

Ludwig-Maximilians-Universität München

Geschwister-Scholl-Institut für Politische Wissenschaft

Thesis Advisor:

Prof. Dr. Dr. h.c Werner Weidenfeld

**EUROPEAN INTEGRATION AND REFUGEE PROTECTION:
THE DEVELOPMENT OF ASYLUM POLICY IN THE
EUROPEAN UNION**

By Esther Ezra

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Dedicated to my late great uncle, César Soubéry, for always being there for me.

Referent: Prof. Dr. Dr. h.c. Werner Weidenfeld

Korreferent: Prof. Dr. Michael Brenner

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INTRODUCTION

The increased influx of asylum seekers since the early 1990's into Western European countries - this at a time of increasingly permeable inner-EU borders - has motivated EU Member States to increasingly coordinate their asylum policies. There has been a clear development from purely intergovernmental cooperation to implementation of common policies in this field, highlighted by the creation - in the Treaty of Amsterdam - of a Common Asylum Policy. Currently, negotiations are being carried out which by May 2004 are to result in the promulgation of concrete measures regarding asylum.

As the contours of this policy become visible, it will be necessary to ask how the new EU asylum policy compares with the previous policies of Member States and - especially - to what extent the new measures taken at the EU level provide for refugee protection. By analyzing the current development of EU asylum policy this work will attempt to examine the linkage between regional integration and refugee protection. Specifically, the research will aim at determining how the nature of European integration in general has affected the specific formulation of asylum policy at the EU level. On the basis of this analysis the likelihood of a future harmonization of this policy area will then be considered.

Most authors writing on the development of EU asylum policy have done so - not illogically - from the legal perspective of the adherence (or non-adherence) to Geneva Convention norms. Accordingly, they generally have given a scathing review of EU asylum policy as it has developed thus far. This study will also illustrate the path the EU has taken away from the commitments of its Member States to existing norms towards a more restrictive policy. At the same time, however, it will go beyond a legal discussion of the merits of EU asylum policy and will seek to provide explanations for the EU's behavior.

The author will develop three main hypotheses in the course of this research. First, in contrast to the widespread expectation that regional integration would lead to liberalization of asylum policy, the policy pursued by the EU demonstrates in fact the opposite. Second, the positions on asylum held by the different EU Institutions can be largely explained by the power structure that has been developing since the European Community was first launched. Third, the nature of integration inevitably encourages Member States to move towards a higher level of cooperation in the field of asylum.

The author contends that the nature of the EU regional integration process has paved the way for an asylum policy which sets itself apart from asylum policies of other Western nations. The makers of asylum policy in all Western nations must struggle with the contradictory objectives of adherence to liberal, universal asylum standards on the one hand, and the desire to restrict immigration, on the other. However, the special features of the EU tend to deepen this dilemma. The result has been that EU integration has increased the motivation for the development of a more restrictive asylum policy.

To a large extent it appears that the European Union's unique political structure allows the two contradictory phenomena of restrictive policies on the one hand and verbal commitments to liberal principles on the other to co-exist. Thus, while the voices advocating a liberal asylum policy are heard more often at the "Community" level, in particular at the European Commission and the European Parliament, more conservative views are evident at the Council and national level. The author argues that the divergent positions of Council/Member States and Commission/ Parliament derive from the EU's political structure. The Commission and the Parliament tend to be more liberal than the Council since they lack significant power in this field of policy making. In other words, as long as the Commission does not shoulder political responsibility, it is easy for it to advocate a liberal policy. Conversely, as soon as it gains more authority it will tend to tone down its earlier criticism of a restrictive asylum policy, and will express similar views to those of the Council.

As for the future, the author believes that the desire of Member States to work together will only grow. It will be argued that unlike foreign policy, where Member States do not always share common interests or visions about the security role of the Union in the world, they do share similar views on asylum. In general, Member States are concerned with the increased number of asylum seekers and preoccupied with the question of how to decrease the number of asylum applications.

1. The EU Community-building Process: The Search for Legitimacy

To understand the possible causes that lead to the development of a restrictive asylum policy at the EU, it is important to appreciate the ramifications of the community-building process in the context of European integration. It will be argued that the distinctive form of the EU community-building process (along with the abolishing of controls at most inner-EU borders and the realization of the free movement of persons) has generated concern among its citizens about the influx of immigrants and asylum seekers into EU territory. Indeed, the author submits that the EU is thus more sensitive to foreigners than traditional nation-states. This concern, as EU leaders are aware, works against the ongoing integration efforts. While the EU resembles traditional nations in terms of exclusion and inclusion pressures, the formation of this community is based on the continued existence of autonomous units – the self-determining states. Thus the loyalty of citizens to their county was not diminished with the creation of the EU. Moreover the community delineated by the EU is still in the formation process, as it remains open to new members. In short, integration is not over yet and it is still not clear who the "people of Europe" are. Based on these factors it can be said that the EU is more sensitive to the need to gain legitimacy from its citizens than, other, more established nation states. EU leadership can not rely on automatic loyalty from its citizens, is acutely aware of its need to gain legitimacy, and therefore has a strong motivation to show that it is as responsive to the concerns of its constituency as it is eager to promote the integration process.

The fact that EU policy-makers have claimed that there is a European citizenship is not enough; they have to prove it and fill it with content. In this process they have to prove the advantages of Europe to its citizens and thus to strengthen its claim to legitimacy. Thus if citizens are concerned about migration, Europe has to prove its effectiveness in this area. The imperative to be effective is particularly pronounced here as it threatens to undermine the EU's ethnic composition. Unlike other areas such as unemployment asylum goes to the very core of a nation-state, i.e. the question of who is a member. Thus, the protection of external borders and subsequently membership are likely to remain major issues at the EU.

2. Power and Responsibility in EU Policy Making: The Critical Role of Power in Explaining the Position of EU Institutions towards the Granting of Asylum

It is interesting to note that despite the tendencies of a more restrictive attitude towards asylum, it is evident that EU policy makers in general claim to espouse a more liberal view. Basically, EU policy makers and in particular Commission officials assume that one of the primary roles of the EU is as a protector of human rights¹. This view is expressed in many of their declarations: "the human being is at the center of our policies" and "ensuring human dignity of every individual remains our common goal"². The author assumes that statements about the EU being a "humanitarian power" are based on genuine sentiments. There are a few possible explanations for this approach. Clearly the EU position as a new regional power requires it to take on more responsibility and tends to result in a liberal perception of human rights and asylum in particular, a tendency strengthened by the fact that the European project was founded against the background of the horrors of the Second World War. Nevertheless one may go beyond moral considerations and look to the EU's political structure to explain this view. In many ways

¹ "Implementing genuine common policies on immigration and asylum is also part of the fundamental objectives of the Union. The point is therefore to ensure effective coordination of integration policies and **maintain the high level of protection of refugees which makes the European Union such a leading light in the international system of refugee protection**". See Communication from the Commission. European Commission, A project for the European Union, Brussels, 22.5.2002, COM (2002) 247 final, p. 9.

² See EU Declaration on the occasion of the 50th Anniversary of the Universal Declaration of Human Rights, December 10, 1998, Vienna.

the EU's views on asylum appear to be closely linked to institutional dynamics. The author believes that there is an inverse correlation between the level of decision making authority and the possibility to be liberal. Thus, institutions with little decision making authority have tended to promote liberal asylum policy compared to institutions with more responsibility.

The EU did not create a traditional state inasmuch as previously existing national units continue to exist. Thus, for asylum as well as for other policy areas there are two-levels of decision-making: the EU-level as well as the Member State level. Decisions on asylum matters are made mainly by EU Member States and the Council of the EU which represents them at the EU level. Other common institutions, such as the Commission and the Parliament, have a limited capacity to participate in EU asylum policy making. They are subject to Member States' pressure and are incapable of operating without their consent. To a large extent the liberal position on asylum of the Commission and the Parliament compared to the Council (in particular until the ratification of the Amsterdam Treaty) largely stems from the formers' relatively small influence in actual asylum policy making. Since the Commission and the Parliament are denied the opportunity of making decisions on asylum and essentially replacing the national legislator, they have been more free to play the human rights card than the Council and declare the EU a leading proponent of liberal principles in the 21st century.

Two trends are causing this situation to change. First, as EU institutions become more democratic, and thus more responsive to the citizens they are representing, one can expect that the views expressed by the Commission and the Parliament will start to appear similar to those expressed by the Council. Second, and subsequently, the decision making authority of the Commission and Parliament has been increased over the years, so that decisions made, whether based on humanitarian principles or not, are no longer of a primarily declaratory nature, but rather clearly impact the lives of the EU's citizens. To some extent, such a change in views is already visible, as the authority of the Commission has increased in recent years as the Amsterdam Treaty entered into force in 1999. The positions of the Commission remain liberal compared to the Council, but there

has been a tendency to show a more restrictive position.

3. Future Cooperation in the Field of Asylum: The Likelihood of Growing Interdependence among EU Member States

This research is based on the idea that there is close affinity between the special features of the EU community building process and the formulation of asylum policy. The process of a deepening European integration, manifested by the founding of the European Union in the 1992 Treaty of Maastricht, has provided the impetus for the emergence of a common asylum policy. As for the nature of future cooperation among Member States, the author predicts that their desire to work together will grow, as they perceive cooperation to be the optimal means to minimize the negative side effects resulting from the creation of the Internal Market. As the Internal Market runs counter to the desire of Member States to control the entry of foreigners into their territory, Member States were given an incentive to work together to address their shared concerns. Whereas in the past the individual state defined its policy according to its narrow national interests, it is now guided by new constraints, since a policy pursued by one Member State impacts those of others. Thus, a Member State policy aimed at limiting the number of migrants/asylum seekers entering its territory can only be effective if other Member States do not pursue a contradictory policy. In short, the increase in interdependence is likely to result in more cooperation and shared responsibility to ensure the benefit of all EU members. Hence, while for the moment only common asylum policy has been achieved, the potential for harmonized policy in this field will inevitably increase.

4. Outline of Study

Part One will review the scientific literature, particularly the current debate with regard to asylum in Western Europe. The main approaches in the present discourse on asylum will be described and the basic arguments of this research will be developed. Part Two will examine the evolution of asylum in Western Europe from a historical perspective. Special attention will be paid to the practice of asylum since the end of World War II. Part Three, the heart of this research, will focus on the impact of European regional integration on refugee protection. This part will describe how integration has led to the adoption of a

restrictive asylum policy and how this policy can be explained by examining the power sharing mechanisms of the EU institutions. Finally, future directions for cooperation in the field of asylum will be assessed.

PART ONE: LITERATURE REVIEW AND BASIC CONCEPTS

I. Introduction

In the last decade of the twentieth century asylum became a subject of extensive research. This development largely depended on dramatic changes occurring in world politics in the 1990s. The end of the Cold War and the dissolution of Communist rule stimulated the outbreak of ethnic conflicts, which in turn led to a significant increase in the number of asylum seekers. At the same time, the creation of new forms of regional co-operation in the field of asylum, particularly within the EU, had a great impact on the attendant practice of Western European states. All these trends could not be overlooked by the academic world.

In the following chapter the author will summarize the current academic discourse in the field of asylum after taking a brief look at the academic debate during the Cold War. It will be argued that there is a basic difference between the way academics looked into asylum policy during and after the Cold War. In principle, the period between 1945-1989 could be characterized by a friendly relationship between the academics and Western democracies, whereas the last decade suggests increasing hostility between the two in light of their divergent views and expectations with regard to refugee protection. Yet, if the scholars of these two periods are divided over their appraisal of Western states' practice of asylum, they are united in their methodology: they all concentrated on the legal dimension of the issue. This is particularly evident in the current debate, in which most scholars view asylum in legal and normative terms. As they primarily focus on policy implementation they describe Western asylum policy, including EU policy, as restrictive. At the same time they often neglect the political context, in which decisions on asylum were taken and thus fail to provide an adequate explanation of decision-makers' behavior, in particular that of EU officials.

After first analyzing the current discourse, the contradictory relations between asylum and Western democracy will be analyzed. This will be followed by an examination of the

link between migration and Western democracy throughout the years. Finally, the impact of regional integration on refugee protection will be explored.

II. The Study of Asylum (1945-2002): An Overview

The academic literature on asylum since the end of Second World War can be divided into two periods, that of the Cold War and that of the subsequent years. While only few scholars looked into the formulation of asylum policy in Europe, they tended to favor the way Western democracies dealt with the problem of refugees during the Cold War. Since the end of the Cold War researchers began to be very critical towards the Western world's practice of asylum, suggesting that this policy represents a threat to refugees.

There is reason to believe that the differing perceptions of the study of asylum were heavily dependent in the background conditions, namely the political situation in the world. The scientific discourse during the Cold War was to a large extent framed by the East-West confrontation. In a mind set which tended to make notions of good and evil palpable to each side in the confrontation, academics often sought to justify Western Bloc positions under the specific political conditions. Towards the end of the Cold War the scientific discourse has gradually moved into a new phase. Once it appeared that the Soviet Union no longer constituted a major threat to Western democracy, researchers began to call into question the policy formulated during the Cold War. Increasingly they seemed to suggest that asylum policies conducted by Western governments were usually not motivated by moral obligations but rather political ones. Moreover, in focusing on contemporary asylum policy, most scholars were disappointed by the restrictive tendencies of national governments and concerned about the present treatment of refugees.

Despite the fact that the end of the Cold War offered more room for maneuver for divergent approaches, it appears that new scholars involved in the debate still offer a limited analysis on the study on asylum. Thus, though asylum policy involves substantial political elements, the asylum discourse remains in many ways a legal domain, being dominated by legal experts. This means that they place great emphasis on one dimension,

namely the legal one, to the detriment of other explanatory factors. Moreover, while there has been a strong legal approach to the discourse, there is a tendency to take a moralist and internationalist view on asylum. As a consequence, there is a tendency to idealize the work of UNHCR and international organizations and disassociate them from the "bad" behavior of national governments. Yet, while most scholars are quick to indicate the serious deficiencies in the performance of Western countries, there is little attempt to address the complexity of the topic. They limit themselves to the assessment that the new regulations are of a restrictive nature. The result is unbalanced scientific debate, which does not go beyond a narrow legal and normative analysis.

1. Debating Asylum in the Shadow of the Cold War (1945-1985): Idealization of a Concept

Up until the mid-1980s a relatively limited number of publications were available in the field of asylum, the vast majority being published by the main international organizations dealing with refugees, such as United Nations High Commissioner for Refugees (UNHCR). The general view in this period was that Western countries' asylum policies were particularly successful and moral. Atle Grahl-Madsen is one of the most distinguished writers during this period. His book, *The Status of Refugees in the International Law*, a major work on the subject, attempts to provide a comprehensive study on the status of refugees from the beginning of the 20th century until the 1960s. Five years prior to the book's publication, Grahl-Madsen had been invited by the United Nations High Commissioner, Felix Schneider, "to come to Geneva and continue his studies there"³. In the first volume he begins by reviewing the development of international instruments affecting the status of refugees in the inter-war period. On the whole he provides a positive appraisal of the League of Nations' treatment of refugees and the organization's ability to make significant progress against the interests of its member states: "This picture would not be complete, however, if we did not mention the Resolutions of the Assembly of the League which repeatedly condemned the practice of certain States

³ He also served as a special consultant in the High Commissioner's office for 18 months and received from the Nansen Fund and Associated Funds the Martin Schweigaard Scholarship for 1965. See preface, Atle Grahl-Madsen (1966), *The Status of Refugees in the International Law*, A.E Sijthoff-Leyden.

expelling refugees”⁴. Grahl-Madsen seems to ignore, however, acts which may shed a different light on the activity of the League of Nations and the true interaction among its members. Thus he does not, for example, refer to various measures taken by the League which favored certain refugee groups, such as the decision to distinguish between Armenian and Russian refugees. A similar attitude was taken with regard to the protection of refugees after the Second World War and the interpretation of the Geneva Convention by the national courts⁵. Grahl-Madsen is not concerned with the political importance of the Cold War and its possible implications on admission policy. From his perspective refugees were treated equally. This perhaps might also explain why he does not debate the UNHCR’s designation of the Geneva Convention as the *magna carta for refugees*, though this convention essentially excluded most of the worlds’ refugees⁶.

Louise Holborn is another major author to make important contributions on this topic. Similar to Grahl-Madsen she reviewed courts’ rulings to see whether Western countries properly interpreted international law. In contrast to Grahl-Madsen, however, she challenged widely held assessments of the protection of refugees during the interwar period. In her study of the League of Nations she argued that the League was unable to handle the problem of refugees properly. After listing the main refugees groups in the 1920s and 1930s, she concluded, ”There were [...] Important differences in the ways in which these refugee groups could be handled”⁷. In a later publication on the work of the International Refugee Organization (IRO) she stressed once again the League of Nations’ inability to properly deal with the question of refugees: ”In the first place, the League accepted the responsibility only for certain groups.” Moreover, ”It served mainly as a coordinating and stimulating agency” and ”The operational tasks were predominately carried out by private and voluntary agencies”⁸. At the same time, however, she believed

⁴ See, p. 14.

⁵ Ibid., pp. 144-145.

⁶ From his perspective, Geneva is ”undoubtedly the international instrument of greatest consequence for the status of refugees in the world today”. Ibid. p. 20.

⁷ Louise W. Holborn (1956), *The International Refugee Organization. A Specialized Agency of the United Nations. Its History and Work 1946-1952*, Oxford University Press, London, p. 4; Louise W. Holborn (1938), “The Legal Status of Political Refugees 1920-1938”, *The American Journal of International Law*, p. 697.

⁸ Holborn (1956), *op.cit.* p. 4.

the new refugee policy established after the Second World War has shifted towards a genuine humanitarian policy. For this reason she supported its work as well as the work of UNHCR which succeeded it.

In her work, *Refugees: A Problem of Our Time*, she expresses her gratitude to the United Nations High Commissioner at the time, Prince Sadruddin Aga Khan, "Who provided the conception, the initiative and invaluable encouragement and support throughout."⁹ The book, which was published under the auspices of the International Refugee Organization (IRO), basically reviews national practice of refugee law and examines the introduction of various regional refugee Conventions such as that of the Organization of African Unity (OAU) held in 1969. In light of the increased number of refugees in Africa, the United Nations and the UNHCR in particular supported African countries in the drafting of a regional Convention according to which refugees from Africa are granted refugee status. The main question in this respect was why the UNHCR did not suggest making use of the existent refugee Convention, especially as two years earlier the 1967 New York Protocol dropped the 1951 geographical limitations and gave the Convention universal character. In this state of affairs, one would have expected the Geneva Convention with the New York Protocol to be applied to refugee situations in Africa as well. Holborn does not seek to look into Western power and UNHCR motivations. She prefers not to question their support behind the new Convention or attribute any significance to the political preferences of the Western Bloc¹⁰. In this sense she follows the same path of Grahl-Madsen, dismissing the importance of political considerations in the context of the Cold War.

⁹ Louise. W. Holborn (1975), *Refugees: A Problem of Our Time. The Work of the United Nations High Commissioner for Refugees, 1951-1972*, The Scarecrow Press, Inc., Metuchen, N.J.

¹⁰ It is important to note that the Organization of African Unity (OAU) gave a broader definition to the term refugee. This included both the 1951 Geneva Convention definition, "refugee shall mean every person who owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" and referred to persons who fled their home because of external aggression, occupation, foreign domination or events disturbing public order as additional reasons, as well. But since Western countries are not signatories to this broader definition, they can refuse to grant refugee status based on the above mention definition.

One of the most vocal participants in this discourse at the same time played a key part in the policies described by it: the UNHCR. Its reports aimed at defending the way Western democracies dealt with the issue. As for its own role, the UNHCR saw little room for critiquing itself or admitting its failures, but rather emphasized how it assumed responsibility for different refugee groups. A prime example of this stance is the great enthusiasm revealed by the UNHCR when it described the 1951 refugee convention. Following the signing of the Geneva Convention which included provisions defining who could be a refugee, the UNHCR insisted on calling the Convention the *Magna Carta for refugees*, this despite the fact that it revealed a strong preference to a particular group of refugees¹¹. It originally referred only to persons who fled their country as a result of events occurring in Europe *before* 1951 rather than offering protection to present refugees. A decade later, in 1962, while examining *Forty years of international assistance to refugees*, the UNHCR stressed once again the neutrality and the impartial nature of its work. Though, as Jackson describes, the organization provided different kinds of help to different categories of refugees, the UNHCR assumed its work "to be non-political and purely humanitarian and social in character" and its main goal to be to protect "refugees in whatever part of the world they might be"¹².

To mark the UNHCR's 20th anniversary, the UNHCR published a detailed report, *Mandate to protect and assist refugees*, in 1972. The report looked back with satisfaction on the policy conducted both by the League and the UNHCR¹³. Thus, for instance, in the historical part it suggested that "until the early 1920s" national governments "usually took little concern" of refugees. The situation, the report suggests, began to change,

¹¹ In the course of the years it would seem that the UNHCR regretted its pre-designation of the Geneva Convention as the *magna carte for refugees*. In 1972, for example, following the signing of the 1967 New York protocol, which made the Geneva Convention applicable to all refugees, it stated, "Together, the Convention and the Protocol have *justly* been termed 'The Refugees' Magna Carta'", p. 32 (my italic).

¹² "Forty years of international assistance to refugees", *United Nations High Commissioner for Refugees (UNHCR)*, 22. 6. 1965, pp. 23-24.

¹³ "Today, protecting and assisting refugees has become a recognized international concern. This development started fifty years ago. Since that time great progress has been made. Millions were helped by Nansen and by the various organizations that succeeded him. That so much could be achieved, often against impossible odds, we owe to the army of men and women, some in high others in humble places, who with devotion and perseverance gave time, energy, thought and action to the cause of the Worlds' refugees". See foreword by the High Commissioner Prince Sadruddin Aga Khan. *A mandate to protect and assist refugees*, 20 years of service in the cause of refugees, 1951-1971, United Nations High Commissioner for Refugees (UNHCR), 22.5.1972.

however, with the creation of the Nansen Office in 1921 by the League of Nations. Since then however, each refugee wave seemed to prompt the League to carry out a similar action: Turkish, Greece, Armenian and Jewish refugees¹⁴. "A major world figure had been active on the refugees' behalf" and "functioning throughout the Second World War this organization was especially effective in providing support"¹⁵. But while the UNHCR considered the work of the Nansen office a great success, one remains puzzled with regard to its poor achievements, as a large number of refugees, especially from Germany, remained unprotected¹⁶. The same applies to refugee protection after the Second World War. Though the UNHCR described its policy as being based on neutral criteria, it appears difficult to explain its preferential treatment vis-à-vis different refugee groups¹⁷.

Indeed, there is enough evidence to suggest that the UNHCR was not as much guided by the interests of worldwide refugees as by the preferences of its major donor countries. As it was established and financed by the Western Bloc to primarily provide protection for refugees from Communist countries, it is not surprising that it took the appropriate steps to ensure the well being of these refugees. This is largely the case with League of Nations. Its actions were identified with the political interests of its members. Thus, this inevitably resulted in a discriminatory treatment between various refugee groups. This period will be covered in the historical overview (Part Two).

2. Towards the End of the Cold War (1985-1992): A New Narrative in the Scientific Debate

Beginning with the mid 1980s scholars adopted a new narrative of Western governments' asylum policy, taking a critical view of the treatment of refugees during the Cold War. One of the first academics to do so was the historian Michael R. Marrus. In one of the most frequently quoted books in the field, he challenged the traditional views of refugee protection in the 20th century. He presented extensive historical analysis supporting the

¹⁴ Thus, for example, in 1930 when a new refugee wave emerged, it was described: "Meanwhile another great exodus had started, with the flow of thousands of refugees from Germany and in 1933 the League once more established an office for a High Commissioner for Refugees", *Ibid.*, p. 23.

¹⁵ *Ibid.*, pp. 23-24.

¹⁶ *Ibid.*, pp. 24-25.

¹⁷ *Ibid.*, pp. 33-58.

argument that refugees were basically *Unwanted* in most host countries. Yet, he believed that for political reasons there were categories of refugees who were more preferred than others. Thus, while Western European countries often accepted individuals who left the Communist Bloc as refugees, they admitted only a small number of refugees from other parts of the world such as Bangladesh, Ethiopia and Sudan¹⁸. This claim was further confirmed and developed by other scholars. In *Refugees and World Politics*, Elizabeth Ferris referred to the gap between international norms and *Realpolitik*. She claimed that political factors were, "major determinations in the implementation of international norms." Hence, in examining the United States' refugee policy, she asserts that, "refugees from Communist nations are seen as political refugees and given refuge while arrivals from El Salvador are treated as economic migrants and usually deported"¹⁹.

In *Refugees in the Cold War*, published shortly after the end of the Cold War, Kim Salomon stressed the decisive influence of the Cold War on international refugee policies²⁰: "In the ideological struggle against the USSR, the role of Eastern European Refugees was not insignificant. Refugees were to symbolize the bankruptcy of Communism". But the end of the Cold War brought a new situation, "Whereby Communism has been pronounced dead, it is no longer as urgent a political necessity for the Western powers to give Eastern European a refugee status"²¹.

3. The Present Discourse (1991-2003): Legalistic and Normative Approaches to Western European Policy on Asylum

3.1. Introduction

Whereas until the fall of Communism most scholars were preoccupied with the Cold War, with the increase number of asylum seekers into the Western world and the important developments in Western Europe, academics have now turned their attention to

¹⁸ Michael R. Marrus (1985), *The Unwanted. European Refugees in the Twentieth Century*, Oxford University Press, New York, pp. 348 and 370.

¹⁹ Elizabeth G. Ferris (1985), *Refugees and World Politics*, Praeger, New York, p. 9.

²⁰ Kim Salomon (1991), *Refugees in the Cold War. Towards a New International Refugee Regime in the Early Postwar Era*, Lund University Press, p. 241.

²¹ *Ibid.*, p. 258.

contemporary refugee policy. The academic discourse, which involved for a short time political scientists concentrating on the political aspect of the Cold Era, was once again dominated by legal scholars. This made sense for two main reasons. As asylum policy involves international law, lawyers wish to examine whether national governments comply with provisions of international norms. Moreover as the EU common policy began to emerge, new legal documents appeared, which stimulated legal experts to carry out further investigation. Thus every new Regulation, Directive and/or Convention received a legal interpretation.

Clearly the legal background of many scholars predisposes them to take a legal approach. At the same time great significance was attached to the text and less to the context. Moreover, while other scholars came to play a role in the debate, they did not fill the lack of a conceptual framework. In contrast to scholars dealing with the issue of migration, political scientists dealing with asylum often prefer to limit the discourse to the human rights dimension and offer a normative stance. In so doing they remain silent about other factors which may influence this policy. Whereas for example in the main discourse on migration it is commonplace to comment on the idea of nation state and the impact of inclusion and exclusion tendencies of the nation state on migration policy, this argument is completely lacking from the asylum discourse. In this respect there is a gap in the research. It is assumed that asylum policy to a large extent has been influenced by similar factors affected by this process and even the EU is not immune from this process.

There are a few possible explanations for this approach. One explanation relates to the background of the researchers. In general, most scholars writing on the topic in the last decade work or used to work in human rights organizations and other related institutions. Thus one can assume that their work tends to result in a universalistic approach to the problem of refugees, advocacy of a more liberal policy, and a lack of critique vis-à-vis international organizations, consequently legitimizing their actions. Yet one may also look to a deeper level to explain this universalistic view. In general most scholars dealing with asylum tend to see themselves in a cosmopolitan light. They often have a critical view of the idea of a nation state as it aims at making preferences and meeting the needs

of one particular community. From this point of view it represents something which is necessarily immoral. For this reason they idealize the work of international organizations, notably the UNHCR which claims to represent the interests of worldwide refugees while being separated from narrow national interests. Their great suspicion of the idea of a nation state affects the quality of their analysis, however. In many ways they seem to be reluctant to attribute great importance to the nation state and thus offer an explanation linked to something they see as old and discriminatory. As a result they often do not bring the consideration of national interests and a nation state into the debate²².

The hopes and expectations of scholars based on higher moral standards seem to project itself also on the study of the EU. To some extent they treat the EU as a potential supranational body which abandoned the model of the traditional nation state to base society on democratic and social principles alone. In this respect the verbal commitments of EU institutions and in particular the Commission reports and proposals are considered to be correspondent to their beliefs. They tend to idealize the Commission, which they feel should guide other EU institutions just as its reports should serve as a possible outline for the European Union's future policy on asylum. In this respect they take an elitist approach to the integration process, believing EU officials can guide and shape public opinion. In so doing they fail to understand the EU, the idea behind its processes and the manner in which its institutions function.

3.2. The scientific debate in the last decade

One of the first books to lay down the foundations for contemporary asylum discourse was edited by Kay Hailbronner in 1992²³. His comparative study of asylum and

²² This approach goes along with the current image of the term nation-state in Western society. While it is not longer popular to refer to the term nation-state, national politicians carefully choose new terminology to describe the attachment to the national community such as integration and *Leitkultur*, for example. Friedrich Merz who expressed his concerns about the integration capacity of immigrants in the German society, argued foreigners living in Germany need to adopt the German way of life (*Leitkultur*), namely its language and culture. See, *Süddeutsche Zeitung*, 4-5 November 2000.

²³ Kay Hailbronner (1992) (ed.), *Comparative Law of Asylum and Immigration in Europe*, Bundesanzeiger, Köln. In 1999, he co-edited another book on the topic with the French political scientist, Patrick Weil. The contributions in this book attempt to reflect on the asylum policy in the EU in the light of the newly created Treaty of Amsterdam. See Kay Hailbronner and Patrick Weil (1999)(eds.), *From Schengen to Amsterdam. Towards a European Immigration and Asylum Legislation*, Bundesanzeiger, Köln.

immigration policy looked into the policy of major European states as well as of the United States. In an attempt to ensure an authentic debate as possible, Hailbronner invited both politicians and academics to contribute to the volume. The result was unbalanced, however. Thus, whereas lawyers posed serious questions about the future nature of asylum policy in light of fears that current developments might dramatically limit the right to asylum, government officials tended to be less concerned with these measures, arguing that they were not likely to have a significant effect on the treatment of refugees. A prime example for the different views can be seen in the contributions presented by Willibald Pahr, the Austrian Bundesminister on the one hand, and the British legal expert David O'Keeffe on the other.

Pahr who was requested to comment on the situation in Austria at the time, rejected the critique directed against the 1991 law on asylum. In fact he argued that the new law not only refrains from violating the Geneva Convention obligation²⁴, but improves the condition of asylum seekers, as it, for example, allows them to more easily settle down in Austria²⁵. O'Keeffe, however, revealed a more critical position in examining the recent development of asylum policy in Britain. He argued that British policy makers primarily aim at limiting the entrance of asylum seekers into Britain. Moreover, he complained about the lack of transparency and limited access to information given to academics: "Statistics are not available to the writers, but it is clear that one aim of the UK is to restrict opportunities for claiming asylum"²⁶. He concludes by arguing that the new asylum draft appears to be, "inconsistent with international principles relating to asylum and refugee procedures"²⁷.

²⁴ It still adheres to Article 33, one of its main provisions. Thus, for this reason alone he concludes those accusations should be rejected (*„schon aufgrund dieser allgemeinen Feststellungen geht jeder Vorwurf, dass das neue Asylgesetz Bestimmungen der Genfer Flüchtlingskonvention verletze, ins Leere“*) Willibald Pahr (1992), „Asyl- und Einwanderungsrecht in Österreich“ in: Kay Hailbronner (ed.), *Ibid.*, p. 68.

²⁵ *Ibid.*, pp. 70-71.

²⁶ David O' Keeffe and Ryszard W Piotrowicz (1992), "Asylum Law and Practice in the United Kingdom", p. 43.

²⁷ This claim was shared by other academics who looked into other Western countries such as Italy, France and the United States, for example. See Bruno Nascimbene, "Law of Asylum in Italy", pp. 55-62; Karin Oellers-Frahm *Grundlagen des Asylrechts in Frankreich*, pp. 29-37, David A. Martin, "National Report United States of America" pp. 91-98. As already mentioned, studies, however, made by politicians provided for a more optimistic view of asylum policy. See also *Grundzüge des geltenden Asyl- und Einwanderungsrechts*, Olaf Reermann, Ministerialdirigent, Bundesministerium des Innern, Bonn, pp. 16-

These sentiments were echoed by the regional representative of the UNHCR, Ruprecht von Arnim, who referred to the restrictive policy in the twelve EC countries: "UNHCR is concerned that, under these pressures, the system as a whole will be questioned, and indeed the considerable changes in laws of asylum in twelve Member States show this intention." For this reason, he wishes to remind European countries that they have subscribed to the Geneva convention, which clearly defines those who should be considered under international protection: "I repeat this definition because I still believe it is the most valid and also helpful instrument for a harmonized and appropriate protection stand in Europe"²⁸. Von Arnim, however, seems to believe that a true remedy will be found in the form of a harmonized policy among EC Member States, towards which goal he encouraged EC members to strive. In short, he is optimistic about the future of asylum policy in the EC, attributing particular benefits to harmonization: "It is in my conviction that the asylum problems will only be solved if a harmonized and fully integrated policy will be applied"²⁹.

Another book, which attempts to analyze the asylum policy of various European states was *Seeking Asylum* by Hélène Lambert. The main purpose of the book was "to give an appraisal on the level of protection offered" in six European countries. Lambert basically argues that there are "obvious differences, not to mention discrepancies" among "the national legal systems and practices in these states". But while she noted that Britain has always had a restrictive policy towards refugees, France and Germany have recently adopted stricter policies in place of their liberal ones³⁰. The result, she claims, is that the above mentioned countries, "consider fight against illegal immigration a priority over the protection of even the most basic human rights"³¹. Indeed "the laws, relating to the admission procedures of asylum seekers [in the six countries under review] have all

28; and Gottfried Zuercher, Eidgenoessisches Justiz- und Polizeidepartment, Bern, Landesbericht Schweiz, pp. 74-90.

²⁸ Ruprecht von Arnim, L'Europe et les refugies a travers la perspective du HCR" in Ibid., p. 127.

²⁹ "UNHCR will be able to go along with a harmonized European asylum policy and even encourages it as an instrument to dilute public opinion pressure on national governments to work constantly in a patchwork fashion towards more restrictive national asylum laws", Ibid., pp. 128-129.

³⁰ Hélène Lambert (1995), *Seeking Asylum. Comparative Law and Practice in Selected European Countries*, Martinus Nijhoff Publishers, Dordrecht, pp. 6-7.

³¹ Ibid., p. 46.

recently changed to meet this end.” Having criticized European policies on asylum, she is confident that if only the UNHCR had been more involved in the process, it would have adopted a liberal policy:

”The UNHCR is the only international authority specialized in the protection of refugees. Such protection would, with no doubt, be better guaranteed if decisions on the status of refugees at national level, were taken after consultation of the UNHCR and with his/her consent”³².

Gil Loescher tends to agree with this observation about the role of the UNHCR. In earlier works, such as *Refugee Movements and International Security*, he acknowledges the *Realpolitik* behind asylum policy. He noted, for example, that due to strategic and political interests the superpowers allied themselves during the Cold War with governments and opposition groups, which could help them in the rivalry³³. In his more recent book, *Beyond Charity*, he stresses once again the effect of refugees on global politics: ”Refugee movement can trigger political events and even set the geopolitical agenda”. At the same time he takes an idealistic/elitist approach to the way refugee policy could be handled. He demands a clear stance from political makers in the assumption that individual leaders play a decisive policy making role: ”Solving refugee problem depends on political leadership and on the exercise of political will”³⁴. From this point of view he dismisses the general public as a participant in the decision making process as well as the responsibility of policy makers vis-à-vis their citizens. Moreover he tends to present the UNHCR as an innocent partner of the Western Bloc rather than a rational actor which operates within the constraints of the Western/national governments and seeks to advance their interests. In his book *The UNHCR and World Politics* there is one side to the story of refugee protection during the Cold War: refugees were discriminated against the will of the UNHCR and United States is to be blamed for the failure to address the problem. As he claims, ”The nature of American commitment to refugees, which became increasingly regional and unilateral, continued to evolve during the 1950s and reflected

³² Ibid., pp. 41-42.

³³ One of the prime examples in this respect is the three million Afghans that fled to Pakistan, creating later the *mujaheddin* who backed by the West to resist the Soviet control of Afghanistan. Gil Loescher (1992), *Refugee Movements and International Security*, Adelphi Papers 268, pp. 12-13.

³⁴ Gil Loescher (1996), *Beyond Charity. International Cooperation and the Global Refugee Crisis*, Oxford University Press, p. 195.

the mania of anti-Communism and McCarthyism that gripped the nation”³⁵. Without doubt the United States’ approach to the Communist world helped to set up some of the rules with regard to asylum. At the same time the UNHCR was an active player, which helped to implement this policy. Moreover most Western countries were not divided on the issue, but recognized their interest and preferred to offer asylum to the refugees from the Communist world. Thus, United States policy was no different from other Western countries, a fact Loescher prefers not to mention. Moreover, similar to the United States, asylum policy in the Western world had already begun to change before the fall of Communism largely because of the number of refugees. In short, political context largely helped to shape asylum policy during the Cold War. At the same time national leaders were aware of the views taken by the general public since the mid 1980s and thus gradually offered a more restrictive policy.

Ivor Jackson’s book on *Refugee Concept in Group Situations* offers an examination of the international community behavior from 1921 to 1985. Jackson focuses mainly on refugee groups ”in which large numbers of persons have been obliged to leave their home country due to serious political events, such as a sudden change of regime, civil war, internal armed conflict.”³⁶ While he provides for a very detailed and interesting analysis on the development of UNHCR policy on asylum, he basically argues that the UNHCR has developed in the course of the years a differentiated terminology in dealing with the persons in question. Some groups were recognized as refugees, others as displaced persons or *prima facie* refugees; others were assigned a ”refugee-like” status. This determination, however, was not always based on an objective assessment of their situation. Jackson argues, for example, that it was the restrictive interpretation which wrongly excluded

”From refugee status under the 1951 Convention, and from the High Commissioner’s competence under the UNHCR Statute, large numbers of persons fleeing situations of armed conflict and violence even though such situations can in many cases be regarded as having a ”persecutory” element justifying the application of 1950/1951 definitions on a group

³⁵ Gil Loescher (2001), *The UNHCR and World Politics. A Perilous Path*, Oxford University Press, Oxford, p. 55.

³⁶ Ivor C. Jackson was an official of UNHCR for almost 30 years. See back cover, Ivor C. Jackson (1999), *The Refugee Concept in Group Situations*, Martinus Nijhoff Publishers, The Hague, p. 4.

basis. Such a result may be wholly inconsistent with the humanitarian objectives and purposes of the 1951 Convention and the UNHCR Statute”.

Moreover, he pointed to the fact that there is ”no general definition of ‘persecution’”. He explains, ”The question whether persons who flee from situations of armed conflict, violence, or generalized violations of human rights can be considered to be fleeing from ‘persecution’ – and in what circumstances – is essentially a question of interpretation”³⁷. Thus whereas Hungarians were recognized as refugees in 1956, refugees from other parts of the world were usually excluding from this definition. Tutsi who were forced to leave Rwanda after its independence in 1961 and fled to neighboring countries (such as Congo and Burundi) were not recognized as refugees. Though the author assumes that they deserved a refugee status, the UNHCR thought it is ”more appropriate to deal with the problem on the basis of ”good offices” as provided in General Assembly Resolutions”³⁸. The same applied for refugees from Sudan³⁹. But while Jackson points out the inconsistency of the UNHCR he refuses to draw the necessary conclusion, apparently as not to harm the reputation of the organization which he served for about thirty years. Thus in his closing remarks he argued that despite the, ”claimed *European* character of 1950/1951 refugee definitions, it should be said, in the first place, that while these are indeed created in a particular context, this context should not be seen as giving them so strong an imprint”⁴⁰.

From a sociological perspective Barbara Harrell-Bond’s study offers a particularly good example of the normative approach with regard to contemporary refugee policies. While examining the experience of refugees as recipients of aid, she asks:

”Is a major problem facing refugees their helpers? Obviously, like all of us, refugees need help of one kind or another, especially because, although they are ordinary people, they are in extraordinary conditions”.’ Their problem lies in their circumstances, the society they live in, the reaction of people to their presence, and the inhumane laws and treatment they are subjected to (Appe in Beristain and Donà, 1997). ”**Even without scientific evidence** that ‘proves’ that assistance which is based on the notion of ‘helpless’ refugee whose problems can be fixed by welfare

³⁷ Ibid., p. 6.

³⁸ Ibid., p. 152.

³⁹ In 1959, UNHCR established the office of Good Office to take care of refugees ”not within the competence of the United Nations”. Ibid., p. 160.

⁴⁰ Ibid., p. 469.

services causes refugees distress, **it would appear obvious that something is terribly wrong with current policies**” (emphasis added)⁴¹.

One of the academics to provide a less emotional picture is Guy Goodwin-Gill. In his book *The Refugee in International Law*, the first elementary work on refugee protection in International Law, he analyzes the development of refugee law since the beginning of the 20th century⁴². Goodwin-Gill examines in particular the way in which national governments interpret the Geneva Convention. He argues that in light of the slippery wording of the Convention different countries were tempted to offer different interpretation.⁴³ The Convention, for example, ”Says nothing about procedures for determine refugee status and leaves to States the choice of means as to implementation at the national level”⁴⁴. The result was that whereas:

”In some countries the principle of asylum for refugees is expressly acknowledged in the constitution, in others, ratification of the 1951 Convention and the 1967 Protocol has direct effect in local law, while in still other cases, ratifying states may follow up their acceptance of international obligations with the enactment of specific refugee legislation or the adoption of appropriate administrative procedures”⁴⁵.

After examining the current situation he asserts that asylum policy tends to be preventive: ”Attention now focuses on the ways and means to prevent refugee outflows”. At the same time, he acknowledges the fact that while refugee movement has an international dimension, ”Neither general international law nor treaty obliges any State to accord durable solutions”⁴⁶. However, he continues, ”The prevention of movements in search of asylum by stopping flight rather than removing causes, is no solution and may indeed amount to an abuse of rights”⁴⁷. As for the role of international organizations, he disputes

⁴¹ Barbara Harrel-Bond (1999), ”The Experience of Refugees as Recipients of Aid”, *Refugees. Perspectives on the Experience of Forced Migration*, Alastair Ager (ed.), Pinter, London, p. 158.

⁴² Guy S. Goodwin-Gill is Professor of international refugee law and Rubin Director of Research at the Institute of European Studies, University of Oxford. He is also the editor of *International Journal of Refugee Law*. Guy S. Goodwin-Gill (1998), *The Refugee in International Law*, Oxford, Clarendon press, second edition.

⁴³ Among the countries reviewed are Germany, France, United States ,Britain, Canada, and Switzerland.

⁴⁴ *Ibid.*, p. 34.

⁴⁵ *Ibid.*, pp. 21-22.

⁴⁶ Indeed ”apart from the duty of the State to readmit its nationals, solutions fall generally outside the area of legal obligation, justifies close attention to the policies and positions of States, particularly as revealed in statements in the UNHCR Executive Committee and in their practice”, *Ibid.*, pp. 268-269.

⁴⁷ *Ibid.*, p. 288.

the traditional image of the UN and UNHCR: "It may have been unrealistic to expect that such bodies could ever be non-political, or attain the desired levels of 'impartiality, efficiency and rectitude'"⁴⁸. The United Nations, for example:

"Repeatedly stressed the necessity for States to uphold relevant legal and humanitarian principles and to provide solutions to refugee problems. It has also approved action by UNHCR on specific issues, but has refrained from participation in the resolution of situations, other than calling generally for appropriate action to deal with causes"⁴⁹.

Thus for example while dealing with the humanitarian problems of Northern Iraq the Resolution, which was adopted by the Security Council on April 5 1991 "remains ambiguous" and "controversial". The United Nations eventually preferred, as it declared two weeks later, "To promote the voluntary return home of Iraqi displaced persons and to take humanitarian measures to avert new flows of refugees and displaced persons from Iraq."⁵⁰ The same applies for the UNHCR's role during the war in Yugoslavia: "UNHCR involvement in supplying humanitarian relief in the guise of 'preventive protection' is open to precisely equivalent criticism." It was even the High Commissioner's Special Representative for former Yugoslavia that declared already in 1994 before the war that "The UNHCR had been used as 'a palliative, an alibi, an excuse to cover the lack of political will to confront the reality of war...with the necessary political and, perhaps, military means."⁵¹

Elsbeth Guild, another prominent legal expert, concentrates mainly on the EU, while addressing the impact of regional integration on its Member States' asylum policy. In her book *The Developing Immigration and Asylum Policies of the European Union* published in 1996, she traces and comments on all measures taken by the EU between 1990 and 1995, i.e. resolutions, recommendations, conventions, etc. The introduction was provided by Jan Niessen, who concludes on his final observation, that:

"The European Union's efforts to design common policies in the fields of migration, asylum and integration are without vision or direction. Moreover, the way in which policies are being shaped lack transparency

⁴⁸ Ibid., pp. 284-285.

⁴⁹ Ibid., p. 285.

⁵⁰ Ibid., p. 286.

⁵¹ Ibid., p. 289.

and efficiency, and suffer from insufficient parliamentary and judicial control”⁵².

Nevertheless, as:

”In most member states of the Union, immigration and asylum are sensitive issues which often result in polarized debates. In such a climate, policy discussions and decisions on the protection of refugees and the integration of migrants can only profit from open and frank discussions at all levels”⁵³.

Guild aimed at showing the restrictive direction the EU has taken in immigration and asylum policy. One example is the *Resolution on minimum guarantees for asylum procedures* of June 1995. From her point of view:

”The most problematic aspect of the Resolution is that relating to the suspense effect of a right of appeal to a court or a review authority which gives an independent ruling. This is reflected in the development of policy on asylum among the Member States whereby the objective of the Member States to process asylum applications quickly and to remove those applicants refused recognition as quickly as possible from the territory has created a most unfortunate tension with the principle of rule of law”⁵⁴.

Guild also voices her critique towards the UNHCR’s position in the matter: ”the UNHCR Conclusion is somewhat unclear what should prevail where the request is clearly abusive”⁵⁵.

Guild together with Carol Harlow edited another study in 2001⁵⁶. The book was dedicated to an analysis of common measures taken at the EU level following the signature of Amsterdam Treaty in 1997, which entered into force in 1999. Most of the contributors, recognized legal experts and human rights activists, concentrated on a wide variety of issues such as on the court of justice’s jurisdiction over immigration and asylum policy, temporary protection and burden sharing (Gregor Noll and Vedsted Hansen), the common asylum procedures (Johannes van der Klaauw,) the Dublin

⁵² Elspeth Guild and Jan Niessen (1996), *The Developing Immigration and Asylum Policies of the European Union*, Kluwer Law International, The Hague, p. 60.

⁵³ *Ibid.*, p. 62.

⁵⁴ *Ibid.*, p. 435.

⁵⁵ *Ibid.*, p. 436.

⁵⁶ Elspeth Guild and Carol Harlow (2001), *Implementing Amsterdam. Immigration and Asylum Rights in EC Law*, Hart Publishing Oxford and Portland. See also Gregor Noll (2000), *Negotiating Asylum. The EU Aquis, Extraterritorial Protection and the Common Market of Deflection*, Martinus Nijhoff Publishers, The Hague, The Netherlands.

Convention and rights of asylum seekers in the European Union (Nicholas Black). The majority of the contributors, while concentrating on policy implementation, concluded that EU policy on asylum have a tendency to be very restrictive.

Danièle Joly's work' on the experience of refugees offers a political scientist's perspective⁵⁷. While she distinguishes between the old European regimes and the new ones, she argues that, "the paradigm has changed from a regime implementing a selective but integrative policy of access and full status recognition paired with full social rights and long-term settlement, to one which maximizes exclusion, undermines status and rights, and emphasizes short-term stay for refugees"⁵⁸. Thus in her opinion, the basic difference between refugee regimes of the Cold War period and contemporary ones can be summed up by the restrictive features of the new refugee regime. Joly also provides a detailed analysis of the measures that have been taken throughout the 1980s and the 1990s in the EU. Based on her analysis, she argues that the development in the EU corresponds to the new restrictive trend of the new regime in Europe in general. In this respect she does not treat the EU as a distinctive political phenomena or perhaps a new potential model in the field of migration. A major reason for this stems from the fact that she provides a descriptive analysis, focusing on implementation rather than the motivations behind this policy. As a consequence, she is limited in her ability to explain why the integration process has led to decreased refugee protection.

Sandara Lavaneax concentrates on European integration and refugee protection only, addressing in particular the question of coordination among Member States. She attempts to explain for example, "By which mechanisms can European integration lead to an approximation of traditional refugee discourses in the Member States and the emergence of convergent policy frames"⁵⁹. Yet, while raising important questions, she fails to fully understand the nature of the integration process. She believes, for example, that

⁵⁷ Danièle Joly and Robin Cohen (1989), *Reluctant Hosts: Europe and its Refugees*, Avebury.

⁵⁸ Ibid., pp. 153-155. See also Danièle Joly (1999), "A New Asylum Regime in Europe" in: Nicholson and Twomey (eds.), *Refugee. Rights and Realities. Evolving International Concepts and Regimes*, Cambridge University Press, p. 336.

⁵⁹ Sandra Lavenex (2001), *The Europeanisation of Refugee Policies. Between Human Rights and Internal Security*, Ashgate, Aldershot, p. 19.

Europeanisation refers mainly to institutional processes, that is "The evolution of intergovernmental cooperation in asylum matters at the European level goes along with a re-organization of political structures and processes at the domestic level and that it changes traditional cleavage structures and the distribution of power and competences in the multilevel constancy"⁶⁰. In this respect she takes an elitist approach to the European project, assuming like Loescher that the political actors should have an influential role on the perceptions of the general public. From her perspective, coordination is a one-sided process, largely determined by the political actors who have the capacity to construct the ethical orientation of the political discourse. In this respect she is not concerned with the public and the democratic nature of European integration. Undoubtedly, decision-making might help to legitimize certain norms at the national level. At the same time, however, one should not ignore the power of the general public. The latter is not an obsolete actor in the policy-making process, but rather can play an influential and perhaps even decisive role in this field.

II. Theoretical Framework

As most authors primarily focus on the legal and normative aspects of asylum, it is difficult to find an adequate theoretical framework for analyzing the relationship between asylum and regional integration. Indeed the nature of this debate has made it hard to differentiate between asylum policy as developed in a normal nation-state and that in the case of a regional experiencing integration. The result has been that the current literature is lacking the ability to appraise the nature of the asylum-EU integration process relationship over the last decade.

As a first step, the author will address those factors affecting decisions on asylum in a nation-state, which have thus far been neglected by scholars dealing with asylum (though not by scholars dealing with migration). Next the background conditions influencing national politicians who deal with asylum at the EU level will be considered. Current EU asylum policy has often been characterized by academics as well as various governmental and non-governmental organizations as restrictive. Yet the author feels that the literature

⁶⁰ Ibid., p, 20.

provides only limited insight into the overall relations between asylum and regional integration. It is believed that the move to regional integration and the resulting changes of form of governance has a greater influence on asylum policy than until now perceived. By analyzing the larger context of “community-building” and institutional factors, this study hopes to provide a useful perspective into the way regional integration has effected asylum policy and will evaluate future developments.

1. Asylum Policy in Western Society: The Built-In Conflict of Liberal Democracy

In many ways, it appears that Western asylum policy has increasingly led to a clash between universal human rights and the idea of a nation-state. The Western world is divided into nation states, which are inherently based on the existence of a subjectively felt community. On the other hand, the Western world has proclaimed its commitment to universal human rights, at a time when universalistic notions - human rights, international cooperation - have long since made inroads into the Western mentality. Thus, not the service to “national interests” alone defines the standards of politicians' behavior, but also the obligation to these universal principles. Under these circumstances, liberal democracy can be said to entail a built-in conflict between the need to preserve the specific character of the national community, on the one hand, and to defend liberal principles, on the other by accepting immigrants and asylum seekers.

2. State Pursuit of National Interests and Universal Human Rights

Most Western nation-states were created in the 18th-19th centuries, at a time when ideas about human rights and egalitarian norms were mostly absent. Though the American Bill of Rights, for example, intended to protect the natural rights of all people or, “what no just government should refuse”, it failed to provide these promises in practice. Slavery was abolished only after the 13th Amendment was approved in 1865 and women were granted voting rights only in 1920. Similarly, the French Revolution, which referred to the law in the spirit of Rousseau as, “the expression of the general will”⁶¹, confronted a great discrepancy between its theoretical claims and actual developments. Not all

⁶¹ As Fermon suggested, Rousseau actually believed woman to be a threat to civil society because “they retained longer than males a direct link to physical love”. See Nicole Fermon (1997), *Domesticating Passions. Rousseau, Woman and Nation*, Wesleyan University Press, Hanover and London, p. 9.

individuals in France enjoyed equal rights after the revolution. French women had to wait until 1945 to be granted political rights, while children of foreigners born in France were excluded from automatic access to citizenship⁶². As Patrick Weil pointed out, the decision to grant citizenship was based on the view that this act might be beneficial to France. Indeed, there is a close relationship between the lack of soldiers and the ability to naturalize foreigners as expressed in the law of 1851⁶³. A similar attitude was taken in Britain⁶⁴. Britain was unwilling to grant political and civil rights to individuals or "aliens"⁶⁵ did not subscribe to the official state religion⁶⁶. As a result, non-Protestants were denied citizenship until the second half of the 19th Century⁶⁷.

⁶² Following the French Revolution *des Droit de l'Homme et du citoyen* made a distinction between passive and active citizenship. The first meant "safeguarding everyone's person, property and liberty, where the latter "was reserved for the adult male who would contribute to the welfare of the state with his body and property". Peter Risenberg (1992), *Citizenship in the Western Tradition. Plato to Rousseau*, The University of North Carolina Press, Chapel Hill and London, p. 271.

⁶³ Though some French officials complained about the risks of disloyalty, the need for military strength finally convinced the French authorities to introduce revisions in the naturalization law. Moreover, where the 1851 naturalization law suggests that every individual born in France could be considered French unless the person concerned rejected this, the 1874 law annulled this option and children of foreigners born in France were forced to accept French nationality. For a detailed analysis of the naturalization process in France, see Patrick Weil (1996), "Nationalities and Citizenship: The Lessons of the French Experience for Germany and Europe", in: David Cesarani and Mary Fulbrook (eds.), *Citizenship, Nationality and Migration in Europe*, Routledge, London, pp. 74-81. See also Gérard Noiriel (1996), *The French Melting Pot*, Minneapolis, University of Minnesota Press, pp. 51-58.

⁶⁴ In the course of this period Britain also refused to recognize women being equal to men. John Stuart Mill, one of the most distinguished thinkers of the period, condemned this difference of approach, arguing that this "Is one of the chief hindrances to human improvements". It is worth noting that "The Subjection of Women", was also Mill's only book, which was commercially unsuccessful. See introduction by Jane O'Grady. John Stuart Mill (1996), *On Liberty and The Subjection of Women*, Wordsworth Classics of World Literature, Kent, Britain.

⁶⁵ The term alien was used to identify individuals who were not perceived as belonging to the dominant culture of the national community including both residents as well as non-residents. See Saskia Sassen (1999), *Guests and Aliens*, The New Press, New York, p. 78.

⁶⁶ In 1848, for example, the Jewish Disabilities Bill was introduced to prevent Jews from sitting in the House of Commons and possess the franchise; "that is the opinion of this House, that so long at least as the House of Commons exercises the authority which it at present does exercise over the Established Church, no Jew ought to possess the franchise, much less be allowed to sit in this House". See Hansard, Parliamentary Debates, April 3 1848, col. 1213.

⁶⁷ It is only with the 1870 Naturalization Act that aliens resided in Britain for a term of not less than five years, or had been in the service of the Crown, could apply to for naturalization. Yet, the naturalization process was still subject to the discretion of the Secretary of State. Laurie Fransman (1989), *Fransman's British Nationality Law*, Fourmat Publishing, London, p. 2. For a brief review on the citizenship and nationality law in Britain see also David Cesarani (1996), "The Changing Character of Citizenship and Nationality in Britain" in: Cesarani and Fulbrook (eds.), *op.cit.*, pp. 58-63.

The fact that the general perception in this age was that there is an inherent difference between various individuals in the society on the basis of race, gender and religion, may offer clues as to the Western state's attitude towards non-residents of the state, such as refugees or migrants, for example. As Sibley notes, the admission of "aliens" into a territory of a state was not an absolute or unconditional right, but a matter to be determined by the state solely⁶⁸. As a consequence, aliens were not in the position to claim any rights beyond those granted by the state.

The 20th century and in particular the aftermath of World War Two gave birth to new political ideas, that limited the ability of governments to use their power to control members of their society. In Western society it was now widely common to use the expression "liberal democracy" to describe a new form of a government which aimed at creating a representative political system that treats its individuals in a fair and just way⁶⁹. In the wider context it also meant a society which fostered ideas of freedom and equality among all individuals to create a true democratic and egalitarian society.

To a large extent, the process of democratization had a great impact on the behavior of the state towards migrants as well. Liberal democracies are called "to face their moral obligation" as Ruth Rubio-Marín suggests⁷⁰. They are subject to new international norms that make it difficult to deny immigrants and refugees basic human rights⁷¹. Yet the

⁶⁸ N.W. Sibley (1906), *The Aliens Act and the Right of Asylum*, William Clowes, London, p. 11. The 1905 Act, for example, prevented undesired aliens from entering Britain and enabled the government to expel foreigners on the grounds of poverty. As Satvinder also described "an undesirable immigrant was one who could not 'decently' support himself and his dependents (if any), and appeared likely to become a charge on public funds or was otherwise a detriment to the public". Satvinder S. Juss (1994), *Immigration, Nationality and Citizenship*, Mansell, London, p. 32. See also Zig Layton-Henry (1994), "Britain: The Would-be Zero-Immigration Country", in James F. Hollifield, Wayne A. Cornelius and Philip L. Martin (eds.) *Controlling Immigration. A Global Perspective*, Stanford University Press, California, p. 282.

⁶⁹ For an interesting analysis of the new challenge of Western society see, for example, Ruth Rubio-Marín (2000), *Immigration as a Democratic Challenge*, Cambridge University Press, Cambridge, pp. 20-24.

⁷⁰ *Ibid.*, p. 66.

⁷¹ Indeed, the rights of refugees and migrants has been recognized in many international conventions and declarations such as the 1948 Universal Declaration of Human Rights, the 1967 Protocol relating to the Status of Refugees, the European Convention of Human Rights, the European Convention on the Legal Status of Migrant Workers, the European Social Charter, and so forth. For a detailed analysis see Richard Plender (1996), *International Migration Law*, second edition, London, Martinus-Nijhoff publishers, pp. 227-236, 365-385 and Ryszard Cholwinski (1997), *Migrant Workers in the International Human Rights Law*, Oxford, Clarendon Press, pp. 332-352.

application of this new approach led increasingly to a new conflict in the host country. On the one hand, Western democracies claimed to be committed to human rights principles, and thus to treat all individuals by virtue of their humanity. On the other hand, they still wished to preserve the distinctive character of the national community and were thus reluctant to recognize all individuals/migrants as potential members. In this respect, Anthony Smith provides for the most authentic definition of the new features of the new nation in Western Europe, when he rightly observed that it has now embraced a legal ground but at the same time still has exclusive characteristics linked with a distinctive culture and tradition⁷².

The national concern about the identity of its community is best illustrated in the terminology used in the discourse over immigration in Western Europe in the last two decades. In Britain, for example, Asians, Africans and Caribbeans are often regarded as *ethnic minorities*. As Geddes pointed out, by defining a group of people as an ethnic minority (that is, sharing a common history, culture and tradition), one necessarily excludes them from the dominant culture and creates a dichotomy within the society between those who belong and do not belong to the majority culture.⁷³ In France the term *immigré* as, Kastoryano notes, is increasingly used to emphasize "l'aspect conflictuel de la présence étrangère". More specifically, it is now used as if to imply a potential for conflict and refers automatically to persons belonging to the most visible group of migrants, namely the North and West Africans (such immigrants arriving in today's France are frequently qualified as *clandestins*, *illegaux* or *sans papiers*⁷⁴). In Germany the expression *Ausländer* with its negative connotations seems to have been most commonly used to describe individuals who were considered to be of special concern, such as

⁷² Anthony D. Smith (1991), *National Identity*, London, Penguin, pp. 13-14.

⁷³ Andrew Geddes (1996), *The Politics of Immigration and Race*, Manchester, Baseline Books, p. 9.

⁷⁴ Riva Kastoryano (1997) *La France, l'Allemagne et leurs immigrants négociés*, Paris, Armand Colin, p. 17. Indeed, the word *immigré* is being used less and is definitely less adequate to refer to European migrants who first came to France on the basis of recruitment agreements between France and the sending countries and later through the provisions of the EEC Treaty and its implementation rules. These migrants received "European preference". Therefore, EC migrants are no longer or hardly "foreign" and the expression *immigré* with its negative connotation became exclusively reserved for the migrants from North and West Africa See Vincent Viet, *La France immigrée: Construction d'une politique 1914-1997*, Paris, Fayard, p. 275.

persons coming from Turkey (whether as asylum seekers or migrants)⁷⁵. Though their offspring are born in Germany and granted political and social rights⁷⁶, they have yet to become full members and are still recognized as *Ausländer* or *Ausländische Mitbürger*.

The wish to preserve the exclusive character of the national community was also reflected by the various attempts to limit the access to the national citizenship by recent legislative measures. If citizenship, as José María Rosales notes, “Empowers individuals to enter the community's political life”⁷⁷, then changes in the citizenship law in various countries in Western Europe imply that the national community prefers to limit this right towards specific ethnic groups⁷⁸. In France, for example, according to a law enacted in 1993, the so-called “Loi Pasqua” (directed primarily against immigrants from North Africa), the automatic acquisition of French citizenship was canceled and made more difficult by an application procedure⁷⁹. Also the 1981 British Nationality Act aimed at

⁷⁵ As Martin notes “many Germans viewed Turks as the most difficult foreigners to integrate because of their lack of education and skills, and importance of Islamic religion in their daily life”. Philip L. Martin (1994), “Germany: Reluctant Land of Immigration”, in: James F. Hollifield, Wayne A. Cornelius & Philip L. Martin (eds.), *Controlling Immigration*, California, Stanford University Press, p. 206.

⁷⁶ Germany, which based its citizenship law for decades on ethnicity, allowing only a few to naturalize altered its citizenship law in 1998. See Rogers Brubaker (1992), *Citizenship and Nationhood in France and Germany*, Harvard University Press, Cambridge, p. 123; Klaus Dieter Schnapauff (2000), “The Reform of the Nationality Law in the Federal Republic of Germany”, *Revue des affaires européennes*, April 2000, p. 81.

⁷⁷ As Soysal also argues citizenship is “an exclusive status that confers on the individual rights and privileges within national boundaries”. Thus, “Nation-states try to protect this exclusive status through immigration and aliens’ law”. Yasemin Nuhoglu Soysal (1994), *Limits of Citizenship. Migrants and Post-national Membership in Europe*, The University of Chicago, Chicago, p. 120; Dawn Oliver and Derek Heater (1994), *The Foundations of Citizenship*, Harvester, New York, p. 10 and Bart van Steenberg (1994), *The Condition of Citizenship*, Sage Publications London, pp. 2-9.

⁷⁸ The main idea was not to prevent all individuals from acquiring national citizenship, but only individuals belonging to the largest ethnic groups in the host country as well as citizens of countries with a high potential of labor exportation. In Britain this includes Immigrants from Asian and Indian origin, where in France it, is North Africans, especially Algerians. Moreover, while there was a tendency to restrict naturalization law, EU citizenship was offered to all EU nationals. This would allow EU nationals to “move and reside freely within the territory of the Member States” (Article 8, Maastricht Treaty). See also Andrew Ewans (1995), “Union citizenship and the equality principle” in: Allan Rosas and Esko Antola (eds.), *A Citizens’ Europe. In Search of a New Order*, Sage Publications, London, pp. 85-112; and Elizabeth Meehan (1997), “Political Pluralism and European Citizenship” in: Percy B. Lehning and Albert Weale (eds.), *Citizenship, Democracy and Justice in the New Europe*, Routledge, London, pp. 73-75.

⁷⁹ Since 1945 citizenship was automatically granted to every individual born in France of foreign parents upon reaching majority, provided the condition of 5 years residence in France was met. As a result of a law enacted in July 1993, individuals fulfilling the aforementioned conditions could acquire French citizenship once they expressed the wish to become French. This law also canceled the privileged treatment of the former colonies. Prior to this law, every individual born in France, with at least one parent born in a French colony before its independence had automatic access to French citizenship. Following the new citizenship

reducing the level of naturalization, primarily directed against persons arriving from the New Commonwealth such as Pakistan and India⁸⁰. Indeed as an OECD Report demonstrates the British Nationality Act helped to decrease the number of naturalized persons, especially from the New Commonwealth⁸¹.

Having briefly reflecting on the national concerns it appears that Western democracy has had difficulty freeing itself from the existence of subjectively felt community and so far is lacking a "democratic objectivity". Though modern Western states claim to have substituted the preferential treatment of individuals in the society by a civic society which provides all individuals with fair access to basic human rights, they have proven incapable of automatically integrating individuals from different political and cultural

law, however, 5 years residence in France before the birth of the child was required. The changes to the law were clearly aimed at tightening the process of naturalization. Moreover, migrants especially from North Africa could no longer gain automatic access to French citizenship. See Patrick Courbe (1994), *Le nouveau droit de la nationalité*, Dalloz, Paris pp. 59-63. Marie-Ange Gaiffe & Frédérique Berrod (1993), "The French Policy on Immigration", in: Gina D. Korella & Patrick M. Twomey (eds.), *Towards a European Immigration Policy*, Brussels, European University Press, College of Europe, pp. 170-171. Yet, the Socialist Government elected in 1997 softened the approach to immigration and made the naturalization law more liberal following the study of the immigration expert, Patrick Weil. As of March 1998, children born in France to foreign parents obtained automatic citizenship at the age of 18, provided they had lived in France for five years. Moreover, half of the illegal foreigners living in France were legalized by October 1998. Some members of the left opposed these measures as insufficiently generous. The government for its part tried to avoid more fundamental changes because of the prevailing anti-immigrant sentiment among the public. In response to pressures by leftist deputies in the Assembly to legalize illegal foreigners, Prime Minister Jospin argued: "92% of the French are in favor of the government's migration control. Should we fail in this..we would be throwing these voters straight into the arms of the far right". See *Le Monde*, April 10 1998, L'adoption du texte sur l'immigration confirme les divisions de la majorité cited in *Migration New*, May 1998.

⁸⁰ Already before the election in 1979, Margaret Thatcher declared that Britain is "being swamped" by immigration from the New Commonwealth. See *Hansard* March 10, 1980, col. 1010. As a result, the 1948 British Nationality Act allowing residents of the former colonies and citizens of the Commonwealth to work and settle in Britain, (since 1948 Commonwealth citizens could acquire relatively easily British citizenship,) primarily for economic reasons, has changed significantly. The 1981 British Nationality Act distinguished between different types of citizenship, giving preference to members of the Old Commonwealth e.g. Canada, Australia and New Zealand and some wealthy residents of Hong Kong. Meanwhile, citizens of the New Commonwealth (including former colonies in Asia, Africa and the Caribbean) who hold a UK passport received a rather meaningless designation. As British Overseas Citizens they had no right of entry or settlement in Britain. See Satvinder S. Juss (1994), *Immigration, Nationality and Citizenship*, Mansell, London, p. 54. See Ian Spencer (1997), *British Immigration Policy Since 1939. The Making of Multi Racial-Britain*, Routledge, London and New York, pp. 147-148; Andrew Walmsley (1998), "British Policy on Nationality" in: Siofra O'Leary & Teija Tiilikainen (eds.), *Citizenship and Nationality Status in the New Europe*, London, Sweet and Maxwell, p. 120.

⁸¹ For figures, see OECD Annual Report (1995), *Trends in International Migration*, Sopemi, Paris, p. 127.

backgrounds who have preserved their attachment to other political communities. Clearly, this affects the state's ability to admit further migrants and asylum seekers⁸².

The national dilemma is well described by Jürgen Habermas in the *Struggle for Recognition in the Democratic Constitutional State*. According to Habermas, the idea of political integration, which aspires to build a neutral order according to which every one can pursue his conception of good, might conflict with "the democratic right for self determination which include the right of citizens to insist on the inclusive character of their own political culture". With regard to migration one of the questions he raises is "assuming that the autonomously developed state order is indeed shaped by ethics, does the right to self determination not include the right of a nation to affirm its identity vis-à-vis immigrants who could give a different cast to this historically developed political-culture form of life?"⁸³

The tension in nation-states motivated by the desire to create a unique community shaped by tradition and history and the call for a pluralistic community (as Walzer advocates) including individuals from diverse cultures living together and tolerating multi-identity and multiculturalism (which is based on the objective notion of human rights and the egalitarian idea of a neutral order) is not likely to disappear. But, while this tension inevitably accompanies and influences Western democracies when they come to deal with asylum, there are a number of additional factors which help to guide decision-makers in the final outcome. These provide an essential trigger for politicians to adopt a more relaxed or restrictive policy on asylum. Hence, the author will take a brief look at certain aspects playing a vital role, focusing in particular on the interdependence of asylum and migration.

⁸² As Will Kymlicka notes, refugees, in contrast to migrants, did not wish "to give up their culture. Indeed, many refugees flee their homelands precisely to be able to continue practicing their languages and culture which is being oppressed by the government (e.g. the Kurds)". Will Kymlicka (1997) *Multicultural Citizenship*, Clarendon Press, Oxford, p. 98.

⁸³ Jürgen Habermas(1994), "Struggles for Recognition in the Democratic Constitutional State" in: Amy Gutmann (ed.) *Multiculturalism. Examining the Politics of Recognition*, Princeton University Press, New Jersey, pp. 137-139.

3. Asylum and Migration: The Inevitable Link

Under international law there is a clear distinction between a migrant and refugee. Whereas a migrant is generally defined as a person who *moves* from one region to another for various reasons, primarily economic ones, a refugee is a person who *flees* to another country in order to escape danger in his own "for reasons of race, religion, nationality, membership of a particular social group or political opinion" (The Geneva Convention). The reasons behind the act of migration have resulted in the interest of the international community in defending migrants and the ability of the Western state to exercise its sovereignty in relation to their admittance. Indeed, while decisions on allowing migrants to enter into a particular country are mainly considered domestic matters, heavily rooted in national interests and discretion, the access of refugees into its territory is also subject to international commitments accordance to its national law. Seen in this context, asylum policy can be expected to be totally independent and detached from immigration policy, as the main issue is to protect individuals in danger. However, in analyzing asylum policy it appears that decisions on granting asylum have often been influenced by priorities set up in other fields, such as migration, rather than solely by international obligations. This trend has become more visible in the last years, when the motives for the admittance of refugees during the Cold War have disappeared and simultaneously the number of migrants and asylum seekers has risen sharply. Yet, although migration and asylum are interrelated, the perceptions of asylum seekers and migrants have not always been uniform. Whereas during the Cold War refugees benefited from a positive connotation, this image is now being challenged by the large number of asylum applications. Moreover, in light of other priorities set by the state, such as economic considerations, migrants are likely to be more welcome than refugees.

3.1. The attitude towards refugees during the Cold War

The view of refugees during the Cold War was largely dependent on the political conditions in the world. In the light of the ideological confrontation between the East and West Blocs, refugees from the Communist World were usually perceived as victims and

thus offered protection by the West⁸⁴. To a large extent, anti-Communist refugees also played a vital psychological role in the confrontation. Their flight meant that they were reluctant to live in a form of governance which deprived its citizens of rights and freedom. This was often interpreted as a triumph for the Western Bloc and thus used as an effective tool to challenge the legitimacy of the Soviet Union. But beyond the need to "punish" the USSR and help the victims of Communism, there are number of other reasons which also help to explain the positive image of anti-Communist refugees. First, the number of asylum seekers until the 1980s was relatively small. Only a small number of refugees from Communist countries could actually apply for asylum since they were prevented from leaving their countries. Moreover, as Thränhardt explains, most European refugee groups were rather small and "elitist and thus could be easily integrated" in the host country⁸⁵. At the same time, other refugees from Communist countries were treated differently. Based on cultural affinity there was a tendency to prefer refugees of European origin. Thus "Chinese refugees could only flee to Hong Kong and many upon arrival were sent back to the Chinese authorities"⁸⁶.

The relatively receptive attitude towards European refugees was also encouraged by the economic conditions after the Second World War. Economic development after the war

⁸⁴ See Prakash Shah (1999), "The legal containment of refugees' political activism" in Nicholson and Twomey (eds), *Refugee. Rights and Realities*, Cambridge University Press, Cambridge, pp. 120-121.

⁸⁵ Dietrich Thränhardt (1996), *Europe. A New Immigration Continent. Policies and Politics in Comparative Perspective*, second edition, Lit Verlag, Münster, p. 14.

⁸⁶ Ibid. p. 15. This goes along with the European preferential immigration policy at the time. Western European governments mostly favored migrants of European origin, as they believed they are more likely to integrate and assimilate in their country. In a letter, for example, addressed to the Minister of Justice in June 1945, de Gaulle asserted, that for ethnic reasons, migration from the Orient should be limited in favor of migrants from Western Europe and the latter should be given preference for acquiring French citizenship. But the first recruitment agreement signed with Italy in 1946, aimed at bringing 200,000 workers, brought only 49,000. Both the labor shortage and the need to strengthen relations with the colonies led to the French authorities to encourage migration from colonies such as Algeria. In 1947, 65,000 Algerians arrived in France and two years later their number had risen to 256,000. Similar to France, other countries such as Britain and Germany failed to implement this idea. Britain, too, preferred initially European workers. However as they were not available, it looked for potential labor in the former colonies in Asia, Africa and the Caribbean. (In 1966 the New Commonwealth immigration population and their British-born descendants totaled 900,000, while by 1981 it had risen to 2.2 million.) Germany at first signed recruitment agreements with Italy (1955), Spain and Greece (1960). But as these countries could not provide enough workers, it then signed agreements with Turkey (1961), Morocco (1963) and Tunisia (1965). (By the early 1970s the Turkish immigrants represented 17% of all foreigners in Germany.) See Rainer Münz, Wolfgang Seifert and Ralf Ulrich, *Zuwanderung nach Deutschland. Strukturen, Wirkungen, Perspektiven*, Campus p. 169; Patricia Goldey, "United Kingdom", in: Ardittis Solon (ed), *The Politics of East-West Migration*, St. Martin's Press, London, p. 185; Noiriël, *op.cit.*, p. 20.

brought a need for more labor in heavy industry and agriculture, especially due to the drop in the birth rate and the refusal of many local workers to take on professions involving physical labor. European countries acknowledged the need to attract foreign workers to come and settle in their territory for a long or short period of time; they also looked for workers among refugees⁸⁷. As Marrus describes, many Western European countries even went to draw potential labor from the DP's camps⁸⁸. Due to the labor demand, national governments often expressed greater tolerance vis-à-vis the presence of illegal migrants. In 1966, for example, the French Welfare Minister declared that, if France were to adhere to international agreements, it would be left with a manpower shortage⁸⁹. Indeed, at that time 80% of the illegal migrants were legalized⁹⁰.

3.2. First signs of attitude change: the demographic factor and its implications on asylum policy

With the general increase of immigrants coming to the Western democracies in the 1970s, the relatively liberal attitude towards the settlement of foreign workers has changed. The general public was of the opinion that an excessive number of immigrants may affect the dominant culture of the national community. Thus, national politicians were preoccupied with the question of how to decrease the number of migrants. By this time foreigners represented about 7.5% of the total population of Britain, 6.5% of France and 5% of Germany. Policy makers worked out various regulations to reduce the level of migration. They have tried to prevent the arrival of additional workers with the suspension of recruitment agreements with countries outside the European Community, for example. They have also encouraged migrants to return to their country of origin by

⁸⁷ Philip Odgen (1995), "The Legacy of Migration in France" in: Russell King (ed.), *Mass Migration in Europe*, second edition, John Wiley & Sons, Chichester, p. 113.

⁸⁸ As Miles notes, Britain introduced the European Volunteer Workers Scheme in the framework of which European refugees were welcomed. Moreover, war prisoners from Germany and Polish exiles were also encouraged to stay. See Robert Miles (1989), "Nationality, Citizenship and Migration to Britain, 1945-1951", *Journal of Law and Society*, vol. 16, no. 4, pp. 430-431; Layton-Henry, *op.cit.*, p. 284.

⁸⁹ See Sarah Collinson (1994), *Europe and International Migration*, second edition, Royal Institute of International Affairs, London, pp. 49-50.

⁹⁰ Odgen, *op.cit.*, p. 113.

offering them incentives to leave as well as investing in their country of origin⁹¹. The number of workers did decline in the short term, thanks to these incentives, but in the long term, partly because of the policy of family reunification, it has steadily risen despite anti-immigrant sentiments⁹².

The inability to reduce the influx of immigrants further aggravated the attitude of the host population towards foreigners. From the 1970s onwards xenophobia and open hostility as expressed in acts of violence increased in number all over Europe. This has greatly affected the attitude vis-à-vis asylum seekers, who started to gain prominence since the mid 1980s⁹³. Consequently, refugees came to be viewed as a problem⁹⁴ and national governments attempted to introduce tougher legislation to limit the right for asylum. These measures, however, were insignificant till the end of the Cold War.

⁹¹ A government policy of offering incentives (since only voluntary repatriation was acceptable) to foreign workers to leave was unsuccessful. France, for example, suggested financial aid to migrants to return home in the end of the 1970s. Only 80,000 migrants, however, left, as a result of this program, most of which were Portuguese and Spanish. Moreover, the government's attempt to repatriate 500,000 Algerians in 1979 failed because of strong opposition from the left, trade unions, Gaullists and Christian Democrats. Even the Conseil d'Etat criticized some of the proposed restrictive measures. In Germany, a law was enacted in November 1983 offering financial help to migrants favoring a return home. Turkish families in particular were offered money. These, however, preferred to stay in Germany rather than return home with few job possibilities. See Patrick Weil & John Crowley (1994), "Integration in Theory and Practice: A Comparison of France and Britain," *West European Politics*, vol. 17 no. 2, April 1994, p. 114. Sarah Collinson (1996), *Shore to Shore: The Politics of Migration in Euro- Maghreb Relations*, London, Royal Institute of International Affairs, p. 19.

⁹² A policy of family reunification heavily supported by human rights organizations brought many family members of foreign workers to the host countries. "Uniting migrants with their families living in the countries of origin is recognized to be essential for the migrants' well-being and their social adaptation to the receiving country" argued the International Labor Organization (ILO) in 1973. Ryszard Cholewinski (1994), "The Protection of the Right of Economic Migrants to Family Reunion in Europe", *International and Comparative Law Quarterly*, vol. 43, July 1994, p. 568. OECD statistics for 1994 indicate that family reunification is the main channel by which French territory could be entered. Family reunification represented the main immigration flow (about 60%) in France in 1993, chart 1.2. OECD 1995, p. 14. The same holds true for the period between 1994-1998 see OECD Annual Report, Trends in International Migration, Sopemi, Paris, 1998, p. 18.

⁹³ The number of asylum seekers especially from non-European countries has grown since the mid 1980s.

⁹⁴ The gradual increase in the number of asylum seekers especially from non-European countries led to a conceptual change in the national discourse with the emergence of new qualifications such as *Asylantenflut* or *Wirtschaftsflüchtlinge* came to the forefront. These were mainly directed against asylum seekers from countries from which their number has risen, such as Sri Lanka, Vietnam, and Turkey. Ursula Münch (1993), *Asylpolitik in der Bundesrepublik Deutschland. Entwicklung und Alternativen*, second edition, Laske and Budrich, Opladen, p. 55. Thränhardt, *op.cit.*, p. 212; Thomas Faist, "How to Define a Foreigner: The Symbolic Politics of Immigration in German Partisan Discourse 1978-1992", *West European Politics*, vol. 17 no. 2, April 1994, p. 65.

3.3. The perception of asylum seekers after the end of the Cold War

With the end of the Cold War, Western governments started to exercise greater control on the admission of refugees. There are several reasons for this fundamental change. First with the collapse of the Soviet Union there was no more justification for pursuing the policy conducted during the Cold War. Moreover, with the sharp increase of the number of asylum applications there was a general demand by the public to halt the number of asylum seekers entering their territory⁹⁵.

In many ways the origin and profile of most asylum seekers has greatly contributed to this restrictive attitude. Newer asylum seekers often carry a different set of qualifications than those arriving during the Cold War. They were often poor, less educated, and coming from different cultural contexts. They were no longer perceived as heroic figures or "romantic exiles"⁹⁶. In the meantime, in the wake of economic growth, a new type of migrant worker became necessary. Unlike the traditional migrant mainly employed in the steel and automobile industries and in positions that did not require special training⁹⁷, the new worker has become a highly educated person, e.g. an IT expert⁹⁸. The need for new immigration contrasted with the public concern about migration, as revealed in opinion polls. Under these circumstances, policy-makers sought to convince the public of the advantages of new migrant workers while indirectly discrediting other types of migration,

⁹⁵ Stephen Padgett & Thomas Poguntke (2002), *Continuity and Change in German Politics*, Frank Cass, London, p. 178

⁹⁶ E.H. Carr (1998), *The Romantic Exiles*, Serif, London, pp. 54-67.

⁹⁷ See Hans H. Blotevogel, Ursula M. Jung & Gerald Wood (1995), "From Itinerant Worker to Immigrant? The Geography of Guest workers in Germany", in: King (ed.) *op.cit.*, p. 87.

⁹⁸ The German government announcement in April 2000 to issue green cards to highly skilled workers led to the appointment of the Bipartisan Immigration Commission, headed by Rita Süßmuth (CDU), which presented its recommendations on 4 July 2001. According to the Commission proposals 20.000 skilled workers should be admitted annually on a permanent basis, using a point system including education, age, language knowledge, etc. to select which foreigners will be admitted. According to this scheme 20 points will be awarded for a university degree, 20 points for language knowledge, etc. Another 20.000 should be admitted temporarily for a period of five years. With regard to asylum, a new approach was adopted, marked by the fact that asylum policy came to be seen as an integral part of immigration policy. Indeed, Minister of the Interior Otto Schily made a link between migration and asylum by declaring that the general public will allow the entrance of new migrants, if more restrictive measures on asylum were imposed. "Schily riskiert Konflikt beim Ausländerrecht", *Süddeutsche Zeitung*, 29 May 2001; Bericht der Unabhängigen Kommission "Zuwanderung gestalten - Integration fördern" July 4, 2001. See also, Esther Ezra (2003), "Refugee Protection in the Age of the EU: Germany as a Case Study", *Revue des affaires européennes*, April 2003, pp. 554-555.

such as asylum seekers. They suggested, for example, that the new migrant workers had special skills which are important to the local economy. Moreover, it was claimed that, in contrast to refugees, migrant worker could be selected and controlled. Indeed, various European governments have developed a mechanism for controlling the stay of those who were less likely to assimilate. The new programs also gave clear preference to migrants of European origin. The result was that migrant workers with special skills had a better chance of being admitted provided they could satisfy certain conditions believed to be necessary to the national economy.

3.4. The relevance of “9/11” to immigration and asylum policy

The events of September 11, 2001, constitute a turning point in the development of immigration and asylum policy. Whereas immigration traditionally involved sociological/economic aspects - the ability of immigrants to integrate into society and their impact on the labor market - immigration for the first time involved the security dimension. Thus, at a time when the Western world is attempting to find ways to respond effectively to the new threat, decisions on immigration are also guided by foreign policy priorities.

In many ways the new security environment has opened the way for a reevaluation of the idea of multiculturalism and opening of borders. From the national perspective, immigrants and asylum seekers are not only considered a threat to the character and economic welfare of the national community, but have a potentially great impact on the security of its citizens. Moreover, the fact that the terrorist attacks were carried out by individuals who shared common cultural features with the larger immigrant communities in Western Europe seemed to reinforce the negative perception of immigrants and asylum seekers⁹⁹. Under the new state of affairs both immigrants and asylum seekers came to be seen as potential dangers.

⁹⁹ Elspeth Guild (2003), “International Terrorism and EU Immigration, Asylum and Border Policy: the Unexpected Victims of 11 September 2001”, *European Foreign Affairs Review*, Vol. 8. Issue 3, Autumn 2003, pp. 336-337. See also Robert S. Leiken, “Bearers of Global Jihad? Immigration and National Security after 9/11”, The Nixon Center, Washington DC, March 2004.

4. Asylum Policy and Regional Integration: The Development of Asylum Policy in the European Union

The liberal democracy dilemma on migration having been described, the impact of the regional integration process on the development of asylum policy in the EU will now be analyzed. In addition, the consequences of this policy for asylum seekers will be examined and the likelihood of EU Member States moving towards a higher level of cooperation in the field will be explored.

One of the major conclusions of this research is that examination of the development of asylum policy in the EU has called into question the notion that regional integration necessarily entails progress in the field of human rights, in particular regarding asylum policy. It will be shown that, in contrast to the claims of EU policy-makers that regional integration would lead to a liberal asylum policy, in fact the opposite has occurred. There are a number of reasons why. Though the EU differs from the traditional model of nation-states, the EU has not been able to escape from the exclusionary and inclusionary pressures of the nation-state. Indeed, in this way the EU fulfils the requirement of a nation state. It will be argued that the special characteristics of this community have intensified the exclusive nature of the nation-states and that Europe is thus more sensitive to the influx of foreigners than traditional nation-states. Another explanation for the motivation for more restrictive asylum policies is related to the nation building process among EU members. Europe is in an early stage of a community building process and is attempting to create a strong common identity. At the same time EU policy makers are attempting to gain loyalty and prove the effectiveness and benefits of the integration process. In other words, the EU leadership wants to be positively viewed by its citizens and thus their claim to legitimacy will be reinforced. In this desire the EU is competing with all other nations because it runs against particular regional/national interests. It is therefore not surprising that the combination of all these forces has prompted the EU to adopt more restrictive measures on asylum in the hope of winning EU public support and to demonstrate the democratic nature of the European project.

4.1. The inclusive nature of the European Project

Though nation-building is not explicitly mentioned among EU policy-makers, it is evident by a number of actions that Europe is confronted with the same dilemma in defining in-groups and out-groups¹⁰⁰. The EU was never intended to avoid the exclusiveness of the traditional nation state, but only set new conditions for membership. The result has been an exclusive Union based on new points of reference¹⁰¹. A reference to this distinction was made by the introduction of a common passport, a symbol of mobility and economic advantages. At the same time non-EC migrants are prevented from entering the Union and enjoying similar rights¹⁰². With the disappearance of border controls and the increase of mobility, there is also pressure for a more restrictive control strategy. Yet beyond the fact that the number of immigrants has considerably increased, something has been left out of the discussion - the EU is in a state of nation building and thus mechanisms of nation building have provided another reason to be restrictive.

As Smith rightly observes, the European project was a deliberated plan, initiated by an elite, not by masses sharing common memories, myths and traditions. Thus "government may lead but their people are not always eager to follow them into the European Union".

¹⁰⁰ Federico Mancini, for example, argued that the European Union "would be a *demos* relying merely on the bond of civic loyalty". He also believed that, unlike the traditional nation-state, the EU is immune from the exclusion and inclusion process as it does not desire to exclude or create "us-them". Federico Mancini, the European Court of Justice, November 1, 1997, http://www.jeanmonnetprogram.org/papers/98/98-6--Europe_.html

¹⁰¹ The Treaty of the European Union stipulates that any European country that fulfils the provisions of Article, 6, that is democracy, respect for human rights and rule of law, can apply for EU membership. (Originally it was every European country. It was however, the Copenhagen European Council in June 1993, that laid down the conditions for the enlargement process.) It is worth noting that the new draft Treaty replaced the word "provisions" with "values": "the Union shall be open to all European States which respect its values and are committed to promoting them together" (Article 1). These values include "respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights" (see Article 2). The draft Treaty establishing a Constitution for Europe" European Convention, CONV 820/1/03 Rev 1, Brussels, June 27, 2003 (01.07).

¹⁰² As Jens Magleby Sorensen rightly describes, European Citizenship provides European citizens with a number of advantages: "they are entitled to move freely, to take up employment, studies or to retire in another Member States in which they hold citizenship". At the same time, "non-European nationals have been excluded and made non-members in the emerging European polity". Thus, for example, Indian migrants in Britain are denied the right of free movement of persons or the right to reside in other EU Member State. Jens Magleby Sorensen (1996), *The Exclusive European Citizenship. The Case for Refugees and Immigrants in the European Union*, Avebury, Aldershot, pp. 152-153.

The EU is lacking common tradition and myths, as Smith notes,¹⁰³ and is based, in Weaver's words, on "*raison de nation* rather than *raison d'état*"¹⁰⁴. A lack of myths makes inclusion more important. As it would not be effective to make references to a common past, policy-makers more frequently refer to a common present and future. Indeed, during the past few years there have been various attempts to prove Europe's effectiveness. In this way European leaders hope to instill in the EU's citizens a sense of identity. One of the means of doing so is through the exclusion of non-members of this integration process, while emphasizing the importance of EU citizen's preferences¹⁰⁵.

The fact that this nation-building process is a hybrid one in terms of its final composition only adds more difficulties to the formation of a common identity. It is yet to be clear

¹⁰³ Anthony D. Smith (1995), *Nations and Nationalism in a Global Era*, Polity Press, Cambridge, pp. 126-129.

¹⁰⁴ Quoted by Heikki Mikkeli (1998), *Europe as an Idea and Identity*, Macmillan, London, p. 219.

¹⁰⁵ "It would be a serious error or judgment to consider European integration as nothing more than an effort to adapt the economies of our countries to the challenge of free international trade and globalization". "What we need to build is a union of hearts and minds, underpinned by a strong shared sentiment of a common destiny – a sense of common European citizenship" Romano Prodi, September 14, 1999. As a result of the criticism directed against the EU and its institutions, politicians at the EU and the national level have stressed the need to make the EU system more attentive to the European public; Following the Declaration on the future of the Union adopted by the European Council in Nice December 10, 2000, prominent politicians have already pledged to put the people of Europe's concerns at the top of the agenda; "We would not start this debate with an abstract discussion of philosophy or institutional change. We should start with what *we* want the European Union to do. In particular we should start with *what the people of Europe want it to do*". Tony Blair, Prime Minister of Britain addressing the European Parliament on 3 April 2001; "We need more of Europe..that respects the equality of its members and where the citizens of Europe can feel effectively represented". "The European Union must not be allowed to risk leaps in the dark of the failing to take account of the concerns of its citizens". Jaime Jose Matos de Gama, the Portuguese Minister for Foreign Affairs addressing the European Parliament on 22 June 2001. In December 2001, the European Council in Laeken decided to set up a Convention to establish a European Constitution. (One of its main goals was to make the EU more efficient and more democratic.) After 16 months of work Valery Giscard d'Estaing, the Chairman of the European Convention submitted a *Draft Treaty establishing a Constitution for Europe* to the European Council in Thessaloniki on June 20, 2003. As declared in the preamble, the basic motivation behind this Convention was "how to bring citizens closer to the European design and European institutions". See the draft Treaty establishing a Constitution for Europe" European Convention, Conv 820/1/03 Rev 1, Brussels, June 27, 2003 (01.07). During the preparations for the European Convention, politicians repeatedly emphasized their commitment to the People of Europe: "The strength of the Union is based on the trust and confidence of its citizens. Without that, the Union will lack legitimacy - and thereby effectiveness. If we want to improve the legitimacy of our actions, we will not only have to reform the institutions but also furnish answers to the questions on the citizens' agenda", Göran Persson, President of the European Council and Prime Minister of Sweden. Message from Göran Persson, President of the European Council and Prime Minister of Sweden, 7.3.2001. http://europa.eu.int/futurum/documents/speech/sp070301_en.htm. During the Thessaloniki European Council on June 20, 2003, the Greece Prime Minister addressed the EU citizens, "We want a better Europe for all its citizens. A genuine Europe. A Europe, which cares about the everyday problems of its citizens and endeavors to find answers and solutions to them".

who the "people of Europe" are. Is Turkey part of Europe? Could Russia or Ukraine be considered as potential members¹⁰⁶? In short, as the number of countries involved in the integration process constantly grows, there is a need to accommodate new members with new political and cultural baggage. From this perspective, the enlargement process could postpone the formation of a common identity, since it is more difficult to find common ground for among 27 Member States than among 15.

The fear of newcomers is indeed manifested in the general public's opinion of the 2004 enlargement round¹⁰⁷. National polls report that there is little public support among the European citizens for EU enlargement¹⁰⁸. Thus, it appears that this process is too fast and that EU citizens are not yet ready to accept new members. The lack of wide support for the enlargement to include Central and Eastern European countries partly stems from

¹⁰⁶ Various declarations at the EU level illustrate how difficult it is for policy makers to define the borders of the EU. The President of the European Commission, for example, suggested that "the aim of 'one Europe'" is to embrace "the whole continent". Yet he notes "the debate on where Europe's borders lie is actually a debate about our identity". "We must try to answer those in the current Member States who are starting to ask where the European Union ends. On the definition of the outer limits of the Union hangs the political choices we have to make for the Union itself – the nature of the project its cohesion, its strength and ultimately its identity". See Romano Prodi, President of the European Commission, opening of the 2002/2003 academic year Florence January 20, 2003. europea.eu.int/comm/commissioners/prodi/speeches/firenze_en.htm, 7.7.2003 and One Europe, European Parliament Strasbourg, December 18, 2002 Speech/02/637.

¹⁰⁷ Ten new Member States i.e. Poland, Estonia, Czech Republic, Hungary, Slovenia, Bulgaria, Romania, Lithuania, Latvia, Slovak republic, Malta, Cyprus, will be admitted to the EU by May 1, 2004; Negotiations with Romania and Bulgaria are expected to be finished by 2007. (The EU offered a road map and reinforced pre-accession strategy.) As for Turkey, the negotiation is yet to be opened. The Copenhagen European Council of December 2002, decided the Commission would reevaluate the political situation in Turkey and present a report before the Council in September 2004. On the basis of this report, the European Council decides, whether or not the negotiation with Turkey can be opened in December 2004. See the Conclusions of Copenhagen European Council, December 12-13, 2002 and Article 1 and 2 of the Accession Treaty Draft, January 31, 2003. See also Thessaloniki European Council 19 and 20 June 2003.

¹⁰⁸ Opinion polls taken in recent years suggest less than 50% support for EU enlargement among the European Public. In 1998, the average support level was 44%, where paradoxically there was a higher support level for countries, which did not join the EU, i.e., Norway and Switzerland. In 2002, the support for EU enlargement had slightly risen to 49% but according to the June 2003 Eurobarometer, it had fallen down to 46%. It should be noted that the level of support among the candidate countries was not particularly high; only 59% of the citizens in the candidate countries felt that EU membership would be a "good thing" for their country. See Eurobarometer, Candidate Countries, March 2002, p. 3; Eurobarometer, Public opinion in the European Union, Report no. 47 October 1997, p. 35; Report No. 48, March 1998, pp. 55, 69; and Eurobarometer 59, Public Opinion in the European Union, June 2003, p. 15. As a reflection of this lack of enthusiasm for enlargement, most European Member States have placed new restrictions on job seekers from the countries joining the EU in May 2004. "Restrictions contradict the ideals of unity: But there are deep cultural fears of being overwhelmed by immigrants". See *Financial Times*, February 9, 2004.

the potential of their citizens to migrate into EU territory¹⁰⁹. For this reason, EU Member States decided to deny the right of free movement of persons to citizens of the new member states at least for several years¹¹⁰. The EU's attempt to prevent migration into its territory also shaped the EC's Accession Agreements with Greece, Portugal and Spain during the 1980s¹¹¹. In the course of negotiations leading to the accession of Spain and Portugal to the European Community, EC Member States insisted that the principle of free movement of workers between the EC and Greece, Spain and Portugal had to be established gradually, that is after a transitional period of 7 years (by 1993). This was not requested from Finland, Austria or Sweden, who joined the EU in 1995, largely because their citizens are less motivated to migrate. In fact these countries already benefit from free movement of persons in 1992 with the signature of the EEA¹¹². In short, while the

¹⁰⁹ The EU is aware of the concerns raised by the citizens on the consequences of EU enlargement. As Günter Verheugen, the Commissioner responsible for enlargement declared: "enlargement is a vast, complex and difficult task" and European citizens fear its implications in various fields such as crime and immigration. But while he acknowledges the public concern and believes the EU "should take these concerns seriously", national governments prefer not to open this issue to public debate. Thus instead of holding a national referendum prior to the admission of the new countries in the EU, Member States decided it is up to the national parliaments to ratify the accession agreement. The candidate countries, however held a national referendum. Günter Verheugen: "Member of the European Commission responsible for enlargement from Copenhagen 1993 to Copenhagen 2002", European Policy Centre Seminar, Brussels. June 6, 2002.

¹¹⁰ In general the maximum duration of a transitional period is seven years. At the same time it is subject to national discretion of individual Member States. A Member State can decide to grant a free movement of persons either after two years (that is May 2006), or only after five years (by May 2009). In both cases, however, they "shall notify the Commission whether they will continue applying national measures". The Commission will review the situation but its findings, however, will not have a binding effect upon the respective Member State. Member States can still apply restrictions up to a period of seven years (particularly "in case of serious disturbances of its labour market or threat thereof and after notifying the commission", see Article 5.) Germany and Austria, on the other hand, decided *a priori* that in sensitive sectors such as construction and industrial cleaning, free movement of workers and services will be established only after seven years of transitional period. (In Austria the list is relatively longer than in Germany, including home nursing, manufacture of metal structures, cutting, shaping and finishing stones, security activities, etc. and other services.) Thus they are exempted from the obligation to "notify the Commission whether they will continue applying national measures" in the course of this period (Article 13). See EU Accession Treaty, January 31, 2003, Free Movement Annex. See also Negotiations on Accession by the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to the European Union, Treaty of Accession, Brussels, April 3, 2003 (OR.en) AA 2003 final.

¹¹¹ France was one of the main opponents to the immediate application of the free movement of workers. Indeed, surveys conducted in the 1980s indicated that a large percentage of the French population believed there were too many Spanish and Portuguese in the country. Christopher Preston (1997), *Enlargement & Integration in the European Union*, London, Routledge, p. 144-145; Antony M. Messina (1990), "Political Impediments to the Resumption of Labor Migration to Western Europe", *West European Politics*, Vol. 13, No. 1, January, p. 43

¹¹² The EEA (European Economic Area) agreement signed in 1992 between EC and EFTA (European Free Trade Agreement) countries allows free movement of workers to both EC and EFTA nationals. As a result citizens of Sweden, Austria, Finland, Norway, Liechtenstein and Iceland, can work in the EU territory. At

EU advocates free movement of persons, it appears to grant this right to countries whose citizens are less likely to migrate¹¹³. But if the EU's public fears migration from the European countries joining the EU in May 2004, this basically implies that it is recognized that it is much more difficult to admit or integrate those who come from a different cultural and political attachment.

4.2. EU's search for legitimacy: "More democracy, transparency and efficiency"

In the normal case of a nation-state, national identity is the primary loyalty of the citizens to the state. This seems to overcome cleavages, cover up differences and create an illusion that different people have similar interests¹¹⁴. The EU however, has not only two

the same time the European agreement were signed in 1991 between EC and Central and Eastern European countries, do not refer to free movement of workers. The differentiation of the treatment is, to a large extent, related to the fact that whereas EFTA citizens do not tend to migrate since the economic situation back home is more or less comparable to the one in the EU, the relatively difficult economic conditions in Central and Eastern Europe makes migration more attractive. See Marise Cremona (1997), "Movement of Persons, Establishment and Services", in Marc Maresceau, *Enlarging the European Union: Relations between the EU and Central and Eastern Europe*, Longman, London, pp. 195-197.

¹¹³ Not surprisingly it took the European Community more than four decades to apply the idea of free movement of persons. It was only in 1992, at a time when EU citizens (such as Italian nationals) were no longer as motivated to migrate as they were in 1957.

¹¹⁴ There is no general agreement about the substance of a nation state. As various theoreticians have already noted, different communities can be based upon different criteria. Deutsch, for example, suggested a functional definition according to which there is no particular ingredient to create a community, but "a complementary test" among its members. Kohn made the distinction between two models of nationalism, namely Eastern European and Western European. The first is marked by the importance of ethnicity and culture; whereas the latter tends to stress the importance of "a liberal and rational civil society". Berlin pointed out in general that the emergence of European nationalism and the creation of nation-states in the 19-century finally disproved the central doctrine of the French Enlightenment about the unity of mankind and rationalism as the driving force of society. Nationalism, according to Berlin, rests on the conviction "that man belongs to a particular human group, and that the way of life of the group differs from that of others, that the characters of the individuals who compose the group are shaped by, and can not be understood apart from, those of the group". Yet, Connor argued that there is often a lack of symmetry between the judicial territorial unit and the ethnic community. Thus, the majority of the countries in the world do not coincide with their national communities. Mayal, took these concerns into consideration but predicted that the territorial map is not likely to undergo dramatic transformation as not to risk the international order. (For this reason, it should be the basic point of reference.) Recent theories, however, in the field of nation-state, provided by Eric Hobsbawm and Benedict Anderson, challenge the traditional definition of this term. Hobsbawm declared that a nation, as such, is a fiction, "an invented tradition", whereas Anderson claimed that a nation "is an imagined political community" because "the members of even the smallest nation will never know most of their fellow-members. yet in the minds of each lives the image of their communion". Whether or not a nation-state is an "illusion" or "imagined community", one cannot ignore the fact that it is very real. People fight for it (national self-determination) and die for what they perceive as their nation-state. Karl Deutsch (1969), *Nationalism and Social Communication*, Cambridge, the M.I.T press, pp. 96-98; Hans Kohn (1965), *Nationalism: Its Meaning and History*, second edition, pp. 29-30. Anthony D. Smith (1991), *National Identity*, London, Penguin, pp. 13-14; Eric Hobsbawm (1983) "Introduction: Inventing Traditions" in: Eric Hobsbawm and Terence Ranger (eds.), *The*

levels of decision-making, but also two levels of nationalism, namely that of the Member States and the EU. As Eric Holm states, "No national government is arguing for the abolition of the states system and for the installation in its place of a single political authority"¹¹⁵. Thus nation states continue to exist within a larger community created to increase the prosperity and political stability of its specific members. Under these circumstances a tension between the Union and the Member States is likely to emerge. EU leaders must prove their effectiveness not only in absolute terms, but relative to the

Invention of Tradition, Cambridge University Press, pp. 1-15. See Isaiah Berlin (1998), "The Counter-Enlightenment" and "Nationalism. Past Neglect and Present Power", *The Proper Study of Mankind*, An Anthology of Essays, Farrar, Straus and Giroux, New York, pp. 243-268, and 581-604. Walker Connor (1978), "'A nation is a nation, is a state, is an ethnic group, is a...'", *Ethnic and Racial Studies*, October, pp. 377-400. James Mayall (1990), *Nationalism and International Society*, Cambridge, Cambridge University Press. pp. 59-69. See Benedict Anderson (1991), *Imagined Communities, Reflections of the Origin and Spread of Nationalism*, Verso, London, p. 6.

¹¹⁵ As Erik Holm argues the European project "is a polity without authority." "Consequently we now see the confrontation between union and nation". Erik Holm (2001), *The European Anarchy. Europe's Hard Road into High Politics*, Handelshøjskolens Forlag, Copenhagen, pp. 10,15. Other scholars have recognized as well that the EU is a new system of governance: "It's neither a state nor international organization". Some treated the EU as a federal system, others as anarchy or "no demos thesis". But while they provided different concepts to this term they basically claim that the "model of democracy developed in the national context cannot be easily transferred to the EU" (Simon Hix). According to Hix, for example, the EU may be more than an international organization, but it will not replicate a state. There is a mix of state and non-state actors: "The process of governing is no longer conducted exclusively by the states but involve non-state actors. The result is a new problem-solving rather than bargaining style of decision-making. In other words the new governance "is in stark contrast to the classic state-centric, command and control. Policy making in the EU is not the same as in a domestic state. There is no central agenda-setting and co-ordinating actor, like the chief executive in a presidential system or the governing party in a parliamentary system. The process from initiation through adoption to implementation is complex and involves constant deliberation and co-operation between several levels of state and non-state officials". Simon Hix (1998), "The Study of the European Union II: the 'new governance' agenda and its rival", *Journal of European Public Policy*, 5:1 March, p. 39. As Warleigh describes the EU is not (solely or even mostly) a tool by which national governments achieve their preferred policy outcomes without significant cost or compromise. By playing the EU game "national governments sacrifice some of their independence in order to secure their objectives". Paradoxically, more democracy at the EU level leads to loss of democratic control at the national level. The result is that "no EU citizen can rely upon her or his government to secure the outcomes they have promised, since the unilateral power to block unwanted decisions has been reduced and in some cases, removed". Alex Warleigh (2003), *Democracy in the European Union*, SAGE, Publications, London, p. 7. Weiler, for example, argued that EU's legitimacy is based on collective peoples rather than one *demos*. This raised the issue of democracy and legitimacy of the EU process: "a majority demanding obedience from a minority which does not regard itself belonging to the same people is usually regarded as subjugation". As for the possibility of producing a constitution for Europe, he believed that "it is a remarkable instance of civic tolerance to accept to be bound by precepts articulated, not by 'my people', but by a community composed of distinct political communities" ("The European peoples are subject to constitutional discipline even though the European polity is composed of distinct peoples"). In this respect he believes the EU resembles the political situation in Canada. "The Quebecois are told: in the name of the people of Canada, you are obliged to obey. The French or the Italians or the Germans are told: in the name of the peoples of Europe you are invited to obey. In both constitutional obedience is demanded". Weiler J.H.H. (2002), "A Constitutional for Europe? Some hard Choices", *Journal of Common Market Studies*, Vol. 40, Number 4, p. 568.

Member States as well.

The 1992 Maastricht Treaty introduced the concept of European citizenship for the first time. Union citizenship implies that Europe has gone beyond an economic union. Indeed, Maastricht meant an increase in responsibility as well as an increase in democracy. The fact, however, that EU policy-makers have claimed that there is a European citizenship is not enough, they have to prove it. They have to fill it with content. In this process they have to prove the advantageous to its citizen of Europe and thus to underpin its claim to legitimacy¹¹⁶. Thus if citizens are concerned about migration, Europe has to prove its effectiveness in this area. The imperative to be effective is particularly pronounced here as it threatens to undermine the EU's ethnic composition. Unlike other areas, such as unemployment, asylum goes to the very core of a nation-state, i.e. the question of who is a member. Thus the protection of borders and membership will remain major issues of the EU.

These expectations of citizens are hard to satisfy in the field of asylum, as there are two mandates to achieve: to be humanitarian and effective. The imperative of these two principles in the case of asylum is associated with much emotion, and involves many people and life and death. Asylum policy is closely perused by the citizens in both the camps of the right and left and involves international norms. The result has been that the EU straddles the fence by attempting to do two things at the same time. The Commission, in particular is trying to prove its allegiance to universal principles. At the same time, it is trying to be effective. In contrast to other policy areas, where the EU proclaims its effectiveness, the EU is loath to tell its citizens: "WE are very effective", "WE expelled

¹¹⁶ Opinion polls have shown that since the signature of the Maastrich Treaty public support for the European Community remains relatively low. Only 44% of EU citizens, for example were of the opinion that the completion of the single European market by the end of 1992 will be a good thing for them (Eurobarometer 37, June 1992, A 41). As March 2002 (Oct-November 1999) Only 46% believe that they benefit from Union membership and 41% are satisfied with the way democracy works in the European Union. When they were asked whether there is a shared European culture identity only 38% of EU citizens agree that there is a shared European culture identity. When EC citizens were asked if they feel European only 14% said it happens often. How Europeans See themselves, Looking through the mirror with public opinion surveys, European Commission, 2001, pp. 12-13 and 23. Eurobarometer 2001, March 2002, p. 4. The Eurobarometer survey for spring 2003 revealed that the image of the Union has improved. Yet only 50% of people think their country has benefited from membership (Eurobarometer 59, Public Opinion in the European Union, June 2003, p. 13). http://europa.eu.int/futurum/documents/other/oth170603_en.pdf

all the foreigners”. While the EU realizes it must be effective, it hesitates to stress the fact that asylum is a problem. They thus couch the problem in other terms. The result has been a development of new categories of refugees and refugee protection, which are, nevertheless designed to limit the access of asylum seekers to refugee status¹¹⁷.

4.3. The different positions towards asylum among EU institutions: the role of power in EU policy making

The governments of Western democracies constantly struggle with balancing exclusionary and inclusionary pressures in setting (and, sometimes equally important, discussing) policy and the EU also has to deal with this conflict. For many years the EU had the advantage, however, that governance responsibilities were divided up among several different institutions (the Parliament, the Commission, and the Council), each with a different level of authority. It could thus accommodate these pressures more readily by having the weaker institutions voice approval for liberal asylum policies based on universal principles (not having a major influence on policy), while the more authoritative institutions promulgate restrictive policies. After the ratification of the Amsterdam Treaty, this balancing act was harder to accomplish, as the weaker institutions, and in particular the Commission, gained more authority and, at the same time, pressure was applied to the EU leadership to become more responsive (democratic) to the citizens. Thus, it has become apparent that the two views are getting closer, more specifically, that those who were advocating for a more liberal asylum policy were now leaning towards more restrictive policies. How this happened is described in more detail below¹¹⁸.

¹¹⁷ While most asylum seekers were recognized as displaced persons, a *prima facie* refugee, *bona-fide* refugees, they were excluding from refugee status. The result was that out of 3.7 million applications for asylum submitted in the EU territory in the last decade less than 10% of the applicants were recognized as refugees under the Geneva Convention. See *The State of the World's Refugees. United Nations High Commissioner for Refugees (UNHCR)*, Oxford University Press, 2000, Annex 9, pp. 321-324.

¹¹⁸ While the EU Member States have created a new form of governance, the power of EU institutions rests with the Member States. The Member States decide when and how much responsibility to delegate to common institutions. Thus any decisions on extending the powers of the EU institutions including the adopting of new treaties such as Amsterdam and Nice or questions of enlargement fall within the authority of intergovernmental organs such as the Council, which consists of the national representatives. Indeed the most powerful institutions in the integration process and in particular in the field of asylum are the Council

Before Amsterdam, the Commission and the Parliament took a universalist view, whereas the Council (representing the Member States at the EU level) along with the Member States were realistic. The fact that the Council was the primary decision-making body was reflected in its more realistic approach. Institutions carrying less final responsibility for legislation have the chance to be moralist in hopes of improving their international prestige. Indeed, at the moment the Commission seemed to be more dedicated to universalist principles than other institutions. Yet, while the Commission has suggested liberal proposals with regard to asylum, its actual decision-making authority in this area was limited¹¹⁹. Moreover, it was less dependent upon public opinion; as it had no voters and was never elected¹²⁰. The Commission officials were not subject to public pressure as were the Council members at the national level. In other words as long as the Commission did not shoulder responsibility, it was easy for it to advocate a liberal policy. It is assumed, however, that as soon as it has to cope with solutions by gaining more responsibility it is likely to tone down its criticism and become more realistic. After Amsterdam to some extent such a change is already visible as the authority of the Commission has increased. The positions of the Commission remain liberal compare to the Council, but in contrast to ten years ago it is now involved in "policy networks". Since then there has been a tendency to show a more restrictive position¹²¹.

of Ministers. Moreover, unlike other areas such as competition and trade where the common institutions such as the Commission and the Parliament have substantial political weight, they have limited authority in the field of asylum. Peter Mair (2000), "The Limited Impact of Europe on National Party Systems", *West European Politics*, Vol. 23, October, No. 4, p. 45.

¹¹⁹ The Commission's main role is to initiate legislation. At the same time it lacks freedom of action in implementing EU policy. The Commission's power is controlled: "when the Commission proposes a policy, it is subject to political control: its proposals become law only if they are approved by the Council and the Parliament" J. Temple Lang (2002), "How much do the smaller Member States need the European Commission? The role of the Commission in a changing Europe", *Common Market Law Review*, Col. 39, No. 2, April, p. 326.

¹²⁰ The 20 Commissioners, who are elected for five-year terms by the national government, are appointed for their general competence and are expected to be act independently from the government in which they are national. See Neil Nugent (1999), *The Government and Politics of the European Union*, fourth edition, Palgrave, London, p. 105.

¹²¹ The fact that the Commission's right of initiative has grown considerably in the last years has not resulted in a more liberal policy. For as the Commission wishes to gain the consent of the Member States, it needs to learn the positions of all Member States and make a proposal that will not be controversial. The result is that it often drafts a proposal which reflects the national stance on a particular issue. Indeed, as Dinan notes, the Commission "rarely wants to isolate or embarrass members states". It is aware of the national stance and thus will make proposals which are likely to be accepted. See Desmond Dinan (1999), *Ever Closer Union. An introduction to European Integration*, The Macmillan Press, London, p. 226.

The Parliament remains insignificant for the moment¹²², but as with the Commission as soon as it was given increased responsibility, it took off its "liberal mask"¹²³. In short, the luxury expressed in popular views disappeared once the Parliament became more involved in certain policy areas. The fact that only EU Member States and the Council are involved in decision-making results in a higher recognition of the views of the voters. There is a linkage between increased responsibility and the existence of democracy. Policy makers have to serve the people, not a monarch. Thus, EU policy makers must prove to their people their effectiveness¹²⁴. One expects them to be active, to strive to gain their loyalty. National leaders are called upon to respect the rights of their citizens. If citizens are concerned about migration, then national politicians must provide an effective response. It can therefore be assumed that EU policy makers have to respond to the same concerns.

But while it is expected that Member States and the Council will show awareness of the public's needs, the author believes that the Commission and Parliament will also follow suit. EU institutions are becoming more democratic, and thus the Commission's and the Parliament's attitudes must, to some extent, reflect the views of the citizens. The Commission as well the Parliament want to be admired. The Parliament wants higher

¹²² The European Parliament has acquired an important voice within the EU system, especially since the treaty of Amsterdam, with the introduction of the co-decision procedure in a variety of policy areas. Yet it remains a peripheral actor in asylum issues. The main reason for this derives from the fact that national politicians often perceive the Parliament as a competitor. Where the Commission operates as a mediator and the Council represents the national governments, the Parliament's increasing power might challenge the authority of the national parliaments. For this reason, as Smith notes, national politicians prefer to retain their power and not always inform the Parliament about their activity. Julie Smith (1995), *Voice of the People. The European Parliament in the 1990s*, The Royal Institute of International Affairs, London, p. 93; Andreas Maurer (2003), "The Legislative Powers and Impact of the European Parliament", *Journal of Common Market Studies*, April, Vol. 41, No. 2, p. 227; Mark Gray and Alexander Stubb (2001), "Keynote Article: The Treaty of Nice - Negotiating a Poisoned Chalice?", *Journal of Common Market Studies*, Vol. 39, September, p. 12.

¹²³ The liberal opinion expressed by the Parliament in human rights issues is largely related to the composition of the Parliament and the profile of its representative. The Social Democrats were the largest group in the Parliament during the 1990s, and members of the Parliament were often involved in human rights issues and took an extremely liberal approach in the field.

¹²⁴ As Dalton and Eichenberg argue, public opinion plays an important role in the integration process. "EU policy is no longer a policy domain that is distant from the everyday life of Europeans. Just as in the formation and implementation of domestic policy, EU policy involves public debates about the political choices facing each member nation". Russell J. Dalton and Richard C. Eichenberg (1998), "Citizen Support for Policy Integration", in: Wayne Sandholtz and Alec Stone Sweet (eds.), *European Integration and Supranational Governance*, New York, Oxford University Press, p. 251.

participation¹²⁵; and along with the Commission it wishes to defend the interests of their citizens and to prove their relevance¹²⁶. It has become common practice at meetings at the EU level for national politicians to declare that "they must prove" the relevance of the EU¹²⁷. Thus it is important for policy makers to get closer to the European citizens and to

¹²⁵ European elections have been poorly attended in the last two decades: from 63% in 1979 to only 49% in 1999. Moreover, higher participation is usually found in places where elections are compulsory such as Belgium, Greece and Luxembourg. See Smith, *op.cit.*, pp. 10-11; Roger Scully (2000), "Democracy, Legitimacy and the European Parliament" in Maria Green Cowles and Michael Smith (eds.), *The State of the European Union. Risks, Reform, Resistance and Revival*, New York, Oxford University Press, p. 241.

¹²⁶ The degree of trust found among EU citizens in the European Union and its institutions is fairly low; the European Parliament, which receives the most widespread trust amount to 59%, where the Commission and the Court of Justice come in second with 45%. The Commission also receives the highest proportion of people who say they tend not to trust it – 30% (Eurobarometer March 2002, p. 29). The resignation of all 20 members of the Commission following the publication of the Committee of Independent Experts' report about allegations of fraud, corruption and mismanagement in March 1999, did not help to improve the Commission's low image in this respect. On the contrary, it would seem to reinforce the image of the Commission as part of an inefficient/ineffective administration, especially in light of the demands for a more democratic and more accountable Europe. As Vitorino suggests, most citizens believe that the largest percentage of the EU budget is spent on administration and personnel (when in fact it is 5% of the budget), Eurobarometer 56, April 2002. See also "Reuniting Europe with its Citizens: What role for the Convention? Speech by Antonio Vitorino, European Commissioner for Justice and Home Affairs, at the Royal Institute of International Affairs, London, 22.7.2002. http://europa.eu.int/futurum/documents/press/sp220702_en.htm, 11.7.2003. See Bulletin EU –3 1999 point 2.3.1. Resolution on the resignation of the Commission and the appointment of a new Commission. <http://europa.eu.int/abc/doc/off/bull/en/9903/p203001.htm>, Eurobarometer 2001, March 2002, p. 29.

¹²⁷ In many ways the discussion on the 'democratic deficit' creates pressure on policy makers, in particular the Commission and the Parliament to prove their relevance ;"for it is now time for us to get down to work. Together we can and must put Europe at the service of the people. We have to win back ordinary people's confidence in Europe and in a European vision which put their needs first". (President of the European Commission addressing the European Parliament on 14 September 1999.) As a result of the Nice intergovernmental conference in December 2000, which pointed out the lack of legitimacy of EU institutions in the general public, the Commission initiated a debate "on the future of Europe" to encourage exchange of ideas and views between Europe's politicians, institutions and citizens: "This should help bring the European Union closer to its citizens and reduce the perception of a democratic deficit which some observers say is characteristic of the European Union's institutional system". In the course of the debate, the Commission expressed its wish to win back the public support: "the people, to whom Europe has brought peace, stability and well-being, are faced with machinery they do not understand". "The future of Europe will no be built without the support of its people". (Communication from the Commission on the future of the European Union. European Governance. Renewing the community Method. COM (2001) 727 final, Brussels, 5.12.2001, pp. 2-3.) Michael Barnier, the Commissioner for regional policy and reform of the institutions, confirmed the Commission's concerns "The Union is gradually losing the support of public opinion. This is partly because it moves forward secretly and silently as far as its citizens are concerned – and we know that silence fuels fears and that fears fuel demagoguery" Michael Barnier, A future-oriented project for Europe, Together for the future of Europe forum, Warsaw, 27.6.2002, http://europa.eu.int/futurum/documents/offtext/sp270602_en.htm. Nonetheless he believed that the debate "will help us to find answers. The European Union needs the active involvement of the citizens of all its Member States". (Contribution by Michael Barnier, Member of the European Commission, 7.3.2001, http://europa.eu.int/futurum/documents/speech/sp010301_en.htm for regional policy and reform of the institutions. The role of the Convention. "Bringing citizens closer to European institutions is at the heart of the debate". See also "Reuniting Europe with its Citizens: What role for the Convention? Speech by Antonio Vitorino, European Commissioner for Justice and Home Affairs, at the Royal Institute of

prove their effectiveness. In the search for power and recognition the Commission and the Parliament will, it is believed, eventually change their positions to those more similar to the Council.

4.4. Future perspective: institutional developments and movement towards increased cooperation

An analysis of the discourse among EU decision-makers about asylum reveals basic differences among EU Member States regarding the role of EU institutions in the field of asylum (and the way asylum policy has to be regulated). Whereas some EU Member States have supported a policy based on intergovernmental cooperation as their proposals during the various IGCs show, others assume that asylum policy can be solved and managed at the supranational level. To a large extent these divergent approaches towards the role of the EU are linked to the EU Member States expectations from the integration

International Affairs, London, 22.7.2002. http://europa.eu.int/futurum/documents/press/sp220702_en.htm)

The question of "democratic deficit" preoccupied the European Parliament as well. Though the Parliament was relatively disappointed in its role in EU policy making, especially 50 years after its existence, it nevertheless attempted to hide its frustration by taking the view that the Council and the Parliament are not rivals but have a joint mission. The result has been an appraisal of the work of the national representative. On the occasion of the signing of the Treaty of Nice, for example, Nicole Fontaine, the President of the European Parliament stated, "the Heads of State or Government took an enlightened and democratically courageous decision. They adopt a radically new approach in the process of further European integration, expressly signifying their intention to ask the people more often for their opinion and to involve them more directly in defining the future of Europe". Nicole Fontaine, the President of the European Parliament, 26.2.2001. In recent resolutions and reports the Parliament declared "the quality of relations between the European Parliament and the national parliaments is of fundamental importance for the overall democratic nature of the Union. If they became rivals democracy would definitely suffer. If, on the other hand, they recognize that they have a joint mission, democracy will win". p. 12. It "does not see itself as the exclusive representative of the citizens and the guarantor of democracy in relations with the other Union institutions: it does not concern itself exclusively with acquiring greater powers, ignoring the recognition of the role of the national parliaments". Hence, "the peoples of the Union are represented to the full by the European Parliament and the national parliament, each in its realm". (See Report on the relations between the European Parliament and the national parliaments in European Integration, Committee on Constitutional Affairs, January 2002, A5-0023/2002, European Parliament resolution on relation between the European Parliament and the national parliament in European Integration (2001/2023 (INI)), RP/459947EN.doc, p. 6.) In another report it raised the question of the 'democratic deficit'. The Parliament is aware of the public concern: "it should be a serious mistake to imagine that the citizens of the Union are not aware of the problem. In fact, the loss of consensus in public opinion and the growing disaffection, disappointment and distrust regarding the development of the Union linked with a "sense of alienation.. a fear of helplessness in the face of imposed decisions which cannot be influenced or controlled". Nevertheless, the Parliament stressed, "we are well aware that in order to regain consensus and support in the Member States, it is essential, at this stage, to stress 'what we want to achieve together'. "The questions regarding what kind of Union we want- - in an ultimately unified Europe – are an indivisible whole and require an overall design with which the citizens can feel at home, not least because it guarantees more democracy".

process. Where some members such as Britain and Denmark hold some reservations as to the establishment of a common asylum policy, since it is likely to undermine their national sovereignty, others, like Benelux countries prefer a more harmonized form of policy. The author, however, believes that these differences with regard to the nature of cooperation in the field of asylum will gradually disappear and thus Member States will transfer more power to EU institutions. In this respect it is believed that there is a spillover effect and the EU response in the field of asylum results from the pressure of the integration process.

There are two main reasons for this transfer of power. While the integration process allows for the free movement of EU nationals, it has created for new problems that support for the development of common immigration and asylum policy¹²⁸. And, indeed the signing of the Amsterdam Treaty in 1997 granting additional power to EU institutions, and perhaps more significantly, establishing a common policy on asylum, is therefore a major milestone in the process of integration. It clearly demonstrates that EU members can put aside their reservation about loss of sovereignty in favor of common goals, when the outcome is believed to be advantageous. As there is no longer a concrete separation between the national borders, there are doubts on the ability of Member States to deal with the challenges of immigration alone. For the first time immigration and asylum policy of one Member State have a potentially great impact on others¹²⁹. This implies that if one Member State wishes to limit the number of asylum seekers it will be difficult if other members set different rules.

The author, however, assumes that cooperation in the field of asylum is easier to achieve compared to other policy areas, such foreign policy, for example. Unlike foreign policy,

¹²⁸ As Diez-Nicolas and Diez-Medrano suggest "the suppression of borders between European Union has created new problems, which contribute to explain the development of the Justice and Home Affairs pillar of the European Union". The new social problems include "terrorism, internationally organized crime, drug trafficking and illegal immigration". Juan Diez-Nicolas and Juan Diez-Medrano (2001), "A European Internal and Security Policy: Freedom of Movement for Whom?" in: Max Haller (ed.), *The Making of the European Union*, Springer, Heidelberg, p. 231.

¹²⁹ Thus if in the past, for example asylum policy of Germany did not have significant effect on France or Britain, this has changed. Decisions made in Germany have a significant impact on the above-mentioned countries as well.

where Member States do not always share common interests/visions about the security role of the Union in the world, they generally share similar views on asylum¹³⁰. They are united around the assumption that the number of asylum applications has to be curtailed. For this reason the need to develop a common asylum policy appears to be necessary. Though asylum is a sensitive matter, Amsterdam has shown that the historical dominance of the state can be challenged by the perceived benefits of the final outcome. That is, EU Member States are likely to support collective action on the condition that the Community produces a policy which is likely to be beneficial for all EU Member States. In other words, the introduction of a more harmonized form of asylum policy becomes feasible when Member States realize that it would secure their interests.

¹³⁰ The major theories in the field of integration are linked with the Intergovernmentalist and Neofunctionalist approach. While the latter sought to study the dynamics of integration, they held different positions as to the nature of integration, largely stemming from their different points of departure with regard to the role of a nation-state in the integration process. Neofunctionalists, for example, tend to underestimate the nation-state, assuming that the benefits of integration will overcome narrow national interests. This approach was basically developed by Ernst Haas. In his book *Beyond the Nation-State* he asserted that post-national community building is to a large extent a dynamic process, which largely motivated by economic interests. To describe this phenomenon, Haas coined the term Spillover. This meant that the degree of coordination and integration among Member States in one particular sector (particular economic) would eventually provide a catalyst for further integration in another one. Neointergovernmentalists, on the other hand, were reluctant to accept the above mention premises on the nature of integration process. While acknowledging the importance of the European Project, they nevertheless stress the role of the nation-state. In contrast to Neofunctionalism, they disagree with the assumption that through the integration process the nation-state will gradually become meaningless. Neointergovernmentalists are right in their criticism that it is too narrow to view the world through the lens of economic analysis. Not all can be explained according to economic considerations in terms of costs and benefits. If states had followed only economic logic, they would have long ago opened their borders to cheap labor. Yet, the admittance of foreign workers is still regulated by the state authorities. Free movement of goods, however is built around different rational and thus easier to accomplish at the community level. It is easier to authorize the community to deal with questions of goods than allowing the EU to decide on the entry of foreigners into individual state territory. But while it is clear that asylum policy cannot rely on economic logic, one can question the weight the intergovernmentalists attribute to the nation-state. One cannot *a priori* exclude cooperation and decide that a Member State might not give up some sovereignty in the issue for its sensitivity as, Keohane and Nye suggest, for example. Though asylum is a sensitive matter, it is still believed that the dominance of the state can be challenged by the final outcome. This means that EU Member States are likely to be stimulated for a collective action on the condition that the community policy produces a policy which is likely to be beneficial for all EU Member State. See Andrew Moravcsik (1998), *The Choice for Europe*, UCL Press, Cornell University, pp. 6-7. Robert O. Keohane and Joseph Nye (1996), *Transatlantic Relations and World Politics*, pp. 371-398. For a detailed analysis see also Ben Rosamond (2000), *Theories of European Integration*, New York, St. Martin's Press, p. 59.

PART TWO: REFUGEE PROTECTION IN A HISTORICAL PERSPECTIVE

I. Introduction

This section examines the asylum policy of the main international organizations dealing with refugees in the 20th century, i.e. the League of Nations and the United Nations High Commissioner for Refugees (UNHCR). While first analyzing the protection granted by the League of Nations, it will be argued that the term refugee as used and understood after the First World War had a very restrictive meaning. Refugees were not neutral persons fearing a danger in their country of origin but largely identified by the political interests of the receiving countries. Western governments set up the first refugee office to offer protection to the White Russians, the opponents of the Bolshevik regime. At the same time, they were hesitant to provide similar protection to other refugees facing persecution. A typical example in this respect is the League of Nations' attitude vis-à-vis Jewish refugees in the 1930s. There are number of reasons why this distinction was maintained. First, while the term "refugee" primarily had a political meaning, Jews fleeing from persecution because of their religion were often not perceived as refugees but rather as immigrants¹³¹. Moreover, with the economic depression in the 1930s and the large number of German Jews seeking asylum, European governments tended to restrict their admission policies. It is also believed that the negative widespread perception of the Jews in Europe played a major role in shaping admission policy. The view of Jews as a social threat was not limited to Germany but included many other European countries, especially in Eastern Europe¹³². To a large extent, European policy makers feared that if

¹³¹ As Zolberg observed, they were not viewed as "innocent victims" like the Huguenots but rather as persons who have earned their "unhappy fate". Aristide R. Zolberg, Astri Suhrke and Sergio Aguayo (1989), *Escape from violence. Conflict and the Refugee Crisis in the Developing World*, Oxford University Press, New York, p. 7

¹³² Thus, for example, Polish, Hungarian and Romanian representatives abroad repeatedly complained about their "Jewish problem", proposing their evacuation to other continents. Hungary, for instance, passed anti-Jewish laws in 1938 to remove Jews from industrial and commercial spheres. In 1924, Romania also passed a law according to which citizenship was denied from 100.000 Jews, and during the 1930s the extreme right-wing government believed that Jews should leave the country. Consequently, the Romanian government supported illegal immigration to Palestine. In Poland, Jews experienced economic boycotts, segregation in the universities and exclusion from certain professions. Under these circumstances, the *London Daily Express* rhetorically asked in 1938: "What if Poland, Hungary, Rumania also expel their

they were to allow a large Jewish immigration, they would encourage anti-Jewish movements existing in their country¹³³.

The close relation between political context and refugee policy continued to characterize the behavior of international organizations after World War Two as well. At a time when humanity was largely split between Communist rule and Western democracy, the UNHCR was more responsive to anti-Communist refugees than other refugee groups. But, in contrast to the interwar period, in the post WW II years the Western world increasingly emphasized the principle of human rights, and the UNHCR was required to explain its willingness to take care of particular refugee claims. An effective tool in this respect was the development of new terminology which distinguished between different groups of refugees, such as *bona fide*, prima facie refugees, and displaced persons, and helped to support and legitimize UNHCR preferential policy.

II. The Right of Asylum in History

Long before the Western democracies defined who is a refugee and established international organizations to assist people fleeing persecution, various religions as well as ancient rulers offered asylum in accordance with their set of norms and beliefs. Perhaps the earliest mention of the term “refugee” occurs in the Old Testament, in the first book of Moses, referring to a person who escaped from a war and sought shelter from Abraham. With time, the concept was further developed to include those who killed another by mistake. Thus, for example, in the fourth book of Moses, God commanded Joshua to build three cities of refuge to allow people guilty of unintentional manslaughter to flee from the blood avenger¹³⁴. The refugees were required to leave their homes and live in the city of refuge until the death of the High Priest. Another way to acquire

Jewish citizens?”. See Marrus, pp. 66, 142-144; Claudena M. Skran (1995), *Refugees in Inter-War Europe, The Emergence of a Regime*, Clarendon Press, Oxford, p. 94.

¹³³ In Britain, for example, the government introduced a quota system according to which 50,000 Jews were admitted. See Louise London (2000), *Whitehall and the Jews. British Immigration Policy, Jewish Refugees and the Holocaust*, Cambridge University Press, pp. 33-43.

¹³⁴ The first cities of refuge were Shechem, Hebron and Bezer. See Jos. 20:7, 8. Later on, three more cities were added: Kedesh, Ramoth and Golan. See Num 35. For an in-depth study of the right of asylum in the Old Testament, see also L Delekat (1967), *Asyle und Schutzorakel am Zionheiligtum*, Brill Leiden, Netherlands, pp. 291-299.

asylum was to reside in the temple at Jerusalem, as it was forbidden to remove by force any person under the protection of the deity. Unlike the word “refugee”, which meant that the person concerned ought to be protected, exile had a negative meaning, suggesting a divine intervention for dealing with inappropriate behavior. From a religious standpoint, it was God’s way of punishing the Israelites who “betrayed” his way by following other customs. Indeed there are many references in the Old Testament where various prophets such as Jeremiah, for instance, predicted the exile of the Jewish people for not observing God’s law¹³⁵. As Jeremiah declared, Judah Kingdom was captured by Nebuchadnezzar II, one of the most powerful rulers at the time and the Israelites were sent to Babylonian exile¹³⁶.

In ancient Greece the right to asylum depended on religious sources. Asylum was automatically granted for persons in search of protection in the temples. Since all Greek temples and alters were inviolable, it was a religious crime to remove by force any person under the protection of a deity. Eventually this right was limited to a small number of temples, as there was a tendency for abuse. Moreover, as Greece was divided into autonomous city-states, these insisted to grant asylum according to their particular interests¹³⁷. The Roman adopted the Greek notion of asylum (though considerably modified by Tiberius). Under Roman law, for example, the status of the emperors and the eagles of the legions were made refuges against acts of violence. The people who claimed the right of asylum were often slaves fleeing from their masters, defeated soldiers, and criminals who feared a trial and escaped before the sentence was passed. In contrast to asylum, exile was seen as a political act designed to remove perceived enemies by forbidding them to live in certain territories or restricting them to live in particular places. Cicero’s early views, at the beginning of the Roman Empire, assumed that exile was a voluntary act and not a punishment: to avoid some penalty or disaster, men change their residence. So in Roman Law, unlike the laws of other states, crime has ever been

¹³⁵ See Jeremiah 25:1, 11-12, Isaiah 6:11, 12:11 and Daniel 9:1.

¹³⁶ According to the Old Testament, Nebuchadnezzar deported the Jewish people three times. The first around 605 B.C., the second deportation was around 597 B.C.E and the third one was around 587 B.C., when the city of Jerusalem and the temple were destroyed (2 Kings 25:9).

¹³⁷ See W. Gunter Plaut (1995), *Asylum. A Moral Dilemma*, Praeger, London, p. 37; Encyclopedia Britannica, University of Chicago, 1945, p. 593.

punished by exile. However, he changed his opinion once he had to leave Rome in 58 B.C. In 46 B.C. he wrote, “Do you not know that exile is a penalty for crime? More than this, by Caesar’s regulation half the condemned man’s property was annexed to the state”¹³⁸. Under Augustus, other famous scholars, such as Ovid, were forced to leave Rome¹³⁹.

The New Testament does not literally mention the idea of asylum. However, since the 12th century the Church developed a policy of offering asylum to people who sought its sanctuary. According to the Code of Canon Law of the Roman Catholic Church, which was practiced till 1983, “A church enjoys the right of asylum, so that guilty persons who take refuge in it must not be taken from it, except in the case of necessity, without the consent of the ordinary, or at least of the rector of the Church”. However, the liberal spirit was absent, in particular in an era dominated by only one truth. Documents on the later Crusades suggest that the Roman Church was committed to the idea of holy war against unbelievers: “Our main goal is to seize it (the Holy Land) from the hands of those who wickedly despise, blaspheme against and persecute His name. That name is above all else and everybody on earth, in heaven or in hell, should perform obeisance to it. The Church has the duty of confessing the faith and judging and punishing the persecutors of the faith. When it sees fit, it can therefore seize the goods and deprive of ownership any pagans who are assaulting the faith, thereby proving guilty of less majesty. And so it is when the Pope creates an army of crusaders, and dispatches it against the pagans, he may give and assign to the former the territories which they conquer¹⁴⁰.” This refusal to tolerate other forms of worship eventually led to waves of refugees, best illustrated in the expulsion of non-believers from Spain in 1492. These refugees often found refuge in the Ottoman Empire.

¹³⁸ “To avoid imprisonment, execution or degradation – all legal penalties – men escape into exile as if taking sanctuary at an altar”. Quoted in J.P.V.D. Balsdon (1979), *Romans and Aliens*, The University of North Carolina Press, London, p. 104.

¹³⁹ Jo-Marie Claassen (1999), *Displaced Persons. The Literature of Exile from Cicero to Boethius*, Duckworth, London, pp. 77-83.

¹⁴⁰ In a tract on papal power (c. 1316), which in other respects is notable for its moderate stance. Pierre de la Palude presents a case for fully-fledged papal authority over both the crusade and territory conquered by crusaders. Also, Philip V of France appointed his cousin, Louis of Clermont, captain general of projected passagium to the Holy Land, 13 September 1318. Norman Housley (1996), *Documents on the Later Crusades 1274-1580*, Macmillan Press, London, p. 49.

At a later stage, the difference of opinions within Christian religious thought, following the development of the new religious doctrine of Protestantism, resulted in a new wave of refugees. In 1685, the King of France revoked the Edict of Nantes, which had guaranteed the rights of nonconformists. As a consequence, French Protestants, also known as Huguenots, were forced to leave the country¹⁴¹. Protestant rulers recognized them as refugees and offered them protection. Frederick William of Prussia, for example, invited them to come and settle in his kingdom in 1689, the year of their expulsion from France. But while Protestant countries were prepared to offer shelter to those who followed their religious beliefs, they often refused to tolerate non-conformist in their own societies. Thus, for example, in order to preserve the Protestant nature of England, the state authorities opposed the succession of James, Duke of York, (a convert to Roman Catholicism) to his brother's throne. John Locke, who strongly opposed the influence of the Church of England on the state, voiced his criticism of this intolerance in a number of essays, such as *Essay Concerning Human Understanding* and *A Letter Concerning Toleration*. His main argument was that "forcing one worship did nothing to strengthen national self consciousness or the general prosperity of the state, and as long as one's personal religious beliefs and practice did not include the obligation to impose those beliefs and practice on others, then the civil government should permit a healthy diversity in religious thought and worship". Eventually, "correction was never a legitimate mechanism for saving souls and that the government's exclusive charge was to secure the lives and the property of the people". As a result of his critical appraisal, he fled to the Netherlands, fearing for his life, where he spent six years before returning to England¹⁴².

In the second half of the 19th century, with the emergence of national movements in Italy, Ireland, Poland and Germany, the definition of asylum shifted from the religious sphere to the political one. The expression most commonly used was 'exile'. Among the *Romantic Exiles*, as E. H. Carr rightly observed¹⁴³, one may find distinguished historical

¹⁴¹ See Emmanuel Le Roy (1998), *The Ancien Régime. A History of France 1610-1774*, Blackwell, Oxford, p. 489.

¹⁴² W.M. Spellman (1997), *John Locke*, Macmillan Press, pp. 16-19, 24.

¹⁴³ The term romantic exile was referred to Alexander Herzen the famous Russian thinker who had to leave

figures, such as Karl Marx, Giuseppe Mazzini, Michael Bakunin and Alexander Herzen. Switzerland, France, and Britain expressed great sympathy and support towards these political activists and served as the main host countries¹⁴⁴.

III. The Evolution of Asylum Policy after World War I

1. The League of Nations and Refugee Protection in the Inter-War Period

In the 20th century refugees played prominent roles on the European continent. The main reason for this is related to the creation of new sovereign states, as well as civil wars and religious and ethnic intolerance. The Nansen office, established under the auspices of the League of Nations, was the first attempt to provide refugee protection in modern times. But in spite of the hopes that many had placed in the role and future of the League of Nations, it had no desire to explore the possibility of establishing a permanent refugee organization to offer international protection. The League of Nations eventually offered a limited degree of humanitarian protection based on the political interests of its members, stressing the priority of supporting refugees fleeing Russia, in particular.

One of the largest refugee movements in the inter-war period consisted of Russians fleeing the civil war. Following the victory of Bolshevism in 1917 and the consequent civil war in Russia, European governments were preoccupied with the future of the counterrevolutionaries, the White Russians who were defeated by the newly established regime¹⁴⁵. In a letter written to Winston Churchill in 1919, Sir Samuel Hore, later the deputy High Commissioner of the League of Nations for the care of the Russian refugees, stated, “For the last six months I have been convinced that the whole future of Europe and indeed the whole world depends upon a Russian settlement and distraction of Bolshevism”. In response to the situation in Russia, in 1921 the League of Nations turned to the famous Norwegian explorer, Fridtjof Nansen, and asked him to serve as the High Commissioner on behalf of the League in connection with the problem of Russian

tzarist Russia for his political views. See E.H. Carr (1998), *The Romantic Exiles*, Serif, London.

¹⁴⁴ Marx was received in Britain in 1849 where Mazzini arrived in London in 1837 and stayed there for about thirty years. See Bernard Porter (1979), *The Refugee Question in mid-Victorian Politics*, Cambridge University Press, Cambridge, pp. 13-14.

¹⁴⁵ Marrus, *op. cit.*, 84.

refugees in Europe¹⁴⁶. As a result, the Nansen Office to Assist Russian Refugees was created. This, however, was not designed to be a universal organization, assuming responsibility for refugees wherever they may be, but was first and foremost an *ad hoc* organization¹⁴⁷, given a mandate of eight years to solve the problem of White Russians only.

While more than one million refugees left Russia after the collapse of the Tsar, they were welcomed by all members of the League, united by their common hostility to Russia. Russian refugees enjoyed the hospitality of Germany, France, and Britain, as well as the Slav States, i.e. Yugoslavia, Bulgaria and Czechoslovakia¹⁴⁸. Countries outside Europe such as China, Japan and the United States, also offered their help. A second wave of refugees in the interwar period stemmed from the dissolution of the Ottoman Empire and the creation of New Turkey under Mustafa Kemal. The transformation from Empire into a nation-state, along with the Turkish-Greco war of 1922, was accompanied by Turkey's decision to expel all Greek nationals from its territory. The League of Nations did not condemn the compulsory expulsion but in fact played a major part in the "exchange of populations". Following the Lussane agreement of 1923, the League of Nations helped to move more than 1.25 million Greeks living in Turkey to Greece¹⁴⁹ while approximately 400,000 Turkish nationals relocated to Turkey. A similar exchange was also concluded between Turkey and Bulgaria¹⁵⁰. Another refugee movement that followed the creation of New Turkey was that of the Armenians. The Armenians suffered from persecution by the Ottomans while losing 1.5 million of their people in the 1915 genocide. About 400,000 Armenians emigrated to the Soviet Armenia in 1918. By the year 1924, however, there was an urgent need to find shelter for 15,000 refugees, and the League agreed to repatriate them from Greece and Constantinople. The League however, was not of the opinion that they should be settled in Europe, but in the "Caucasus or elsewhere". In the report written by Dr. Fridtjof Nansen, the President of the Commission appointed to

¹⁴⁶ Kathleen E. Innes (1931) *The Story of Nansen and the League of Nations*, Friends Peace Committee, London, pp. 17-19; *Ibid.*, p. 89.

¹⁴⁷ F.P Walters (1952), *A History of the League of Nations*, Oxford University Press, London, p. 187.

¹⁴⁸ John Hope Simpson (1939), *The Refugee Question*, Oxford, p. 10.

¹⁴⁹ *Ibid.*, pp. 8-9 and Marrus, *op.cit.*, pp. 101-102.

¹⁵⁰ Stephen P. Lades (1932), *The Exchange of Minorities Bulgaria, Greece and Turkey*, The Macmillan Company, New York.

study the question of the settlement of Armenian refugees, it was proposed to send them to Armenia while granting that country financial resources¹⁵¹: “As far as I can see, that is the only manner in which the problem of the Armenian refugees can be completely solved”. The rise of fascist regimes in Europe in the 1920s and 1930s produced additional refugee movements. While many hoped to find a shelter from the Mussolini, Salazar and Franco dictatorships¹⁵², the League of Nations was reluctant to provide political or juridical protection, especially to Italian refugees, to avoid provoking Mussolini. After all, Italy was a member of the League until 1935. The majority of refugees from Italy (10,000) and Spain (400,000) were admitted into France¹⁵³

2. Jewish Refugees as an Example

In contrast to most interwar refugees who finally found refuge, German Jews trying to leave the country as the National Socialists came into power in 1933 faced great difficulties in finding shelter. The position taken by the League would seem to indicate lack of interest among its members, best illustrated by the decision to create an organization without financial support.

The question of Jewish refugees was brought before the League of Nations Assembly already in September 1933. The question was considered a “technical problem”, and the main objective was to indirectly remind Germany of its commitment to the Resolution of 1922, which called on countries not party to the Minority Treaties to respect the treatment of minorities in their territory¹⁵⁴. Surprisingly, the German delegate voted in favor of new resolution, assuming that the Jews in Germany were not an ethnic minority but rather a social/economic problem as the League of Nations described in its report¹⁵⁵. However, with regard to the second paragraph, according to which it is not allowed to exclude

¹⁵¹ See Report by Dr. Fridtjof Nansen. President of the Commission appointed to study the question of the settlement of Armenian refugees, Lysaker, July 28, 1925.

¹⁵² See Simpson, *op.cit.*, p. 24.

¹⁵³ See Loscher (1996), *op.cit.*, p. 41; *Ibid.*, p. 25.

¹⁵⁴ See Wilson Harris, Geneva 1923. *An account of the Fourth Assembly of the League of Nations*, League of Nations Union, 1923, p. 47.

¹⁵⁵ Freda White, Refugees and the League, *Geneva 1935, An account of the Sixteenth Assembly of the League of Nations*, League of Nations, December 1935, p. 45.

certain citizens from the scope of the resolution, the German delegate voted against and hence prevented the Assembly from the adoption of this Resolution¹⁵⁶. In the end a compromise was reached according to which a High Commission for the Refugees from Germany was created.

In contrast to the Nansen Office supported by the League, the new office for refugees from Germany was not financed by the League as Germany, a member of the League, contributed to its budget¹⁵⁷. Therefore, it was suggested that funding for the administrative activity as well as the settlement plans for the refugees was to be obtained from private organizations. This decision, as James McDonald, the first High Commissioner for refugees coming from Germany later observed, weakened its position¹⁵⁸. Even with this weak financial base, the organization was not allowed to undertake the direct work of relief but was restricted to focus on the coordination of the existing organizations and to negotiate with the potential receiving governments¹⁵⁹. After two years of activity, by the end of 1935, 35,000 refugees left Germany, most of whom, 27,000, arrived in Palestine¹⁶⁰.

The intensified persecution in Germany, and the limited capabilities of the High Commission to provide aid to the German refugees, heavily affected McDonald's decision to resign at the end of 1935. In his letter of resignation he expressed his disappointment in the High Commission for Refugees coming from Germany: "Progress has been made during the last three years in settling the refugees from Germany". Yet this accomplishment, he noted, "has been primarily the work of the refugees themselves and of the philanthropic organizations- Jewish and Christian-whose devoted laborers have been ceaselessly carrying on in many parts of the world"¹⁶¹. While describing the

¹⁵⁶ See Holborn (1938), *op.cit.*, p. 691; League of Nations 1935, p. 43.

¹⁵⁷ *Geneva 1937, an account of the Eighteenth Assembly of the League of Nations*, League of Nations, December 1937, p. 24; Holborn, *op.cit.*, p. 691.

¹⁵⁸ See Simpson, *op.cit.*, p. 14.

¹⁵⁹ "Refugees and the League", League of Nations Union, September 1935, p. 45.

¹⁶⁰ Against this backdrop McDonald declared at the Zionist Congress at the same year that, "the daily grace in the High Commission Office was Thank God for Palestine". Quoted in Marrus, *op.cit.*, p. 163.

¹⁶¹ See James G. McDonald, *The German Refugees and the League of Nations*, January 1936, p. 7. See also the Petition in support of the letter of resignation of James G. McDonald and concerning the treatment of Jews and non-Aryans by the German Government, addressed to the XVIIth Plenary Assembly of the

Jewish distress he declared, “It has been made increasingly difficult for Jews and non-Aryans in Germany to sustain life. More than half of the Jews remaining in Germany have already been deprived of their livelihood”¹⁶². Hence, he called, “for fresh collective action” in regard to the problem created by the National Socialists in Germany. “The moral authority of the League of Nations and of state members of the League must be directed towards a determined appeal to the German government in the name of humanity and of the principles of the public law of Europe. They must ask for a modification of policies which constitute a source of unrest and perplexity in the world, a challenge to the conscience of mankind, and a menace to the legitimate interests of the states affected by the immigration of German refugees”.

To a large extent, McDonald remained pessimistic about the chances that the situation would improve in the near future, partly due to the economic situation. “In the present economic conditions of the world, the European states, and even those overseas, have only a limited power of absorption of refugees”. He was also aware of the fact that, “The efforts of private organizations and of any League organization for refugees can only mitigate a problem of growing gravity and complexity” rather than giving a comprehensive answer to the Jewish refugee problem¹⁶³. Nevertheless he pled “that world opinion, action through the League and its member-states and other countries, move to avert the existing and impending tragedies”¹⁶⁴. The resignation of McDonald did not lead to a fundamental change in the attitude of the League. League of Nations reports from 1935 and 1936 revealed that members of the League were not particularly concerned with Jewish refugees¹⁶⁵. On the contrary, they tried to downplay the importance of the problem: “there are ten exiles from Soviet Russia to every one from Germany”¹⁶⁶. Moreover, under the title *objectives* it was noted that the main task of the League is first

League of Nations, American Jewish Committee, 1936. For a detailed account see also The Society for the Protection of Science and Learning, Third Report, 22 July 1937.

¹⁶² McDonald, *Ibid.*, p. 8.

¹⁶³ In France, for example, French National Committee of Aid to German Victims of Anti-Semitism has been established to aid scientist and artists. See McDonald, *Ibid.*, p. 12.

¹⁶⁴ McDonald, *Ibid.*, p. 13.

¹⁶⁵ At the time the Norwegians made a proposal for a refugees and stateless persons charter. This however was refused by the League in 1935. See Paul Frings (1951), *Das Internationale Flüchtlingsproblem, 1919-1950*, Verlag der Frankfurter Hefte, Frankfurt am Main, p. 17.

¹⁶⁶ Refugees and the League, *op.cit.*, p. 3.

to prevent refugees from starvation and then settling them in their new homes¹⁶⁷. It was not clear, however, how these objectives could be achieved, especially in light of the fact that some members were already unable to admit more refugees, as the report noted. Czechoslovakia closed its frontiers to those who escaped; Switzerland allowed only the transit of refugees, and France, Belgium and Holland tightened their laws against the admission of further refugees¹⁶⁸. Under this state of affairs, it is not surprising that the author of this report believed that salvation would be found in other parts of the world. Under *a plan for the refugees*, for example, he suggested to send refugees to South America: “South America seems to be the part of the world most likely to afford opportunities of settlement”¹⁶⁹.

A year later, in 1936, the League of Nations considered the dissolution of Nansen’s Office in spite of the situation in Germany. The plans for the dissolution started already in 1930, as it was assumed that the problem of refugees would be solved in the near future. Based on this estimation, the League of Nations suggested dismantling the Nansen Office no later than December 1938¹⁷⁰. In view of the political situation in Germany, it would have been expected that the League would abandon this idea or at least postpone it. This, however, did not occur¹⁷¹. In a Memorandum prepared by the refugee committee of the League of Nations, it was determined to dismantle the Nansen Office. “The acting president of the Nansen Office is required to make to the next Assembly of the League a report upon the “constructive liquidation” of the Nansen Office.” Moreover it should decide, “whether and under what conditions the work of the High Commission for refugees from Germany is to be continued”¹⁷². Finally, in January 1938, the League of

¹⁶⁷ Ibid, pp. 54-55.

¹⁶⁸ See Holborn (1938), *op.cit.*, p. 698.

¹⁶⁹ Refugees and the League, *op.cit.*, p. 58.

¹⁷⁰ See Holborn (1938) *op.cit.*, pp. 688-689.

¹⁷¹ In *The Refugee Problem* published in 1936, the author wonders about the planned liquidation. “I must confess that I never been able to grasp the exact implication of the term ‘liquidation’, can the League of Nations, without compromising itself, effect such a liquidation so long as the refugee problems remains unsolved?” See Maitre J. L. Rubinstein (1936), *The Refugee Problem*, The Royal Institute of International Affairs, London, September-October 1936, p. 733.

¹⁷² Memorandum Prepared by the Refugees Committee of the League of Nations Union, S.G.8420, 25.7.1936.

Nations dismantled the Nansen Office and destroyed any hope of solving the problem of political refugees through international cooperation.

There is a good reason to believe that one of the reasons behind this decision was the lack of gratitude expressed by the White Russians who had obtained refuge in the member-states. The 1938 report noted, for example, that a large number of the White Russians were involved in pro-Fascist activities, “that is how they would thank the Republic for its liberalism and tolerance towards them?”¹⁷³ asked France, and the League concluded that, “what public opinion expects of the League of Nations is, first the liquidation, complete and final, of the Nansen Office. It is secondly, the creation of office of the League of Nations for the refugees who are friends of peace and democracy”¹⁷⁴. In 1939 the High Commission for refugees coming from Germany was unified with the office of High Commissioner for all refugees under the League of Nations protection¹⁷⁵. Although unable to solve the refugee protection, the Nansen international office of refugees was awarded the 1938 Nobel Prize for peace.

Due to the deterioration of the situation in Germany, President Roosevelt appealed to the governments of the world for a cooperative effort to facilitate emigration of political refugees from Germany and the former Austria, calling for an inter-governmental conference in Evian to discuss the refugee problem¹⁷⁶. At the Evian meeting, which was held between 6-15 of July 1938, the American President proposed to establish an international organization consisting only of states receiving refugees and a permanent body outside the League, “to concern itself with all refugees wherever governmental intolerance shall have created a refugee problem”¹⁷⁷. In both cases the inter-governmental organization was to be complementary to and was to cooperate with the League’s existing refugee organizations. Decisions taken at the Evian Conference on Jewish refugees on the 14 of July demonstrated that League Members refused to introduce a less

¹⁷³ The Liquidation of the Nansen Office and the Problem of Political Refugees, International Information Agency, January 23, 1938, p. 9.

¹⁷⁴ *Ibid.*, p. 12. See also Freda White. Geneva 1938, An account of the Nineteenth Assembly of the League of Nations, League of Nations Union, September 1938, p. 30.

¹⁷⁵ See the British Parliamentary Debates, House of Commons, Official Report, vol. 341 1938, col 891.

¹⁷⁶ Holborn (1938), *op.cit.*, p. 699.

¹⁷⁷ Decisions taken at the Evian Conference on Jewish refugees on July 14, 1938.

restrictive asylum policy. The general position was that the reception of refugees is subject to national immigration laws and should be in accordance with the economic conditions of the receiving countries. Moreover, as Article 8 b observed, Jews coming from Germany were not regarded as refugees, but as immigrants, and, “such immigrants each government may be prepared to receive under its existing laws and practice”. Moreover, “the governments of the countries of refugees and settlement should not assume any obligations for the financing of involuntary emigration”(8d). To some extent, refugees were also perceived as an obstacle to peace, at a time when western leaders were attempting to appease Germany: “they may seriously hinder the process of appeasement in international relations” (para. 3). The result was that the Evian Conference did not bring about significant change in the refugee’s situation. The admission of refugees remained subject to state discretion.

In Britain, for example, due to the increasing attacks on German Jews in November 1938, a special meeting was held on November 21 in the British Parliament to discuss the situation in Germany. Members of Parliament expressed their deep concern with the racial measures taken against Jews and noted that these measures had been in place for the last five years¹⁷⁸. But while the British Parliament acknowledged the deliberate persecution of Jews, demonstrating the necessity for immediate acts of succor, in the end responsibility for action on the part of Britain was not taken: “Civilization as a whole must oppose this spirit of intolerance.”¹⁷⁹ And after analyzing a proposal made by its members, Parliament refused to allow significant relaxation of immigration rules in Britain. One of the suggestions in this respect was to allow a quota of 10,000 refugees annually and for temporary residence only¹⁸⁰. Moreover, these refugees also needed to meet certain criteria such as possessing good character traits and technical skills¹⁸¹. Other members proposed a distinction between the two main categories of refugees: self supporting and of a good character vs. persons who are unable to maintain themselves, claiming that, “our taxpayers and our ratepayers are already shouldering heavy burdens”.

¹⁷⁸ British Parliamentary Debates, House of Commons (Hansard), Official Report 1938 col. 1431; See also Hansard 1939, Vol. 355, col. 234.

¹⁷⁹ Hansard, col. 1450.

¹⁸⁰ Hansard col. 1452.

¹⁸¹ Hansard col. 1452.

Eventually, it was argued that, “our first duty is to our own people”¹⁸², and, “one cannot be swayed by sentiment alone in this matter”¹⁸³. Some members claimed that as the Jews were good businessmen, they were therefore, “not suitable for work on the land”¹⁸⁴. Finally, the Secretary of State for the Home Department, Sir S. Hore concluded that a liberal migration policy would stimulate anti- Jewish feelings in Britain, “I have to be careful to avoid anything in the nature of mass *migration* which, in my view, would inevitably lead to the growth of a movement which we all wish to see suppressed”¹⁸⁵.

Even the idea of settling the refugees in the British Colonies was rejected: “The Colonies are restricted in place and the Dominions must speak for themselves. It is not for us to speak for them”⁴⁴. It was even suggested that one should try to match the territory to the type of people wishing to settle there: “...a particular territory in the past was found unsuitable for a particular type of emigration”¹⁸⁶. In the meantime, the 1939 White Paper was published in Palestine which aimed at reducing the number of Jews entering that territory. As a consequence, Britain introduced a quota system: about 10,000 migrants came in 1940, and in 1941 and 1942 8,000 altogether¹⁸⁷.

After taking a brief look at the policy of the League of Nations, and in particular vis-à-vis the German Jews, it appears that the League was incapable of dealing with one of the greatest refugee problems of the inter-war period. This is not surprising, bearing in mind that the League had few financial resources or sufficient political will among its members. To a large extent European governments felt more threatened by the rise of Bolshevism than anti-Jewish sentiments. Moreover, they hoped that the threat of Nazi Germany could be defused in a peaceful way. In this respect, they implied that the Jewish refugees might threaten the potential for peace. Under this state of affairs Sir John Hope

¹⁸² Hansard, col. 1458.

¹⁸³ Hansard, col. 1457.

¹⁸⁴ Hansard, col. 1459.

¹⁸⁵ Hansard, col. 1468.

¹⁸⁶ Hansard, col. 1467.

¹⁸⁷ Between 1933 and 1936 the Jewish population rose from 230,000 to 400,000. See Martin Gilbert (1976), *The Arab Israeli Conflict: Its History in Maps*, Weidenfeld and Nicolson, p. 20.

Simpson, who examined the refugee question, concluded on the eve of the Second World War that, “no radical solution can be expected”¹⁸⁸.

IV. The Evolution of Asylum Policy after World War II

At the end of the Second World War millions of refugees were spread all over Europe. The institutions established at the time were first designed to function on a temporary basis by offering emergency relief. With the changing political conditions, however, the Western allies supported the establishment of a permanent refugee institution, best illustrated by the development of UNHCR and the signing of the 1951 Geneva Convention. Initially, the Western Bloc, represented by the United States, Britain, and France worked together with the Soviet Union in the hope of finding a solution to the problem of European refugees by means of repatriation. But, as American and Soviet relations deteriorated in the wake of Russian dominance of Eastern Europe, divergent positions regarding refugee policy appeared. Whereas the Soviet Union continued to defend its original position of in favor of the return of refugees from Western to Eastern Europe, the Western Allies changed their strategy in favor of settlement opportunities, in particular for refugees fleeing Communist rule.

1. UNRRA and IRO Policy in the Shadow of the Cold War

In 1943, the Western Allies established the United Nations Relief and Rehabilitation Administration (UNRRA) to provide relief to the victims of the war in regions liberated by the Allied forces¹⁸⁹. In the course of time the UNRRA objectives were ultimately broadened to include the repatriation of persons made refugees by the war. Though it was difficult to draw a clear distinction between a “displaced person (DP)” and a “refugee”, as these concepts were constantly redefined, a DP was usually perceived as a person who had been deported from his home and/or recruited by the National Socialists as

¹⁸⁸ See Simpson, *op.cit.*, p. 31.

¹⁸⁹ Forty four nations signed the agreement establishing the UNRRA in Washington on November 9, 1943. Its central committee was composed of six members including China, the Soviet Union, the United Kingdom, the United States, France and Canada. See United Nations, Official Records, General Assembly, January 29, 1946 (A/C.2/14), p. 16 and 23 January (A./C.2/4) p. 25.

compulsory labor (*Zwangsarbeiter*). A refugee, on the other hand, was either a victim of Nazi or any other Fascist regime or a person who was considered a refugee before the outbreak of the Second World War¹⁹⁰. Expelled Germans from central and Eastern Europe were not considered DP's or refugees. In the wake of the 1945 Potsdam Agreements the Soviet Union and the Western allies agreed that the German exiles had to be taken under the care of the German authorities in the Western Zone¹⁹¹. Indeed, thirteen million German exiles were admitted into Western Germany after the Second World War.

With the assistance of the Allied armies, the UNRRA succeeded in repatriating seven million DP's and refugees to their countries of origin in the course of a year¹⁹². Repatriations, however, were not always voluntary, as Mark Wyman suggests in his book *DP's Europe's Displaced Persons*. He notes, for example, that the first director of the UNRRA, Herbert Lehman, stated in the Council session of August 1945 that Poles who refused for political reasons to return home, "should no longer be taken care of by the

¹⁹⁰ Indeed, speeches delivered by the various representatives during the General Assembly's discussion reflected the difficulties in defining and classifying these groups. The French, for example, believed that a distinction should be drawn between "statutory refugees" and "displaced persons". While statutory refugees were defined as, "people belonging to one of the categories defined before the war who enjoy a legal status in their country of residence", displaced persons were perceived as, "people who, through the upheavals arising of the war are at present in search of a place of refuge". The Dutch, however, preferred to apply the collective term "uprooted people", while at the same time making a distinction between repatriable and non-repatriables. Only the non-repatriables, from their perspective, were "refugees in the real meaning of the word". The Soviets, on the other hand, argued that it is unnecessary to distinguish between the two definitions, as, "the main task of the United Nations is to help them (all refugees) return to their native countries". See United Nations, Official Records General Assembly, February 4, 1946, pp. 52, 54, 57-59. Also, among academics it appears that there is no agreement as to the precise definitions of these terms. See, for example, Tommie Sjoberg, (1991), *The Powers and the Persecuted: The Refugee Problem and the Intergovernmental Committee on Refugees (IGCR), 1938-1947*, Lund University Press, Sweden, p. 154 and Kim Salomon, *op.cit.*, p. 39. In 1946 the International Refugee Organization (IRO) decided that the term Displaced Person was to apply to a person who, as a result of the Nazi or fascist regimes or of regimes who took part in their side in the Second World War, has been deported or has been obliged to leave his country of nationality or of former habitual residence, such as those who were compelled to undertake forced labor or who were deported for racial, religious or political reasons.

¹⁹¹ As the Potsdam Agreements originally applied only to exiles from Poland, Czechoslovakia and Hungary it was not clear whether German exiles from Yugoslavia, Romania and Bulgaria should also be included in the Western Allies' protection. Finally, the International Refugee Organization (IRO) declared that assistance should not be provided to German minorities who, "have been or may be transferred to Germany". See Jacques Vernant (1953), *The Refugee in the Post-War World*, George Allen & Unwin Ltd, London, p. 97.

¹⁹² "Protecting the Refugees. The Story of United Nations Effort on Their Behalf", United Nations, Department of Public Information, 1953, p. 7.

UNRRA”¹⁹³. Nevertheless, by the end of 1946, as many as one million refugees, the so-called “hard core”, still remained in the occupied territories. The vast majority consisted of persons from the Baltic States, Poland and Russia, for whom the alternative of repatriation was less attractive because of the changed political conditions in their country¹⁹⁴.

As the UNRRA planned to terminate its work by 31 December 1946, the General Assembly in February of 1946 established another non- permanent organization, the International Refugee Organization (IRO), to resolve the refugee problem and then disband. The IRO’s main task was to assist in the return of displaced persons and refugees to their country of origin. However, as Communism began to spread through Europe (Communist parties were already established in Poland, Hungary, Rumania and Bulgaria), a fundamental change in US and Soviet relations occurred, and the IRO changed its policy, shifting to a more individual approach, taking into account the personal preferences of the DPs and refugees. The new policy emphasized the need to assist refugees from Eastern Europe, fearing to remain under Soviet control, to find asylum in the American occupied zones. As a result of this changed policy, the IRO gave assistance to, “those who desired to be repatriated”, while at the same time, negotiated agreements for the resettlement of refugees, “for whom repatriation does not take place”. Against this background, the President of the United States, Harry Truman, addressed the Congress on July of 1947 and appealed for the relaxation of immigration restrictions for displaced persons, “these are people who oppose totalitarian rule and who because of their burning faith in the principles of freedom and democracy have suffered untold privation and hardship. Because they are not Communists and are opposed to Communism, they have staunchly resisted all efforts to induce them to return to

¹⁹³ His successor, Fiorello La Guardia, once declared to Yugoslav refugees who refused to go home that Communism is no reason for refusing repatriation, “I’ve disagreed with the government in my country for more than twenty years now- but you don’t see me running away from America on that account”. See Mark Wyman (1998), *DP’s. Europe’s Displaced Persons, 1945-1951*, Cornell University Press, Ithaca and London, pp. 69-70.

¹⁹⁴ This group also included ill and aged persons, whose resettlement by the Western Allies was relatively difficult compared with other refugee groups, which were perceived as a potential labor force. Marrus, *op.cit.* p. 345.

Communist-controlled areas. In addition, they were our individual allies in the war”¹⁹⁵. The Congress was reluctant at first to approve Truman's request, but finally approved the admission of almost 400,000 displaced persons¹⁹⁶.

The resettlement agreements carried out by the IRO greatly angered the Soviets. The latter perceived the IRO as a Western tool which failed to implement the earlier agreement made after the war. The Soviets complained that, “the International Refugee Organization systematically violated General Assembly resolution 8 (I) on the repatriation of displaced persons; it hampered repatriation in every possible way, becoming in effect, an office for the recruitment of refugees and displaced persons. It is clear that the United Kingdom and France as well as the International Refugee Organization are responsible for the failure to carry out various decisions and agreements adopted with regard to displaced persons”¹⁰. The Soviet Union argued that, “the only correct solution to the question of refugees and displaced persons is the unconditional fulfillment by the Members of the United Nations-and first and foremost by the governments of the United States, the United Kingdom and France-of the terms of the General Assembly resolution concerning the early return of displaced persons to their countries of origin, as well as the fulfillment by those agreements existing on this matter”¹⁹⁷. Since Western powers, however, declined to do so, the Soviet Union and its satellite countries in Eastern Europe withdrew from further participation in the refugee relief efforts of the United Nations¹⁹⁸. They also declined membership in the new refugee organization, i.e. the UNHCR. “It is now proposed that we should establish a so-called High Commissioner's office for refugees. This measure is intended to prevent the

¹⁹⁵ Message of the President to the Congress, 20 July 1947, The Displaced Persons Problem. A Collection of Recent Official Statements, Department of State, United States of America.

¹⁹⁶ Already before the conclusion of the Geneva Convention it was difficult to convince the contracting parties to allow victims of World War Two to enter their territory. President Truman, for example, had to ask several times for Congressional approval to relax immigration restrictions for displaced persons. Leonard Dinerstein, *America and Survivors of the Holocaust*, Columbia University Press, 1982. Following the Soviet suppression in Czechoslovakia in February 1948, the United States issued the American Displaced Person's Act of 1948 declaring that an “eligible displaced person“ was also a citizen of Czechoslovakia, “who has fled as a direct result of persecution or fear of persecution from that country since January 1, 1948“.

¹⁹⁷ *Ibid.*, p. 671. See also a draft resolution made by the Byelorussia Soviet Socialist Republic on November 22, 1950 UN Document A/C.3/L.120.

¹⁹⁸ See Salomon, *op.cit.*, p. 40.

repatriation of refugees and to keep them in the countries to which they were forcibly sent”¹⁹⁹. Similar accusations were directed against the attempt to define the term “refugee” in 1951 Geneva Convention.

2. The 1951 Geneva Convention: The Impact of Western Bloc Interests on the Definition of the Term ‘Refugee’

The decision to draft a convention relating to the status of refugees was a result of a resolution adopted by the General Assembly’s Human Rights Commission in 1947. This called upon the Economic and Social Council of the General Assembly to study the existing situation of stateless persons²⁰⁰ and to submit recommendations, “as to the desirability of concluding a further convention on this subject”²⁰¹. Having examined the refugee problem, the General Assembly decided on August 8, 1949 to appoint an *ad hoc* committee on refugees and stateless persons. The committee’s task was to submit a draft convention relating to the status of refugees and a draft protocol relating to the status of stateless persons, taking into account the comments made by various governments and specialized agencies. Following the suggestions of a preparatory working paper made by the Allied countries, i.e. the United States, Britain and France, the General Assembly decided on December 14, 1950 to hold a conference in Geneva to complete the work of

¹⁹⁹ General Assembly, December 14, 1950, *op. cit.* p. 671.

²⁰⁰ The term stateless person referred to a person who was not a national of any state. In general there are two kinds of stateless people: those who did not acquire a nationality at birth and those who acquired a nationality at birth but lost it and did not acquire another one. As Weis noted, statelessness occurs for a number of reasons. In the first half of the 20th century, for example, it was a consequence of the change of sovereignty over territory. Indeed, various treaties were concluded between members of the League of Nations to provide legal status to certain classes of stateless peoples such as Russians and Armenians (see the Convention of October 1933). The Second World War generated a new wave of stateless people. The proportion of stateless people was particularly high among Jewish refugees who had been deprived of their nationality due to the anti-Jewish legislation enacted in certain European countries. See Paul Weis & R. Graupner (1945) *The Problem of Stateless*, World Jewish Congress, London, pp. 3-13, 27-33. It should be noted that originally the Economic and Social Council had decided to prepare a draft convention relating to the status of stateless people. However, “in the view of the urgency of refugee problem” the Committee decided, “to address itself first to the problem of refugees whether stateless or not and leave to later stages the problem of stateless persons who are not refugees”.

²⁰¹ See The Refugee Convention (1995) with a Commentary by the late Dr. Weis, Head of the Legal Division of the Office of the United Nations High Commissioner for Refugees, Cambridge international documents series vol. 7, Cambridge University Press.

drafting the documents and to sign both the convention concerning the status of refugees and the protocol concerning the status of stateless people²⁰².

The Geneva Convention, which took place in July 1951, was represented by 26 countries²⁰³, although the Soviet Union delegate was absent. According to the Convention it was decided that “refugee” status would apply either to persons considered refugees under pre-war arrangements, or to those who left their country of origin as a result of events occurring before the date of signing of the Convention as a result of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or having a particular political opinion²⁰⁴. Thus, although the Geneva Convention has been described as the *magna carta for refugees*,²⁰⁵ it did not provide a universal definition of “refugee”, and instead limited the term to cover only certain groups. Moreover, the Convention defined “refugees” as those who fled their countries *before* 1951 and as a response to *events*²⁰⁶ occurring on the *European* continent. One may well ask why the drafters of the Geneva Convention were seemingly unable to anticipate future waves of refugees²⁰⁷. In fact, the protocols leading to the finalizing of the Geneva Convention suggest that the contracting parties were reluctant to assume responsibility for future refugees and therefore chose not to make the Convention applicable to them.

²⁰² For a detailed analysis see also a commentary by Nehemiah Robinson (1953), *Convention relating to the Status of Refugees. Its History, Contents and Interpretation*, Institute of Jewish Affairs, New York.

²⁰³ This included the following states: Australia, Austria, Belgium, Brazil, Canada, Colombia, Denmark, Egypt France, Federal Republic of Germany, Greece, the Holy See, Iraq, Israel, Italy, Luxemburg, Monaco, Netherlands, Norway, Sweden, Switzerland, Turkey, United Kingdom, The United States, Venezuela and Yugoslavia.

²⁰⁴ See Article 1 paragraph A.

²⁰⁵ “This document is the most comprehensive charter ever written concerning the rights of refugees. It is also the most international code of ethics yet devised for refugees...a new level of world morality”. A speech delivered by James M. Reed, United Nations Deputy High Commissioner for Refugees. *Magna Carta for Refugees*, James M. Reed, United Nations, New York 1953, p. 3.

²⁰⁶ Paragraph A (2) spoke of “events” as one of the criteria for refugee status. It is assumed that the drafters preferred to refrain from explicitly mentioning the Cold War between the United States and the Soviet Union as a reason for refugee status while offering a neutral wording such as ‘events’.

²⁰⁷ Already before the conclusion of the Geneva Convention, the world witnessed the large scale formation of refugees in many regions of the world. As Loescher points out, millions of Hindus and Muslims on the Indian sub continent appealing for United Nations assistance hardly receive any help, as they are not recognized as genuine refugees falling under the mandate of the 1951 Geneva Convention. See Gil Loescher (1996), *Beyond Charity. International Cooperation and the Global Refugee Crisis*, Oxford University Press, p. 62.

The American representative, for instance, argued that the definition should be precise and accurate, refer to specific categories of refugees and to a time limitation of 1951. The British, and in particular the French representatives, called at first for a general definition which could also be extended to include future refugees: “The right of asylum should be made in the spirit of the Universal Declaration of human rights”¹⁰. In the course of discussions, however, both countries departed from their original positions, submitting drafts which favored a more restrictive formulation²⁰⁸. France strongly defended the time limitation and in fact their proposal for a draft convention contained a definition, which is similar to the one finally adopted in the Geneva Convention. In the end, the signatory countries were given the option of applying the convention to both future and non European refugees. In practice, none of the signatory countries ever applied this option²⁰⁹.

After sixteen years the signatory states came to the conclusion that the above-mentioned limitations had to be lifted, and, in 1967, the New York Protocol abolished the time limit as well as the geographical limitations and gave the treaty a truly international character. Nevertheless, the contracting parties have not always followed the guiding principles they themselves established in Geneva for granting refugee status, namely, fear of persecution. Refugee policy during the Cold War was to a large extent a case of preferential treatment inspired by the rivalry between East and West. In a mind-set which tended to make notions of good and evil palpable to each side in the confrontation, refugees as well as countries were viewed through the prism of East-West rivalry and hence classified into one of the two main camps. “Good” refugees, from the Western perspective, were often victims of Communism, i.e. dissidents from Eastern Europe or Cuba, Vietnam, etc. or those who were considered to be of ideological or strategic importance. Refugees from

²⁰⁸ The term “refugees” applied only to persons considered as refugees under the pre-war instruments and under the IRO constitution or to persons who fled their countries due to a well founded fear of being persecuted as a result of events in Europe before 1951. In contrast to the French, the British were hesitant to refer first to the 1951 dateline. It was only on December 1, 1950 that they joined the French draft proposal, which contained the year 1951. See UN document A/C.3/L.115, November 20, 1950 and A/C.3/L.131/Rev.1, 1 December 1950. See Jackson p. 59.

²⁰⁹ The process of ratification was not an easy one. As Marrus rightly observed enthusiasm for the Convention waned as public opinion lost interest in the refugee problem. The result was that it was only in 1954, when Australia provided the sixth necessary signature; the Convention could enter into force. The United States, however, never ratified it. It is only a party to the 1967 New York Protocol.

countries whose regimes were supported by the West, on the other hand, were often perceived as unwanted. As a result of this Manichean division of the world people fleeing Communist countries, especially European ones, were granted asylum almost automatically²¹⁰, while people from South America facing threats to their lives remained largely unprotected and unrecognized.

3. United Nations High Commissioner for Refugees' (UNHCR) Role in the Cold War

Next to the General Assembly decision to draft a convention relating to the status of refugees it was also suggested to prepare a draft statute to establish a High Commissioners Office for Refugees to follow up on the work of the International Refugee Organization (IRO) ²¹¹. The UNHCR was therefore set up on December 1950 and began its activities in January 1951. Under the terms of its statute the UNHCR's major role was to provide protection to persons defined as refugees under the provisions of the Geneva Convention, that is, pre-World War II refugees and those who compelled to look for shelter as a result of events occurring prior to 1951. In view of the retroactive nature of its work, namely, resolving the problem of earlier refugees' with the aim of integrating them into their new country of residence²¹², it was assumed that a period of 3 years would be sufficient to fulfill this goal²¹³.

Cold War pressures, however, caused the Western allies to modify their original views concerning the limited duration of the UNHCR, and extend the life of the UNHCR indefinitely. At the same time, the UNHCR's original statute did not change until 1967.

²¹⁰ See Prakash Shah, „The legal containment of refugees' political activism“ in Nicholson and Twomey (eds.), *op.cit.*, pp. 120-121.

²¹¹ IRO was liquidated on March 1, 1952. From its establishment on July 1, 1947 to 31 August 1950, it assisted 1.5 persons, of whom 70.000 had been repatriated while 832.000 resettled. By October 1950 there were 293.000 refugees for whom a solution had to be found. See also (Third Committee 338th) United Nations, Official Records, General Assembly, Fifth Session, p. 415.

²¹² 1951 Geneva Convention provisions were made in mind as to allow refugees to express their preferences. Thus, according to Article 1 Paragraph A (2) if a refugee is unable or unwilling to avail himself to the protection of his country, he is allowed to stay.

²¹³ See United Nations Office of the High Commissioner For Refugees. Background Paper on the Office of the United Nations High Commissioner for Refugees (UNHCR) September 1971, Geneva, Switzerland, MHCN/85/71, GE.71-18339, p. 5.

For this reason, the UNHCR could not recognize persons outside Europe as refugees. Moreover, when the 1967 Protocol finally broadened the provisions of the 1951 Convention to include refugee groups outside Europe, the UNHCR still showed little interest in addressing refugee situations outside Europe and particularly from non-Communist regimes. As the funding for its humanitarian programs were financed by the Western Bloc, the UNHCR commitment to refugees was deeply influenced by the interests defined by the latter²¹⁴.

3.1 UNHCR Policy vis-à-vis Refugees from Communist Countries: Hungary and Vietnam

The Russian invasion of Hungary on November 4, 1956 with the purpose of suppressing the Hungarian uprising resulted in a flight of approximately 200,000 Hungarians to neighboring countries - approximately 180,000 arrived in Austria and almost 20,000 reached Yugoslavia. The UNHCR, which had a particular interest in assisting those who fled communist rule, in light of the position of its donor countries, started its work even before it had been asked do so by the General Assembly²¹⁵. Initially, the UNHCR's view was that the people fleeing Hungary were eligible for *prima facie* recognition as refugees, as they were obliged to leave their country by political events, could reasonably fear for their safety in the event of their returning to their home country, and were deprived of their home country's protection²¹⁶. In the end, however, the UNHCR decided that these people ought to be treated as refugees under the (more restrictive) Geneva Convention definition, despite the fact that the Convention's definition only covered refugees created before 1951. To legitimize its decision, the UNHCR argued that the Hungarian refugee situation was in fact a result of events that occurred prior to January 1 1951, rather than

²¹⁴ The UNHCR's work relies almost exclusively on voluntary contributions. Most of its funding since its creation during the Cold War, was provided by the United States, Western Europe, Canada and Japan. Between 1963 to 1981, for example, the United States contributed 30% of its budget and Britain, West Germany, France, Sweden and the European Community contributed another 40% . See Shelly Pitterman (1985), "International Response to Refugee Situations: The United Nations High Commissioner for Refugees" in Elizabeth G. Ferris (ed.) *Refugees and World Politics*, p. 64.

²¹⁵ Gil Loescher (2001) *The UNHCR and World Politics*, *op.cit.*, p. 84.

²¹⁶ On *Prima facie* refugees, see General Assembly Resolution 1673 (XVI), 18 December 1961.

November 4 1956, and thus the refugees should be covered under the Convention's definition.²¹⁷.

In many ways, the UNHCR's behavior during this crisis reflected the political interests of the Western Bloc countries, which expressed a preference for the admittance of these refugees by offering generous funds and assistance. Hungarian refugees were encouraged to come and settle in virtually every Western country²¹⁸. Indeed, in a period of a few months 154,000 Hungarian refugees settled in 35 countries, of which approximately half were in Europe: Britain took in 21,000, Germany hosted 15,000, and both France and Switzerland accepted 13,000 refugees²¹⁹.

Refugees from Indo-China represented another group which attracted special attention in light of the political context of the Cold War. In the wake of the Communist victory in the Vietnam War approximately one and a half million refugees from Cambodia, Vietnam and Laos left their countries in 1975, all of whom the UNHCR considered to be "displaced persons", rather than refugees²²⁰. Thus, initially the UNHCR refused to

²¹⁷ See Louise. W. Holborn (1975), *Refugees: A Problem of Our Time*, *op.cit.*, p. 178.

²¹⁸ The liberal position of Western Europe vis-à-vis anti-Communist refugees created as a result of the global conflict was expressed in a number of actions. In 1959, for example, members of the European Council including Belgium, Cyprus, Denmark, France, Finland, Germany, Luxemburg, Netherlands, Spain, Sweden and Norway signed the *European Agreement on the abolition of visas for refugees*. This agreement specified that those refugees who crossed borders between contracting parties could reside in any country party to this agreement without obtaining a visa. In 1967, they also adopted a resolution on asylum for persons in danger of persecution, placing emphasis on the need to assure asylum based on the spirit of solidarity. European states, "should act in a particular liberal and humanitarian spirit in relation to persons who seek asylum on their territory. They should in the same spirit insure that no one should be subjected to refusal of admission at the frontier, rejection, expulsion or any other measures which would have the result of compelling him to return to a territory where he would be in danger of persecution". Thus, for instance, it was suggested that if a member state faces difficulties, other members should assist her, "in a spirit of European solidarity and of common responsibility in this field". Though this resolution had no legal standing, it represented a liberal approach towards refugees, European refugees in particular. In this respect, it gave preference to Eastern European refugees, notwithstanding the fact that the New York Protocol, signed the same year, emphasized the neutrality of the refugee convention by allowing non-Europeans to apply for refugee status.

²¹⁹ The US government under President Eisenhower took special measures to allow the admission of 27,000 Hungarian refugees into the United States. On July 25, 1958, for example, it passed The Hungarian Refugee Adjustment Act to grant the latter immigrant status after a period of two years of residence. See Ellen Percy Kraly (1990), "U.S. Refugee Policies and Refugee Migration Since World War Two" in: Robert. W. Tucker, Charles B. Keely and Linda Wrigley (eds.), *Immigration and U.S. Foreign Policy*, Westview Press, Boulder, pp. 80-81.

²²⁰ It should be noted that the UNHCR recognized them also as *prima facie* refugees. Laotians were recognized as *prima facie* refugees till 1985 whereas Vietnamese held this status till 1989 (Unwanted and

resettle Vietnamese refugees in third countries and preferred to arrange for their voluntary repatriation to neighboring countries (such as Thailand), after negotiating with the Communist authorities. The United States, however, believed that repatriation of Laotians to a Communist regime would not be safe. This concern stemmed largely from moral obligations felt towards refugees who were pro-American and had served on the side of the United States army²²¹. Thus, under pressure from the US government, the UNHCR began to implement resettlement programs. The resettlement of refugees from Southeast Asia was to become, as Smyser notes, “the largest organized movement of people since the days of the IRO”. The United States received most of the refugees from the region, more than 750,000, and Australia, Canada and France each took in about 100,000. Other countries in Western Europe accepted refugees on a smaller scale²²². In 1979, the UNHCR also concluded an agreement with the Vietnamese government for an “Orderly Departure Program” (ODP), allowing certain categories of refugees, in particular those with relatives and job opportunities in the resettlement countries in the West, to leave²²³.

3.2 UNHCR policy vis-à-vis refugees from non-Communist countries: Haiti and El Salvador

Unlike the immediate help conferred on the above-mentioned groups, the UNHCR appeared to offer only limited assistance in refugee crisis where there was no vital interest to its donor countries. A classic example in this respect was that of the UNHCR’s policy towards refugees fleeing authoritarian regimes in Haiti and El Salvador. The large scale human rights abuses in Haiti, which was ruled by the Duvalier family during the years 1957-1986, forced many of its inhabitants to leave the country. Initially, many

Unprotected <http://www.hrw.org/reports98/thai/thai989-02.htm>, 13.9.2000, p. 3. See also Guy S. Goodwin-Gill (1998), *The Refugee in International Law*, *op.cit.*, pp. 12-13.

²²¹ See, for instance, the Nixon Doctrine of July 1969 reaffirming the American commitment to provide assistance to its allies in South East Asia.

²²² See W. R. Smyser (1987), *Refugees. Extended Exile*. Praeger, New York, The Washington Papers/129, p. 56.

²²³ See Janina Wiktorja Dacyl (1992), *Between Compassion and Realpolitik. In Search of a General Model of the Responses of Recipient Countries to Large-Scale Refugee Flows with Reference to the South-East Asian Refugee Crisis*, University of Stockholm, p. 27.

entered the United States, though the United States did not recognize them as refugees. Since the 1970s, however, it was decided that it was in the US national interests, in light of Haiti's anti-communist regime, to support President Duvalier rather than admit additional refugees from Haiti. In other words, as Zolberg notes, the United States was caught up between its anti-dictatorial and anti-Communist policies. The result was that most Haitians entering the States were henceforth refused asylum, as they were now classified as economic migrants - only a few were granted asylum status and the rest were deported²²⁴. Though human rights organizations called attention to numerous breaches of human rights by the Haitian regime, the United States was of the opinion that the Duvalier regime was, "not a government which was so repressive that being a Haitian entitles one to political asylum. It is not Pol Pot. It is not Cuba²²⁵" and that nothing happened to those who were deported back to Haiti²²⁶.

The UNHCR for its part failed to secure the treatment of asylum seekers from Haiti. Though it acknowledged the human rights abuses, the UNHCR avoided taking a clear stance on the matter. In fact, it often undermined the right of Haitians to be eligible for refugee status by supporting the position taken by the United States, namely, that refugees from Haiti were in fact economic migrants²²⁷. The UNHCR pursued the same approach in other crisis in South America, e.g. El Salvador. Following the political violence and struggle between the Left and Right (represented by the FMLN and FDR parties, respectively) in El Salvador in the 1980s²²⁸ a large number of El-Salvadorans

²²⁴ In 1982, for example, out of 5,453 applications made by Haitians only five were entitled to refugee status. Pitterman, *op.cit.*, p. 67.

²²⁵ Indeed, since Fidel Castro assumed power in Cuba in 1961 many Cubans who fled the country because they opposed the Communist regime were usually recognized as refugees by the United States. Cuban refugees also attempted, with the assistance of the US, to overthrow the Castro regime. Though their efforts in this respect failed, their resistance to Communism served as an important ideological tool in the Cold War era. Indeed, though US migration policy became more restrictive in the 1980s, President Carter still assured its commitment to the Cuban refugees, announcing on May, 5 1985 that, "we'll continue to provide open arms to refugees seeking freedom from Communist domination and from economic deprivation, brought about primarily by Fidel Castro and his government". See Jorge I. Domínguez "Immigration as Foreign Policy in U.S.-Latin American Relations" pp. 154-155.

²²⁶ Quoted by Aristide R. Zolberg, Astri Suhrke, Sergio Aguayo (1989), *Escape from violence. Conflict and the Refugee Crisis in the Developing World*, Oxford University Press, New York, p. 196.

²²⁷ Loescher, *op.cit.*, p. 186.

²²⁸ In the six-year period between 1979 and 1985 about 6,000 civilians were killed, and about another 6,000 have disappeared. Angela Delli Sante (1989), "Central American Refugees: A Consequences of War and Social Upheaval" in: Ved P. Nanda (ed.), *Refugee Law and Policy. International and U.S Responses*,

tried to escape the political violence in the country by seeking to apply for asylum. But, since they were often supporters of the leftist forces in the country, the Western Bloc was less interested in offering them asylum. A similar attitude was demonstrated by UNHCR policy as well. Indeed, it appears that the UNHCR did not provide sufficient protection and often decided to withhold refugee status unnecessarily. At the same time, the UNHCR was more generous towards refugees from Nicaragua²²⁹. As most Nicaraguan refugees opposed the Communist regime, their welfare was of more concern to the Western Bloc. Thus, the UNHCR often conferred upon refugees from Nicaragua the Convention definition of refugee (with its associated favored treatment). Moreover, about half a million Nicaraguans were resettled in Central America and the United States, while most Salvadorans applying for refugee status in the United States were rejected²³⁰.

Preferential treatment was also expressed in the refugee camps in Honduras operated by the UNHCR program to aid Nicaraguans and El Salvadorans who fled their native lands. The UNHCR worked closely with the Nicaraguan refugees to improve their living conditions. At the same time, in response to Western Bloc demands, the UNHCR relocated the refugee camps of El Salvadorans far from the border, where they were subject to tight control. Many refugees refused to go along with the planned relocation and the UNHCR used coercive measures, sometimes withholding food from refugees. In the end, many refugees died in the course of this forced relocation²³¹.

The importance attached by the UNHCR to the Western Bloc's political interests was demonstrated in its asylum policy in Asia as well. Following a rightist military coup in Indonesia headed by General Suharto in the 1960s many supporters of the Indonesian Communist Party became targets of the new regime. The massive killing and human

Greenwood Press, New York, pp. 90-91.

²²⁹ By the end of the 1970s about 200,000 Nicaraguans had left the country and another 800,000 were internally displaced persons seeking protection from the leftist Sandinistan regime.. See Elizabeth G. Ferris (1987), *The Central American Refugees*, Praeger, New York, p. 124.

²³⁰ The result was that many El Salvadorans were accommodated in detention centers and then deported. Asha Hans and Astri Suhrke (1997), "Responsibility Sharing" in: James C. Hathaway (ed.), *Preconceiving International Refugee Law*, Martinus Nijhoff Publishers, The Hague, p. 94.

²³¹ Gil Loescher (2001), *The UNHCR and World Politics*, Oxford University Press, New York, pp. 219-220 and 229-230.

rights violations did not draw UNHCR attention, however. As Indonesia remained a military ally of the Western Bloc the UNHCR was reluctant to take sides in the conflict in Indonesia, declaring that it was unable to interfere in the internal affairs of a nation. Thus, in a letter directed to Amnesty International by the High Commissioner at the time, it was also stated that, “the internal problems of Indonesia fall by definition outside my competence”. In other international crisis, of no particular interest to Western governments due to either cultural and demographic factors, the UNHCR offered limited humanitarian assistance. In 1971, for example, the UNHCR refused to recognize East Pakistanis who fled to India as refugees. Instead it adopted Resolution 2790 of December 6, 1971, where the General Assembly argued that, “repatriation was the only satisfactory solution to the refugee problem”²³².

3.3. “Good office strategy”: UNHCR policy towards refugees not within its competence

The term “Good Office” developed in the end of the 1950s to help refugees not under the competence of the UNHCR and who were of less interest to the Western Bloc²³³. “Good Office” refugees do not carry any obligatory protection and hence are subject to humanitarian assistance of a strictly voluntary nature. To a large extent it appears, as Jackson notes that the UNHCR used the “Good Offices” mechanism as a matter of policy when it preferred not to be directly involved in these situations. The UNHCR Evaluation Unit was therefore sometimes critical of the usage of the “Good Office” mechanism. In the case of Burma, for example, the “Good Offices” mechanism was applied to the 200,000 Rohingya refugees who fled the ethnic discrimination and the violence of the Burmese military in 1978, and were not taken under the competence of UNHCR. It was argued that the decision that, “these groups could not be dealt with under the mandate is not entirely convincing. They were admittedly exposed to persecution in the area of

²³² See Resolution 2790 of December 6, 1971, United Nations assistance to East Pakistan refugees, Official Records, General Assembly, Twenty-sixth Session, Third Committee, 1876th meeting. See also Jackson, *op.cit.*, pp. 215 and 227.

²³³ As the 1951 Geneva Convention limited itself to persons who became refugees before 1951 and to events occurring in the European continent, most refugee groups in the world and in particular outside Europe were excluded from refugee status.

Burma from which they came”²³⁴ From Jackson’s point of view there were sufficient elements present to consider the situation of these groups as ‘comparable to refugee situation’ and there seems to be little doubt that they could have been considered *prima facie* refugees had this been so desired. The decision to proceed on the basis of “Good Offices” appears therefore to have been a matter of deliberate choice, rather than having been dictated by the composition of the group and the reasons for their departure from their country of origin. In addition, the sense in which the term ”Good Offices” was used was not clear. Did it relate to persons who by definition were outside the competence of the United Nations, or to persons who were *prima facie* within the UNHCR Mandate but in respect of whom no formal determination of mandate refugee status had been made? From the above description of developments, it appears that this issue was not given very serious examination. It is therefore plausible that the ‘Good Offices’ notion was invoked for purely pragmatic reasons, when a relatively small amount of assistance was granted and when it was desired not to create a precedent for similar situations which might exist in Southeast Asia. In other words, “this approach did not, in the final analysis, necessarily correspond either to the actual composition of the group or to the reasons why its members found themselves in a ‘refugee situation’ “²³⁵.

4. The UNHCR in a Changing World

Since the end of the 1980’s the UNHCR’s policy has changed dramatically. With the end of the Cold War and the simultaneous and massive increase in the number of applicants for asylum, there was no longer need for the earlier preferential policy. The result has been that, paradoxically, asylum policy in the post-Cold War era has been more restrictive than the one pursued during the Cold War. Moreover, as the number of asylum seekers has increased, the public calls for a general limit to the new waves of migration have effected decision makers' perceptions of asylum seekers, who now came to be generally perceived as undesirable economic migrants, as members of an impersonal, somehow threatening *Asylantenflut*. Thus, while during the Cold War the UNHCR often

²³⁴ Jackson, *op.cit.*, p. 226.

²³⁵ *Ibid.*, p. 227.

considered resettlement, as the most appropriate solution for persons fleeing communist regimes, the UNHCR now espouses repatriation is the ideal solution for the vast majority of refugees. In this respect the promise provided in the 1951 Geneva Convention to allow individuals to chose whether to stay or be repatriated was not kept. As Loescher has described, in some cases refugees were sent back to their country of origin against their will or simply ignored. Furthermore the UNHCR's negotiations for repatriation were sometimes with countries where refugees could not safely return home due to massive human rights abuses²³⁶.

But while the UNHCR, along with Western governments, began to act to reduce the refugee waves through the introduction of various legislative measures, the process of a deepening European integration in Western Europe (manifested by the founding of the European Union in the 1992 Treaty of Maastricht) has also provided for the development of a new asylum policy. Western European States have been increasingly confronted with the hazards of conducting an independent refugee policy and have become increasingly keen on coordinating - for their own sake - their policies.

²³⁶ Loescher (2001), *op.cit.*, pp. 295-308.

PART THREE: THE DEVELOPMENT OF ASYLUM POLICY IN THE EUROPEAN UNION

I. Introduction

The purpose of this research is to examine the influence of the European integration on the development of asylum policy in the European Union (EU). The central question in this respect is to what extent did regional integration and the creation of new policy making bodies affect the development of asylum policy in the EU. Moreover, what are the impacts of the new measures taken by the EU on asylum seekers?

The basic assumption of this research is that EU regional integration has paved the way for an asylum policy which sets itself apart from the ways other Western nation-states deal with the issue. While establishment of an asylum policy in Western society always involves the difficulty of satisfying the contradictory objectives of adherence to liberal universal asylum standards, on the one hand, and the desire to control immigration into one's country, on the other, the special features of the EU tend to deepen this difficulty. The result has been that EU integration has increased the motivation for the development of a more restrictive asylum policy.

There are number of reasons why the EU has adopted a more restrictive asylum policy . Though the EU model differs from the traditional model of nation-states, the EU, since it must represent the interests of its individual member states, cannot escape similar exclusionary pressures. Like any nation, it must also try to develop a policy that reflects the conflicting goals of promoting the interests of the citizens of its member states while also respecting universal human rights. In fact, it appears that this conflict is even more severe in the case of the EU, due to its unusual position. The EU entails multiple actors (representing the various member states), who both participate in the policymaking while at the same time continue to protect their own national interests. Moreover, it appears that the EU is more vulnerable compared to other Western democracies, as it is still involved with the community building process and consideration of new members. It is attempting to create a strong common identity and to gain legitimacy by demonstrating its

effectiveness in promoting the interests of its citizens. One side effect of this tendency to stress the priority of EU citizens is to take into account their concerns and fears about new migration pressures. Thus, if citizens are concerned about migration, EU policy-makers have to prove their effectiveness in this area. And indeed, in recent years the EU has adopted relatively restrictive measures in the field of asylum.

In the coming chapters the progress leading to the development of asylum policy in the EU will be described. The main documentary sources and other points of reference to illustrate the path the EU (and Member States) have chosen to follow will be examined. There are a number of important road marks along this path. The first was the Schengen Agreement (1985) and the Single European Act (1986), which abolished intra-EC borders and allowed for the free movement of persons. While EU Member States were in favor of these initiatives, they feared losing control of the movement of non-EC nationals as a result of the new fluidity at the national borders and the new migration pressures. The result was a growth of interests in promoting common migration and asylum policy. Yet, while different levels of cooperation were available to deal with the new border situation, at first Member States preferred not to develop a common immigration policy but to adopt a number of measures to pursue their own immediate interests. The next significant step was the signing of the Treaty of Maastricht and the founding of the European Union in 1992. The signing of the Treaty of Maastricht offered a higher degree of cooperation among Member States, though negotiations among EU Member States revealed differences of opinions over the extension of the EU's powers. Certain countries supported the idea of a common immigration policy, while others were of the opinion that intergovernmental cooperation was the best solution to avoid undermining the sovereignty of the national state. Nevertheless, the desire to work together has grown in the course of the years. As Member States attempted to limit the number of migrants/asylum seekers entering EU territory, they realized that this goal could only be fully achieved if other members did not pursue a contradictory policy. The result was a clear shift from purely intergovernmental cooperation to implementation of common policies, highlighted by the creation of a common asylum policy in the 1997 Treaty of Amsterdam. Currently, negotiations are being carried out which are to result in the

promulgation of concrete measures by May 2004.

II. Towards the Creation of a Regional Refugee Policy in Western Europe

One of the more important developments after the Second World War was the creation of the European Economic Community (EEC) in Western Europe. The search for peace and stability in light of the horrors of war induced European states to dismantle many of the conditions necessary for war, with the creation of the European Community for Coal and Steel²³⁷, and to pursue common economic interests with the establishment of the EEC. At first, the EEC consisted of six members including Germany, France, Italy, Belgium, the Netherlands and Luxembourg. In the course of time additional countries such as Denmark, Britain, Ireland (1973), Greece (1981), Spain, Portugal (1986) Sweden, Austria and Finland (1995) joined the Community. Community members initially defined their activities primarily through the lens of economic interests and plans to move towards more intensive political cooperation emerged only in the mid 80s. In many ways this process began as the new political situation in the world, namely, the gradual decline of the Communist Bloc was becoming more evident. As the EC members began to appreciate the opportunities made possible by this new political environment, they were motivated to implement a number of political and economic reforms. To a large extent these steps were not possible during the Cold War, as the EC members preferred not to provoke the USSR²³⁸. Yet beyond the need of the EC to be flexible and to carefully select the political measures to be taken under the political conditions at the time, a major reason for the relatively modest political cooperation between EC members during the Cold War was related to the particular stage of development that the EEC was in. The

²³⁷ See "Schuman Declaration" of May 9, 1950 calling upon European countries to join the common control on coal and steel. Hans August Lückner & Jean Seitlinger (2000), *Robert Schuman und die Einigung Europas*, Editions Saint-Paul, Luxemburg, pp. 87-91.

²³⁸ For this reason a number of European countries such as Sweden, Finland and Austria were reluctant to join the European Community during the Cold War. As they wished to remain neutral (and maintain good relations with the Soviet Union) during the Cold War, they preferred a membership in the European Free Trade Area (EFTA) rather than in the EC. As Pedersen noted, "the EFTA was seen as a defensive move with no long term political purpose". Moreover, "while the EC was both a Custom Union and a Common Market, EFTA merely aimed at removing internal trade barriers on industrial goods". Thomas Pedersen (1994), *European Union and the EFTA Countries. Enlargement and Integration*, Pinter Publishers, London, pp. 20-21. See also Philippe G. Nell (1990), "EFTA in the 1990s: The Search for a New Identity", *Journal of Common Market Studies*, Vol XXVIII, No. 4, June 1990. Only after the collapse of the Soviet Bloc did they submit their application for EU membership.

EEC was primarily designed to be a new form of diplomacy, restoring the relations between European countries and overcoming their mutual hostility. Members of the European Community did not seek to replace the traditional nation-state, but to create a new alliance which would open the way for economic and political cooperation²³⁹. The gradual progress towards European unity began in the mid 1980s with the creation of the Single European Act (SEA) and the founding of a European Union in the 1992 Treaty of Maastricht. This increased unity not only offered a higher degree of cooperation among Member States, but also led to the introduction of a new set of rules governing policymaking that significantly differed from other approaches prevalent in the Western world.

1. The Schengen Agreement and the Single European Act: The Logical Consequences of the Free Movement of Persons

Until the mid-1980s there was no significant attempt among EC members to cooperate in the field of migration and coordinate asylum policy towards non-EC nationals. As the European Community in its incipient stage tended to focus primarily on economic rather than political cooperation, migration and asylum policy were considered to be the exclusive concern of the individual Member States. Another reason for the lack of motivation to develop common policy measures was associated with the perception of migrants in Europe. Until the early 1970's the admission of non-EC nationals into EC countries was not recognized as a possible threat to the local citizens. On the contrary, many European countries were encouraging the entrance of migrant workers to compensate for the lack of local labor. Thus, the policy which emerged was one which facilitated the admission of migrant workers from outside the EC²⁴⁰. EC legislation such as Regulation 1616/68/EEC, for example, guaranteed entry and residence to families of non-EC migrant workers. Council Regulation 1408/71 specified that there should be no discrimination between EC and non-EC migrants. Finally, based on bilateral agreement between a Community member and non-EC country, non-discriminatory treatment is to

²³⁹ See Article 2, the Treaty of Rome.

²⁴⁰ The Treaty of Rome provided for the free movement of workers (Articles 48-51 of the EC Treaty – [old numbering] envisaged that by December 1969 EC nationals would be free to work in other EC countries). This freedom however, did not refer to non-EC nationals.

be assured to non-EC nationals working in the EU²⁴¹.

The relative liberal attitude towards non-EC nationals gradually begun to change after the early 1970s. With the oil crisis of 1973 and increased numbers of foreign workers, European countries began to adopt a new approach towards non-EC nationals, responding to the growing public demand to halt migration. At the time migrants represented about 6% of the total population²⁴². But while EC members gradually introduced restrictive measures at the national level, a policy at the EC level was still not desired²⁴³. In June 1980, for example, the Council published guidelines for the community labor market emphasizing the need for consultation only with regard to third countries²⁴⁴. As Collinson also observed, the limited EC jurisdiction in the area of third country nationals was expressed in the types of agreements concluded between the EC and third countries. The Cooperation Agreement with Tunisia, Morocco and Algeria in 1978 or the Association agreement with Turkey and the Additional Protocol of 1980 were generally limited to non-discrimination clauses, rather than specifying migration or asylum policy of the individual Member States as such²⁴⁵.

The degree of cooperation between EC members in the area of asylum and migration policy significantly increased as a result of the Schengen Agreement and the Single European Act. As a result of these agreements, the borders between EC members became much more open. Along with these initiatives the new migration pressures and the large

²⁴¹ For example, the Association Agreement between the European Community and Morocco stipulates that Moroccan workers in the EC will benefit from non-discriminatory treatment. See also Willy Alexander (1994), "The law applicable to nationals of third countries in the absence of agreements between the Community and their countries", *Actualités du droit*, p. 289.

²⁴² Between 1969 and 1973 about 570.000 workers from third world countries were admitted every year into the European Community. At the same time, the share of EC workers, in particular Italians, who constituted about half of the foreign labor in the EC in the 1960s, constantly dropped. See W. Mole (1991), *The Economics of European Integration*, Aldershot, Dartmouth, p. 208.

²⁴³ See Giuseppe Callovi (1992), "Regulation of Immigration in 1993: Pieces of the European Community Zig-Saw Puzzle", *International Migration Review*, vol. 26, No. 2, pp. 355-357.

²⁴⁴ In 1974, the EC adopted an Action Program for Migrant Workers and their Families to provide for the examination of future development. Moreover, the Council of Minister adopted in 1976 a resolution calling for a Community approach to non-EC nationals. But since this resolution was not legally binding, the Council of Ministers did not attempt to transform this document into compulsory legislation. See also Council Resolution of July 16, 1985 on Guidelines for a Community Policy on Migration, *Official Journal*, C 186, 26.7.1985, pp. 0003-0004.

²⁴⁵ Collinson, *op.cit.*, pp. 122-123.

number of non-EC migrants residing in the EU tended to change the Member States' perception about migration, making it more desirable to cooperate more closely with other EC members.

In June 1985 five Member States, namely Germany, France and the Benelux countries signed the Schengen Agreement allowing for the gradual abolition of controls at their common borders. The agreement was basically a product of a Franco-German initiative aimed at facilitating the movement of trucks crossing their frontiers by removing the checks in their common borders²⁴⁶. The result was the abolition of police and customs formalities for people goods and services crossing intra-community frontiers²⁴⁷. The Schengen Implementation Convention concluded in 1990, provided for specific measures to implement this agreement.

Not all Member States participated in the scheme to dismantle border control, though the signatory states declared this act to be an expression of an “ever closer union of the peoples of the Member States”²⁴⁸. Italy, for example, though favoring the integration process, was not invited to sign either agreement. The major reason for this stems from doubts harbored by the signatory states as to whether Italy would take the necessary measures to effectively implement the agreements. Britain and Denmark, on the other hand – already often described as Euro-skeptic towards the integration process - vigorously opposed these initiatives, expressing concern about the Schengen Agreement. In many ways this reservation seemed to reflect the lack of trust in the Community members. In other words, Britain’s and Denmark’s view was that border control should fall under the competence of the national government, as other states cannot sufficiently

²⁴⁶ On July 13, 1984 Germany and France concluded an agreement at Saarbrücken to remove the obstacles to the free movement of transports by abolishing police and customs formalities for people and goods crossing intra-community frontiers.

²⁴⁷ As Geddes notes, while the Commission was allowed to participate as an observer, Member States concluded the provisions of this agreement alone. Andrew Geddes (2000), *Immigration and European Integration. Towards fortress Europe?*, Manchester University Press, p. 81.

²⁴⁸ The decision to remove the checks on the common borders was already decided in the European Council in 1974. The Commission suggested to first gradually remove the checks by facilitating the movement of persons crossing the common frontiers and than to abolish them. See Alberto Achermann, Roland Bieber, Astrid Epiney & Ruth Wehner (1995), *Schengen und die Folgen. Der Abbau der Grenzkontrollen in Europa*, Verlag Stämpfli + Cie AG, Bern, pp. 22-23.

ensure the common borders. Thus, as a result of British opposition, Ireland, which shares a Common Travel Area with Britain, was prevented from joining the Schengen agreement. Denmark finally decided to join and by 1996 all EU members with the exception of Britain and Ireland were signatories to the Schengen Agreement: Italy (1990), Spain, Portugal (1991), Greece (1992), Austria (1995), Sweden, Denmark and Finland (1996). Moreover, due to the Nordic Passport Union²⁴⁹ between Denmark, Finland, Sweden, Norway and Iceland, the Schengen Agreement - originally designed to include EU Member States only – was applied also to Norway and Iceland²⁵⁰. As “associate members”, they were allowed to express their opinion but had no right to vote and to take part in the decision making process²⁵¹. The Schengen Agreement of 1985 and the Implementation Convention of 1990 came into force in 1995.

In contrast to the Schengen Agreement, which was initially an arrangement limited to just a few Member States, the Single European Act (SEA), signed in February 1986, was open to all Community members²⁵². It was not, in contrast to the Schengen Agreement, separate from the EEC Treaty but part of the latter. The SEA’s purpose was to upgrade and amend the EEC Treaty while creating an internal market by 1992, “in which free movement of good, persons, services and capital was to be insured”. While the SEA primarily promotes the idea of “an area without internal frontiers” with the ultimate goal of achieving greater political unity, one of its most important innovations was the transition of focus away from just the free movement of workers and self employed (Article 48 and 52) to the broader category of free movement of persons in general. The

²⁴⁹ The Nordic Passport Union signed in 1954 provides for the free movement of persons between Denmark, Finland, Sweden, Norway and Iceland.

²⁵⁰ Lars Bay Larsen (1997), “Schengen, the Third Pillar and Nordic Cooperation” in: Monica den Boer (ed.), *The Implementation of Schengen: first the widening, now the deepening*, European Institute of Public Administration, Maastricht, the Netherlands, p. 18.

²⁵¹ See also *Free movement of Persons in the European Union*, Working Paper, European Parliament, September 1998, p. 8.

²⁵² The European Council meeting in Luxembourg on December 2-3, 1985 to discuss the SEA faced a number of difficulties. Italy, for example, preferred this act to be brought before the national parliament in view of its historical implications, whereas Denmark had already opened it up to public debate by arranging a referendum. Greece for its part had no particular objection to the SEA but nevertheless preferred to make a decision on the basis of how the latter two countries would decide. In the end, nine Member States signed the agreement on February 17, 1986, while Italy, Denmark and Greece signed the act on February 18. For more details about the draft treaty establishing the European Union, see Desmond Dinan (1999), “Ever Closer Union”. An introduction to European Integration. The Macmillan Press, London, p. 119.

Treaty of Rome allows only for the free movement of workers, whereas in the framework of the newly created Treaty of Maastricht, Member States pledged to allow citizens from other Member States to enter their territory by opening their national border. Moreover it allows EU nationals to reside in another Member State and take the nationality of a Member State if they wish.

The decision to move forward towards establishment of the European Union (“to make concrete progress towards European unity” Article 1, SEA), and, in particular, the establishment of the free movement of persons, had large ramifications on the desire for cooperation between Member States. While Member States were aware of the advantages that the new European model provided via the Four Freedoms of the Single Market, they were concerned about the implications of this initiative, specifically in light of new migration pressures and the increased vulnerability at the national borders. The result was a growth of interest in promoting common migration and asylum policy²⁵³. Nonetheless, the formulation of a common policy was not easy, as Member States were wary of having control of their borders given to the EU. Thus, while different levels of cooperation were available to address the immediate problem of trans-border migration, Member States preferred to develop short-term solutions to pursue their immediate interests. Hence, the first measures to be taken were used to counter some of the more threatening results of the Schengen Agreement and the Single European Act, namely, confronting the externalization of borders control and the free movement of persons.

2. Initial Outcomes of the Single Market Initiative: the *ad-hoc* Group on Migration and the Schengen Implementation Agreement

The Commission’s White Paper for the Implementation of a Single Market by the Year 1992, of June 1985, stressed that a number of specific measures relating to migration were necessary to establish the Single Market. The Council however, provided only a general statement about how these measures could be realized. In its 1985 Resolution on the Guidelines for a Community Policy on Migration of 1985, for example, the Council

²⁵³ Werner Weidenfeld (1994) (ed.), *Das europäische Einwanderungskonzept. Strategien und Optionen für Europa*, Verlag Bertelsmann Stiftung, Gütersloh, pp. 20-21.

merely declared that, “it is desirable to promote cooperation and consultation between the Member States and the Commission as regards migration policy, including vis-à-vis third countries”²⁵⁴. Only in a declaration annexed to the final act of the SEA, in 1986, did Member States for the first time explicitly express their expectations towards cooperation on migration issues²⁵⁵. The Schengen Agreement also was explicit, listing the measures, which needed to be taken in the area of migration policy; “the application of this agreement require legislative measures”. It made a distinction between short and long-term measures and suggested the improvement of external and internal EC border checks to prevent the movement of terrorists, drug traffickers, criminals and illegal migrants. The Agreement also mentioned the desirability of harmonization of visa policies and close cooperation among members to avoid asylum abuse. One of the suggestions in this respect was that the signatory states should attempt “to approximate their visa policies as soon as possible in order to avoid the adverse consequences in the field of migration and security that may result from easing checks at the common borders” (Article 7).

Under the British EU Presidency the first meeting of the twelve EC immigration ministers was held in London in October of 1986. The ministers emphasized the need to re-examine the repercussions of the free movement of persons, and in particular, how this movement would impact the fight against illegal migration, terrorism and drug trafficking. As a result of this meeting, the ministers also decided to set up an *ad-hoc* group on immigration which was charged to prepare a working program describing specific measures necessary for the achievement of the Internal Market²⁵⁶. In the Rhodes

²⁵⁴ “Much closer consultation and cooperation is required at the Community level in the implementation of national migration policies vis-à-vis third countries”. See Council Resolution of July 16, 1985 on Guidelines for a Community Policy on Migration, Official Journal, C 186, 26.7.1985, pp. 0003-0004.

²⁵⁵ “In order to promote the free movement of persons, the Member States shall cooperate in particular as regards the entry, movement and residence of national of third countries”. See the “Political Declaration by the Governments of the Member States on the Free Movement of Persons”, annexed to the Final Act of the Single European Act.

²⁵⁶ As Hentges notes, the name of the group alone implies the nature of its activities: Terrorism, Radicalism, Extremism, Violence International (TREVI). It was established to deal with internal security and reported annually to the meeting of the interior ministers on its activities. See Gudrun Hentges (2002), “Refugee and Asylum Policy Influenced by Europeanisation” in Evans Foundation (ed.) *Europe's New Racism? Causes, Manifestations and Solutions*, Berghahn Books, New York, p. 107. See also Tony Bunyan (1997) (ed.), *Key texts on Justice and Home Affairs in the European Union. Vol. 1 (1976-1993). From Trevi to Maastricht*, Statewatch, London, p. 9.

European Council of December 1988, the immigration ministers also established a group of coordinators to oversee the policy allowing the free movement of persons. Like the *ad-hoc* group on migration, the activity of this group was structured on an intergovernmental basis, and thus EC institutions could influence the decision making process. One major achievement of this intergovernmental cooperation was the formulation of the Palma Document adopted at the Madrid European Council in June 1989²⁵⁷. This document contains the compensatory measures considered to be essential for the implementation of the free movement of persons, referred to the development of a mechanism for determining which nation is responsible when asylum is requested, specified rules governing external border controls, and described the future European information system.

The signing of the Schengen Implementation Agreement in 1990 represented major progress in specifying how migration and asylum policy was to be implemented. And in fact, most of the objectives presented in its agenda were eventually achieved. The Implementation Agreement aimed at developing a new mechanism to address the priorities and needs of the Member States and suggested a plan to avoid the negative implications of the internal market. The starting point was to guarantee that efficient mechanisms would be used to control the entrance of non-EC nationals into the EC. For this reason, policy-makers readily ignored the differences between legal migrants, asylum seekers and illegal migrants, describing them all as alien, and tended to see them as obstacles to the freedom of movement. This confirms the idea that from the national perspective, the entrance of asylum seekers as well as migrants was viewed as needing control.

Moreover, the measures suggested by the Member States with regard to the abolition of checks at internal borders and free movement of persons show that the signatory states

²⁵⁷ While several action plans were offered, the document made a distinction between “measures which are essential” and “measures which are desirable”. Thus, for example, in the field of asylum essential measures referred to the determination of the State responsible for examining the application of asylum, while desirable measures referred to the possible examination of criteria for granting the right of asylum and refugees status. “The Palma Document” Free Movement of Persons. A Report to the European Council by the Coordinators' Group, Madrid, June 1989. See also Korella, *op.cit.*, pp. 49-50.

were prepared to cooperate and even harmonize their policies on issues which were believed to be central to state sovereignty. The most important policy in this respect concerned the granting of visas to non-EC nationals: “the contracting parties undertake to peruse through common consent the harmonization of their policies on visas” (see Article 9)²⁵⁸. The fact that EC members did not reject the idea of cooperation on such issues demonstrated that they were capable of being flexible in policy formulation if they were likely to benefit from the consequences. Another attempt to deal with consequences of the new circumstances related to the treatment of asylum seekers. Thus, for example, Article 30 of the Schengen Implementation Agreement aimed at developing a mechanism that would impose the responsibility of responding to applications of asylum to a single state, “If two or more contracting parties have issued an asylum seeker with a visa of whatever type or a residence permit, the contracting party responsible shall be the one which issue the visa or the residence permit that will expire last”. Whereas in the past asylum seekers could apply to all twelve Member States, they could apply now for to only one Member State. This provision was eventually incorporated in the signing of 1990 Dublin Convention, which placed severe restrictions on the ability of asylum seekers to ask for asylum. The 1985 Schengen Agreement did not address this issue, partly because asylum became a major point of discussion in the political agenda of many European countries only with the increase number of asylum seekers into their territory in the early 1990s²⁵⁹.

An additional area of cooperation between Member States, though of a different nature, was police matters. The contracting parties undertook, “to ensure that their police authorities shall, in compliance with national law and within the scope of their powers, assist each other for the purpose of preventing and detaching criminal offenses” (Article 39). Criminal offenses included murder, rape, kidnapping, trafficking in human beings,

²⁵⁸ “Visa arrangements relating to third states whose nationals are subject to visa arrangements common to all Contracting Parties at the time of signing this Convention or at a later date may be amended only by common consent of all contracting parties”. See Article 9.

²⁵⁹ As the United Nations High Commissioner for Refugees noted, whereas in the beginning of the 1980s the total number of people seeking asylum in 23 European Countries from Poland to Portugal was 71.000, in 1992 the figure was over 700.000. See Sadako Ogata (1993), “Refugees and Asylum Seekers: A Challenge to European Immigration Policy”, *Towards a European Immigration Policy*, The Philip Morris Institute for Public Policy Research, Brussels, October, p.14.

and illicit trafficking in narcotics. Cooperation in police matters was based on the assumption that removal of border controls could adversely affect the quality of security and thus promote criminal activity. One of the inevitable outcomes of cooperation in visa and police activities was the construction of a detailed information system, the so called the “Schengen Information System”, to enable the authorities to exchange important information “to maintain public policy and public security” (Article 93).

It was decided to appoint an executive committee for the purpose of implementing the convention” (Article 131), in which every state had a seat and decisions were to be taken unanimously (Article 132). The European Parliament repeatedly criticized the way the committee functioned, claiming that it lacked transparency in the decision making process, “there is no provision for democratic accountability, no role for the European Court of Justice and not even a limited code of access to documents”²⁶⁰. Moreover, the meetings of the executive committee were not public unless otherwise decided. The European Parliament also often criticized the measures adopted by the signatory states. It argued that the signatory states were motivated by the wish to limit migration waves. The creation of the Schengen area, it stated, “must not be the excuse for introducing systematic controls in border regions or for hermetically sealing the external borders ('fortress Europe')”²⁶¹.

The approach taken at the Schengen Convention suggested that the main concern that came to dominate the policy of EU Member States was how to limit the number of migrants into EC territory and how to provide a feeling of security. Member States gave the impression that they believed that the creation of the Single Market would be accompanied with negative side effects, including increased migration. In this environment, asylum seekers were viewed as a threat, and EU Member States shared the opinion that they needed to provide measures to reduce the number of asylum applications. Under this state of affairs the road to the drafting of the Dublin Convention became inevitable.

²⁶⁰ See also *Free movement of Persons in the European Union*, Working Paper, European Parliament, September 1998, p. 22.

²⁶¹ *Ibid.*, p. 24.

3. The Dublin Convention

The Dublin Convention signed in 1990 and ratified in 1997 was a result of the Single Market initiatives. With the abolishing of internal borders, asylum seekers were no longer considered an exclusive concern of the individual states, but rather of the Community as a whole. Hence, a common approach to asylum had become necessary. One of the Schengen Agreement's guiding principles was that a person applying for asylum in one Member State is not entitled to apply for asylum in another one, if the first application had been rejected. Exceptions could be made when family members of the applicants (wife and minor unmarried child) were already recognized as refugees and were residing in a different Member State than the one where the application was lodged (Article 4) or in cases where the applicant concerned had a valid residence permit or a visa issued by another Member State²⁶².

While the provisions of the Dublin Convention, emphasizing the importance of a common asylum policy, could be justified as necessary due to the creation of a single market, a harmonized asylum law did not emerge. Rather, the convention simply authorized Member States to examine applications on behalf of all other Member States in accordance with their national law ²⁶³. What has finally emerged is a mutual recognition that the right of asylum seekers to look for shelter elsewhere in the EU should be withheld once the application was rejected by a Member State, this even in the absence of a common asylum policy. In other words, notwithstanding the fact that a differentiation of asylum treatment among EU Member States still prevailed, only one application could be submitted. This point is critical, since the Geneva Convention places no limits on the number of applications for asylum. If the EU wished to “guarantee adequate protection to refugees in accordance with the terms of the Geneva Convention” as stated in the preamble of the Dublin Convention, a more honest approach would have

²⁶² If the applicant has more than one valid residence and/or visa permit the responsibility will be assumed by the Member States, which granted him the longest period of residency. See Article 5.

²⁶³ Karsten Kloth (2000), “The Dublin Convention on Asylum- An Introduction” in: Marinho Clotilde (ed.) *The Dublin Convention on Asylum. Its Essence, Implementation and Prospects*, European Institute of Public administration, Maastricht, p. 9.

been to first decide on a timetable for achieving a harmonized asylum policy and only then to adopt the above-mentioned measures. The Member States, however, were not ready to follow this reasoning. Instead they favored a coordination of their policies, striving to protect their national interests by limiting the entrance of potential asylum seekers into EU territory and encouraging the notion of unfounded claims for asylum. From the EU perspective the Convention was found to be very efficient in preventing “asylum shopping” by limiting the number of applications. At the same time it also opened the door for a long and bitter debate between Member States about identifying the country most responsible for examining an application.

4. The External Border Convention

As a result of the decision to dissolve existing internal border controls, a first draft of an External Border Convention was submitted to EU immigration ministers by the 1989 French Presidency. The main objective of this Convention was to “remove the obstacles to the full abolition of internal border controls”²⁶⁴ while laying down the rules governing the crossing of external borders by non-EC nationals. The Convention defined “external borders” as the land of a Member State not sharing a common border with another Member State, airports and seaports (except those used solely for internal flights) and made special arrangements for controlling these frontiers. It included, for example, regulations to ensure that passengers with a connecting flight will be subject to control at the airport in which they make their departure. Additional measures referred to travel documents and the period of stay in a Member State. It was also decided that the rules governing “short” (less than three months) stays should be distinguished from those governing “long” stays: while the Convention provided the possibility of mutual recognition of short term stays for non-EC nationals, it left to the individual Member States to decide about long term visas.

The Convention also attempted to formulate visa policy towards non-EC nationals. EC Member States were able to make significant progress in this regard. In 1995, the EC

²⁶⁴ Riccardo Faini (1995), “Migration in the Integrated EU” in: Richard E. Baldwin, Pertti Haaparanta & Jaakko Kiander(eds.), *Expanding Membership of the European Union*, Cambridge University Press, p. 145.

presented a list of countries whose nationals would need a visa when crossing the external border of a member state. This list included poor countries, such as India and Pakistan, which had the greatest potential for dispatching immigrants to the EU²⁶⁵. Signing of the Convention, however, was blocked as a result of a dispute between Spain and Britain on the status of Gibraltar²⁶⁶. Nonetheless, most of the objectives declared were achieved outside the framework of the Convention. Visa policy, for instance, was subject to Community law after Maastricht. Moreover, once almost all EU member States became members of the Schengen Convention and the Schengen information system (SIS), it was no longer necessary to refer to the External Border Convention as most of its measures were adopted via Schengen²⁶⁷.

III. The Maastricht and the Justice and Home Affairs Pillar: A Bastion of National Sovereignty

The idea of the internal market was discussed at the 1985 Intergovernmental Conference (IGC). The plan that emerged was to amend the Treaty of Rome to include the Four Freedoms (movement, service, capital and goods) in an area without internal frontiers. The establishment of the Economic Monetary Union (EMU) was considered especially

²⁶⁵ Philip Alan Butt (1994), "European Union Immigration Policy: Phantom, Fantasy or Fact?" *West European Politics*, vol. 17 No. 2 April 1994, p. 176. See Council Regulation (EC) No 2317/95 of 25 September 1995 determining those third world countries whose nationals must be in possession of visas when crossing the external borders of Member States, *Official Journal of the European Communities*, 1995, L 234/1. In addition to the countries mentioned in the Common List for which a visa was needed, the Commission published another list of countries not included in the Common List but whose nationals nevertheless needed a visa to reside in one or more specific Member States, see Commission Communication of 14 December 1996, *Official Journal of the European Communities*, 1996, C 379/3. In December 1995, the European Parliament appealed against this decision to the European Court of Justice since the Council did not consult the Parliament. The Court of Justice annulled this measure and as a result the Council, on the basis of Article 100c in the Maastricht Treaty, had to consult the Parliament.

²⁶⁶ Gibraltar is considered a British dependent territory under the Utrecht Treaty of 1713. When Britain joined the European Community in 1973, Gibraltar received a special status. Spain, however, refused to accept this and attempted to win back the sovereignty of Gibraltar, though a referendum in 1968 showed that the vast majority of the people of Gibraltar wished to remain under British rule: 12,148 in favor, 44 against. Moreover, in 1997, the government of Gibraltar made it clear that it was not seeking independence but to maintain the political ties to the UK "through a modernized, non-colonial constitution". At the same time it stressed that Gibraltar "wants and seeks good neighborly relations and mutual cooperation with Spain". See statement by the chief Minister of the government of Gibraltar, the Hon Peter Caruana, Brussels, January 29, 1997.

²⁶⁷ See Klaus-Peter Nanz(1995), "The Schengen Agreement: Preparing the Free Movement of Persons in the European Union", in: Bieber and Monar (eds.), *op.cit.*, pp. 45-46.

important among the Member States. As the latter came to view economic cooperation with considerable interest, they proposed the creation of a single currency zone to eliminate the last barrier to trade. Along with the creation of the EMU, attention was also gradually paid to other policy areas that traditionally had been assumed to be the provenance of individual Member States, such as foreign policy, justice, and home affairs²⁶⁸. Although historically the EU exhibited relatively poor performance in the political sphere, external factors in the early 1990s forced the EU to act more effectively.²⁶⁹ The end of the Cold War and the emergence of the Yugoslavian crisis prompted Member States to strengthen their will to fulfill the necessary conditions to play a major role in foreign policy and present a more unified political front²⁷⁰. In the field of migration it was recognized that new arrangements were necessary to deal with the waves of migration and asylum seekers resulting from the formation of the internal market and the collapse of the Soviet Union.

In order to coordinate the direction of the European Union it was left to the 1991 IGC to make the appropriate measures, eventually leading to the signing of the Maastricht Treaty. During the IGC discussions, Member States divided into two main approaches. Some countries supported the federalist approach, advocating for political integration which was likely to carry supranational characteristics, while other countries were of the opinion that intergovernmentalism was the appropriate form of governance for this stage

²⁶⁸ As the EC lacked the ability to operate in world politics outside the field of economics, the President of the Commission declared in 1985 that the EC is an “economic giant but political dwarf”. For a further analysis of Delors's expectations of the Internal Market see “Das neue Europa” (1992), Carl Hanser Verlag, Munich.

²⁶⁹ In the Kohl-Mitterrand letter of April 20, 1990 to the Irish Presidency, the German and French leaders supported the idea of a second IGC on political union. “In the light of far-reaching changes in Europe and in view of the completion of the single market and the realization of economic and monetary union, we consider it necessary to accelerate the political construction of the Europe of the twelve. With this in mind...the European Council should initiate preparations for an intergovernmental conference on political union. In particular, the objective is to: strengthen the democratic legitimization of the union, - render its institutions more efficient, - ensure unity and coherence of the union's economic, monetary and political action, - define and implement a common foreign and security policy”. European Political Cooperation (EPC) began in 1970 but the creation of the internal market and the collapse of the Soviet Union gave a real boost to the development of this common policy.

²⁷⁰ During the IGC on Political Union and Economic and Monetary Union, EU policy makers were obliged to develop foreign policy mechanisms to meet the challenge of the post-cold war period. Thus, it was expected that the EU would now play a major role in maintaining peace and stability in Europe as well as in the world. See Charlotte Bretherton and John Volger (1999), *The European Union as a Global Actor*, Routledge, London and New York, p. 178.

of development²⁷¹. To some extent these different approaches were expressed in other policy areas, such as asylum. The Maastricht Treaty signed on February 7, 1992 and ratified in November 1993 was based on a compromise between these two notions. The Treaty provided three structural pillars - the first pillar dealing inter-alia with the internal market and competition, external trade, EMU, and the environment, were subject to community law. In contrast, in the second and third pillars, describing Common Foreign Security Policy (CFSP) and Justice and Home Affairs (JHA), respectively, policy-making was clearly proscribed as intergovernmental in character and thus largely decided at the national level.

1. The Road to Maastricht: Preparatory Work before the Conclusion of the Treaty of the European Union (TEU)²⁷²

At the 1990 IGC in Rome dealing with the EMU and with political union, Member States had to determine what kind of cooperation they would like to develop. While recognizing the need to redefine the Community competence in these specific areas, they also considered “whether and how activities currently conducted in an intergovernmental framework could be brought into the ambit of the Union, such as certain key areas of home affairs and justice, namely immigration, visas, asylum and the fight against drugs and organized crime”²⁷³. The Luxembourg Presidency suggested four options in January 1991: 1) developing cooperative measures outside the Community framework; 2) introducing a short reference in the Treaty to the principle of cooperation and leaving it to the Council to work it out in detail; 3) defining the exact fields in which to cooperate; 4) achieving full communitarization, i.e. the decision making process will be subject to Community law. As Corbett notes, Member States reacted with mixed feelings. While the Netherlands, Belgium, Italy and Spain were in favor of harmonization, Germany and France preferred option three with the possibility of moving towards a harmonized policy

²⁷¹ See Renaud Dehousse (1994), “From Community to Union” in: Renaud Dehousse (ed.), *Europe after Maastricht. An Ever Closer Union*, C.H. Beck, Munich, p. 6.

²⁷² The Treaty of Maastricht established the European Union. The Treaty of the European Union incorporates the Maastricht Treaty and further amendments. After the ratification of the Amsterdam and Nice Treaties, for example, the TEU included the amendments made in these two Treaties.

²⁷³ See Conclusions of the European Council Meeting held in Rome, December 14-15, 1990.

in the future. The UK, Ireland and Greece choose option two and Denmark “could accept either one or two”²⁷⁴.

The positions shared by the Member States to a large extent coincided with their ambitions and hopes with regard to the integration process. The Benelux countries, from the early years of the EEC, became great supporters of “a more unified inter-state system”. The Second World War experience as Nugent notes, “re-emphasized their vulnerability to hostile and more powerful neighbors and the need to be on good terms with West Germany and France”. This could explain why they backed most of the proposals made by France and Germany. Italy and Spain took a similar position but for different reasons; the economic benefits the Community brought to their countries, formerly suffering from high inflation and an unemployment rate²⁷⁵, made them look favorably on the integration process²⁷⁶.

Britain²⁷⁷, Ireland, and Denmark²⁷⁸, on the other hand, took a minimalist approach to the integration process. They often expressed great concern about their potential loss of

²⁷⁴ Richard Corbett (1993), *The Treaty of Maastricht*, Longman, Essex, pp. 48-49.

²⁷⁵ EC membership has proved very beneficial to Italy and in particular to Spain. Thanks to the generous access to the EC structural funds and regional aid plans, the number of Spanish nationals migrating to other European countries, in particular France, declined over the years. Moreover, Spain, which traditionally was an emigrant country become a receiving country due to its membership in the European community. Christopher Preston (1997) *Enlargement & Integration in the European Union*, London, Routledge, pp. 144-145; see also Heinz Werner (1994), “Regional Economic Integration and Migration: The European Case”, *The Annals*, vol. 534, July pp. 154-155.

²⁷⁶ See Neil Nugent (1999), *The Government and Politics of the European Union*, Fourth Edition, Palgrave, London, pp. 24-25.

²⁷⁷ To a large extent the tense relations between Britain and the EU paralleled Margaret Thatcher's views towards the EU. The extremely negative attitude of Thatcher towards the integration process led to harsh criticism in Europe as well as in Britain. Anthony Bevens, for example, declared: “What you have is a position in which Mrs. Thatcher is now out of the mainstream of thinking, not simply of socialist leaders and socialist governments, but even of right-wing governments”. Anthony Bevens, *The Independent*, May, 9 1989. See Norbert Himmler (2001), *Zwischen Macht und Mittelmaß. Großbritanniens Außenpolitik und das Ende des Kalten Krieges*, Duncker & Humblot, Berlin pp. 65-73 and 170. See also Stephen George (2001), *An Awkward Partner. Britain in the European Community*, Oxford University Press, New York, p. 15. Britain, for example was the only EC country, which did not accept the Community Charter of the Fundamental Social Rights of Workers of December 9, 1989, which established the main principles on which the European model for labor law should be based. The Charter includes, for example, social protection, freedom of association, health care, vocational training, protection of children and adolescents and the improvement of living and working conditions. The Charter itself is not a legally binding document but it imposes obligations on the signatory states to guarantee, as far as possible, fundamental social rights. It also contains a specific mandate for the Commission to propose an action program to implement the

sovereignty, particularly during the debate over the extension of EU institutional powers²⁷⁹. The position of Ireland towards refugee policy at the EU level generally followed the British position, partly due to its economic and political dependence on the latter as well as for the fact that, in any case, the number of refugees applying to Ireland for asylum was small²⁸⁰. The consequence was that these latter countries, and in particular Britain, was extremely hostile to any motion that included the increase of power of EC institutions at the expense of the sovereignty of the individual Member States.

France and Germany, the main “engines” of the Community, often took a leading role in the formulation of Community policy. Indeed, most of the proposals made till the 1990s were the result of cooperation between these two countries²⁸¹. With regard to formation of asylum policy they were also very activist. In fact, the decision of a second IGC on political issues leading to the introduction of the third pillar was basically a result of a Franco-German initiative²⁸². Moreover, France, and in particular Germany, made

Charter's aims. European Commission (1994), “Community Social Policy”, *Internal Market*, Vol. 6 July 1994-EN pp. 67-87.

²⁷⁸ In Denmark, the first referendum on the ratification of the Maastricht Treaty was rejected by the general public and thus the European Council had to work out special arrangements for the Danes. See Conclusions of the European Council meeting in Edinburgh, December 11-12, 1991.

²⁷⁹ The British approach favoring a limited role of the Union reflected its general ambitions and the way it viewed its role in the world. Although Britain sought to become a member of the European Community (in spite of President de Gaulle's opposition), it did not seek to limit itself to cooperation in the European Continent only, but sought to foster its relationship with the Commonwealth and the United States as well. But since it lost its former colonies it gradually realized that a closer cooperation with the EC is necessary. This was clearly demonstrated since 1997 with the election of Tony Blair. David Gowland and Arthur Turner (2000), *Britain and the European Integration 1945-1998. A Documentary History*. Routledge, London, pp. 71-72.

²⁸⁰ The position of Ireland, as Bill Shipsey notes, was unique among EU Member States. Until 1996 Ireland immigration and refugee policy was subject to the 1935 Alien Act which made no explicit reference either to the term asylum or refugee. However, since the 1980s asylum policy was regulated by the minister of justice, who used the Ten-Point procedures to determine refugee status. The need to adopt specific measures on asylum did not appear to be necessary for the small number of asylum seekers. In 1991, for example, 31 persons applied for asylum in Ireland, and in 1992 and 1993, the number had risen to 39 and 91 respectively. See Bill Shipsey (1997), “Asylum Policy and Title VI of the Treaty on European Union” in Gavin Barrett (ed.), *Justice Cooperation in the European Union*, Institute of European Affairs, Dublin, pp. 174-175.

²⁸¹ The European Political Cooperation (EPC) understanding of 1970, for example, was a result of an agreement between France and Germany. The close cooperation between the two also led to the creation of the European Monetary System in 1979 (EMS). See Ben Soetendorf (1999), *Foreign Policy in the European Union*, Longman, London, p. 21.

²⁸² Thomas Oppermann (1998), ‘Du Plan Schuman au Traité D'Amsterdam: La Coopération Franco-Allemande, Moteur de L'Integration Européenne’ in *La Coopération Franco-Allemande en Europe À L'Aube du XXIe Siècle*, Presses Universitaires d'Aix-Marseille, pp. 31-39. See also Wichard Woyke (2000),

suggestions encouraging cooperation on asylum. The European Council of 28-29 June 1991, for example, welcomed the German proposal on the issue of migration and asylum and, “noted with interest the practical proposals submitted by the German delegation, which supplemented the work already carried out in this area”²⁸³.

With regard to the nature of the measures to be included in building the justice and home affairs pillar there were a number of options. The Commission prepared several proposals and in particular proposed a Communication to the Council and Parliament on immigration and asylum policies. The 1991 Communication laid down the policy guidelines for Community action with regard to migration and asylum. This plan was based on three main principles: the need to take action to alleviate migration pressure; controlling migration flow and strengthening integration policy. The Commission acknowledged the fact that economic aid to third countries could help to reduce migration to Western Europe. Moreover, it called for harmonization at the national level and recommended intergovernmental procedures concerning the treatment of asylum seekers that would lead to a decrease in migration flow. The Commission was also of the opinion that a common policy towards the deportation of illegal migrants and harmonization of criteria for reuniting families ought to be established. At the same time the Commission stressed the responsibilities of the EU towards migrants within its own borders. Thus, it encouraged Member States to promote integration policy while emphasizing the importance of guaranteeing the protection of migrants and refugees in the EC. It linked the right of free movement of persons within the Community to the need for Member States to ensure that immigrants and especially non-EC nationals become well integrated into their adopted countries. For this reason, the Commission called for joint measures to prevent discrimination against immigrants in a variety of areas and to provide access to employment, housing, health, education and job training²⁸⁴.

Deutsch-französische Beziehungen seit der Wiedervereinigung, Leske Budrich, Opladen, pp. 41-47.

²⁸³ See the Conclusions of the European Council, Luxembourg, June 28-29, 1991.

²⁸⁴ See Communication from the European Commission to the Council and the European Parliament on Immigration and Asylum Seekers, Brussels, SEC (91) 1855 final, 23.10.1991, p. 2-12.

In addition to the Commission Communication, the twelve EU ministers of immigration worked out a program establishing the work of the Union for the coming years. They prepared a report on immigration and asylum policy for the European Council, calling for coordination and harmonization of asylum policy. The report demonstrated that the immigration ministers had a clear preference for promoting migration control rather than integration strategy for non-EC nationals. While stressing the restrictive nature of migration policy, they declared that “*the term ‘immigration policy’ used in this context may be misleading in that no EC Member State currently conducts a policy focused on immigration. It is on the contrary the control of immigration that is involved*”²⁸⁵. The result was that the report contained proposals for efficient reduction of the number of immigrants and asylum seekers and identified strategies for achieving this aim through various programs.

In general the ministers noted the main tasks necessary for implementation of migration policy in both the broad and specific senses. The former refers to the elimination of the causes of immigration, as it was realized that even if Member States would succeed in harmonizing their national policies, “results will be limited unless the causes of migratory pressure are also addressed”²⁸⁶. Hence, they suggested taking into account the different factors behind migration; “in some countries the main reason behind migration would be the socio-economic situation, whereas in other countries ethnic tensions or demographic factors might be predominant”²⁸⁷. Specific policy issues involved actions leading to the harmonization and coordination of European migration policy. These issues were mainly concerned with common procedures and regulations regarding expulsion, illegal immigration and restrictive admission policy. With regard to the position of non-EC nations in the EU, estimated at the time at 8.3 million, no decisions were taken modifying the existing legislation, although the hope was expressed that EU policy makers will,

²⁸⁵ “Thus EC ministers responsible for immigration must in particular pinpoint those aspects which are related to migration policy in the *strict* sense of the term”. See Report “From the Ministers responsible for immigration to the European Council meeting in Maastricht on immigration and asylum policy”. Brussels, December 3, 1991 (05.12) (OR.f) SN 4038/91 (WGI 930) in: Elspeth Guild. (1996), *The Developing Immigration and Asylum Policies of the European Union. Adopted conventions, Resolutions, Recommendations, Decisions and Conclusions*, Kluwer Law International, The Hague, pp. 449-491.

²⁸⁶ Ibid., p. 465.

²⁸⁷ Ibid.

“examine which rights third country nationals should be able to enjoy among those enjoyed by Member State nationals”. It was noted that this does not mean that admission policy has to be fully harmonized before the situation of third country nationals is improved²⁸⁸.

The twelve immigration ministers also noted the measures to be taken concerning asylum²⁸⁹. They realized that, “the initial results of co-operation between Member States - the Dublin Convention to determine the State responsible for examine applications for asylum and the draft Convention between the Member States on the crossing of their external frontiers by non-EC nationals - in themselves implied that a more through harmonization of policy was needed”²⁹⁰. Thus, the ministers agreed that, “harmonization of asylum policy is a logical component of the increasing co-operation amongst the twelve on immigration”. As it turned out, harmonization policy did not mean that Member States were planning to change their laws on asylum, rather, it referred to the harmonization of procedures and fundamental policy rules as a mechanism to control (and reduce) the number of asylum seekers²⁹¹. The ministers did not wish to define who is a refugee and who is entitled to have access to refugee status, and only supported the development of measures determining who is not entitled to asylum. It was assumed that Member States did not wish to use this forum to undermine national sovereignty by limiting their ability to decide who is a refugee. Moreover, assuming it would be difficult to find a common definition, they chose to concentrate on exclusion procedures, specifying who is not a refugee. By doing so, they left considerable room for maneuver, satisfying national concerns by allowing considerable independence on this issue. Two different strategies were adopted at this point: defining the concept of “clearly unjustified” application for asylum, defined as those applicants whose “real aim is to migrate for other, mostly economic reasons”²⁹² and the drawing up of a plan to

²⁸⁸ While the ministers made a proposal for measures to be taken by the Member States they argued, “this does not mean that admission policy has to be fully harmonized before the situation of third country nationals is improved”. Ibid., p. 472.

²⁸⁹ These steps formed the basis of the proposals submitted by the ministers of immigration to the EU.

²⁹⁰ Ibid., p. 450

²⁹¹ Ibid., p. 476.

²⁹² It is interesting to note that to justify this position the ministers argued that UNHCR also supported accelerated procedures for “clearly unjustified” applications for asylum. See Guild, *op.cit.*, pp. 480-481.

implement the Dublin Convention. The Member States eventually adopted these proposals in 1992.

2. The Treaty of Maastricht and Justice and Home Affairs Cooperation

The Maastricht Treaty signed on February 7, 1992 mandated that migration and asylum issues be dealt with by the intergovernmental third pillar - Justice and Home Affairs. Under the title “Provisions on cooperation in the fields of justice and home affairs” Article K1 stipulated that in order to achieve the objective of the free movement of persons, Member States should regard the following areas as matters of common interest; asylum and immigration policy; rules governing the crossing of non-EC nationals of external borders of Member States; conditions of entry and change of residence by nationals of third countries on the territory of Member States, including family reunion and access to employment; combating unauthorized immigration; judicial cooperation in civil and criminal matters; customs and police cooperation for the purpose of preventing and combating terrorism; and combating unlawful drug trafficking and other serious forms of international crime.

As the third pillar was based on intergovernmental cooperation, the EU's attempt in integrating its Member States migration, asylum and judicial policies in the Treaty of Maastricht would seem to serve as a possible starting point – both for a new discourse on migration and possible models of cooperation in these fields. This cooperation was also based on the realization that the Member States' aims of limiting the number of migrants/asylum seekers entering their territory implied that increased police cooperation would be needed, as one of the implications of a more restrictive migration policy would be an increase in the number of illegal migrants²⁹³. Thus, in order to overcome these difficulties a new policy was build around the idea that cooperation would likely lead to achievement of the aims of the EU members. The result was a new integrated approach,

²⁹³ In various documents the problem of illegal migration was recognized. Indeed, soon after the signing of the Treaty of Maastricht a report to the European Council in Edinburgh from the Coordinators Group on the free movement of persons described the potential danger of the integration process on illegal migration. See 1991 Edinburgh European Council.

based on a strong link between migration policy and internal security²⁹⁴. This link would be further strengthened in the course of the years and in particular after the Amsterdam Treaty.

The concern about the growing threat to internal security as a result of the increased openness of the borders prompted Member States to work together in this area. In the field of judicial cooperation in criminal matters EU Member States had already achieved much progress before the signing of the Maastricht Treaty. Alderson observed in 1988 that “there is much common ground already concerning the control of international drug trafficking and it might be anticipated that through approximation of laws and police operations anything lost at internal border checks would be regained at external borders and by means of internal police collaboration”²⁹⁵. Under the new Treaty in addition Member States were given the opportunity to deepen their cooperation by establishing Europol.

Another important evolution resulting from Maastricht, which helped Member States justify coordination on security measures between national police forces and adopt common measures on immigration, was related to the creation of European Citizenship. Article 8 of the Treaty of the European Union (TEU) explicitly states that, “Citizenship of the Union is hereby established” and thus, “every citizen of the Union shall have the right to move and reside freely within the territory of the Member States”²⁹⁶. The establishment of European Citizenship was a significant step towards the development of a more unified Europe. But while allowing easy access of all EC nationals to Member States' territory, this concept resulted in a complex situation with regard to the legal position of non-EC nationals residing in EU territory. European Citizenship did not include non-EC nationals. In addition, as a declaration annexed to the Treaty of Maastricht made clear, decisions on granting citizenship could only be determined by

²⁹⁴ Werner Weidenfeld (1992), “Die Innere Sicherheit als europäische Politik”, *Innere Sicherheit im Europäischen Binnenmarkt*, Verlag Bertelsmann Stiftung, Gütersloh, pp. 15-17.

²⁹⁵ Indeed, Member States had already decided on establishing the Europol organization to improve police cooperation. John Alderson (1988), “Are Border Controls Necessary?” in: Roland Bieber, Renaud Dehousse, John Pinder and Joseph H.H. Weiler (eds.), *1992: One European Market*, Nomos Verlagsgesellschaft, Baden-Baden, p. 307.

²⁹⁶ See Declaration on Nationality of a Member State, 1992 Treaty of Maastricht.

national and not by EC law: "the question whether an individual possess the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned"²⁹⁷. Thus, non-EC nationals residing in a Member States continued to be subject to the domestic laws of the Member States. Moreover, EC and non-EC nationals were not treated equally. Non-EC nationals were not allowed to work and reside in Member States other than the ones in which they received authorization. But, since there was not to be any border control inside the EC, Alfred Tovias notes that, "immigrants may risk working in a Member State other than the one they are allowed to work in. In particular many legal immigrants in one EC State could be tempted to cross daily into a neighboring country to work"²⁹⁸. For this reason Member States realized that they needed to adopt similar positions to combat "unauthorized immigration, residence and work by nationals of third countries on the territory of Member States" (K.1)²⁹⁹.

Under the third pillar Member States recognized two basic ways in which they can limit migration into their territory. This could be done by imposing conditions of entry and movement by nationals of third countries in the territory of a Member State, and by combating unauthorized immigration, residence and work by nationals of third countries in the territory of Member States. At the same time they abstained from explicitly mentioning the way asylum policy could be conducted, despite the fact that the proposals

²⁹⁷ Denmark, for example, expressed its concern with regard to EU citizenship by unilaterally declaring that, "citizenship in the Union is a political and legal concept which is entirely different from the concept of citizenship within the meaning of the constitution of the United Kingdom of Denmark and of the Danish legal system. Nothing in the Treaty of the European Union implies or foresees an undertaking to create a citizenship of the Union in the sense of the citizenship of a nation state". It also argued that, "citizenship of the Union in no way gives a national of another Member States the right to obtain Danish citizenship or any of the rights, duties, privileges or advantageous that are inherent in Danish citizenship by virtue of Denmark's constitutional, legal and administrative rules". See Annex 3 of the Unilateral Declarations of Denmark to be associated to the Danish Act of ratification of the Treaty on European Union and of which the 11 other Member States will take cognizance, Edinburgh European Council 11-12 December 1992, Conclusions of the Presidency, *Official Journal of the European Communities (OJ)*, C 348, 31.12.1992.

²⁹⁸ Alfred Tovias (1992), "The Single Market and Labour Mobility", in: Jozef M. van Brabant (ed.), *Implications of the Single European Act for Non-Member Countries*, United Nations, New York, p. 107.

²⁹⁹ The European Commission suggested that in the light of the internal market Member States should, "enable third country nationals to move freely around within the Union on the basis of their residence permit which would replace any existing visa requirements". The Schengen Agreement provides such a right, but this is only applicable to the Schengen countries. Thus, Britain, for example, which is not a member of the Schengen Agreement does not ensure this right. See Communication from the European Commission to the Council and the European Parliament on Immigration and Asylum Seekers Policies, Brussels, COM (94) 23 final, 23.2.1994, p. 34.

made by the ministers of migration in December 1991 specified the decisions required to be adopted. There were good reasons for preferring to avoid declaring clear provisions on asylum. One reason was that Member States did not wish to push for significant progress in an area that has an important impact on national security at this early stage of cooperation among Member States, and they preferred to delay or postpone such decisions to a later stage. Moreover, full harmonization demanded a revision of the national legal system. Finally, when the Maastricht Treaty was signed immigration issues appeared to be more urgent than asylum issues. Indeed, the number of applications for asylum was still relatively small in 1991 compared to the number of applications in 1992 and in subsequent years.

Another possible explanation for the non-inclusion of asylum policy in the Treaty has to do with the human rights aspects of asylum. In contrast to migration policy, which was considered to be a domestic matter (and thus subject to national discretion), and Member States were assumed to take actions in accord with their national interests, policy makers have less flexibility on asylum policy, as they are expected to demonstrate generosity, fulfilling their obligations of international agreements³⁰⁰. From this point of view, Member States preferred that policy decisions concerning asylum should be less specific³⁰¹. To summarize, while the Maastricht Treaty drew much more attention than the proposals of the Twelve Ministers in 1991, the signers needed to be more careful in their formulation. In this respect, lack of exact procedures in the field of asylum enabled Member States flexibility to practice their own policies without binding themselves to specific EU criteria³⁰².

³⁰⁰ Thus the ability to make restrictions in asylum is harder than in migration issues.

³⁰¹ This is especially evident in light of the new role that the EU pledged to play in the field of human rights.

³⁰² In a Declaration on Asylum annexed to the Treaty of Maastricht, however, (a similar declaration can be found already in the final draft by the Dutch presidency of December 10, 1991) Member States declared that, “the Council will consider as a matter of priority questions concerning Member States' asylum policies with the aim of adopting them by the beginning of 1993, common action to harmonize aspects of them, in light of the work program and timetable contained in the report of asylum drawn up at the request of the European Council meeting in Luxembourg on 28 and 29 June 1991. Moreover, on the basis of this report the Council will consider by the end of 1993 the possibility of applying Article K.9 to such matters”. This statement implies that asylum policy will be subject to jurisdiction of the Community institutions rather than intergovernmental cooperation. See Declaration on Asylum, The Treaty of Maastricht.

3. The Decision Making Process of the Third Pillar: The Various Actors and their Chief Responsibilities

Article C of the Treaty on European Union states the foundation of the European Union will bring about, “a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*”. Indeed, the single unity, characterized by the four institutions (the Council, Commission, Parliament and the Court of Justice), is what inevitably binds the first and third pillars³⁰³. In practice, however, there has been a considerable difference in the impact of these two pillars as a consequence of the negotiations among Member States.

While EU institutions have been strengthened by the process of integration, in particular with regard to first pillar issues, the third pillar has been characterized by a weak inter-governmental arrangement, leaving major decision responsibilities to the Member States. The inter-governmental nature of the Justice and Home Affairs (JHA) implied that the role of Community institutions, and in particular, of the Commission and the European Parliament, role was expected to be insignificant. Unlike the first pillar, where Member States believed in increased cooperation, Member States did not strive for a similar form of cooperation under the third pillar. From their point of view intensive involvement of the Community institutions in the third pillar might eventually threaten the interest of the individual states. They thus declined to provide significant authority to EU institutions on most justice and home affairs issues.

3.1. The non-exclusive right of initiative of the European Commission

According to the Treaty of Rome, the European Commission has the exclusive right and obligation to initiate and formulate policy according to the conditions provided in the

³⁰³ As Müller-Graff notes, the term “justice and home” affairs is not really clear and remains very abstract. See Peter-Christian Müller-Graff (1994), “The Legal Bases of the Third Pillar and its Position in the Framework of the Union Treaty” in: Joerg Monar & Roger Morgan (eds.), *The Third Pillar of the European Union. Cooperation in the fields of Justice and Home Affairs*, European University Press, Brussels, pp. 22-25.

Treaty. In reality, the Commission had limited power in the decision-making process until the ratification of the TEU³⁰⁴. Thanks to Maastricht the Commission's major activity is the right of initiative, namely to make proposals for legislation to the Council. This is especially evident in the first pillar where the Commission has an exclusive right of initiative³⁰⁵. The Council can amend the Commission's proposal but it needs unanimity to do so, which is often difficult to achieve. Another important function of the Commission is negotiating international agreements, especially in the field of trade which is part of the first pillar.

Whereas the Commission played an extremely important role in the initial phase of the legislative process establishing the first pillar this was not the case with regard to the third pillar. Under the third pillar the Commission's ability to act was restricted. It had the right to submit proposals to the Council only in areas of cooperation K1 to 6 only i.e. issues covering asylum policy³⁰⁶, migration, drugs, and fraud. Moreover, the Commission did not have an exclusive right of initiative in third pillar issues but needed to share it with the Member States. This implied that both the Commission and Member States could initiate proposals (see Article K.3). With relation to matters dealing with judicial cooperation, criminal, custom and police cooperation the Commission has no power to submit proposals. These issues were to be settled by the Member States alone, as Member States were reluctant to lose sovereignty in such highly sensitive issues. Member States felt strongly that they did not wish to push for a progress in an area that might

³⁰⁴ Janne Haaland Matlary (1998), "Democratic Legitimacy and the Role of the Commission", *Democracy and the European Union*, Springer, Heidelberg, p. 68.

³⁰⁵ In the absence of proposals from the Commission, the Council is unable to make legislation.

³⁰⁶ It is worth noting that during the negotiations leading to the conclusion of Treaty of Maastricht, Member States offered various drafts to establish the basis for Member States' cooperation in the field. In the first draft Treaty presented by the 1991 Luxembourg presidency on June 18, 1991, for example, they attempted to squeeze asylum policy into sub article A 1 b, that is, next to issues dealing with "authorized entry, movement and residence on the territory of the Member States by *nationals of third countries* (in particular conditions of access, visa policies, asylum policies)". The Dutch Presidency Draft Treaty of September 24, 1991, however, suggested the creation of a separate provision (i.e. a new sub article) for asylum policy and also offered the "harmonization of the formal and substantive aspects of asylum policy". Yet, a working document of 8 November 1991 demonstrated that Member States preferred not to follow this suggestion to proscribe the nature of their cooperation. Hence they decided not to reveal their plans about the form of cooperation and changed this provision by deleting the reference to the harmonization of asylum policy. See Luxembourg Presidency "Draft Treaty on the Union", June 18, 1991, Dutch Presidency Draft Treaty "Towards European Union", September 24, 1991 and Dutch Presidency Draft Union Treaty, Working Document, November 8, 1991.

compromise important nationalistic concerns, especially those linked with specific history and tradition. Moreover, an attempt to revise and approximate the national legal system could add further complications to the negotiation process. Finally, Member States had already demonstrated that they were capable of working efficiently alone in these areas.

The Commission was also deprived of the opportunity to propose legally binding instruments (used under the first pillar) such as Regulation and Directive. Under the third pillar, Member States created a new set of measures to deal with the issues of migration and asylum, as joint positions and joint actions³⁰⁷. The legal status of these measures, however, was not clearly specified in the Maastricht Treaty. Certainly, these instruments were not legally binding³⁰⁸. The only legal binding instrument offered by the third pillar was a Convention. This, however, needed to be ratified by the national parliaments, and therefore is not often used. It is thus evident that the third pillar involved measures that were either non-binding or difficult to implement, as they required a ratification of the national parliaments. Thus, the Commission had little effect on the behavior of Member States in this area, and Member States were satisfied that the Commission was not about to limit their ability to decide on their own policies³⁰⁹.

Despite the limited role of the Commission in the decision-making process on most third pillar issues, it gained important responsibility on visa policy. The Commission could make proposals to the Council with regard to, “the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member State”. Moreover the Maastricht Treaty also provided Member States the opportunity to transfer some provisions, namely K.1 (1) to (6), to Community jurisdiction (see Article K.9). Thus the Council could decide which of the decisions are to be taken by a qualified

³⁰⁷ According to Article K.3, the Commission is granted the right of initiative for the adoption of joint positions, joint actions and conventions which be adopted by the Council by qualified majority. The Commission usually adopted these instruments in Common and Foreign Security Policy (CFSP), though they often have proven to be very vague and weak.

³⁰⁸ Where O’Keeffe suggests, for example, that joint action do not have legal effects, Monar is of the opinion that the latter is a legal binding instrument. See O’Keeffe, *op.cit.*, p. 914.

³⁰⁹ Ben Crum (2003), “Legislative-Executive Relations in the EU”, *Journal of Common Market Studies*, Vol. 41, No. 3, June, pp. 376-377.

majority. As a result, the Commission had the potential to play a significant role if Member States were to shift these provisions to the First Pillar control.

3.2. The marginal role of the European Parliament (EP)

Although the European Parliament was already established under the Coal and Steel Treaty in 1951, it played a minor role in policymaking until the second half of the 1970s. In these years, as it acquired more power with relation to the budget, it became increasingly more important. This is particularly evident with regard to certain aspects of the Community budget such as non-compulsory expenditure (i.e. most of Community matters with the exception of agriculture). The Parliament gradually gained the ability to share with the Council the responsibility to decide on the budget and also gained the power to reject the final draft made by the latter. Further reforms to increase its position occurred in 1979, when the EC Member States decided for the first time to organize direct elections to the European Parliament³¹⁰.

The Maastricht Treaty also increased the capacity of the Parliament to act in other areas of the decision-making process³¹¹. Whereas under the Treaty of Rome the Parliament's main competence was to provide consultation, under the new Treaty, the Parliament became prominent in "cooperation", "co-decision" and "assent" procedures³¹². The assent

³¹⁰ The number of seats allocated to each country is in proportion to its size. As a result, large countries such as Germany had a larger representation than small one such as Belgium. See also Andreas Follesdal (1998), "Democracy and the European Union: Challenges" in: Follesdal & Koslowski (eds.), *op.cit.*, p. 5.

³¹¹ Though, as Lewis rightly observed, the Parliament had the ability to significantly influence Community legislation, it "failed in its bid to initiate legislation and to share the veto rights of member governments". See David W. P. Lewis (1993), *The Road to Europe. History, Institutions and Prospects of European Integration*, Peter Lang Publishing, New York, p. 184.

³¹² "Consultation" (single reading) means that the Parliament gives its opinion but the Council is not obliged to take it into account and can reject it. Under "cooperation" the Council is obliged to consider the opinion of the Parliament, but it can still reject its proposal during the cooperation procedure (two readings). (If the Council does not agree with the opinion of the Parliament it can ask the Parliament to read the measure again.) If the Council chooses to reject the measure after a second reading of the amendment by the Parliament, the Council needs a unanimous vote to override the Parliament's view. It is only under the "co-decision" procedure, (after three readings) that both the Parliament and Council share equal power. During the third reading both Parliament and Council have the authority to prevent the adoption of a specific proposal. The last important competence of the Parliament is the "assent" procedure which is a binding opinion of the Parliament to which the majority in the Parliament have to agree. Parliament's assent is required for the accession of new members to the EU, the conclusion of certain international agreements, and for all Association agreements with third countries. Helen Wallace and William Wallace (2000)(eds.),

of the Parliament became necessary for the signing of international agreements. It gained the ability to veto Association agreements with third countries,³¹³ and could prevent the accession of new candidate members to the EU³¹⁴.

Despite major developments in the integration process, especially after Maastricht, which made it possible for the Parliament to gain additional power primarily in the area of the first pillar, the Parliament remained weak with respect to issues falling under the jurisdiction of the third pillar. The only procedure that it had available was that of consultation, which was non-binding. Thus Article K.6 stated that, “the Presidency will consult the European Parliament and will take into consideration its opinion”. Moreover, the Presidency and the Commission shall, “inform the European Parliament of discussions in the areas” covered by the third pillar. The Parliament could ask questions of the Council, and make recommendations to it, and in addition was to hold each year a debate on the progress made in the implementation of the areas referred to in Title VI.

As Monar observed, availability of information is an important democratic principle, but the Parliament was not in the position to guarantee that the Commission and the Presidency would share with it all relevant information in a timely manner. Moreover, important information such as Communications to the Parliament, “are usually vague and evasive, and it has happened frequently that the Parliament has been left in the dark as regards the precise legal status of texts adopted by the governments or that texts have been forwarded with considerable delays or even not at all”³¹⁵. It is thus evident that the Parliament was not considered to be an important actor in the decision-making process

Policy-Making in the European Union, fourth edition, Oxford University Press, p. 22.

³¹³ One prime example is the Partnership Agreement with Russia. The Parliament threatened to delay the ratification process because of the situation in Chechnya. The first time the Parliament used the assent procedure was in 1987, with regard to relations with Turkey. It decided to postpone a consideration of two protocols with Turkey due to the arrest of opposition leaders before the national election. See Richard Corbett and Otto Schmuck (1992), “The New Procedures of the European Community after the Single European Act. Efficiency and Legitimacy in the Light of Experience”, in: Christian Engel & Wolfgang Wessels (eds.), *From Luxembourg to Maastricht. Institutional Change in the European Community after the Single European Act*, Europa Union Verlag, Bonn, p. 43.

³¹⁴ The Parliament must also give its assent with regard to the enlargement process, as assent is a pre condition for ratification.

³¹⁵ See Joerg Monar (1995), “Democratic Control of Justice and Home Affairs: The European Parliament and the National Parliaments” in: Roland Bieber and Joerg Monar (eds.), *Justice and Home Affairs in the European Union. The Development of the Third Pillar*, European University Press, Brussels, p. 247.

with respect to issues pertaining to the third pillar. And, in general, the tendency to increase power of the Parliament through institutional changes in the basic Treaty was not reflected in third pillar matters. To a large extent, Title VI: provisions on cooperation in the fields of justice and home affairs, represented an unwillingness to increase power of the Parliament through institutional change of the basic Treaty. Before and after Maastricht, the Parliament's major function was consultation. It could not compel the Presidency and the Commission to change their stance on any particular issue, but was completely dependent on their willingness to cooperate and to take into consideration its opinion in third pillar matters.

3.3. The limited jurisdiction of the European Court of Justice (ECJ)

The main role of the Court of Justice is to ensure the interpretation and application of Community law. An area of substantive EC law where the Court has important jurisdiction is in the regulation of the Internal Market. Though Member States have, for example, frequently attempted to prevent and hinder the import of goods from other Member States by establishing so-called Non-Tariff barriers (NTBs.), the Court has constantly condemned such protectionist practices³¹⁶. The effect of such judicial condemnation has become much more important since the Treaty of Maastricht entered into force. As a result of the Treaty's new procedures in the case of Member non-compliance with the ruling of the Court, the Commission can ask the Court to impose financial penalties³¹⁷.

But while the Maastricht Treaty increased the power of the Court, allowing the latter to impose penalties on Member States which do not follow its rulings, the Court's role with

³¹⁶ A famous case in this respect is the Judgment *Cassis de Dijon* of 1979, in which the Court ruled against the decision of the German authorities with regard to the national standards pertaining to liquor, and upheld the principle that products legally produced and marketed in a Member State (such as *Cassis de Dijon* in France) should have free access to the German Market (i.e. the principle of mutual recognition of food standards). Consequently, Germany had to abandon its own standards and allow the import of liquor legally produced in France. Nugent, *op.cit.*, pp. 262-263.

³¹⁷ In 2002, for example, the Commission recommended that financial penalties should be imposed on France due to its refusal to allow the import of British meat into French territory after the BSE crisis. In addition, one possible consequence of non-compliance is that the Commission can prevent future access of Member States to structural funds.

regard to third pillar issues remained non-existent. The policy that finally resulted from the Treaty was that in matters concerning migration the Court was explicitly denied jurisdiction, since these areas were integrated in the inter-governmental pillar of the Maastricht Treaty. Consequently, the Court of Justice was not authorized to make any judgment in migration issues. Member States were requested under the Treaty of Maastricht to consider the possibility of involving the Court of Justice in third pillar issues, authorizing it to make judgment in migration and asylum issues. However, they were not obliged to do so. Only with respect to conventions dealing explicitly with third pillar issues would the Court have jurisdiction³¹⁸. Moreover, should Member States decide to transfer certain areas covering asylum and immigration into the first pillar as set forth in Article 100 of EC Treaty along with Article K.9, the Court would have jurisdiction in these issues since they are subject to Community law.

The very limited role given to the Court of Justice in Justice and Home Affairs led to harsh criticism regarding the nature of the third pillar and on the questionable quality of judicial protection precisely in those areas where such protection is most needed. Some scholars have noted, for example, that while all EU Member States are parties of the European Convention of Human Rights (ECHR) and international treaties with regard to the treatment of refugees, it is not clear what mechanism exists that can assure that Member States abide by these arrangements and how these international treaties are being observed and how they should be interpreted³¹⁹. Although Article K.5 explicitly stipulated that, “matters referred in Article K.1 shall be dealt with in compliance with the European Convention for the Protection of human rights and fundamental freedoms of 4 November 1950 and the Convention relating to the status of refugees of 28 July 1951”, the Commission is unable to take action against a Member State that is in breach of these provisions³²⁰. Thus, if a Member State violates one of the treaty provisions the Commission cannot compel it to comply. Also, the Court of Justice was not given

³¹⁸ “Such conventions may stipulate that the Court of Justice shall have jurisdiction to interpret their provisions and to rule on any disputes regarding their application, in accordance with such arrangements as they may lay down” Article K.3.2 (c).

³¹⁹ See Nanette Neuwahl (1995), “Judicial Control in Matters of Justice and Home Affairs: What Role for the Court of Justice”, in: Bieber and Monar (eds.), *op.cit.*, p. 305.

³²⁰ *Ibid.*, p. 301.

jurisdiction to interpret the Geneva Convention, the major legal document regarding refugee protection.

3.4. The Key Actor: The Council of Ministers

The Council of Ministers is undoubtedly the most important institution in the EU. It enacts legislation and develops policy on the basis of EU Member States' priorities and preferences. Though the European Parliament's opportunities to co-legislate in certain areas have gradually increased, the Council is still the key player in the EU legislative process. This key role is particularly apparent regarding legislation on issues falling under the jurisdiction of the second and third pillars, since the new competence given to the Commission and the Parliament on first pillar issues diminishes the Council's power in this arena.

Besides the General Affairs Council, which is composed of the ministers of foreign affairs of the Member States, the work of the Council is divided into different policy areas. For example, issues relating to education are discussed among ministers for education, whereas agricultural matters are discussed among those ministers responsible for agriculture. Asylum and migration topics are addressed by the ministers of the interior and Justice³²¹. Article K.3 in the Justice and Home Affairs pillar describes the Council as the forum where Member States are given the opportunity to, "inform and consult one another within the Council with a view to coordinating their action". Thus, ministers exchange views in the Council and jointly determine policies according to the Member States' preferences and "common interests". The decisions taken by the Council may be based on a proposal made by the Member States as well as the by the Commission in areas referred to in article K.1 (1) to (6). On the other hand, on issues related to articles K.1 (7) to (9) (i.e. judicial and customs cooperation and policing) only Member States

³²¹ The frequency of meetings depends on the interest and importance that Member States grant to the topic. Ministers of finance and agriculture tend to meet more often than ministers of transportation or environment. See Peterson John and Elizabeth Bomberg (1999), *Decision-Making in the European Union*, Palgrave, New York, pp. 34-35.

can submit proposals for consideration by the Council. Also, the final decision on whether to adopt a proposal is made by the Member States alone³²².

Before the Treaty of the EU, decisions in the Council required a unanimous vote. But as this requirement allowed the legislative process to be easily blocked if one member decide to impose a veto, it was decided already in the SEA³²³ to simplify the voting procedures by also allowing various forms of voting such as qualified majority and later, also simple majority. Nonetheless, third pillar issues, to a large extent, are still subject to unanimity rule. This state of affairs indeed led to the portrayal of the third pillar as, “a triumph of the nation States”³²⁴. As O’Keeffe also points out, “the requirement of unanimity is a severe obstacle to the adoption of measures under the third pillar”³²⁵. With the unanimity requirement it is often difficult to put forward proposals, resulting in limited progress and ineffectiveness. But while Member States preferred to use this procedure when dealing with migration and asylum issues, fearing that other forms of cooperation might clash with their national interests, they were willing already in Maastricht to compromise with regard to visa policy. It was explicitly stated that, starting January 1, 1996, common visa policy would be adopted by a qualified majority (see Article 100c). In this respect it appears that Member States found it easier to agree on this issue and did not seem to suffer from conflicting views.

Because of the intergovernmental nature of the third pillar it was recognized that Member States needed to coordinate their preferences in a shared forum where they could develop future policy measures. Thus, Article K.4 in Title VI suggested the creation of a coordination committee to, “give opinions for the attention of the Council, either at the

³²² Anke Gimbel (1995), “Innen- und Justizpolitik – die dritte Säule der Europäischen Union”, in: Werner Weidenfeld (ed.), *Maastricht in der Analyse. Strategien und Optionen für Europa*, Verlag Bertelsmann Stiftung, Gütersloh, pp. 78-79.

³²³ The SEA established derogation from the principle of unanimity for Directives and allowed for a qualified majority. A qualified majority vote applies to most of the decisions taken under the first pillar, such as trade policy. Unanimity, however, still applies to Second and Third Pillar issues.

³²⁴ See Roger Morgan (1994), “The Third Pillar: An Introduction”, in: Joerg Monar & Roger Morgan (eds.), *The Third Pillar of the European Union. Cooperation in the Fields of justice and Home Affairs*, European University Press, Brussels, p. 16.

³²⁵ David O’Keeffe (1995), “Recasting the Third Pillar”, *Common Market Law Review*, 32, p. 898.

Council's request or on its own initiative". The K.4 Committee was also to help prepare the Council for discussions, "in areas refereed in Article K.1 and in the conditions laid down in Article 100d of the treaty establishing the European Community in the areas refereed to in Article 100c of that Treaty". One of the functions of the K.4 Committee was to, "avoid a duplication of work and if necessary to expand certain tasks or relocate them"³²⁶.

As for the specific working methods and the structure of the coordinating committee; a proposal was made in the Report to the European Council of Edinburgh from the Coordinators' Group on Free Movement of Persons on December 3, 1992, where it was recommended that, "in view of the very wide range of subjects covered in Title VI" the work of the Committee would be organized into three main sectors: 1) immigration, asylum, security and law enforcement; 2) police and customs cooperation; and 3) judicial matters³²⁷. In the Conclusions of the Belgium Presidency of 29 October 1993, the activity of the Committee was further discussed, stressing its importance in preparing the Council's meetings. It was suggested that the K.4 Committee, "will have an essential function to fulfill: in addition to its general role in coordinating the various bodies subordinate to it, the Committee will endeavor when preparing for the Council, to resolve as far as possible the substantive problems raised by the various dossiers"³²⁸.

3.5. The European Council: Giving the Impetus

The European Council created in 1974 is the most prestigious forum of the EU³²⁹. It consists of heads of state and /or government and the President of the Commission, and

³²⁶ See Michael Niemeier (1995), "The K.4 Committee and its Position in the Decision Making Process", in: Bieber and Monar (eds.), *Justice and Home Affairs in the European Union. The Development of the Third Pillar*, European University Press, Brussels, p. 326.

³²⁷ See Report to the European Council in Edinburgh from the Coordinators' Group on Free Movement of Persons, December 3, 1992, CIRC 3687/1/92, Rev 1, Confidential.

³²⁸ See Brussels European Council, October 29, 1993.

³²⁹ It was Giscard d'Estaing who took the initiative to bring the leaders of the Member States together to informally discuss important topics. The main catalyst in this respect was the energy crisis of 1973. The French president was of the opinion that important matters are best discussed at the highest level. Originally, these meetings took place outside the formal framework of the institutional Treaties, and only after the Single European Act of 1986 were they integrated into the formal institutional framework. (Until

meets at least every six months in the country holding the presidency to discuss and shape the further progress of EU policy³³⁰. The main task of the European Council, as described by the Treaty of the European Union is to “provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof”. The issues to be discussed during its meetings are chosen based on the interests of the Member States, and are often linked to major issues currently on the political agenda of the EU. For example, the political and economic conditions necessary for EU membership were established at its famous 1993 Copenhagen meeting. Other major issues, such as security, were also discussed by the European Council³³¹. Increasingly, migration and asylum have become “popular topics” at the European Council meetings. The European Councils of Tampere (1999), Seville (2002) and Thessaloniki (2003) have largely focused on these issues. As Member States became increasingly concerned with the question of migration the Council strongly recommended on these occasions that suitable measures be taken to deal efficiently with the new waves of migration. For example, suggestions were made on how to reduce the influx of illegal migrants. The European Council as such is not a legislative body but, rather, a political forum, and thus its conclusions are not legally binding. Nevertheless, its conclusions are extremely valuable as they represent the basis for setting future policy. Based on the conclusions of the Council, Member States adopt a new set of measures after each meeting.

1987 the Council was an informal body lacking a legal recognition. Following the ratification of the Single European Act in 1986, however, it became a formal body and was later integrated into the Treaty.) Some major achievements of the European Council, were the decision to organize direct elections to the European Parliament and the compromise on the controversial British contribution to the Community budget.

³³⁰ According to Article D of the Treaty of Maastricht the Council is supposed to meet, “at least twice a year”. In recent years the country, which holds the presidency, tends to organize two meetings of the Council. In 2001 the Belgium Presidency, for example, organized a meeting in Ghent and then in Brussels. Under the Spanish Presidency in 2002, one Council meeting was held in Barcelona and the other in Seville.

³³¹ The terrorist attacks of September 11, 2001 drew much attention in the subsequent meeting in Laeken in December 2001. The Council called for an adequate response to tackle more effectively the new security threat. See the 2001 Laeken European Council.

4. The Nature of Cooperation among EU Member States after the Signing of Maastricht

Between the signing of the Maastricht and Amsterdam Treaties, Member States have proposed and adopted a series of measures in the field of asylum, although most of these measures were not even mentioned in Title VI: Provisions on cooperation in the fields of Justice and home affairs. These measures were non-binding and had little effect on national policy making. In other words, EU Member States could suggest eligibility criteria and common asylum standards but could not determine how this policy should be implemented, or oblige Member States to follow these measures. Generally, Member States pursued two main strategies in the field of asylum policy. First, they attempted to decide on a common, and more restrictive, definition of “refugee”, recognizing that a common approach is essential in reducing the number of migrants and asylum seekers into EU territory. At the same time they left it to the national governments to work out the exact details, recognizing that some member states might choose to adhere to more liberal/restrictive interpretations of international obligations. In this area the Member States were particularly successful, and made significant progress in reforming the definition of “refugee”.

One of the reasons why Member States had so much flexibility in terms of revising definitions was that the Geneva Convention left a great deal of room for maneuver, as its provisions, like those of other international Conventions, were open to further interpretation. Member States first took advantage of the possibility of revising the definition of the term “refugee” with the influx of refugees from Yugoslavia, an event which prompted Member States to try to limit the scope of the Convention. After presenting a common approach to a more limited interpretation of asylum, Member States attempted to find practical ways of implementation. One way was to make sure that those asylum applicants who did not meet the criteria covered by the new definition be removed from EU territory, or, at most, be granted a temporary stay. This effort was facilitated by the signature of readmission agreements with third countries. These agreements made it easier for Member States to send back illegal migrants, including asylum seekers, who entered the EU via external borders. Increased police coordination

also facilitated expulsions. Moreover, as the Dublin Convention decided that only one state would be responsible for reviewing any particular asylum application, the EU needed to prepare itself for the implementation of this new rule. This included taking practical measures to prevent asylum seekers from applying for asylum in more than one Member State. Thus exchange of information and a plan for fingerprinting were suggested.

4.1. Unjustified claims for asylum and refugee status: “safe country” and “safe third country” concepts

The first measures to be developed after the signature of the Maastricht Treaty focused on the definition of the right for asylum, due to the large increase of asylum seekers into the EU and the growing criticism³³² that the current asylum procedure was too lengthy and expensive. Member States developed a Resolution on Manifestly Unfounded Applications for Asylum, 30 November 1992³³³. This resolution was intended to prevent the abuse of the asylum procedure in general and speed up the rejection procedure for “unfounded“ applications for asylum in particular. “Unfounded” in this context meant that either the applicant could look for shelter in another part of their own country or that their claim was based on forged documents, false identity, etc.

³³² EU citizens raised doubts about the nature of the asylum seekers’ status, believing that a large number of them were economic refugees, i.e. people taking advantage of their refugee status to circumvent the strict regulations of migration control to improve their economic situation. In Germany, for example, although only 10% of applicants are accepted annually, the rest are not necessarily expelled; 60%-65% remain in Germany for an unlimited period of time even though their applications have been rejected. Franz-Josef Kemper, “New Trends in Mass Migration in Germany” in: King (ed.), *op.cit.*, p. 264. The dramatic increase in applicants - mostly from Eastern Europe - led to strong demand for a change in the asylum law. Whereas between 1960 and 1979, about 200.000 persons applied for asylum and the acceptance rate was high, in less than a decade between 1986 and 1992 around 1.2 million applications were submitted. See Rainer Münz, Wolfgang Seifert and Ralf Ulrich (1997), *Zuwanderung nach Deutschland. Strukturen, Wirkungen, Perspektiven*, Frankfurt am Main, Campus Verlag, p. 47. See also *Eurostat Jahrbuch 1997*, Europa im Blick der Statistik, 1986-1996, p. 84 and Table 2: Asylanträge und Anerkennungen in den westlichen Industriestaaten, 1987-1996, “Zur Lage der Flüchtlinge in der Welt”, United Nations High Commissioner for Refugees (UNHCR) Report, Bonn, Dietz, 1997.

³³³ See Resolutions on manifestly unfounded applications for asylum and on a harmonized approach to questions concerning host third countries, 30 November 1992, together with the Conclusions on countries in which there is generally no serious risk of persecution, 30 November 1992.

On November 30, 1992, another resolution was adopted by the EU on a harmonized approach to questions concerning host third countries, together with conclusions concerning countries which, in the view of the EU, posed no serious risk of persecution for its inhabitants. As a consequence of these agreements, the position adopted was that persons arriving from safe countries, i.e. countries free of persecution, or from countries capable of offering asylum, are deprived of the right of asylum. Accordingly, their applications were to be regarded as unfounded and these persons could be deported to their country of origin or to the first safe country through which they passed.

The resolution on host third countries established criteria according to which countries can be classified as a host safe country. This refers to effective protection against *refoulement*; i.e. the lack of torture or inhuman or degrading treatment, and general protection of life and existence of freedom (e.g. observance of human rights, democratic institutions and stability). The resolution did not, however, provide a common list of these countries, as was the case with the visa list, for example. The lack of a uniform list, especially in the case of the safe countries of origin, is a crucial point³³⁴, as it means, in practice, that a Member State can return asylum seekers back to a country which, though perceived by that state as safe, could be denied this status by other Member States.

Germany's list of safe countries of origin (*sichere Herkunftsstaaten*) included, for example, Bulgaria, Ghana, Poland, Romania, Senegal, the Slovak Republic, the Czech Republic and Hungary, whereas Denmark's list included, besides the afore-mentioned countries, Lithuania, Latvia, Russia, Estonia, Niger, Tanzania, the United States, Australia, New Zealand and Japan. In the Netherlands, on the other hand, the list of countries considered to be safe includes Bulgaria, Czech Republic, Ghana, Hungary, Poland, Romania, Senegal and Slovak Republic, while from a British perspective such countries as Bulgaria, Cyprus, Ghana, India, Pakistan, Poland and Romania are regarded

³³⁴ The concept of a "safe" country of origin was first introduced by Switzerland in 1990. As Martenson and McCarthy note, the idea that a country is generally safe, "contains a notion of safety for the majority", and thus inevitably fails to take into consideration individual cases of persecution. See Henry Martenson and John McCarthy (1998), " 'In General, No Serious Risk of Persecution': Safe Country of Origin Practices in Nine European States", *Journal of Refugee Studies*, Vol. 11, No. 3, 1998, p. 307.

as safe³³⁵. Yet other Member States, such as Belgium, France, Greece, Italy, Luxembourg, Portugal and Spain currently do not have a formal list of countries considered to be safe. Austria considers all its neighboring countries as safe as well as Romania, the Ukraine, Saudi Arabia, Iran, Pakistan, Algeria, Tajikistan, Ghana and Northern Iraq (considered as an internal flight alternative for Iraqis), Niger and Jordan. Thus applications for refugee status from these countries are considered “without a merits hearing”³³⁶

There is good reason to believe that those Member States who maintain an official list of safe countries were not solely guided by objective criteria in deciding which countries to include but also intended to limit the flow of asylum seekers by including those countries from which the greatest number of asylum seekers would be found. Thus, third countries which share a border or common sea with a Member State are usually describes as safe (indeed, all neighboring states of Germany and Denmark are safe countries). The same holds true in general for countries which have great potential for dispatching asylum seekers. Britain, keen on limiting the flow of asylum from its former colonies, i.e. India and Pakistan, refer to the latter countries as safe.

Finally, most of the countries designated as safe countries were found in Eastern Europe. Their willingness to serve as a buffer for east-west migration, meant to express a feeling of good faith towards the European Union, was motivated by their desire to become members of the EU. Many of these countries received financial aid to help control their borders and for facilitating the readmission of asylum seekers rejected by Member States³³⁷. However, at least some of these countries had deficiencies in the area of human rights, and their tradition of refugee protection is generally young (they did not participate in refugee protection at all prior to the demise of Communism, though they

³³⁵ Subhan Andrea (2000), *Asylum in the EU Member States*, Working Paper, European Parliament, January, pp. 57, 85, 126 and 165.

³³⁶ Despite the fact that the UNHCR requested Austria to reconsider classifying Hungary and Slovakia as safe countries, Austria nevertheless continues to reject applicants from these countries. US Committee for Refugees, Country Report Austria, 23.9.2002.

³³⁷ In return for bilateral readmission agreements signed between Germany and Poland and the Czech Republic, the latter countries received subsidies of 120 and 60 million Marks, respectively. Similar agreements were also concluded with Hungary, Romania, Slovakia, etc. See Recommendations of the Joint German-American Project of the American Academy of Arts and Sciences, *German and American Migration and Refugee Policies*, 1996, pp. 28-29.

have made fundamental progress in this field during the last decade). One prime example in this respect is Slovakia. In 1997 Slovakia's application for EU membership received a negative response from the European Commission for basically political reasons. The Commission took the view that the treatment and protection of Hungarian and Roma minorities (constituting between 18-23% of the total population, depending on the estimates of the Roma) was unsatisfactory, “the gypsies or Roma ... continue to suffer considerable discrimination in daily life” and, “improvement is also required in the treatment of the Hungarian minority”³³⁸. Finally, when reflecting on Slovakia's application, the Commission concluded that due to, “the instability of Slovakia's institutions” and, “their lack of rootedness in political life and the shortcomings in the functioning of its democracy” negotiations for EU accession could not be opened. In spite of the fact that Slovakia received a negative evaluation concerning human rights by the European Commission, a situation which did not improve in the progress report a year later, Slovakia was, nevertheless, incorporated in the list of safe countries of origin by some Member States, i.e. Denmark, the Netherlands and Germany. It was not until the Helsinki Summit held on 10-11 December 1999, that the EU decided that negotiations with Slovakia for EU accession could be opened.

Compared to Eastern European countries the qualification of EU Member States as safe countries is less controversial. Indeed, in the Amsterdam Protocol on asylum for nationals of Member States of the European Union, it was stated that, “Member States shall be regarded as constituting safe countries of origin”. Nevertheless, there is still disagreement among Member States as to whether an application from another Member States must be rejected *a priori*³³⁹. Following the request of a Spanish citizen, a member of the ETA separatist Basque organization, for political asylum in Belgium, a unilateral declaration issued by Belgium on the Protocol on asylum for nationals of Member States of the European Union and annexed to the Amsterdam Treaty makes it clear that Belgium continues to adhere to Geneva obligations and carry out on an individual basis, “any

³³⁸ Commission Opinion on Slovakia's Application for Membership of the European Union, European Commission, Brussels, 15.7.1997, COM (97) 2004 final, pp. 17-18, 117.

³³⁹ Evelyn Stich (1998), *Abschaffung des Asylrechts für Unionsbürger innerhalb der Europäischen Gemeinschaft?* Zeitschrift für öffentliches Recht, pp. 505-526.

asylum request made by a national of another Member State”. In other words, Belgium’s policy is that EU nationals are not to be discriminated against by being denied the right of asylum. This approach, in fact, corresponds with the provisions set out in the Geneva Convention and the 1967 New York Protocol, namely, that decisions on granting refugee status should be determined after individual examination and, “without discrimination as to race, religion or **country of origin**”(Article 3)³⁴⁰.

The fact that EU Member States have failed not only to agree to which countries should be regarded as safe countries of origin but, in addition, whether the EU itself can be referred *a priori* as a safe area reflects the inability of the Member States to overcome national interests and harmonize substantive aspects of asylum policy, allowing the transfer of sovereignty in this area to EU institutions. On the one hand, EU Member States are united in agreeing on the number of applications for asylum that can be submitted to the EU. On the other hand, they are have been unable to formulate a common list of safe countries, a step that would insure that asylum seekers would be treated equally by all EU Member States. This equality of treatment is, of course, fundamental to the asylum seekers' well being and protection. Under the current state of affairs, with different standards being applied by Member States as to what constitutes a safe country, the country of entrance becomes of crucial importance for an asylum applicant. If, for example, an asylum seeker from Romania arrives in Denmark to his application will be deemed as unfounded, whereas if he arrives in Belgium his application will be examined³⁴¹.

³⁴⁰ Emphasized added.

³⁴¹ Already in 1991 the Commission indicated that Member States are incapable of agreeing on a common approach to third countries. See Alberto Achermann (1995), “Asylum and Immigration Policies: From cooperation to Harmonization” in: Roland Bieber and Joerg Monar (eds.), *Justice and Home Affairs in the European Union. The Development of the Third Pillar*, European University Press, Brussels, p. 157. Even in the more recent commission proposals there is no attempt to create such a list but only to set up general rules on how to determine whether a country is a safe third country or a safe country of origin. See Commission Proposal of 20 September 2000 on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM (2000), 578 final, 2000/0238 (Cns).

4.2. Origin of persecution: state and non-state agents

Additional attempts to challenge the spirit of the Geneva Convention were made through the introduction of different interpretations of the importance attached to the source of persecution. Article 2 of the Geneva Convention did not define the nature of the persecutor, and simply stated that a, “well-founded fear of being persecuted” for reasons of race, religion, nationality, membership in a particular social group or adherence to a particular political opinion is a sufficient reason for be granted refugee status. Seen in this context the identity of the originator of a particular case of persecution is to a largely irrelevant, as the main goal was to provide protection to persons facing danger³⁴².

The UNHCR position on strict interpretation of Geneva Convention definitions has been ambivalent. On the one hand, in the famous *Handbook of Procedures and Criteria for Determining Refugee Status*, it argued that, “persecution is normally related to the authorities of a country”. It may also, “emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious [practices] of their neighbors”³⁴³. On other occasions, such as on the fiftieth anniversary of the UNHCR in 2000, the UNHCR declared that the Geneva Convention, “does not say that a state must be responsible for the persecution”. The UNHCR, “has therefore consistently advanced [the position] that the Convention applies to any person who has a well-founded fear of persecution, regardless of who is responsible for the persecution”³⁴⁴. Moreover, the UNHCR also believed that, “this position is shared by the overwhelming majority of the states party to the Convention”³⁴⁵. In practice, this is usually not the case.

³⁴² See Jean-Yves Carlier (1999) “The Geneva refugee definition and the ‘theory of the three scales’ “ in: Nicholson and Twomey (eds.), *Refugee. Rights and Realities*, Cambridge University Press, p. 48.

³⁴³ “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”. *Handbook of Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, *United Nations High Commissioner for Refugees*, Geneva, January 1992, p. 17.

³⁴⁴ *The State of the World's Refugees. United Nations High Commissioner for Refugees (UNHCR)*, Oxford University Press, 2000, p. 163.

³⁴⁵ *Ibid.*

The position of France Spain, and Germany for example, is that the state is considered the agent of persecution and thus refugee status is not granted to asylum seekers fleeing countries where the state is not guilty of the persecution but is simply unable to offer protection³⁴⁶. The result is that persons from Afghanistan, Somalia or Sri Lanka will not be granted refugee status, as they fled from non-state sponsored persecution³⁴⁷.

At the EU level, Member States also declared in the *Joint Position of 4 March 1996*, that persecution is generally the act of a state organ³⁴⁸. While this resolution is non-binding, some Member States nevertheless incorporated it into their national law. Additionally, they also developed the concept of the “internal flight” option: that even if state authorities were the source of persecution, asylum seekers could be deprived of the right for asylum if they, “could obtain effective protection in another part of his country...”³⁴⁹. The Council of Ministers also considered developing a regional approach to protection in

³⁴⁶ Until 2000 Germany did not consider asylum seekers fleeing a state incapable of providing effective protection against third parties, such as Afghanistan, as refugees. The German Constitutional Court (*Bundesverfassungsgericht*), however, reviewed a judgment of the Federal Administrative Court (*Bundesverwaltungsgericht*) concerning the granting of political asylum to refugees coming from Afghanistan. It ruled that persons fleeing the Taliban regime have the right to obtain political asylum in Germany since the term “political persecution”, interpreted to imply that the state or quasi state was the originator of the persecution, as interpreted by the Federal Administrative Court, was too narrow. In the Constitutional Court’s view, the right of asylum could be granted since the Taliban regime, in fact, has had stable control for an extended time over large territories of the country. Hence, it could be regarded as a quasi-state actor. As a result, it was decided to suspend decisions on applications from Afghanistan from August 2000 until the Federal Administrative Court re-examined the situation in the country in accordance with the judgment of *Bundesverfassungsgericht* and determined who was likely to be subject to direct control of the Taliban and who was not. Asylum seekers, for example, coming from regions which were not subject to Taliban control might be deprived of the right of asylum, whereas others who were fleeing the area which was directly controlled by the Taliban could have access to refugee status. Clearly, this judgment had a considerable impact on the rate of recognition of asylum seekers from Afghanistan. “Politische Verfolgung durch staatsähnliche Herrschaftsgewalt. Bundesverfassungsgericht hebt Urteile des Bundesverwaltungsgerichts auf”. *Amnesty International*, asyl-info October 2000. See also Beschluss vom 10. August 2000 - 2 BvR 260/98 und 1353/98.

³⁴⁷ European Parliament (2000), *op.cit.*, p. 12. Most applications for asylum came from Yugoslavia, Romania, Turkey, Iraq, Sri Lanka, Iran, Somalia and Afghanistan. Anita Böcker and Tetty Havinga, *Asylum Migration to the European Union: Patterns of Origin and Destination*, European Commission, 1998. See Anja Edelhäuser, Stefan Rappenglück & Marc Schürmeyer (1999), *Fluchtbürg Europa-Asylpolitik in einem Zusammenwachsenden Europa Forschungsgruppe*, Jugend und Europa, Centrum für angewandte Politikforschung (CAP), Munich, p. 180.

³⁴⁸ Joint Position 96/1967JHV of 4 March 1996, defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized 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.

³⁴⁹ See *Resolution on manifestly unfounded applications for asylum, 30 November 1992*. According to British law, for example, refugee status could be withheld when there are inner-state alternatives /*innerstaatliche Alternativen*.

appropriate cases involving cooperation with non Member States and the possibility of identifying safe areas within these regions. In practice, as Frelick argued, it was difficult to assure the safety of refugees. In 1996, for example, “when Iraqi forces entered the safe heaven for Kurds in Northern Iraq, Turkey closed its doors and refugees were left without either a safe haven or a country of first asylum. While the United States evacuated 6500 people the rest were left to face their fate”³⁵⁰.

Asylum seekers fleeing war or civil war are usually not considered refugees, though state authorities might be at the origin of their, “.. well founded-fear of being persecuted”. A prime example in this respect was the case of refugees fleeing Yugoslavia. The Council Resolution of 25 September 1995 referred to persons coming from the former Yugoslavia as “displaced persons”³⁵¹. They enjoyed temporary protection but not refugee status³⁵². Moreover, the admission to and conditions of residence of displaced persons in EU territory have to gain the unanimous consent of all EU Member States. The concept of, “temporary protection” as Plender noted, was developed to prevent overburdening the asylum granting bureaucracy by the mass influx of refugees from Yugoslavia, and the UNHCR and the International Committee of the Red Cross were encouraged to adopt it³⁵³.

It is evident that the distinction between state and non-state actors as well as the idea of an intra-state alternative for asylum effectively excluded most asylum seekers entering EU territory in the last decade from receiving refugee status. The overwhelming majority of refugees fleeing their home countries due to civil war, ethnic conflict, or a well founded fear of persecution emanating from non-state agents were unable to meet the

³⁵⁰ See Bill Frelick, “Recent European Union Initiatives to Stem the Flow of Asylum Seekers and Migrants”, October 9, 1998, International Migration Policy Program, Carnegie Endowment for International Peace, 23.09.2002.

³⁵¹ See Council Resolution of 25 September 1995 on Burden Sharing with regard to the admission and residence of displaced persons on a temporary basis.

³⁵² As Lavenex notes, refugees from Yugoslavia are the prototype of *de facto* refugees. They were not covered by the Geneva Convention definition but were rather regarded as persons who were to be admitted on humanitarian grounds. They were usually received under the condition of temporary protection. Sandra Lavenex (1999), *Safe Third Countries. Extending the EU Asylum and Immigration Policies to Central and Eastern Europe*, Budapest, Central European University Press, p. 57.

³⁵³ See Richard Plender (1991), “Asylum Policy: Deficits of Intergovernmental Cooperation”, *op.cit.*, p. 161.

strict criteria for asylum laid down by EU Member States. Thus, of 3.7 million applications for asylum submitted to EU Member States between 1990-1999, the average acceptance rate was a relatively low 10%. With the exception of France where the rate of recognition stood at 27%, the number was much lower in other EU member States. In Britain, for example, only 6.4% of all applicants were recognized as refugees under the Geneva Convention, while in Belgium and in Sweden the percentages were 7.2% and 3.6%, respectively³⁵⁴. Despite the fact that the rejection rate has dramatically increased over the years the vast majority of asylum seekers remain in their host countries³⁵⁵. According to the 2002 Report of the Federal Government's Commissioner for Foreigners' Affairs their number amounted to 1.1 million. This figure includes persons recognized under the Geneva Convention, persons granted Humanitarian Status and those granted temporary protection³⁵⁶.

4.3. Sharing the burden of asylum protection with non EC-nationals

Another strategy to reduce the number of asylum seekers was introduced by the signing of a series of bilateral readmission agreements, between EU Member States and third countries, particularly with those in Central and Eastern Europe, i.e. Poland, Czechoslovakia, Romania, Bulgaria, Croatia, and the Federal Republic of Yugoslavia. Similar agreements were also concluded with non-European countries, such as Vietnam, Pakistan and Algeria³⁵⁷. The primary motivation behind the conclusion of these agreements was to facilitate Member States to return illegal immigrants and asylum seekers coming from those countries.

³⁵⁴ See UNHCR Report 2000, Annex 9: Asylum applications and refugee admissions to industrialized states, 1990-1999, *op.cit.*, pp. 321-324. The general rate of recognition in Germany in the last decade stood at 5.5%. See Table 7: "Entscheidungen des Bundesamtes für die Anerkennung ausländischer Flüchtlinge von 1990 bis 1999", Migrationsbericht 1999. Zu- und Abwanderung nach und aus Deutschland, *Die Beauftragte der Bundesregierung für Ausländerfragen*, Bonn, 1999, p. 29.

³⁵⁵ Germany for example, according to the 1997 Report of the Federal Government's Commissioner for Foreigners' Affairs, allowed 550,000 persons to remain in its territory for humanitarian reasons. „Daten und Fakten zur Ausländersituation“, *Beauftragte der Bundesregierung für die Belange der Ausländer*, Bericht über die Lage der Ausländer in der Bundesrepublik Deutschland, März 1997, Bonn, p. 26.

³⁵⁶ See Table 9 "Entwicklung der Flüchtlingszahlen nach Gruppen von 1997-2000", Daten und Fakten zur Ausländersituation, 2002, p. 29.

³⁵⁷ See Sandra Lavenex (1999), *Safe Third Countries. Extending the EU Asylum and Immigration Policies to Central and Eastern Europe*, Budapest, Central European University Press, p. 81.

On March 29, 1991 the Schengen countries, i.e. Belgium, Germany, France, Italy, Luxembourg, and the Netherlands, concluded the first readmission agreement, with Poland³⁵⁸. The agreement enabled these countries to send back Polish nationals³⁵⁹. But as Poland was also on the safe third country list of most EU Member States the readmission agreement meant that third country nationals who had been traveling through Poland could also be sent back. It is worth noting that Poland itself concluded readmission agreements with other Eastern European countries, including Bulgaria, Hungary, Moldova, Slovakia and Ukraine with the goal of discouraging asylum seekers and reducing the number of illegal migrants residing on its territory⁴⁰. What has emerged is a dynamic of shifting responsibilities leading to a chain reaction of gradually diminishing protection for asylum seekers. Schengen countries have thus far only signed agreements with countries party to the Geneva Convention³⁶⁰. Poland, however, has retained the right to sign agreements with countries which have questionable commitments to the Geneva Convention and where there are serious doubts as whether they are free of persecution and human rights abuses. Under these circumstances one can hardly ensure the protection of asylum seekers.

Nevertheless, the EU continued to encourage the signature of such agreements over the course of time. In February 1993 EU Member States' Ministers of Interior met in Budapest to discuss ways to prevent uncontrolled migration into the EU. One of the recommendations offered was to sign readmission agreements similar to the one with Poland, "with all appropriate countries". "Where possible" it was noted, "such agreements should be multilateral, but where this is not possible bilateral agreements

³⁵⁸ See Hentges, *op.cit.*, p. 110.

³⁵⁹ Readmission agreements were already concluded among various European countries after the Second World War. Germany, for example, has signed readmission agreements with Sweden (1954), Denmark (1954), Norway (1955), Switzerland (1955), France (1960), Austria (1961) and the Benelux Countries (1966). These agreements usually referred to illegal persons crossing the common borders. Martin Schieffer (1997), "The Readmission of Third-Country Nationals within Bilateral and Multilateral Frameworks" in Monica den Boer (ed.), *The Implementation of Schengen: first the widening, now the deepening*, European Institute of Public Administration, Maastricht, the Netherlands, pp. 100-106. In general there are different forms of readmission agreements: where some refer to nationals of the contracting parties, others also refer to stateless persons and third country nationals.

³⁶⁰ The rate of recognition in Poland is lower than that of EU Member States. In 1998, it stood at 1.9 and in 1999 at 1.4 only. See Annex 9, UNHCR Report 2000, *op.cit.*, p. 323..

should be considered”. “In the case of multilateral agreements, these might be along the lines of that between Poland and the Schengen States”³⁶¹.

On 30.11-1.12, 1994 the Council of Ministers introduced a specific format, “as the basis of negotiation with third countries on the conclusion of readmission agreements”³⁶². In contrast to the agreement with Poland in 1991, the new readmission agreements would henceforth provide the option of re-admitting third-country nationals. Thus any person who entered the EU via Poland could be send back³⁶³. As Guild observed the specific readmission agreements were, “designed to provide some underpinning in international law for other acts of the Member States relating to expulsion”. Though the recommendation makes reference to the UN convention with regard to the status of refugees as well as to the European Convention on Human Rights of 1950 there is no obligation on the contracting parties to comply with the requirements of either convention³⁶⁴. Moreover, as the UNHCR rightly noted, this recommendation “fails to

³⁶¹ See Conference to Prevent Uncontrolled Migration, Budapest, February 15-16, 1993. Later, however, the Council seemed to prefer the conclusion of bilateral readmission agreements between individual Member States and a third country, apparently for geographical reasons. Indeed, the main priority was apparently to sign agreements with countries that shared a common external border/or sea with a Member State. Tony Bunyan (ed.) (1997), *Key Texts on Justice and Home Affairs in the European Union. Vol. 1 (1976-1993). From Trevi to Maastricht, Statewatch*, London, p. 84.

³⁶² According to the specimen readmission agreement it was possible to send back, “persons who do not, or who no longer, fulfill the conditions in force for entry or residence on the territory of the requesting Contracting Party”. See Recommendation concerning a specimen bilateral readmission agreement between a Member State of the European Union and a third country, 30.11-1.12, 1994.

³⁶³ The costs of transporting these persons, “shall be borne by the requesting Contracting Party as far as the border of the requested party” (Article 9). As a European Parliament report noted “the readmission agreement signed with Poland in July 1998 included automatic return of asylum seekers without any safeguards. Considering that Poland has the same type of readmission agreement with Lithuania, it means that asylum seekers rejected by Germany can be sent back from Germany to Lithuania, even if Lithuania is not a safe third country in the view of Germany”. It is also interesting to note that Lithuania itself has concluded readmission agreements with Estonia, Latvia, Bulgaria, Slovenia, Poland, Croatia and Ukraine. Readmission agreements are also under consideration with Russia, Belarus, Romania, China, India, Pakistan, Sri Lanka and Bangladesh. (“The readmission agreement signed with Poland in July 1998 might bring about a chain of asylum seeker deportations from Germany to Poland, from Poland to Lithuania and thence to the Country of origin, although Germany does not consider Lithuania as a safe third country. The number of illegal migrants has increased due to the trafficking in clandestine workers originating from Afghanistan, India, Pakistan, Sri Lanka and Bangladesh who, after living for a long time in Belarus or Russia, were migrating through Lithuania and Poland to Western Europe and Scandinavia. These illegal migrants, numbering around 2000 a year, have been either expelled or detained in the Lithuanian-Polish border regions.”) Andrea Subhan (1999), *Migration and Asylum in Central and Eastern Europe (1999)*, European Parliament, Civil Liberties series, LIBE 104 EN, pp. 43-44.

³⁶⁴ This meant, “a breach of obligations under the agreement by one state in respect of a person returned under the agreement would not trigger any repercussions under the agreement”. The UNHCR also argued

differentiate between regular migrants and persons seeking international protection. Where asylum seekers would be returned under such agreements, without additional safeguards their protection claims risk not to be examined”³⁶⁵.

In spite of these criticisms³⁶⁶, EU Member States did not challenge the nature of the re-admission agreements. In fact, most Member States signed further bilateral agreements. For example, Sweden signed an re-admission agreement with Estonia, the Federal Republic of Yugoslavia, Poland and Bulgaria³⁶⁷, and Denmark signed re-admission agreements with Latvia and Lithuania; Austria has concluded re-admission agreements with all of its neighboring countries: the Czech Republic, Slovak Republic, Slovenia, Bulgaria, Estonia, Latvia, and Romania. Germany concluded re-admission agreements with Bulgaria, the Czech Republic and Romania, and France concluded agreements with Bulgaria, the Czech Republic, Hungary and Romania. Finland and Sweden has concluded re-admission agreement with Estonia³⁶⁸. One of the consequences of these agreements was that the number of asylum seekers from Eastern Europe has considerably decreased over the years³⁶⁹.

that, “such agreements may lead to situations of persecution and other violations of basic human rights; such agreements should contain a specific provision requiring the substantive consideration of asylum applications; they should include information regarding the ground of the removal decision (i.e. whether there is a safe third country to which the asylum seeker can apply) to avoid summary rejection of asylum applications”. UNHCR Pres Release December 1994, see Guild (1996), *op.cit.*, p. 406.

³⁶⁵ See Commission Green Paper on a Community Return Policy on Illegal Residents. UNHCR's Comments, Geneva July, 2002.

³⁶⁶ As Kris Pollet noticed “the conclusion of readmission agreements with actual and potential migrant sending countries is an important tool.. in preventing immigrants from reaching the territory of the Member States”. “Readmission agreements in fact should inspire the countries concerned to introduce tight border controls and a global immigration policy modeled upon the Union's strategy. In addition, most EU Member States have introduced national measures that should complement these bilateral agreements and the visa policies established by the union and the Schengen states”. Kris Pollet (2001), “The European Union and Migratory Pressure from the Mediterranean and Central and Eastern Europe” in: Marc Maresceau and Erwan Lannon (eds.) *The EU's Enlargement and Mediterranean Strategies. A Comparative Analysis*, Palgrave, New York, p. 358.

³⁶⁷ U.S. Committee for Refugees, country report: Sweden <http://www.refugees.org/world/countryrpt/europe/1999/sweden.htm>, 25.11.2003.

³⁶⁸ Subhan (1999), *op.cit.*, pp. 11, 22, 26, 31, 38, 43,53, 58, 64.

³⁶⁹ Whereas between 1985-1994 around 450,000 applications were submitted by asylum seekers from Romania, Poland and Bulgaria (330,407, 133,370, 90,457, respectively) to the EU, virtually no applications were registered from these countries in 1999, with the exception of Romania with 220 applicants. See Böcker and Havinga, *op.cit.*, Table 1: Asylum Applications in EU Member States by country of nationality, 1985-1994, *op.cit.*, p. 39; UNHCR Report 2000, *op.cit.*, p. 308.

5. The Main Outcomes of Maastricht

The various measures concerning asylum adopted by EU Member States after the signature of the Maastricht Treaty were based mainly on inter-governmental cooperation. The working assumption was to leave a great deal of flexibility to the individual Member States while exploring possible cooperation at the EU level. An examination of the measures taken at the national and the EU levels, however, would seem to suggest that EU Member States shared basically similar views and expectations with regard to asylum policy. Thus, notwithstanding their refusal to delegate substantial power to EU institutions, there was no great difference between Member States with regard to the concept of refugee protection. The main question that all Member States appeared to be concerned with was what measures are most likely to reduce the influx of asylum seekers into EU territory. These concerns were often reflected in national debates, leading to frequent demands to develop a new, more restrictive immigration policy, recognizing the fear of the general public and general perception that asylum seekers were a potential threat to the national economy and identity. Policy makers tended to respond to these pressures by suggesting a new definition of “asylum”, thus the introduction of new concepts such as “safe country” and “safe third country”, for example. But as Member States began to impose new restrictions, allowing them to exclude additional asylum seekers from the EU, it became clear that the burden of dealing with asylum seekers who are refused entrance was transferred to other countries. Central and Eastern European countries have proven to be ideal partners with the EU in this respect. As these countries have expressed their desire to be future members of the EU, they were subject to pressures from EU Member States in the field of asylum and migration. The result has been that they agreed to re-admit asylum seekers who entered the EU via their territory. The Amsterdam provisions offer a greater opportunity for cooperation between the EU and the candidate countries and strengthen the relationship between the two in migration and police cooperation. While the EU was aiming at developing a more democratic Union, EU policy makers had to demonstrate their ability to be more effective in the field of asylum by imposing further restrictive measures.

IV. The Amsterdam Treaty: A New Code of Conduct

In 1996 EU Member States established a new Intergovernmental Conference to review the provisions of the Maastricht Treaty. The goal was to create a new treaty, which would address the main challenges of the EU: opening the door to new candidate countries and making European governance more democratic. After almost two years of preparatory work, Member States reached an agreement on the draft treaty in June 1997. The Treaty of Amsterdam was signed in October 1997, and entered into force on May 1999.

The Amsterdam Treaty kept the three-pillars structure of Maastricht but defined new relations between EU institutions. With an emphasis on the development of a common immigration policy, one of the important innovations was that migration and asylum policy were finally incorporated into the first pillar. Moreover, the Schengen Agreement, which was intergovernmental and had been developed outside the legal framework of the Community and thus involved no Community control, in both its interpretation and application, now became subject to the first pillar of the EU. But as the Amsterdam Treaty had developed due to the growth of criticism of the EU's "democratic deficit" the principles of flexibility and effectiveness dominated the discourse. The result was that the EU did not seek to impose one single policy but different levels of cooperation were available, taking into account Member States' preferences. Under these conditions minimum standards were introduced and the harmonization of asylum policy was delayed.

1. The Incentive for a New Intergovernmental Conference (IGC): "A Union Close to its Citizens"

The incentive for convening a new IGC was to create a more democratic and transparent union, one "closer to its citizens. The idea of convening a new Intergovernmental Conference was already anticipated in the Treaty of Maastricht. Article B declared that, "the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the

community”. As a result, policy makers set a timetable for a future revision even before the signing of the Treaty³⁷⁰.

The European Parliament, however, was extremely critical of the new Treaty and already two months after the signing of Maastricht adopted a resolution to express its disappointment with the final outcome. While identifying the major achievements of Treaty such as a monetary union, common foreign policy and common citizenship, the Parliament asserted, “the Treaty of Maastricht contains provisions which are inconsistent with regard to the above requirements. The institutional system contains shortcomings to the extent that it is doubtful whether the European Union will be able to achieve its proclaimed objectives, especially if its membership is enlarged, and whereas it has not eliminated the parliamentary democratic deficit”³⁷¹. One of the shortcomings was the issue of cooperation in the field of migration and asylum under the third pillar. The third pillar, “leaves cooperation in the spheres of justice and home affairs outside the European Community Treaty, thus escaping parliamentary and judicial control in an area in which citizens' rights are directly affected with no democratic procedures for decision-taking in this matter”. As a consequence the Parliament urged the national parliaments to call on their respective governments, “to prepare the next IGC in order to eliminate the shortcomings of the Treaty of Maastricht in particular as regards the remaining democratic deficit and the efficiency of the decision-making process”.

The argument of the Parliament that prompted Member States to work towards political reform was reinforced by two additional factors: the 1993 decision of the Brussels European Council to open the negotiations for the accession of Austria, Finland and Sweden in 1995, and the decision to consider ten Central and Eastern European countries,

³⁷⁰ “A conference of representatives of the governments of the Member States shall be convened in 1996 to examine those provisions of this Treaty for which revision is provided, in accordance with the objectives set out in Article A and B”. Article N, Maastricht Treaty.

³⁷¹ The Parliament also argued that Member States have already, “recognized the insufficiency of their achievements in that they provided in the Treaty for a new IGC in 1996”. See European Parliament, Resolution on the Results of the Intergovernmental Conference, April 7, 1992, *Official Journal of the European Communities*, OJ, No. C 125/81, May 18, 1992.

including Cyprus and Malta, as potential members³⁷². Although the EU in general supported the enlargement of the EU to include those European countries that met the political and economic criteria for membership, it had to prepare itself at the institutional level for this accession³⁷³. Yet beyond the enlargement process the major incentive for the 1996 IGC stemmed from the growing sense of dissatisfaction among “the People of Europe” about EU policy making. Thus, the primary aim of 1996 IGC was to give power to EU institutions and developing democratic institutions, “to counteract the alienation of public opinion from the whole European Union enterprise, which had become painfully apparent during the process of ratifying the TEU”³⁷⁴. A critique of EU policy-making and the democratic deficit had become increasingly evident since the signing of Maastricht. The Danes voted against the Treaty of Maastricht on June 2, 1992, and in France only a very small majority ratified the Treaty³⁷⁵. Similar results were further manifested in opinion polls, which indicated little public support for the European project and its institutions. Only 44% of the EU’s citizens were of the opinion that the completion of the single European market by the end of 1992 would be beneficial to them³⁷⁶. Concerning EU institutions, only 10% were of the opinion that the European Parliament played an important role in the everyday life of the Community. As for the Commission only 42% of EU citizens had even heard about the Commission of the European Community. Moreover, of those Europeans who had heard about the Commission only 47% stated that

³⁷² Between 1991-1996 the European Union signed Europe Agreements with ten Central and Eastern European countries. In the Copenhagen European Council of 1993 the EU laid down the principle that it is willing to enlarge and create the political and economic conditions for enlargement, by adopting specific criteria for EU membership (the so called “Copenhagen conditions”). These criteria included democratic institutions, the rule of law, human rights the respect for minorities as well as a functioning market economy and the ability to follow the *acquis communautaire*. See European Council of Copenhagen, June 21-22 1993. See also Marc Maresceau (1997)(ed.), “On Association, Partnership, Pre-Accession and Accession”, *Enlarging the European union. Relations between the EU and Central and Eastern Europe*, Longman, London, p. 9.

³⁷³ This meant taking the appropriate measures for the allocation of power in the various EU institutions, reviewing the size of the Commission “and the weighing of the Member States’ votes in Council”. Brussels European Council, December 10-11, 1993.

³⁷⁴ Anthony Arnall, Alan Dashwood, Malcolm Ross and Derrick Wyatt (2000), *Wyatt and Dashwoods’ European Law*, fourth edition, Sweet and Maxwell, London, p. 17.

³⁷⁵ In the first referendum held in Denmark 50.7 % rejected the Treaty with 49.3 % in favor. In France 51% voted in favor where 48% were against. See Finn Laursen and Sophie Vanhoonacker (1994) (eds.), *The Ratification of the Maastricht Treaty. Issues, Debates and Future Implications*, Martinus Nijhoff Publishers, Dordrecht, pp. 69, 162.

³⁷⁶ Eurobarometer 37, Public Opinion in the European Community, June 1992, Annex 41. See also Eurobarometer 36, Öffentliche Meinung in der Europäischen Gemeinschaft, European Commission, December 1991, Table 24, Annex 26.

they have been impressed by the work of the Commission³⁷⁷. When EC citizens were asked if they feel “European” only 14% said it happens often³⁷⁸.

Not surprisingly, the heads of states and governments responded to these sentiments and in Birmingham on June 1992 declared that the Community must developed the identity of its citizens and aspire to, ”a Community close to its citizens”³⁷⁹. Policy makers were, determined to respond to the concerns raised in the recent public debate. “As a community of democracies, we can only move forward with the support of our citizens”. “We must demonstrate to our citizens the benefits of the community and the Maastricht of Treaty; make the Community more open, to ensure a better informed public debate on its activities; make clear that citizenship of the Union brings our citizens additional rights and protection without any way taking the place of their national citizenship. We reaffirm that decisions must be taken as closely as possible to the citizen”.

As it became clear that the major task of the 1996 IGC was to garner wider support among the people who were at the center of the European project³⁸⁰, the European Council prepared the steps necessary to achieve this goal. In various Council meetings it identified the necessary measures to be examined during the conference so that EU institutions would be more responsive to the interests of the citizens³⁸¹. In Corfu on June 1994, the Council requested all EU institutions to prepare a report on the functioning of

³⁷⁷ Eurobarometer 37, pp. 22-23.

³⁷⁸ Despite the importance of the European Council of Maastricht on 11 December 1991 (where the treaty was approved by the Head of States or Governments) only 44% of EC citizens said in March 1992 that they heard anything about this summit. Eurobarometer 37, p. 45; Annex 53. It is worthwhile noting that questions about whether certain policy areas should be decided at national or joint community decision-making levels usually referred to environment, foreign policy, currency, security, health/social welfare and education matters rather than immigration. Eurobarometer 33, *Die Öffentliche Meinung in der Europäischen Gemeinschaft*, Vol. 1, European Commission, June, 1990, p. 27; See also Eurobarometer 36, *Die Öffentliche Meinung in der Europäischen Gemeinschaft*, European Commission, December 1991, p. 30.

³⁷⁹ Birmingham Declaration - A Community close to its citizen. Birmingham European Council, October 16, 1992. Conclusions of the Presidency. EC Bulletin October 1992, pp. 7-9.

³⁸⁰ See Werner Weidenfeld (1995), *Reform der Europäischen Union. Materialien zur Revision des Maastrichter Vertrages 1996*, Verlag Bertelsmann Stiftung, Gütersloh, p. 19.

³⁸¹ Stefan Griller, Dimitri P. Droutsas, Gerda Falkner, Kartin Forgó and Micahel Nantwich (2000)(eds.), *The Treaty of Amsterdam. Facts, Analysis, Prospects*, Springer, New York, p. 11.

the Treaty of the European Union, and a Reflection Group to offer and propose possible changes to the Treaty of Maastricht was established³⁸².

2. The 1995 Reflection Group Report: The European Commission and European Parliament Positions on Asylum and Third Pillar Issues

The Reflection Group, which consisted of the Ministers of Foreign Affairs of the fifteen EU Member States, the President of the Commission and two representatives of the largest parties in the European Parliament, began its work under the Spanish Presidency in Messina on June 2, 1995 and submitted a final report on December 5, 1995. The report was divided into two main sections: *A Strategy for Europe* and *An Annotated Agenda*. It first summarized the major objectives of the IGC and then explained ways of achieving these goals. The Reflection Group believed emphasis should be placed to achieve results in three main areas: making Europe more relevant to its citizens, enabling the Union to work more efficiently, and preparing for the coming enlargement and giving the Union greater capacity for external action³⁸³.

The report also noted that Member States were mostly concerned with the interests and preferences of, “the People of Europe” and in particular the growing dissatisfaction with the functions of EU institutions. For these reasons, the Reflection Group believed that, “a key element not only for an understanding of the reasons for reform of the Treaty but also in order to guarantee the success of the conference is to place the citizen at the center of the European venture by endeavoring to meet his expectations and concerns, that is to say, to make Europe the affair of its citizens”. In short, “serving the citizen’s interests and

³⁸² See The Corfu European Council, June 24-25, 1994. The Brussels European Council on 10-11 December 1993, recommended that the 1996 IGC examine the legislative role of the Parliament and the allocation and distribution of power for each member state in the Commission and the Council.

³⁸³ The Reflection Group, for example, argued that the enlargement negotiations could not begin before the institutional structure to include new members be settled. Thus, before enlargement could take place, EU institutions must create the conditions necessary, “to ensure the smooth running of the institutions” for the next enlargement. The representatives of the fifteen Foreign Ministers also acknowledged the willingness of their respective Member States to shape the new international order, and thus advocated for a greater authority over issues of external action, and to use the EU, “as a factor of peace and stability”. See Reflection Group's Report, Messina June 2, 1995 - Brussels December 5, 1995, pp. 4-7.

perspectives for the future should be the main guiding principle for the envisaged reform”³⁸⁴.

The Group referred to areas of the greatest concern to the citizens of Europe such as unemployment and environmental degradation, for example. Immigration, however, seemed to receive less attention, and was not treated as a separate issue. Rather, discussions of immigration were linked with discussions on the lack of internal security. This linkage could be interpreted as implying that the search for security heavily depended on the ability to develop efficient border control mechanisms. In short, it was believed that EU citizens would feel safer only if immigration waves were to be reduced. At the same time, Member States avoided declaring specifically how efficiency in this field can be achieved. While the Group recommended improving cooperation it did not go into specifics and elaborate on how future policy ought to be shaped. This vagueness is also reflected in the type of recommendations suggested to promote greater efficiency in dealing with the third pillar issues. During the discussions concerning cooperation in the field of justice and home affairs, the Reflection Group focused on elucidating the division of power between the EU institutions and individual Member States rather than on the nature of asylum policy per se. But even with regard to division of power they failed to agree on concrete measures. Under a fairly provocative title, “Critical analysis of cooperation in the fields of justice and home affairs”, the Group offered a report that did not express or suggest a specific framework to facilitate asylum and migration policy-making. Rather the Group provided different levels of analysis, providing a friendly critique, resulting in a relatively mild report that, nevertheless, seemed to acknowledge that the diverse opinions within the EU were an obstacle to cooperation in policy formation. Some members tended to agree that EU Member States failed to coordinate their activities and often suffered from the, “overlapping of actions”³⁸⁵. Other, however,

³⁸⁴ Ibid., p. 16. As Daniela Obradovic noted, the Reflection Group also believed that the treaty must clearly declare values shared by all Europeans, such as: the principles of democracy, human rights and social justice. See Daniela Obradovic (1996), “Policy Legitimacy and the European Union”, *Journal of Common Market Studies*, Vol. 34, No. 2, June 1996, p. 211.

³⁸⁵ For this purpose improvements needed to be made in the legal instruments, to be improved and the roles of the different institutions needed to be clarified. Ibid., p. 20. For further analysis of the 1996 IGC and issues relating to migration in the 1996 IGC, See Simon Hix and Jan Niessan (1996), *Reconsidering European Migration Policies. The 1996 Intergovernmental Conference and the Reform of the Maastricht*

felt that a, “lack of progress is not necessarily attributed to the intergovernmental nature of cooperation”. The Group thus favored, “a pragmatic approach to identify where there is need for further use of common institutions and criteria and where the full use of Community competence is required”³⁸⁶.

The work of the Reflection Group received considerable support from the Commission, which reacted positively to the Westendorp Report a day after its publication on December 6, 1995: the Commission, “firmly supports all the general ideas in the report”³⁸⁷. On the subject of cooperation in Justice and Home Affairs the Commission agreed with the view, expounded in the report, that immigration be linked with security issues such as terrorism and crime, recognizing the potential threat arising from free movement, “For freedom of movement to be applied in practice, solutions must also be found to complex problems such as asylum and immigration, crime, drugs and terrorism”. The Commission also believed that EU decision-making policy was cumbersome and ineffective but nevertheless expressed its optimism: “There are obvious remedies: a stronger role for the European Parliament; more extensive judicial review by the Court of Justice; qualified majority in the decision making process and better legal instruments than the current joint actions, common positions and international conventions”. In other words the Commission believed that if only new institutional arrangements were introduced, freedom and security would be achieved. On the issue of immigration, the Commission commented that, “the transfer of jurisdiction is particularly necessary in the fields most closely associated with the movement of individuals, such as rules on crossing borders, fighting drugs, immigration, policy on nationals from non-member countries, and asylum”³⁸⁸. It is interesting to note that asylum policy was not

Treaty, Briefing Paper, Migration Policy Group, November, pp. 10-11.

³⁸⁶ In general, however, Member States preferred to continue to develop policy at the intergovernmental level in the field of police and judicial matters “where arrangements for aliens, immigration policy and asylum and common rules for external border ought to be brought under Community competence”. Ibid.

³⁸⁷ Press release: Intergovernmental Conference 1996: Commission reacts to Westendorp report, December 6, 1995, <http://europa.eu.int/en/agenda/igc-home/eu-dc/commissn/press-r.html>, 16.8.2002.

³⁸⁸ “The unanimity rule generally applied at present either paralyses the Council or reduces decisions to the lowest common denominator. Parliament must be more closely involved” and the “Commission should have the power of initiative in all the fields concerned”. Finally, the Commission suggested to Member States that, “the content of the Schengen Agreement should be incorporated into the Treaty”. See Intergovernmental Conference 1996, Commission Opinion. “Reinforcing Political Union and Preparing for

mentioned among the (specific) main objectives the Commission proposed to cover in the field of justice and home affairs. It only encouraged Member States to establish common rules on the entry and residence of non-EC nationals, to mutually recognize judgments by national courts, to adopt measures to combat all forms of crime and fraud, and to improve cooperation between government departments of Member States³⁸⁹. Finally, it believed that, “the best way of attaining all these objectives would be to transfer justice and home affairs to the Community framework, with the exception of judicial cooperation in criminal matters and police cooperation”.

The Parliament brought similar arguments to the debate. Following the Corfu European Council in 1994, the Parliament set up a task force to inform it of the activities of the 1996 Intergovernmental Conference by producing a series of documents (briefing papers). It gave a high priority to institutional reform as well, strongly advocating an increase in power of EU institutions in the field of migration. The Parliament also hoped to increase its own power, at the expense of Member States national governments, in the new Treaty, as it called for “decisive progress” in the field of Justice and Home Affairs. It argued, for example, that “decisions on asylum policy, the crossing of the Member States' external frontiers, rules governing immigration policy towards third country nationals, and action to combat drug trafficking and judicial cooperation in civil matters must be progressively brought within the Community domain”, while action on criminal matters were to remain within the domain of Member States³⁹⁰.

The Parliament also believed it was important that the decision making process be more democratic, suggesting the Council should act by a qualified majority instead of unanimously; that the restrictions imposed upon the Commission in the Treaty of the European Union (TEU) on its right of initiative should be removed; that the jurisdiction of the Court of Justice, the Court of Auditors and the European Parliament should be

Enlargement”, February 28, 1996, p. 12.

³⁸⁹ Ibid., p. 11.

³⁹⁰ Resolution on the functioning of the Treaty on European Union with a view to the 1996 Intergovernmental Conference- Implementation and development of the Union, European Parliament, PE 190 441, No. 39, 17.5.1995.

strengthened³⁹¹. With regard to the Schengen Agreement, the Parliament often expressed its concern that the Agreement was left outside the Community institutions and thus its democratic control was not guaranteed. The Parliament considered it appropriate that the Agreement, “be progressively integrated into Union policy”³⁹².

After analyzing the recommendations made by the European Commission and the Parliament, some questions remain. While the Commission and Parliament sought to increase their power, gaining authority in the field of asylum and migration, they gave little guidance about how they expected the Member States to act in this area. Should policy makers produce a more liberal policy? Should the new arrangements increase access of asylum seekers to EU territory? Moreover, the relations between “efficiency” and asylum policy remained unclear. (I.e. what does it mean for an institution to be effective in this area?) Is the use of qualified majority decision making likely to result in a more liberal asylum policy and how will the exclusive right of initiative of the Commission help to reinforce the rights of asylum seekers?

The Commission and Parliament had good reasons for avoiding defining ‘effective policy’ in the field of asylum. This is partly because it is difficult to imagine how a more effective policy will provide better treatment of asylum seekers or contribute to a more liberal asylum policy, especially if EU policy makers sought to develop a form of democracy which is close to its citizens. As it was clear from national debates that citizens were concerned about migration and sought to restrict the flow of migrants into the EU, the EU realized that to gain the support of its citizens it would need to recommend more restrictive immigration measures. The Parliament and the Commission, which aimed to increase their power and gain more legitimacy for their actions were no longer in the position to advocate for a more liberal policy. They wanted to be positively viewed by the general public and thus concentrated on the fight against an increase of illegal migration and abuse of the right for asylum.

³⁹¹ Ibid. For further details see also Briefing No. 39 on Asylum and Immigration Policy, Task Force on the Intergovernmental Conference, European Parliament, Luxembourg, August 22, 1996, JF/bo/244/96, p. 6.

³⁹² Ibid. See also Briefing No. 27 on the 1996 Intergovernmental Conference and the Schengen Convention, Task Force on the Intergovernmental Conference, European Parliament, Luxembourg, January 30, 1996, JF/bo/197/96, p. 7.

3. Member States' Stance on Cooperation in the Fields of Justice and Home Affairs

The debate among the individual Member States, like the debate in the Commission and the Parliament, was often not about the character of asylum policy (i.e. whether there should be a more or less liberal policy) but about the relations between EU institutions and the Member States. To a large extent EU Member States shared a similar view about asylum policy. The main question at the center of the debate was how much power should be delegated to EU institutions, in particular the European Commission and the European Parliament. The discussion among EU Member States reveals conflicting views on this issue. The different opinions on this subject can be seen to be linked to differing general conceptions about the nature and goals of European integration. These different views are often described by suggesting that there are two basic approaches i.e. Supernationalists/Federalists and Intergovernmentalists. Supernationalists/Federalists, which are often described as Pro European, tend to strongly support intensive cooperation among EU Member States and increasing intervention of EU institutions in policy making. From their perspective the use of common tools can only increase the value of productivity and degree of effectiveness in this area. Intergovernmentalists, however, who are often perceived as Eurosceptics, tend to disagree with this hypothesis, doubting the ability of EU institutions to defend the interests of the national community, in particular on such sensitive issues as immigration and asylum policy. From their perspective, the transfer of power to EU institutions does not necessarily contribute to national interests but might in fact threaten its interests, partly because it would be almost impossible to tackle all of the possible threats that a Member State might face. In their view, the EU can effectively deal with some of the major issues in the field of asylum. However, it is unable to address the specific issues that concern the individual Member State.

Perhaps the best way to capture the divergent views of EU Member States is via the analysis of official documents released by the national governments during the negotiations of the Amsterdam Treaty. The Benelux countries, for example, which have always been in favor of a federal Europe, had little difficulty in accepting, "the transfer of

sovereignty to either the regional or the supranational level³⁹³. This approach, advocating wider cooperation, was also undertaken in a common memorandum adopted by the Prime ministers of Belgium, Luxembourg and the Netherlands at The Hague on March 7 1996. The three countries affirmed their commitment to defend, “the irreversible nature of progress already achieved in European integration” and thus proposed that this process should continue on the basis of close cooperation³⁹⁴. In the field of justice and home affairs they suggested to transfer all matters related to freedom of movement, including immigration, visa and asylum policy to the first pillar. Matters, however, related to criminal law and police cooperation should remain under the third pillar and a number of measures should be adopted to increase the degree of effectiveness³⁹⁵. As far as the Commission is concerned, the memorandum continued, it should have the joint right of initiative on all third pillar matters and the Parliament should be consulted on all proposals before the Council decides on the issue. Finally, they agreed that the Schengen agreement should be incorporated into the TEU.

To some extent the Nordic Bloc, and in particular Denmark, represented the opposite approach to the Benelux countries. Though the Belgium government was against the development of *Europe à la carte* according to which each Member State “may choose from the menu those policy fields most suitable to its needs”³⁹⁶, Denmark along with Britain was not willing to accept the idea of transferring third pillar issues to first pillar jurisdiction, i.e. the Community pillar. Both countries preferred to preserve the three-pillar structure or at least to be able to select those provisions which overlap their interests³⁹⁷. On March 12, 1996 Britain, for example, published a white paper, whose title

³⁹³ Alfred Pijpers and Sophie Vanhoonacker (1997), “The Position of the Benelux Countries” in: Geoffrey Edwards and Alfred Pijpers (eds.), *The Politics of the European Treaty Reform. The 1996 Intergovernmental Conference and Beyond*, Pinter, London, p. 121.

³⁹⁴ *White Paper on the 1996 Intergovernmental Conference, Vol. II Summary of Positions of the Member States of the European Union with a View to the 1996 Intergovernmental Conference*, European Parliament Intergovernmental Conference Task Force. March 29, 1996, p. 25.

³⁹⁵ *Ibid.*, p. 126.

³⁹⁶ *Ibid.*, p. 124.

³⁹⁷ As Larsen notes, during the negotiations of the 1996 IGC, Britain threatened to block the forthcoming enlargement if qualified majority voting were to be accepted in the Council. British Prime Minister John Major declared that he would veto any further extension of majority voting or any weakening of the national veto on EU matters. Henrik Larsen (1999), “British and Danish European Policies in the 1990s”, *European Journal of International Relations*, Vol. 5, No. 4, December 1999, pp. 467- 471.

already indicated its point of departure vis-à-vis the European Integration: “An Association of Nations”. The British government believed that effective policy is needed with regard to terrorism, organized crime, drug trafficking and illegal migration. These dangers, however, should be dealt with according to the third pillar decision-making process. Britain believed that the key actor in the process should remain the nation state and that the roles of the Commission, Parliament and the Court of Justice should not be changed beyond the one accepted in Maastricht³⁹⁸. In a speech held earlier by the Foreign Secretary, Mr. Douglas Hurd, on January 12, 1995, this point was further developed: “The roles of the European Commission, the Council of Ministers, the European Council and the European Parliament and the European Court of Justice should be clearly defined. We want them to perform better the tasks with which they are already entrusted”. Yet, “we do not believe that they need to justify themselves by constantly reaching out to do more. We believe that home and justice matters are best handled not by supranational institutions but by cooperation between governments as set out in the Treaty - a steadily growing cooperation more effective than anything Europe has dreamt of in the past”³⁹⁹.

Denmark had a similar view with regard to the division of power. Danish reservations to the EU were already manifested through the first referendum on the Maastricht Treaty, which resulted in a number of concessions by the EU, among them the concept of citizenship⁴⁰⁰. In the preparation to the Amsterdam treaty the Social Democratic

³⁹⁸ 1996 White Paper, pp., 159, 163.

³⁹⁹ See Speech by the British Foreign Secretary, Mr. Douglas Hurd, to Institut Francais des Relations Internationales, Paris, January 12, 1995. As far as Schengen is concerned Britain decided not to join the Agreement as it failed to control illegal immigration. One prime example of the failure of Schengen to protect the individual state was (and in this respect the principle of Schengen was undermined) when Belgium and Luxembourg re-imposed border controls to prevent the increase of illegal immigrants. The Belgium Interior Minister argued that it was a temporary measure to last just a few weeks. He also argued that the Schengen agreement allowed a member state to opt out for a short period of time in light of special circumstances. For Britain, however, the actions of Belgium and Luxembourg were final proof that the Schengen policy of a common EU external border had failed to control illegal immigration at a time when the sheer number of immigrants and asylum seekers was causing major concern in the UK. A statement by a British government minister in February 2000 made it clear that Britain’s response to the refugee crisis had very little to do with directives from Brussels, stating that, ‘far from being a European treaty, it is the 1951 United Nations convention on refugees – signed by more than 120 countries – that obliges the United Kingdom to assess every asylum claim on its merits’. Colin Pilkington (2001), *Britain in the European Union Today*, Second edition, Manchester University Press, p. 152.

⁴⁰⁰ The concept of joint citizenship was rejected by an overwhelming majority. A survey taken after the 1992 referendum found that only fifteen percent accepted the concept of joint citizenship while seventy three percent were against. See Brigid Laffan (1996) “The Politics of Identity and Political Order in

government defended the national interests and had preferred a functional cooperation on an intergovernmental basis⁴⁰¹. It also emphasized that it wished to see effective decisions in areas such as asylum law, action against cross border crime, drug trafficking and illegal immigration. Denmark continued to advocate for membership in the Schengen Agreement⁴⁰².

Sweden and Finland, though less skeptical than Denmark about the integration process, also placed great emphasis on the intergovernmental nature of the EU. As Petersen observed, “they share a fundamental intergovernmental view of the Union and reject any federal goal for it”⁴⁰³. This approach originated largely from their tradition of neutrality, which was still relatively strong and thus influenced the way they viewed integration. Indeed, as Antola noted, even before they were admitted into the EU the main question in Sweden and Finland was whether “neutrality and membership of the Community can be in harmony”⁴⁰⁴. In the case of Sweden, it would seem that its isolationist attitude also stemmed from the belief that the national parliaments can best represent the will of each nation, and that this institution has a critical democratic role in representing the citizens. For this reason, Sweden did not reject the notion of *Europe à la carte* and truly believed that a more flexible policy making organization would benefit EU members. On one hand Sweden also argued that the Commission should be given more influence in third pillar

Europe”, *Journal of Common Market*, Vol 34, No. 1, March, p. 89.

⁴⁰¹ Nicolay Petersen (1997), “The Nordic Trio and the Future of the EU” in: Edwards and Pijpers (eds), *op.cit.*, p. 167. See also Bases for Negotiations: An open Europe: the 1996 IGC, Memorandum of the Danish Government, December 11, 1995.

⁴⁰² 1996 White Paper, p. 34.

⁴⁰³ Petersen, *op.cit.*, p. 184. During the discussions concerning the accession of Finland and Austria to the EU, the general public opinion in these countries increasingly looked unfavorably on the idea of joining the European Union. According to Ludlow, one of the explanations for the growing opposition to EC membership in Sweden, for instance, was related to the fact that the Swedes seemed to be, “nostalgic for the past, resentful of the present and fearful of the future. In this context, deeper involvement with the EU becomes a further obstacle to the effort to reach 'back' to the prosperity, security and simplicities of a golden age which was as much reality as myth in the 1940s, 1950s and 1960s”. Hence, opposition to EC membership should not be, “confined to the Social democrats. It must be seen as part and parcel of a deeper shift in the attitudes of many Swedes towards some of the most fundamental questions concerning society and politics”. See Peter Ludlow (1994), *The Forth Enlargement. Public Opinion on Membership in the Nordic Candidate Countries*. Center for European Policy Studies, CEPS, Brussels, Paper No. 56, p. 22.

⁴⁰⁴ “Finland and Sweden are basically in the same position. Their neutrality is not based on international treaties but on the political will to pursue the politics of neutrality”. Esko Antola (1990), “Finnish Perspectives on EC-EFTA Relations”, in: Finn Laursen (ed.), *EFTA and the EC: Implications of 1992*, European Institute of Public Administration, Maastricht, p. 172.

issues by giving the Right of Initiative in these areas, and advocated for increased cooperation in the field of criminal law, policing and customs ⁴⁰⁵. On the other hand it was afraid that the Commission would not be able to safeguard the interests of the small countries. This fear was also directed against the Council, as, “on the pretext of efficiency” the balance between small and large countries could be violated. In contrast to Denmark it expressed its wish to join the Schengen Agreement⁴⁰⁶.

Finland’s point of view was also that the, “European Union must first look into the preferences of the citizens”⁴⁰⁷. It believed that Member States should clearly define their objectives and that the transfer of matters covered by the third pillar to the first should be done openly and pragmatically. Finland refused to leave areas important to national sovereignty, such as control of the external border and cooperation against international crime, under the Community (first) pillar⁴⁰⁸. In this respect it also encouraged Member States to ratify the European Convention for police cooperation and wished to join the Dublin Convention. Finland also suggested strengthening the role of the Commission in third pillar issues while stating that, “the currently played role by Parliament in this field is sufficient”⁴⁰⁹. The Court of justice should not gain power in areas where it is likely to affect national sovereignty⁴¹⁰.

Austria was the only county among the new members which supported a supranational approach to asylum. In its, “positions on principle on the Intergovernmental Conference” submitted to the European Council in Turin on March 26, 1996, it stated its belief that policy related to visas and asylum, external frontiers controls, immigration of non-EC nationals residing in the EU, and fighting against drug trafficking and fraud should be “communitarized”. Nevertheless it chose to leave issues such as criminal law under the third pillar. The Austrian government also proposed to revise the decision making

⁴⁰⁵ Communication of the Swedish Government of 30 November 1995 on the 1996 IGC; White Paper 1996, p. 156.

⁴⁰⁶ Ibid., p. 152.

⁴⁰⁷ See Memorandum concerning Finnish Points of View with regard to 1996 Intergovernmental Conference of the European Union, September 18, 1995.

⁴⁰⁸ Ibid.

⁴⁰⁹ White Paper on the 1996 IGC, pp. 141-144.

⁴¹⁰ Ibid.

mechanism to allow a greater use of majority voting on third pillar matters, in particular in the area of fighting organized crime. Though Austria originally suggested that the Commission's Right of Initiative in the field of justice and home affairs should not be extended, it changed its position in 1994⁴¹¹, favoring a greater role for the Commission in third pillar matters and recommended that the Commission's right of initiative be extended to all third pillar issues⁴¹². Austria also suggested that the EU Parliament be better informed and more frequently consulted by the national parliaments. To make the third pillar more transparent, Austria suggested that its confidential documents be published. Finally, Austria suggested that better control be maintained over the third pillar's finances⁴¹³.

Portugal presented only one document to the European Council, "Portugal and the IGC for the revision of the Treaty on European Union - Foreign Ministry document, March 1996". It was however rather clear in presenting its views on future cooperation. It proposed that the EU focus its efforts in three main areas to improve the effectiveness of cooperation under the third pillar. These areas were asylum policy, action against illegal migration and visa policy⁴¹⁴. Portugal suggested that these areas should be subject to community control. Should full communitarization not be attainable, Portugal suggested that legislative instruments and new institutional arrangements be provided. It also preferred majority voting in the above three areas while encouraging in the field of police cooperation new actions. In general, it believed that the Commission and the Parliament

⁴¹¹ See the Guidelines of the Austrian Government on the subjects likely to be dealt with at the 1996 IGC, June 1995; 1996 White Paper, p. 128.

⁴¹² The overwhelming pro EU majority demonstrated during the 1994 EU referendum could partly explain this approach. As Ulram noted, after the final negotiations for Austria's accession to the European Union public opinion was extremely supportive of the European Integration; (In the referendum on June 12, 1994 more than 66% of the Austrians voted for joining the European Union.) Nonetheless, a closer view of the perceived advantages and disadvantages of EU membership shows that Austrians were especially concerned about the effect of EU membership on immigration policy. Peter A. Ulram (1999), "Public Opinion about the EU in Austria" in: Paul Luif and Karin Obergelsbacher (eds.) *The Initial Years of EU Membership*, Federal Academy of Public Administration, Vienna, pp. 140-143.

⁴¹³ *Ibid.*, p. 131.

⁴¹⁴ Portugal and the IGC for the Revision of the Treaty on European Union, Foreign Ministry document, March 1996

should play a greater role in the field of asylum. Like Austria, Portugal thought that the public should be better informed concerning the activity taken in third pillar matters⁴¹⁵.

Italy shared a similar vision. In several documents published between February 1995 and March 18, it stressed the need to simplify the decision making process in the Council in justice and home affairs and strengthen the binding nature of legal instruments. These views were also repeated in a joint declaration with Germany on July 15, 1995⁴¹⁶. In its declaration of its position on March 18, the Italian government sought to develop the concept of citizenship and made it clear that, in its view, European citizenship was not likely to replace national citizenship⁴¹⁷. Italy also proposed to gradually transfer immigration and asylum policy making from the third to the first pillar and to introduce legally binding instruments. Additionally, it believed that Member States should empower the Court of Justice to rule on justice and home affairs⁴¹⁸.

In a document released by the Spanish Government on March 2, 1995, “The Intergovernmental Conference: starting points for a discussion”, Spain's point of departure on the subject of EU integration was clearly different from its neighbors. In contrast to Italy and Portugal, it rejected the idea that unanimity voting should be replaced with majority voting in the fields of immigration and asylum. From its perspective, if unanimity voting were replaced with qualified majority voting, this should be the case only with regard to civil and criminal law. Otherwise, decisions on asylum and immigration should be accepted in unanimity, especially as long as some EU members allow asylum to be granted to nationals of other Member States⁴¹⁹. In a later Memorandum Spain argued that the right of asylum should be withheld from EU nationals, as the EU upholds the idea of respect for human rights⁴²⁰. Though not

⁴¹⁵ 1996 White Paper, p. 139.

⁴¹⁶ See Joint Declaration of by the German and Italian Foreign Ministers regarding the 1996 Intergovernmental Conference, July 15, 1995

⁴¹⁷ See Position of the Italian Government on the IGC for the revision of the Treaties, March 18, 1996.

⁴¹⁸ See also 1996 White Paper, p. 102.

⁴¹⁹ “The Intergovernmental Conference: starting points for a discussion”, March 2, 1995; 1996 White Paper, p. 61.

⁴²⁰ See Memorandum espagnol sur la non reconnaissance du droit d'asile pour les citoyens de l'Union, IGC Document, Brussels, CONF/3826/97, 24.2.1997.

mentioned explicitly, this memorandum was directed against the Belgium government, which had granted asylum to ETA members. In its last document submitted before the negotiations started on March 28, “Elements for a Spanish position at the 1996 Intergovernmental Conference”, it declared that anti- terrorism should be the primary objective of European police cooperation and thus there should be close intergovernmental cooperation in civil and criminal law. Spain also favored possible harmonization in the field of immigration and asylum policy and external borders, joint Right of Initiative to the Commission, consultation with the Parliament and Judicial control by the Court of Justice⁴²¹.

Germany and France, as Geddes rightly formulated, were as usual, “the key IGC players”⁴²² as eventually most of their proposals⁴²³ were accepted. In a joint letter on December 6 1995 from the President of France, Jacques Chirac and the Chancellor of Germany, Helmut Kohl, it was recommended that the IGC concentrate on four main objectives: achieving a common foreign and security policy, the creation of an area where the free movement of EU nationals is guaranteed, improving the efficiency of EU institutions, and bringing “Europe” closer to its citizens. Chirac and Kohl also believed that a differentiated integration is possible and even desirable and thus the EU should introduce general provisions to enable those Member States which have the will and the capacity to develop closer cooperation among themselves to do so within a single institutional framework⁴²⁴.

⁴²¹ 1996 White Paper., p. 76.

⁴²² Geddes, *op.cit.*, p. 115.

⁴²³ Helmut Kohl, the Chancellor of Germany, was fairly content with the results of Amsterdam in the field of justice and home affairs. “Auch im Bereich der Innen- und Justizpolitik - einem Schlüsselkapitel des neuen Vertrags - sind wir zu guten Ergebnissen gekommen”. Wir haben darüber hinaus die Überführung der Schengen-Zusammenarbeit in den institutionellen Rahmen der EU vereinbart. In den Bereichen Asyl- und Visapolitik, Einwanderung und bei der Zusammenarbeit von Justiz und Zollbehörden hat Amsterdam die Grundlagen für ein effektives gemeinsames Handeln gelegt. Dabei konnten und mussten wir zur Wahrung unserer Interessen sicherstellen, dass in Fragen der Einwanderung und des Asyls auch künftig das Prinzip der Einstimmigkeit gilt”. Regierungserklärung von Bundeskanzler Dr. Helmut Kohl vor dem Deutschen Bundestag zu den Ergebnissen des Europäischen Rates von Amsterdam, Bulletin des Presse- und Informationsamts der Bundesregierung, Nr. 55, July 1, 1997.

⁴²⁴ 1996 White Paper, pp. 87-88. See also Letter of December 6, 1995 from the President of French Republic, Jacques Chirac and the Chancellor of the Federal Republic of Germany, Helmut Kohl.

France did not present any official document to the IGC but the French government's guidelines for the 1996 IGC were published in *Le Figaro* on February 20, 1996. Among these guidelines was the proposal that asylum and immigration policy be brought under the Community jurisdiction. With regard to police cooperation, the guidelines suggested that the existing arrangement be improved by increasing cooperation in legal matters. Thus, for example, the guidelines suggested that Member States coordinate their civil and criminal codes. The guidelines also suggested that EU institutions, such as the Commission, should have joint Right of Initiative in the area of civil and criminal law, while the national parliaments would retain the right to draft the actual text. Finally, the guidelines once again reiterated its lack of objection with regard to different forms of cooperation among EU Member States⁴²⁵.

Germany's basic positions were published in the Manifesto of the CDU/CSU Group in the Bundestag of September 1, 1994. The program presented by Mr Schäubel introduced the idea of a "multi speed" Europe, the idea being to strengthen the hard core of the European Union including Germany, France and the Benelux countries⁴²⁶. The document also proposed to concentrate on combating organized crime, establishing a common policy on asylum, and combating unemployment. In another discussion document, the steering committee of the CDU/CSU Parliamentary Group in the Bundestag reflected also on the cooperation in the field of third pillar. The basic idea was to bring Member States policies in the field closer. Thus, for example, they proposed to gradually grant the Commission the right of initiative on issues covered by K.1 that is immigration, asylum, and police cooperation in judicial and criminal matters. Moreover, the Group favored a

⁴²⁵ 1996 White Paper, pp. 84-90.

⁴²⁶ When the Schäubel-Lamers paper was released, the early reactions of most EU Member States were negative mainly because the paper mentioned Germany, France and Benelux states as a possible hard core. Within a week, however, prominent politicians launched two other flexible visions. The first was of Prime Minister Edward Balladour who called for a Europe of concentric circles. His model was based on three circles of cooperation, which would vary according to the degree of integration. The final aim, however, would be to integrate the three into one. The second vision was submitted by the British Prime Minister, John Major calling for a greater flexibility in a form of a la carte. He proposed that EU Member States should only commit themselves to a minimum number of common policies allowing for a greater freedom of choice. See Alexander C-G Stubb (1997), "The 1996 Intergovernmental Conference and the Management of Flexible Integration", *Journal of European Public Policy*, Vol. 4. No. 1, March, pp. 41-42. See also Bertelsmann Stiftung (1995) (ed.), *Das neue Europa - Strategien differenzierter Integration*, Verlag Bertelsmann Stiftung, Gütersloh, pp. 42-48.

progressive transition from intergovernmental cooperation to Community competence in the Council and the adoption of decisions on asylum via majority voting. It was also suggested that the European Parliament be granted the right of compulsory prior consultation in all the areas covered by article K.1 of the EU Treaty. In addition, the document raised the possibility of combating crime at the European level, and called for EUROPOL to conclude uniform legislation on border crossing and asylum policy.

Finally, the document contained the proposal to make existing legislation among the Member States as uniform as possible and to take into account geopolitical differences. The document affirmed that key issues arising in discussions of asylum, visa and immigration policy could be resolved only at a community level. On March 26, 1996 the German Minister of Foreign Affairs submitted the last document with regard to the 1996 IGC, “Germany's Objectives for the Intergovernmental Conference”. Concerning the third pillar, Germany stressed the fact that the general public expected progress in the fight against transnational crime and drug trafficking. The government also supported closer police cooperation, with the long-term objective of creating a European police office with operational powers, harmonization of civil and criminal legislation, and bringing visa asylum, customs cooperation and immigration under the Community pillar. A greater consultative role for the Commission, the Court of Justice and the European Parliament was also suggested⁴²⁷.

4. The 1997 Amsterdam Treaty: Setting a New Model for Cooperation among EU Member States

The Treaty of Amsterdam largely represented the views of the leading political actors in the EU: Germany, France and Britain. The stated aim was to organize a system which would pursue further cooperation in the field of asylum. At the same time, Member States established boundaries to limit intervention by EU institutions in their internal affairs and imposed limitations under the pressure of Britain. The result has been a “differentiated” integration approach. In principle there has been a clear development from pure

⁴²⁷ See 1996 White Paper pp. 39-49; Germany's Objectives for the Intergovernmental Conference, March 26, 1996.

intergovernmental cooperation to common policies, highlighted by the creation - in the Treaty of Amsterdam - of a legal basis for the development of a Common Migration and Asylum Policy⁴²⁸. However, the dominant influence of “differentiation” is evident from the wording of the section entitled, “Visas, asylum, immigration and other policies related to movement of persons”, where the Treaty merely stipulated that within a period of five years after the entry into force of the Treaty, the Council is entitled - on the basis of an unanimous vote - to take measures concerning asylum, such as minimum standards for qualifying for refugee status, minimum standards on procedures for granting and withdrawing asylum, minimum standards on the reception of asylum seekers and criteria and mechanisms for allocating responsibility for an asylum claim. The main direction of this policy is easy to discern: the preference of minimum standards to harmonized ones. Moreover, in deciding to move immigration and asylum from the third to the first pillar, EU Member States did not yet grant full competence to the Community to decide on migration matters. Finally, as stated above, unanimity voting on these issues continued to be maintained. As a result, the individual Member States will still to a large extent decide asylum policy. In addition, in a number of protocols added to the Amsterdam Treaty, Britain, Ireland and Denmark clearly stated that they do not feel obligated to adopt all measures taken by the EU relating to asylum⁴²⁹. This opt-out clause is likely to further block the process of harmonization within the EU. It goes without saying that despite this lack of further progress towards a common EU asylum policy, the restrictions established by the Dublin Convention were not loosened.

5. The Division of Powers under Amsterdam

The Amsterdam Treaty addressed much of the criticism of the Commission and the Parliament on EU decision-making mechanism during the 1996 IGC. But the desire to make the work of the European Union more effective ran against the desire of Member States to achieve a more democratic system responsive to the preferences of the citizens of the individual Member States. Member States were reluctant to transfer all matters

⁴²⁸ Thomas Fischer and Nicole Schley (1999), “Innen- und Justizpolitik” in: Werner Weidenfeld (ed.), *Europa föderal organisieren. Ein neues Kompetenz- und Vertragsgefüge für die Europäische Union*, Europa Union Verlag, pp. 186-187.

⁴²⁹ Kris Pollet (2000), “The Amsterdam Treaty and Immigration and Asylum Policies: A legal Analysis“, *Revue des affaires européennes*, April, p. 68.

regarding justice and home affairs to the first pillar. While this reluctance is particularly obvious in the fields of judicial and police cooperation, which remained under the third pillar framework, even decisions on asylum and migration policy, though transferred to the first (community) pillar, were not, in practice, totally under the jurisdiction of this pillar (which usually grants considerable freedom to EU institutions), but rather were subject to several constraints dictated by Member States. Apart from this, some Member States received special status, e.g. Britain, Ireland and Denmark were not compelled to participate in the policy making of the first pillar and thus were free of the consequences of the planned 2004 EU Common Immigration and Asylum policy.

5.1. The new status of the European Commission: a stronger engagement in shaping asylum policy

Under the Maastricht Treaty the Commission shared the Right of Initiative with Member States only in areas associated with cooperation in K1 (1) to (6) i.e. issues covering asylum policy, entrance and residence conditions for migrants, efforts to combat illegal migration, drug trafficking and fraud and judicial cooperation in civil matters. Thus, the Council could act on a proposal either from the Commission or a Member State. However, on issues related to judicial cooperation in criminal matters as well as customs and police cooperation, only Member States could initiate proposals for consideration by the Council. The Amsterdam Treaty transferred most of the issues originally covered by the third pillar to the Community (first) pillar. But unlike other policy areas covered under the first pillar, where the Commission enjoyed the exclusive Right of Initiative, this exclusive right was to be granted only after a period of five years for asylum issues. During this waiting period the Commission was required to share the Right of Initiative with Member States in the field of asylum. After this transition period, however, the Council would only act on proposals coming directly from the Commission, and while Member States could still submit proposals, these first had to be examined by the Commission before being sent to the Council⁴³⁰. Since asylum was now subject to the

⁴³⁰ However, as Cornelis D. Jong rightly observed, the Commission's power is hampered by the fact that the Council can choose not to accept a Commission proposal or to "water it down". In these situations the

first pillar the Commission was also entitled to propose a new set of measures such as regulations, directives, decisions, recommendations and opinions, for example⁴³¹. These to some extent made it easier for Member States to cooperate in the field of asylum, as they felt that their concerns could be presented to the Council, albeit through the medium of the Commission. Moreover, in contrast to third pillar measures, which were often non-binding, the new measures had legal ramifications. Nonetheless, the decision making process required the approval of all Member States as it was still subject to unanimous vote.

5.2. The limited role of the European Parliament

The role of the Parliament in the decision making process of the third pillar was insignificant. This position remained weak even after the signing of Amsterdam. Its major activity remained consultation⁴³², which, since the Council is not obliged to take its opinions into account, had little impact on the decision making process. Moreover, as

Commission does not have the power to act against the Council, but does retain the right to withdraw its proposal. However, as long as Member States retain the Right of Initiative, the Council can act on the basis of proposals from one or more Member States. See Cornelis D. Jong (2000), "Harmonization of Asylum and Immigration Policies: The Long and Widening Road from Amsterdam via Vienna to Tampere, in: Peter J. van Krieken (ed.), *The Asylum Acquis Handbook. The Foundation for a Common European Asylum Policy*, T.M.C. Asser Press, The Hague, p. 23.

⁴³¹ The legal instruments provided under the first pillar are different than those provided in the third pillar. Whereas in the third pillar the Council was limited in its ability to adopt legally binding measures on asylum, under the first pillar it was possible for the Council to impose legally binding measures. Regulations are the most important legal measures under EC law, and can be compared with a national law. They are directly applicable to all Member States and cannot be overruled by national law (that is, community law has primacy over national law.) Regulations must also be applied uniformly. Since a regulation impinges on state sovereignty, it can be imposed only where a treaty specifically authorizes it. Before the transfer of asylum matters to the first pillar, regulations were imposed in competition and trade policy. Another set of legally binding instruments is directives that, in contrast to regulation, are more general in nature. Also, whereas regulations apply to individuals and private sectors as well as the Member States themselves, directives are addressed to Member States only. Finally, in contrast to regulations, directives allow Member States considerable freedom concerning implementation. In other words, directives are used to set the objectives while allowing Member States to decide how to achieve them in practice. Directives are often used to harmonize or approximate national legislation. Decisions are also binding instruments but are usually addressed to Member States. However, in certain areas decisions can be addressed to individuals. For example, in the area of economic competition policy the community can bring a firm to court for alleged violations. Directives are also used to create minimum standards applicable to all Member States, aiming to bring Member States closer, while decisions usually address more specific concerns.

⁴³² "During the transitional period after the entry into force of the treaty of Amsterdam the Council shall act unanimously after consulting the European Parliament". See Article 73o Amsterdam Treaty.

Fernhout noted, it was left to the discretion of the Presidency and the Commission to decide how much information the Parliament receives, and when. In general it would seem that the Council, “has a very restrictive attitude in this respect and devotes a great deal of time to discussing whether a certain document can be sent to the European Parliament for information purposes”⁴³³.

Article 73o of the Amsterdam Treaty contained the possibility of including the Parliament in co-decision procedures to strengthen its position. Thus, “The Council acting unanimously after consulting the European Parliament, shall take a decision with a view to providing for all or parts of the areas covered by this title to be governed by the procedure refereed in Article 189b”. Article 189b referred to co-decision procedures, which granted veto power to both the Parliament and the Council. But this option requires unanimity among Member States⁴³⁴. Moreover, this was only available during the first five years after the Treaty entered into force⁴³⁵. The reluctance of Member States to give the Parliament more responsibility in policymaking, indicates how little trust Member States have in this institution. The individual Member States clearly prefer to rely on their national parliaments for the development of asylum policy. From their perspective, a significant increase in the power of Parliament will ultimately limit the freedom of action of the national parliament⁴³⁶. This shift may occur in the future but for the moment Member States have no desire to grant more power to the Parliament.

⁴³³ See R. Fernhout (1996), “Justice and Home Affairs: Immigration and Asylum Policy. From JHA co-operation to Communitarisation” in: *Reforming the Treaty on European Union. The Legal Debate*, Jan A. Winter, Deirdre M. Curtin, Alfred E. Kellermann and Bruno de Witte (eds.), Kluwer Law International, The Hague, p. 388.

⁴³⁴ Michael Shackleton and Tapio Raunio (2003), Co-decision since Amsterdam: a laboratory for institutional innovation and change”, *Journal of European Public Policy*, Vol. 10, No. 2, April, pp. 172-173.

⁴³⁵ Stefan Griller, Dimitri P. Droutsas, Gerda Falkner, Kartin Forgó and Micahel Nantwich (2000) (eds.), *The Treaty of Amsterdam. Facts, Analysis, Prospects*, Springer, New York, pp. 474-475.

⁴³⁶ The European Parliament has only the right to be consulted. At the same time, the rights of the national parliaments had increased, as after Amsterdam they were permitted to, “give comments on draft text before their decision in the Council. This change coincides with the fundamental tasks of the 1996 IGC, to make a treaty with the aim of making decision making more democratic and transparent”. See Laurent Jan Brinkhorst (1997). “Pillar III” in *Making Sense of Amsterdam*, The European Policy Centre, Brussels, p. 49.

5.3. Council of Ministers: still the main actor

One of the surprises of the Amsterdam Treaty was related to the fact that decisions in the field of asylum were still to be taken with unanimity. Though Member States originally intended to simplify the process by establishing qualified majority voting, in the end they appeared to favor unanimity rule. This attitude had much to do with the position of one of the most important EU Member State, i.e. Germany, which was concerned about the consequences of qualified majority voting and refused to relinquish its veto⁴³⁷. As some scholars noted, making a decision on the basis of unanimity is most likely to affect the substance of decisions, “given the fact that a considerable number of compromises might be necessary in order to achieve the required consensus”⁴³⁸. On a number of issues, however, such as visa policy, Member States had the possibility, as already anticipated in the Treaty of Maastricht⁴³⁹, to act by a qualified majority. Article 100c stated that after a period of five years from the entry of the Treaty into force, Member States could act by a qualified majority and adopt a list of third countries whose nationals must be in possession of visas when crossing the external borders⁴⁴⁰.

5.4. The increasing authority of the European Court of Justice

Under the Treaty of Maastricht, the Court of Justice (ECJ) had no jurisdiction in the field of justice and home affairs, though the treaty suggested that Member States allow the

⁴³⁷ Germany had altered its policy by resisting the extended application of qualified majority voting. Some scholars argue “it was the price that Helmut Kohl had to pay to his Länder representative in order to secure safe passage through the *Bundesrat* and not to add further burdens on an already difficult struggle for the EMU”.

⁴³⁸ Griller, *op.cit.*, p. 474. As Gudrun Hentges comments, “the step by step transfer of the third pillar into the first does not have as a consequence a change in the exclusive competence of the European Council (that is, the interior and justice ministers of the EU States) in questions of migration and refugee policy. In spite of the transfer of internal justice policy to the first pillar, the European Council will still remain the deciding committee that takes decisions about migration and refugee policy”. Gudrun Hentges (2002), “Refugee and Asylum Policy Influenced by Europeanisation” in: Evans Foundation (ed.) *Europe’s New Racism? Causes, Manifestations and Solutions*, Berghahn Books, New York, p. 115. One of the main criticism directed against the Amsterdam Treaty was the limited number of changes made to voting rules within the Council: only 5 out of a possible 48 articles were changed from unanimity to qualified majority voting. Philippa Sherrington (2000), *The Council of Ministers. Political Authority in the European Union*, Pinter, London, p. 175.

⁴³⁹ Article 100c provided for a transitional period until the Council could shift to qualified majority mechanism. “From 1 January 1996, the Council shall adopt the decisions referred to in paragraph 1 by a qualified majority”. Maastricht Treaty.

⁴⁴⁰ In addition it needed to have a uniform format for visas. See Article 73 J Amsterdam Treaty.

Court to extend its jurisdiction to Convention matters (Article K.3 para. 2). In general, Member States failed to agree about the power of the Court. While some members favored greater involvement of the Court of Justice others were against. It was even suggested that the debate about the competence of the Court contributed to the delay on the draft convention on the crossing of external borders⁴⁴¹. The Amsterdam Treaty improved the position of the Court, allowing it to participate in asylum policy making. But in contrast to most pillar one issues where any national court can ask for a preliminary ruling from the Court of Justice, in the transfer of justice and home affairs to the first pillar, the national courts can ask for preliminary rulings through the supreme court only⁴⁴². There is a good reason to believe that this restriction was designed to prevent the frequent use of the court and thus abuse of procedures. In other words, EU Member States feared that if a lower court retained the ability to ask the opinion of the Court of Justice this might delay the stay of asylum seekers in a Member State⁴⁴³. As the general opinion was that one must look for a remedy at the national level, the Court was given jurisdiction only where there is no judicial remedy under national law. In many ways, this limitation is an exception to the rule since, for example, in the field of goods any national court can go to the ECJ and ask for its opinion⁴⁴⁴.

6. The Development of a Common Immigration and Asylum Policy

6.1. The 1998 Strategy Paper and the Commission Action plan: Outlines for a Community Policy

On July 1, 1998 the Austrian Presidency submitted a draft strategy paper on immigration and asylum policy as a basis for the European Union's future immigration policy. The delegations on the K.4 Committee, Justice and home Affairs Council were requested to discuss and comment on this paper by the beginning of September. Although the draft was classified as confidential it was leaked and led to considerable criticism from various

⁴⁴¹ See Fernhout, *op.cit.*, pp. 388-389.

⁴⁴² Since Britain did not declare its willingness to opt in it is not obliged to accept the judgment of the Court of Justice.

⁴⁴³ Baldwin-Edwards, *op.cit.*, p. 505.

⁴⁴⁴ Jonas Tallberg (2002), "Delegation to Supranational Institutions: why, how and with what consequences?", *West European Politic*, Vol. 25, No. 1, January, p.31.

international organizations and the UNHCR for its restrictive concept of refugee protection. On the introduction of the Strategy Paper, the Presidency noted that the current migration policies of EU Member States suffer from major weaknesses and thus, “a number of particularly pressing issues need to be addressed immediately at a European level”. The strategy paper looked back to the 1994 Commission Communication and criticized the EU for failing to implement the suggestions made by the European Commission at the time. Though the drafters of the Strategy Paper, for example, assumed that the EU needed to respond to the migration challenge more efficiently by harmonizing the data on migration movements, “the results were only partially successful”⁴⁴⁵. “The Union is still unable to give exact details on the number of illegal migrants in EU territory” and “cooperation with the transit states has not succeeded in stopping the influx of illegal migrants”⁴⁴⁶.

With regard to asylum the report believed that the number of asylum seekers had decreased thanks to the new legislative measures implemented by individual Member States, as asylum reforms in many countries now made that option less attractive⁴⁴⁷. Despite, however, the legislative changes in Member States the report noted that, “it has been practically impossible to achieve the really crucial breakthrough in preventing or reducing the number of manifestly unfounded applications for asylum”. Moreover, it was noted that a legal provision was still lacking with regard to the concept of temporary admission. To deal with the above deficiencies it was suggested to adopt a global approach, and achieve the reduction of migratory pressures in three main ways: managing migration movement, curbing illegal migration, and introducing new refugee protection. The first way to reduce the migratory pressures begins, according to the report, “in the country of origin when a visa is granted”⁴⁴⁸. Thus it concluded that a list of states be drawn up whose nationals require a visa. In addition, “a successful migration policy can

⁴⁴⁵ “CIREA and CIREFI are still not fully satisfactory and the systems are not sufficient” (point 2.1.). The Austrian Presidency Document on Migration/asylum/refugees, European Council Brussels, July 1, 1998, The Council 9809/98 OR.d, Limite, CK4 27, Asim 170, <http://www.groenlinks.nl/partij/europa/austrian1a.htm> 14.10.1998, section 4.9. Priority Issues, paragraph 112.

⁴⁴⁶ “Effective measures to combat illegal employment have still not be taken and speeding up of the voluntary return of illegal immigrants was as strikingly unsuccessful”. Section 2.1. paragraphes 17-19.

⁴⁴⁷ See section 2.1. paragraph 11.

⁴⁴⁸ Section 4.4. paragraph 86.

never be implemented solely by one party involved in this process⁴⁴⁹. For this reason, “EU's bilateral agreements with third states must incorporate the migration aspect⁴⁵⁰. It was suggested, for example, that economic aid should be linked to the degree of cooperation in the field of migration: “Economic aid will have to be made dependent on visa questions, greater border crossing facility on guarantees of readmission, air connections on border control standards and willingness to provide economic cooperation on effective measures to reduce push factors⁴⁵¹. The paper also offered a model of “concentric circles” of migration policy. While Schengen countries lay down the most intensive control measures, “their neighbors the associated countries should gradually be linked into a similar system which should be brought increasingly into line with the first's circle standards, particularly with regard to visa, border control and readmission policies”. A third circle of states, consisting of the CIS area, Turkey and North Africa, will concentrate primarily on transit checks and combating illegal networks, while the fourth circle, composed of Middle Eastern countries, China and Black Africa concentrate on, “eliminating push factors⁴⁵².”

To prevent the entrance of illegal migration it was suggested that part of the problem stemmed from the fact that Member States were unable to introduce uniform penalties. It was also acknowledged that the vast majority of illegal immigrants entered EU territory through third countries rather than through their own country of origin. Thus, it was, “necessary to involve the transit states in a control system⁴⁵³. The next filter in the control process is the control carried out at the external borders of Union territory: “It is essential that the Schengen standard is implemented in its entirety and constantly improved at all external European union borders⁴⁵⁴. It was recognized that an essential aspect of any effective system of entry control must include mechanisms to prevent the circumvention of the existing rules and to make their breach unattractive⁴⁵⁵. With regard to asylum, the report noted that a new approach is needed for refugee protection. The

⁴⁴⁹ Section 4.1. Paragraph 58.

⁴⁵⁰ Section 4.1. paragraph 59.

⁴⁵¹ Ibid.

⁴⁵² Section 4.1. paragraph 60.

⁴⁵³ Section 4.4. paragraph 89.

⁴⁵⁴ Section 4.4. paragraph 90.

⁴⁵⁵ Section 4.4. paragraph 92.

main argument in this respect was whether the Geneva Convention was still adequate to deal with the present realities: “Unlike the traditional claims of persecution by the state or those on particular grounds spelled out in the Geneva Convention, these new threats are much more difficult to prove or disprove”⁴⁵⁶. Moreover, the approach of the Geneva Convention, according to which a person recognized as a refugee can, “settle permanently in the host country, does not match the widely held idea that it should be possible and internationally acceptable for such people to return home within a foreseeable period of time”⁴⁵⁷. From the point of view of the Austrian Presidency, asylum law has, “to meet the requirements of the present time rather than the geopolitical situation of yesterday”. It was felt necessary to build a comprehensive legal instrument which, “is based on minimum standards, a uniform notion of what constitutes a refugee, a law on temporary protection and a shared belief in joint responsibility”⁴⁵⁸. As far as the Geneva Convention was concerned, the paper explicitly stated that the “asylum 'business'” could be, “transformed from a huge machine which at considerable expense produces no results at all for 90% of the problem cases it handles back into an instrument of speedy assistance in the framework of the political possibilities”⁴⁵⁹. This “can only be implemented on the basis of a Convention supplementing, amending or replacing the Geneva Convention”⁴⁶⁰.

In the last section of the report, under the title “Operational Plan”, the Council and the Commission prepared a list of possible legal acts. One of the suggestions in this respect was to prepare an asylum convention which would cover the consequences of inter-ethnic displacement, non-state persecution, assessment of national flight alternatives, tightening of procedures, and quota policy⁴⁶¹. Another matter which was discussed was the

⁴⁵⁶ Section 4.6. paragraph 101.

⁴⁵⁷ Section 4.9 paragraph 127.

⁴⁵⁸ Section 4.9. paragraph 125.

⁴⁵⁹ Section 4.6. paragraph 102.

⁴⁶⁰ Section 4.6. paragraph 103.

⁴⁶¹ The convention would also cover legislation concerning refugee acceptance on humanitarian grounds, permission to remain in the host country in individual cases, the protection of displaced persons, the position of legal immigrants unfounded claims for asylum, and their legal consequences for the applicants. Section 5.3. For a detailed analysis see Steffen Angenendt (2002), “Die Europäische Union als Einwanderungsgebiet” in: Werner Weidenfeld (ed.), *Europa-Handbuch*, Bundeszentrale für politische Bildung, Bonn, pp. 550-551.

standardization of the social systems among EU members. According to the report, “differing levels of welfare provision for asylum seekers is one of the main causes of secondary movements between Union Member States”. Therefore, it noted, that the Dublin system and control of mass migration would be operable only if, “what is on offer is more or less identical in all European states”.

The UNHCR reacted to the Austrian Presidency Strategy Paper with growing dissatisfaction. It agreed with the general assumption that the policies with regard to migration prevention and protection, “need to be considered in a comprehensive manner”⁴⁶². Yet it was concerned that, “asylum policy and its protection dimension were to be subordinated to the political, security and socio economic dimensions of migration policy, as the Presidency paper appears to suggest”. In general it opposed the idea of asylum policy, “based on a quota system, rather than a subjective individual right based on a legal instrument”. Moreover, it believed that the view expressed in the paper that asylum procedures are, “too costly and complicated and that any asylum seeker arriving in irregular manner should be removed to a third country outside the EU”, violates the principle of non-refoulement. It acknowledged that the 1951 convention, “may have to be supplemented with other legal instruments” in order to address the protection of asylum seekers who cannot be protected under the 1951 Convention. At the same time it believed that the 1951 Geneva Convention, “is still a perfectly valid and viable legal instrument to address the protection needs of persons fleeing, inter alia, internal armed conflict, ethnic tensions, civil war or persecution by non state agents”⁴⁶³.

Amnesty International’s preliminary observations tended to be even more critical. Its main argument was that the very act of creating new protection with the assumption that asylum seekers are a burden contradicts the idea of human rights and the liberal stance of the Geneva Convention vis-à-vis asylum seekers. The Bonn Office of Amnesty International, for example, believed that despite the fact that the Geneva Convention has had difficulty in dealing with modern refugee problems it could still adjust itself to the

⁴⁶² Preliminary observations by UNHCR on the Austrian Presidency Strategy Paper on Immigration and Asylum Policy, UNHCR Brussels, September 9, 1998.

⁴⁶³ Ibid.

new developments. Thus, in its view, there was no reason to run the risk of endangering the right of asylum⁴⁶⁴.

Notwithstanding the critique directed against the Strategy Paper, most of its proposals were finally adopted, first by the action plan of the Commission and later in the proposals and through legal instruments. In December 1998, the Commission and the Council presented an *Action Plan* which to a large extent resembled the proposals described in the initial report. The main difference between those reports was in the wording, as it was thought that by using weaker language it could avoid further criticism. Thus, for example, instead of focusing on the negative aspects of current migration policy and identifying the migrants as a problem, the Commission argued that Action Plan was primarily intended to defend ideas of freedom and justice. The Council linked asylum policy with the subjective feeling of security of the European Peoples and stated that the Action Plan was primarily designed to reflect on, “the philosophy inherent in the concept of an area of freedom and security”. These notions, according to the Commission, are interlinked: “freedom loses much of its meaning if it cannot be enjoyed in a secure environment and with the full backing of all Union citizens” and residents should realize that, “these three inseparable concepts have one common dominator 'people' and one cannot be achieved in full without the other two”. Thus, “maintaining the right balance between them must be the guiding thread for Union action”. The declared objective, as described in the plan, was not to reduce the number of asylum seekers but to have an area where, “people can feel free and secure”. One of the ways of achieving this is by preventing and combating crime “at the appreciate level, 'organised or otherwise', in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud”.

⁴⁶⁴ “amnesty international lehnt diesen Vorschlag als einschneidenden Rückschritt des internationalen Flüchtlingsrechts ab. Die Genfer Flüchtlingskonvention (GFK) ist in schwierigen Zeiten entstanden und hat sich in schwierigen Zeiten weitergehend bewährt. Sie könnte sicherlich den neueren Entwicklungen angepasst und verbessert werden. Es besteht aber kein Anlaß, am Schutzrecht der Flüchtlinge gegenüber den Staatengemeinschaften zu rütteln”. See Wolfgang Grenz, Erste Stellungnahme zum Strategiepapier der österreichischen EU- Präsidentschaft zur Migrations- und Asylpolitik vom 1.7.1998, amnesty international, Referat für politische Flüchtlinge, Sektion der Bundesrepublik Deutschland, September 4, 1998.

The Action Plan divided the measures to be implemented into two time periods: two and five years. In the field of asylum, short-term measures included those found to be effective in the Dublin Convention. The Commission did not explicitly mention the need to change the Convention but it was stated that measures to be taken within five years of the entry into force of the Treaty included provisions mentioned in Amsterdam, i.e. adoption of minimum standards with respect to the qualifications of nationals of third countries as refugees, and defining minimum standards for subsidiary protection to persons in need of international protection⁴⁶⁵.

6.2. The Commission's Proposals for the 2004 Common Immigration and Asylum Policy: Adopting Common Measures on Asylum

6.2.1. The Eurodac system

After the ratification of the Treaty of Amsterdam in May 1999, the Commission was able to submit a series of proposals on the basis of Article 63 of the Treaty. The main objective of these proposals was to introduce minimum standards in the area of asylum, in particular with regard to the reception of asylum seekers, new procedures in Member States for granting and withdrawing refugee status and for evaluating the qualification of nationals of third countries. The first proposal submitted for Council Regulation was for the establishment of Eurodac system, a procedure to make use of fingerprints to facilitate effective application of the Dublin Convention, - a recommendation already submitted to the Council on May 26, 1999⁴⁶⁶.

The Dublin Convention, signed in 1990 and ratified in 1997, allowed asylum seekers to submit only one application in EU territory. Member States, however, could not assure that asylum seekers would apply only once. Thus, they fear “asylum shopping”, that is, multiple applications by asylum seekers in various EU Member States. For this reason

⁴⁶⁵ See also Christoph Gusy and Hans Arnold (2002), “Die Rechts- und Asylpolitik der Europäischen Union”, in: Werner Weidenfeld (ed.). *Europa-Handbuch*, Bundeszentrale für politische Bildung, Bonn, p. 532.

⁴⁶⁶ Commission proposal for a Council Regulation for the establishment of Eurodac, May 26, 1999, COM 1999 260, *Official Journal of the European Community (OJ)*, 2000 C 337 E/37.

Member States established a new control mechanism to determine whether an applicant has already submitted an application in EU territory.

The Eurodac system, according to the proposal, would consist of a central database where fingerprints would be digitally processed. When an asylum seeker submits his application, his fingerprints would be transmitted by the Member State to the Eurodac central unit to be compared with the fingerprints already in the system, a match meant that he has already applied for asylum in a EU Member State and thus is no longer entitled to asylum⁴⁶⁷. The Council approved the proposal after minor revisions on December 2, 1999, and it entered into force on December 15, 2000⁴⁶⁸. The fact that Member States almost immediately agreed to this regulation is a reflection of its importance and perceived benefit⁴⁶⁹. From the point of view of the individual state, this regulation did not entail any particular risks except for costs to operate the database. Member States were not requested to grant a set of new rights and privileges for asylum seekers but limited their action through a new effective tool which would ultimately help to reduce the number of applications for asylum. The European Parliament rejected the draft calling for the extensive use of fingerprints by a narrow majority. The Austrian MEP Hubert Priker stated, for example, that, “instead of tattooing them, the modern-day Europe is going to identify those who make us feel uncomfortable by fingerprinting. After immigrants, we take on the gypsies, then citizens who do not like the look of immigrants and those we feel uncomfortable with in society are branded, as criminals are today”⁴⁷⁰. The Parliament’s rejection, however, did not bind the Council.

⁴⁶⁷ As a consequence his application be declared as unfounded.

⁴⁶⁸ Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, *Official Journal (OJ)*, L 316/1, 15.12.2000. The Council adopted implementation measures on 28 February 2002. See Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No. 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, *Official Journal (OJ)*, L 62/1, 5.3.2002

⁴⁶⁹ It should be noted that Britain and Ireland have opted in while Denmark wished to have a separate arrangement.

⁴⁷⁰ See Fortress Europe? Circular Letter, “European Parliament rejects draft Protocol”, www.fecl.org/circular/5804.htm, 8.11.2002.

6.2.2. Determining the state responsible for examining applications for asylum

In contrast to the idea of Eurodac, which was positively viewed by most Member States, the question of bearing responsibility for asylum seekers as a result of Dublin caused much tension. Member States were not capable of properly implementing the provisions of the Dublin Convention and thus had serious problems in identifying the Member State that is responsible for examining an asylum application. As the Commission noted in a number of reports, there were practical and legal difficulties in implementing the Convention, such as the refusal of one Member State to accept a transfer of asylum seekers from another Member State, for instance. Moreover, in those cases where a transfer was agreed on, only a small percentage of asylum seekers were actually transferred⁴⁷¹. The result was a growing mistrust, which often led to bitter inter-community disputes.

The Commission appeared to believe that the only way to improve the implementation of the Dublin convention was by introducing a new set of provisions, which would be based on, “a clear and workable method”⁴⁷². Under this state of affairs it offered to revise the Dublin Convention⁴⁷³. The Council provided some outlines for new provisions and on July 26, 2001, the Commission proposed a new regulation to replace the Dublin Convention⁴⁷⁴, which was adopted by the Council on February 18, 2003⁴⁷⁵. In the

⁴⁷¹ The Commission Evaluation Reports found that between January 1998 and December 1999, 16,590 people found themselves in a situation where they expressed their intention to apply for asylum but their application was not examined in either the Member State where they lodged it, which happened to not be responsible, or in the Member State responsible, to which they had not traveled. The actual transfer of applications to the responsible parties was less than 30%. Commission Staff Working Paper “Evaluation of the Dublin Convention” Sec (2001) 756 final, July 13, 2001.

⁴⁷² The Council was not sure as to what was the best way to deal with this problem. In its outline for a discussion on the Dublin Convention on February 22-23, 2001, it raised the question of, “whether improvements should be made by using the already existing Dublin Convention and just 'pushing it up' or whether an instrument with an entirely new outline should be created”. See Note from the Presidency to Strategic Committee on Immigration, Frontiers and Asylum, 5528/02 Limite, Asile 7, Brussels, January 19, 2001.

⁴⁷³ See the Commission's working paper “Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an asylum application submitted in one of the Member States”. Sec (2000) 522 final, March 21, 2000. See also Karsten Kloth (2001), “The Dublin Convention on Asylum: A General Presentation” in: Cláudia Faria (ed.), *The Dublin Convention on Asylum. Between Realities and Aspirations*, European Institute of Public Administration, Maastricht, pp. 7-26.

⁴⁷⁴ Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member

explanatory memorandum the Commission stated that, “the responsibility for examining an asylum application lies with the Member State which played the greatest part in the applicant's entry into or residence on the territories of the Member States”. However, it argued that constructive cooperation among Member States is needed to accomplish the goal of proper allocation of responsibility: ”The mechanism for determining which member states is responsible will not function unless the member states set up a system of fair cooperation with a view to collecting the necessary evidence, processing applications within the agreed time limits and organizing transfers in the best conditions”. One important suggestion was a time limit of six months for performing the transfer from one Member State to another. But while the Commission was preoccupied with clarifying which Member State ought to deal with a particular application for asylum, the Commission did not call into question the fact that only one application for asylum can be submitted, notwithstanding the fact that Member States practiced different asylum policies and EU policy on asylum was not harmonized

6.2.3. Establishing common visa policy

Article 73j of the Treaty of Amsterdam stated that the Council should, within a period of five years after its entrance into force, adopt measures dealing with the crossing of the external borders of the Member States and establish rules for granting three month visas. In 1995, the Council adopted a regulation based on Article 100c of the EC Treaty and drafted a list of countries whose nationals need visas⁴⁷⁶. However, the Court of Justice annulled this regulation since the Parliament was not consulted as required in the EC Treaty. According to Article 100c of the Maastricht Treaty the Council should determine which countries whose nationals would need a visa before entering the Union on a

State responsible for examining an asylum application lodged in one of the Member States by a third country national, COM (2001) 447, 26 July 2001.

⁴⁷⁵ See Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining asylum application lodged in one of the Member States by a third-country national, Official Journal of the European Union, OJ L 50/1, 25.2.2003.

⁴⁷⁶ *Official Journal of the European Communities (OJ)*, 1995 L 234/1. Next to this list the Council published another list of countries mentioned in the common list but whose nationals nevertheless needed a visa in one or more specific member states see commission communication of December 14 1996, OJ, 1996, C 379/3.

proposal from the Commission, “and after consulting the Parliament”. The Council, however, ignored this call and adopted a visa regulation in 1995 based on a proposal from the Commission and without consulting the Parliament⁴⁷⁷. In December 1995, the European Parliament successfully appealed against this decision to the European Court of Justice. The measure was therefore annulled on June 10, 1997⁴⁷⁸. It is worth noting that though the Parliament expressed its criticism in its resolution of April 21, 1994, concerning the process of the determination of third countries whose nationals needed to obtain a visa⁴⁷⁹, when the proposal for a new, similar, regulation in 1999 was presented before the Parliament, it made no substantial attempt to amend it. The result has been that the new visa list was essentially identical to the original list introduced in 1995⁴⁸⁰, and consisted of one hundred countries⁴⁸¹. The visa requirement undoubtedly affected asylum seekers. As the Parliament indicated in its working paper, the visa requirement might affect asylum seekers especially, “if they are citizens of a country, nationals of which are

⁴⁷⁷ See Council Regulation (EC) No 2317/95 of 25 September 1995 determining the third countries whose nationals must be in possession of visas when crossing the external borders of Member States, *Official Journal of the European Communities*, 1995, L 234/1.

⁴⁷⁸ See Court of Justice Judgment in case C-392/95, *European Parliament vs. Council of the European Union*, OJ C 252/4, 16.8.1997.

⁴⁷⁹ The European Parliament expressed its criticism about the process of determination of third countries needed to obtain visa. The selection process, it argued, was not always clear. Some of the countries included in the list were also rich such as the Gulf Countries. Moreover Peru was the only South American country to be included. OJ, No. C 128/350, April 21, 1994, Legislative Resolution embodying the opinion of the European Parliament on the Proposal for a Council Regulation determining the third countries whose nationals must be in a possession of a visa when crossing the external borders of the Member States (Com (93) 0684-C3-0012/94); *Free movement of Persons in the European Union*, Working Paper, Civil Liberties Series, European Parliament, September 1998, pp. 109-110. See also a report on Civil Liberties and Internal Affairs from March 1994 where the Parliament stated that it, “approves the Commission Proposal subject to Parliament’s amendments. Report on the Commission proposal for a Council regulation determining the third countries whose nationals must be in a possession of a visa when crossing the external borders of the Member States, Committee in Civil Liberties and Internal Affairs, Francois Fromen-Murice, 29.3.94. A3-0193/94.

⁴⁸⁰ See Council Regulation (EC) No 574/1999 of 12 March 1999 determining the third countries whose nationals must be in possession of visas when crossing the external borders, *Official Journal L 072*, 18.3.1999, p. 0002-0005. The Council adopted two years later a new regulation on third countries whose nationals are not subject to a visa requirement. The list consists of about 45 countries such as Slovakia, Czech Republic, Estonia, the USA, Hong Kong, Macao, Canada, Australia Andorra, Honduras and Malta. Regulation 539/2001 (EC) of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement”, OJ L 81/2, 21.3.2001.

⁴⁸¹ As Hailbronner notes, when the EC immigration ministers discussed for the first time the issue of harmonization of visa regulation in 1987, a list of fifty countries whose nationals must be in possession of a visa was introduced. See Kay Hailbronner (1994), “Visa Regulations and Third-Country Nationals in EC Law”, *Common Market Law Review*, 31, 1994, pp. 979-980. See also Peter-Christian Müller-Graff and Friedmann Kainer (2000), “Asyl-, Einwanderungs- und Visapolitik”, in: Werner Weidenfeld and Wolfgang Wessels (eds.), *Jahrbuch der Europäischen Integration 1999/2000*, Europa Union Verlag, Berlin, p. 128.

required to have a visa for entry, they are usually not allowed to enter”. Indeed, when examining the list it is evident that the main countries generating refugee movements into the EU, such as Afghanistan, Sri Lanka, Romania, Yugoslavia, Pakistan, Iran, Ghana, and Zaire, are included⁴⁸².

6.2.4. Laying down minimum standards for the reception of asylum seekers in EU Member States

Another proposal submitted by the Commission was for a Council Directive to establish minimum standards for the reception of applicants for asylum in Member States⁴⁸³. The basic idea was to introduce common reception conditions at all stages of the asylum process. This included provisions on information, freedom of movement, housing, food, clothing, health care, and schooling for minors. The Commission, for example, proposed that asylum applicants be able to move freely in the territory of the host country. Moreover, “Member States shall not hold applicants for asylum in detention for the sole reason that their applications for asylum need to be examined” (Article 7). The Commission also proposed that applicants and their accompanying family members should have access to health and psychological care (Article 10) and children, either of asylum applicants or applicants themselves should be sent to school (Article 12). Also, asylum applicants should have access to labor market within six months after their applications has been lodged (Article 13) and “Member States shall not forbid applicants and their accompanying family members to have access to vocational training for more than six months after their application has been lodged” (Article 14). They should also take into account the specific situation of minors, unaccompanied minors, disabled and elderly people and pregnant women (Article 23). The proposal also set rules under which Member States can reduce or withdraw reception conditions, such as in cases where the

⁴⁸² Most of the asylum applications in the EU Member States between 1985-1994 came from the following countries: Yugoslavia (485,047), Romania (330,407), Turkey (264,491), Sri Lanka (124,608), Zaire (81,309) Somalia, (42,211), Iran (115,154), Ghana (66,215) Pakistan (57,879) and Afghanistan (52,661). See Table 1: Asylum Applications in the EU member states by country of nationality, 1985-1994 in: Böcker and Havinga, *op.cit.*, pp. 93-95.

⁴⁸³ See a proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States, European Commission, COM (2001) 181 final, 2001/0091 (CNS), Brussels, 3.4.2001.

applicant disappears or has not complied with reporting duties, if he withdraws its application or is regarded as a threat to national security (Article 22).

Member States did not favor the proposed actions and thus the Commission had to revise its proposal. Following the discussions of the Permanent Representative Committee on 18 and 24 April 2002, Member States removed certain benefits from asylum seekers and introduced a few changes in the proposal. But the most notable change was in terms of language. While the Commission stressed the obligations of the Member States to grant a list of conditions using the words “Member State shall”, the text of the Permanent Representative often used the word “may”, which seems to indicate a looser form of commitment towards asylum seekers. Other changes were: with regard to the reception condition, Member States may decide on the residence of the applicant for reasons of public interest or public order (Article 7). Additionally, the applicant but not the entire family was to have access to health care. Furthermore, the applicant was no longer entitled to receive psychological treatment (Article 15), but, rather, would be subject to medical screening if a Member State required a medical screening (Article 9). The new proposal did not contain a time limit by which the Member State was required to grant a work permit: “Member States shall determine a period of time, starting from the date on which an application for asylum has been lodged, during which an applicant shall not have access to the labour market” (Article 11), and Member States were not obliged to allow applicants access to vocation training (Article 12). In the Commission proposal it was suggested, “Member States shall ensure co-ordination between the competent authorities and other actors including NGOs, involved at national or local levels in the reception of applicants for asylum in accordance with this Directive” (Article 28). In the new proposal this provision was dropped. Member States were required to inform the UNHCR only with regard to the number of persons covered by reception conditions (Article 22). The Commission introduced the necessary changes, common understanding was reached in the JHA Council on 25/26 April 2002 and the Council adopted this Directive on January 27, 2003⁴⁸⁴.

⁴⁸⁴ See Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, *Official Journal of the European Union (OJ)*, L 31/18, 6.2.2003.

6.2.5. Laying down minimum standards on procedures for granting or withdrawing refugee status

The last Commission proposal on the “first step” for a Common Asylum System was submitted on September 12, 2001. The Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Otherwise Need International Protection⁴⁸⁵ touches on one of the major questions in the field of asylum, namely, who is a refugee? The Commission first listed the conditions for granting refugee status and when this should be withheld. One can learn much about the relationship between the Commission and the Council from this proposal. While the Commission traditionally advocates for a more liberal approach towards refugees than the Council, it was nevertheless obliged to follow the Council position on refugee protection. Moreover, every proposal made by the Commission has to be reviewed by the Council. Already in the initial proposal that was crowned as extremely liberal, the Commission recommended that new concepts of complementary protection be developed rather than extending the scope of the Geneva Convention to allow easier access to asylum seekers Convention protection. The Commission began by explaining that while the Geneva Convention “remains relevant”, at the same time it was considering complementary measures to the Geneva Convention⁴⁸⁶ by suggesting a new status, that of “subsidiary protection”. The idea was that persons who have a well-founded fear of being persecuted or suffering serious harm should be entitled to protection from a Member State⁴⁸⁷.

In many ways, the distinction between a refugee and a person eligible for subsidiary protection is not clear. Article 11 is a very good example in this respect. On the one hand, the Commission argues that a person who fled from war or generalized oppression is

⁴⁸⁵ Commission Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as otherwise need international protection, Brussels, 12.9.2001, OJ, C 051 E 26.2.2002.

⁴⁸⁶ See p. 10.

⁴⁸⁷ Ibid., p. 12.

entitled to be recognized as a refugee if race, religion, nationality, membership in a particular social group, or political opinion are the source of their oppression. On the other hand, it recognizes the fact that Member States have the tendency to exclude these persons from refugee status. In other words, the Commission admitted to the reality that refugee status does not depend on objective criteria⁴⁸⁸ but rather is based on the willingness of Member States to grant this status.

While discussing the source of persecution, the Commission declared that there are three main agents: state, parties of organizations controlling the state and non-state actors where the state is unable or unwilling to provide effective protection (See Article 9). The Commission declared that, “Member States need to evaluate the effectiveness of state protection. They shall consider whether the state takes reasonable steps to prevent the persecution and whether the applicant has reasonable access to such protection”. Moreover, “ ‘state’ protection may also be provided by international organizations and stable quasi-state authorities who control a clearly defined territory of significant size and stability” and who are able and willing to protect an individual from harm in a manner similar to an internationally recognized state. As Steve Peers argues, this concept is difficult to apply in practice, “because non-state agents controlling some or all state territory are not signatory to human rights treaties and have intrinsic problems guaranteeing safety upon the entire territory”. Moreover, “these entities would not have been trusted with the job of administrating a territory if there were not a risk or a reality of conflict in the relevant territory to begin with, and moreover their role is in principle transitional”⁴⁸⁹.

The idea of internal protection, which was often criticized, was supported by the Commission (Article 10), “Member States may examine whether this fear is clearly confined to a specific part of the territory of the country of origin and, if so whether the applicant could reasonably be returned to another part of the country where there would

⁴⁸⁸ According to the Geneva Convention principles a refugee is a person who has a well-founded fear of being persecuted for reasons of race, religion, sex, nationality and belonging to a specific social group.

⁴⁸⁹ See Submission by State watch on the Commission Proposal for a Directive on refugees status and subsidiary protection to the House of Lords Select Committee on the European Union, Sub-Committee “E”, prepared by Steve Peers, State watch, March 8, 2001.

be no well-founded fear of being persecuted”⁴⁹⁰. The Commission also further developed the concept of internal flight, the basic idea being that even if state authorities were the source of persecution, asylum seekers might be deprived of the right for asylum if they, “could obtain effective protection in another part of his country...” In this area the Commission emphasized the idea of developing a regional approach to protection in appropriate cases involving cooperation with non Member States and the possibility of identifying safe areas within the country of origin.

Articles 22 to 32 refer to the different rights of refugees and grantees of subsidiary protection in the country of residence since in general they do not enjoy the same set of benefits. Whereas a refugee, for example, is entitled to reside for five years, persons eligible for subsidiary protection are allowed to stay for only for one year (Article 21). Another important distinction between the two groups concerns employment. Refugees can be employed or self-employed under the same conditions as nationals. They can also be offered vocational training and workplace experience under the same conditions as nationals. Persons, however, enjoying subsidiary protection have to wait six months (Article 24) and a year respectively until they could gain access to vocational training and workplace experience.

In the end, the text was rejected by the Council and had to be amended. On April 24, 2002, the Asylum Working Party presented a new proposal on these matters taking into consideration the comments of the Member States⁴⁹¹. Under Article 2 definitions accompanying family members must be of the same nationality as the applicant for

⁴⁹⁰ Article 13 provides a list of refugee status cessation clauses. Refugee status shall be maintained unless the refugee has voluntarily reaviled himself, received a new nationality, or received new protection either from his own country or from another country. In addition, if the Member States are of the opinion that a refugee no longer needs international protection his refugee status can be withheld, “because the circumstances in connection with which he or she has been recognized as a refugee have ceased to exist.” In this situation the refugee is compelled to return to his country of origin. This ruling contradicts the Geneva Convention, which states that the refugee alone can decide whether he would like to return to its country of origin.

⁴⁹¹ Council of the European Union, Outcome of Proceedings, Asylum working Party, April 8, 2002, Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as otherwise need international protection. Inter institutional File: 2001/0207 (CNS), 7882/02 Limite, Asile 20, Brussels, April 24, 2002.

consideration as refugees⁴⁹². Moreover, a time limit was imposed upon their application: “three months after the application was lodged should be introduced for family members to opt for international protection”⁴⁹³. While the initial proposal allowed family members to obtain the same rights as the applicant for international protection, in the new draft only family members, “residing in the same Member State should be entitled to this status, but not automatically” (Article 6)⁴⁹⁴. With regard to assessing the fear of being persecuted, the original proposal suggested, for example, that Member States should take into account, as a minimum, “the individual position of personal circumstances of the applicant, including factors such as background, gender, age, health and disabilities so as to assess the seriousness of persecution or harm” (Article 7 d). It was now suggested to delete the words, “including factors such as background, gender, age, health and disabilities so as to assess the seriousness of persecution or harm”. Article 9 stated that a definition of non-state actors should be included in the Directive: “In principle, no protection should be offered in these cases, unless certain conditions are met (e.g. that these activities of non-state actors are tolerated or encouraged by the public authorities)”. Article 10 leaves more room for maneuver by a Member State: “in cases involving asylum procedures more scope for return must be left to Member States”⁴⁹⁵. Article 12 argued that one should, “establish more general criteria” about the reasons of persecution, as, “The ones provided for here are too specific and would raise problems of application in the future”. Thus, for example, one should “avoid defining nationality” or “referring to sexual orientation as an example of a social group”. In any case, it was stated that the concept of 'social group' was too large⁴⁹⁶. Though the new proposal was more restrictive than the initial proposal made by the Commission on September 2001, it too was similarly rejected. A number of meetings have been held ever since but agreement, as of April 2004, has not been reached. The Seville European Council of June 2002 set a deadline to arrive on an agreement on this Directive by June 2003. Nevertheless, the justice and home affairs (JHA) Council failed to agree on this Directive and thus further discussion was postponed until the Irish Presidency in 2004.

⁴⁹² Ibid., p. 4.

⁴⁹³ Ibid., p. 4.

⁴⁹⁴ Ibid., p. 7.

⁴⁹⁵ Ibid., p. 12.

⁴⁹⁶ Ibid., p. 17.

6.3. The creation of a Refugee Fund: a burden sharing mechanism

One of the first challenges in the aftermath of the Amsterdam Treaty was the crisis in Yugoslavia. The growing number of asylum applications due to the Yugoslavian conflict highlighted the necessity of cooperation and burden sharing of asylum matters among EU Member States. As early as 19 January 1994 the European Parliament had published a Resolution on the general principles of European refugee policy which emphasized the need for refugees to be distributed evenly among EU Member States. The *Council Resolution of 25 September 1995 on burden-sharing with regard to the admission and residence of displaced persons on temporary basis* urged Member States to continue to give temporary protection to persons whose life was in danger as a result of armed conflict or civil war. With regard to the application of burden sharing mechanisms, the Council gave no explicit instructions as to how it ought to be implemented. The Council only stated that, “the Council agrees that the burden in connection with the admission and residence of displaced persons on a temporary basis in a crisis could be shared in a spirit of solidarity”. A similar tone was heard in the *Council Decision of 4 March 1996 on an alert and emergency procedure for burden-sharing with regard to the admission and residence of displaced persons on a temporary basis*. The Council acknowledged the need to admit additional displaced persons on a temporary basis, but avoid referring directly to the materialization of such a policy.

On 26 June 1998, the Commission presented two proposals concerning temporary protection of displaced persons: one on the establishment of a temporary protection regime and the other on solidarity measures to be arranged among Member States. On the *Proposal for a joint action concerning solidarity in the admission and residence of beneficiaries of the temporary protection*, the Council emphasized the importance of solidarity among Member States when making major decisions concerning the admission of large numbers of displaced persons from crisis regions, but abstained from suggesting any specific arrangements or measures to be taken to ensure that the above solidarity

would in fact take place. Instead, it made a proposal for financial assistance from the Community budget to assist Member States which received large numbers of refugees.

On a special meeting held in Tampere on October 15 and 16, 1999, under the Finish Presidency, the European Council called for further cooperation in the area of freedom, justice and security. The main conclusion was that the EU should cooperate with the country of origin through trade development and cooperation policies. Moreover, closer cooperation on border controls and measures to combat illegal immigration were offered. A financial reserve to handle emergency situations was recommended as one of the main provisions to cope with the mass influx of displaced persons or asylum seekers⁴⁹⁷. Indeed, one of the results of this meeting was the Council Decision, on 28 September 2000, for the establishment of a European Refugee Fund. One of the major objectives of this Fund was to ease the burden on Member States by granting financial support in order to provide appropriate reception conditions (such as accommodation, legal advice, etc.) to persons asking for refugee status or temporary protection. Moreover, the fund assists Member States with the integration and adaptation process of refugees and displaced persons and provides support for repatriation and resettlement of those persons in their countries of origin⁴⁹⁸.

In the *Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*⁴⁹⁹, the Commission suggested that Member States adopt minimum standards in the case of the mass influx of displaced persons. The Commission stressed once again the idea of solidarity, suggesting that the successful admission of a considerable number of displaced persons is largely dependent on solidarity and cooperation among Member States. In the formulation of the Commission, “the Directive

⁴⁹⁷ See Presidency Conclusions, Tampere European Council 15 and 16 October 1999, European Commission SI (1999) 800, Brussels, 16 October 1999.

⁴⁹⁸It should be noted that this decision does not apply to Denmark. Denmark, in accordance with its Protocol annexed to the Treaty of the European Union, decided not to adopt this decision. See Council Decision of 28 September 2000 establishing a European Refugee Fund, 2000/596/EC, *Official Journal of the European Communities*, L 252/12.

⁴⁹⁹ See Proposal for a Council Directive, Brussels, COM (2000) 303 final, 24 May 2000.

acknowledges the link between a mass influx of displaced persons and solidarity”. While referring to the way according to which solidarity will be organized (Article 24-27), the Commission made a distinction between two main categories of solidarity: financial solidarity and solidarity in physical reception. Financial solidarity was based on the proposal for the abovementioned Refugee Fund and suggested that EUR 216 Million be provided over a period of five years to finance Member States that need financial support for the reception, integration and voluntary return of displaced persons. The solidarity in physical reception, however, remained to a large extent a vague and abstract concept. Member States were not obliged to receive displaced persons or assist other Member States by taking on some of them, but were only required to give a general assessment indicating their capacity to receive displaced persons. Acts of solidarity with other Member States were to be expressed “on a voluntary basis”. In sum, Member States were not obliged to share the burden with their neighboring Member States. This proposal reflects once again the inability of the EU to set up specific criteria according to which the reception of displaced persons will be carried out (e.g. based on a correlation between the population of a Member State and the number of displaced persons it should receive). It leaves to the Member States the exclusive right to decide how many displaced persons it wishes to take on, based on a spirit of solidarity. As long as these burden-sharing mechanisms are not implemented in practice, even the introduction of qualified majority voting in the area of the EU’s common asylum policy would not represent a true remedy. In fact, from the German perspective it might even entail new risks, as the other EU Member States could in this case decide - hypothetically at least – on a more generous asylum or immigration policy, the brunt of the burden of which Germany itself – due to its geographic location and economic attractiveness – would be obliged to bear. This – along with the constitutional nature of the issue – best explains Germany’s otherwise seemingly paradoxical refusal to relinquish its veto in this field at the EU Summit in Nice in December 2000.

Clearly, the EU has thus far limited its burden-sharing discourse mainly to the financial arena. None of the above-mentioned proposals envisioned practical arrangements for sharing the refugees among the Member States themselves. In that respect, one can say

that the EU was avoiding tackling the real problem, namely, the distribution of asylum seekers among Member States. When Germany, the largest asylum receiver in Europe in the 1990s,⁵⁰⁰ repeatedly asked other Member States to share the asylum burden with her, it was not hoping for financial support, but primarily expected other Member States to share the persons who had found shelter in her territory. This, however, was refused by the other Member States⁵⁰¹. The lack of solidarity is especially evident in the case of Yugoslavia⁵⁰². Though Germany received by far the highest number of Bosnians and Kosovars⁵⁰³, other Member States refused to help her. The French Prime Minister, for example, who did not favor the admission of additional Kosovars to France, declared in April 1999: “Let us not add forced departure to deportation. We must assure them of their right to return to their country of origin”. Instead, additional financial assistance for Albania and Macedonia, which provided shelter to approximately 350.000⁵⁰⁴ Kosovars, was given. Even the Commission admitted in one of its reports that Member States had failed to reach an agreement on 7 April 1999 in Luxembourg with regard to the coordination of the admission of the displaced persons from Kosovo⁵⁰⁵. In light of this blatant lack of solidarity within the EU, it is not surprising that national governments are under public pressure to act to reduce the number of asylum seekers by introducing new legislation at the national level.

⁵⁰⁰ Between 1990 and 1998 more than 1.8 Million applications for asylum were registered in Germany, whereas in Britain and France the figures are much lower; 405,000 and 267,000 respectively. In United States, for example, the number of asylum requests stood on 928,000. See, Migrationsbericht 1999. Zu- und Abwanderung nach und aus Deutschland, *Die Beauftragte der Bundesregierung für Ausländerfragen*, Bonn 1999.

⁵⁰¹ See *Frankfurter Allgemeine Zeitung*, 9. November 1998, „Schily fordert gerechtere Lastenverteilung bei der Aufnahme von Flüchtlingen“.

⁵⁰² Joanne van Selm-Thorburn (1997), *Refugee Protection in Europe. Lessons of the Yugoslav Crisis*, The Hague, Martinus Nijhoff Publishers pp. 127-130.

⁵⁰³ France took only 6,300 and Britain hosted only 4,346. See UNHCR Country Profile- United Kingdom, www.unhcr.ch/world/euro/uk.htm, 28.11.2000 and UNHCR Country Profile- France, www.unhcr.ch/world/euro/france.htm, 28.11.2000.

⁵⁰⁴ UNHCR Press release Geneva 4 April 1999 “Refugees as exodus grows”, 28.11.2000.

⁵⁰⁵ See Commission proposal for a Council Directive, 24.5.2000, COM (2000) 303 final.

6.4. Return policy of the EU via cooperation with third countries: readmission agreements

In addition to the idea of sharing the burden of granting asylum among EU Member States the EU has developed in the course of the years a policy aimed at also sharing the burden with non EC-countries, and the signing of readmission agreements in this respect would seem to close to an ideal solution. The main idea was to send back asylum seekers to their country of origin if they entered an EC country illegally, or to send them back to the country they used for transit, if that country was considered a “safe country”, i.e. a country deemed to be free of persecution and party to the Geneva Convention, and make them apply for asylum in that country. The advantages of these kinds of agreements had been already recognized in the beginning of the 1990s when the Schengen countries signed a readmission agreement with Poland (see section 4.3. above). The individual Member States also concluded bilateral agreements with neighboring countries⁵⁰⁶.

The Amsterdam Treaty provided the Community a legal basis for readmission agreements⁵⁰⁷. On the basis of Article 63 (3) (b) the Commission was authorized by the Council to negotiate Community readmission agreements with third countries⁵⁰⁸. The importance the EU has attributed to readmission agreements is also manifested in the number of discussions held at the Council level on this issue. Between 1998-2001 most of the meetings taking place in the Justice and Home Affairs (JHA) Council dealt with

⁵⁰⁶ Indeed ,whereas between 1985-1994 around 400,000 applications were submitted from Romania, Poland and Bulgaria (273,000, 106,000 and 78,000, respectively) to Germany, virtually no applications were registered from the latter in 1999 with the exception of Romania with 220 applications. See Böcker and Havinga, *op.cit.*, pp. 93-95.

⁵⁰⁷ It should be noted that the European Community has no exclusive right to conclude readmission agreements. That is, Member States can negotiate bilaterally and sign readmission agreements with a third parties provided that such agreements are not already concluded with the country concerned. Ireland, for example, concluded a readmission agreement with Romania on May 12, 2000. The agreement provides for the readmission of Romanian citizens who are residing illegally in Ireland to Romania as well as third country nationals (that is, persons who do not hold the citizenship of Romania) who used Romania as a transit country on their way to Ireland. See Irish Department of Justice, Equality and Law Reform, November 1, 2000, www.justice.ie/80256996995F3617/vWeb/wpJWOD4RY6Z, 7.11.2002.

⁵⁰⁸ Such for instance with Morocco, Sri Lanka, Russia, Pakistan (September 2000), Hong Kong, Macao (May 2001) and Ukraine (June 2002). Council of the European Union, Note from the Commission to Council on readmission agreements, Council of the European Union 12625/02 Limite, Migr 91, Relex 186, October 10, 2002.

the question of readmission⁵⁰⁹. But while the EU has obvious reasons to conclude readmission agreements with non- EC countries that allows it to send back asylum seekers who have arrived in the EU, one may well ask what might push a third country to sign a readmission agreement and to agree not only to admit its own nationals but third country nationals as well. There are two main reasons for this. First, the great interest expressed by the contracting parties, in particular countries in Eastern Europe, to join the EU. Second, economic assistance is provided by the EU to countries with whom readmission agreements are signed.

EU accession created one of the greatest incentives for candidate countries in Eastern Europe to conclude multilateral or bilateral readmission agreements with EU Member States. As the candidate countries were working to become members of the EU, they felt it necessary to foster good will with existing Member States during the negotiation process by agreeing to sign readmission agreements. To a large extent the candidate countries realized that a refusal to do so might jeopardize their application for EU membership, since eventually their application is subject to final ratification by all the individual Member States. For similar reasons they also agreed to adopt the EU *acquis* in Justice and home affairs. Naturally, the financial contribution made available by the EU for the implementation of joint asylum measures served as another strong motivation for cooperating⁵¹⁰. Readmission agreements also often involved abolishing visa requirements⁵¹¹.

Nonetheless it appears the candidate countries and in particular Romania were not always

⁵⁰⁹ For a detailed list of the Council's meetings between 1998-2001, see Peter J. van Krieken, (2001), *Migration Acquis Handbook, The Foundation for a Common European Immigration Policy*, Asser Press, The Hague. p. 294.

⁵¹⁰ Between 1997-2001, EU 304.15 million was allocated to Phare national programs to develop effective border control policy in the candidate countries in Central and Eastern Europe (Bulgaria, Czech Republic, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia). Another EU 23.67 million was allocated to the areas of migration, asylum and visas. See European Commission, Commission Staff Working Paper- EC external assistance facilitating the implementation of UN Security Council Resolution 1373: an overview, Sec (2002) 231, Brussels, 25.2.2002.

⁵¹¹ Poland, for example was granted a visa free border with Germany a few days after the readmission agreement entered into force. In May 1993, Poland concluded an agreement with Germany according to which 10,000 persons per year could be returned to Poland. See Saskia Sassen (1997), *Migranten, Siedler, Flüchtlinge. Von der Massenauswanderung zur Festung Europa*, Fischer Verlag, p. 123.

happy about the readmission arrangement. To some extent the pressure imposed on this country was greater than that imposed on other candidate countries, as Romania was included along with Bulgaria in the second round of accession in 2007⁵¹². The result was that Romania had to give in to EU pressure and sign readmission agreements with all EU states except Britain and Portugal. It also, “had to harmonize its legislation with the European Union and strengthen border and passport security”⁵¹³. In return, the EU abolished visa requirements for Romanian nationals.

Other potential EU members are the new neighbors of the EU in its enlarged form: Russia and Ukraine. Since these countries will border the EU on May 2004, following the accession of ten Eastern European countries, the EU has emphasized the importance of strengthening relations in the field of migration with these two countries while making progress on issues of border control and readmission agreements: The Common strategy of the European Union on Russia mentions readmission clauses, and states that the EU is looking to cooperate in the field of readmission. Proposals have been presented for programs to support refugees and internally displaced people in cooperation with Russia⁵¹⁴, and requests from Russia to facilitate the cooperation between the EU and Russia, “by concluding a readmission agreement” have been presented. The EU has proposed allocating substantial funds for infrastructure improvement at border crossings and improved border control, especially for dealing with the Kaliningrad question⁵¹⁵.

⁵¹² Among ten Central and Eastern European countries (CEECs) with whom Europe had concluded readmission agreements, only Romania’s and Bulgaria’s citizens needed to obtain visas to enter the EU. This differentiation of visa treatment among associated CEECs, all candidates for EU membership, has caused intense dissatisfaction among the concerned applicant countries. Marise Cremona (1997), “Movement of Persons, Establishment and Services”, in Marc Maresceau (ed.), *Enlarging the European Union: Relations between the EU and Central and Eastern Europe*, London, Longman, p. 197.

⁵¹³ See Radio Free Europe, Romania: Travelers Ponder Gains, Losses From EU's Visa-Free Regime, www.rferl.org/nca/features/200/12/12122001085/49.asp, 18.9.2002.

⁵¹⁴ See also the UK Parliament - House of Commons, European Scrutiny-Nineteenth Report, Common Strategy on Russia, May 28, 1999, www.parliament.the-stationery-office.co.uk/pa/cm199899/cmselect/cmeuleg/34-xix/3415.htm, 4.11.2002.

⁵¹⁵ Kaliningard which is located between the Baltic Sea, Poland and Lithuania will be surrounded after the enlargement by EU territory. For this reason the EU attempt to regulate this problem. Senior officials of the European Commission and Russia met on 15 May 2002 to discuss the implications of EU enlargement for Kalinigrad. The EU offered about 40 million euro of assistance to Kaliningard to the end of 2003 to combat crime, to economic recovery to bridge the gap between the region which 30% of its population lived below the poverty line, which might encourage migration, and suffer from a high rate of crime. See EU-Russia Relations in Kaliningrad, IP/02/721, Brussels, May 15, 2002.

While the Kaliningrad agreement was achieved, it appears that the EU has had difficulty gaining Russian support in the matter of readmission. This is partly due to the fact that Russia itself is confronted with a large number of illegal immigrants and has thus sought to conclude readmission agreements with neighboring countries. Dmitry Rogozin, Russian President for the Kaliningrad problem, stated for example that it is necessary for Russia to toughen its policy with regard to illegal migration: “We are interested in concluding agreements on readmission with many CIS countries. We must not tolerate the situation any longer when our Southern frontiers are wide open”. Thus, he argued that these countries, which have a visa-free arrangement with Russia, “will have to conclude the Agreement on Readmission in order to take back those illegal migrants who do not want to leave the territory of the Russian Federation”⁵¹⁶. Not surprisingly, the Commission’s initial reports to the Council on the state of negotiations with Russia were not optimistic: “There have been repeated contacts at the diplomatic level but no informal meetings were held nor formal negotiations launched”⁵¹⁷. Russia received a draft text in April 2001 but the EU has received “no formal response yet”. The EU has been trying ever since to persuade Russia to sign readmission agreements in return for liberalization of the EU’s visa policy. Russia for its part has been holding out for a visa free policy, the EU, however is reluctant to grant this condition.

Ukraine, like Russia, was also not enthusiastic to conclude readmission agreements with the EU. In the Ukraine-European summit on July 5, 2002, in Copenhagen it appeared that the EU was keenly interested in signing a readmission agreement with Ukraine⁵¹⁸: “The EU looks forward to a successful conclusion of negotiations on a readmission agreement”. It also “encourages all countries in the region to conclude readmission agreements between themselves”. The EU reiterated that it would “continue to support Ukrainian efforts to conclude readmission agreements with its neighboring countries”⁵¹⁹.

⁵¹⁶ See on-line Pravda 19.9.2002. “Problem of illegal migrants inside Russia impedes the solution of Kaliningrad Problem”, http://english.pravda.ru/region/2002/09/19/36918_html, 4.11.2002.

⁵¹⁷ Council of the European Union, Note from the Commission to Council on readmission agreements, Council of the European Union 12625/02 Limite, Migr 91, Relex 186, October 10, 2002.

⁵¹⁸ Ukraine is likely to adopt this policy to defend its interest, as it desires to join the European Union, See Viktor Zamyatin, “Copenhagen: Signaling no Signals”, *The Day*, July 9, 2002.

⁵¹⁹ See European Union-Ukraine Summit, Copenhagen, July 4, 2002, a Joint Statement by president of the European Council, Secretary General of the Council/High Representative for EU Common Foreign and

The abolishment of the requirement of visas was stressed as a possible outcome of a readmission agreement: “We also look forward to a positive continuation of our dialogue on visa issues, including an examination of Ukrainian proposals in this regard”⁵²⁰. A Draft treaty was transmitted to Ukraine a month later in August 2002 and following an informal preparatory meeting in Brussels in March 2002, the first round of formal negotiations took place in Kiev on November 2002⁵²¹.

Besides Russia and Ukraine, the EU also sought to reach agreements with potential migrant sending countries. The EU made in this respect a linkage between financial aid to third countries and migration control. Thus, for example, the Council decided that cooperation agreements between the European Community, its member states and third countries would include readmission clauses⁵²². The Lome Convention, for example, agreed to on February 2002, contains readmission agreements, and the Common Strategy on Mediterranean countries contains readmission clauses⁵²³. Moreover the EC's external aid programs to the Mediterranean region were conditional on coming to agreement on border control issues.

The Commission has proposed six action plans agreed to by the EU's General Affairs

Security, the President of the Commission and President of Ukraine. Slovakia, for example, one of the candidate countries for eastern enlargement in May 2004, imposed a visa duty on Ukraine on June 28, 2000, “in order to meet some of its obligations towards the European Union”. On January 24, 2002, the Slovak Cabinet approved the liberalization of visa restrictions imposed on Ukraine. According the Ukraine Foreign Ministry, “The Slovakian foreign minister and minister of defense expect this move to encourage Ukraine to renew the readmission agreement with Slovakia”. Foreign Policy of Ukraine, Newsletter 20.1.2001-26.1.2002, Press release, January 26, 2001.

⁵²⁰ EU-Ukraine Summit.

⁵²¹ Council of the European Union, Note from the Commission to Council on readmission agreements, Council of the European Union 12625/02 Limite, Migr 91, Relex 186, October 10, 2002.

⁵²² See Council of the European Union note from Strategic Committee on Frontiers, Immigration and Asylum to the Permanent Representatives Committee on the consequences of the Treaty of Amsterdam on readmission clauses in Community agreements and in agreements between the European Community, its Member States and third countries (mixed agreements). Council of the European Union, 12134/99 Limite, Migr 64, Bruseels, October 21, 1999. In 1995, the Council already agreed on readmission clauses for Community and mixed agreements. Thus, for example, in the Barcelona Declaration of November 1995 it was declared that in the area of illegal immigration, “the partners are aware of their responsibility for readmission, agree to adopt the relevant provisions and measures, by means of bilateral agreements or arrangements, in order to readmit their nationals who are in an illegal situation”. This declaration, however, was not binding. See *Barcelona Declaration adopted at the Euro-Mediterranean Conference, Barcelona, November 28, 1995*.

⁵²³ See COM 2000, 324, May 23, 2000, *Official Journal of the European Communities (OJ)* 2000 L 183/5.

Council and the governments of Afghanistan, Iraq, Morocco, Somalia, Sri-Lanka and Albania which cover financial support for migration control, voluntary return and combating trafficking and illegal migration⁵²⁴. In addition, the European Commission was asked to submit draft-negotiating mandates for readmission with Turkey and Algeria⁵²⁵. The negotiations with the above mentioned countries were not particularly successful, as the Commission noted on a note sent to the Council on October 10, 2002 to summarize the state of negotiations. The conclusion of a readmission agreement between the EU and Morocco was recommended in the 1999 HLWG (High Level Working Group Meeting) Action Plan on Morocco, and a draft was sent Morocco on May 2001. However, Morocco has not yet agreed to launch formal negotiations. Similarly, a readmission agreement was recommended in the 1999 HLWG Action Plan on Afghanistan, and a draft was sent in April 2001, but the EU has yet to receive a formal response⁵²⁶.

The Commission's attempts to conclude readmission agreements were more successful with Sri Lanka, Albania, Hong Kong and Macao. Hong Kong was the first country that signed a readmission agreement with the EU. A final text was initialed on November 2001 and the Commission has proposed to sign this agreement in April 2002⁵²⁷. The Council authorized the Commission to sign the agreement on September 23, 2002. The EC's Commissioner, Antonio Vitorino was extremely happy about the signature of a

⁵²⁴ The EC oversaw a project with Morocco, for example, which aimed at reinforcing effective border control. This four-year project, performed between 2000-2004, had a budget of about EU 40 million, European Commission, Sec (2002) 231.

⁵²⁵ See also Note from the General Secretariat of the Council to Coreper/Council on the Criteria for the identification of third countries with which new readmission agreements need to be negotiated, Draft Conclusions, Council of the European Union 7990/02 Limite, Migr 32, April 15, 2002.

⁵²⁶ Council of the European Union, Note from the Commission to Council on readmission agreements, Council of the European Union 12625/02 Limite, Migr 91, Relex 186, October 10, 2002.

⁵²⁷ According to the proposed agreement, Hong Kong shall readmit permanent residents of the Hong Kong SAR persons belonging to other jurisdictions and persons who are neither permanent residents or nationals of SAR, including third country nationals and stateless persons. At the request of a Member State, the agreement continues, Hong Kong shall readmit the person within a period of six months. See also Proposal for a Council Decision concerning the signing of the Agreement between the European Community and the Government of the Special Administrative Region of the People's Republic of China on the readmission of persons residing without authorization, Sec (2002) 412 final, Brussels, 18.4.2002.

readmission agreement with Hong Kong; “this first European Community Readmission Agreement is an important milestone for the EC”⁵²⁸.

A draft agreement was transmitted to Macao on July 2001, and, following a round of formal negotiations in Macao in October 2001, the agreement was initialed on October 18 2002 and signed by the Council on October 13, 2003⁵²⁹. Concerning Sri Lanka, a draft text was transmitted in April 2001 and, following two formal rounds of negotiations, a final text was initialed in Brussels in May 2002. The Council signed the agreement on November 25, 2003. Negotiations for a readmission agreement were also completed with Albania. The Commission proposed that the Council sign and conclude the treaty on February 12, 2004⁵³⁰.

Vitorino’s response to the first readmission agreement, signed between the EC and Hong Kong, in a way highlighted the Commission’s difficulty in concluding readmission agreements. Indeed, after five years of negotiations the Commission, based on its new competence to negotiate readmission agreements with third countries, was able to sign only three agreements, though it was seeking to sign agreements with eleven countries⁵³¹. But beyond the fact that readmission agreements and negotiations with potential EU member countries involve political and economic pressure of the EU on the contracting country, this desire for readmission agreements throws into question the EU’s basic

⁵²⁸ Vitorino indicated that the fact that this agreement was negotiated relatively quickly, “illustrates the strength and depth of EC- Hong Kong relations”. He also noted that, “Hong Kong's willingness to be the first to complete a Readmission Agreement with the EC is a positive sign of Hong Kong's free and open society”. *HKSAR and EC initial milestone readmission agreement, Hong Kong's Government*, Press Release, November 22, 2001. www.info.gov.hk/gia/general/200111/22/1122233.htm, October 16, 2002.

⁵²⁹ See Commission’s proposal for a Council Decision concerning the signing of the Agreement between the European Community and the Government of Macao special administrative region of the People’s Republic of China on the readmission of persons residing without authorization. COM (2003) 151 final, Brussels, March 31, 2003.

⁵³⁰ See Proposal for a Council Decision concerning the signing of the Agreement between the European community and the Republic of Albania on the readmission of persons residing without authorization, European Commission, COM 2004, 92 final, Brussels, 12.2.2004.

⁵³¹ On the basis of Article 63 (3) (b) Treaty of Amsterdam, the Commission was also authorized by the Council to negotiate Community readmission agreements with seven third countries/entities: Morocco, Sri Lanka, Russia, Pakistan (September 2000), Hong Kong, Macao (May 2001) and Ukraine (June 2002). Council of the European Union, Note from the Commission to Council on readmission agreements, Council of the European Union 12625/02 Limite, Migr 91, Relex 186, October 10, 2002. See also statewatch “EU seeking readmission agreements with 11 countries. www.statewatch.org/news/2002/oct/06readm.htm , March 5, 2004.

commitment to human rights. The EU official stance is that, “Readmission Agreements are fully respectful of human rights and fundamental freedoms, and as such should be seen in the context of the European Union's human rights policies”⁵³². Nevertheless, it is generally assumed that readmission agreements can hardly assure adequate protection of refugees, and in particular, the principle of non-refoulement (enshrined in Article 33 (1) of the 1951 Geneva Convention or Article 3 of the Convention against Torture and other Cruel and Degrading Punishment and Treatment), which stipulates that states shall not expel, return and extradite a person where there are substantial grounds for believing that he would be in danger of being subject to torture. While this clause prohibits states from expelling or returning refugees, “to the frontiers of territories where his life of freedom would be threatened”, readmission agreements are often negotiated with countries which are not particularly characterized as great promoters of human rights such as Russia, Sri Lanka and China. In fact, some of these countries suffer from internal conflicts and often produce asylum seekers who flee into other countries. Another important point to be taken in this regard is the fact that the EU does not prevent third countries (concerned about immigration into their own country) with which they have signed readmission agreements from signing agreements with their own neighboring countries, and, in fact, encourages them to do so. While international organizations often draw attention to the deficiencies of EU policy in this field, EU Member States continue to promote repatriation policy⁵³³, mainly because it is seen as a useful mechanism to address the problem of increased number of asylum seekers in the EU.

7. The Importance of Amsterdam to the Development of a Common Asylum Policy

The Amsterdam Treaty can be considered one of the most important documents in the field of migration and asylum. While the Maastricht Treaty treats asylum as a domestic issue subject to intergovernmental cooperative decision making, Amsterdam emphasizes

⁵³² “Readmission Agreements do not alter the EU's commitment to shelter individuals fleeing persecution from their home country. The EU will continue to uphold international protection and human rights as laid down in the Geneva Convention, the European Court of Human Rights (ECHR) and the Charter of Fundamental Rights of the EU”. European Commission, Press Releases, Readmission Agreements DN: Memo/02/142, Brussels, June 17, 2002.

⁵³³ See UNHCR, Commission Green Paper on a Community Return Policy on Illegal Residents, UNHCR's Comments, Geneva, July 2002.

the necessity of coordinating and harmonizing immigration and asylum policy at the EU level. The decision to move from a purely intergovernmental cooperation to a common immigration and asylum policy - though based on minimum standards - seems to suggest a change in the national position vis-à-vis EU institutions and in particular the European Commission. Whereas in the past, the Commission was often perceived as a competitor and potential threat to national interests because it expressed a more liberal view on refugee protection, Member States for the first time learned to value the work of the Commission. They gradually realized that the Commission might not jeopardize their national interests but in fact may help to secure them. The increased role of the Commission in EU policy making resulted in higher recognition of the views of the people of Europe and the national concerns as well. Evidently, in the search for power and recognition the Commission eventually realized that its views on asylum policy must be more in line to those of the Council in order to convince EU citizens that it is concerned about defending their interests and thereby prove its relevance.

In addition, since every proposal made by the Commission has to be reviewed by the Council the Commission clearly realizes that to be effective it needs to find a way of drafting proposals which will gain the consent of all Member States. In other words the Commission right of initiative is controlled by the Member states. Its proposals become law only if they are approved by the Council, which represents the Member States. Indeed, the Commission's proposals in the last few years do represent a change in its policy. While in the early 1990s the Commission was a strong advocator of human rights and a liberal asylum policy, in recent years it has tended to express a more restrictive, and pragmatic, position. The Commission currently sees its role as one of preparing Member States for the second stage of a more harmonized form of asylum policy, with the first stage being the creation of a common asylum policy. To this end it has helped Member States identify useful and efficient instruments in the fight against illegal immigration and has suggested mechanisms that can be used to decrease the number of asylum seekers. The Commission has, for example, restricted the definition of "refugee" and the access to refugee status by developing the concept of temporary protection. Moreover, while the JHA (Justice and Home Affairs) Council emphasized the importance of readmission

agreements, the Commission was authorized to sign agreement for the repatriation of illegal immigrants and rejected asylum seekers with eleven countries: Morocco, Sri Lanka, Russia, Pakistan, Hong Kong, Macao, Ukraine, Albania, Algeria, China and Turkey. When third countries appeared reluctant to sign readmission agreements with the EU, the Commission has exerted political and economic pressure, for example, by offering financial help to countries which are willing to cooperate in the management of migration flows and compulsory readmission of illegal immigrants and rejected asylum seekers. To a large extent the introduction of readmission clauses in agreements with third countries has made it easier for Member States to return asylum seekers whose applications have been rejected, thereby reducing the number of illegal aliens residing within their borders. At the same time, however, the existence of these clauses damages the EU's reputation as a human right protector by sending asylum seekers on to third countries where they may suffer persecution.

V. The Nice Treaty and the European Convention

On February 14, 2000, a new Intergovernmental Conference was organized to amend the Treaties of the European Union. Its main objective was to implement new institutional reforms to enable ten new Member States to join the EU in May 2004. The Nice Treaty signed, on December 2, 2000, was central to the enlargement process as it defined the voting weight of each Member State in the Council as well as in the Commission⁵³⁴. Other objectives of Nice were modifications of the way policymaking should be conducted, in particular with relation to the extension of qualified majority vote (QMV) to additional areas. As unanimity vote in the fields of immigration and asylum was often seen as an obstacle for cooperation, it appeared to EU leaders that it was necessary to

⁵³⁴ It was decided, for example, that each Member State would have one Commissioner (until the EU reaches 27 members) and the number of seats in the Parliament was increased to 732 from the 700 seats decided in Amsterdam. The IGC also discussed weighting of votes and the shift to Qualified Majority Vote (QMV) in the Council. A compromise was reached according to which large Member States would not increase their power in the council. However, the criteria of population was introduced, which gives Member States the opportunity to ask whether a particular decision represent 62% of the total population. In case it fails to do so, a veto could be applied. One of the effects of this change was that, as Mobreg notes, "Germany gets a greater blocking power for the size of its population". See Axel Moberg (2002), "The Nice Treaty and Voting Rules in the Council", *Journal of Common Market Studies*, Vol. 40, No.2, June 2002, pp. 275-276.

simplify the decision-making process by shifting to QMV⁵³⁵. During the conference, however, it became evident that Member States were unable to make significant progress in this field. The fact that they were unwilling to transfer more responsibility to common institutions in the fields of migration and judicial matters meant that policy-making in these areas was likely to remain slower and more cumbersome than if QMV was used. Indeed, if the EU had difficulties in reaching agreements between fifteen Member States the accession of ten new members to the EU would only add more difficulties to the existing negotiation process. Moreover, due to the veto power, small Member States such as Estonia have the capacity to block decisions on asylum in the Council. In this respect Nice has done very little to accommodate asylum in the enlargement process.

1. The Rationale Behind Nice: Preparing for Enlargement

One of the major questions after the signing of the Amsterdam Treaty was how can the candidate countries join the EU if no institutional arrangements were taken prior to their accession. Though one of the objectives declared at Amsterdam was that EU institutions need to be reformed to accommodate the further expansion of the EU, the Amsterdam Treaty failed to follow through on this task, apparently for lack of political will. The result was a Protocol annexed to the Treaty that simultaneously makes two contradictory statements. Whereas Article 1 declared that the EU should review the institutional dimension once the first new member is likely to join the EU, Article 2 suggested that it should be reviewed once the number of EU Member States exceeds 20⁵³⁶. The European Council in December 1998 in Vienna recognized the deficiencies of Amsterdam and suggested that the Cologne European Council find ways to overcome the institutional aspects not “resolved in Amsterdam”⁵³⁷. The European Council in Cologne on 3-4 June 1999 debated the “Amsterdam leftovers” and set three main goals for the next IGC: deciding on the size and composition of the European Commission, weighing of votes in

⁵³⁵ For a detail account see Claus Giering (2001), “Die institutionellen Reformen von Nizza. Anforderungen, Ergebnisse, Konsequenzen”, in: Werner Weidenfeld (ed.), *Nizza in der Analyse. Strategien für Europa*, Verlag Bertelsmann Stiftung, Gütersloh.

⁵³⁶ See Protocol D *On the institutions with the prospect of enlargement of the European Union*, Treaty of Amsterdam.

⁵³⁷ Mark Gray and Alexander Stubb (2001), “Keynote Article: The Treaty of Nice - Negotiating a Poisoned Chalice?” *Journal of Common Market Studies*, Vol. 39, Annual Review, September, p. 8.

the Council and examining the possibility for extension of qualified majority voting in the Council (on fiscal matters, foreign policy, immigration and asylum issues). It is thus evident that the Treaty of Nice, as Dashwood notes, was thus, “essentially concerned with institutional reform and indeed there is little in it that extends the substantive powers already available to the EU under the Treaty on European Union (TEU) and the EC Treaty, as amended by the Treaty of Amsterdam”⁵³⁸.

In the European Council in Helsinki on 10-11 December 1999 the Heads of States adopted the Cologne agenda for the next IGC calling for, “a comprehensive review of the provisions of the treaties concerning the institutions in the light of the challenges of enlargement”. The negotiations began under the French presidency in February 2000, and both EU institutions and Member States presented their positions on necessary changes to policy making by the EU. Significantly, both groups advocated for the extension of a qualified majority in EU policy making. The Commission, for example, stated that, “all decisions which still require unanimity must therefore be reviewed on the principle that the odds are against such decisions being taken after enlargement. Qualified majority voting should therefore become the rule, a part from a very few exceptions for issues which are truly fundamental or felt extremely sensitive politically”⁵³⁹. The Parliament confirmed the concern of the Commission and called for, “an open-minded approach”⁵⁴⁰. It also urged Member States, after welcoming their work on the Charter on Fundamental Rights, to include the latter in the new Treaty.

As for the position of the individual Member States, the approach described in their national reports give the impression that they did not exclude the idea of QMV as such. Britain, however, was very skeptical about any changes in the existing *status quo*, “We shall insist on retaining unanimity for other key issues of national interest such as

⁵³⁸ For an analysis of the Nice Treaty see Alan Dashwood (2001), “The Constitution of the European Union after Nice: law-making procedures”, *European Law Review*, June, p. 216.

⁵³⁹ European Commission Communication “Adapting the Institutions to make a success of enlargement” *Contribution by the European Commission to preparations for the Intergovernmental Conference on institutional issues*. COM (1999) final 592.

⁵⁴⁰ European Parliament, Resolution of the European Parliament on the Convening of the Intergovernmental Conference 14094/1999-C5-0341/1999-1999/0825 (Cns) A5-0018/2000.

taxation, border controls, social security, defense and Own Resources. In other areas we will look at the pros and cons of QMV on a case by case basis”⁵⁴¹. The Benelux countries, as expected, favored the concept of QMV: “It is obvious that in an extended union, the decision making by qualified majority has to be applied to the largest possible extent”. The Benelux countries considered that the passage from unanimity to qualified majority, “will contribute to the further development and the good functioning of the internal market and the Economic and Monetary Union”⁵⁴². Germany and France also appeared to be in favor of QMV, “The Federal Republic has chosen a new approach whereby all provisions requiring unanimous voting should in principle be a qualified majority voting. Exemption to this rule should be determined on the basis of a concrete catalogue of criteria”⁵⁴³ Italy as well believed that, “the starting point for the Intergovernmental Conference's discussion of this entire question should be the principle that qualified majority voting must be the rule”⁵⁴⁴. Austria was also, “in principle positive with regard to an extension of majority decisions and will thus continue the pro-integration stance which it had already adopted at the last Intergovernmental Conference”⁵⁴⁵. Greece believed, “that a host of vital issues must continue to be subject to the rule of unanimity”. Yet it was, “willing to examine, on case-by -case basis, the extension of qualified majority voting as a decision-making method”⁵⁴⁶. For Denmark the most important outcome of Nice was that the EU would, “be able to work effectively”.

⁵⁴¹ The United Kingdom Parliament, The 2000 Inter-Governmental Conference, Qualified Majority Voting, www.publications.parliament.uk/pa/ld199900/ldselect/lducom/92/9205.htm, 4.11.2002.

⁵⁴² See Conference of the Representatives of the Governments of the Member States, Information Note, Memorandum from Benelux, CONFER 4721/00, Limite, Brussels, March 7, 2000, p. 4.

⁵⁴³ Conference of the Representatives of the Governments of the Member States, Translation of Letter from Dr. Gunter Pleuger, Representative of the Government of the Federal Republic of Germany, March 21, 2000 to Mr. Francisco Seixas Da Costa, Chairman of the Intergovernmental Conference Group of Ministers' Representatives, *Policy document of the Federal Republic of Germany on the Intergovernmental Conference on institutional reform*, CONFER 4733/00, Limite, Brussels, March 30, 2000, pp. 5-6.

⁵⁴⁴ Conference of the Representatives of the Governments of the Member States, Information Note from Italian delegation to delegations, *Italy's position. Memorandum from Benelux*, CONFER 4717/00, Limite, Brussels, March 3, 2000, p. 4.

⁵⁴⁵ Conference of the Representatives of the Governments of the Member States, *Letter from Austrian Permanent Representation, Mr. Gregor Woschnagg*, February 10, 2000 to Mr. Javier Solana, Secretary General, Basic Principles of Austria's position, CONFER 4712/00, Limite, Brussels, February 15, 2000, p. 7.

⁵⁴⁶ Conference of the Representatives of the Governments of the Member States, *Information Note, Memorandum from the Greek Government to the Intergovernmental Conference on institutional reform of the European Union*, CONFER 4719/00, Limite, Brussels, March 3, 2000, p. 6.

Thus, in contrast to Britain it did not oppose the shift to QMV: “The Danish Government is prepared to discuss further areas where qualified majority can be applied”⁵⁴⁷.

2. The Discourse on Asylum among EU Member States

In the beginning of negotiations on February 11, 2000 the Presidency listed the articles in the Treaty of the European Union (TEU) where a shift to qualified majority was thought necessary. These included sensitive policy areas such as taxation, social policy, common commercial policy, visas, asylum, and migration⁵⁴⁸. On February 22, 2000 it was argued that in the field of Justice and Home Affairs a distinction should be made between asylum, visas, and immigration and provisions on police and judicial cooperation in criminal matters (TEU Title VI). The Presidency argued that it would be difficult to cooperate in the field of criminal matters, as this is an area of great political sensitivity to all the Member States: “This is a field to which the Community decision-making process does not apply and the Presidency considers that in these circumstances it would be very difficult at this point to contemplate a move to qualified majority voting in this area for the adoption of basic legislation”⁵⁴⁹. With regard to asylum, however, the Presidency was rather optimistic, suggesting that decisions in asylum could be governed by a qualified majority procedure⁵⁵⁰. Moreover, it suggested that Member States should identify areas within specific articles of the Treaty of the European Union such as Articles 62 and 63 (referring to control of crossing internal and external borders, asylum, and immigration

⁵⁴⁷ Conference of the Representatives of the Governments of the Member States, *Information Note, Contribution from the Danish Government: basis for negotiations*, CONFER 4722/00, Limite, Brussels, March 7, 2000. p. 6.

⁵⁴⁸ Conference of the Representative of the Governments of the Member States, *Presidency note on IGC 2000: Possible extension of qualified majority voting*, CONFER 4706/1/00, REV 1, Limite, Brussels, February 11, 2000 (14.02) (OR.f). It noted, however, that some provisions might be regarded as “institutionally anomalous” that is, provisions which require unanimity in the Council in the case of co-decision procedures or provisions which would allow a Member State to appeal a decision taken at the ministerial level by a qualified majority of the Council. This appeal process would include meetings with Heads of States and Governments who would then make a unanimous decision. The provisions falling into this category include authorization for closer cooperation in the JHA (Article 40 of the TEU), provisions facilitating the right of citizens of the Union to move and reside in the territory of Member States (Article 18 (2) of the TEC), and measures concerning the amount of social security needed for the free movement of workers (Article 42 of the TEC).

⁵⁴⁹ Conference of the Representative of the Governments of the Member States, *Presidency note on IGC 2000: possible extension of qualified majority voting*, JHA field, CONFER 4710/1/00, REV 1, Limite, Brussels, February 22, 2000 (OR.fr).

⁵⁵⁰ Ibid.

policy) which could move to qualified majority vote after the entry into force of the new Treaty⁵⁵¹. After several months of debate, by April 2000, negotiations among EU Member States were able to reach the point where, “a measure of openness has been expressed in relation extending QMV for certain matters under Title IV of the TEU on visas, asylum and immigration”⁵⁵². In September, however, it became evident that Member States had gradually changed their opinion about the extensive use of qualified majority voting in the decision making process. Indeed, the Presidency presented only a few amendments with respect to asylum policy, replacing the idea of a qualified majority with the co-decision procedure⁵⁵³. Thus, most measures on asylum and migration remained under unanimity rule but with the possibility of being decided by the co-decision procedure. The result was that qualified majority voting applied, as before Nice, only to matters related to visa policy and perhaps with regard to Article 63 (2) (b) that is, sharing of the burden between Member States in the care of refugees and displaced persons. On October 26, 2000, the latter option was also abolished. Thus the Council continues to require unanimous voting on all asylum issues with the exception of visa policy⁵⁵⁴. The reasons for this more restrictive change most likely lie in the refusal of Member States to give up their veto power in asylum matters. Though Member States originally declared their intention to reform European decision-making processes to accommodate the coming enlargement, they continued to cling to the unanimity rule in a number of areas they viewed crucial to their national sovereignty. One of the major proponents of this view was Germany⁵⁵⁵, who argued that a move to qualified majority would jeopardize its national interests. This claim was based on the German experience on Yugoslavia; whereas Germany admitted the vast majority of the refugees from

⁵⁵¹ Ibid.

⁵⁵² It appears, however, that “Member States incline to consider any change with relation to police and criminal matter”. See Conference of the Representative of the Governments of the Member States, Presidency note on IGC 2000: Possible extension of QMV, CONFER 4737/00, Limite, Brussels, April 20, 2000 (OR.fr,en), p. 3.

⁵⁵³ Conference of the Representative of the Governments of the Member States, Presidency note on IGC 2000: Extension of qualified majority voting, CONFER 4776/00, Limite, Brussels, September 28, 2000 (OR.fr), p. 13.

⁵⁵⁴ Conference of the Representative of the Governments of the Member States, Presidency note on IGC 2000: Extension of qualified majority voting, CONFER 4789/00, Limite, Brussels, October 26, 2000 (OR.fr), Annex 1, p. 2.

⁵⁵⁵ Josef Janning and Claus Giering (2001), “An Ambivalent Result: Germany and the Nice Treaty”, in: Martyn Bond and Kim Feus (eds.), *The Treaty of Nice Explained*, The Federal Trust for Education and Research, London, pp. 176-177.

Yugoslavia (350.000 Bosnians and 160.000 Kosovars)⁵⁵⁶, other EU Member States have shown little interest to share the burden with it by taking on some of its refugees. Not surprisingly, then, Germany refused to relinquish its veto in the area of asylum and immigration policy.

3. The Effect of Nice on Asylum Policy

The attempt at Nice to reform EU decision-making processes in the field of asylum to anticipate enlargement was not particularly successful. One of the major failures of Nice was that QMV was not implemented in the field of asylum⁵⁵⁷, and thus decision making in this area remained subject to the unanimous voting rule. But beyond the discussion on QMV, no significant changes in relation to the nature of cooperation among EU Member States was offered at Nice. While Amsterdam introduced the idea of minimum common standards on immigration and asylum, Nice avoided reflecting on the possibility of Member States moving towards a higher level of cooperation while adopting a more harmonized form of asylum policy. Under these circumstances, Nice continued to focus on minimum standards mechanism provided already in Amsterdam.

The only change Nice offered referred to the transitional period where a shift to the co-decision procedure⁵⁵⁸ was possible after the Amsterdam Treaty entered into force: “The Council acting in accordance with the procedure referred to in Article 67, shall within a period of five years after the entry into force of the Treaty of Amsterdam, adopt: measures on asylum; criteria and mechanism for determining which member states is responsible for considering an application for asylum and minimum standards on reception of asylum seekers in Member States; minimum standards with respect to the qualification of nationals of third countries as refugees; minimum standards on procedures in Member States for granting or withdrawing refugee status {Article 63 (1)}

⁵⁵⁶ Barbara Marshall (2000), *The New Germany and Migration in Europe*, Manchester University Press, p.116.

⁵⁵⁷ The Nice Treaty kept the rule of unanimity in most important matters such as foreign policy, fiscal matters and immigration. See also IGCinfo, Observatoire social européen electronic newsletter on the Intergovernmental Conference, December 2000, No. 5.

⁵⁵⁸ Under co-decision procedure both Parliament and Council have veto power.

and minimum standards for giving temporary protection and promoting the balance of effort between Member states in receiving and bearing the consequences of receiving refugees and displaced persons {Article 63 (2)}.” Since Nice, however, entered into force only in February 2003, due to the refusal of Ireland to ratify the Treaty, the transitional period was relatively short: from February 2003 till May 2004. Article 63 of the EC Treaty states that within a period of five years after the entry into force of the Treaty of Amsterdam, the Council must adopt measures on asylum, illegal immigration, and return policy. As the Treaty of Amsterdam entered into force in May 1999, this means that the deadline is May 2004. Notwithstanding that, Council’s ability to enact legislation is hindered by the requirement of following unanimity voting during this period and, moreover, the proposals prepared by the Commission are only applicable to legislation enacted before Nice. This means that proposals can only be made if the basis legislation has been already adopted. Article 67 of the Nice Treaty states that, “By derogation from paragraph 1, the Council shall adopt in accordance with the procedure referred to in Article 251; the measures provided for in Article 63 (1) and 2 (a) provided that the Council has previously adopted in accordance with paragraph 1 of this Article, Community legislation defining the common rules and basic principles governing these issues: the measures provided for in Article 65 with the exception of aspects relating to family law”⁵⁵⁹. This naturally limits the scope of the co-decision procedure. At the end of the five-year period, on May 2004, the Council is required to decide on asylum issues using unanimous voting. Nice in this respect has not offered much apart from a change related to the transitional period. It mainly deals with this transitional period and thus its relevance is temporary. After May 2004, Member States will still have to work with the provisions decided in the Amsterdam Treaty. The result has been that the Nice Treaty has not contributed significantly to the decision-making process to be used in an enlarged EU⁵⁶⁰.

⁵⁵⁹ Measures regarding burden sharing will not be incorporated while on temporary protection and displaced persons co-decision can be introduced once the Commission defines common rules and basic principles {Article 63 (2)(a)}.

⁵⁶⁰ Dimitris Tsatsos, European Parliament Representative to the 2000 Intergovernmental Conference. The Treaty of Nice. A failure which can only be remedied by means of an effective and properly implemented post-Nice process, January 8, 2001, CM/427133EN.doc, PE 294.739.

4. EU policy on Asylum in Anticipation of the Future

4.1. The European Convention

After the signing of Nice in 2001, the European Council decided in Laeken in December 2001 to set up a Convention to draft a European Constitution. The basic motivation behind this proposal was to make the EU more efficient and democratic and, “to bring citizens closer to the European design and European institutions”⁵⁶¹. Responding to criticism directed against EU policy making, EU and Member State leaders have stressed the need to make EU governance more attentive to the European public: As the Portuguese Minister for Foreign Affairs declared, “We need more of Europe that respects the equality of its members and where the citizens of Europe can feel effectively represented”⁵⁶². In the course of the debate on the future of Europe, the Commission as well as the Parliament expressed their wish to win back public support: “the people, to whom Europe has brought peace, stability and well-being, are faced with machinery they do not understand. The future of Europe will no longer be built without the support of its people”⁵⁶³. After sixteen months of work Valery Giscard d’Estaing (former Prime Minister of France), the Chairman of the European Convention, submitted a *Draft Treaty establishing a Constitution for Europe* to the European Council in Thessaloniki on June 20, 2003. While the Convention as such did not cover new ground on the issue of asylum, it did declare asylum as one of the fundamental rights. In so doing, it recommitted Member States to international agreements in the field of asylum, and in particular to the 1951 Geneva Convention⁵⁶⁴.

Yet, the discussion on the ‘democratic deficit’ in the EU would seem to create pressure on EU policy makers to prove their relevance and legislate more restrictive measures in

⁵⁶¹ The Convention also sought to organize the politics of the EU in anticipation of an enlarged union and to develop the EU into, “ a stabilizing factor and a model in the new world order”. See the *draft Treaty establishing a Constitution for Europe*” *European Convention*, Conv 820/1/03 Rev 1, Brussels, June 27, 2003.

⁵⁶² Jaime Jose Matos de Gama, the Portuguese Minister for Foreign Affairs addressing the European Parliament on 22 June 2001.

⁵⁶³ See Communication from the Commission on the future of the European Union. *European Governance. Renewing the Community Method*. Com (2001) 727 final, Brussels, 5.12.2001, pp. 2-3.

⁵⁶⁴ See Article II-18, *Draft Treaty establishing a Constitution for Europe* submitted to the European Council in Thessaloniki, June 20, 2003, European Communities, 2003.

the field of asylum. Indeed, at meetings at the EU level it was evident that the policy makers were aware of citizens' concern about migration and asylum and thus strived to provide a more effective response. The Seville (June 2002) and Thessaloniki (June 2003) European Councils, for example, made it clear that the EU should emphasize the return policy strategy. Thus, they welcomed European Commission attempts to sign readmission agreements with third countries in order to repatriate immigrants and send asylum seekers to third countries⁵⁶⁵. The Council encouraged, "the use of all appropriate instruments in the context of the European Union's external relations". It explicitly stated that lack of cooperation of third countries with the EU will have far reaching implications on their relations with the EU: "Persistent and unjustified denial of cooperation regarding readmission will have a negative effect on the third country"⁵⁶⁶.

In February 2003, the UK government proposed the idea of a regional protection area i.e. refugee centers located at the external borders of the EU. Though this proposal as Amnesty International noted⁵⁶⁷, was ultimately rejected by the EU Member States, the Commission's Communication from June 3, 2003 suggests that the Commission accepted the UK's analysis of the asylum problem in Europe and in general supported the idea of introducing a more restrictive asylum and immigration policy⁵⁶⁸. The Irish Presidency, during the first half of 2004, also stressed the fact that immigration and asylum were high on the EU's agenda. Like the Seville and Thessaloniki Councils, it emphasized the need to develop a common European policy on asylum and immigration and reaffirmed the need for EU dialogue with third countries, in particular to facilitate the management of external borders and the return of illegal immigrants and rejected asylum seekers⁵⁶⁹. In this context

⁵⁶⁵ Seville European Council, June 21-22, 2002 and Thessaloniki European Council, June 19-20 2003.

⁵⁶⁶ 2002 Seville European Council.

⁵⁶⁷ Amnesty International, EU Office, *Losing Direction: The EU's Common Asylum Policy*. Open Letter from Amnesty International to the Heads of State and Government Thessaloniki European Council, Brussels, June 18, 2003.

⁵⁶⁸ See Communication from the European Commission to the Council and the European Parliament, *The Common Asylum Policy and the Agenda for Protection*, COM (2003), 152 final, March 26, 2003. See also a speech held by the President of the European Commission, Romano Prodi at the European Parliament on "The Seville Summit: Enlargement, Immigration and Reform", European Parliament, Strasbourg July 2, 2002.

⁵⁶⁹ Mr. Michael McDowell, T.D., Minister for Justice of Ireland and the President of the Justice and Home Affairs Council before the European Parliament Committee on Citizens; Freedoms and Rights, Justice and Home Affairs, January 21, 2004

the Irish Presidency gave a high priority to implementation of a comprehensive plan to combat illegal immigration and trafficking of human beings and to the development of a common readmission policy in the area of illegal immigration.

4.2. The impact of the new security environment since 9/11 on EU asylum policy

To a large extent the changed global security environment in the wake of September 11, 2001, has undermined basic EU premises with regard to the internal market. From the EU perspective, the new threat to security from international terrorism casts doubt on the effectiveness of EU policy in the area of Freedom, Security and Justice. Since this threat is an external one, the EU response will for the first time not result from a “spillover”, but from the pressure of international events. Thus, the centrality of the EU Member States and their interests is being challenged in these fields. The new security situation also constitutes a turning point in the development of the European political system and the way the common institutions operate. For the first time the pillars are becoming interrelated as police and judicial cooperation (third pillar) significantly impact the EU's common foreign and security policy (second pillar), and both these pillars directly impact the Single Market⁵⁷⁰. In short, it has become necessary to introduce a new set of rules and institutions to provide an adequate answer to the new challenges.

The new security environment has also reopened the national debates in the EU concerning the ability of immigrants and asylum seekers to integrate into their new society. While in the last decade the general public has been concerned about the general increase of immigrants and asylum seekers and the impact this trend may have on the dominant culture of the host nation⁵⁷¹, 9/11 would seem to reinforce their initial fears and their generally negative perception of asylum seekers. From the EU Member States' perspective, immigrants and asylum seekers are not only considered a threat to the

http://www.eu2004.ie/templates/news.asp?action=search&sNavlocator=66&policy_area=3&content_type_id=2&populate=1, April 13, 2004.

⁵⁷⁰ In the draft for the European Constitution it was, for example, suggested to abolish the “concrete” separation between the pillars created in the 1992 Treaty of the European Union.

⁵⁷¹ According to opinion polls taken in October 2000, 75% of Germans believed that more restrictions on refugees should be imposed. *Migration News*, October 2000, Vol. 7, No. 10.

character of the EU/national community, but can have a negative impact on the welfare of its citizens. Moreover, the fact that the terrorist attacks were carried out by individuals who shared common cultural features with the larger immigrant communities in the EU would seem to reinforce the negative perception of immigrants and asylum seekers⁵⁷². Under the new state of affairs immigrants and asylum seekers came to be seen as potential threats.

In many ways, new security concerns have marked not only a turning point in the development of immigration policy at the EU and national levels, but has significantly affected transatlantic relations as well. For transatlantic security can no longer be guaranteed by overwhelming military strength (e.g. NATO's integrated forces or nuclear weapons) directed outward, but must take into account threats passing between or even emanating from NATO member states. Thus, a considerable upgrading of US-European relations is required, as issues such as immigration and extradition are tackled⁵⁷³. This is especially true in light of recent institutional changes on both sides of the Atlantic. On the one hand, EU Member States are striving to develop a common policy on immigration by May 2004. At the same time, the United States has already established the Department for Homeland Security to deal with the challenge of terrorism. Yet, questions remain about the specific measures each side will take, their effectiveness and the capabilities of the United States and Europe to move towards a higher level of cooperation.

⁵⁷² The majority of EU's asylum seekers from 1992 to 2001 are persons coming from countries which are primarily Muslim, i.e. Turkey, Iraq, Afghanistan, Iran and Somalia. Elspeth Guild (2003), "International Terrorism and EU Immigration, Asylum and Border Policy: the Unexpected Victims of 11 September 2001", *European Foreign Affairs Review*, Vol. 8. Issue 3, p. 336.

⁵⁷³ For a review of the new measures adopted at the EU and the transatlantic levels, see Jörg Monar (2004), "Die EU und die Herausforderung des internationalen Terrorismus. Handlungsgrundlagen, Fortschritte und Defizite" in: Werner Weidenfeld (ed.) *Herausforderung Terrorismus. Die Zukunft der Sicherheit*, VS Verlag für Sozialwissenschaften, Wiesbaden, pp. 148-154.

VI. SUMMARY AND FINAL REMARKS

From an analysis of EU policy in the last decade it appears that regional integration had clear repercussions on the shaping of asylum policy in EU Member States. To a large extent the process of a deepening European integration, manifested by the founding of the European Union in the 1992 Treaty of Maastricht, has prompted Member States to take collective action to protect their national interests. The creation of the Internal Market, resulting in increased vulnerability of the national borders and new migration pressures, led to a turning point in the way migration and asylum was viewed and to the growth of interest in promoting a common migration and asylum policy. Thus, there has been a clear shift from purely intergovernmental cooperation to formulation of common policies, highlighted by the creation of a Common Asylum Policy in the Treaty of Amsterdam. Currently, negotiations are being carried out which by May 2004 are to result in the promulgation of concrete measures.

From a review of the academic discourse, it appears that scholars involved in the debate often offer limited insights into the overall relations between asylum and regional integration. While they correctly point out the serious deficiencies in the performance of EU policy on asylum, they rarely attempt to address the complexity of the topic or look for explanations for the EU's behavior. They generally limited themselves to the assessment that the new regulations are of a restrictive nature and did not go beyond a narrow legal and normative analysis. The result, in the author's view, is a relatively unbalanced scientific debate.

In many ways the legal background of many scholars predisposes them to take this approach. Since discourse on asylum has been dominated by legal experts, these tended to place great emphasis on the legal dimension. They primarily focused on policy implementation and new legal measures taken by the EU, and thus concluded that asylum policy in the EU is restrictive. But while much significance was attached to the text, the political context in which decisions on asylum were taken was often neglected. The result was lack of an adequate explanation of decision-makers' behavior in the field of asylum.

The political scientists who joined the debate often did not address the lack of a conceptual framework. In contrast to legal scholars dealing with the issue of migration, political scientists generally prefer to limit the discourse to the human rights dimension and offer a normative stance. In so doing they remain silent about other factors which may influence this policy. Whereas, for example, in the main discourse on migration it is commonplace to comment on the idea of a nation state and the impact of inclusionary and exclusionary tendencies of the nation state on migration policy, this argument is completely lacking from most discussions on asylum. In this respect there is a gap in the research.

One possible explanation for this latter approach is related to the universalistic view of many political scientists dealing with asylum. Their wariness towards the idea of a nation state can affect the quality of their analysis, however. Their reluctance to attribute great importance to the nation state prevents them from offering an explanation linked to an entity they perceive as old and discriminatory, given that the nation state is assumed to represent the interests of specific group, that is, the national community. To some extent, they hope that the EU would abandon the exclusive nature of the traditional nation state and create a pluralistic community with a liberal asylum policy. In particular, they seem to idealize the work of the European Commission, which claimed to represent the interests of refugees worldwide. Many believe that the Commission should guide other EU institutions just as its reports should describe a possible outline for the European Union's future policy on asylum. In this respect they take an unrealistic approach to the integration process, believing that the European Commission can guide and shape public opinion. In so doing they seem to fail to understand the EU and the manner in which its institutions function. EU integration is not a coordination process of institutions heavily reliant on elites, rather, the institutions must respond to the needs and concerns of EU citizens. Not surprisingly, many scholars were very disappointed by the restrictive tendencies of the EU and in particular the Commission's proposals to the Council in the last few years.

Before illustrating the path the EU has taken in the field of asylum, the author has attempted to demonstrate the importance of national interests and the idea of a nation state to the debate, and thereby help explain the possible causes for the direction asylum policy developed in the EU. Though the EU represents a new form of governance which differs from the one prevailing in other Western democracies, it appears that the EU has not been able to escape from the exclusive character of a nation state and is thus subject to the same process of exclusion and inclusion. It still faces the liberal dilemma of Western democracies, that is how to adhere to liberal universal asylum standards, on the one hand and how to preserve the distinctive character of the community by controlling immigration into the Union's territory, on the other.

It was demonstrated that regional integration tends to deepen the tension of Western nation states towards immigrants and generates concern among its citizens about the influx of immigrants and asylum seekers into EU territory. The result was that in contrast to EU policy makers' stated views and expectations, that regional integration would lead to liberalization of asylum policy, the opposite has occurred. One explanation for the motivation for restrictive politics is related to the special features of this community. On the one hand the EU resembles the traditional nation-state in terms of exclusion and inclusion tendencies. On the other hand, however, the formation of this Community rests on specific characteristics, namely the continued existence of autonomous units, the self-determining states. Thus the loyalty to the national unit did not disappear as integration continued⁵⁷⁴. The EU is still in a formation process, as it remains open to new members. In short the integration project is not over yet and it is still not clear who the "people of Europe" are: Is Turkey part of Europe? Could Russia or Ukraine be considered as potential members? Based on these factors it can be assumed that the EU is more sensitive to the need to legitimate itself than other more established nation states. The community is still in a formation process and can be characterized by the attempt to create a strong common identity. EU policy makers want to be positively viewed by their

⁵⁷⁴ EU Member States aimed at achieving greater European unity. At the same time they still carried the "burden" of the past, namely, the commitments to the individual nation states. More specifically, they had deal with the challenge of how to reconcile their commitment to a larger community while simultaneously protecting their national interests.

citizens and thereby strengthen their claim to legitimacy. Thus, if citizens are concerned about migration, Europe feels that it has to prove its effectiveness in this area.

Examination of the various measures taken to regulate asylum policy in the last decade shows that policy makers recognized the concerns that were often voiced in national debates, and the frequent demands to develop new asylum and immigration policy. After the signing of the Maastricht Treaty, Member States, on the basis of intergovernmental cooperation, offered a new definition to the term ‘refugee’. The primary aim was to restrict access of asylum seekers to EU territory by developing restrictive control measures, e.g. visa policy, determination of unfounded applications and perhaps most significantly, the new regulation, established at the Dublin Convention of 1997, that only one Member State has responsibility for examination of any particular asylum application. Whereas in the past asylum seekers could apply to all EU Member States, they were now restricted to applying to only one Member State. This provision placed severe restrictions on the capacity of asylum seekers to ask for asylum. From the EU perspective the Convention was found to be very efficient in preventing “asylum shopping”, by limiting the number of applications. Nevertheless, in the absence of harmonization of asylum policies among EU Member States the country of entrance (where the application is typically filed) becomes of crucial importance.

Another mechanism devised to reduce the number of applications for asylum was through the creation of a common visa list. The EU determined, on the basis of Article 100c of the Maastricht Treaty, which third countries nationals must be in possession of a visa when they enter EU territory - the list consists of about one hundred countries. This visa requirement meant, for example, that an asylum seeker lacking a visa would be denied entry to a Member State if his country of origin were on the list. Not surprisingly, the list includes most of the main countries generating refugee movements, such as Afghanistan, Iraq, Iran, Turkey and Sri Lanka.

EU Member States have also narrowed the scope of asylum by making use of new concepts such as “safe country” and “safe third country”, for example. According to the

new resolutions, an asylum seeker who entered EU territory, either via a state which could offer asylum or via a state that was free of persecution (“safe” country) would be denied the right to ask for asylum from the EU. Most of the countries designated as safe countries were Eastern European countries. Their willingness to serve as a buffer for East-West migration, designed to express a feeling of a good faith towards the European Union, has been inspired by their desire to become members of the EU. Moreover, many of these countries received financial help for controlling their borders and the re-admission of asylum seekers from Member States. These countries, however, have concluded - on their own part - re-admission agreements with other countries, which allow them to repatriate asylum seekers and illegal migrants. Under this state of affairs, asylum seekers find themselves repeatedly rejected and might well end up back in their country of origin.

The Amsterdam provisions offered the opportunity for greater cooperation between the EU and the candidate countries and strengthened the relationship between the two in migration and police cooperation. In many ways, the Amsterdam Treaty is considered the most important document in the field of migration and asylum. The Commission, for example, was authorized to sign agreements for the repatriation of illegal immigrants and rejected asylum seekers with eleven countries: Morocco, Sri Lanka, Russia, Pakistan, Hong Kong, Macao, Ukraine, Albania, Algeria, China and Turkey. When third countries were reluctant to sign readmission agreements with the EU the Commission applied political and economic pressures. It, for example, explicitly linked external aid and migration control by offering financial incentives to countries willing to readmit illegal immigrants and rejected asylum seekers. These incentives were effective, and the introduction of readmission clauses in agreements with third countries helped to reduce the number of asylum seekers. The Treaty of Nice and recent legislative measures further emphasized the importance of readmission agreements and the need to identify useful and efficient measures in the fight against illegal immigration and the increased number of asylum seekers.

Along with the increased cooperation among EU Member States and the development of

a common policy in the field of asylum, the role of EU institutions, in particular the European Commission and the European Parliament have grown. Whereas after Maastricht the Commission's Right of Initiative in third pillar issues was limited, this right has grown considerably over the last few years, and in particular after the Amsterdam Treaty entered into force. The European Parliament has also acquired a more important voice with regard to asylum issues, especially with the introduction of co-decision procedures in justice and home affairs areas by the Treaty of Amsterdam. Yet, compared to the Commission and especially the Council, the European Parliament remains a peripheral actor in asylum issues.

The increased role of the Commission and the Parliament in EU policy making did not result in a more liberal asylum policy in spite of the liberal positions they have expressed throughout the years (the position of the Commission remains liberal compared to the Council, but in contrast to ten years ago, since it is now involved in policy-making, there has been a tendency to exhibit a more restrictive position.) The author believes that the fact that the Commission and the Parliament are now directly involved in the decision-making process has resulted in their having a higher degree of respect and recognition for the views of the EU public. In other words, as long as these institutions did not shoulder responsibility like the Council, it was easy for them to advocate for a liberal asylum policy. However, as soon as they gained more responsibility and had to come up with solutions to real problems, they tended to tone down their criticism and become more conservative. Thus, while it is expected from the Council of the European Union, which represents the Member States directly (as it consists of representatives of each Member State), to be cognizant of the public's needs and wishes, the Commission and Parliament will also follow suit. As was described above, as result of years of criticism, EU institutions are becoming more democratic, and it would be only logical for the Commission and the Parliament to advocate for the same issues as the Member States in order to prove their usefulness to their citizens. In the search for power and recognition the Commission and the Parliament will, it is believed, gradually change their positions to those more similar to those held by the Council.

As for the future, it is believed by the author that Member States will transfer more power to the Parliament and in particular the Commission. Unlike the past, when the Commission was often perceived as a competitor and potential threat to national interests (partly because it shared different views on refugee protection,) Member States have learned to value its work, especially after Amsterdam entered into force in 1999. They gradually realized that the Commission might not jeopardize national interests but in fact help to secure them. Moreover, as the Commission can only initiate legislation, its proposals become law only if approved by the Council.

The author also believes that Member States have the capacity to move to a higher degree of cooperation in the field of asylum and achieve a more harmonized form of asylum policy. To a large extent it is believed that cooperation in the field of asylum is easier to achieve compared to other policy areas, such as foreign policy, for example. Unlike foreign policy, where Member States do not always share common interests/visions about the security role of the Union in the world, they generally share similar views on asylum. They are united around the assumption that the number of asylum applications has to be reduced. For this reason the need to develop a common asylum policy appears to be necessary. In short, the increase in interdependence is likely to result in more cooperation and shared responsibility to ensure the benefit to all EU members. Hence, while for the moment only common asylum policy appears possible, the potential for harmonized policy would inevitably increase.

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