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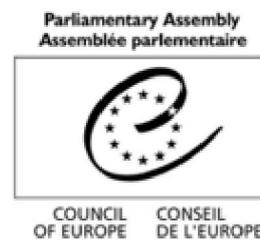
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Restrictions on asylum in the member states of the Council of Europe and the European Union

Report

Committee on Migration, Refugees and Demography

Rapporteur: Mr Boriss Cilevics, Latvia, Socialist Group

Summary

At a time when the Council of Europe has just reaffirmed its commitment to the generous vision and human rights values, including freedom from persecution, that inspired its creation, the report stresses that these principles are under threat from governments increasingly intent on restricting the number of refugees and asylum seekers on their territory. These restrictive policies and practices are reflected and amplified in the intensifying efforts of the European Union to create a Common European Asylum System, which will inevitably affect the policies of the central and east European states.

The report recommends that the Council of Europe member states eschew any policies or practices which threaten the right to asylum, and avoid widening the gap between the members of European Union, candidate members, and other European countries. To this end, the Committee of Ministers is urged, among other things, to draw up a European Convention on the harmonisation of asylum policies in Europe and to incorporate the right to asylum into the European Convention on Human Rights.

I. Draft recommendation

1. In celebrating its fiftieth anniversary, the Council of Europe has just reaffirmed its commitment to the generous vision and values that inspired its creation: the defence and promotion of democracy, the rule of law, human rights and fundamental freedoms, including freedom from persecution. Moreover, the right to seek and to receive asylum from persecution is enshrined in the Universal Declaration of Human Rights.

2. The Parliamentary Assembly is deeply concerned that these principles are in danger of being undermined by a climate of hostility towards refugees, asylum seekers and other persons in need of international protection in Europe. In recent years, many European governments have introduced restrictions in their immigration and asylum policies and practices with a view to substantially reducing the number of refugees and asylum seekers on their territory. These restrictions are reflected and amplified in the ever more intensive efforts by the European Union to harmonise the asylum and immigration policies and practices of its member and applicant states.

3. Restrictive policies and practices may be classified into four types:

i. those designed to prevent undocumented travellers from arriving in Council of Europe member states at all, whether genuine asylum seekers or not;

ii. measures designed to expedite the consideration of applications by those asylum seekers who do manage to reach their destination or to shift the determination procedure to other countries;

iii. restrictive interpretation of international refugee law, and in particular the

refugee definition;

iv. deterrence measures taken to make life uncomfortable for asylum seekers awaiting a decision.

4. The Parliamentary Assembly is particularly anxious to ensure that the European Union's plan to establish a Common European Asylum System provides sufficient protection for those in need. Moreover, the Assembly considers that any European Union policies which have the effect of reducing the responsibility of Union member states for persons in need of protection at the expense of non-member states are to be avoided. In this connection, the Assembly stresses the need for sustained co-ordination of asylum and immigration policies between the European Union and Council of Europe member states which are not members of the European Union.

5. The Parliamentary Assembly recalls and reaffirms its past recommendations designed to improve the protection and treatment afforded asylum seekers and refugees, notably its [Recommendation 1236](#) (1994) on the right of asylum; [Recommendation 1237](#) (1994) on the situation of asylum seekers whose asylum applications have been rejected; [Recommendation 1278](#) (1995) on refugees and asylum seekers in central and eastern Europe; [Recommendation 1327](#) (1997) on the protection and reinforcement of the human rights of refugees and asylum seekers in Europe, and [Recommendation 1374](#) (1998) on the situation of refugee women in Europe.

6. The Parliamentary Assembly recommends that the Committee of Ministers:

i. step up the monitoring of member states' compliance with international refugee law and with the general principles governing the protection of refugees and asylum seekers enshrined in the relevant international instruments with a view to continuing to improve common standards for the treatment of refugees and asylum seekers;

ii. invite Moldova and Ukraine to accede to the 1951 Geneva Convention relating to the Status of Refugees and its 1967 Protocol, and Turkey to drop its geographic limitation to the Convention;

iii. initiate action to ensure the incorporation of the right of asylum into the European Convention for the Protection of Human Rights and Fundamental Freedoms and report back on progress made towards the fulfilment of this objective within a year;

iv. draw up a European Convention on the harmonisation of asylum policies in Europe, in close co-operation with the European Union, with a view to improving the standard of protection for refugees and asylum seekers in Europe and strengthening solidarity between the member states with regard to their responsibilities towards refugees and asylum seekers;

v. urge the member states:

a. to undertake a thorough review of their obligations under the 1951 Convention and 1967 Protocol relating to the Status of Refugees with a view to ensuring strict compliance;

b. to refrain from applying and legitimising regulations and practices which might hinder fair implementation of the right to asylum;

c. to recognise systematically, in their refugee status determination procedures:

i. that persecution may not only originate from the authorities of the country of origin of an asylum seeker, but also from entities with no link to the state and over which it exercises no control;

ii. that war and violence may be used as instruments of persecution with a view to repressing or eliminating specific groups on account of their ethnicity or other characteristics;

iii. that asylum seekers should not be required to demonstrate that they had exhausted all possibilities of reaching safety in an area within their own country (the so-called "internal flight alternative") before seeking international protection;

iv. the right of women seeking asylum to apply separately from their spouses or companions in consideration of their specific needs and motivations;

d. to ensure that no asylum seeker is removed to a third country in contravention of Recommendation No. R (97) 22 of the Committee of Ministers to member states containing guidelines on the application of the safe third country concept or those of the Office of the United Nations High Commissioner for Refugees;

vi. call on the institutions of the European Union to ensure that the planned Common European Asylum System in no way undermines the 1951 Geneva Convention relating to the Status of Refugees nor has the effect of reducing the

responsibility of Union member states for persons in need of international protection at the expense of non-member states.

II. Explanatory memorandum by Mr Cilevics

1. Introduction

1. In celebrating its fiftieth anniversary in 1999, the Council of Europe has just reaffirmed its commitment to its founding values of democracy, the rule of law, human rights and fundamental freedoms, including freedom from persecution. The year 2000 marks the 50th anniversary of the Council of Europe's most important achievement: the signing of the European Convention on Human Rights. It will also mark the 50th anniversary of the decision by the United Nations General Assembly to set up the Office of the United Nations High Commissioner for Refugees. The Council of Europe and the UNHCR were founded in the wake of the Second World War and its untold horrors in a positive, pioneering and humanitarian spirit. This inspired the creation of an effective international mechanism for the protection of human rights in Europe and an international system designed to guarantee protection of the individual fleeing from persecution.

2. We are now in serious danger of losing this humanitarian vision. The whole climate in Europe has turned negative and hostile towards refugees and asylum seekers. In recent years, particularly after 1992 when record numbers of asylum seekers sought protection in Council of Europe member states, many European governments have sought to reduce substantially the number of refugees and asylum seekers on their territory. They have thus introduced restrictions in their immigration and asylum policies and practices. These restrictions are reflected and amplified in the ever more intensive efforts by the European Union to harmonise the asylum and immigration policies and practices of its member and candidate states.

3. Serious concern has been expressed – in particular by non-governmental organisations working in the field – that the proliferation of new international agreements, national laws, regulations and procedures designed to stem immigration, as well as the increasingly restrictive interpretation being given to international refugee law, threaten to undermine the basic principles of refugee protection. Several instances of the right to asylum being effectively denied in the Council of Europe member states have recently been brought to public attention. The most salient examples involve Roma fleeing Kosovo, where they suffered wholesale persecution and violence, being effectively denied the international protection they undoubtedly deserved. For example, in July 1999, Italian authorities announced their intention to cease considering persons fleeing Kosovo, including Roma, as entitled to such protection, and would instead treat them as illegal immigrants.

4. Europe's leading role as the birthplace of refugee protection makes it a model for the rest of the world, even though it must be said that at present other continents are generally more liberal in their policies and practices. Thus if Europe is progressively lowering its standards of refugee protection, this example may soon be followed in other parts of the world, particularly those with the least means to respond to the needs of millions of refugees. However, this "exporting" of restrictive policies will certainly lead to the "re-importing" of new problems, since restrictions on asylum elsewhere in the world will inevitably increase the number of applicants in Europe.

5. The purpose of this report is (i) to assess the scope and impact of this restrictive trend in Europe, particularly in the light of the need to raise, rather than lower, standards of refugee protection in Europe as a whole, and (ii) to make corresponding recommendations to the Committee of Ministers.

6. The Committee on Migration, Refugees and Demography is currently working on a number of reports that are relevant to these issues. They include those on forced separation of families; rendering expulsion procedures more humane; transit migration in Central and Eastern Europe; the arrival of asylum seekers at European airports; the situation of gays and lesbians in respect to immigration and asylum law, and the vocational training of young asylum seekers in host countries.

7. Attention should also be drawn to a number of past recommendations adopted by the Parliamentary Assembly, notably those on the right of asylum (Recommendation 1236 (1994)); the situation of asylum seekers whose asylum applications have been rejected (Recommendation 1237 (1994)); refugees and asylum seekers in Central and Eastern Europe (Recommendation 1278 (1995)); the training of officials receiving asylum seekers at border points (Recommendation 1309 (1996)); the protection and reinforcement of the human rights of refugees and asylum seekers in Europe (Recommendation 1327 (1997)); refugees, asylum seekers and displaced persons in the Commonwealth of Independent States (Recommendation 1334 (1997)); temporary protection of persons forced to flee their countries (Recommendation 1348 (1997)) and the situation of refugee women in Europe (Recommendation 1374 (1998)). Many of these recommendations have been translated into recommendations by the Committee of Ministers to the member states (see paragraph 57 below).

2. Asylum application figures

8. According to UNHCR statistics¹, from a peak of nearly 700,000 asylum applications submitted in 26 European countries in 1992, the figure dropped steadily to somewhat over a third of that figure, at 253,290, in 1996. It rose slightly in 1997, and more substantially in 1998 to just over 359,000. For the same countries, *recognition* of asylum seekers under the 1951 Convention remained steady at around 48,500 in the three years 1993-1995, and has since dropped to some 32,000 in 1998. Convention recognition *rates* have varied considerably between European countries and years, but the average for the same 26 European countries has evolved from 7 per cent in 1992, to 6.1 in 1993, 8.4 in 1994, 12.3 in 1995, 11.5 in 1996, 11.4 in 1997 and 9.2 in 1998. It is clear that the number of asylum applications has dropped considerably in recent years and the number of positive decisions under the Refugee Convention with it. It must be said that while total recognition rates have not decreased markedly, the share of persons granted humanitarian status grew considerably (e.g. 11 per cent in 1998). This means that the number of positive decisions under the Refugee Convention is in fact in steady decline.

9. It is of course extremely hard to identify the precise causes of these trends or to draw inferences from numerical data about the effects of asylum policies and practices being followed by member states and the European Union. The number of asylum applications may fall because persecution and conflict have abated or because greater numbers have been prevented from applying. It is impossible to know how many asylum seekers *would* have submitted applications but *could* not do so because they were denied a visa or prevented from boarding a flight by an airline subject to a large fine for carrying undocumented passengers under "carrier sanctions" legislation in the destination country. Moreover, although UNHCR publishes asylum statistics such as those cited above, no such data are available for other relevant factors such as time taken to process applications, the number of successful appeals or reviews, or how many asylum applications are considered to be "manifestly unfounded" or subject to the "safe third country" principle.

10. Restrictive policies and practices may be classified into four types: (i) those designed to prevent undocumented travellers from ever arriving in Europe at all, whether genuine asylum seekers or not; (ii) measures designed to expedite the consideration of applications by those asylum seekers who do manage to reach their destination or to shift the determination procedure to other countries; (iii) restrictive interpretation of international refugee law, and in particular the refugee definition; and (iv) deterrence measures taken to make life uncomfortable for asylum seekers awaiting a decision. These aspects are discussed below.

3. Gaining access to asylum procedures

11. In order to ask for asylum, asylum seekers must first gain access to the territory and to the refugee status determination procedure of the country whose protection they seek. This has become more difficult over recent years owing to increasingly stringent immigration rules and efforts to deter and deflect potential asylum seekers from their goal. For example, visa requirements may prevent legal departure from the country of origin. In July 1999 Finland, in swift reaction to arrival of several hundreds of Roma fleeing Slovakia, imposed a visa regime on Slovak citizens, and on 6 December 1999 Slovak Foreign Minister Eduard Kukan announced that Norway intended to do the same on account of the number of Roma asylum seekers arriving in that country. On the other hand, if the asylum seeker obtains a visa, the fact that he or she departed legally may undermine the validity of the asylum claim on arrival.

12. It is of course illegal under the 1951 Convention (Article 31) to prosecute asylum seekers who enter or attempt to enter the country illegally, as was pointed out by the High Court in the United Kingdom when it ruled on 29 July 1999 that the Government had acted in breach of the Convention through its practice of prosecuting and imprisoning asylum seekers who enter Britain on false documentation. As the presiding judge commented: "One cannot help wondering whether perhaps the increasing incidence of such prosecutions is yet another weapon in the battle to deter refugees from ever seeking asylum in this country."²

13. Where asylum seekers are forced to flee persecution without the requisite documentation, it is virtually impossible for them to travel by air since airlines are required to check that documentation is valid before allowing passengers to board. Failure to do so may result in heavy fines in the country of destination under "carrier sanctions" legislation. Travel over land or sea may involve greater physical danger and the risk of falling into the hands of unscrupulous traffickers. Travel through different countries may also result in access to asylum procedures in the country of destination being denied because of the application of the "safe third country" or similar restrictive practices or accelerated procedures that may not allow a fair consideration of the asylum claim.

14. Moreover, applying carrier sanctions provokes airline companies to take certain

"preventive" measures of their own. A recent case of this kind was reported by the media and by international human rights NGOs (in particular, Amnesty International and the European Roma Rights Centre). The Czech National Airlines marked with the letter G (for Gypsy) the names of passengers who had Roma names or who looked like Roma, with the apparent purpose of alerting the British immigration authorities to potential Roma asylum seekers. Apparently, the practice started following complaints from London about the large numbers of asylum seekers arriving from the Czech Republic and a consequent threat to introduce an entry visa requirement for all Czech citizens. Racial discrimination in such a blatant form is rarely encountered in Europe today.³

4. "Safe country of origin"

15. Some European states consider that there are certain countries in which there is no serious risk of persecution ("safe country of origin"). The most important criterion in this assessment is observance of human rights and democracy. Those states applying this doctrine draw up lists of so-called "safe" countries as part of their asylum legislation or regulations. Although no state excludes admission to the refugee determination procedure in such cases, consideration of the application may be accelerated as "manifestly unfounded", with immediate expulsion. In fact, consideration of such applications becomes merely a formality, and the applicant has no chance to have his or her claim heard in a fair manner. The whole concept is obviously designed to introduce a presumption (which is supposed to be open to "rebuttal" by the applicant) that asylum seekers from "safe" countries do not have a valid asylum claim.

5. "Safe third country"

16. The "safe third country" practices require that asylum applicants should apply in the first country considered "safe" in which they have an opportunity to do so. Not all member states apply this rule, but some consider that asylum seekers who transited through such a country before entering their territory must be returned there. Misuse of this concept often results in asylum seekers being removed to territories where their safety cannot be guaranteed.

17. The application of this rule in practice often entails controversies over the question of which country should undertake obligations under the refugee protection conventions. The problem is particularly acute for the countries of Central and Eastern Europe, where the perceived economic burden connected with the acceptance of refugees and asylum seekers may cause dissatisfaction and foster anti-refugee attitudes within their societies. Besides, the will of the refugees themselves (for example, to settle in countries where well-established communities of their compatriots can help them to integrate) is often not taken into account. The application of the "safe third country" rule is, in other words, one aspect of the problem of fair burden-sharing between the European states.

18. The assessment of what constitutes a "safe country" can differ fundamentally even between European Union member states. Thus on 23 July 1999 the British Court of Appeal ruled that the British Home Secretary had acted unlawfully in ordering two asylum seekers to be returned to Germany and one to France without an examination of their applications as to the merits. France and Germany had already rejected the asylum seekers' claims on the grounds that they were based on fear of persecution by non-state agents, which these countries do not recognise as a basis for granting asylum, while Britain does. France and Germany could therefore not be considered as "safe third countries". Thus the application of different criteria, as well as differing standards of proof required by different member states of the Council of Europe, may in practice lead to the effective denial of the right to asylum. In the worst case, the "safe third country" approach leads to "chain deportations". For example, NGOs in the Czech Republic have reported the case of a Somali family which had applied for asylum in Belgium. The application having been rejected, the family was returned to the Czech Republic, considered a safe country by the Belgian authorities. In turn, the Czech immigration authorities sent this family back to the next "safe country", Slovakia, whence the family was reportedly forwarded to Poland. Finally, the family found itself in Ukraine, and its further destiny is unknown. There is an obvious need for greater consultation and harmonisation on these issues.

6. "Manifestly unfounded claims"

19. As has been noted above, application of the "safe third country" concept can result in accelerated procedures being applied to asylum cases. However, there are other situations that may trigger "fast-track" consideration of applications within drastically shortened time limits. For example, if the claim to fear persecution is obviously without foundation or if there is deliberate abuse of asylum procedures, applications can be summarily rejected as "manifestly unfounded". The "manifestly unfounded claim" procedure which is increasingly applied in European countries to accelerate a negative decision is perhaps the most obvious case where the right to have one's application considered in a fair manner could be seriously endangered. Significant variations exist between states as to definitions and practice.

20. Some experts and NGOs claim that only "processing" of asylum applications within the judicial system can guarantee the right to fair and due consideration of them, and it is unlikely that procedures established within the administrative system are capable of achieving the same goal. Both approaches are applied at present in the member states of the Council of Europe.

7. Readmission agreements

21. In recent years, a whole network of bilateral readmission agreements has been concluded between the main European asylum countries and the countries in which asylum seekers originate or through which they have transited. Thus they provide for both the return of nationals to their own country and, in most cases, also for the return of third country nationals and stateless persons. They have become an instrument for the return of asylum seekers to "safe third countries", among others.

22. Readmission agreements, like the "safe third country" concept, raise the issue of whether returned asylum seekers are allowed access to the refugee determination procedure in the country to which they are returned. There is evidence to suggest that in some cases they are not, with chain deportations being organised: research has shown that "often, the receiving "safe" country had already made arrangements for the asylum seeker's return to the country of origin or to another unsafe country en route".⁴

23. The position of UNHCR is that the return of asylum seekers can only take place after the sending state has affirmatively established that the receiving state would admit the asylum seeker to its territory; would observe the principle of *non-refoulement* and would generally treat the asylum seeker in accordance with accepted international standards; would consider his or her claim and, if appropriate, allow the asylum seeker to remain as a refugee. Some observers go further, arguing that any and every state is obliged under the 1951 Geneva Convention to examine an asylum request.⁵ In the Rapporteur's opinion, all Council of Europe states should abide by the UNHCR position at the very least.

8. The refugee definition

24. The Universal Declaration of Human Rights declares that "everyone has the right to seek and to enjoy in other countries asylum from persecution". However, the right to grant asylum remains, for the time being, the exclusive prerogative of states and has not been incorporated into any binding international instrument.⁶ The refugee definition⁷ and the principle of *non-refoulement*⁸ enshrined in the 1951 Convention and its 1967 Protocol relating to the Status of Refugees are the cornerstones of international refugee law.⁹ Moreover, the procedural rules that guarantee the right of asylum seekers to due and fair consideration of their applications are essential features of the international refugee regime developed to fully implement the right to asylum in practice.

25. Interpretation of the Convention refugee definition is one way in which some European governments seek to limit numbers. Some countries interpret the definition as referring only to persecution by agents of the state, excluding persecution by such non-state agents as terrorist groups. European states should harmonise their policies in this regard, on the principle that the agent of persecution is irrelevant to the existence of a "well-founded fear" of it.

26. Similarly, some countries may blur the distinction between those fleeing armed conflict or generalised violence, which is not covered by the Convention, and those fleeing armed violence as an instrument of persecution specifically aimed at them as an ethnic group, for example, who should qualify for Convention refugee status. It was to cope with large-scale arrivals of both categories from the former Yugoslavia in the early 1990s that the concept of "temporary protection" was developed, a subsidiary form of protection that falls short of Convention status.¹⁰ Both the Council of Europe and the European Union are seeking to harmonise policies in this respect and should do so in concert.

27. Another concept applied by some member states and not others when deciding whether to grant Convention refugee status is that of the "internal flight alternative". The question may arise in the course of the refugee determination procedure whether the risk of persecution could have been avoided if the applicant had moved to a "safe" part of the country of origin, and, further, whether the applicant could reasonably have been expected to do so. This is also the subject of harmonisation efforts, at least within the European Union, which should be extended to other Council of Europe member states.

9. Treatment of asylum seekers and refugees

28. As the Parliamentary Assembly has already recommended, detention of asylum seekers should be avoided as far as possible in favour of non-custodial measures such as supervision systems, the requirement to report regularly to the

authorities, bail or other guarantee systems. Moreover, the Assembly asked the member states to introduce rules on a maximum allowed period of detention and to review detention conditions with a view to improvement. Under no circumstances should asylum seekers be detained with common-law prisoners. The Committee of Ministers in their reply to the Assembly stressed that while they endorsed the Assembly's view, "the non-custodial measures need to be combined with effective guarantees that asylum seekers will not abscond". Yet detention is still widespread. In the United Kingdom, male Roma asylum seekers are routinely separated from their families and placed in detention immediately after applying for asylum - although, according to British law, this can be done only when there is reasonable doubt that the applicant will comply with the asylum procedures. British lawyers assisting these asylum seekers claim that the reasons given for this detention are unusually weak. The Assembly should make a special study of this whole issue.

29. A further issue for report by the Assembly is that of the social rights and benefits available to refugees and asylum seekers, which are being curtailed in several member states. Access to education and training for refugee children and young people is a matter of particular concern.

30. Full implementation of basic humanitarian principles requires further development and improvement of refugee-related legislation and practices also in other areas.

31. As a rule, women refugees find themselves in a particularly vulnerable situation. The problem of the right to family life and the reunification and separation of families should be mentioned first in this context. On the other hand, women who divorce or are widowed in the host country often cannot have their applications considered separately or adequately.

32. The expulsion of asylum seekers whose applications have been rejected or of those who have been deprived of refugee status for some reason, is also a pertinent problem. The Parliamentary Assembly has recently examined or is examining these issues.

10. Harmonisation in the framework of the European Union¹¹

33. The ambition of the European Union is to introduce a "Common European Asylum System". The Amsterdam Treaty, signed by the member states of the European Union in June 1997 and in force since 1 May 1999, introduces a new responsibility for the European Community in respect of asylum. All measures on asylum are to be in accordance with the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, an assurance that was confirmed by the European Council meeting at Tampere on 15-16 October 1999. The European Council emphasised that the Common European Asylum System was to be "based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement."

34. The Amsterdam Treaty provides that the Council shall, within five years of its entry into force, adopt measures in the following areas:

(i) criteria and mechanisms for determining which member state is responsible for considering an application for asylum submitted by a third country national in one of the member states.¹²

(ii) minimum standards on the reception of asylum seekers in the member states. There is currently no measure in the European Union relating to this.

(iii) minimum standards with respect to the qualification of third country nationals as refugees.¹³

(iv) minimum standards on procedures in member states for granting or withdrawing refugee status.¹⁴

(v) minimum standards for giving temporary protection to displaced persons.¹⁵

35. A further area of competence, which does not have to be exercised within five years, relates to promoting a balance of effort between member states in receiving, and bearing the consequences of receiving, refugees and displaced persons.¹⁶

36. This legal structure has no evident legal relationship with the three measures on asylum that were adopted by the member states on 30 November and 1 December 1992 outside the structures of the European Union:

(i) Resolution on manifestly unfounded applications for asylum;

(ii) Resolution on a harmonised approach to questions concerning host third countries;

(iii) Conclusions on countries in which there is generally no serious risk of persecution.

37. The Amsterdam Treaty makes provision for the Schengen *acquis* to be incorporated into the EC Treaty. The Schengen Agreements of 1985 and 1990 and their implementing measures provide for the abolition of border controls between the contracting parties (the 15 member states of the European Union with the exception of Denmark, Ireland and the United Kingdom). Among other things, they set out the conditions for the crossing of external Schengen borders by persons and conditions of the issue of visas. The provisions relating to asylum have been replaced by the Dublin Convention referred to above. The general provisions of the Schengen *acquis* are important to the question of asylum because of their effect on access to the Schengen territory (see below). It is intended that the Schengen *acquis* will be transposed into Community law without substantive amendment. Denmark, Ireland and the United Kingdom will not automatically be bound by these provisions even after they become part of the EC Treaty. Similarly, Ireland and the United Kingdom will only participate in the other measures on asylum contained in the Amsterdam Treaty amendments to the EC Treaty if they choose to do so.

38. The Amsterdam Treaty also incorporates a Protocol (No. 29) on asylum for nationals of EU member states, which has generated some controversy, since it has the potential effect of denying asylum within the EU to Union citizens. This Protocol has its origins in a Spanish Government proposal made in response to a refusal by certain European countries, in particular Belgium, to surrender members of the Basque nationalist organisation, ETA, who had sought their protection.

39. This Protocol assumes that the level of human rights protection in all EU countries is such that they may be considered as "safe countries of origin", and that therefore no asylum application from any of them can be admitted. The only exceptions are where the asylum seeker is from an EU member state which has derogated from its obligations under Article 15 of the European Convention on Human Rights, where the Council of the EU has been seized of or has determined a serious and persistent breach of fundamental rights in such a member state, or, finally, if a member state decides unilaterally to consider such an asylum application, in which case the Council must be immediately informed and the application must be dealt with "on the presumption that it is manifestly unfounded".

40. One observer assesses the Protocol thus: "The purpose of the Protocol is radically to reduce, or to remove, asylum possibilities within the EU for Union nationals. It violates the letter and the spirit of the 1951 Refugee Convention, as well as other human rights instruments and principles, in five broad areas. It makes asylum decisions subject to a political process which includes the violator state; it does not (as a general principle) examine the individual grounds for fear of persecution; it restricts access to any form of status determination procedures; it discriminates on the basis of nationality, and it evades international obligations through reliance on the obligations of another state."¹⁷

41. These are serious criticisms, which moreover appear to be of little concern to the Committee of Ministers of the Council of Europe. In their reply to written question No. 374 by Mr Jurgens, whether they considered the European Union decision "to restrict European Union citizens' access to asylum a retrograde step and indeed contrary to the 1951 Geneva Convention...",¹⁸ they limited themselves to pointing out that "...the interpretation of international treaty obligations in the field of refugee protection, established outside the Council of Europe, falls explicitly to the appropriate judicial bodies" and that the Protocol states both that it "respects the finality and the objectives" of the 1951 Geneva Convention and that the Union "shall respect fundamental rights" as guaranteed by the European Convention on Human Rights.¹⁹ This of course begs the question: since all Council of Europe member states have undertaken this commitment, why are rights guaranteed by the Convention violated every day, even in the European Union?

11. Principal features of the European Union's asylum policy

42. There are two main control mechanisms within the policy of the European Union in respect of asylum seekers.

11.1 Limiting access to the territory

43. Under Article 100C EC the European Union adopted in 1995 a Regulation determining the third countries whose nationals must be in possession of visas when crossing external borders of the member states. The list of countries includes most of the main asylum sending countries of the European Union including three Council of Europe member states: Albania, Romania and Turkey²⁰. Therefore, asylum seekers wishing to come to the European Union from these states must obtain a visa before they leave their home states. This is often impossible as where a person is fleeing persecution by the state he or she is unlikely to be able to obtain genuine travel documents to present in order to obtain a visa. Surveillance on western embassies is not unusual in countries where persecution is widespread which makes it dangerous for persons fearing persecution to attend to apply for visas.

44. Under the Schengen Agreements this system of mandatory visas is reinforced by an obligation on all signatory states to enact legislation fining carriers for transporting any person (albeit a refugee) with inadequate documentation or without a visa as required. In this way, the European Union policy on movement of third country nationals makes it extremely difficult for refugees and persons in need of protection to arrive directly from their state of origin into a Union state in order to seek asylum. Therefore pressure increases on states surrounding the European Union which have different provisions on carrier sanctions and visa lists from the European Union common visa list. Further, the increase in obstacles to access to the European Union for persons in need of protection and refugees may be a contributing factor to the traffic in persons. The inability to flee a country of persecution on account of obstacles to access to other countries means that persons who are sufficiently desperate and who have sufficient funds may resort to traffickers in order to achieve this.

11.2 A new "geographic limitation" to the right of asylum?

45. The original 1951 Geneva Convention relating to the Status of Refugees was subject to a geographic limitation to refugees originating in Europe as a result of events arising before 1951. This limitation was lifted by the Protocol in 1967. The new European Union asylum policy has sometimes been described as creating a new form of geographic limitation in that the emphasis is on keeping refugees and persons in need of protection in their region of origin. For example, in the context of the influx of refugees and asylum-seekers from Northern Iraq and Turkey in 1997-98, the European Union adopted an Action Plan which stated, under the heading "effective application of asylum procedures", that the Council should "consider the scope for developing a regional approach to protection in appropriate cases involving co-operation with non-member states and the possibility of identifying safe areas within the region of origin ("internal flight" options)". The principle which the European Union deploys to achieve this objective is the concept that an asylum seeker must seek protection in the first safe country to which he or she comes.

46. The Dublin Convention provides that asylum seekers who make an application in any one of the member states of the European Union are limited to only one application and that application must be processed by the responsible member state determined in accordance with the fairly complex rules contained in the Convention. The underlying principle is that the first country of arrival of the asylum seeker is the country responsible for determining the application unless there are countervailing circumstances.

47. This policy within the member states has been extended to other countries through the Resolution on manifestly unfounded applications for asylum and the Resolution on a harmonised approach to questions concerning host third countries, mentioned in paragraph 31 above. By these two intergovernmental memoranda, the member states agreed that wherever possible they would not apply the Dublin Convention to return an asylum-seeker to another EU member state if there were a third country through which the applicant had passed en route to the EU and to which he or she could be returned. Therefore in a measure designed to deal with applications for asylum which reveal no ground of persecution, the member states inserted the possibility that a well founded application could be treated as manifestly unfounded if a third country exists to which the person can be returned.

48. The Resolution on host third countries sets out the requirements for a country to be determined safe so that an asylum seeker can be returned to it. It does not include any provision for common designation of countries deemed safe. As it is increasingly difficult for refugees and persons in need of protection to arrive directly in the member states from their country of origin for the reasons set out above, increasingly there will be a "safe third country" (in respect of which many Council of Europe countries have been designated), to which the person can be returned for the asylum application to be determined there. This policy has been facilitated by the settling of bilateral re-admission agreements with almost all of the border states of the European Union which require the non-Union country to admit back to its territory such third country nationals in search of protection provided sufficient evidence is adduced that the person passed through that state en route to the member state.

49. An important effect of the European Union's asylum policies has been to shift the "burden" of international protection of refugees and persons in need of protection to countries outside the Union. The full weight of this policy - not least in terms of administrative and social costs - has fallen primarily on the countries of Central and Eastern Europe which border on the member states. More serious is that by setting up a system whereby any person in need of international protection who has arrived in a European Union member state through another country can be returned to the nearest neighbouring state to have his or her claim determined, the EU has caused some concern regarding the concept of international solidarity towards refugees who lack any country of origin to protect them.

50. These policies provoke Central and Eastern European countries, in their turn, to make their asylum policies more restrictive - particularly because of the willingness

of the EU candidate states to align their legislation and practices with the EU. Moreover, enlargement of the EU is often used as an argument against more liberal asylum policies. Finally, ongoing EU enlargement will definitely have profound implications for asylum policies. To put it simply: after some states of Central and Eastern Europe have joined the EU, with whom will re-admission agreements be signed?

51. At its meeting in Tampere on 15-16 October 1999, the European Council welcomed the report of the High Level Working Group on Asylum and Migration set up by the Council, which contains Action Plans to address the root causes of migration from Afghanistan and the neighbouring region, Iraq, Morocco, Somalia and Sri Lanka. Action plans are also being considered for Albania and the Western Balkans. The European Council invited the Council and the Commission to report back on their implementation to the European Council in December 2000. The Parliamentary Assembly should monitor closely the implementation of these Action Plans to ensure that due weight is given to addressing the human rights violations which force people to flee these countries, and that the standard of protection given to these persons is not undermined for the sake of achieving harmonisation.

12. The European Convention on Human Rights and political asylum

52. Although the Council of Europe has never incorporated the right of asylum into a legally binding instrument, the European Convention on Human Rights has become a major source of refugee law and is increasingly invoked in asylum cases. In particular, there is a prohibition on expulsion where such a measure could lead to violation of Article 3 (banning torture and inhuman or degrading treatment or punishment). This implies the need for general application in the member states (and the European Union) of the right of appeal with suspensive effect for asylum seekers whose applications have been rejected. This was clearly not available to the 74 Roma rejected asylum seekers deported from Belgium to Slovakia in October 1999, despite the explicit request of the European Court of Human Rights to delay deportation made in response to a complaint filed on behalf of the Roma applicants by the Belgian League for Human Rights.

53. Obviously, the mere fact that a Council of Europe member state has ratified the European Convention on Human Rights does not mean that there will never arise a situation in which persons under its jurisdiction may, because of a well founded fear of persecution in that state, seek political asylum in another country. Violations of the Convention occur in practically all Council of Europe member states – the jurisprudence of the European Court of Human Rights offers good evidence for this. Moreover, the assumption that mere ratification of the Convention guarantees its full and fair implementation would make the very existence of the European Court of Human Rights unnecessary.

54. Often, persecution in the country of residence is perpetrated not by the state itself but by non-state agents. In these cases, the key issue is not the undemocratic nature of the state but its weak institutional capacities: the state does not itself persecute people but is simply incapable of effectively protecting them from persecution by racist, extremist, fundamentalist, terrorist or other overtly criminal groups. This problem is particularly urgent in the post-Communist countries of Central and Eastern Europe because of the inadequate level of training given to state officers, financial problems, and other factors related to institutional transformation during the period of transition.

55. In essence, the European Convention on Human Rights, on the one hand, and the international instruments on political asylum, on the other, offer substantially different types of protection from persecution. The former provides a legal evaluation of the case and a judgement which the Council of Europe member state concerned is bound to accept, as well as a remedy (including possible financial compensation) for the victim. On the other hand, the international asylum instruments provide for the remedy of immediate protection, allowing individuals to escape persecution, sometimes even before it has occurred, on the basis of a "well-founded fear of being persecuted". In other words, while the European Convention on Human Rights offers remedies of a strictly legal kind, the asylum instruments are humanitarian rather than legalistic. Thus, the two approaches are complementary rather than contradictory, and in no way can they exclude each other. Incorporation of the right to asylum into the European Convention of Human Rights would be the best way to reconcile potential controversies in this respect.

13. Harmonisation in the framework of the Council of Europe

56. The Committee of Ministers long ago recommended to member states that they treat refugees and asylum seekers in a "particularly liberal and humanitarian spirit", in full respect of the principle of *non-refoulement*. (Resolution (67)14). In application of this principle it has adopted a number of recommendations to the member states which seek to enhance the protection of refugees and asylum seekers. For example, and it is important to stress this, Recommendation No. R (97) 22 of the Committee of Ministers to member states containing guidelines on the application of

the safe third country concept is essentially designed not to legitimise this practice but on the contrary, to set limitations to its application and to urge governments to apply it with less restrictive effect.

57. The groundwork for the development of Council of Europe instruments designed to harmonise member states' policies is done by the Ad Hoc Committee of Experts on the legal aspects of territorial asylum, refugees and stateless persons (CAHAR), often on the basis of the recommendations of the Parliamentary Assembly. Recent work has resulted in recommendations by the Committee of Ministers to the member states on the arrival of asylum seekers at European airports, the application of the safe third country concept, the right of rejected asylum seekers to an effective remedy against decisions on expulsion, the training of officials who first come into contact with asylum seekers, and the return of rejected asylum seekers. The CAHAR is currently drafting recommendations on temporary protection and on family reunion and is considering the issue of women refugees.

58. The recommendations of the Committee of Ministers based on the work of the CAHAR, which are addressed to all member states of the Council of Europe including those belonging to the European Union, should seek, in co-operation with the EU, to ensure constant improvement in the standard of international refugee protection. Indeed, the Committee of Ministers should envisage drawing up a European Convention for the harmonisation of asylum policies based on the highest common denominator.

14. Conclusions

59. The Council of Europe should increasingly monitor member states' compliance with international refugee law and with the general principles governing the protection of refugees and asylum seekers enshrined in the relevant international instruments. The objective would be to continue to improve common standards for the treatment of refugees and asylum seekers. Intensified efforts by the European Union to harmonise its member and candidate member states' asylum and immigration policies makes this task even more urgent, because insufficient co-ordination between the EU and the Council of Europe in this field may deepen the existing gaps and pose an even more serious threat to the fair implementation of these basic principles.

60. The Parliamentary Assembly should recommend that the Committee of Ministers draw up a European Convention on the harmonisation of asylum policies in Europe, in close co-ordination with the European Union. The convention should build on previous work in both the European Union and the Council of Europe with a view to improving the standard of protection for refugees and asylum seekers in Europe.

61. Finally, the Assembly should continue to insist that the Council of Europe incorporate the right of asylum into the European Convention for the Protection of Human Rights and Fundamental Freedoms. This would be a fitting achievement to mark the Convention's 50th anniversary in 2000.

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Reporting committee: Committee on Migration, Refugees and Demography.

Budgetary implications for the Assembly: none.

Reference to committee: [Doc. 8225](#) and Reference No. 2331 of 4 November 1998.

Draft recommendation unanimously adopted by the committee on 17 December 1999.

Members of the committee: *Mr Díaz de Mera (Chairman)*, Mr Iwiński (Vice-Chairman), *Mrs Aguiar*, MM. Akselsen, Amoruso, Mrs Arnold, MM. Atkinson, Aushev (Alternate: *Mr Fyodorov*), Mrs Björnemalm, MM. Bogomolov (Alternate: *Mr Maltsev*), *Bösch*, Brancati, Branger, *Mrs Bušić*, MM. Chiliman (Alternate: *Mr Pop*), Chitaia, Christodoulides, Chyzh, *Cilevičs*, Connor (Alternate: *Mr Kiely*), Debarge, Mrs Dumont, Mr Einarsson, *Mrs Err*, Mrs Fehr, MM. Filimonov, Frimannsdóttir (Alternate: *Mrs Hlödversdóttir*), Ghiletschi, Hrebenciuc (Alternate: *Mr Paslaru*), Ivanov, Jakic, *Lord Judd*, *Mrs Karlsson*, MM. Koulouris, *Kozłowski*, Laakso, *Lauricella*, *Liapis*, *Luís*, Mrs Markovska (Alternate: *Mr Gligoroski*), MM. *Mateju*, Melo, Minkov, Moreels, Mularoni, *Mutman*, *Ouzky*, Pullicino Orlando (Alternate: *Mr Attard Montalto*), *Rakhansky*, Mrs Rastauskienė, Mrs Roth, MM. *von Schmude*, Szinyei, *Tabajdi*, Tahir, *Telek*, Thönnnes, *Tkác*, Vanooost, Verhagen, Mrs Vermot-Mangold (Alternate: *Mr Gross*), Mr Wray, *Mrs Zwerver*.

N.B. The names of those members present at the meeting are printed in italics.

Secretaries of the committee: Mr Newman, Mrs Nachilo, Mr Adelsbach.

¹ UNHCR, Refugees and others of concern to UNHCR. 1998 Statistical overview, Geneva, July 1999.

- ² *The Times* (London) 30 July 1999, "Court ruling opens door to asylum seekers", by Richard Ford.
- ³ *Die Presse* (Austria), 17 November 1999, "Kann man 20 Prozent aus der Gesellschaft ausschliessen?" by Stephan Müller, Adviser, European Roma Rights Centre, Budapest; *Migration News Sheet*, Nov. 1999, p. 14.
- ⁴ Karin Landgren, *Deflecting international protection by treaty: bilateral and multilateral accords on extradition, readmission and the inadmissibility of asylum requests*, UNHCR, New issues in refugee research, Working Paper No. 10, June 1999, p.16.
- ⁵ *Ibid*, p.15.
- ⁶ Despite repeated recommendations in this sense by the Parliamentary Assembly. Cf. for example [Recommendation 1236](#) (1994) on the right of asylum.
- ⁷ Persons who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" are outside their country of origin and are unable or unwilling, because of such fear, to avail themselves of that country's protection.
- ⁸ "No contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."
- ⁹ It should be noted that neither Moldova nor Ukraine has signed the 1951 Convention and that Turkey continues to restrict its geographical scope to Europe.
- ¹⁰ Cf. Assembly [Recommendation 1348](#) (1997) on temporary protection of persons forced to flee their countries.
- ¹¹ Sections 9 and 10 are based on a paper written for the Sub-Committee on Refugees by Ms. Elspeth Guild "Asylum policy in the European Union" (AS/PR/Ref (1998) 1).
- ¹² This subject matter is currently covered by the Dublin Convention determining the state responsible for examining applications for asylum lodged in one of the member states of the European Communities (1990) which came into force in September 1997. It replaces the provisions on asylum contained in the Schengen Agreement (1990).
- ¹³ This is currently the subject of a joint position defined by the Council in 1996 on the basis of Article K.3 (the so called Third Pillar) of the Treaty on European Union (Maastricht) on the harmonised application of the definition of the term "refugee" in Article 1 of the 1951 Geneva Convention relating to the Status of Refugees.
- ¹⁴ This subject matter is currently covered by a Third Pillar Resolution of 1995 on minimum guarantees for asylum procedures. See also the European Commission's current working document "Towards Common Standards on Asylum Procedures".
- ¹⁵ This is the subject of a 1997 proposal by the European Commission for a joint action under the Third Pillar concerning temporary protection of displaced persons.
- ¹⁶ This is the subject of two "Third Pillar" measures adopted by the European Union in 1995, the Resolution on burden sharing with regard to the admission and residence of displaced persons on a temporary basis and the Decision on an Alert and Emergency Procedure for Burden Sharing with regard to the Admission and Residence of Displaced Persons on a Temporary Basis.
- ¹⁷ Karin Landgren, *Deflecting international protection by treaty: bilateral and multilateral accords on extradition, readmission and the inadmissibility of asylum requests*, UNHCR, New issues in refugee research, Working Paper No. 10, June 1999.
- ¹⁸ Parliamentary Assembly [Doc. 7853](#), 26 June 1997.
- ¹⁹ Parliamentary Assembly [Doc. 8251](#), 28 October 1998.
- ²⁰ The others are: Algeria, China, Iran, Iraq, Liberia, Nigeria, Sierra Leone, Somalia, Sri Lanka, Sudan and the Democratic Republic of Congo, formerly Zaire.