Reconciling the *acquis* of the European Union concerning asylum and the international standards for the protection of human rights: some challenges for the candidates to the EU enlargement

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European Union members have considered harmonisation of norms and policies concerning forcible migrations necessary to avoid undesired effects of the internal market. Although not all of members take part in the same way in the related *acquis*, nor is it strengthened yet, the principle of taking over the EU *acquis* concerning asylum was established with associated states since the beginning of negotiations[1]. From the EU point of view, one of the main purposes of negotiations was to ensure that candidate countries would conform their internal legislation to the EU *acquis* and that they would be able to conform to all of the obligations established by the Community legal order in the future.

At the present moment, the Justice and Home Affairs chapter of negotiations, that includes asylum among other related subjects (Chapter 24), has been provisionally closed with ten candidate countries for EU enlargement. In November 2001, it has been closed with Hungary; in December 2001, with the Czech Republic, Cyprus and Slovenia; in March 2002, with Estonia and Malta; in April 2002, with Lithuania and; in June 2002 with Latvia and Slovakia. Finally, in July 2002, the chapter has been provisionally closed with Poland (European Commission (2002): 2). Now, the Justice and Home Affairs chapter is still open and under negotiation with Bulgaria and Romania (European Commission COM (2002) 700 final: 95).

Central European and Eastern EU enlargement involves economical and political advantages for both the candidate states and the fifteen EU members. Nevertheless, the EU considers Central and Eastern Europe as "sources of trouble and instability", which is frequently "articulated in terms of concerns about migration"

(Collinson, 1999: 13-14)[2]. Although EU countries have economical and political interests in Central and Eastern enlargement, and even a 'moral obligation' to respond to the expectations of countries whose people share the same cultural tradition, institutional problems and political balances could frustrate their prospects[3].

The enlargement process takes place at the same time that the European integration model "is challenged by a context of globalisation in which increased transnational integration go beyond the forms of continental integration" (Laffan *et al.*, 2000: 5-6[4]). The process of enlargement introduces "additional pressures" (*ibid.*: 5) for defining the way for further progress in the dynamics of European integration, since it will "greatly enhance the diversity within the Union" (Zielonka, 2000: 152). Nevertheless, it is undeniable that the problem of the limits of the EU transcends this single question.

Migration flows of all kind are increasingly impossible to be controlled and, consequently, political units and states lose their capacity to determine the identity of their components. The increasing globalisation challenges the European integration and the forecasted enlargement simply makes it more pressing to find the way to go on. Beyond law or politics, those issues influence the identity of the community (Schimmelfenning, 2001: 165-186[5]) and the sense of belonging of people (Weiler, 1999: 324-356; 2000: 235-247). And, consequently, questions of access to territory, migrations, even forcible, and seeking for asylum are viewed as serious threats. In this context, asylum confronts the 'universalistic' approach of international protection of human rights with the conservative and 'particularistic' approach.

This chapter is divided into three main parts. Firstly, it has been considered interesting to analyse in figures the evolution of the asylum seeker's arrival in European candidate countries in order to determine comparatively with EU countries, perceived tendencies. This analysis is based on available data from UNHCR for seven Central European countries: Bulgaria, the Czech Republic, Hungary, Poland, Romania, Slovakia and Slovenia. Those countries consist of almost all the territory bordering the current Eastern frontiers of 'Schengen space', also called the 'sanitary cordon' of EU towards migration. Taking into account that the EU system of

'responsibility' of states to take charge of asylum seekers relies on their actions, allowing those particular kind of migrants to enter the territory, and on their lack of efficient control at the borders, to examine the evolution of data in those seven countries can give guidelines for the assessment of the dimension of questions to be dealt with afterwards.

Secondly, this chapter will focus on the EU *acquis* concerning asylum, to point out some current or potential inconsistencies with international standards for the protection of human rights. Finally, before trying to bring some conclusions forward, it will analyse how legislations of these seven Central European associated countries bordering 'Schengenland' have conformed to the EU *acquis* concerning asylum, and whether it is possible to enhance in this context the protection of refugees and asylum seekers in an enlarged EU.

Asylum seekers and refugees by numbers. The perception of a threat to internal security arising from the supposed increase of asylum applications in the European Union and in Central European candidate countries

Freedom of movement, asylum and the security paradigm

Freedom of movement of people has been built in the EU starting from the idea that lack of controls at the internal borders, must be counterbalanced by the transfer of devices for control at the external frontiers of the 'new geographical space' formed by the territory of all member states. This kind of system entails both solidarity and harmonisation of norms and political standards on migration in general, also in the asylum field, and it involves that countries on the outskirts become responsible for the security of the whole (Labayle, 1997: 931). In contrast with this underlying assumption, globalisation erodes the capacity to control trans-border flows and to maintain forms of excluding territorial-based authority.

However, for internal reasons, the establishment of internal market and, for external reasons, globalisation allowing easier migration flow, EU frames Immigration

and Asylum Policies in a realistic 'security paradigm', where threats caused by immigration and vulnerability are treated as objective facts. In the EU system, established rules go further beyond the 1951 Geneva Convention dispositions allowing for security interests of asylum countries (Hathaway and Harvey, 2001: 259-262). This perspective entails "focus on border controls rather than individual rights and freedoms, and lack of differentiation between genuine refugees, bogus asylum seekers and illegal immigrants" (Lavenex, 2000: 17).

Perceived threat to security and related commitment of states to maintain stringent border controls "lead them beyond the outer frontier of EU into a virtual outward projection of borders" (Kostakopoulou, 2000: 511). According to Kostakopoulou, three key aspects of the Union's migration policy reflect this approach based on this perception of security threats and explain the shift in operational strategies. First of all, the management of migratory flows, forced or voluntary, is deemed to require the maintenance of the migration pressure "at source". Second, it is considered necessary to obtain a more efficient management of migration flow 'at all their stages', that is, to construct a "model of concentric circles of migration". Firstly, the 'circle' of Schengen members; secondly, the 'circle' of associated bordering states, which would be *de facto* obliged to conform its own migration policies with the first circle standards; thirdly, states of the former Soviet Union and North-Africa, which will have to focus on transit and illegal immigration networks; and, fourthly, the Middle East states, China and Africa, who would be obliged to co-operate with the aim of combating 'push' reasons of migratory flows[6].

Finally, the third feature of migration politics in EU would be "the formulation of an overall concept of control of legal entry aimed at shifting the focus from illegal apprehension after entry to deterrence before entry" (Kostakopoulou 2000: 511-514).

Political and normative strategies at EU level show these features, because it is supposed to exist objective reasons to fear for problems of internal security of states due to uncontrolled flows of migrants 'abusing' asylum procedures.

From the EU point of view, enlargement is perceived as an additional reason to fear for potential increase of those migratory flows. Policies of free movement and, in general, questions concerning migration, which in practice merges with asylum protection, reflect this perception which is not proved by figures. If this is true, the level of protection of refugees is in danger of decreasing even more by the exportation of European Union standards to Central European candidates. For this reason, it is opportune to have a quick look at figures to assess whether the internal security of the EU could be in danger due to enlargement.

Asylum seekers and refugees in the candidate states by numbers

In general, figures on applications for asylum show that Central European candidate states have had to manage with an increasing number of demands for protection since the early nineties. In the case of Hungary, for example, several important increases occurred during the last decennia, in 1990[7], and also after each one of the main crises in the Balkan zone (Nagy, 2002: 146-153). Furthermore, from 1998 to last data, on 2001, it receives around ten thousand applications per year (Appendix: Table 3).

The number of asylum applications submitted in the seven Central European countries considered has multiplied by six from 1990 (5,760 demands) to 2000 (34,877 demands); and, in 2001 (46,590 demands), the number is almost twice high as it was in 1999 (26,771 demands). Although from 1999 to 2001 the number of asylum applications has increased in 74.03%, it seems that at the present moment the overall number is becoming stable (comparison between number of applications in January-February of 2001 and 2002 does not show any outstanding difference) (Appendix: Table 8).

The steadily increasing number of applications, on the other hand, affects Central European countries in different ways. Considering the absolute and relative (applications per thousand inhabitants) numbers, for example, Slovenia was the most affected country by the increasing asylum applications in 2000. Despite being the sixteenth in absolute numbers, it was the first in relative numbers, as regards the rank

of twenty-nine industrialised countries including the seven Central European countries and all the EU members (Appendix: Table 7 and 10).

The progression of applications in each of these countries differs from others. For example, for different political, historical and geographical reasons, Hungary, Poland and the Czech Republic, by this order, receive the majority of asylum applications from 1990 (from 1991 in the case of Poland) (Appendix: Tables 3, 4 and 2). By contrast, in the case of countries that do not share territorial borders with the European Union, like Romania and Bulgaria, the number of asylum applications only reaches significant figures from about 1997 in the first case, and from about 1998-1999 in the second case (Appendix: Tables 5 and 1). Alternatively, it is noteworthy that in the last two years, those two countries have increased the number of asylum applications nearly at the same rhythm as the others (74.70% from 2000 to 2001 in the case of Romania, and 79.90% from 1999 to 2001 in the case of Bulgaria) (Appendix: Tables 5 and 1).

In this sense, one of the most significant case is the Czech Republic which received in 2001 twice asylum applications as in 2000. In this country, from 1999 to 2000 figures increased 150 % (Appendix: Table 2). This fact can hardly be exclusively explained by supposed political disturbances entailing persecution and, consequently, ensuing flows of refugees from countries next to Czech Republic borders. In 2001, the majority of asylum seekers came from Ukraine (4,398), Republic of Moldova (2,454), Romania (1,839) or India (1,304) (Appendix: Table 11).

Would enlargement inevitably suppose increasing figures on asylum seekers in the EU?

Without judging the merits of such applications of asylum, it is possible to reckon from numbers that those particular kind of migrants try to come closer to economical and political prosperous zones and, from this perspective, the Czech Republic is a geographically privileged country because it shares the majority of its borders with two flourishing EU countries, Germany and Austria. Concerning Austria, this state shares

borders with four candidate countries and some of its main economic centres are located close to those borders, for example, Vienna and Linz[8].

Political repression amounting to flows of refugees increasingly merges with poverty, economical instability and lack of future perspectives of well-being for people and, as a result, it is not rare that, seriously fearing persecution or ill-treatment in their countries of origin, asylum seekers look to settle in countries where they will have the most chances of being 'safe' from all points of view.

Furthermore, figures show that Central European countries candidates to EU enlargement have been and, in general, still can be considered 'transit states' for forcible migration. Figures on applications closed on grounds 'other' than recognition of refugee or other humanitarian status and rejections, allow the presumption that a large number of applicants travel to another country with the purpose of seeking protection and, consequently, desert first procedures (Appendix: Tables 1-8 *E*). Some scholars have pointed out that the general inefficiency of administrative systems due to their lack of adequate means may contribute to this high number of desertions as well (Bouteillet-Paquet, 2001: 350).

For example, figures for 1997 and 1998 concerning Poland (Appendix: Table 4 E), and for 1999 concerning Hungary (Appendix: Table 3 E), the Czech Republic (Appendix: Table 2 E), Slovakia (Appendix: Table 6 E) and Slovenia (Appendix: Table 7 E) prove that each year more than fifty percent of applications submitted are closed without a decision on the merits. On the top of this phenomenon, in 1999, in the Czech Republic this figure reached 97.6 percent (Appendix: Table 2 E)[9].

On the other hand, figures give the impression that some of those countries would be reversing the tendency of being states 'of transit' to target countries for refugees, for example, in the case of Poland (Appendix: Table 4; European Commission SEC (2002) 1408: 116), or in less measure, in the case of Hungary (Appendix: Table 3) or Romania (Appendix: Table 5)[10]. In this sense, pre-accession instruments financed by the European Community to assist Central European countries in their preparations for joining the EU could support this tendency.

Moreover, the comparative examination of figures concerning asylum applications in the European Union members and in the seven Central European candidates considered (Appendix: Tables 8 and 9), illustrates that the progressively lower number of submissions for asylum in the EU from 1992 has been relatively compensated by increasing demands in Central Europe. In this sense, as a free zone for seeking asylum, EU borders have already moved to the West, without increasing the absolute number of applicants (Appendix: Tables 12 and 13). On the contrary, it seems that in a European enlarged space tendencies do not permit a realistic forecast enhancement of 'flows' of unlawful refugees.

EU law-*acquis* concerning asylum and refugees interpreted in the light of international standards of refugees and human rights

Theoretical framework of political strategies in the asylum field

Policies concerning asylum and the international protection of refugees can be regarded from two abstract models. Scholars have used different words to refer to them but, in general terms, it is possible to identify the "realist frame of internal security", which focuses on the efficiency in controlling borders, almost without distinguishing between asylum seekers and 'illegal' migrants; and the "liberal frame of human rights", which, by contrast, gives priority to the protection of individuals from a humanitarian perspective (Lavenex, 2000:6). Putting the accent on related questions, other authors have called those two opposite ideal models 'universalism versus particularism', dichotomy that explains the tension between calls for 'inclusion' from the point of view of systems of international/collective protection, and calls for 'exclusion' from the point of view of a restricted host community with limited resources (Noll, 2000:75-82).

Current results of the harmonisation of policies concerning asylum at European level show that normative strategies are leading to a process of location away 'responsibilities' of states, with regard to asylum seekers. Asylum policies, having

in mind the special protection of human rights in specific situations of vulnerability, become 'subsidiary' towards policies of migratory control, starting from a defensive conception of a settled community. In other terms, "normative provisions of the European refugee regime tend to weaken the individual states commitment under the international refugee regime in so far as they establish a system of redistribution, which diffuses responsibility and blurs accountability among the participating states" (Lavenex, 1999:165).

From the beginning, the purpose and development of the harmonisation of policies concerning asylum and refugee law in the European Union was linked to the creation of a single market and, to the perceived necessity of common control of external borders. Nevertheless, what was first presented as a technical necessity has turned out to be a political choice and has given EU countries "an opportunity to re-conceptualise refugee flows as irritants to coordination, and to pursue with impunity generalised policies of deterrence" (Hathaway, 1993:734).

As some scholars have pointed out, there are problems for the conciliation between those different perspectives in the European context ─

> "In all, the Union's *demos* is controlled, yet undefined. This entails a number of consequences. In the absence of a pre-established balance between universalism and particularism, the latter remains unchecked and tends to colonise the former. In accordance with the present self-interest of member states, particularism translates into co-ordinating policies of exclusion, while little or no co-ordination is taken place on inclusion. The prevalence of control carries with a considerable risk of simply externalising the *demos* problem: Where real or potential asylum-seekers simply do not reach the territories of member states, or, once there, vanish in illegality, the visibility of inclusion demands fades away. Together with the universalist perspective, human rights considerations risk to disappear in discourse" (Noll and Vedsted-Hansen, 1999: 362).

The EU approach to the asylum subject in the Justice and Home Affairs area

European Union strategies for the harmonisation of policies concerning asylum cover a plurality of norms formally and substantively heterogeneous among them. In general, it is possible to distinguish between instruments of deterrence for asylum seekers depending on the time they work. Some provisions aim to avoid even the exit from the country in which persecution could take place, as in the case of generalisation of visa requirement, or the establishment of carrier sanctions. Other instruments enhance difficulties of entering a EU member territory or having access to complete and fair proceedings able to examine demands for asylum. For example, procedures of pre-screening at the border or accelerated procedures, when authorities use in their implementation concepts of 'safe third country', 'safe country of origin' or 'demand manifestly unfounded' without enough guaranties. Finally, it is possible to identify provisions for avoiding making it attractive for 'illegal immigrants' to ask for asylum in EU countries, therefore, reducing procedural guaranties for people being recognised as refugees or accorded protection otherwise.

Measures of the first and second kind have also been considered to be "deflection policies", and, among them, the latter, namely, 'non admission policies' based on the notion of 'protection elsewhere', have been considered likely to affect neighbouring EU states candidates to enlargement the most (rather than 'policies of non arrival' which tend to contain potential asylum seekers in their region of origin) (Byrne *et al.* 2002: 15).

Nearly all these political strategies and normative measures can be analysed from the point of view of their accordance with international standards for the protection of refugees and human rights. Nonetheless, this chapter will only focus on one specific question arising from this *acquis* in relation to the definition of possible beneficiaries of the 'refugee statute'.

The Dublin Convention, light and shade

The Dublin Convention, an instrument of "negative integration" (Peers, 2000: 3-7 and 111), establishes that only one member state would be required to examine every application for asylum presented in one part of the territory of the whole EU (Dublin Convention, 1991)[11]. The system was constructed on the fiction that an asylum application is submitted once for all EU members, whose territory becomes only one geographical and political space for the purposes of the Convention. The authorities of EU members, in principle, recognise the validity of negative decisions taken in respect of asylum seekers by the other authority's countries, in application of a non-explicit principle of mutual recognition of norms and procedures of implementation of the 1951 Geneva Convention. In this sense, a negative decision in one member state "would be valid for all member states and relieve the others of their international commitments to determine an application for protection" (Guild, 2002: 1). Asylum applications, consequently, will be examined in only one of the states according their own national regulations and procedures, which are neither common nor still harmonised to guarantee the same chances to be recognised as 'refugee' or to obtain the same kind and level of protection[12].

The state whose authorities have to examine in each case asylum applications is identified according to certain rules named of ascription of 'responsibility', essentially based on direct or indirect contribution of the factual presence of asylum seekers in the territory of the whole EU. Asylum seekers, in exchange, obtain the guarantee that almost one of the states taking part in the Dublin Convention will effectively examine their request for shelter. In this sense, the system would preclude for participating states what are known as 'refugees in orbit' (Jong, 1993: 189)

To guarantee fair results and success, such a machinery of redistribution of taking full 'responsibility' for asylum seekers should be based on shared minimum standards, like 'who' deserves protection. In this sense, the Dublin Convention starts with a definition of 'applicant for asylum' as a foreigner who has made a request whereby "seeks from a member state protection under the Geneva Convention by

claiming refugee status within the meaning of Article 1 of the Geneva Convention, as amended by the New York Protocol"[13].

Taking into account that it was not a single interpretation of the meaning of the term 'refugee', whose definition is included in article one of the Geneva Convention and, aiming at assuring a common interpretation of this definition by the EU member states, it was adopted on 4 March 1996 a *Joint Position on the Harmonised Application of the Definition of the Term 'Refugee'* in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees (Council of the EU, 1996). This normative instrument is not legally binding for the EU states but it is still trying to indirectly guarantee that they would conform their norms and practices to its content[14].

The Joint Position does not resolve the ambiguities concerning one of the main practical problems of the definition of the term 'refugee', that is, what can be the source of 'persecution' for qualifying as refugees victims of 'well-founded fear' of suffering it[15]. Some restrictive interpretations have held that 'persecution' in the sense of the Geneva Convention only can be understood as being exercised by the state, state agents, or with the connivance of state.

There are essentially two different approaches to the meaning of 'persecution' under the Geneva Convention. According to the 'accountability theory' one conduct can only amount to persecution within the meaning of article 1 of the Geneva Convention if a state can be regarded as accountable for it. According to the 'persecution theory', individuals are entitled to protection as refugees "if not given protection against persecution in their own country, irrespective of whether this is due to a lack of power in the state or due to encouragement or toleration of the persecution by the state" (Lord Hutton, UK-House of Lords, 2000: 219).

The Office of the United Nations High Commissioner for Refugees addressed this question in his *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*. As the UNHCR has said, although persecution is normally related to the action of the national authorities —

> "It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned (…). Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection" (UNHCR Handbook*,* 1992: paragraph 65).

Concerning 'Persecution by third parties', paragraph 5.2 of the Joint Position establishes by contrast that ─

> "Persecution by third parties will be considered to fall within the scope of the Geneva Convention where it is based on one of the grounds in Article 1A of that Convention, is individual in nature and is encouraged or permitted by the authorities. Where the official authorities fail to act, such persecution should give rise to individual examination of each application for refugee status, in accordance with national judicial practice, in the light in particular of whether or not the failure to act was deliberate. The persons concerned may be eligible in any event for appropriate forms of protection under national law" (Council of the EU, 1996: paragraph 5.2).

This weak compromise reveals a restrictive interpretation of the concept of 'persecution' in connection with 'who' can be the agents whose actions can conform to it in the EU, and has been criticised by the UNHCR as inconsistent with an accurate understanding of the text of the Convention (UNHCR, 1996: paragraph 5).

In the European context, this 'common minimum standard' of interpretation can hamper and pervert a fair application of national rules regulating the recognition of the refugee quality. Firstly, diverging interpretations of the refugee definition turn

into an 'unfair' implementation of the Dublin Convention to make use of its criteria, in order to transfer an asylum seeker having submitted an application for asylum in a country applying a 'broad' interpretation, to another country applying a 'restrictive' interpretation. The 1951 Geneva Convention establishes the 'non-discrimination principle'[16], which could be violated if states take into account the itinerary followed by asylum seekers before arriving in the host country solely with the aim of excluding taking charge of them and examining their applications[17]. Furthermore, there is a risk of 'indirect' breach of article 33 of the Geneva Convention as "for a country to return a refugee to a state from which he will then be returned by the government of that state to a territory where his life or freedom will be threatened will be as much a breach of article 33 as if the first country had itself returned him there direct" (Lord Hobhouse of Woodborough, UK-House of Lords 2000: 225).

Secondly, to transfer asylum seekers from one to another EU countries, where standards of protection are different, could also be contrary to the states duty not to remove persons under their jurisdiction when those persons could suffer in the country of destination inhuman or degrading treatment forbidden by article 3 of the 1950 Roma Convention[18]. As the European Court has interpreted it, article 3 provides an 'absolute' kind of protection, which extends to situations where the danger emanates from persons or groups of persons who are not public officials (for example, ECHR Judgement (1996) *Chahal*: paragraphs 79-80; ECHR Judgement (1997) *HLR*: paragraph 40), or even from consequences to health due to serious illness (for example, ECHR Judgement (1997) *D*: paragraph 49).

The EU *acquis* in the field of asylum versus the European public order

Problems of full respect of the 'European public order' arise from combining protection afforded by the 1951 Geneva Convention and the 1950 Rome *Convention for the protection of Human Rights and Fundamental Freedoms*. The main issue here is whether contracting states can be considered responsible for the violation of the latter instrument when removing an asylum seeker to another contracting party, in case of

the authorities of this second one do not recognise as deserving refugee status persons 'persecuted' by non-state agents. In this case, asylum seekers risk being returned to the country of origin where they would face real risk of ill treatment. The European Court of Human Rights was forced to face this kind of problem in March 2000 in the affair *T.I versus the United Kingdom*.

The facts of the affair referred to the decision of Britain's authorities to transfer an applicant for asylum to Germany following the criteria established by the Dublin Convention, which had been included in the domestic legislation of the United Kingdom. The applicant, Sri Lanka national, feared to be submitted to treatments contrary to article 3 by agents whose actions were not attributable to the state, if German authorities, who had refused to concede him asylum, implemented removal directions already issued to his country of origin. In this case, the European Court said that ─

> "The Court finds that the indirect removal in this case to an intermediary country, which is also a Contracting state, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where states establish international organisations, or mutatis mutandis international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting states were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attributions" (ECHR Admissibility Decision 2000: 456-457).

In this affair the European Court solved the 'principle question' about obligation of states whose actions constitute only a "link in a possible chain of events which might result in a return to a country where a real risk" of treatment contrary to Article 3 exists. According to the European Court judgement, those states must consider not only direct consequences of their acts or failure to act but also "indirect consequences". Contracting parties must assure their schemes would not lead, even indirectly, to violations of Article 3 of the 1950 European Convention and, therefore, that they would not be accomplice to such a violation. Nevertheless, this does not imply that states are obliged not to transfer asylum seekers to another country where they will have less chances of success in their demand to obtain protection.

In fact, when applying the Dublin Convention criteria, EU states do not make substantive analysis of the applications submitted by foreigners. They only entrust another country to examine the application on the basis of a previous assumption that it will implement its obligations under the 1951 Geneva Convention in good faith. This include a range of different responses, all of them considered equally valid, independently of whether the other country will apply exactly the same interpretation or the same high standard of protection as the transferring state.

In the *TI* case, the European Court considered that "the apparent gap in protection resulting from the German approach to non-state agent risk" was met, "to at least some extent", by some provisions of the domestic legislation concerning protection of persons facing risk of life, and by the assurances given by the German authorities concerning its domestic law and practice. Finally, the Court stated that the application was inadmissible by a majority of votes and thus, that the possibility of a final removal to Sri Lanka in breach of Article 3 of the Convention was not "sufficiently concrete or determinate" in the circumstances of the case (ECHR Admissibility Decision, 2000: 459-460).

Moreover, bearing in mind the forecasted substitution of the Dublin Convention by a European regulation (after the Amsterdam Treaty was enforced), it is noteworthy that, the European Court has regarded the responsibility of member states concerning the European Convention to "continue" even after a transfer of

competences to international organisations, like in the case of the European Communities (ECHR Judgement, 1999: paragraph 32).

The EU *acquis* in the field of asylum versus the general international principles of the protection of human rights and refugees

Although applying criteria for distributing responsibility of taking charge of asylum seekers, even when not sharing the same interpretation of 'refugee', is not contrary *per se* to the 1950 European Convention[19], some national courts have considered that the application of procedural criteria like 'third safe country' could be contrary to an accurate understanding of the Geneva Convention. In particular, in case of the otherwise considered 'safe' country holds different standards of protection as a result of the particular interpretation of the 'refugee' concept it applies.

In the United Kingdom, the Court of Appeal had to decide in 1999 whether the Secretary of State was entitled to treat France and Germany as 'safe third countries' because of the risk of indirect *refoulement*. It was about asylum seekers who asserted a fear of persecution by non-state agents in their country of origin where the state was not accomplice in the alleged persecution. The statutory conditions to be satisfied for removal to 'safe third countries' were ─

> " (a) that the person is not a national or citizen of the country or territory to which he is to be sent; (b) that his life and liberty would not be threatened in that country or territory by reason of his race, religion, nationality, membership of a particular social group, or political opinion; and (c) that the government of that country or territory would not send him to another country or territory otherwise than in accordance with the Convention" (Section 2.2 UK Asylum and Immigration Act, 1996).

Both states, France and Germany, share with the United Kingdom the same relevant international instruments with regards to the recognition of refugee status. All EU member states are parties in the 1951 Geneva Convention and in the 1969 Vienna *Convention on the Law of Treaties*, and they should also consider the UNHCR Handbook on Procedures and Criteria and the European Union Joint Position of 1996. Nonetheless, their courts hold different approaches than those of the United Kingdom concerning persecution by non-state agents.

With little differences among them, German and French courts subscribe the 'accountability theory', according to the types of case in which a claimant might obtain refugee status under the Geneva Convention are limited to situations where the state can be considered accountable for the persecution. If persecution is attributable to non-state agents, it must also be shown that it is 'tolerated', 'encouraged' or that the state is 'unwilling' to offer protection against it. The German courts hold that the Geneva Convention is not relevant when even there is no effective state authority, so, in case of civil war or 'failed states'.

In the case *R versus Secretary of State for the Home Department, ex parte Adan; idem, ex parte Subaskaran, and idem, ex parte Aitseguer,* decided on 23 July 1999, the United Kingdom Court of Appeal started the argumentation with an interesting distinction of principle between the 'interpretation' and the 'application' of the 1951 Geneva Convention. In accordance with this judgement, the duty of the Secretary of State to examine the practice in the third country in question should be accomplished in order to decide ─

> "(a) whether it is consistent with the Convention's true interpretation, and (b) whether, even if so consistent, it nevertheless, imposes such practical obstacles in the way of the claimant as to give rise to a real risk that he might be sent to another country otherwise than in accordance with the Convention. (a) Is a matter of law; and if the Secretary of State mistakes the law, he is reviewable on illegality

> grounds as surely as if erred in the construction of a municipal statute. (b) Is a matter of fact (…)"(UK-Court of Appeal, 1999: 720)

Consistent with this starting point, the Court considered that "The essence of the Convention's protective measures is to be found in Article 1 A (2), which defines 'refugee' (and in the prohibition of *refoulement* in Article 33)". And that ─

> "The scope of the definition (…) must be a matter of law, not fact. Otherwise the protection offered by the Convention would in effect be reduced to a discretionary exercise by the signatory states. But the Convention's very purpose is plainly to afford international protection to persons falling within objectively defined classes" (UK-Court of Appeal, 1999: 722)

Certainly, there is a range of possible interpretations concerning the meaning of 'particular social group', what constitutes a 'religion', or the nature or gravity of ill-treatment required to be shown to constitute 'persecution' in order to apply the Geneva Convention but, according to the Court, "the identification of the essential classes of person entitled to the Convention's protection remains, categorically, a matter of law" (UK-Court of Appeal, 1999:723).

Bearing in mind the interpretive parameters of international Treaties incorporated in the Article 31 of the Vienna Convention, the Court of Appeal considers that from the words of Article 1 A (2) of the Geneva Convention, it is possible to ascertain that the article scope extends to persons who fear persecution by non-state agents in circumstances where the state is not accomplice in the persecution, whether unwilling or unable to afford protection. This interpretation would be supported by the approach taken into the UNHCR Handbook, considered "good evidence of what has come to be international practice" (UK-Court of Appeal, 1999:724) despite not being itself a source of law.

The Court of Appeal excludes the historical argument based on the fact that in the making process of the Geneva Convention, after the Second World War, persecution by state was perceived as being the very wickedness to be confronted. According to the judgement ─

> "(…) this argument as to the scope of Article 1 A (2) is in our judgement deprived of all its force by the 1967 Protocol to the Convention (…). It is clear that the signatory states intended that the Convention should afford continuing protection for refugees in the changing circumstances of the present and future world. In our view the Convention has to be regarded as a living instrument: just as, by the Strasburg jurisprudence, the European Convention on Human Rights is so be regarded. Looked at in this light, the Geneva Convention is apt unequivocally to offer protection against non-state agent persecution, where for whatever cause the state is unwilling or unable to offer protection itself"(UK-Court of Appeal, 1999:724).

In the interpretation of the scope of the definition of 'refugee', the Court of Appeal notes that in spite of the Joint Position there is "no consensus" as to the position of EU members relating to persecution by non-state agents, and that "no reasonable interpretation of the Convention could depart" from it. The Court ends the statement saying that "in truth, it constitutes an agreement to disagree" (UK-Court of Appeal, 1999:725).

In December 2000, the House of Lords decided to dismiss the appeals to the Court of Appeal 1999 judgement, maintaining in substance the right of the applicants to remain provisionally in the United Kingdom territory (UK-House of Lords 2000: 202-229). The House of Lords rejected the submission based on the "principle of comity" under which the phrase "otherwise than in accordance with the Convention" should mean "otherwise than in accordance with the relevant state's possible

reasonable, permissible or legitimate view of what the Convention means". It was considered that —

> "the question is not whether the Secretary of State thinks that the alternative view is reasonable or permissible or legitimate or arguable but whether the Secretary of State is satisfied that the application of the other state's interpretation of the Convention would mean that the individual will still not be sent back otherwise than in accordance with the Convention. The Secretary of State must form his view as to what the Convention requires in order to satisfy the conditions laid down by the 1996 Act" (Lord Slynn of Hadley, UK-House of Lords 2000: 204).

In Endicott's terms, "a national court applying multilateral treaties should pay attention to considerations of subsidiarity and justiciability which sometimes require it to defer to the views of others decision makers; but where no such reason for deference apply the court should do its best to do justice" (Endicott, 2001: 289).

In *ex parte Adan and Aitseguer* judgement, the House of Lords confirms the 'protection theory' as being the autonomous international meaning of the Geneva Convention, but it also address the question of whether the United Kingdom is prohibited from sending 'third-party refugees' to accountability jurisdictions "on the strength of the protection principle". The Court "confronted the prospect of 'chain-reaction *refoulements*' finding such indirect forced returns in violation of article 33 of the 1951 Convention" (Moore, 2001: 44). In the Lord Hobhouse's opinion it is stressed in this sense that "(i)n Convention terms, it is a question of the United Kingdom performing its obligation under Article 33" (Lord Hobhouse of Woodborough, UK-House of Lords 2000: 228).

Central European candidate countries normative conformation to the EU *acquis*

Risks of enlargement for the protection of human rights of asylum seekers

Regarding the Joint Position on the harmonised application of the definition of the term 'refugee', the judgement of the United Kingdom Court of Appeal in the *Adan*, *Subaskaran* and *Aitseguer* case highlights a statement relevant for EU members and for candidates for enlargement as well, namely that it is wrong to treat what is 'necessary' as if it were 'sufficient' for the purpose of ascertaining the accurate interpretation of Article 1 A (2) of the Geneva Convention (UK-Court of Appeal, 1999:726).

Scholars have asserted that, in general, Central and Eastern European Countries have spread a 'defending legal arsenal' out in order to avoid becoming the 'overflow' of European Union (Bouteillet-Paquet, 2001: 265, 353-366). This reaction has been criticised from the point of view that the level of protection of those countries are *clearing lower* than EU countries (*ibid.*: 283), or maintaining reservations about the ability of applicant countries to meet EU standards (Craig, 2002: 501). Nonetheless, the main problem is not the previous one but, in particular, that the level of protection in Central European Countries candidate to enlargement improves just to fit the 'common minimum standard' of EU states included into the *acquis*. Exporting EU standards in the asylum field to Central European states risks to encompass perverse consequences, because the majority of those countries have not yet steadied systems for the protection of human rights and have just ratified international instruments on this field, like the 1950 European Convention[20]. In this sense, Byrne, Noll and Vedsted-Hansen pointed recently out that "the premature regionalizing of unrefined asylum practices heightens, rather than reduces, risks of *refoulement*" (Byrne et al., 2002: 26).

Whether theoretically, from the point of view of the EU the single problem is to secure that future members share the same internal or communal rules as current members[21], a 'universalistic' perspective reveals that, in practice, in the field of asylum,

an enlargement supported on present EU *acquis* risks diluting even more the 'European' compromise on the protection of human rights.

The European Commission presented in 2001 a proposal for a directive on the legal basis provided by the Amsterdam Treaty (article 63, point 1 (c) first paragraph, and point 2 (a) of the EC Treaty) consistent with international standards regarding sources of harm or persecution[22]. Consequently, this proposal would improve the EU *acquis* on this subject but, like other proposals in the asylum field, it is still pending a unanimous decision by the delegates of states in the EU Council and nothing assures that it will be approved in the current version.

European candidate states development of legal regimes for the protection of asylum seekers and refugees

As Boldizsár Nagy pointed out some years ago, the development of domestic legal regimes concerning refugees in European candidate states is characterised by two features; "first, it was a long time lag between the appearance of asylum-seekers and the establishment of a complete set of rules". And, "second, in more than a few countries regulations were adopted at the administrative (ministerial) level, with an air of provisionality" (Nagy, 1997: 67).

The majority of Central European candidate states, after a first set of rules concerning these subjects, have revisited their regulations concerning aliens and asylum seekers or are currently in the process of modifying it, largely, with the purpose of restricting the opportunities for foreigners entering the territory and having protection in it, in line with the EU *acquis*.

The constitutions of the seven Central European candidates, whose regulations have been examined, incorporate articles recognising in different degrees the right to obtain asylum from authorities in case of 'persecution', according to conditions and procedures established by law. Nevertheless, five out of seven fundamental laws of those Central European states refer to foreigners "persecuted" or "who are subject to persecution", instead of "having a well-founded fear of

persecution", which qualifies aliens as refugees in the sense of the 1951 Geneva Convention.

A literal interpretation of articles concerning asylum of the Bulgarian[23], Slovak[24] and Slovenian[25] Constitutions, and Czech and Slovak Charter of Fundamental Rights and Freedoms[26], would lead to recognise asylum only to refugees proving past persecutions or definite probability of persecution if returning to the country of origin (until the 1997 Amendment Act it was also the case for the constitution of the Republic of Hungary[27]). For that reason, 'asylum' would constitute in those countries a strengthened protection compared to recognising 'refugee' status. Furthermore, it would be contrary to the EU *acquis* that defines in the Dublin Convention an 'asylum seeker' as someone who demands protection as refugee accordingly the 1951 Geneva Convention.

Poland and Romania's Constitutions refer to international agreements and law. In the case of Poland, after a revision in 1997, article 56 of the Constitution refers to the "right of asylum" that foreigners shall have "in accordance with principles specified by statute", and to the right to be granted status of "refugee in accordance with international agreements to which the Republic of Poland is a party"[28]. In the case of Romania, article 18 of the Constitution establishes that the "right of asylum shall be granted and withdrawn under the provisions of the law, in compliance with the international treaties and covenants Romania is a party to"[29].

European candidate states conformation to the EU *acquis* in the field of asylum

Regarding conformation to the EU *acquis*, the Regular Reports of the Commission on candidate countries towards accession, issued in November 2001 and in September 2002, highlight progress in co-operation in the field of Justice and Home affairs as regards the majority of items which strengthen the possibility of all kinds of migration. Relating to this question, in general, the Commission considers greatly positive the progress made by the seven Central European candidates studied in visa policy, in the

preparation for future participation in the Schengen system (especially in the Schengen Information System), in alignment and implementation of the *acquis* in the field of external border control, and, as regards to migration, in regulating the conditions of entry, stay and removal of foreigners in line of the EU *acquis*.

Emphasis is also made with reference to readmission agreements concluded with bordering countries with the intention of facilitating the removal of illegal migrants, refused asylum seekers and the application of the 'safe third country' concept. Paying attention to this, it is mystifying, for example, that Bulgaria signed in September 2001 a readmission agreement with Ukraine (European Commission SEC (2001) 1744: 79), which has only acceded to the 1967 *Protocol on the Status of Refugees* on 4 April 2002 (*States Parties 1951 Convention*). In addition, for instance, during 2001 more than four thousand asylum seekers who arrived in the Czech Republic came from Ukraine (Appendix: Table 11).

The Commission considers, on the other hand, that the Republic of Slovakia "should allow for the development of a comprehensive border management strategy", among other reasons, for the cause that the Slovak-Ukrainian border "continues to be very permeable" (European Commission SEC (2001) 1754: 80). And that "it should continue to strengthen border control management and improve capacity to control external borders, especially by giving priority to the border with Ukraine" (European Commission SEC (2002) 1410: 109).

At the same time, nevertheless, the Commission highlights in its 2001 and 2002 Regular Report*s* that Slovakia needs to ensure the effective implementation of the recent Act on Asylum, "in particular the principle of *non-refoulement*" (European Commission SEC (2002) 1410: 110).

In those cases, taking in account that it is not possible to exclude the possibility of persecution in states sharing territorial frontiers with Slovakia, readmission agreements or reinforced border controls of persons wishing to seek protection but without having required documentation to migrate, risks barring the internationally recognised right to 'seek asylum' elsewhere (Article 14.1 of the 1948

Universal Declaration on Human Rights) and even, as suggested by the same Commission, the *non-refoulement* principle.

In the field of asylum, in general, the Commission positively assess the alignment of Central European states to the EU *acquis* in case of our legislations are amended in order to introduce concepts such as 'safe country of origin', 'safe third country', 'manifestly unfounded applications', or in order to provide 'accelerated procedures'. For example, the European Commission stressed in the 2001 Regular Reports that these innovations, aiming at preventing 'abuse' of asylum in the cases of Hungary (European Commission SEC (2001) 1748:83-86), Poland (European Commission SEC (2001) 1752:87) or Romania (European Commission SEC (2001) 1753:86), completed the adjustment of legislations to "current European standards"[30]. In the case of Romania, the European Commission also considered in the 2002 Report that recently modified lists of August 2002 in that country were "in line with the criteria adopted in 1992 on countries in which, in general, there is no serious risk of persecution and on safe third countries", and also "with the Resolution adopted on 30 November 1992, on a harmonised approach to questions concerning host third countries" (European Commission SEC (2002) 1409:113).

The encouraging appraisal of the European Commission on those defending devices contrasts with some assertions also included in its Regular Reports. For instance, in the case of Romania, after stressing the introduction of the concept of 'safe country' in the domestic regulations, it is also mentioned that although some shortcomings have been addressed "problems remain regarding the protection regime for persons who have been granted humanitarian protection, as well as concerning the *non-refoulement* principle and the detention of asylum seekers" (European Commission SEC (2002) 1409:112-113).

In this sense, it is surprising that while the European Commission considers Romania's law modifications on 'safe countries' to be acceptable in spite of these remaining 'problems', EU national courts continue to have doubts on the likelihood to be still 'persecuted' by Romania's authorities, and have recently validated a decision recognising a Romanian national as refugee for political reasons[31].

Concerning Hungary, the European Commission also assessed positively in 2002 the fine implementation of laws on asylum "largely in the line with the *acquis*" (European Commission SEC (2002) 1404:112). In the case of the Czech Republic, the 2002 Regular Report considered as positive developments the amendments to the Act on Asylum entered into force on 1 February 2002, restricting access to employment by applicants for asylum and defining the concept of 'manifestly unfounded application' (European Commission SEC (2002) 1402:113), still missing in 2001 and considered mandatory to "contribute to combating the misuse of asylum procedure" (European Commission SEC (2001) 1746:91).

Regarding Bulgaria the European Commission highlighted in the 2002 Regular Report the adoption of a new law on asylum in May 2002, which would represent significant progress in aligning with the *acquis* in this field (European Commission SEC (2002) 1400: 108).

European candidate's conformation to the EU *acquis* as challenging international standards for the protection of human rights

Regulations of Central European states adopted with the aim to conform to the EU *acquis* present many features challenging international standards for the protection of human rights. In the case of Romania, for instance, former law provided that 'refugee status' could also be granted 'for humanitarian reasons' to the foreigners who do not fulfilled strict conditions of 1951 Geneva Convention[32], like "foreign nationals or stateless persons from areas affected by armed conflicts of internal character, as well as those who are in need of temporary protection on humanitarian grounds"[33]. A new ordinance on the status and regime of refugees in Romania passed by the Parliament in June 2001, abrogates former regulations and establishes three forms of protection, refugee status, conditioned humanitarian protection and temporary humanitarian protection. Only those recognised as 'refugees' could benefit for a maximum period of nine months from state financial reserves of an aid "set at the level of the minimum

gross wage in the country" and, in case of those with 'special needs', of accommodation in an 'accommodation centre' for applicants for refugee status[34].

Furthermore, in Romania the *102/2000 Ordinance on the Status and Regime of Refugees* provides that, with the exception of the cases where the circumstances or the evidence presented by the applicant shows otherwise, the application of an alien "coming from a country in which in general there does not exist a risk of persecution shall be rejected as manifestly unfounded". Those countries, "for which it is considered that in general there is no serious risk of persecution", are the EU member states and other states to be determined, for example, on the basis of "the number of applications for granting of refugee status lodged by the citizens of that country and the granting rates of this status"[35]. This kind of presumption according to some states are states in which there is, 'in general', no serious risk of persecution on the basis of quantitative criteria would prejudice asylum seekers. They will have to destruct this presumption by evidences in case of country of 'persecution' is a country of origin of 'few' recognised refugees and, for that reason, considered as a 'safe' country. In addition, it breaks article 3 of 1951 Geneva Convention that forbids discrimination among refugees based on the country of origin[36].

As regards to Slovenia, a new law on asylum replacing few former provisions about refugees in the 1991 *Foreigners Act* raises questions concerning full respect of the *non-refoulement* principle. However, neither the 2001 nor the 2002 Regular Report*s* of the European Commission pay special attention to these problems as to consider legal framework not to be largely in line with the *acquis* (European Commission SEC (2002) 1411:104; SEC (2001) 1755:93). In Slovenia's national rules it is established that asylum seekers shall benefit from "the provision of basic living conditions, basic health care, financial assistance or an allowance, free legal assistance for implementation of rights pursuant to this law, humanitarian aid" and, also, the precondition of these benefits, that is the right "to reside in the Republic of Slovenia, but, only until the asylum procedure has been finally closed"[37]. In the case of the status of asylum seeker is maintained only while pending a decision, and it ends when a final governmental decision comes into force, then, an asylum seeker could be

deported by force from the host country before ending the judicial procedure of appeal. Amnesty International-Slovenia has held that this situation violates the principle of non-return as one of the most important principles of the International Refugee Law (UNHCR, 2001)[38].

Some features of the EU candidate's law that respect the international human rights standards beyond the EU *acquis*

Concerning domestic provisions about the concept of 'safe third country', by contrast, the Slovenian Asylum Law includes one of the most guaranteeing description of asylum seekers rights, because it is said that a third country is only 'safe' when the refugee stayed in its territory prior to arriving in the Republic of Slovenia, provided:"1. he/she is there safe from persecution or human rights violations in the sense of Article 1, paragraphs 1 and 2 of this Law" ('refugee' definition of the 1951 Geneva Convention, article 3 of the 1950 *European Convention for the Protection of Human Rights* as amended by Protocol No 3, 5 and 8 and complemented by Protocol No. 1, 4, 6, 7, 9 and 11), "2. he/she is able to satisfy his/her basic subsistence needs in that country, 3. he/she can legally return to that country and file an asylum application without any risk of being expelled or deported to a country where his/her life or freedom would be threatened"[39].

This definition is the only one establishing the guarantee for people demanding protection not to be removed to a country where 'basic subsistence needs' cannot be satisfied.

As regards to the scope of the term 'persecution', so as to consider an asylum seeker as deserving protection as a 'refugee' in the sense of the 1951 Geneva Convention, only one of the states whose regulations have been studied explicitly includes an interpretation consistent with the 'protection theory', held by the UHCR. The Asylum Act of the Czech Republic provides an "Interpretation" Section 2 which establishes that ─

> "For the purposes of this Act, persecution means danger to life or freedom as well as measures causing psychological pressure or any other similar treatment if carried out, supported or tolerated by the authorities in the country of the alien's nationality or, in case of stateless persons, in the country of his former habitual residence, or if such country is not able to ensure protection against such treatment in an adequate manner"[40].

No other legislation includes such a kind of provision.

Considering that Central European candidates do not still have consolidated systems for the protection of refugees and human rights, including into written internal legislation what is considered to be the accurate interpretation is a good way to assure safeguard of international standards otherwise at risk. Legally determining the 'right interpretation' of controversial concepts in countries lacking such a legal traditions can assure an adequate level of protection.

According to the UNHCR, there are no objective reasons permitting to fear that judicial authorities in other Central European countries would apply a restrictive interpretation of the definition of 'refugee'. In Poland and the Czech Republic there has been cases in which asylum seekers claimed to be persecuted by non-state agents, but the courts decided them on other grounds. In those cases, the question of whether the 'refugee status' could be recognised in case of non-state agents accomplish persecution was not the centre of the problem to be solved. In the *Chabitezeva* case, resolved in 1994 by the Czech Superior Court, applicants feared ill treatments by political public and private agents fighting in a civil war but, the problem to be solved was whether or not the possibility of termination of proceedings as a consequence of the applicant's wilful violation of conditions set in the law concerning refugees was in compliance with the provisions of the 1951 Geneva Convention (Czech Rep.-Superior Court, 1994).

Similarly, in the case *Gevorkova*, the Czech Superior Court resolved a case of supposed persecution between Armenians and Azerbaijanis on procedural grounds

(lack of complete and accurate discovery of the factual conditions by the charged administrative bodies) (Czech Rep.-Superior Court, 1994-2). Moreover, in the case *Dallakajan*, the Czech Superior Court had to manage with a case of fear of persecution by 'political groups'. Without paying attention to the private condition of agents whose actions were feared, the Court said not to have "reason to doubt that the plaintiff considers the situation in his home country to be dangerous, he feels threatened, whether by the general state of war, the economic and moral disintegration, the criminality or by the danger of criminal proceedings; but, these fears no matter how objectively supported they are, do not mean that there are reason here, as given by the law for fear of persecution justifying the granting of refugee status" (Czech Rep.-Superior Court, 1994-3).

In Poland, a case of fear of persecution by private persons for reasons of nationality and religion was resolved by the High Administrative Court on procedural grounds as well: lack of consult to the Minister of Foreign Affairs, lack of sufficient justification of the decision which rendered review 'impossible' and, lack of evaluation of the "political situation in connection with war and migration phenomena in Abkhazia and Georgia (…) for establishing whether the complainant's statements are credible and whether the complainant could fear persecution for reasons of nationality and religion, and therefore whether she is the refugee as interpreted by Article 1 of the Geneva Convention concerning the status of refugees" (Poland-High Administrative Court, 1995).

Conclusion

Establishing a Common European Asylum System, "based on the full and inclusive application of the Geneva Convention", as suggested by the European Council in the 1999 Tampere Conclusions (European Council, 1999: paragraph 13), must entail recognition of international obligations at Community level. Strategies of states with the aim of avoiding being charged of those in need of protection, cannot amount to a

distortion of international obligations recognised as binding by states and interpreted according to settled international standards, including evolving international practices.

Giving actual sense to the Geneva Convention definition of the term 'refugee' means to extend its scope of application beyond situations foreseeable in 1951 bearing in mind past experiences. For some, in order to endorse a "true interpretation" commensurable with protection an "unavoidable conclusion is that some authority will be required (…) to rule authoritatively even in areas presumed dear to national legislators" (Goodwin-Gill, 1999: 737).

Meanwhile, to avoid inconsistencies with international standards of human rights, Central European candidates have to conform their internal legislations and practices 'beyond' the current requirements of the EU *acquis* in the field of asylum.

Notes

[1] The Justice and Home Affairs policies were included in the pre-adhesion strategy in the 1994 European Council of Essen (European Council, 1994: paragraph 10).

[2] For the EU, the enlargement will bring a larger market for economics and reinforce its structural power in the world system; for Central and Eastern European states, membership or 'association' with EU represents the way for their "economic and political survival in the globalising economy" (Collinson, 1999: 14).

[3] Notwithstanding this, "EU could neither to renounce to enlarge, without lacking his vocation, nor to renounce to deepen without loosing his dynamic" (Schoutheete, 1998: 5).

[4] For them, in this sense, "we are confronted with a still Unsettled Europe" (Laffan *et al.*, 2000: 3-10).

[5] According to this scholar, from the EC perspective, "identity is the crucial variable", because there exists "the risk of diluting its collective identity and the possibility of disseminating its constitutive values and norms". European Union would be founded upon a "postnationalist, liberal collective identity" (Schimmelfenning, 2001: 166 and 182).

[6] About this "regionalisation of refugee intake", Council of the European Union 1999: paragraph 12; and European Council 1999: paragraphs 11-12.

[7] In August 1989, Hungary opened its borders allowing East German citizens who have sought asylum in the compound of the West German embassy in Budapest to travel to West Germany. On 10 September permission was extended to the rest of East German citizens in Hungary who did not wish to return home. By mid-September 23.000 citizens would have used this possibility. (Romsics, 1999: 433).

[8] Concerning free movement of people, the Commission has forecasted that while overall numbers of migrants do not might be large in percentage terms, "in absolute terms a disproportionate number would target Germany and Austria", for reasons indicated above (European Commission COM (2001) 437: 11 and 26).

[9] For making calculations each year have been taken separately, although asylum applications pending can be decided on substantive grounds or closed the years following the date of submission.

[10] Brig Gen Vasile, head of the National Refugee Office of Romania, has stated that his country was one of the main cross points of the routes used by illegal immigrants, and has also pointed out that as the date of the admission to the EU was approaching, the number of those foreigners who entered the country illegally in the hope of gaining political asylum was going to increase significantly (UNHCR, 2001:2).

[11] The Dublin Convention entered in force on 1 September 1997. After the relative 'communalisation' of policies in the field of asylum made by the Treaty of Amsterdam, the European Commission presented in 2001, a *Proposal for a Council Regulation establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third-country national* (European Commission, COM (2001) 447 final: 192-201), on the juridical basis of Title IV EC Treaty. This proposal is intended to replace the Dublin Convention by an instrument of "high politics" (Shaw 2000: 340), a common rule in the context of the EU purpose of progressively establishing an area of freedom, security and justice. It provides for some elements of rationalisation of the system, like when limiting the number of transfers of asylum seekers between two member states, aiming to benefit both the member states concerned and the asylum seekers (European Commission, COM (2001) 447 final: paragraph 11)

[12] With the aim of dealing with the risk of a "race to the bottom" (Craig 2002: 495), or even the 'encouragement' to the states to engage in such a 'race' after the positive legal integration strengthening controls on illegal immigration and admission (Peers 2000: 6), the European Commission has presented three proposals of 'positive integration'. These proposals concern minimum standards for the qualifications and status for being recognised third country nationals and stateless persons as refugees or otherwise needed of international protection (European Commission COM (2001) 510 final); minimum standards on the reception of applicants for asylum in member states (European Commission COM (2001) 181 final); and minimum standards on procedures in member states for granting and withdrawing refugee status (European Commission COM (2002) 326 final/2).

[13] Article 1 of the Geneva Convention (1951) "Definition of the term 'Refugee' A. For the purposes of the present Convention, the term 'refugee' shall apply to any person who: (1)(...) (2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it". According to the Article I.2 of the New York Protocol (1967), "For the purpose of the present Protocol, the term 'refugee' shall (…) mean any person within the definition of article 1 of the Convention as if the words 'As a result of events occurring before 1 January 1951 and…' and the words '…as a result of such events', in article 1 A (2) were omitted".

[14] Although the Preamble includes an even more restrictive clause according to which the Joint Position "is adopted within the limits of the constitutional powers of the Governments of the member states and that it shall not bind the legislative authorities or affect decisions of the judicial authorities of the member states".

[15] In this sense, a comparative analysis of different interpretations of the term 'persecution', included in the definition of 'refugee' of the Geneva Convention was made by Ben Vermeulen, demonstrating that the compromise reached in the 1996 Joint Position on 'persecution by third parties' was not enough to assure a 'common interpretation' because the compromise "leaves the member states free to follow their own 'national judicial practice' " (Vermeulen *et al.*, 1998: 4, 30-33).

[16] Article 3 of the 1951 Geneva Convention establishes that "(t)he Contracting states shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country or origin".

[17] At least for procedural purposes, until substantive examination of application, asylum seekers would enjoy "presumptive refugee status" (Vedsted-Hansen, 1997: 87).

[18] All EU members are parties in the 1950 European *Convention for the Protection of Human Rights and Fundamental Freedoms*, of Rome 4.11.1950 (amended by Protocol Nº 11), and, the EU is also engaged on the respect of fundamental rights guaranteed by the European Convention (Article 6 of the EU Treaty).

[19] Neither the right to be accorded political asylum nor the right to be recognised the refugee status stem from the 1950 European Convention or Protocols.

[20] The 1950 *Convention for the Protection of Human Rights and Fundamental Freedoms* came in force on 07.09.1992 for Bulgaria, on 01.01.1993 for the Czech Republic and Slovakia (18.03.1992 for the former Czech and Slovak Federal Republic), on 05.11.1992 for Hungary, on 19.01.1993 for Poland, on 29.06.1994 for Romania, on 28.06.1994 for Slovenia <http://conventions.coe.int> (consulted on 15.05.2002).

[21] I.e. the EU *acquis* concerning Internal and Security Affairs, including rules regarding Refugee and Asylum Law, and international standards of human rights, basically the 1951 *Geneva Convention* and the 1950 Roma *Convention for the protection of Human Rights*. Concerning the 1951 Geneva *Convention relating to the Status of Refugees* and the 1967 *Protocol*, they came in force on 12.05.1993 for Bulgaria, on 11.05.1993 for the Czech Republic, on 14.03.1989 for Hungary (which only adopted alternative b) of article 1A on 08.01.1998, hence, without geographical limitation), on 27.09.1991 for Poland, on 07.08.1991 for Romania, on 04.02.1993 for Slovakia, and on 06.07.1992 for Slovenia <http://www.unhcr.ch> (consulted on 15.05.2002).

[22] According to the Explanatory Memorandum of the proposal, "(t)he source of persecution or serious unjustified harm is deemed irrelevant" (European Commission COM (2001) 510 final: 17).

[23] Article 27.2 of the *Constitution of the Republic of Bulgaria*, in force since July 1991, establishes that "(t)he Republic of Bulgaria shall grant asylum to foreigners persecuted for their opinions or activity in the defence of internationally recognized rights and freedoms". Moreover, article 98.10, entitles the President of Republic to grant asylum. *Constitution of the Republic of Bulgaria promulgated State Gazette Nº 56/13.07.1991* <http://www.bild.net/constitut.htm> (consulted on 19.12.2002).

[24] Article 53 of the *Constitution of the Slovak Republic* establishes that "(t)he Slovak Republic shall grant asylum to aliens persecuted for the exercise of political rights and freedoms. Such asylum may be denied to those who have acted in contradiction with fundamental human rights and freedoms. A law shall lay down the details". *Constitution of the Slovak Republic* (Nº 466/1992

Coll., in force on 1.10.1992, as amended by *Constitutional Act* Nº 244/1998 Coll. in force on 5.8.1998, *Constitutional Act* Nº 9/1999 Coll. in force on 27.1.1999, *Constitutional Act* Nº 90/2001 Coll. in force on 1.7.2001 and 1.1.2002) <http://www.concourt.sk/A/A_ustava/ustava_a.pdf >(consulted on 19.12.2002).

[25] Article 48 of the *Constitution of the Republic of Slovenia* establishes that "(w)ithin the limits of the law, the right of asylum shall be recognised for foreign nationals and stateless persons who are subject to persecution for their commitment to human rights and fundamental freedoms". *Constitution of the Republic of Slovenia* (adopted on 23.12.1991, *Official Gazette of the Republic of Slovenia* Nº 33/91-I, as amended by the *Constitutional Act* of 14.7.1997, *Official Gazette* Nº 42/97, and the *Constitutional Act* of 25.7.2000, *Official Gazette* Nº 66/2000) <http://www.us-rs.com/en/basisfr.html> (consulted on 19.12.2002).

[26] Article 43 of the *Charter of Fundamental Rights and Freedoms*, in force since January 1991, establishes that "(t)he Czech and Slovak Federal Republic shall grant asylum to citizens of other countries, persecuted for asserting political rights and freedoms". The *Constitution of the Czech Republic*, in force since January 1993, instituted the Charter as an "integral component of the constitutional system" and does not include any other juridical basis on asylum. The *Constitution of the Czech Republic* of 16 December 1992 (as amended by constitutional acts Nº 347/1997 Sb., Nº 300/2000 Sb., Nº 395/2001 Sb., and Nº 448/2001 Sb, and as supplemented by Constitutional Act of 22 April 1998, Nº 110/1998 Sb.) <http://www.concourt.cz/angl_verze/constitution.html> (consulted on 19.12.2002).

[27] Article 65 of *the Constitution of the Republic of Hungary*, established that "the Republic of Hungary, in accordance with conditions determined by law, shall grant the right of asylum to foreign nationals and stateless persons persecuted for racial, religious, national, lingual or political reasons in their country and place of residence". According to an unofficial translation <http://www.unhcr.ch> (consulted on 21.04.2002). In this article it was also surprising the absence of "membership in a particular social group" as a ground for justifiyng to be submitted to persecution, and the inclusion of "lingual reasons", not included as such in the 1951 Geneva Convention. In 1997, the *Act* LIX, in force since 30 July 1997, changed the article 65, which nowadays establishes that "(t)he Republic of Hungary shall provide, in accordance with the conditions established by statute, asylum to those non-Hungarian citizens who are subject to persecution in their native country or in the country of their habitual residence, on the basis of their race, religion, nationality belonging to a certain group in society, or religious or political convictions, or whose fear of persecution is well founded, provided that neither the country of their origin nor another country provide them protection". According to the *Constitution of the Republic of Hungary*, (*Act XX of 1949 as revised and restated by Act XXXI of 1989*) as of 1 December 1998 <http://www.mkab.hu/mkab06.htm> (consulted on 19.12.2002).

[28] Article 56 of the *Constitution of the Republic of Poland* of 2 April 1997 (*Dziennik Ustaw* of 16.7.1997, Nº 78, item 483) <http://www.tribunal.gov.pl/eng/index.htm> (consulted on 19.12.2002)

[29] Article 18.2 of the *Constitution of Romania*, in force since December 1991 (*Monitorul Oficial* Part I, nº 2, 21.11.1991) <http://www.ccr.ro/Legislatie/Constitutie/const_en.htm#t2c1en> (consulted on 19.12.2002).

[30] The *Ordinance on the Status and Regime of Refugees in Romania 102/2000*, in force since November 2000, establishes in the article 11 that the member states of the European Union are considered 'safe third countries'. Other states can also be considered 'safe third countries' by an order of the Home Affairs Minister, upon the suggestion of the National Refugee Office, provided that some conditions are met: protection against *refoulement*, not risking being exposed

to torture or inhuman or degrading treatment, and 'effective protection' against return to country of origin "in the sense of the provisions of the Geneva Convention and on the basis of information provided by the Office of the UNHCR on the practice concerning the application of the principle of *non-refoulement*". *Ordinance on the Status and Regime of Refugees in Romania 102/2000,* according to an unofficial translation <http://www.unhcr.ch> (consulted on 21.04.2002). As a result, the EU states benefit from a 'presumption', according to which they are 'safe third countries', what definitely facilitates a future implementation of the *acquis* of the 1991 Dublin Convention, despite the differences in the degree of 'effective' protection in the EU states.

[31] For example, the judgment of the Spanish *Tribunal Supremo* issued on September 2002 which do not considers established that there is not a current danger of being submitted to judicial 'persecution' for a political dissident enduring repression and judgements in 1990 (Spain TS 2002: paragraphs 4 c-5).

[32] Article 2 of the *Law concerning the Status and Regime of Refugees in Romania* (*Lege nr. 15 din 2 aprile 1996 privind statul şi regimul refugiatilor in Romania*, nr. 69/5 *aprile* 1996 <http://www.cdep.ro/pls/legis/legis_pck.htp_act_text?idt=4955> (consulted on 19.12.2002)), according to an unofficial translation <http://www.unhcr.ch> (consulted on 21.04.2002). .

[33] Article 2.1 of the *Decision No. 1.182, 13 November 1996, on the Implementation of law No. 15/1996 relating to the Status of refugees in Romania*, unofficial translation prepared by the UNCHR Bucharest, <http://www.unhcr.ch> (consulted on 21.04.2002).

[34] Article 23.3 of the *Ordinance on the Status and Regime of Refugees in Romania 102/2000*, according to an unofficial translation <http://www.unhcr.ch> (consulted on 21.04.2002).

[35] *ibid.*., article 19 of the *Ordinance on the Status and Regime of Refugees in Romania 102/2000*.

[36] See Final note nº 16.

[37] According to the article 43 of the *Law on Asylum*, in force since August 1999, official translation, <http://www.unhcr.ch >(consulted on 21.04.2002.).

[38] It seems that this problem would be solved in the case of the recently amended Czech Republic legislation on asylum because, according to the UNHCR-News, under the amended asylum law "a foreigner will have the status of an asylum seeker until his/her application is decided on by the High Court" <http://www.unhcr.ch> UNHCR-Country of Origin and Legal Information, January 2002 (consulted on 19.12.2002).

[39] *ibid.*., article 2 of the *Law on Asylum* of Slovenia.

[40] Section 2 of the *Act No. 325 of November 11th, 1999 on Asylum and Amendment to Act No. 283/1991 Coll. On the Police of the Czech Republic as amended in the later versions (Asylum Act),* in force since 1 January 2000, <http://www.unhcr.ch> (consulted on 21.04.2002).

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