114.

Therefore the first scenario for asylum rules in the European Union could be the transfer of asylum from Article K.I TEU to Article 100c EC Treaty (Community competence) on the basis of Article K.9, if asylum is perceived less dramatic, which could consequently lead to full Community competence, before, at, or after the 1996 intergovernmental conference on the revision of the Treaty on European Union. The second scenario might be that Member States keep the matter under their control, in which case jurisdiction for asylum of the European Court in Luxembourg could be established on the basis of Article K.3 of the Third Pillar and specific agreements/conventions of all Member States. The third scenario could be a protocol, following the example of the 1971 Protocol of the 1968 Brussels Convention. Member States thus could apply the "opting in" procedure, to be ratified only by those Member States who wish the Court of Justice to be competent.