



The European Union on the Path to a Common Asylum Law – Minimum requirements a European system designed for protecting refugees has to meet

The European Union (EU) currently is in a historic transitional phase. On May 1, 1999, the Treaty of Amsterdam became effective. By the year 2004 central sections of asylum and migration policy are scheduled to have become EU law, binding on all EU member states.

Until today only the Dublin Convention stipulates which member state bears the responsibility for checking the asylum application; a common European asylum law, however, has not been created yet. European asylum policy in the 1990s was marked, above all, by jointly undertaken measures to „raise the drawbridges“ ([Abschottungsmaßnahmen](#)) and a persistent negative attitude towards receiving refugees. The Dublin Convention does not guarantee that it is really a EU member state which is responsible for checking an asylum application. The EU-wide introduction of the term „Safe Third Country“ into the member states' national legal systems has increasingly undermined the protection of refugees. The armament of border authorities associated with Schengen, the Third Country practice, and the over 100 treaties laying down rules for turning back refugees, which have been signed with neighbouring countries as well as countries of transit and origin, pose a serious threat not only to the Non-Refoulment-Rule but are increasingly shifting the reception of refugees to non-EU countries.

The European Union is at a crossroads:
Either an open Europe or clinging to the strategy of
raising the drawbridges.

„The aim is an open and secure European Union, fully committed to the obligations of the

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Geneva Refugee Convention and other relevant human rights instrument, and able to respond to humanitarian needs on the basis of solidarity“.

(Presidency Conclusions, European Council, Tampere, October 1999)

The declaration made by the heads of state and government in Tampere is characterized by unmistakeable professions of supporting openness and transparency in the European Union, and of upholding human rights as well as the right to asylum.

Yet in practice the European Union continues to be a community specialized in raising the drawbridges when faced with refugees. Its manifest expression are the so-called EU „action plans“ concerning different countries of origin (Iraq, Afghanistan, Morocco, Somalia, Sri Lanka, and Albania/Kosovo).

These „action plans“ are meant to express a greater future coherence between EU domestic and foreign policy. In the part dealing with its concrete implementation, however, the well-known principle of European domestic policy is the determining factor: not a single word is lost about how a person seeking shelter can gain access to an asylum procedure within the EU. What it is all about is preventing flight, regionalizing the reception of refugees, raising the drawbridges (*Abschottung*), and the search for new ways of deportation.

To realize the claim to be an „open Union“ would be tantamount to a fundamental reorientation: a break with the strategy of raising the drawbridges and deterrence, as well as pulling down to a considerable extent the fortifications erected against refugees and migrants.

Protecting refugees is not a matter of quota: seeking asylum and immigration must be distinguished.

The European Union needs much more than 20 million new immigrants from non-EU countries in the next twenty years. The necessary debate on immigration will primarily be

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orientated towards the respective demographic and economic needs within the Union.

By contrast, the main concern of refugee policy is offering protection to persecuted individuals. Therefore, the protection of refugees, which is mandatory in international law, cannot be turned into a matter of quota. Protecting refugees is part and parcel of the universal protection of human rights and not something to be changed at the whim of politicians addicted to thinking in terms of profit or loss only. Human rights are clearly defined and juristically enforceable titles, which guarantee the individual the right to a life in human dignity.

Requirements a future European system designed for protecting refugees has to meet

PRO ASYL backs a common asylum and refugee law on the highest possible level. The following requirements for a future European system designed for the protection of refugees have to be fulfilled:

- 1) The right to asylum has to be guaranteed in a future EU Charter of Fundamental Rights.
- 2) In translating the Amsterdam Treaty's agenda concerning asylum policy into reality certain minimum requirements guaranteeing an effective protection of refugees have to be met.
- 3) The preservation of the fundamental right to asylum and the guarantee of legal protection are the best safeguards against the risk that the Federal Republic of Germany might not honour the obligations imposed on it by international law.
- 4) In the Federal Republic of Germany there is urgent need of action concerning the restrictive interpretation of the Geneva Refugee Convention and the European Convention for the Protection of Human Rights and Fundamental Freedom. The existing protection gap has to be closed, thus initiating a return to international standards of protection.

- 1) The protection of refugees has to be guaranteed in a future EU Charter of Fundamental Rights



At present, a convent acting on behalf of the EU heads of state and government draws up the draft of a Charter of Fundamental Rights. The European Council intends to proclaim this charter in December 2000. But the European Union will not do justice to its own claims by merely proclaiming its catalogue of fundamental rights. The future Charter of Fundamental Rights in its entirety has to become legally binding by including it in the EU Treaty.

There are some areas within the borders of the EU in which protection of individual rights and parliamentary control have only insufficiently been formed, in particular in the third pillar of police cooperation, but also for example with respect to the policies related to asylum and migration. However, fundamental rights must be valid and enforceable in all pillars of the Community Treaties. It would be absurd to continue to turn a blind eye to those aspects where infringements of fundamental rights occur especially intensely.

a) The Charter has to guarantee the right to asylum. The question as to what extent there will be a constitutionally enforceable right to asylum within the borders of the European Union is vital for the protection of refugees. Accordingly, in Tampere the European Council have committed themselves to base the future common European asylum law on „the full and inclusive application“ of the Geneva Refugee Convention. This passage has to turn up again in a Charter of Fundamental Rights.

b) There must not be any EU citizens who are excluded from the purview of the asylum law. An inadmissible geographical limitation of refugee protection would be a fatal model for countries outside the EU borders.

c) Protection against persecution has been a major legal advance in the system of the universal protection of human rights since 1948. Refugee law developed in the face of various forms of state antagonism. The Geneva Refugee Convention has justly been called the Magna Carta of refugee law. All member states of the European Union have signed the Geneva Refugee Convention of 1951 and the Supplementary Protocol of 1967. By doing this they accepted without reservation the definition of refugee contained in it. The universal and unlimited purview of these international means for protecting refugees has repeatedly been

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stressed by the international community.

d) The unconditional observance of the Non-Refoulment-Rule in accordance with article 3 of the European Human Rights Convention and article 3 of the United Nations Convention against Torture have to be laid down in the Charter, too.

2) In translating the Amsterdam Treaty's agenda concerning asylum policy into reality certain minimum requirements guaranteeing an effective protection of refugees have to be met.

a) Definition of the term „refugee“

Article 63, paragraph 1, letter c: „minimum standards with respect to the qualification of nationals of third countries as refugees“

We demand:

a1) A consistent application of the Geneva Refugee Convention must be the starting point and not the final phase of a harmonization policy. Yet the guideline for „reaching a degree of consensus with respect to the rules for the adjudication and the criteria for granting refugee status“ [Arghh!, the translator] is scheduled for as late as April 2004.

a2) At present, a great part of the **de facto** refugees in the EU is kept from the protection they are entitled to under the Geneva Refugee Convention. Against the background of widely differing recognition procedures in the respective EU member states the refugee's decision to choose a certain country of refuge may fairly be described as a choice the outcome of which is determined by pure chance.

a3) The EU ought to accept the resolutions adopted by the Executive Committee for the program of the UNHCR as minimum standards. The current legal interpretation put forth by some EU member states is not based on the Geneva Refugee Convention at all and contradicts the view expressed by the UNHCR. The interpretation of the definition of „refugee“ in the treaty has to take into account all forms as well as all perpetrators of

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persecution. A future EU instrument for harmonizing the definition of „refugee“ must make clear that asylum applications putting forward persecution through non-governmental agents are within the scope of the Geneva Refugee Convention. In addition, persecution may take on specific shapes, including sexual violence against women. Furthermore, the definition of „refugee“ does not exclude those persons seeking shelter who are exposed to danger of life and limb in a country where the state authority has collapsed.

b) Complementary forms of protection

Article 63, paragraph 2, letter a: „minimum standards for ... persons who otherwise need international protection“

We demand:

b1) The correct application of the Geneva Refugee Convention once again has to be the starting point with respect to „subsidiary, respectively, complementary protection.“

b2) „Complementary protection“ has to be granted to persons who, although not within the scope of the Geneva Convention, are protected from deportation by means of international treaties, such as the European Convention of Human Rights or the United Nations Convention against Torture.

b3) Establishing an answer to the question whether asylum seekers are refugees under the Geneva Refugee Convention or under the rules relating to „complementary protection“ has to be safeguarded by a uniform procedure.

b4) A secure status and social rights in accordance with the Geneva Refugee Convention have to be guaranteed for those persons who seek shelter.

c) Temporary protection / Emergency measures

Article 63, paragraph 2, letter a: „minimum standards for giving temporary protection to



displaced persons from third countries who cannot return to their country of origin ...“

The instrument of „temporary protection“ – originally intended to cope with situations of mass flight – was abused in the past so as to evade the Geneva Convention.

We demand:

c1) The use of this instrument has to be restricted to cases of war and emergency in which it is impossible to set up an individual asylum procedure at short notice. Ensuring effective protection and a coordinated reception of refugees should be arranged in consultation with the UNHCR and human rights organizations.

c2) Its basis has to consist of measures intended to help evacuate people, and (for those who have to flee spontaneously) the possibility to enter the EU without restrictions concerning visa, „Third Country“ practices, or border measures undertaken to deter refugees.

c3) Refugees have to be granted rights modelled on the Geneva Refugee Convention, in particular the right to re-unite their families, the rights to habitation, work, education and to unrestricted access to health services.

c4) Refugees have to have the opportunity to file an asylum application at all times.

d) Article 63, paragraph 2, letter b: „promoting a balance of effort between member states in receiving and bearing the consequences of receiving refugees and displaced persons“

We demand:

Sharing responsibility between the European countries must not be based on a bureaucratic assignment and redistribution but has to take into consideration the individual interests and, in particular, the family concerns of those who seek protection. It would be more reasonable and humanitarian, and less expensive, to develop a system of financial adjustment within the framework of the European Refugee Fund on EU level instead of (re)distributing refugees.



e) The Dublin Convention

Article 63, paragraph 1, letter a: „criteria and mechanisms for determining which member state is responsible for considering an application of asylum submitted by a national of a third country in one of the member states.“

We demand:

e1) Any agreement substituting the Dublin Convention has to be drafted in such a way as to really guarantee the checking of each asylum application within the borders of the European Union.

e2) The European Union ought to suspend the rejection and subsequent sending away of refugees to so-called „safe third countries.“

e3) The member states hoped that a fairer sharing of responsibility might be achieved by means of the Dublin Convention. This desired effect has not come to pass. In this context, too, it would be more humanitarian and less expensive to develop a system of financial adjustment on EU level instead of (re)distributing refugees.

Ad hoc measures until the substitution of the Dublin Convention

e4) In the meantime, the Convention ought to be translated into practice in a flexible and decent way in the interest of asylum seekers by applying the self-entry clause ([Selbsteintrittsklausel](#)) as well as the humanitarian clause. In order to reach this goal practical guidelines ought to be worked out as quickly as possible. Regarding the preservation of the unity of family, no obstacles or excessively narrow criteria for determining a person's belonging to a family ought to be used. A wide definition of the term „family“ ought to avoid the separation of family members.

e5) Any asylum seeker waiting for a decision has to be granted, first, social rights that have not been provided in the Dublin Convention, and, secondly, the right to lodge an appeal with

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staying effect (ein Recht auf Einlegung eines Rechtsmittels mit aufschiebender Wirkung) against the decision to transfer his application to another member state.

f) Minimum standards for an asylum procedure:

Article 63, paragraph 1, letter d: „minimum standards on procedures in member states for granting or withdrawing refugee status.“

We demand:

f1) A common European asylum law must guarantee that each asylum application is individually checked in court and each applicant enjoys legal protection (the right to have checked any administrative decision with staying effect). There must not be laid down any clauses that exclude certain groups of persons.

f2) The guiding principle of the Non-Refoulment-Rule implies that access to an asylum procedure and the actual appropriateness of national asylum procedures for ascertaining the refugee status have to be guaranteed. The people involved in deciding on the applicant's lot at an independent administrative body have to be well-versed in international refugee law and human rights protection. All asylum seekers have to be referred to this administrative body, which is concerned with questions related to asylum.

f3) Asylum seekers have to be granted the right to consult a lawyer and a translator as well as to contact the UNHCR during all phases of the procedure.

g) Reception conditions of asylum seekers

Article 63, paragraph 1, letter b: „minimum standards on the reception of asylum seekers in member states“

We demand:



f1) International protection does not only comprise the refugee's safety but also the organization of his/her social environment in accordance with human dignity. Special laws for asylum seekers that bear the stamp of stigmatization and discrimination violate human dignity and have, consequently, to be excluded from the future EU minimal standards.

f2) Reception conditions safeguarding a suitable living are a precondition for correct and efficient asylum procedures. Asylum seekers have to gain access to education – including language courses and vocational training; in addition, they must be granted a permission to work. The access to the full range of health services, including a special treatment for torture victims as well as the treatment of traumata, has to be guaranteed. Children seeking asylum need the same rights as other children living in the country of reception.

3) The preservation of the fundamental right to asylum and the guarantee of legal protection are the best safeguards against the risk that the Federal Republic of Germany might not honour the obligations imposed on it by international law.

The fundamental right of asylum and the guarantee of legal protection (article 19, paragraph 4 of the Constitutional Law of the FRG) serve the purpose to make sure that the applications for asylum to be processed by the Federal Republic of Germany are checked in an effective, constitutional, and fair legal procedure. This is no obstacle to the European harmonization of procedural law.

4) In the Federal Republic of Germany there is urgent need of action concerning the restrictive interpretation of the Geneva Refugee Convention and the European Convention for the Protection of Human Rights and Fundamental Freedom. The existing protection gap has to be closed, thus initiating a return to international standards of protection.

4a) On account of its too narrow concept of „refugee“ the Federal Republic of Germany cannot live up to the provisions and obligations imposed by international law. The official German interpretation is at odds with the interpretation of the Geneva Refugee Convention in the majority of EU countries. Refugees from disintegrated countries like Somalia and



Afghanistan are still denied the protection as refugees, which they are entitled to, because of the restrictive interpretation of the Geneva Refugee Convention. British courts have repeatedly classified Germany as an unsafe country of asylum, claiming that non-governmental reasons of persecution have not been taken into account there when checking the refugee status according to the Geneva Refugee Convention. In Belgium, Denmark, England, Finland, the Netherlands, Austria, Portugal, and Sweden, refugee status is also granted if persecution measures are undertaken by non-governmental agents. Even in France and Italy, countries that have adopted a similarly restrictive stance as Germany has, the factual interpretation of law is far more liberal.

4b) The Federal Republic of Germany has also isolated itself in the interpretation of the European Convention of Human Rights. The jurisdiction of the Federal Administrative Court is in calculated contrast to the European Court of Human Rights. As in the case of asylum law, the threat to the refugee is required to emanate from a functioning state authority.

Ad hoc measures:

4c) The following sentence is appended to §51, par.1 of the Alien Act: „The status of refugee cannot be denied by claiming that there is no unchallenged state (or statelike) power guaranteeing order“.

4d) §53, par.4 of the Alien Act has to be phrased as follows: „An alien must not be deported as far as it follows from the application of the Convention for the Protection of Human Rights and Fundamental Freedom of 4th November 1950 (BGBl. 1952 II page 686) and the jurisdiction of the European Court of Human Rights that a deportation is unlawful“.

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Faltblatt (deutsch)

siehe auch: [Asylpolitik in der EU – Tagung 1. – 3. September 2000 in der Evangelischen](#)

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