

The Harmonisation of asylum policy in Europe

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INTRODUCTION

The issue of refugees in Europe is assuming a greater importance than the numbers involved for a variety of reasons. From an international point of view European policies can have a strong impact, both in the economic and the political field. European countries do have a major say in international conventions and they can also influence political and economic developments in countries where refugees originate from. The numbers of asylum seekers and refugees in Europe has increased in the last twenty years and the nature of the refugee movement itself has changed from what it was in the post Second World War years when the majority of refugees in Europe were Europeans. Today's refugees come mostly from the Third World, from distant cultures and societies. Future trends may also include refugees from Eastern Europe. They are arriving at a time when the European economy is in a plight and when Europe is closing its doors to immigration.

These are a few of the elements which set the scene for European asylum policies. The process of consultation and coordination undertaken by European states has been accelerated by the forthcoming elimination of internal borders in 1993. Discussions and agreements have not been completed as yet but they point to a number of trends emerging from conflicting opinions and influences.

This study is based on interviews with government officials, international organisations and agency staff, MEPs and on the analysis of archives. The objective of this paper is to identify the main trends and issues regarding refugees and asylum seekers in Europe. For methodological reasons these issues have been grouped into two sets, broadly expounding governmental versus non-governmental viewpoints, although some nuance has to be introduced in both categories.

A simple reflection on the connotations of the terms "asylum" and "refugees" will illustrate my classification. When the term "refugees" is mentioned to government officials it immediately brings up to mind the notion of state security and immigration control. For non-governmental agency staff these terms conjure up notions of human rights and humanitarian traditions. Are these two groups of people working to the same agenda? Do the two interpretations interrelate in any way? According to Gerard Soulier they stand in direct opposition to one another as they pertain to the contradiction between state and democracy "il n'est pas un droit, pas une liberté, qui n'ait, t, arraché, par la lutte sociale et politique contre les appareils de la domination, c'est ... dire l'Etat".[1] Ensuring the security of the state thus seems to bear little relevance to preserving human rights, part and parcel of democratic rights. European governments perceive refugees as a potential threat to the security of the state and quote "terrorism" as a reason to tighten up on asylum seekers. Governments claim that the security of the state is synonymous with the security of citizens but the latter are rarely asked to voice their opinion on the measures supposed to protect their security. For instance, the three main intergovernmental consultations examined in this article have been held in secrecy and have not allowed for democratic consultation on the issue. In addition the notion of "security of the state" is not neutral. In its name the French Minister of the Interior, Charles Pasqua, with the approval of the Front National, introduced the "procédure d'urgence absolue" making possible the summary expulsion of foreigners including recognised refugees. The same Pasqua declared unambiguously "la démocratie s'arrête où commence l'Etat".[2]

In contrast to this it is civil society which has been upholding democratic and human rights including the right of asylum. In Soulier's words "le respect du droit d'asile [est] preuve et garant du droit démocratique".[3] It is civil society which has been campaigning for the right to asylum against government policies. To illustrate this, it suffices to mention the Campagne Nationale pour le Droit d'Asile launched in France by non-governmental organisations from

January to October 1986, British trade unions pressing for the acceptance of Chilean refugees in the seventies and the intervention of churches in several European countries to protect asylum seekers.

PART ONE Governments' negotiations

This section examines the initiatives taken by European governments to harmonize European policy on asylum seekers and refugees.

Three main bodies have been considered. The so-called "Schengen" group, named after an island where the first meeting took place on 14 June 1985, brought together the ministers of the Interior of Belgium, Germany, France, Luxemburg and the Netherlands with the aim of establishing a one visa area. It discusses the question of asylum within the framework of "circulation of persons" and "police and security" issues.

The Council of the 12 comprises the Ministers of the Interior and Justice from all the EEC countries. Their first meeting took place in London on 20 October 1986 and they met again in Brussels (28.4.87) and Copenhagen (9.12.87) to formulate a policy on terrorism, drug and illegal immigration. They have set up an ad hoc group on immigration which created a subgroup on asylum with the responsibility of "examining the measures to be taken to reach a common policy to put an end to the abusive use of the right of asylum". Their conclusions serve as guidelines for national policies.

The European Commission, composed of nominated civil servants has prepared a proposal for "harmonisation". The subgroup on asylum (part of the Ad Hoc Group on Immigration, not to be confused with the Council of the 12 group mentioned above) has presented an Avant Projet de Directive. As is explained by an EEC functionary in a note for Lord Cockfield dated 8.3.88 "The subject of the proposal is therefore not the harmonisation of the law of asylum in general but only of those provisions and practices vital for the removal of frontier controls."

The composition of these bodies (Ministers of Interior Justice and senior civil servants) the text of their brief give a good indication of the main thrust of the measures proposed. Refugees are considered in the wake of discussions on terrorism, drugs and arms rackets. They are also identified to fraudulent third world immigrants trying to circumvent immigration controls. Moreover this image of refugees is taken up by the media. As is summarised by a senior civil servant involved in the Council of the 12 "the lowering of internal borders must not jeopardize the security of the state nor the control of immigration".[4] The harmonisation of European policies will thus concentrate on preventing asylum seekers from "taking advantage of the absence of internal borders". One risk often quoted by governments is that of multiple or successive applications for asylum. Not only are they resented because they overload national procedures but because they enable asylum seekers to stay in Europe for years "under false pretences." As stated by a French civil servant "Imagine that an asylum seeker presents an application successively in all the member countries. If the procedure and appeal take an average of three years; with twelve EEC countries, the person could manage to live in Europe for 36 years".[5]

However the harmonisation of policies does not take place in a vacuum. It has to take into account the existing procedures and situations in each European country. European countries are increasingly developing protectionist policies with regards to all kinds of immigration, including refugees. These efforts towards harmonisation might appear to manifest a "European protectionism" superseding the national one. In reality the Europeanisation of policies is conceived as a means to secure national interests. Part of these interests are common to several or all of the EEC countries in which case an agreement beneficial to all is easily reached. But there are also conflicting national interests which are often resolved to the advantage of some and to the detriment of others. One problem frequently cited is the unbalance in the distribution of refugees among European countries.[6] It seems logical that the countries which receive a great number of refugees would want to establish policies designed to

prevent them from arriving or to redistribute them to other countries. To cite one example: a large number of refugees arriving in Spain and Italy cross the Alps and the Pyr,n,es clandestinely to apply for asylum in France. France is therefore likely to try and persuade Spain and Italy to take responsibility for the asylum seekers landing on their territory. Yet it is probable that these two Southern European countries will resist France's suggestion as it would entail settling a much greater number of refugees. Such a discrepancy between national interests has motivated specific association between states. The North-South divide gave rise to the formation of the Schengen group which brought together "Northern" states (France included) to ensure a better control of the intake of asylum-seekers. It has been stated privately by senior civil servants that the Schengen agreement is also intended to provide a "model for the 12" which really means that some Northern states are organising themselves to impose their viewpoint on the rest of the EEC. Moreover each government is jealous of preserving national sovereignty and prerogatives so that the European Commission's initiatives are sometimes unwelcome even when its suggestions do not contradict the national view. Up until this date European governments have not accepted that the Commission had any competence to deal with the harmonisation of asylum policy.

With so many complications involved one may wonder why Europe does not simply close its doors to these unwelcome refugees. However, this is not possible. Another set of factors has to be taken into account. All the European countries are signatory to several international conventions which protect asylum seekers and refugees and cannot flout them flagrantly. Nonetheless these conventions can give rise to varying interpretations. Only the 1951 Convention and the 1967 Protocol are quoted in the agreements proposed by the three bodies studied in this section. Let us now turn to the main items which lay the basis for an harmonisation of European policy on asylum.

1. Which state is responsible for examining requests of asylum

One of the main purposes of harmonisation is to introduce some order in the handling of asylum applications. With the aim of avoiding multiple applications the parties concerned soon established the principle that each application should be examined by only one state. The most difficult task then became drawing up guidelines to determine which state was responsible. The possibility of giving the applicant the choice of the country was rejected as asylum seekers, unlike immigrants are not supposed to plan their emigration but go wherever possible.[7] It is probable that the real reason for this decision was the desire to avoid the possible congregation of refugees in the more prosperous states with higher standards of living. Governments retain as a guideline the notion of "country of first asylum". To define beyond doubt what this meant, the leading idea put forward was that "the more one state manifested its agreement to the arrival or even to the stay of an asylum seeker, the more this state became responsible." [8]

The granting of a visa was deemed to provide the most crucial indicator. The three bodies studied, the Schengen group, the Council of the 12 and the European Commission, expressed similar opinion on this. In a summary, the proposed rules are as follows.

The state which granted the visa of "longest duration" was to be deemed responsible. If a state did not require a visa it was nonetheless deemed responsible as this constituted an "implicit agreement" to the arrival of the asylum seeker. When a visa was valid in several countries, as is already the case in Benelux, the country responsible would be the one where the asylum application was handed in. If an asylum seeker was found in an irregular situation the first border reached would determine which state was responsible. In addition, the Schengen group stated that they aimed to achieve a "uniform visa area". In this eventuality, as the Netherlands pointed out, most of the

detailed clauses mentioned above would become void and two criteria would remain : the country where the application was handed in (if the asylum seeker's situation was regular) and the border reached first (in an irregular situation).[9] It appears that these circumstances would lead back to the situation which states feared, whereby the more prosperous countries or those with more permeable borders would attract the bulk of refugees. Hence it is likely that the Schengen group will achieve the uniform visa much quicker than the 12. Another possibility is that the 12 might implement the present French policy of requiring a visa of almost all non EEC citizens, thus considerably restricting access to asylum.

All these proposals are applicable only if all the countries concerned adhere to the 1951 Convention and 1967 Protocol. According to the 1951 Geneva Convention, the statute of refugee is to be awarded to "persons outside their country because of a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion." But the Convention also stipulated that these provisions applied only to Europeans victims of events having taken place before 1951. The Bellagio Protocol (1967) removed the geographical and date limitations, extending to people of all origin and to post-1951 events the provisions of the Convention. Italy, which had retained the geographical reservation excluding non-European refugees would have dropped it in January 1990 so that it can now settle Third World refugees. In the discussions involving the 12 a North-South cleavage renders agreements difficult, the "North" attempting to make the "South" responsible for the asylum seekers it allows in. At the moment most of the asylum seekers are in transit in the Southern countries and migrate to Northern countries to settle.

The Schengen group, the Council of the 12 and the European Commission all broached the question of expulsion in order to reinforce the notion of responsibility. Indeed, it was not considered sufficient that a state examine an asylum application, it also had to be made to take responsibility for a negative decision. To this end the proposal stipulates that each state must ensure the expulsion of applicants to whom it has refused asylum as this would prevent them from drifting into neighbouring countries. Moreover to protect each country from the "irresponsibility" of others a "readmission clause" was included in the proposals of the three bodies under study. Consequently, the country in charge of examining the application will have to take back asylum seekers which may have entered other member countries irregularly.

The general tone of these agreements seems to indicate that states are reluctant to settle refugees. Their one redeeming feature from the refugees point of view is that such agreements may reduce the risk of remaining "in orbit", pushed on from country to country. However, as was pointed out by the Dutch Council of State in a note dated 8 April 1991 to the Dutch government, it may have precisely the opposite effect, that of increasing the numbers of "refugees in orbit".

The Council of the 12 and the Commission introduced an additional criterion to determine the state responsible for examining asylum requests, that of close family links; and a transfer of responsibility is planned if need be.[10] They insisted however that this did not establish the right to family reunion. Another document from the Schengen group proposes that the treaty making state that has granted refugee status and residence to an alien must take into consideration an asylum application from a member of his family if all the parties concerned agree to it. In this instance, the definition of member of his family is deemed to include spouse, unmarried minor children (less than 18), father and mother of unmarried minors. Although Belgium and Holland had expressed reservations about this definition,[11] it was incorporated into the final text of the treaty.[11a] These two bodies also make it possible for another state than the state deemed responsible to examine the request to do so in accordance with its national procedure if it had special ties with the

applicant. Within the Schengen group it was proposed that asylum requests could be examined by a state which was not responsible "for special reasons concerning national law".[12] The Schengen group also included an incentive to ensure a strict application of the agreements; it launched the idea of creating a common fund designated to cover the costs of deporting "illegals", the modalities of which have not been decided as yet as reservations were expressed by France and Germany.[13] Such provision does not appear in the definitive text. In a further attempt to control the arrival of asylum seekers the Schengen group discussed the possibility of imposing sanctions upon transport companies carrying foreigners in possession of irregular documents. This suggestion has not been taken up as yet as French officials have expressed their reluctance to hand over the checking of documents to airline employees who might not even be French nationals. It is worth noting that Air France and the SNCF have already been fined heavily and have refused to pay the fine.

However, the Schengen states finally agreed on tackling transporters. It imposes on air-sea-land- transporters the obligation of taking back immediately an alien refused entry; they must also take measures to ensure that aliens have the required documents to travel. In order to enforce this, the Schengen states will be committed to introduce sanctions accordingly.[13a] They will also introduce penal sanctions to whoever "for purposes of gain" helps or tries to help an alien enter the territory without the required documents.[14]

2. Procedures

Procedures have not given rise to a great deal of debate as a concensus was reached rapidly. The three bodies studied agreed that national procedures should be left as they stood to handle applications.[15] The Council of the 12 and the Schengen group do not accept any departure from this model.

As for the Commission it put forward the creation of a central EEC wide consultative committee[16] to ensure that decisions taken in one state did not contradict the statute law of another state. In the Commission's opinion this is the only way to secure the respect of "Community standards" and the enforceability of negative decisions in all the states. The Commission's Directive adds that this Consultative Committee does not constitute yet another echelon in the procedure and purely imparts advice which is not legally binding but should be taken into account because of its "moral strength". Despite the Commission's concern to demonstrate that such a committee would in no way encroach on national sovereignty, European government have expressed their disapproval of this proposal.

Finally the Commission is the only body to have proposed the creation of an "abridged procedure".[17] The Commission argues that several states already have one and that it could be generalised and streamlined to help decrease the overloading of applications. This procedure is designed to deal with three situations; successive or simultaneous applications, an application whose responsibility rests with a non-EEC country, and a "manifestly unfounded application"

3. Exchange of information

All the three bodies studied make mention of an exchange of information on asylum seekers. The Commission proposed to exchange general information. The Council of the 12 is already circulating statistics. The Schengen group has prepared a detailed list of the type of information to be gathered, including general information on national procedures, on the monthly arrival of asylum seekers, on the emergence or significant increase of certain groups and more specific information on the countries of origin and on individual asylum seekers, i.e the details pertaining to their identity; this also includes information on members of the family,[18] their documents, their itineraries,

and the decisions taken about their cases. The set of information regarding the motives of the asylum application and of the decision is the only information which would be subject to the applicant's consent.[19] French reservations did not preclude an agreement on this point.[20]

From the point of view of the asylum seekers, information concerning their countries of origin alone might be beneficial if it is sufficiently accurate. All the other registers of data mentioned above belong to a vast police operation which only appears necessary if asylum seekers are considered a priori unwelcome and a threat to European states.

4. Circulation of foreigners

A broad discrepancy exists between the views of representatives of states and of the Commission concerning the circulation of asylum seekers and refugees within the confines of the EEC. The Schengen proposal treats refugees in the same way as other aliens holding a residence permit from one of the Contracting States. They will be able to move freely within the borders of the Schengen states if they have a valid travel document. But, they will be under the obligation of declaring themselves to the competent authorities on entry or within three days of entry (at the choice of the Contracting Parties).[21] Some asylum seekers might be included in this provision if they hold a provisional residence permit and a travel document issued by one of the Schengen states.[21a] In April 88, the French had raised objections to this proposal on account of the heavy workload that would be involved "with little effect",[22] but dropped them thereafter. The Commission adopts a different attitude and argues that the absence of border checks will make it impossible to prevent asylum seekers and refugees from circulating and concludes that it is best to try and put some order in their movements. According to the Commission Directive refugees should be allowed to stay in another EEC state for up to three months without a visa,[24] and asylum seekers who cross an internal border must register with the police within 72 hours, and are allowed to stay up to a month and cannot call upon health and social benefits. This last point will probably have to be modified as it contravenes the established rules on the rights to benefits granted by the social affairs division.[25] A Convention on controls at EC external borders, still to be signed by the 12, proposed to allow any alien who holds a residence permit from one of the EC states to travel freely "for a short stay" within EC borders (if the residence permit still has more than four months to run),[25a]

All the documents which constitute the basis for these agreements have been kept confidential while they were discussed internally as well as the meetings of the Schengen group and the Council of the 12 which remain shrouded in secrecy. Observers from Non Governmental Organisations (NGOs) or the United Nations High Commissioner for Refugees (UNHCR) have not been permitted. The Commission was allowed to send an observer to the Council of the 12 which the European Parliament requested to attend as well (without success until now). The Commission has sent its directive to the UNHCR for comments and invited independent experts from European governments to look at it.

Information about these discussions has leaked out and provoked widespread protest. A press conference was held on 14 June 1988 by MEPs and non-governmental organisations on the theme "Today the clock is being turned back 50 years. The doors of Europe are being shut". Organisations campaigning for the right of asylum submitted a petition to the governments of Belgium, the Federal Republic of Germany, France, Luxemburg and the Netherlands stating: "The main issue of these discussions seems to be "How to prevent the admittance of refugees in our countries? The effect of these measures are a diminished opportunity for refugees to reach the "Schengen" countries, a very restrictive application of the Convention of Geneva and inhuman treatment of refugees."

The measures proposed by the three bodies studied cover a limited number of issues which all address the basic concern of European governments, security and immigration controls. As a consequence, 'A reinforcement of controls on the community external borders is unanimously recognised as essential, following the abolition of controls on the community internal borders'.[26] One can infer from those an undoubtedly stricter and more efficient control of the arrival of asylum in Europe.

5. Treaties and conventions

All these discussions and negotiations have led to the setting up of several treaties and conventions. The Schengen group which had suspended its work in 1989, resumed it in 1990 and signed an agreement in June 1990. Italy, which had no party to the discussion leading to this agreement also signed soon after. However, the Schengen agreement cannot be implemented as yet, because the Dutch Council of State has advised the Dutch government not to introduce the Schengen Convention of 19 June 1990 for ratification by the Dutch Parliament. In addition, the Twelve have moved fast in drafting two Conventions. The first, the Dublin Convention on the determination of the state responsible for examining an asylum application, was signed by all members of the EC with the exception of Denmark in June 1990. Under the Convention the main criteria for determining the state responsible are the conditions of entry of the asylum-seeker - which state authorized entry and/or issued a visa. It also takes into account family links, the family being defined in the narrow sense as spouse, parents or children, if the latter are minors. It recognizes the sovereign prerogative of states to consider an asylum-request even if they are not bound to do so by the agreement. The Convention includes a re-admission clause for asylum-seekers whose request has been definitely rejected by a state if the latter has not taken measures to make them leave their territory. Finally, an exchange of general and individual information on asylum-seekers is planned within the scope of the convention.

The second draft Convention which relates to controls at EC external borders defines what constitutes a point of entry, how to deal with agreements with Third States (non-EC members) and small border traffic. It includes a proposal to draw up a computerized list of *persona non grata* on EC territory. Another of its significant concerns is the harmonization of policies and practices of EC states on the question of visas, with the possibility of issuing European visas. Council of Ministers Convention meeting in Rome in December 1990 failed to reach an agreement on this Convention on account of the dispute between Britain and Spain over Gibraltar.

Two additional documents are being considered which may result in further international agreements: a draft convention on the transfer of proceedings in criminal matters; and a summary document on the strengthening of police cooperation. Finally, a new forum has been established to coordinate all these activities and to create a framework of action and a timetable in the run-up to 1992: the Coordinators Group on the Free Movement of Persons, which was established after the Rhodes summit of the 12 EC heads of governments in December 1988.

Part two Human rights and humanitarian organisations

The second part of this paper discusses the issues brought to light by organisations concerned with asylum and human rights. Most of the texts examined emanate from a selected number of organisations preoccupied with European policy on asylum. They include international, European and non-governmental organisations.

The UNHCR documents have been discussed in particular when they addressed Europe.

The European Parliament has produced numerous recommendations, questions and a detailed initiative report on asylum issues. Several of its committees have been discussing them, in particular the Political Affairs Committee, the Committee on Legal Affairs and Citizens' rights and the relevant regional committees such as the delegation for relations with the countries of Central America and the Contadora group etc.

The Council of Europe, comprising 23 European countries issued declarations and agreements on refugees as early as the sixties and continued to do so until this date. Three of its committees have been directly involved, the Parliamentary committee on refugees, migration and demography, the comite ad hoc sur les asiles et les refugies (CAHAR) and the resettlement fund committee.

The coordination of non-governmental agencies in Europe plays an important role in shaping alternative policies. The European Consultation on Refugees and Exiles (ECRE), the main one, was founded in 1975. A Council of European Churches' working group on asylum and refugees was formed in the late 80's. All these organisations start from a fundamentally human rights/humanitarian viewpoint. The Council of Europe however is somewhat contradictory as its Parliamentary committees function publicly in a spirit clearly steeped in human rights whereas CAHAR, a governmental committee composed of representatives of the Ministries of Interior and Justice holds its discussions in complete secrecy and seems to share the same outlook as the organisations studied in the first part of this article.

It is not my objective in this section to exhaust the numerous issues pertaining to asylum seekers and refugees in Europe but to identify and explore the more urgent questions which have been focused upon by the organisations mentioned. Many of these issues have arisen from the prominent trend in the policies and practices of European countries which cristallised into the "harmonisation" process initiated by governments.

It is noticeable that previous attitudes have considerably changed. The notions of human rights and solidarity which prevailed in the wake of the Second World War and inspired several UNHCR declarations are now retreating. Governments and national communities are preoccupied with the preservation of their advantages not only because the struggle against nationalist atrocities and discrimination experienced throughout the 'thirties and early 'forties has receded in people's memory but also because the relatively improved standard of living and the previously buoyant European economies are perceived as insecure.

This is happening at a time when economic and political crises in the Third World have deepened, leading to an increase in the number of refugees to whom modern means of transport have rendered Europe more accessible. European governments have shown little concern for the Third World. Even the spirit promoted by Willy Brandt, linking up the interests of the Third World with those of the industrialised countries has receded. The European harmonisation of policies demonstrates the strengthening of European chauvinism against Third World and asylum seekers' interests. As a consequence the general trend manifested by the organisations studied in this section expresses a defensive

position. What were considered as acquired rights and protections are being gradually whittled away.. It follows that most of the points made in this section concern responses to government initiatives which are detrimental to refugees. Other points are issues which governments have ignored but which the human rights organisations consider as important.

1. Global approach

Unlike European governments which have looked at issues strictly confined to their national or European situation, human rights organisations promote a global approach to the question of refugees. All the organisations studied here have adopted this view and advocate an analysis of the root causes of refugee movements. Both the European Consultation on Refugees and Exiles (ECRE)[27] and the report prepared by H.O. Vetter for the European Parliament quote Prince Sadruddin Agha Khan's study on "Human rights and massive exoduses" and underline Europe's responsibility to tackle the root causes of refugee movements. They propose a European intervention not only in the humanitarian field but also in the area of economics and politics. This presupposes the readiness to broach issues of underdevelopment and political instability in Third World countries. The problems involved are complex and cannot be developed here.

A global approach is also put forward by the UNHCR in its consultation with European governments, where the latter are asked to intervene in conflict ridden areas in order to make satisfactory voluntary repatriation possible and secure. The Council of Europe[28] and the European Parliament have emphasised the same idea which entails the granting of European aid to facilitate the reintegration and survival of the refugees in their homeland as well as ensuring guarantees for their safety. In addition, the organisations under study encourage Europe to take its share of the responsibility for assisting the countries which receive great numbers of refugees and for the refugees themselves in those countries. The UNHCR calls upon European governments to recognise the burden of first asylum countries,[29] the ECRE[30] and the Council of Europe asks them to assist refugees outside Europe. Numerous resolutions of the European Parliament do likewise and have led to the creation of budget headings to this effect. The Vetter report expounds the historical, philosophical and economic reasons for Europe's responsibility in these matters: "The Community's responsibility stems from:

- a general humanitarian and moral obligation towards people in need;
- the special historical role of Europe as a former colonial power;
- the Community's present role as a leading industrial power;
- the commitment made in international and European treaties...to respect human dignity and human rights and actively promote them."[31]

European states rarely, officially acknowledge any of these arguments. They may make a reference to the international Conventions to which they are signatory and the special colonial responsibility is sometimes brought up by a state to criticise another state. For instance France and Denmark have protested against Britain's shunning of its responsibility towards Sri Lankan Tamils which diverted them to neighbouring countries as they required a visa to enter Britain (confidential source). Human rights organisations argue that European governments are acting like ostriches. ECRE points out that a global approach could offer them distinct advantages as the tackling of the root causes of refugee movements, assistance to satisfactory settlement in the countries of first asylum and voluntary rapatriation programmes might very well decrease the number of asylum seekers reaching Europe.

These "advantages" however are never the objectives posited by ECRE or any of the organisations quoted in this section, they merely accrue from a global approach to the refugee phenomenon.[32] As for the governments, they do not examine the decrease of refugees in Europe within the world context, their sole interest in the world refugee movements seems to have derived from their desire

to know where the next arrivals will come from, presumably to close Europe's door more efficiently. Hence the exchange of information proposed in the harmonisation process.

The first reference to harmonisation made by the organisations studied in this section is a recommendation produced by the Council of Europe in 1976.[33] It noted the differential practices and procedures in Europe as well as discrepancies in the rates of recognition of refugees and sought to remedy them. This led to another Council of Europe recommendation in 1981 on the Harmonisation of national procedure related to asylum. The latter text does not promote any formal harmonisation but invites European states to check that their procedures and practices meet with Council of Europe standards requiring an "objective and impartial judgement", the referral of the decision to a "central authority" (not to be the responsibility of immigration officers at the border), "clear instructions" to immigration officers against refoulement, and the permission for the applicant to remain whilst the asylum request was being examined." [34]

Since these recommendations were drawn up, a greater sense of urgency has coloured the declarations of the human rights organisations as European states have been trying to reduce the number of asylum seekers on their territory through various means.

2. Restrictive practices

One area of concern for human rights organisations has been the imposition of visas which prevent asylum seekers from leaving their country of nationality or residence. H.O. Vetter notes that EEC member states are "trying to discourage the influx of those applying for asylum by extending the visa requirements to the principal countries of origin", and substantiates his statement by numerous examples from several European countries.[35] Moreover this trend promises to become more pronounced. The UNHCR voiced its concern at the Commission's directive plans to "tighten up controls on asylum seekers and refugees at external frontiers".[36] Since 1986 France has been implementing a blanket visa policy for almost all non-EEC and Swiss nationals and it is feared that 1992 Europe may do the same. ECRE warns that "it is contrary to international legal principles to impose entry visa requirements exclusively in order to prevent people from leaving their own country or country of first arrival in order to seek asylum." [37] In addition to visas several European countries have also implemented a policy of sanctions to airlines and other transport companies for carrying passengers who do not have adequate documentation. As a consequence, the UNHCR has objected to "visa requirements which are intended, and/or work often in combination with airline sanctions, to inhibit the entry and therefore the access to asylum procedures by applicants in need of international protection." [38] The UNHCR sees in these practices not only an infringement of basic principles of refugee protection but also a threat to principles of international cooperation. Indeed they mostly serve to divert asylum seekers into other states.

On the whole what is criticised by the UNHCR is a restrictive interpretation of the Convention and Protocol as Tiberghien points out in *Le Monde* (19 April 1988). In its consultation with European governments the UNHCR signals restrictive trends in the concept of country of first asylum and the refugee concept itself: "Restrictive practices have been manifested in different ways and vary substantially in scope and intensity from one country to another. Overall, however, they can be said to amount to a clearly discernible regional trend." [39] Both the European Parliament and the Council of Europe criticise the restrictive interpretation of the concept of refugee and the increased standard of proof requested of the applicant.[40] The Council of Europe also objected to the unfair treatment dealt to refugees because of "recent developments in the policies of several countries tending to assimilate the

situation of the refugee with that of the ordinary alien or migrant worker." [41] The European Parliament warns against the risk of an effective restriction on the numbers of spontaneous refugees because numerous quota refugees have been accepted. For many reasons the situation of asylum seekers is made quite impossible. In some cases asylum seekers are "punished" for being in possession of forged travel documents or for making false statements [42] without taking into account the fact that this may derive from the very fear of persecution which motivates their flight and justifies their right to asylum. On other occasions it is implied that the possession of regular documents contradicts their claim that they are unable to enjoy the protection of their country of nationality. [43] Finally refugee status is often refused because of a restrictive interpretation of country of first asylum.

Another issue looming high on the agenda of human rights organisations is the increased likelihood of refoulement (deportation). H.O. Vetter signals in his report "moves to repeal the principle of non-refoulement" [44] and the European Parliament made several recommendations against refoulement as well as the extradition of recognised refugees. The UNHCR expressed its concern for the application with increased frequency and rigour of the notion of "manifestly unfounded" or "abusive" claims. It proposed a definition for "manifestly unfounded" which protects asylum seekers qualifying for asylum not only under the 1951 Convention and 1967 Protocol but also under "any other criteria justifying the granting of asylum". [45] The risk of refoulement has become such a preoccupation for non-government agencies dealing with refugees that ECRE includes, in its policy for Europe, very clear guidelines about the situations in which it would be acceptable to return asylum seekers to their country of origin or to the country of first arrival. The more frequent cases of refoulement have not been those of asylum seekers being returned to their country of origin but to the country of first arrival considered as country of "first asylum" by the relevant authorities; this country then had sent them back to their country of origin where they risked torture and death. Moreover, European countries are extending more and more the range of cases where refugees are deemed to have passed through a "country of first asylum". ECRE makes sure that it caters for this possibility with the maximum guarantees of safety being granted to returnees by spelling out the conditions which must prevail in countries where asylum seekers are to be returned. In such countries there must exist a basic protection (including specific protection against refoulement), and assistance, an effective access to a local procedure, an effective access to efficient and adequate resettlement facilities and facilities for voluntary repatriation. [46] ECRE also reaffirms the need to give favourable consideration to asylum requests if fears are expressed that the asylum seeker's physical safety and freedom would be endangered on being returned.

3. De facto refugees

As a response to the European governments' increasingly restrictive interpretation of the 1951 Convention on refugees, international and non-governmental organisations have resorted to a variety of other Conventions and declarations to protect asylum seekers. [47] For example the European Convention on Human Rights includes a number of articles which could be applied to asylum seekers. ECRE cites among them article 3 which prohibits inhumane and degrading treatment, thus preventing refoulement to countries where this would take place or article 8 which would stop the deportation of an asylum seeker if it was to disrupt his or her family life. [48] Melander explains how states in this case have to accept an indirect responsibility for what happens to asylum seekers who have been returned. [49] A new category of refugees have thus been created, sometimes described as "humanitarian law refugees" [50] or de facto refugees [51] for whom an extension of the protection and assistance accorded to Convention refugees is asked for by the organisations concerned.

This development reflects an actual change in the world panorama and the circumstances bringing about refugee movements. The 1951 Convention has been drawn up with a specific population of refugees in mind, resulting from the reorganisation of post-war Europe. In 1985 the UNHCR pointed to changes in the "nature and scope" of refugee problems and the "changing character of refugee movements".[52] Today's refugees come from the Third World and a study carried out by Prince Sadruddin Agha Khan into the causes of mass refugee movements singles out wars, revolts, the break down of law and justice, repression and anarchy, persecution and the denial of social equality of opportunity and general fears about the future.[53]

As it reads now, the Geneva Convention does not cover victims of civil war or generalised violence. To cater for these refugees one possibility was to broaden the interpretation of the Geneva Convention to include them. It has even been put forward that post Second World War refugees were not so different as they were flying in order to escape from severe internal upheavals or armed conflict.[54] On other occasions women who had suffered from severe sexual discrimination have claimed Convention status on the basis that they constituted a "social group".[55] Agency or UNHCR representatives argue that all asylum seekers should be given the same treatment as Vietnamese refugees who were not asked to justify individually of persecution. The European Parliament quoting the UNHCR guidelines proposed to broaden the concept of persecution to include cases "if certain social groups in the population suffer at the hands of another section of the population ... if it happens with the authorities' knowledge or if the authorities refuse or show that they are unable to afford those concerned effective protection. Internal conflicts, serious unrest or a state of war may mean that a person cannot avail himself of the protection of his country or such protection is ineffective."[56] The practices of European states have revealed their reluctance to accept any collective notion of persecution as grounds for recognition of refugee status under the 1951 Convention. Rather than broaden the interpretation they have made it more and more restrictive.

The second option open was to propose a rewriting of or an addition to the 1951 Convention. It was mentioned that the OUA Convention could simply be added on. On the whole this option has been abandoned as most agencies and organisations dealing with refugees judge that the political climate is such that it would bring about a new version of the Convention even stricter than the present one. This feeling underlies the UNHCR viewpoint that there is no need to revise international refugee instruments.[57]

The third strategy widely adopted now among refugee agencies and international organisations has been to argue for the granting of asylum to applicants who do not meet convention criteria but have a valid reason to be granted asylum on humanitarian grounds. In the consultation between the UNHCR and European governments one of the main issues to be discussed is presented by Mr Moussali as "the notion of who is a refugees [sic] and the treatment to be granted to persons who are not refugees according to the traditional concept, but who nevertheless are in need of protection."[58]

The Council of Europe in its Declaration on Territorial Asylum emphasized the right to grant asylum to any person they consider worthy of receiving asylum for humanitarian reasons.[59] as early as 1975, the Council of Europe had already produced a report on the Situation of De Facto Refugees and proposed a definition of de facto refugees as "persons not recognised as refugees within the meaning of Article 1 of the Convention relating to the Status of Refugees of 28 July 1951 as amended by the Protocol of 31 January 1967 relating to the Status of Refugees and who are unable or, for reasons recognised as valid, unwilling to return to their country of nationality or, if they have no nationality, to the country of their habitual residence."[60] It also proceeds to explain what is understood by "valid reasons".

"As valid reasons shall be recognised:

- a. a person's reasonable belief that he will be
 - i. seriously prejudiced in the exercise of his human rights as proclaimed in the European Convention of Human Rights and Fundamental Freedoms of 30 November 1950 and Protocol No.1 thereto, in particular discriminated against for reasons of race, religion, ethnic or tribal origin, membership of a particular social group or political opinion;
 - ii. compelled to act in a manner incompatible with his conscience.
- b. war or warlike conditions, occupation by a foreign or colonial power, events seriously disturbing public order in either part or the whole of the person's country of nationality, or, if he has no nationality, the country of his habitual residence."[61]

Moreover, H.O. Vetter argues that some so-called "economic refugees" could be included in this de facto refugee category when economic hardship directly results from political oppression. As Vetter explains:

If a person leaves his country for economic reasons the underlying factors must be examined carefully. If his financial situation is desperate, this may also be the result of persecution by the State. If economic measures adopted in the home country are directed against a particular section of the population and destroy their chances of economic survival, the object and intention behind the measures may be of a racist, religious or political nature.[62]

In subsequent years refugee agencies have found it more urgent to press for a widespread acceptance of the principles outlined above in order to secure some possibility of asylum to the asylum seekers who needed protection but failed to qualify as Convention Refugees. Such a strategy has had the advantage of obtaining asylum for a greater number of applicants than those to be recognised as Convention refugees. The drawback is that the former constitute an inferior category of refugees with worse socio-economic conditions and civil rights. They also provide an escape for European governments which may seize this opportunity to recognise a lesser number of Convention refugees without risking the blame of contravening the human rights conventions they have signed. Consequently a disagreement exists amongst refugee agencies on this issue, several of the French ones refusing this additional category of refugees.

In the interim several requests have been put forward for an improvement of the de facto refugee situation. The Council of Europe listed a series of demands to this effect concerning housing, employment, residence, language and vocational training, the recognition of qualifications, and the authorisation to engage in political activities.[63] However it appears that their mere existence is not envisaged in the discussions of European governments on the harmonisation of refugee policy. The UNHCR finds it necessary to remind the Commission to include them in its Directive.[64] It is difficult to contemplate what will be the fate of de facto refugees when internal frontiers are abolished.

4. Refugees in Orbit

The phenomenon of refugees "in orbit" being pushed on from one country to the next, as none accepted to examine their asylum requests, made it necessary to consider the state responsible. The Council of Europe has been working on this issue since 1977 without reaching an agreement. It points out that asylum seekers cannot be allowed to remain unattended as it contravenes the European Convention on Human Rights. It also argues that it is not fair to let countries most accessible by accidents of history or geography be overburdened. The latest proposal for discussion which the Ad Hoc Committee of experts on the legal aspects of territorial asylum, refugees and stateless persons (CAHAR) has drawn up establishes the general principle that any party authorising a person

to enter or stay on its territory shall be solely responsible.[65] In general its recommendations do not differ essentially from the proposals of the Commission and would fit better within the framework of governmental points of view.

5. Social provisions

There is one area which governments negotiations have not touched but which figures high on the agenda of organisations concerned with refugees, namely their socio-economic and civil rights, their conditions of reception and settlement. Asylum seekers and de facto refugees are the ones who suffer most and are given the worst conditions. H.O. Vetter develops a strong section of his report demonstrating how insufficient the social provisions for asylum seekers are,[66] and denounces "deterrence measures" designed to discourage applicants from putting in asylum requests in some countries. The UNHCR stresses to the European Commission the interdependent relationship between the uneven distribution of refugees and asylum seekers in Europe and the discrepancy in socio-economic conditions offered to them across Europe. "This (uneven distribution) is in part caused by different standards regarding the treatment of asylum seekers with respect to residence, employment and social assistance." [67]

For H.O. Vetter, the solution is a burden-sharing approach within the EEC and he proposes the setting up of a community budget for this purpose. Most government officials reject this notion on the grounds that it would simply become a pretext for states to shun their responsibility. Finally ECRE proposes a campaign to restore the positive image of refugees to facilitate their integration.[68]

Conclusion

Most of the issues explored in this paper remain inconclusive. One reason for this is that none of the agreements discussed and struck by governments have been implemented as yet. In the meantime international organisations and refugee agencies are deploying their efforts to influence those discussions and counteract the prevailing restrictive trends. However, in the last analysis, the power of decision and application rests in the hands of governments. What is at stake is the character of the Europe which is being built. A Europe of business and market or a Europe of social and human rights.

Notes

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2. Ibidem, p.8.
3. Ibidem, p.14.
4. Interview, Paris, 12.7.88, confidential.
5. Ibidem.
6. Avant projet de proposition de Directive du Conseil relative au rapprochement des regles concernant le droit d'asile et le statut des refugies, June 88, p.3. (Thereafter quoted as Directive).
7. Interview, Paris 14.7.88, confidential.
8. Directive, p.31.
9. Accord de Schengen Bruxelles, le 21 decembre 1987. Conclusions de la reunion tenue a Berlin le 17.12.87. Annexe 1 pp.13-16.
10. Directive, Art 3 to 13, p.39-43.
11. Schengen, Working Party I et II, Mixed Committee Ad Hoc I et II, "Border security and border-control", Brussels 25 April 1988. Article 36, 25 April 88.
- 11a Chapter 7, Article 35. 1.2.
12. Accord de Schengen, Chapitre 7, Article 29-4.
13. Accord de Schengen, Sch/M (87) P & 2. Chapitre II p.16.
- 13a Accord de Schengen, Chapter 6, Article 26 1-a, b, and 2.
14. Schengen, Chapitre 6, Article 27-1.
15. Directive, titre IV p.65, article 17.
16. Directive, p.49.
17. Directive, Titre V, Article 20. 21. p.67, 68.
18. Schengen, Chapitre 7, Article 38 2.a).
19. Accord de Schengen, Chapitre 7, Article 38-3.
20. Schengen, Working Party I et II, Mixed Committee Ad Hoc I et II, "Border security and border-control", Brussels 25 April 1988. Article 28.
21. Accord de Schengen, Chapitre 4, Article 21-1, 22-2.
- 21a Chap ? Article 21, 2.
22. Schengen, Working Party I et II, Mixed Committee Ad Hoc I et II, "Border security and border-control", Brussels 25 April 1988. Article 23.

24. Directive, Titre VI, p.71.
25. Note ... l'attention de Mr Braun, Directeur g,n,ral, DGIII, from Jean Degimbe, 24.02.88.
- 25a Article 8, 1.b) p.17, July 15.91.
26. Commission des Communaut,s Europ,ennes Com (88) 640 Final. Bruxelles, le 7 d,cembre 1988.
27. European consultation on refugees and exiles, A Refugee Policy for Europe. London, ECRE, September 1987, p.4.
H.O. Vetter Report (on behalf of the Committee on Legal Affairs and Citizens Rights) on the right of asylum.
European Parliament, Working Documents 1986-87.
28. Parliamentary Assembly of the Council of Europe. 37th ordinary session, Recommendation 1031 (1986).
29. UN General Assembly, 36th session, Note on the consultations on the arrival of asylum-seekers and refugees in Europe. Annex I.
30. ECRE, A Refugee Policy for Europe p.4.
31. EEC, European Parliament Working Documents 1986-87.
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32. ECRE, A Refugee Policy for Europe, p.4.
33. Parliamentary Assembly of the Council of Europe, 28th ordinary session, Recommendation 787 (1976).
34. Council of Europe: Recommendation on the Harmonisation of National Procedures relating to Asylum. Recommendation No. R(81)16.
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36. UNHCR Comments on the Preliminary Draft Proposal for a Council Directive to approximate National rules on the Grant of Asylum and Refugee Status, 1988, p.4.
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44. H.O. Vetter, Report on the Right of asylum, p.16.

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46. ECRE, A refugee policy for Europe, p.2.
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