CENTRE FOR
EUROPEAN
POLICY
STUDIES

CEPS POLICY BRIEF NO. 9
DECEMBER 2001

ENSURING A GENEROUS EUROPEAN ASYLUM POLICY FOR THOSE IN NEED OF INTERNATIONAL PROTECTION

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Abstract

Since the entry into force of the Treaty of Amsterdam in May 1999, asylum and immigration policies have fallen within the competence of the European Union. When the countries of the European Union signed the Charter of Fundamental Rights, one wonders which values Europe intended to defend concretely and what importance it placed on the protection of refugees. The communitarisation of the right of asylum has caused many concerns because, until now, the process of European harmonisation has focused on erecting a "fortress", which has led to the erosion of the protection granted to refugees. However, by emancipating the contention on the rights of asylum seekers at national level, particularly close to election dates, communitarisation constitutes a single chance to break with the security-conscious Schengen years and to develop a generous policy based on the humanitarian principles that have formed the basis of European integration.

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I. The opening of the borders in Europe vis-à-vis the "asylum crisis": The return of a myth

For almost fifteen years, the existence of an "asylum crisis" has been postulated by the governments of the member states of the European Union in order to justify "protectionist" measures aimed primarily at protecting their territories against the arrival of "hordes of refugees", generally presented as candidates for economic immigration. Despite the uniformity of the speech, it is advisable to wonder about the breadth of this asylum crisis in Europe by placing it in the global context.

One currently counts approximately 22 million refugees and displaced persons in the world, within the competence of the United Nations Office of the High Commissioner for Refugees (UNHCR). It is advisable to add to this figure those persons in a similar humanitarian situation to that of refugees, but who do not benefit from international assistance due to the fact that they were displaced inside their own countries.[1] On the whole, one estimates at 50 million the number of victims suffering forced displacement, the majority of whom live in the poorest countries of the world.[2] Thus, from an overall point of view, the European Union is largely saved from the refugee crisis since it welcomes only 10 to 15% of the world's population of refugees and displaced persons.

As one may recall, the importance of the request for asylum in Europe is variable, according to the times and according to the countries, and that refugee protection has not always been treated as a phenomenon related to migration policy. Thus, between 1975 and 1984, certain European countries knew a first massive surge of refugees from Asia and Latin America, mainly Chile. National programmes, often implemented in the form of admission quotas, made it possible to ensure a generous reception while at the same time, in parallel, the majority of the European governments decided to close their borders to economic migration. While demonstrating a policy of "zero rate immigration", France welcomed almost 100,000

[1] For a detailed analysis, see UNHCR (1997, p. 295).

[2] According to the UNHCR'S statistics, in 1998, Africa welcomed approximately 4,341,000 refugees, including 390,500 persons in Ethiopia and 393,800 in Sudan; Asia welcomed almost 4,808,600 refugees, of whom almost a quarter lived in Pakistan (1,202,700). See UNHCR (1998). *Refugees and persons under the UNHCR'S protection, statistical Report,* Geneva..

persons from South East Asia, under its historical debt towards its former colonies. Apart from these exceptional reception programmes, however, *the proportion of the requests for asylum submitted to the European countries remained relatively stable until 1984.*

It is only since 1985 that one has witnessed a substantial increase in requests, passing from 170,000 annual requests for the whole of Europe, to a record figure of 700,000 requests in 1992, including 438,000 in Germany alone. Following the restrictive measures introduced by the governments, this figure considerably decreased during seven consecutive years to around 250,000 requests a year. It would seem that the European countries are recording a new rise since 1999, when there was an increase of 19% in relation to 1998 with 354,000 requests. This figure nevertheless remains relatively modest for a geographical number of 360 million inhabitants. In addition, these statistics cannot be analysed in an overall way because the "burden" of refugees is highly disparate according to the member states of the European Union. Indeed, five principal host countries (in descending order: Germany, Great Britain, the Netherlands, Belgium and France) account for more than 80% of the requests for asylum submitted in the European Union, while countries such as Greece or Ireland hardly record 100 requests a year.[3] This set of data makes it possible to relativise the weight of the asylum applicants in one of the richest regions on the planet.

In addition to the quantitative criterion, it is also advisable to look at the significance of European asylum policy, since for the last decade, the European continent has been again producing refugees. At the end of the 20th century, there is a striking contrast indeed between the countries of the European Union – opulent and stable – and certain East European countries (such as the Caucasus or the Balkans) that find themselves prey to misery and fratricidal wars. Beyond the moral duty and solidarity between European peoples, the reception extended European refugees constitutes a determining element of the political identity of the European Union, a mere free trade area – a champion of rights. Indeed, the various conflicts in the Balkans showed that the European Union couldn't claim the leadership on the European continent without assuming its political responsibilities and providing suitable protection to displaced persons.

II. Before Amsterdam: The assessment of a dissuasive and security-oriented intergovernmental policy

[3] In 1999, Germany received 95,330 requests for asylum, Great Britain 91,390, the Netherlands 39,300, Belgium 35,780 and France 30,380. Statistics quoted *in the France Ground information letter of Asylum,* No. 10, April 2000.

Initially, the provisions of the Treaty of Rome establishing the European Economic Community, adopted on 25 March 1957, comprised no Community competence as regards asylum and immigration. *However, the adoption of the Single Act and the aim of free movement of persons in an "area without internal borders" forced the member states to define rules of access to Community territory and to bring about a concertation of their asylum and immigration policy.* Schematically, this cooperation began in 1985, between some member states within the restricted framework of the Schengen agreements, to be extended at a later date by the Maastricht Treaty of 7 February 1992 to all the member states. Asylum and immigration at the time were considered as belonging to intergovernmental cooperation, independent of the Community treaty (3rd pillar of the Treaty on European Union), where decisions are adopted unanimously by the member states, within a decisional framework where the Community competence is largely absent, and in the absence of any democratic and judicial control. These decisions are void of any binding effect and actually constitute principles of convergence, interpreted freely by each member state.

Fundamentally, European harmonisation in the area of asylum falls under a more general concern to control migratory flows and results therefore in the development of a defensive legal arsenal. The removal of internal borders is compensated for by the erection of physical and legal barriers at the external borders of the European Union in order to prevent the flows of asylum applicants (visa requirements, sanctions imposed on the carriers), but also by the development of a restrictive interpretation of the Geneva Convention. The member states adopted an instrument, the Dublin Convention, controlling the treatment of the requests for asylum before even harmonising their protection system.[4] The Dublin Convention was the subject of considerable criticism because, in addition to the fact that the asylum applicants no longer can choose their country of asylum, the criteria retained by this system appeared to be completely unsuitable in practice. Indeed, the current system is entirely turned towards the "management" of the flow of asylum applicants and it attaches only a marginal importance to the cultural or family links of the asylum applicants.

In addition, the Dublin Convention does not necessitate any systematic obligation for the member states to deal with the requests basically because member states can be discharged from this responsibility since there is a "safe third country", where the asylum applicant can ask for asylum without the risk of persecution. The concept of a safe third country, defined by

[4] Convention on the determination of the state responsible for the examination of a request for asylum submitted in one of the Member States of the European Communities, *Official Journal* N° C 254, 19 August 1997, p. 18.

the London resolution of 1 December 1992, is symptomatic of a policy that actually aims to get rid of the burden of refugee flows from the countries bordering the European Union, particularly the Central and East European countries, newly converted to democracy. This policy is completed by the concluding of readmission agreements in which third countries commit themselves to take back persons who have transited their territory before crossing the borders of the Union illegally.

Lastly, the Dublin Convention is based on the assumption that all signatory states give *a protection level equivalent* to that of refugees. This assumption is highly debatable because the adoption of the Dublin Convention was not accompanied by substantial harmonisation. Thus, member states still do not agree on the interpretation of the concept of refugees, as provided for in Article 1 of the Geneva Convention. In order to qualify for refugee status in certain countries, France and Germany in particular, the asylum applicant must establish that he or she underwent persecution at the hands of the official authorities. Other European countries argue, to the contrary, that the source of the persecution is not a condition of receiving refugee status. In addition, the procedures applied in each member state differ considerably. The few European principles defined in this field are limited to a general convergence arrangement, which allows for very important exceptions. Lastly, the successive crises in the former Yugoslavia revealed the incapacity of the European countries to develop common instruments of humanitarian protection. The legal heritage left by the Maastricht Treaty is therefore vulnerable to criticism on grounds that, in addition to creating unsuitable institutional and decision-making structures, intergovernmental cooperation suffered from the absence of an *ambitious political project,* as the states limited themselves to agreeing to the lowest common denominator.

III. The contributions of the Treaty of Amsterdam: Which asylum policy for Europe?

Owing to numerous criticisms addressed to the third Maastricht pillar, the Intergovernmental Conference in Amsterdam largely was polarised on the problems of asylum and immigration. In this respect, the new Title IV of the Treaty of Amsterdam carries out an ambitious qualitative leap forward since all the fields related to free movement of persons (visas, asylum, immigration) fall within the exclusive competence of the European Community, except for questions of public order and national security which remain matters of state sovereignty. This development has to be viewed as an historical advancement in the Community integration process since the European Union acquired competences in fields

hitherto considered as an integral part of national sovereignty. It is advisable nevertheless to specify that it actually is a communitarisation with "variable geometry".

In the first instance, three states – the United Kingdom, Ireland and Denmark – do not take part in this process owing to their traditional reserve to the European Union. This situation raises various questions because it implies that these countries, amongst which one finds the United Kingdom – the second most important host country after Germany – will not be governed by European legislation but will continue to apply their cross-bred national policy of European cooperation.

Secondly, member states chose a progressive communitarisation process. If asylum and immigration can already be subject to legally binding Community rules, these decisions are adopted unanimously for a five-year period (1999-2004). It is only at the end of this period of transition that the rule of the qualified majority will be applicable to these fields. This development of the decision-making process thus involves a significant loss of national sovereignty; the passage to a qualified majority will be achieved only if the European states adopt it at the end of five years by a unanimous vote. One can fear that states may block the full and complete communitarisation. Nevertheless, despite this period of transition, the applicable decisional procedure as from the entry into force of the treaty – commonly called the joint decision procedure – constitutes considerable progress. In concrete terms, one replaces an opaque system of technical committees outside of democratic control by a decisional system where the European Commission plays a role of major initiative, under the control of the European Parliament and the Court of Justice. The technical methods provided for in the Treaty of Amsterdam met with a certain reserve on the part of some of the most eminent lawyers. For the moment, however, one should insist on the importance of a democratic debate unconstrained by national electoral considerations, but also, and especially, on the major contribution of European judicial control which will make it possible to unify a practice that has been up to now relatively incoherent. It is also very positive that there are various provisions of the treaty that envisage consultation with the UNHCR and the relevant associations.

Concerning its fundamental aspects, the Treaty of Amsterdam achieves an ambitious political objective since the Council has five years to adopt a genuine legislative corpus as regards asylum and refugee protection. Assembled on 15-16 October 1999, in Tampere (Finland) with a view to implementing a European area of freedom, safety and justice, "the Council is agreed

to work to the adoption of a European, founded common asylum arrangement on the full and overall application of the Geneva Convention … and to maintain the principle of non-refoulement". Within five years, the EU has therefore to obtain a legal status including:

- A redefinition of the rules of determination of the state responsible for the examination of a request for asylum, making it possible to take more account of cultural and family links, which involves a revision of the Dublin Convention of 15 June 1990;
- The adoption of common standards for an equitable and effective asylum procedure;
- The definition of minimum conditions of reception of the asylum applicants;
- The alignment of the rules on recognition and the contents of the refugee's status, which could lead to a new act relating to the interpretation of Article 1A of the Geneva Convention giving the definition of the refugee; and
- Measures concerning subsidiary forms of protection giving a status to the victims of civil wars or of situations of general violence which do not enter the scope of the Geneva Convention; as well as of the temporary measures concerning protection in the event of massive surges of displaced persons.[5]

This five-year programme is certainly ambitious, but one essential question remains: Will the communitarisation process bring about a better protection of the refugees while European cooperation becomes more concrete?

If it is too early to say what will be the content of the Community standards, it is advisable to stress that the first initiatives for the European Commission go in a positive direction which were generally supported by the UNHCR and the associative medium. In spite of these some projections, it is advisable however to remain vigilant.

Firstly, one can fear that the adoption of Community standards could still result in a restrictive interpretation of the scope of the Geneva Convention. The harmonisation of the various forms of protection (statutes B, regional asylum) has therefore to be an opportunity for reflection on the place of the Geneva Convention in the European system. If the multiplication of the civil wars and the ethnic conflicts pleads for broad protection of displaced persons, the subsidiary instruments of protection must not substitute for real asylum

[5] One must point out that the Commission has already submitted a proposal for a Directive with respect to minimum standards for temporary protection in the event of a mass influx of displaced persons and measures which establish a burden-sharing of the efforts of the member states [COM (2000) 303 final, 24 May 2000].

protection, but they can be viewed as a complementary protection which takes as a starting point the legal assets of the Geneva Convention. It is advisable to stress that the definition of a coherent and generous Community policy constitutes essential concern because the entire JHA *acquis* of the European Union is in a way to be extended to the Central and Eastern European countries, which have not previously shared the same humanitarian traditions.

Secondly, if the application of a single procedure is necessary in order to end the disparities and to guarantee a comparable level of protection, asylum policy cannot however be regarded as a simple technique in the management of flows. Nevertheless, without modification of Community developments, one can fear a technocratic drift for the Community institutions which do not possess the same knowledge "on the ground" as the national administrations. The European asylum policy has therefore to take account of the cultural diversity of the reception policies, but also of the privileged links that member states maintain with certain countries. My conviction is that the European asylum policy has to incorporate *the principle of subsidiarity, at the same time as that of solidarity.* When the Commission realised the difficulty of obtaining a uniform procedure throughout the Community territory, it preferred to be directed towards a pragmatic solution. On 28 September 2000, it therefore proposed a draft Directive limiting the harmonisation to the conditions of examination of the applications, in order to avoid excessive disparities between national legislation. After a few years, this draft Directive should be replaced by a single procedure. The pragmatic attitude of the European Commission shows the possibility for the difficulties, which will have to be overcome in order to achieve at a truly uniform asylum system. In this respect, it seems that the five-year deadline is a relatively short period of time in which to carry out such an ambitious legislative programme.

More generally, all the questions posed in this article show that, beyond the technical questions, the problems of asylum constitute a test field of European political maturity. Achieving a common asylum policy within the five-year deadline set at Tampere is certainly a challenge for the EU, but it is not sufficient on its own. A certain standard of protection and solidarity also needs to be guaranteed.

References

Crepeau, F. (1995), *Droit d'asile: De l'hospitalité aux contrôles migratoires*, Bruylant, éditions de l'Université de Bruxelles, Bruxelles, p. 423.

Dardenne, E. (1998), "Immigration and asylum: New competences for the Community?", in M. Telo and P. Magnette, eds., *From Maastricht to Amsterdam. Europe and its new treaty,* European Study collection, Brussels, pp. 163-182.

Labayle, H. (1998), "La libre circulation des personnes dans l'Union européenne, de Schengen à Amsterdam", XI^{ème} congrès de l'Union des avocats européens, publié *in Les annonces de la Seine*, 30 juillet, pp. 1-10.

Marie, C.-V. (1995), *Les Etats membres de la CEE face à l'immigration en 1994 : Montée de l'intolérance et rigueur accrue des politiques de contrôle*, rapport RIMET, DG 5, p. 194.

United Nations High Commissioner for Refugees (UNHCR) (1997), *Displaced persons: Humanitarian emergency*, Geneva.

United Nations High Commissioner for Refugees (UNHCR) (1998). *Refugees and persons under the UNHCR's protection, Statistical Report,* Geneva.

Withold de Wenden, C. (1998), "De Maastricht à Amsterdam: Les inconnues de la politique d'immigration", *Hommes & Migrations*, No. 1216, novembre-décembre, pp. 5-11.

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