

Towards a Common European Asylum Policy

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Foreword

By Elizabeth Collett

During the 1990s, the influx of asylum seekers to Europe topped the asylum and immigration agenda. Public debate centred on the steep rise in asylum applications across the continent, the malfunctioning of backlogged and overstretched administrations, and fears that bogus asylum seekers were taking advantage of the sanctuary offered by the European Union's Member States.

It was against this backdrop that the EU's 1999 Tampere Programme prioritised the development of a Common European Asylum System, with rules for determining the state's responsibility for asylum applications, common standards for reception and across-the-board rules for recognising refugee status.

Today, the focus of public attention has shifted away from asylum and asylum seekers to illegal immigration and, in particular the flow of irregular migrants from Africa across Europe's southern borders. The parameters of this debate are similar: a sudden rise in numbers, the inability of overstretched administrations (such as those in Malta, Lampedusa and the Canary Islands) to cope with the influx, and fears that irregular migrants are taking advantage of European prosperity.

The EU has responded to this flow of migrants by creating jointly-organised border patrols in the Mediterranean, allocating additional emergency funding for the reception of new arrivals, enhancing bilateral and multilateral cooperation with sending and transit countries, and reviving the debate on fostering development through migration. A new European Commission Communication has also been published outlining policy priorities in the fight against illegal immigration.¹

Increasing cooperation on this issue tops the agenda at Justice and Home Affairs Council Meetings, amid calls for "solidarity" and "burden-sharing" from the current Finnish Presidency of the EU and European Commission. So, with all this activity, is the political impetus to move forward with a common asylum policy being overshadowed and marginalised by the struggle to combat illegal immigration?

In this Issue Paper, Stefano Bertozzi, a member of Justice, Freedom and Security Commissioner Franco Frattini's *cabinet* (private office), outlines the work which has been done so far to construct a common EU approach towards asylum. This is followed by a critical appraisal of the EU's common asylum policy and future proposals by Ferruccio Pastore, Deputy Director of the Centre for the Study of International Politics (CeSPI) in Italy.

The first stage of the process to create a common system was completed in December 2005 with the adoption of the Asylum Procedures Directive.² Mr Bertozzi argues that a period of transposition, implementation and evaluation is now needed to ensure that this basic framework is transposed accurately and effectively into national law.

He acknowledges that the context for asylum policy has changed since the period covered by the Tampere Programme, most notably because the number of asylum applications has declined dramatically across Europe. In this new, less pressurised, environment, Member States should be able to ensure asylum protection of a quality and consistency that is in line with international standards.

In addition to consolidating existing EU law, new initiatives are needed. The current agenda for immigration and asylum – the 2004 Hague Programme – set new targets for cooperation on asylum and called for a complete Common European Asylum System by 2010. This system, designed to cover all 25 EU Member States, would include joint assessment and use of country-of-origin information, uniform processing of asylum applications and a uniform status for those granted asylum or other groups deemed to be in need of protection on humanitarian grounds.³

Given the work still to be done, Mr Bertozzi concludes that European enthusiasm for the drive towards a common asylum policy needs to be “rekindled”, and a new climate of cooperation fostered with countries outside the EU.

Dr Pastore agrees that, in a formal sense, the completion of the first stage of the process can be deemed a success. He argues, however, that EU policy has had little substantive impact on improving conditions for asylum seekers, or on achieving a more equal geographical distribution of applications. He also maintains that some of the worst practices at the local level remain unlikely to be sanctioned and corrected, not least with respect to the use of detention centres.

On an international level, the way in which border controls have been gradually ‘externalised’ – for example, through readmission agreements and carrier sanctions on airlines and other transport operators – may limit asylum seekers’ ability to enter Europe. While moves to create Regional Protection Programmes in refugees’ countries of origin are designed to resolve the contradiction between offering asylum while strengthening borders, there are currently only a limited number of pilot projects and they have a narrow geographical scope.

Although the standards laid down in the EU Directives which form the first phase of the common asylum policy were lower than those originally proposed by the Commission, both Mr Bertozzi and Dr Pastore agree that the development of pan-European approach to asylum is a significant step forward.

As Mr Bertozzi points out, asylum is a concept which predates the current borders of the European Union. It is imperative that the next stage of the asylum project is not eclipsed by the current fervour to secure those borders. This paper highlights the work which still needs to be done to create a comprehensive common asylum system capable of offering humanitarian protection, and warns that both effective implementation and political commitment will be essential to ensure that such a system exists in substance as well as in form.

This Issue Paper forms part of the work of the European Policy Centre’s Multicultural Europe Programme, run in cooperation with the King Baudouin Foundation, which focuses on policies related to migration and migrant integration in Europe.

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Endnotes

1. Communication from the European Commission on ‘Policy Priorities in the fight against illegal immigration of third country nationals’, COM (2006) 402. http://ec.europa.eu/justice_home/news/intro/doc/com_2006_402_en.pdf
2. Council Directive 2005/85/EC of 1 December 2005 on ‘Minimum standards on procedures in Member States for granting and withdrawing refugee status’. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:01:EN:HTML>
3. ‘The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, Annex I, Presidency Conclusions’, Brussels 4/5 November 2004.

A Common European Asylum Policy: which way forward?

By Stefano Bertozzi

Introduction

The concept of asylum goes back to the dawn of time. The word 'asylum' comes from the Greek *asylon*. It means a sacred place which cannot be violated and was used to describe Greek temples, which offered a safe haven to anyone fleeing from a secular power. For the Romans, it was a place to be protected, a *perfugium*. It was, therefore, originally a religious concept.

Since time immemorial, individuals or whole populations across the world have had to abandon their homes to seek refuge from persecution, armed conflict or acts of violence. The granting of asylum is therefore not an invention of modern international or European Community law. Over the years, international instruments and, more recently, Community law, have simply attempted to refine and codify an existing concept.

So why did the European Union decide to develop a Common Asylum Policy for its Member States?

The answer is that, as with many significant political initiatives in the history of European integration, the EU's asylum policy developed as a reaction to unforeseen events.

It was the armed conflict in Bosnia-Herzegovina,¹ the 1999 Kosovo war and the humanitarian crisis triggered by the displacement of more than 850,000 people from the region² that prompted EU Member States to adopt a coordinated response to tackle the critical situation on the Union's borders.

The unprecedented mass exodus of refugees from the Balkans to many EU countries highlighted the inherent flaws in individual Member States' responses to the problem and the clear need for greater solidarity to cope with the influx. This in turn prompted a serious debate on developing common European instruments in the field of asylum.

Since then, the EU has gone a long way towards laying the foundations for a Common Asylum Policy by adopting a number of important legislative measures. This policy is, however, still at an embryonic stage and the coming years will be crucial.

The main objective of this fledgling system is to enable Member States to work together to deal with asylum issues. The EU has become involved in this process because, in a Union without internal borders, no single country can develop an effective response to these issues on its own.

Protection at European level: the state of play

A Common European Asylum Policy – with common procedures which provide a uniform legal status throughout the Union for those who are granted asylum – is one of the essential 'pillars' of the Union's plans to create a European Area of Freedom, Security and Justice (AFSJ).

This ambitious objective was set by the Tampere European Council in 1999 to respond to the new millennium's internal and external security concerns.

At Tampere, the EU Heads of State and Government agreed that: "The European Council reaffirms the importance the Union and Member States attach to absolute respect of the right to seek asylum. It has agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention,³ thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of *non-refoulement*."⁴

This political, inter-governmental agreement was crucial because, for the first time, it enabled Member States to cooperate more closely in a highly-sensitive field even before the Treaty of Amsterdam formally brought asylum and migration issues under the EU's competence.⁵

The four main legal asylum instruments called for by the Amsterdam Treaty – the Reception Conditions Directive,⁶ the Asylum Procedures Directive,⁷ the Directive on Qualification as a Refugee⁸ and the Dublin II Regulation⁹ – laid the foundations for the development of a Common Asylum Policy, thereby creating a level playing field for asylum throughout the EU.

The negotiations on these instruments took place between 2000 and 2004, at a time when asylum and migration issues were rising to the top of the political agenda in almost every EU Member State because of the rapid increase in the number of people seeking to enter the Union. However, the need for unanimous decisions on these 'first stage' instruments¹⁰ meant that discussions on specific issues were often protracted as individual Member States sought to safeguard national practices.

As a result, the standards laid down in the Directives were lower than those contained in the European Commission's original proposals, and civil society's expectations were not always met. However, although it was not possible to adopt a harmonised approach in as many areas as the Commission had hoped, significant progress was made in crucial areas and minimum standards to protect asylum seekers were agreed.

The European mood has significantly changed since the 1999 Tampere Council. The AFSJ touches on sensitive issues which go to the heart of the debate over Member States' sovereign powers and, in the absence of a Constitutional Treaty, many are now less keen to push ahead with European integration in this area. To put it another way, the 'European passion' needs to be rekindled.

Completing the first stage of the EU strategy

A major step forward was taken on 1 December 2005 when the Justice and Home Affairs Council adopted the Asylum Procedures Directive. This pivotal agreement marked the completion of a set of complex and cumbersome negotiations over a long list of legal instruments. These set the minimum standards for asylum policy and constituted the first stage of an EU strategy for those in need of international protection.

It also paved the way for the EU to move forward under the new institutional framework introduced by the Nice Treaty,¹¹ with policy formulated on the basis of Qualified Majority Voting and co-decision by the Council of Ministers and the European Parliament.

Europe's task now is to build on these foundations to deliver an effective common system which protects people in need and deals in a fair and efficient manner with those who are not.

This challenge – to give legislative life to common values for asylum while defending the external frontiers of a borderless Europe – is an important 'test case' for a modern EU. If it is successful, it will send a strong message that 'more Europe' can deliver what its citizens really expect and want.

Achieving this political objective is becoming even more urgent as the growing volume of both legal and illegal immigration threatens to paralyse the national mechanisms for processing applications.

This immigration explosion has undermined the once-clear distinction between asylum seekers and immigrants. Of every 100 migrants who enter Europe illegally, only 4-5% genuinely need international protection. As a result, EU Member States need to find new ways to identify and protect asylum seekers and economic migrants.

Solidarity between Member States

The creation of a European Refugee Fund¹² and the Directive for Temporary Protection, which was drawn up to deal with mass influxes of displaced people,¹³ have been equally significant steps towards fostering solidarity between EU Member States and taking a collective approach towards responsibility for refugees and displaced people.

These burden-sharing instruments embodied a concept of solidarity that was complemented by a further Tampere European Council commitment to provide similar levels of administrative and financial support for asylum seekers across the EU. This would strengthen the system and ensure that asylum seekers would not see some Member States as more attractive destinations than others.

Thus, developing a Common Asylum Policy means that wherever asylum seekers lodge their application, they can be sure of getting support, of having their asylum claims heard with the same procedural guarantees, and of not being disadvantaged by a more or less generous interpretation of what constitutes a 'refugee'. The provisions which have been put in place are designed to guarantee the achievement of this objective.

In addition, the Reception Conditions Directive establishes the principle that asylum seekers should receive an adequate level of support in all Member States. This is aimed at ensuring that they will not be forced to move to another EU country in order to find adequate living conditions and accommodation.

The Directive on Qualification as a Refugee sets out a harmonised set of eligibility criteria for being granted either refugee or subsidiary protection status (as in cases when people are seeking protection from civil war). It also clearly sets out the rights, benefits and obligations of each type of status.

The Dublin II Regulation establishes which Member State should assess an application for asylum, thus helping to combat the phenomenon of multiple applications or 'asylum shopping'.

Finally, the Asylum Procedures Directive puts essential procedural guarantees in place, including the right to a personal interview and the possibility of an effective remedy before a court or tribunal if the initial decision on an asylum seeker's application is negative.

An important feature of this legislative framework is that it reflects the day-to-day practices used in each Member State to deal with asylum issues. These directives include clear and tough clauses designed to exclude anyone perceived to be a security threat, and make it possible to withdraw or reduce support in cases where there is evidence that the system has been misused or abused. At the same time, by establishing well-defined and objective criteria for deciding who needs international protection, these directives reinforce the credibility of Member States' own asylum procedures.

The EU is now entering a period of transposition, implementation and evaluation of this wide set of measures. As guardian of the Treaty, the Commission's first duty is to ensure that these provisions are transposed into national law accurately and on time. It will also monitor and report on the steps taken by Member States to fulfil their legal obligations.

These directives are enforceable in the European Court of Justice and the court's interpretation of this framework legislation may prove vital for ensuring that it is uniformly applied and encourages greater EU harmonisation.

The EU is now ready to take the initiative when the next refugee crisis occurs by assuming responsibility, spreading the burden and showing that it is capable of providing those countries most affected by the problem with the best possible assistance.

So-called 'border states' – such as Italy, Malta and Spain, and, to a lesser extent, the new Central European Member States – currently bear a disproportionate financial and logistical burden. When emergencies

arise, it is these countries which have to take in, accept or ultimately refuse entry to the vast majority of people trying to enter Europe.

With this in mind, Commission Vice-President Franco Frattini has proposed changes to the new European Refugee Fund (which will become operational in January 2008) to enable the EU to fund emergency measures swiftly and effectively when countries find themselves having to cope with a massive influx of refugees. As EU law does not currently provide for such a rapid reaction capability, this would help to bolster solidarity between Member States.

The Hague Programme

In November 2004, five years after the Tampere European Council, the Heads of State and Government met in The Hague to take stock of progress in creating an AFSJ and to look ahead to future developments.

The Hague Programme¹⁴ – the EU's action plan in the field of Justice and Home Affairs for 2005-2010 – takes up the challenge of creating a Common European Asylum System, establishing a common asylum procedure and establishing a uniform status valid throughout the Union by 2010.

It also recognises the importance of the period of transposition and implementation, and sets this within a framework of practical cooperation between Member States. This will play an important role in fostering solidarity and promoting responsibility-sharing, and will allow harmonisation to be achieved not only through traditional legislative measures, but also through increased cooperation and the exchange of best practices.

In particular, the Hague Programme calls on each Member State to establish appropriate structures within their national asylum services to foster practical and collaborative cooperation. This has three key objectives: 1) to establish a single procedure for dealing with all applications for international protection; 2) to adopt a common approach to country-of-origin information (the information used to make decisions on asylum claims); and 3) to develop mechanisms to address pressures on particular Member States' asylum systems and reception capacities because of their geographical location.¹⁵

The principal goals of this practical cooperation are to achieve greater convergence between Member States' decision-making processes within the framework of EU asylum legislation; to create the basis for closer cooperation; and to build a climate of trust and an awareness of common interests.

This increased cooperation should help Member States to develop 'commonly shared tools' for their asylum authorities and respond to the daily needs of those involved. These tools should assist Member States in their efforts to enhance the quality of their asylum management across the board – and, in particular, their decision-making – in line with the Hague objectives.

This will make it easier to assess the success of the first phase of the Common European Asylum System and provide a sound basis for launching the second phase.

A structured approach to cooperation will therefore underpin the implementation of the asylum directives and encourage greater convergence between Member States' asylum systems. Establishing a cooperation network to exchange information and promote best practices will also make it possible to conduct a more comprehensive evaluation of how the first-phase instruments have changed asylum in the EU, and to see what further measures are needed to establish a fully-fledged Common European Asylum System.

The Hague Programme sets an ambitious deadline – 2010 – for the creation of a Common European Asylum System. This means that the legal instruments required to reach this milestone need to be developed and tabled over the next two years.

The asylum context of the Hague Programme is, however, different from that of Tampere. According to a report by the United Nations High Commissioner for Refugees (UNHCR),¹⁶ the number of asylum applications has dropped by 49% in the 50 industrialised countries examined since 2001, with the 25 EU Member States receiving 46% fewer requests in 2005 than in 2001.

These developments have reduced the total number of asylum seekers to its lowest level since 1987 and significantly reduced the pressure on governments.¹⁷ As a result, Member States should now be able to implement the new EU asylum directives without lowering the quality of their refugee protection.

To this end, the Common European Asylum System must be based on respect for international standards, not on the lowest common denominator.

The external dimension of asylum

It is important to underline that the Hague Programme introduced an external dimension to EU asylum policies for the first time, calling for an increased partnership with third countries in order “to contribute in a spirit of shared responsibility to a more accessible, equitable and effective international protection system in partnership with third countries, and to provide access to protection and durable solutions at the earliest possible stage”.¹⁸

Regional Protection Programmes (RPPs) are among the key tools of this external dimension. From the outset, the development of these programmes has involved close cooperation between different European Commission departments, clearly illustrating how a truly cross-cutting policy such as asylum requires and benefits from concerted effort and vision.

The Commission’s Communication on these programmes underlines that coordination between refugee, humanitarian and development policies is crucial in order to address the full spectrum of protection needs and the impact on host communities.¹⁹

RPPs should complement and bring added-value to ongoing development and humanitarian activities. Europe needs to provide refugees with protection and durable solutions. This would help to reduce spontaneous movements of poverty-stricken people suffering persecution, torture or inhuman treatment. Although such movements cannot be entirely eliminated, credible asylum systems in the EU would complement programmes in the regions from which refugees come and those they cross to reach the Union.

That is why the Commission has established a Regional Protection Programme Expert Group, involving Member States, the UNHCR and all the relevant Commission departments. This approach should ensure that policies are properly coordinated and foster exchanges of information about all the activities taking place in a given region.

Although their lives may not always be at risk, refugees depend on external aid and have no automatic prospect of a durable solution, be it voluntary repatriation, integration in their first country of asylum or resettlement. Resettlement offers a lasting solution for refugees who can neither return home nor settle permanently in their first country of refuge.

RPPs, which complement existing humanitarian and development initiatives, are an important vehicle for disbursing EU funds for asylum and protection activities, in partnership with third countries and the UNHCR.

EU funds to support action on asylum and migration in third countries are supplied through the AENEAS financial programme. This is currently supporting and financing pilot RPPs in the EU’s eastern neighbours (Ukraine, Moldova and Belarus) and in sub-Saharan African countries, with a particular focus on refugees from East Africa and the Great Lakes Region.

Following the Commission's Communication of 1 September 2005 on RPPs,²⁰ exploratory talks have taken place with third countries on their protection priorities. Projects put forward under the AENEAS Call for Proposals in 2005 will form the basis for these first RPPs.

Regional Protection Programmes are not about 'Europe outsourcing its responsibilities', but about working in countries with vast numbers of refugees to build programmes that offer practical protection and which can make a real difference to refugees' daily lives. Discussions with authorities in these countries have identified a host of potential activities, such as technical assistance with interpretation, information about refugees' countries of origin and training for the committees responsible for determining refugee status.

There is also a plan to resettle refugees from RPP areas in partnership with the UNHCR. This would make it perfectly clear to the third countries involved that partnership and burden-sharing (not burden-shifting) are an inherent feature of these programmes.

However, asylum in general is a difficult issue to include in the terms of the EU's relationship with several third countries because many of them have no tradition of asylum and are not signatories to the 1951 Geneva Convention.

Conclusions

Europe has a duty and an opportunity to bring the Area of Freedom, Security and Justice much closer to its citizens in the coming years.

By 2010 the EU should aim to be an area where international refugee protection is consistently guaranteed, where solidarity between Member States continues to be the key guiding principle, and where the same criteria and procedures are uniformly applied.

In addition to achieving these political and legislative objectives, it is important to bear in mind the humanitarian dimension of asylum policy: asylum is not only a right, but also implies a duty on Member States and governments. It represents the right to freedom, the right to exist and the right to have an identity. To deny this right would be to deny the values and principles on which the European Union is built.

Two challenges, however, may hinder these ambitious goals.

The first is that Europe must continue to monitor the situation. Where possible, it must bridge the gaps which may emerge between dissimilar legal and institutional frameworks, provide assistance and legal counselling to asylum-seekers, and provide them with support during their lengthy wait for decisions on the admissibility and substance of their cases.

In a nutshell, Europe has to improve the quality and consistency of asylum decision-making procedures in its Member States.

The second challenge is to combat the risk of lukewarm political attitudes towards a Common European Asylum System, despite overall closer practical cooperation between Member States. Increased solidarity between Member States, efficiency and strong political commitment are indispensable ingredients for fostering the necessary degree of EU harmonisation, based on respect for international standards.

As regards the external dimension of EU asylum policies, Europe has to deepen its cooperation and increase its financial support for countries where asylum systems are still rudimentary and function poorly. This is vital to develop its capacity to offer proper refugee protection.

These initiatives should be framed within a set of responsibility-sharing agreements between the EU and the third countries concerned. This framework should bring about a new 'climate of cooperation' in

which both sides work closely together to achieve shared political objectives. This entails a frank and constructive dialogue in which both parties agree to work towards the same goal: namely, to improve refugee protection, in particular for women and children.

Europe and its Member States have the potential to carry out all these tasks successfully. This historical opportunity to create a Common European Asylum Policy should not be missed. Europe needs to rise to this challenge with renewed vigour and resolve if it is to become a bigger player in the international arena. If it fails, it could well remain a respectable economic partner with political feet of clay.

Stefano Bertozzi is member of the *cabinet* (private office) of Franco Frattini, Vice-President of the European Commission. The ideas and opinions expressed in this article are entirely those of the author and do not necessarily represent the views and/or ideas of the European Commission.

Endnotes

1. It took place from 6 April 1992 to 14 September 1995. The United Nations' agencies have put the number of dead and missing persons in Bosnia-Herzegovina at 278,000. They also recorded around 1,325,000 refugees and exiles. For more details: Nora Beloff (1997) *Yugoslavia: An Avoidable War*. New European Publications.
2. United Nations High Commissioner for Refugees (UNHCR) (1999) *Global Report*. pp. 345-347. www.unhcr.org/cgi-bin/texis/vtx/publ/openssl.pdf?tbl=PUBL&id=3e2d4d5f7
3. 1951 Convention relating to the Status of Refugees, 28 July 1951, and its Protocol relating to the Status of Refugees, 4 October 1967, 606 U.N.T.S. 267.
4. Tampere European Council, Presidency Conclusions, 15-16 October 1999. www.europarl.europa.eu/summits/tam_en.htm#a
5. The treaty was approved by the European Council in Amsterdam on 16-17 June 1997, signed on 2 October 1997 and, following ratification by all Member States, came into force on 1 May 1999.
6. Council Directive 2003/9/EC of 27 January 2003 laying down the minimum standards for the reception of asylum seekers, OJ L 31/18 (06.02.03).
7. Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13 (13.12.05).
8. Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304 (30.09.04). The Directive must be transposed by all Member States by 10 October 2006.
9. Council Regulation (EC) 343/2003 of 18 February 2003 establishes the criteria and mechanisms for determining the Member States responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50/1 (25.02.2003).
10. A transitional five-year period from the entry into force of the Amsterdam Treaty was introduced for measures related to asylum – Articles 63(1), 63(2)(a) and 63(2)(b).
11. Title IV, Article 67 of the Treaty establishing the European Community, as amended by the Treaty of Nice, which came into force on 1 February 2003.
12. Council Decision 2000/596/EC of 28 September 2000 established a European Refugee Fund, OJ L 252/12 (06.10.2000).
13. Council Directive 2001/55/EC of 11 December 2000, OJ L 31/18 (06.02.2003).
14. 'The Hague Programme: strengthening freedom, security and justice in the European Union' OJ C 53/1 (3.3.2005).
15. 'Communication from the Commission to the Council and the European Parliament on strengthened practical cooperation', COM (2006) 67 Final, Brussels, 17 February 2006.
16. UNHCR 'Asylum levels and trends in industrialised countries, 2005', Overview of asylum applications lodged in Europe and non-European industrialised countries in 2005, 17 March 2006. www.unhcr.org/cgi-bin/texis/vtx/statistics/openssl.pdf?tbl=STATISTICS&id=44153f592
17. In 2005 the same 50 countries registered 336,100 asylum seekers, as compared to 655,100 applications for refugee status submitted in 2001.
18. Ibid. Point 1.6 'The external dimension of asylum and migration'. p.5.
19. Communication from the Commission to the Council and the European Parliament on Regional Protection Programmes, COM (2005) 388 Final, Brussels, 1 September 2005.
20. Ibid.

How to assess the first stage of the EU's asylum policy

By Ferruccio Pastore

Asylum policy is probably one of the policy areas where the lack of European action has generated most political and moral frustration, as well causing physical harm (on a large scale and most dramatically during the Yugoslav wars).¹ It is also an area where, because the expectations for a common policy were so high, disappointment at the actual outcomes so far has been deeper.

The European Commission is right to regard the fact that the targets and deadlines set in the Tampere Scoreboard have largely been met as a success – despite some significant delays, particularly in relation to the 2005 Procedures Directive.

From a formal point of view, inter-institutional planning has worked well and the successful completion of the first phase – the harmonisation of minimum standards – has opened the way for a second phase of greater harmonisation and a truly common European asylum policy.

But beyond the formal level – the adoption of legal instruments and respect (more or less) for the deadlines that were set – there is the substantive work at the policy-making level, which must be judged on the basis of qualitative and quantitative indicators. The former concern the actual conditions for asylum seekers and refugees in Europe, while the latter relate to the number of asylum applications and their distribution amongst Member States.

From this more substantive viewpoint, the picture is less satisfactory. This becomes clear if we consider the specific *content* of the EU asylum policy and legislation, and the broader *context* in which it is being adopted and implemented.

The substance of harmonisation: a race to the bottom or virtuous dynamic?

The driving force behind the decision to grant the EU competence in the field of asylum – and behind the Tampere asylum agenda – was not a noble and abstract political will to reinforce and improve the overall level of protection for refugees in Europe. Rather, the fundamental priorities were to: a) regain control over forced migration flows into the EU; and b) spread the effort and cost of providing asylum more evenly among the EU's Member States (the process known as 'burden sharing').²

This is hardly surprising, since neither asylum seekers nor most refugees vote, and humanitarianism is not an issue from which politicians in affluent democracies can gain much mileage.

Looked at from the perspective of controlling migration flows and burden sharing, the first stage of the EU's common asylum policy has achieved some impressive results. Europe's yearly intake of asylum seekers has declined for the fifth successive year³ and the huge imbalance between the refugee burden on Germany and other Member States has eased significantly, both through a geographical redistribution of migratory flows and through a number of specific measures, including the European Refugee Fund and the Dublin II Regulation (with support from Eurodac).

However, progress must also be measured by assessing what impact these new regulations have had on the actual legal conditions facing asylum seekers and refugees.

Many non-governmental organisations argue that harmonisation has simply led to a 'race to the bottom'; i.e. that the new common standards are based on the lowest common denominator of all the Member States' national regulations. In certain areas, primarily relating to procedural rules, this certainly seems to be the case. In others, such as the standards for receiving asylum seekers, the picture is more nuanced.

For countries such as Italy and most Southern European Member States – where, partly because of the shortcomings in their national welfare systems, reception conditions have traditionally been very poor – the January 2003 Directive can certainly be seen as a virtuous device, and has probably already acted as such, even before the deadline for transposing it into national law has been reached.

To a certain extent, the same can be said of the 'Qualification Directive' of April 2004, which may already have had an impact on the less-advanced domestic legal systems, which had not previously included any form of fully-fledged protection for those who fall outside the scope of the Geneva Convention. Here again, Italy is a case in point.

The context of harmonisation: what happens locally?

In assessing the impact of EU asylum legislation, one has to examine both the local and the international context in which the process of harmonising legal standards in the first phase occurred.

At the local level, the short answer is that in certain Member States, almost anything and everything can still happen, and there is very little chance that bad practices (including some that are clearly unlawful) will be punished and corrected.

Again, Italy is a case in point as, in the four years since the last reform of its (still very basic) asylum legislation (Law No. 189 of 30 July 2002), the procedures for detaining asylum seekers have remained very ambiguous, and unregulated facilities known as 'Identification Centres' appear to have become almost the norm. These are being used in 62% of all cases, according to recent estimates published by the Italian Consortium of Solidarity (a member of the European Council on Refugees and Exiles – ECRE) in its annual report on asylum in Italy.⁴

In this context, the Commission's emphasis on assessing the implementation of the EU's justice and security legislation at national level – in the package of four communications presented on 28 June 2006 ('From Tampere to Tampere') – is very welcome, particularly in relation to asylum.

The context of harmonisation: what happens internationally?

An assessment of the first stage of the EU's asylum policy cannot ignore the increasingly important 'external dimension'.

Over the last 20 years, EU Member States have worked intensively and consistently to try to 'externalise' their migration controls as much as possible. They have largely been successfully in doing so, both through bilateral negotiations with country-of-origin and transit states, and through multilateral and supra-national endeavours at the European level.

Initially this was achieved through informal cooperation at the operational level, later through intergovernmental cooperation, mainly within the Schengen framework, and now mostly through action at EU level.⁵

The tools used to 'externalise' migration controls are complex and numerous. They range from an enormous increase in the use of visas as a filter mechanism, sanctions on carriers, seconding immigration liaison officers to an increasing number of country-of-origin and transit countries, and readmission agreements to recent more complex agreements with sending and transit states aimed at delegating (some provocatively say 'outsourcing') migration controls to third countries.⁶

To achieve this, a control model that operates in concentric circles has gradually been developed which often fails to take asylum and, more generally, international protection obligations into account. This prompted António Guterres, the United Nations' High Commissioner for Refugees, to tell the European Parliament, on 21 February 2006: "I fear that [the decline in the number of refugees] also reflects the barriers which have been erected by states seeking to deter and control irregular migration. These

barriers are not necessarily aimed at refugees, but they do not differentiate between them and other categories of people on the move.”

Mr Guterres was voicing a very serious concern which the European institutions are now trying to address within a complex strategy aimed at making the external dimension of the EU’s ‘Area of Freedom, Security and Justice’ more coherent with the rest of the Union’s external activities.

Currently, the most comprehensive and ambitious tool developed to solve the inherent contradiction between Europe’s commitment to international protection and the externalisation of its migration controls is probably its Regional Protection Programmes (RPP).

The Commission first proposed establishing such programmes in its Communication on ‘Improving Access to Durable Solutions’⁷ in 2004. In response to a request from the European Council, it then followed this up with a more detailed Communication, published in September 2005 on RPPs.⁸

This is the new frontier of European asylum policy. If EU action on this frontline does not succeed, the second stage of the EU common policy on asylum runs the risk of being a weak and legalistic alibi for failing to ensure a consistent approach. The problem is that, for the time being, the RPPs are only projects in a preliminary pilot scheme, with limited geographical scope and scarce financial resources (see table below).

The external dimension of EU migration policy – European Commission proposals for 2007		
Heading	Appropriations 2007	
	Commitments	Payments
Cooperation with third countries in the areas of migration and asylum – activities under horizontal and geographical coverage of the European Neighbourhood Policy instrument (ENPI).	22,897,000	6,000,000
Cooperation with third countries in the areas of migration and asylum – activities under horizontal and geographical coverage of the Development, Cooperation and Economic Cooperation Instrument (DCECI).	23,347,000	6,000,000

Source: European Commission, Statement of Estimates of the Commission for 2007 – Document IV – Figures by budget line, SEC (2006) 531 final, p 61.

Asylum policy and the future of the EU

Despite its relevance within the ‘home affairs’ sphere of the EU’s activities, asylum remains a small and relatively marginal policy at European level. This is not just because of the paucity of financial and human resources devoted to it, but also because it carries little political weight in everyday European policy-making. From a broader political, symbolical and moral point of view, however, asylum policy is crucial for the EU’s future outlook and even for its ‘identity’.⁹

Countries are no longer able nor (apparently) willing to comply individually with the legal obligations they voluntarily accepted by signing the Geneva Convention in 1951 and the subsequent New York Protocol in 1967. As in so many other areas, pooling sovereignty and resources is also a *conditio sine qua non* to meet the challenges of globalisation, with its heavy burden of imbalances, inequalities and transnational waves of instability.

As already argued in this paper, the EU has, up until now, taken an ambiguous approach towards asylum. In some areas, giving the EU supra-national competence in this area has helped to raise standards of protection; in others, new obstacles have been created to both physical access and the legal recognition of refugees.

In the current international context, asylum policy can no longer only operate in 'passive' mode (waiting for asylum seekers to arrive and granting asylum to a majority of them). This may have been sufficient in the old, bipolar world, where exit restrictions imposed by Eastern bloc countries acted as the main regulatory factor limiting forced international migration into Western Europe. In today's post-bipolar and turbulent world, however, an effective asylum policy must be proactive, and be complemented by a strong foreign policy that promotes and safeguards basic human rights outside the EU and on a global scale.

As the EU establishes itself as a global political player, asylum policy cannot just rely on prevention and *in loco* protection (i.e. protection in the very countries where forced population movements originate by, for example, establishing 'safe havens'; or in countries in their immediate neighbourhood). An increasing international role for the EU in promoting and defending human rights cannot be taken for granted and, in any case, this cannot be a substitute for 'traditional' asylum policy. The EU still has an obligation to admit refugees and grant them long-term protection and full recognition, as part of the obligations solemnly undertaken by individual countries in their national constitutions and continental treaties after World War II.

Given its current role in actively externalising migration controls, the EU has often been accused of deliberately – although indirectly – stripping the right to asylum of its meaning: this is what is implied by the commonly-used phrase 'Fortress Europe'.

The second phase in the building of a Common European Asylum System offers the opportunity to rebut such serious accusations. Innovative policy tools such as the RPPs will play a crucial role in responding to this challenge, since their ultimate aim is to help preserve and enhance the coherence between EU principles and practices, and between its inward identity and its external face.

But foreign policy tools – which is what the RPPs are in essence – will not be enough. Admitting refugees and others in need of protection onto EU soil (including within the framework of the joint resettlement scheme)¹⁰ is a moral and legal necessity. It is also essential if the EU is to expand and consolidate its moral prestige (internally and externally), its legitimacy and its political credibility.

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Endnotes

1. On the management of forced migration flows from the former Yugoslavia and on the lack of effective common European responses, see J. Van Selm (1997) *Refugee Protection in Europe: Lessons of the Yugoslav Crisis*, Kluwer Law International, and J. Van Selm (ed.) (2000) *Kosovo's Refugees in the European Union*, Continuum.
2. On the notion and the issues connected to asylum burden-sharing, see the work of Eiko Thielemann and especially E. Thielemann (ed.) 'European Burden-Sharing and Forced Migration', special issue of the *Journal of Refugee Studies*, Vol. 16, No.3, 2003, and E. Thielemann, 'Towards Refugee Burden-Sharing in the European Union: State Interests and Policy Options', paper presented at the 9th European Union Studies Association (EUSA) Biennial Conference, 31 March–2 April 2005, Austin, Texas, available at <http://aei.pitt.edu/archive/00003001/>. See also C. Boswell (2003) 'Burden-sharing in the New Age of Immigration', Migration Information Source, Washington DC: Migration Policy Institute (MPI). www.migrationinformation.org/Feature/display.cfm?id=17
3. See UNHCR, *2005 Global Refugee Trends*, available at www.unhcr.org/cgi-bin/texis/vtx/statistics/opendoc.pdf?tbl=STATISTICS&id=4486ceb12
4. A preliminary on-line version is available at www.icsitalia.org/modules.php?op=modload&name=News&file=article&sid=163&mode=thread&order=0&thold=0. The printed version (*L'utopia dell'asilo*, Feltrinelli, Bologna, 2006) is forthcoming.
5. For more details, see F. Pastore, "Formation, Structure and Current Evolution of the EU Entry Control System", in N. Walker, (ed.) (2004) *Europe's Area of Freedom, Security, and Justice*, Oxford: Oxford University Press.
6. On 'externalisation' of migration control policies, see the work of Virginie Guiraudon and, in particular 'Before the EU Border: Remote Control of the 'Huddled Masses'', in K. Groenendijk and E. Guild (eds.) (2002) *In Search of Europe's Borders*, London: Kluwer International, and "Comparative Perspectives on Migration Control: Away from the Border and Outside the State" (with G. Lahav), in P. Andreas and T. Snyder (eds.) (2000) *The Wall Around the West: State Borders and Immigration Controls in North America and Europe*, New York: Rowman and Littlefield.
7. COM (2004) 410. http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0410en01.doc

8. Communication from the Commission to the Council and the European Parliament on Regional Protection Programmes, COM (2005) 388 Final, Brussels, 1 September 2005. [http://images.derstandard.at/20060102/com2005_0388en01.pdf#search=%22\(COM\(2005\)%20388\)%22](http://images.derstandard.at/20060102/com2005_0388en01.pdf#search=%22(COM(2005)%20388)%22)
9. Identity is defined here as the body of values and principles with which a political community identifies itself (see S. Lucarelli and I. Manners (eds.) (2006) *Values and Principles in European Foreign Policy*, London-New York: Routledge.
10. On this crucial point, see Migration Policy Institute (for the European Commission) (2003) Study on *The Feasibility of setting up resettlement schemes in EU Member States or at EU Level, against the background of the Common European Asylum system and the goal of a Common Asylum Procedure*, available at www.migrationpolicy.org/pubs/resettlement-study-full_2003_en.pdf; see also European Council on Refugees and Exiles (ECRE) (April 2005) *The Way Forward: Towards a European Resettlement Programme*, www.ecre.org/positions/resettlement.pdf

Executive summary

In the 1990s, an influx of asylum seekers sparked fears that bogus applicants were taking advantage of the sanctuary offered by the EU and its prosperity. It was against this backdrop that the Union's leaders agreed, at their 1999 summit in Tampere, to prioritise the development of a Common European Asylum Policy.

Now the public's attention has moved to illegal immigration. The EU has responded to these concerns with jointly-organised border patrols, additional funding, increased bilateral and multilateral cooperation, and a new communication on fighting illegal immigration. As a result, humanitarian protection has moved down the agenda.

This Issue Paper considers the progress made so far in developing a Common Asylum Policy, highlights the work which still needs to be done to create a comprehensive system capable of offering humanitarian protection, and warns that both effective implementation and political commitment are essential to the process.

Stefano Bertozzi, member of Justice, Freedom and Security Commissioner Franco Frattini's *cabinet*, outlines the work which has been done to date to construct a common approach to the issue.

He argues that the first phase of the process, which was completed in 2005 with the adoption of the Asylum Procedures Directive, has been a success and maintains that a dramatic fall in the number of those seeking asylum has taken the pressure off Member States, making it easier for them to provide protection in line with international standards. He stresses that a phase of implementation and evaluation is now needed, coupled with new initiatives to drive the process forward – and “rekindle” European enthusiasm for a Common Asylum Policy.

In a commentary on Mr Bertozzi's paper, Ferruccio Pastore, Deputy Director of the Centre for the Study of International politics (CeSPI) in Italy, argues that while, formally, the completion of the first phase has been a success, EU policy has not, in reality, done much to improve conditions for asylum seekers 'on the ground'. He is also critical of new policies to externalise controls, fearing that they limit asylum seekers' ability to enter Europe.

Both writers agree that while the standards laid down in EU directives for asylum are lower than those originally proposed, the development of a pan-European approach is a step forward.