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The Europeanization of Asylum Policy: From Sovereignty via Harmony to Unity

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Summary

To what extent do asylum decisions within the EU amount to an EU asylum policy? The paper tackles the question within a simplified and amended framework recommended by Lasswell and McDougal's policy analysis (the amendment is that the postulation of basic public order goals has three interrelated functions: the explication of evaluative assumptions entertained by a policy analyst; the articulation, appraisal, revision and ordering of the assumptions, which result in a prescription of public order goals; the identification and ordering, from among a potentially endless flow of empirical data, of those decisions that conform to the postulated goals).

The principal postulated goal is human dignity or a free society. Subordinate goals include the right to life, the right to freedom, the rule of law, and solidarity.

The analysis of tendencies in decision, although exhaustive, does not suffice to give an unequivocal answer to the principal question. A major reason is a discrepancy between the EU treaties and directives on asylum, which allegedly are the basic and the implementing EU instruments respectively. However, it is apparent that minimum standards are an insufficient incentive for the proper harmonisation of national asylum systems, and leave a too high level of discretion to the member states regarding the transposition of the legal *acquis* into national systems.

The Europeanization of asylum policy has not been inspired by humanitarian considerations, but by policies of the member states to discourage and prevent asylum seekers to access state territories on the one hand, and to promptly and efficiently process asylum applications on the other.

European institutions will probably keep putting efforts into the building of the Common Asylum System and harmonisation of national asylum systems, particularly in the direction of the establishment of a single procedure and uniform refugee status at the level of the entire Union. However, the question

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now arises as to what degree the member states will actually harmonise their national asylum systems with the specified higher standards.
Even an appropriate asylum system will be of little importance if it is not accompanied by specific measures that allow for the possibility of access to the asylum system and protection in the EU territory. Changes in the policy of management of the external borders, which restricts access to the asylum policy in various ways, are necessary so as to ensure full respect for the right to seek asylum.

Key words: asylum policy, Lasswell and McDougal, Common Asylum System, Europeanization, Croatia

Last summer, on 12 July 2009, Greek riot police first evacuated and then levelled up a camp of illegal immigrants – including some twenty asylum seekers – near the city of Patras. The raid was merely a step in a series of measures ordered by the conservative Greek government against the so-called "clandestines", that is, illegal aliens who have arrived in Greece from Asia and Africa hoping to settle down in Europe. 20 000 persons applied for asylum in Greece in 2008, but only 379 were granted the status. Relying on the information that Greece breaches the human rights of asylum seekers, the Norwegian appellate immigration board terminated the transfer of asylum seekers into Greece required by the Dublin Regulation of 2003 (doc. 1.21).

The Patras raid indicates the primary problem of this paper, which can be formulated as follows: To what extent are asylum decisions within the EU an EU asylum policy? Asylum is protection granted by a state in its territory to a person who "owing to a well-founded fear of being persecuted on account of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of their nationality, and is unable to or, owing to such fear, is unwilling to avail him/herself of the protection of that country" (doc. 1.01: Art. 1). The harmonisation of asylum practices and policies of EU members *qua* sovereign states towards a common EU asylum policy may be termed the Europeanization of asylum policy or, more accurately, the Europeanization of asylum. It is a building block of the emerging polity at the level of the EU (see Grubiša 2005).

The paper offers a tentative solution to the primary problem within the framework of Harold D. Lasswell and Myres S. McDougal's policy analysis (Lasswell 1992; see also Lasswell 1938; Lerner 1951), which is still recognized as the first step "towards a more unified approach to the study of public problems and policy" (e.g. Parsons 1995: 18 ff). The paper performs, in a manner appropriate to the format of a review article (following Padjen 2009), all the tasks recommended by the framework, but with regard to community policies, that is the criteria for evaluation of public decisions, rather than with regard to the decisions themselves. Thus the paper, having identified its problems and standpoint in this introduction: (1) postulates basic public order goals relevant to an EU asylum policy; (2) clarifies policies

that may amount to an EU asylum policy by (2.1) identifying relevant basic decisions at the EU level, (2.2) identifying implementing decisions and ordering them into elements of a policy, and (2.3) appraising the elements in terms of the postulated goals; (3) relates the decisions to conditions; (4) projects future decisions; and (5) invents alternative decisions more in accord with the goals.

The secondary problem of the paper is that the adopted framework may not provide sufficient guidance for "the clarification of community policies" (Lasswell 1992: 36, 725-786) on the basis of "the postulation of basic public order goals" (Id.: 34). That Lasswell and McDougal's framework may be wanting is indicated by its application, which varies from a tacit merger of the two tasks (e.g. McDougal 1967: 35-77; McDougal 1980: 365-422) to a highly selective use of the framework (e. g. Reisman 1971). Hence the clarification of public order goals is preceded by a theoretical explanation of the task (also at 1).

The problems determine the purpose. While the paper is a study *de lege ferenda*, which should also be useful to policy-makers, it is written from the standpoint of scholars, that is, for the sake of knowledge and enlightenment rather than of policy and power (see Lasswell 1992: 22-24). The purpose is also defined by a broader policy study, which should appraise Croatian decisions on asylum in terms of EU asylum policies.

1. THE POSTULATION OF PUBLIC ORDER GOALS

The clarification of EU asylum policies begins with a selection from among a multitude of candidates, which include decisions of the United Nations, regional international organisations, especially the European Union itself, and influential national orders, notably those of North America and, again, of the European Union. Such a selection is never a mere description of brute facts, but also an evaluation of human acts. "The postulation of basic goals of public order" recommended by Lasswell and McDougal can indeed function as the basis of the clarification. While postulation, rather than justification, may seem to be a "give it up" approach to fundamental problems of policy analysis, the approach successfully avoids logical derivation of public policies from allegedly higher principles in a way followed by doctrines of natural law (Lasswell 1992: 231).

It is submitted here that the postulation of basic public order goals can and should be used in policy studies to achieve three interrelated functions. The first is the explication of evaluative assumptions entertained by the policy analyst herself or himself. The second are articulation, appraisal, revision and ordering of the assumptions, which result in a prescription of public order goals (values and/or principles) of two kinds: procedural goals as to who (and how) is to make public policies and other public decisions; substantive goals as to what constitutes the public

goods other than the power to make public decisions, and who is entitled to those – substantive – goods. The third function is the clarification of basic community decisions, that is, the identification and ordering, from among a potentially endless flow of empirical data, of those decisions that conform to the postulated goals. Such decisions are community policies in Lasswell and McDougal's sense or, all of them as a unity, a policy in the sense of contemporary analysts (e.g. Petak 2006). The term "EU asylum policy" is used here in both senses in contexts that are meant to be self-explanatory.

The postulated basic order goals are meta-constitutional in that they, first, identify – like a basic norm (see Kelsen 1962: 115 ff, 124 ff) – constitutive procedures of public order or of a part of public order (such as a hypothetical EU asylum policy) and, secondly, limit ends of the constitutive procedures by substantive criteria of both justice ("objective law") and rights ("subjective laws"). In addition, basic public order goals are also meta-systemic in that they imply formal requirements to be met not only by empirical orders, or their parts, but also by meta-constitutional postulated goals. The obvious requirements are those of clarity, completeness and coherence (Visković 1981: 244-254; Fuller 1967: 33-94). Thus a set of public decisions, even of the most basic kind (e.g. laying down procedures and limits of legislation) can count as a policy only if the decisions have a definite scope of application, cover most problems they are intended to solve, and work together towards the intended ends rather than conflict with each other.

This inquiry, following Lasswell and McDougal's recommendation, postulates human dignity as the principal basic goal, or a free society, which is characterised by "the greatest production and widest possible distribution of all important values" (Lasswell 1992: 34-35; see also Padjen 2009). Subordinate basic goals of public order include the right to life, the right to freedom, the rule of law, and solidarity.

The postulated goals indicate that an EU asylum policy should be sought within decisions establishing the responsibility of states for the protection of refugees (rather than within decisions establishing the responsibility of states for the protection *from* refugees, which may be identified following, say, national well-being as the principal basic public order goal). The international policies establishing the protection of refugees are found primarily in the 1951 Geneva Convention (doc. 1.01) and the 1967 New York Protocol (doc. 1.02), which have laid the foundations of international refugee law. While these instruments do not include the right of a refugee to be granted asylum, they do include her or his right to seek asylum, that is, the principle of access to asylum. Furthermore, the Convention codifies the principle of non-refoulement, which protects a refugee from being returned – individually or collectively with other refugees – to the place of origin or other place where her or his life or freedom could be threatened. Meanwhile, the principle has become

international *jus cogens* (strict law), from which no subject of international law (a state or international organization) can depart, not even by a multilateral treaty. The same principles – that is, of access to asylum and non-refoulement – are also guaranteed by European law, primarily by the Charter of Fundamental Rights of 2000 (doc. 1.08), which closely follows the Geneva Convention and the New York Protocol, and the Treaty establishing the European Community (doc. 1.47). The two principles are considered here the tenets of a hypothetical EU asylum policy.

2. THE CLARIFICATION OF EUROPEAN ASYLUM POLICIES

2.1. The Identification of Basic EU Decisions

Even though the European Union member states have had a long tradition of granting asylum protection to persons who have left their countries of origin because of persecution, the development of elements of an asylum policy at the level of the European Community, later the European Union, has proceeded at a slow pace and in a non-uniform manner.

A common asylum policy at the level of the European Union has been observable since 1 May 1999 when the 1997 Treaty of Amsterdam (doc. 1.44) came into force establishing the Common European Asylum System, and when asylum policies, visa regime, control of the external borders, policies linked to the freedom of movement of persons, and judicial cooperation in civil-law matters were transferred from Pillar 3, made up of police and judicial cooperation in criminal matters, to the supranational Pillar 1. As one of the objectives of the European Union, the Treaty lists the maintenance and development of the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external borders control, asylum, immigration and the prevention of and combating crime.

Until the 1997 Treaty of Amsterdam (doc. 1.44), issues of justice and home affairs and, within them, issues of migration and asylum, were solved among the member states of the European Union almost exclusively within bilateral and multilateral interstate collaboration. The early signs of collaboration emerged in 1976, when twelve member states, on the initiative of the United Kingdom, founded the Trevi Group in order to fight terrorism and coordinate police cooperation in the fight against terrorism, but without including institutions of the European Economic Community. The Trevi Group was an informal intergovernmental body with no permanent administrative personnel, headquarters and budget, which consequently led to impaired coordination of its workings and the impossibility of effective control over the implementation of agreed measures and their evaluation, as well as of the necessary modifications of its work. Within the Trevi Group, several working

groups were established, relative to diverse fields of collaboration, including the exchange of information on terrorist activities, exchange of knowledge about the operation of the police, and collaboration in the field of nuclear security (Turkalj 2006: 1131-1132).

The Single European Act of 1986 (doc. 1.42) supplied a framework for a single European market, in order to eliminate border control within the European Community by 1992. Even the free movement of persons, which became a part of the field within the competence of the Community, along with the freedom of movement of goods, services and capital, began to be considered an important component of the establishment of an internal market. However, the Act does not mention the freedom of movement of refugees and asylum seekers; these issues were left within the domain of the member states (Guild 2006: 634).

In accomplishing the objectives laid down by the 1986 Single European Act (doc. 1.42), the coordination of activities relating to the internal and external borders became an important issue. Thus, in October 1986, on the initiative of the United Kingdom, an *ad hoc* Immigration Group was founded in order to coordinate visa issuing policies and national asylum systems, in which, apart from ministers responsible for the question of immigration, the European Commission's observers also took part. The Group was responsible for all matters in the field of asylum and immigration, particularly in connection with the establishment of the single market (Boccardi 2002: 31).

The elimination of internal borders as an objective laid down by the Single European Act found its materialisation in practice in July 1990 by the adoption of the Schengen Convention (doc. 1.10) and the Dublin Convention (doc. 1.09). The 1985 Schengen Agreement (doc. 1.07) created a union between Belgium, France, Luxembourg, the Netherlands and Germany, and all border checkpoints on land, on sea and at airports were removed in order to encourage the freedom of movement and implement a common visa-issuing policy. The basic objectives of the 1985 Schengen Agreement (doc. 1.07) included the strengthening of border control for the purpose of ensuring a higher level of internal security of the member states, and the enhancement of the efficiency of control of the external borders for the purpose of faster movement of citizens and goods between the EU and third countries (Peers & Rogers 2002: 169-184). The 1990 Schengen Convention (doc. 1.10) specified the conditions and guaranties for the implementation of the Agreement that came into force in March 1995, between Belgium, Germany, France, Luxembourg, the Netherlands, Spain and Portugal. The Convention established the Schengen regime, consisting of common rules regarding visas, asylum and border checks at the external borders. The Schengen *acquis* was integrated in the EU legal framework by the 1997 Treaty of Amsterdam (doc. 1.44). The provisions of the 1990 Schengen

Convention (doc. 1.10) that regulated the responsibility for actions regarding asylum applications were replaced by the provisions of the Dublin Convention of 1990 (doc. 1.09) when it came into force in May 1997. The Objective of the Dublin Convention, built upon the Schengen Convention, was to "ensure that every asylum seeker's application will be examined by a Member State, unless a 'safe' non-Member country can be considered as responsible", to "avoid situations of refugees being shuttled from one Member State to another, with none accepting responsibility, as well as multiple serial or simultaneous applications". The two conventions, first, avoided "asylum shopping", that is, the situation where a person claims asylum simultaneously or consecutively in more than one EU member state; and, secondly, removed the potential for the situations of "an asylum seeker in orbit", where an asylum seeker is transferred between states with no state willing to assume competence for examining the person's claim. The Dublin Convention obligated the first EU member state in which an asylum seeker landed to assume responsibility to examine the seeker's asylum claim. The obligation was a kind of punishment to the member state that made it possible for an asylum seeker to enter the European Union's territory by crossing the state's border either legally, by the state's visa, or illegally, without a valid visa (Guild 2006: 637).

The Dublin Convention of 1990 (doc. 1.09) was replaced by the Dublin Regulation of 18 February 2003 (doc. 1.21), which laid down the criteria for identifying the member state responsible for examining asylum applications lodged in one of the member states, based on the rules ordering asylum seekers to seek asylum in the member state whose territory they have first stepped into, regardless of the current asylum policy of the respective country.

The Treaty on European Union of 1992 (doc. 1.46) brought a new – in principle European – orientation into the field of asylum, but it did not regulate the right to asylum at the level of the Community. The asylum policy, migration policy and policy relating to third-country nationals were placed in the EU Pillar 3 encompassing collaboration in the field of justice and home affairs, and were defined as matters of common interest. Following the Treaty on European Union that came into force on 1 November 1993, the Resolutions on Manifestly Unfounded Applications for Asylum (doc. 1.33), on Minimum Guarantees for Asylum Procedures (doc. 1.34), and on a Harmonised Approach to Questions Concerning Host Third Countries (doc. 1.32) of 1992, and the 1992 Conclusion Concerning Countries in Which There Is Generally No Serious Risk of Persecutions (doc. 1.11) were adopted. These documents were legally unbinding and incomplete, with the main purpose to help the member states to determine the cases in which asylum protection should not be granted. At the same time, the documents supported a restrictive interpretation of the right to asylum, and of the policy of restricting access to the asylum system of

asylum seekers whose applications were considered manifestly unfounded or who were deemed to have arrived from a safe third country (Guild 2006: 638).

By the Treaty on European Union of 1992 (doc. 1.46) the member states committed themselves to consult one another and exchange information within the EU Council with the purpose of harmonised action, and the Council was authorised to adopt joint positions, joint actions and draw up conventions that would be recommended to the member states for adoption at the proposal of one member state or the Commission. Also, the obligation of the Council was laid down to enact a list of third countries, whose citizens were required to obtain visas to enter the EU territory, unanimously, and subsequently by qualified majority, by 31 December 1993.

In practice, the agreement by the member states on matters of asylum and migration was being reached with difficulty, which resulted in the adoption of soft law instruments that did not oblige the member states. The soft measures were primarily directed towards increasing control and making access to the asylum system impossible, but can nevertheless be considered creators of the development of asylum policy at the level of the European Union (Boccardi 2002: 69).

The Treaty of Amsterdam of 1997 (doc. 1.44) was a turning point in the development of a common policy in the area of asylum. This Treaty established the Common European Asylum System and introduced a mandatory jurisdiction of the European Court of Justice with respect to the interpretation of Title IV of the Treaty, and the procedure of co-decisioning of the Council and the Parliament after a five-year transitional period since the enforcement of the 1997 Treaty of Amsterdam. The EU Council was authorised to adopt measures relating to asylum, in accordance with the 1951 Geneva Convention (doc. 1.01), the 1967 New York Protocol (doc. 1.02) and other relevant treaties. The measures envisaged to be enacted included defining criteria and mechanisms for determining the member state responsible for examining the asylum application of a third country's national submitted in one of the member states, minimum standards on the reception of asylum seekers in the member states, minimum standards with respect to the qualification of nationals of third countries as refugees, minimum standards as to procedures for granting and withdrawing of refugee status in the member states, as well as minimum standards for giving temporary protection to displaced persons from third countries in need of international protection, and for promoting a balance of effort between the member states in receiving and bearing the consequences of receiving refugees and displaced persons. At the same time, the establishment of common minimum standards made it possible for the member states to maintain a high level of discretion in the implementation of the asylum policy, along with the principles of subsidiarity and proportionality. The Community should only act when a member state could not satisfactorily fulfil the proposed and scheduled activities. However, the 1997

Treaty of Amsterdam (doc. 1.44) limited the competence of the Community by the provision prescribing that Title IV of the Treaty would not affect the responsibility of member states regarding the preservation of the legal order and the maintenance of internal security.

The 1997 Treaty of Amsterdam (doc. 1.44) laid down an ambitious plan for the adoption of measures concerning asylum in a five-year period since the enforcement of the Treaty, so that the need for drawing up a working plan became a priority. The need was confirmed by the Cardiff meeting of the European Council in 1998 (doc. 1.27), and both the Council and the Commission were asked to prepare a plan proposal for the next meeting of the European Council. The Action Plan on how best to implement provisions of the Treaty of Amsterdam (doc. 1.06), adopted in December 1998, set priorities for actions of the Council in the field of freedom, security and justice in a five-year period.

The Tampere meeting of the European Council (doc. 1.29), held in October 1999, defined fundamental objectives and principles of a common asylum policy within the strategy of justice and home affairs. The meeting emphasized that the development of the Union as an area of freedom, security and justice was one of the most important priorities. The establishment of a common asylum system was recognised as a top-priority task. In this matter, the rules of the Community were to lead to a common procedure of granting asylum and the equal status of all persons granted asylum in the entire Union.

The significance of the development of a common asylum policy was highlighted at the meetings of the European Council held in Leaken (doc. 1.28) in December 2001 and in Thessaloniki (doc. 1.30) in June 2003.

The Treaty of Nice of 2001 (doc. 1.43) changed the mode of decision-making in the Council to the effect that certain issues that had required unanimous decision could be decided by a qualified majority. In contrast to the asylum provisions of the 1997 Treaty of Amsterdam (doc. 1.44), qualified majority and the co-decisioning with the Parliament applied only when the Council already adopted legislation (introduced by the Commission) defining common rules and basic principles.

The Brussels European Council in November 2004 (doc. 1.26) adopted a five-year programme of cooperation in justice and home affairs (the Hague Programme), which defined guidelines for the EU policy in the area of security, freedom and justice. The Programme defined measures that should be taken with respect to freedom, security and justice by 2010, and specified the establishment of the Common European Asylum System (CEAS) based on an efficient and harmonised procedure and conforming to EU values and humanitarian tradition as one of the ten priority areas. The expected objective in the first stage of development of the CEAS (1999--2005) was the harmonisation of national asylum systems on the basis of common

minimum standards, while the objective of the second stage of development of the CEAS was to establish a single asylum procedure and a uniform status of the persons granted protection throughout the Union. However, the deadlines for completing the first stage of the CEAS were not met because of the delay in working out minimum standards for procedures of granting and withdrawing the status.

The Policy Plan on Asylum (doc. 1.35), prepared by the European Commission in June 2008, defined the action plan and the list of measures to be proposed by the Commission in order to complete the second stage of the CEAS. The basic principles of further development of the CEAS included ensuring the accessibility of asylum protection to all those in need of it, equal procedure in all member states, with the same high standards, efficiency of the asylum system, and ensuring solidarity within the territory of, and outside, the European Union. The strategy for accomplishing objectives of the 2008 Policy Plan on Asylum was based on higher and more harmonised standards of protection through further harmonisation of legislation of the member states, on efficient collaboration between the member countries and a higher mutual level of solidarity and responsibility, with respect to the 1951 Geneva Convention (doc. 1.01), the Charter of Fundamental Rights of 2000 (doc. 1.08) and practices of the European Court of Human Rights.

The meeting of the European Council in October 2008 (doc. 1.25) adopted the European Pact on Immigration and Asylum (doc. 1.24), which pointed out the willingness of the EU and member states to implement a fair, efficient and consistent public policy on asylum and migration, in the spirit of solidarity among the member states and in collaboration with third countries. While the member states remained responsible for granting asylum protection within national asylum systems, the Pact highlighted the need for completion of the establishment of the Common European Asylum System, which would guarantee higher standards of protection.

The Treaty of Lisbon of 2007 (doc. 1.45) significantly widened the EU's competences for asylum and immigration questions. Asylum, immigration and border checks are now dealt with in Chapter 2 of the Treaty of Lisbon under Title V – the Area of Freedom, Security and Justice. The 2007 Treaty of Lisbon also emphasized that the Union should develop a common asylum policy, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement, in accordance with the 1951 Geneva Convention (doc. 1.01), the 1967 New York Protocol (doc. 1.02) and other relevant documents. For these purposes, the European Parliament and the Council are obliged to adopt different measures for a common European asylum system. The measures envisaged to be enacted include a uniform status of asylum for nationals of third countries within the Union; a uniform status of subsidiary protection for nationals of third

countries who are in need of international protection but are not granted refugee status; a common system of temporary protection for displaced persons in the event of a massive inflow; common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status; criteria and mechanisms for determining the member state responsible for considering an application for asylum or subsidiary protection; standards concerning conditions for the reception of applicants for asylum or subsidiary protection; partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.

In June 2009, the European Commission issued a communication entitled An Area of Freedom, Security and Justice Serving the Citizen (doc. 1.36), which listed the priorities in the development of the asylum policy in the next five years. The priorities include the development of a single area of protection, allocation of burden and solidarity among the member states, and solidarity with countries outside the European Union. The communication constitutes a basis for the adoption of the so-called Stockholm Programme[1] in the field of freedom, security and justice by the end of 2009 during Sweden's presidency of the EU.

2.2. From Implementation to a Policy

The EU *acquis* on asylum consists, on the one hand, of founding treaties and their amendments, and, on the other, of directives setting the common minimum standards that the member states can implement in their national asylum laws by modes and methods the states themselves deem appropriate. While the directives are to a considerable extent an implementation of the treaties as the basic EU decisions, in practice it may well be the other way around, namely that the directives are more basic in that they constitute elements of an EU asylum policy. The inversion may well be an inevitable consequence of the fact that the treaties are designed to proclaim high standards, leaving details to implementing instruments. The directives as such instruments express the true agreement between the member states to find the lowest common denominator with respect to the standards of protection rather than the protection of refugees *per se* (Van Selm 2005: 11).

The most important documents of the EU *acquis* on asylum include the Directive on Temporary Protection of 20 July 2001 (doc. 1.14), the Directive on Reception of 27 January 2003 (doc. 1.15), the Dublin Regulation of 18 February 2003 (doc. 1.21), the Directive on Qualification of 29 April 2004 (doc. 1.17) and the Directive on Procedures of 1 December 2005 (doc. 1.18).

[1] On the Stockholm Programme, see < www.se2009.eu/en/the_presidency/about_the_eu/justice_and_home_affairs/1.1965 >.

2.2.1. Temporary Protection

The Directive on Temporary Protection of 20 July 2001 (doc. 1.14) is pertaining to the persons who have fled areas of armed conflict or endemic violence, as well as to those who are at serious risk of systematic or generalised violations of their human rights, or are victims of such violations of human rights. In such cases, the Directive does not stipulate individual examination whether it is a matter of persecution. A mass influx of people can be proclaimed by the Council by qualified majority, at the proposal of the Commission. In principle, temporary protection lasts for one year and can be prolonged to two years at the most. In any moment persons under temporary protection are entitled to submit an application for asylum.

The Directive on Temporary Protection was adopted as a response to the Kosovo crisis, which generated a huge number of refugees who sought protection in the European Union (Boccardi 2002: 165).

2.2.2. Reception of Asylum Seekers

Reception of asylum seekers is regulated by the Directive on Reception of 27 January 2003 (doc. 1.15), which is applicable to all third-country nationals and stateless persons who have sought asylum at the border or on the territory of a particular member state. The standards of reception conditions stipulated by the Directive, which constitute a set of measures granted to asylum seekers by the member states, are considered sufficient to ensure asylum seekers appropriate standard and living conditions roughly equal in all member states. Even though the Directive is based on the notion of the harmonisation of reception standards within the EU territory, practice has shown a multitude of drawbacks caused primarily by a high possibility of discretion left to the member states with respect to its interpretation (Peers and Rogers 2002: 303). Research on the implementation of the Directive on Reception in national asylum systems of the member states lists a plenty of problematic fields in the implementation of the Directive, the most important of which include restricting access to employment and health care; insufficient provision for material conditions of access, including housing, food and clothes; restricting reception conditions of asylum seekers whose freedom of movement has been limited by their accommodation in detention; and the lack of identifying and appropriate treatment of asylum seekers with special needs. In this respect, in the Green Paper on the Future of the Common European Asylum System of 2007 (doc. 1.37), the European Commission found that leaving broad discretion to the member states led to negation of the desired harmonising effect. It was concluded that, because of different interpretations of the Directive on Reception in the member states, it was necessary to change the existing provisions in order to ensure a higher level of harmonisation, improve the reception standards, and prevent secondary movement of asylum seekers into countries granting a higher level of protection (doc. 1.38).

2.2.3. Responsibility for Application for Asylum

According to the Dublin Regulation of 18 February 2003 (doc. 1.21), in each particular case only one European Union member state may and should be responsible for the entire procedure of examining an asylum application. The Regulation establishes a hierarchy of criteria for determining the member state responsible for the examination of an asylum application, in order to ensure that each application submitted in this way is given consideration and decided upon by one of the EU member states, but also with the purpose of preventing multiple asylum application submissions by the same person. The Regulation has been applied to the asylum applications submitted after 1 September 2003 and is directly binding for the member states. In practice, however, the application of the Regulation has had severe implications on the human rights of asylum seekers. During the procedure of determining by the member state responsible for the examination of an asylum application, asylum seekers have often been doomed to long-lasting waiting for their transfer to the proper member state, often in detention. Furthermore, the established hierarchy of criteria for determining the responsible state has excluded taking into consideration possible bonds of the asylum seeker with one of the member states, such as the existence of a social network, relatives and members of the same ethnic or other group, which has consequently made the integration of refugees more difficult and encouraged secondary movements of asylum seekers. The Dublin system has been particularly cruel toward families and asylum seekers with special needs due to their age, health condition or experienced trauma (Peers and Rogers 2002: 230). Although the Regulation is based upon the assumption that asylum seekers will have equal access to the asylum system and protection in each member country, in practice, the discrepancies between national systems are large. In certain member states the asylum applications of persons transferred on the basis of the Dublin system have often not been given consideration, or they have even been prevented from access to the procedure of granting the refugee status (Guild 2002: 636). In this way, the system has taken the form of an 'asylum lottery', and decisions on asylum applications have depended on the route taken by asylum seekers in entering the territory of the Union. In practice, the Dublin system has proven to be expensive and inefficient, and a remarkable burden has been placed on the member states located at the external eastern and southern borders of the Union.[2]

[2] On the severe implications of the Dublin Regulation on human rights protection of asylum seekers, see UNHCR, *The Dublin II Regulation* (doc. 1.05); ECRE, *Report on the Application of the Dublin II Regulation in Europe* (doc. 1.51); ECRE, *Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered* (doc. 1.49).

2.2.4. Recognition of Refugee Status

The Directive on Qualification of 29 April 2004 (doc. 1.17) was directed toward the insurance of the application of common criteria for identifying persons who needed international protection, in which, in defining the concept of a refugee, the definition stipulated by the 1951 Geneva Convention (doc. 1.01) was used. The Directive has introduced the institution of subsidiary protection, determined qualifications for refugee status, which include acts of persecution, reasons for persecution, and reasons for the exclusion and cessation of refugee and subsidiary protection. The implementation of the Directive in the member states has reflected the practice that existed at the national level before its transposition. The Directive enables the member states to apply even higher standards, and research has shown that, in the states that have applied a more restrictive policy in deciding as to whether a person meets the criteria for the recognition of protection, no extensive changes in the number of submitted applications have been recorded (doc. 1.48).

2.2.5. Granting and Withdrawing Refugee Status

The Directive on Procedures of 1 December 2005 (doc. 1.18) was adopted in order to harmonise the rules in the procedures for granting refugee status and is the last one among the directives scheduled to be adopted according to the Hague Programme. The harmonised rules should help limit secondary movements of asylum applicants between the member states, when such movement is caused by differences in legal systems. In this respect, the Directive on Procedures specifies procedural guarantees for asylum seekers that include access to and providing information on the procedure, the right to remain in the member state pending the examination of the application, holding a personal interview about the application, the right to an interpreter, the right to legal assistance and representation, and the right to be informed of the decision by the determining authority on the application for asylum. The examination procedure of the application should include individual, objective and impartial consideration of the application by the authority whose personnel is specialised in the right to asylum and educated for this very purpose. However, the Directive on Procedures is one of the most controversial parts of the EU *acquis* in general. Thus, Peers and Rogers (2006: 410) suggest that no other act by the EC is to such a high degree contrary to international documents on human rights as certain provisions of the Directive on Procedures, and they indicate at least 12 invalid articles of the Directive.

2.2.6. Access to the Asylum System

According to the Directive on Procedures of 1 December 2005 (doc. 1.18), the member states have an obligation to provide asylum seekers with access to the asylum procedure, to guarantee their stay in the state's territory, at the border or in a

transit zone until the completion of the examination of the asylum application, the right to appeal against a negative decision, including the decision refusing entry within the framework of the border procedures and access by the UNHCR.

According to the Schengen Borders Code of 2006 (doc. 1.31), the management and strengthening of the external borders of the EU as part of the establishment of an area of freedom, security and justice, constitute a means to combat illegal migration and terrorism. In regard to the commitments of the states toward refugees, the Code stipulates that refugees and persons in need of international protection make an exception in relation to applications that must be filled by third-country nationals for crossing the external borders.

In practice, however, the access to the EU territory has been restricted in a multitude of ways. Thus, the common list of countries (doc. 1.19, 1.22 and 1.23) whose nationals are required to obtain visas for entry into the EU territory comprises 131 countries, including all African, Caribbean and many Asian countries, from which the greatest number of refugees have arrived (Iraq, Afghanistan, Somalia, Sudan, Sri Lanka). Refugees and stateless persons are required to obtain visas if they arrive from a negative-list country, but a member state can decide not to apply the visa regime to refugees arriving from, and holding passports of a country for which visas are not required (Peers and Rogers 2006: 187).

The possibility of obtaining visas is made more difficult for asylum seekers in respect of the criteria for granting or denying a visa as well: according to the Common Consular Instructions of 2005 (doc. 1.12), persons belonging to high-risk groups for obtaining visas are also 'unemployed persons and those with no regular income', which is most often the case with asylum seekers.

The Directive of 28 June 2001 (doc. 1.13), which defines sanctions for professional carriers transporting third-country nationals to the EU territory, decrees penalties in the minimum amount of € 3,000 for each transported person refused entry to the EU, the obligation to return third-country nationals, and the responsibility of carriers for finding means of onward transportation in case the carriers fail to return the person, and bearing all the costs of stay and return of the third-county national in question. This Directive, however, does not question the commitments arising from the 1951 Geneva Convention (doc. 1.01). Carriers also have the duty to inform the proper authorities about the details of their passengers (doc. 1.16).

In practice, even other measures, including biometric and information databases (doc. 1.20), the network of immigration liaison officers and airport liaison officers, the role of the FRONTEX Agency and interception at sea, which control access to the territory of the European Union and prevent illegal migration, limit access to persons in need of international protection. In this way, over 90 percent of asylum seekers have been forced to use illegal methods of entering the EU territory (doc. 1.52).

The Policy Plan on Asylum of 2008 (doc. 1.35) announced changes in the existing legal *acquis* on asylum in order to ensure a higher level of harmonisation and improve standards in the protection of asylum seekers and acknowledged refugees within the Common European Asylum System. By the completion of this paper in August 2009, the Commission proposed changes in the Directive on Reception of 27 January 2003 (doc. 1.15) and the Dublin Regulation of 18 February 2003 (doc. 1.21), and announced changes in the Directive on Qualification of 29 April 2004 (doc. 1.17) and the Directive on Procedures of 1 December 2005 (doc. 1.18).

2.3. An Appraisal of EU Asylum Decisions

The analysis in the preceding sections, although exhaustive, does not suffice to give an unequivocal answer to the principal question of this inquiry, which runs as follows: to what extent are asylum decisions within the EU an EU asylum policy? One reason is the discrepancy, noted at 2.2, between the EU treaties and directives on asylum, which are allegedly the basic and the implementing EU instruments respectively. But there are other reasons as well.

The Directive on Qualification of 29 April 2004 (doc. 1.17) requires of the member states to recognize the refugee status to all persons covered by the 1951 Convention (doc. 1.01). Other good practices required by the Directive include the recognition that persecution which is a ground for refugee status may be committed by non-state as well as state actors and may consist of acts that affect primarily women and minors. However, the following provision (Art. 17, Sect. 1.d) of the Directive significantly broadens reasons for exclusion of the 1951 Convention: "A third country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that ... he or she constitutes a danger to the community or to the security of the Member State in which he or she is present" (Storey 2008: 24).

EU instruments, especially the directives analysed at 2.2, do not provide sufficient warranties of non-refoulement (ECRE, doc. 1.53: 10). A case in point is the Directive on Procedures of 1 December 2005 (doc. 1.18), which provides for (Art. 25, Sect. 1.b) that "a country which is not a Member State is considered as a safe third country for the applicant". Another case is the Directive of 28 June 2001 (doc. 1.13) on sanctions against professional carriers.

Procedures of the member states to process applications for asylum should conform to the following principles: access to free legal aid; access to the UNHCR; right to an impartial and qualified interpreter; personal interview; and the right to appeal that suspends deportation (doc. 1.52: 17). The Directive on Procedures of 1 December 2005 (doc. 1.18) seriously limits the application of these principles. Thus a member state may provide that the right to free legal assistance and/or represen-

tation is granted "only for procedures before a court or tribunal ... and not for any onward appeals or reviews provided for under national law, including a rehearing of an appeal following an onward appeal or review; and/or ... only if the appeal or review is likely to succeed" (Art. 15, Sect. 3) (Peers and Rogers 2006: 390). Likewise, provisions on detention do not protect an asylum seeker from arbitrary detention and arbitrary length of detention. The Dublin Directive of 18 February 2003 (doc. 1.21) does not allow a refugee to seek asylum in a state of her or his choice.

The objective of the Dublin Directive is to share the burden of asylum procedures among the EU member states. However, the fact that most refugees enter the EU in a member state whose borders are also borders of the EU makes the burden sharing a never-ending issue, which ultimately affects asylum seekers.

To conclude, the minimum standards of protection, laid down by the existing EU legal *acquis* on asylum, are insufficiently harmonised, particularly the cases that are directly contrary to international standards, such as the Directive on Procedures of 1 December 2005 (doc. 1.18). The minimum standards are an insufficient incentive for proper harmonisation of national asylum systems, and leave a too high level of discretion to the member states regarding the transposition of the legal *acquis* into national systems.

3. CONDITIONS OF A EUROPEAN POLICY

Following the recommendations by Lasswell and McDougal to examine the significance of culture, class, interests, personality and previous exposure to crisis during the development of a comprehensive analysis of the conditions for decision-making (1992: 865-972), the interests and culture of the immediate, more significant groups of actors in the process of Europeanization of asylum policy at the level of the European Union, including the EU institutions and member states, are herein taken into account. However, these conditions are so numerous and diverse that it is impossible to prove empirically, especially on the basis of a covering law (Wright 1975: 64--68), the causal relationships between the conditions on the one hand, and the past course of decision-making and a predictable course of decision-making in the future on the other. Anyway, if this was possible, the course of future decisions would be so predetermined by past events that it would not be, or it would hardly be, possible to implement alternative decisions, and thus even a policy analysis would not, or would hardly ever, make sense.

> All that can be done, in this as in most other policy-oriented legal inquiries, is the following: first, to imagine probable inconvenient but avoidable future decisions; secondly, to project preferable future decisions which would, to a greater extent than inconvenient decisions, realise basic public order goals and tenets of a policy (as postulated supra in Section 1); thirdly, to identify – by a thought experiment

> (which could be upgraded partly in a broader study by empirical research) – the conditions that are common to both past and future decisions. The experiment would above all reduce the complexity of potential conditions by counterfactually identifying the conditions that are common to major past, inconvenient and preferable decisions. (Padjen 2009: 33)

It is useful to divide the common conditions in the sense explained above, which have affected and can further affect the Europeanization of asylum policy and the development of the Common European Asylum System, into stages, hence, in terms of time periods in which particular conditions prevailed in the past.

In early stages, the collaboration among the member states in matters of asylum and migration was primarily based on economic considerations. The basic objectives of the European Community, according to the founding treaties, were the establishment of a common market and of an economic-monetary union. As a precondition for the realisation of the notion of a common market, there emerged a need for the elimination of internal borders between the member states and the establishment of an unrestricted flow of goods, services, capital and people (Guild 2002: 631).

The cooperation between the member states in the field of asylum has been directed, from its very beginnings, primarily toward maintenance of internal security, enhanced control of the external borders, and restriction of the conditions for entry into the territory. Such an approach at the level of the member states has been further accomplished through the harmonisation of rules and practices at the level of the Community (Peers and Rogers 2002: 507).

In the early 1990s, the number of applications for asylum in the EU from the area of the former Yugoslavia, as well as from non-European countries, increased, particularly in the member states that provided protection in a larger proportion, in which there was better access to the labour market and various possibilities for integration. No less importantly, the differences between national asylum systems generated secondary movements of asylum seekers, from the member states with a lower level of protection toward the states which guaranteed better standards to asylum seekers. Consequently, the differences between asylum systems led to disruption of the notion of the allocation of burdens and responsibilities regarding the reception of refugees and asylum seekers among the member states (Guild 2002: 633).

The terrorist attacks on the USA in September 2001, in Madrid in 2004 and in London in 2005 further affected the development and implementation of the asylum policy at the national levels as much as at the level of the European Union. The member states adopted different restrictive security measures, which led to a restrictive interpretation of the right to access the asylum system and state territory.

At the level of the EU, the measures included the adoption of a series of initiatives and actions, and taking measures in the field of diplomacy, legislation, transport and finances (Peers and Rogers 2002: 535). As a consequence of restricting legal migration, illegal migration has been increasing: as estimated by the Europol, 500,000 illegal immigrants enter Western Europe every year, a certain number of which seek asylum.[3]

Public perception and citizens' attitudes towards asylum seekers and refugees in the European Union are far from positive, which also affects the restrictive public policies of asylum.[4]

The above analysis, albeit brief, allows the conclusion that the Europeanization of asylum policy has not been inspired by humanitarian considerations but by policies of the member states – to discourage and prevent asylum seekers to access state territories on the one hand and to process promptly and efficiently asylum applications on the other. The policy is an expression of the political will of the member states not to respect and apply international standards for the protection of refugees and human rights guaranteed by international treaties (Guild 2006: 650). However, recent activities of the European Commission and European Parliament to change the existing legal *acquis* on asylum are a positive step forward in the direction of granting a higher level of protection to asylum seekers and refugees (doc. 1.38).

4. PROBABLE FUTURE DECISIONS

While a general tendency toward reducing the number of asylum seekers has been clearly visible over the last several years, the UNHCR reports (doc. 1.03) show that, at the global level, in the period 2007-2008 there was an increase compared to the number of asylum applications in 2006, when the lowest number of asylum seekers in the last 20 years was recorded (307,000).

Europe, with approximately 290,000 asylum applications in 2008, remains the primary destination for asylum seekers. Compared to 2007, a 6 percent increase in the number of asylum applications was recorded in the area of the European Union (doc. 1.04). In 2008, 238,000 new applications were recorded, compared with 222,900 in 2007. In view of the fact that there are still many hot spots worldwide, such as Iraq, Somalia, Sudan and Afghanistan, which generate a huge number of refugees, the conclusion can be drawn that the number of asylum seekers in the period to come will show a trend of light increase, or of persistence of the existing level. In this respect, the issues of asylum and migration will remain at the top of the political agenda of the European Union and its member states.

[3] For more detail, see Broeders and Engbersen 2007.

[4] For more detail, see M. Canoy et al. 2006.

Regarding the development of a European asylum policy, the conclusion can be made that the European institutions will keep putting efforts into the building of the Common Asylum System and into harmonisation of national asylum systems, particularly in the direction of the establishment of a single procedure and uniform refugee status at the level of the entire Union. However, the question now arises to what degree the member states will actually harmonise their national asylum systems with the specified higher standards. Past practice of the member states has shown that there remains a long way before the full harmonisation of asylum systems, and this statement is supported by the example presented at the beginning of this paper.

5. TOWARDS THE EUROPEAN POLICY

The prerequisite of a fair, efficient and consistent public policy of asylum and migration is the political will of the member states to implement international and European standards of the protection of asylum seekers and refugees and the solidarity of the member states. We assume that such will of the EU member states is generated in the conditions outlined in Section 3.

Starting from this assumption and following the Policy Plan on Asylum of 2008 (doc. 1.35), the European Pact on Immigration and Asylum of 2008 (doc. 1.24) and the Stockholm Programme in the field of freedom, security and justice, we recommend that European minimum standards are adjusted to the public order goals and tenets of an EU policy outlined in Section 1.

It is essential to reduce the gap between the determinants of public policy at the level of the EU and their implementation at the national levels. Apart from the transposition of norms into national systems, the existence of practical measures for facilitating adjustment is also needed, such as creating funds for proper implementation of the policy, networks of professionals, and the adoption of best practices.

Because of the dynamics of migration movements, it is continuously important to keep a vigilant eye on, and evaluate outcomes of the decisions taken, and adjust the policy.

Even an appropriate asylum system will be of little importance if it is not accompanied by specific measures that allow for the possibility of access to the asylum system and protection in the EU territory. In order to deliver this purpose, changes in the policy of management of the external borders, which restricts access to the asylum policy in various ways, are necessary, so as to ensure full respect for the right to seek asylum.

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