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A Study of the Development of  
the Asylum Law and Policy of the  
European Union with Focus on  
the Role of Burden-Sharing and  
Temporary Protection

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# Contents

<b>SUMMARY</b>	<b>1</b>
<b>1 INTRODUCTION</b>	<b>3</b>
<b>2 THE FRAMEWORK OF COMMUNITY ACTION UNDER HUMAN RIGHTS AND THE GENEVA CONVENTION</b>	<b>6</b>
2.1 Introduction to the framework of community action under human rights and the Geneva Convention	6
2.2 EU Asylum Law and Policy and the Human Rights Treaties	6
2.3 The Geneva Convention on the Status of Refugees	8
2.3.1 The refugee definition	8
2.3.2 The principle of non-refoulement	12
2.4 The content of the commitments undertaken by the Community under the European and Geneva Conventions	13
<b>3 ASYLUM LAW AND POLICY OF THE EUROPEAN UNION</b>	<b>15</b>
3.1 Introduction to the asylum law and policy of the European Union	15
3.2 The Palma Document	15
3.3 The new Part III, Title IV of the Treaty establishing the European Community	17
<b>4 BURDEN-SHARING AND TEMPORARY PROTECTION</b>	<b>22</b>
4.1 Introduction to burden-sharing and temporary protection	22
4.2 The objective and scope of burden-sharing	22
4.3 The concept of temporary protection	26
4.4 The 1995 Resolution on Burden-sharing and the 1996 Decision on Burden-sharing	27
4.4.1 The legal effect	28
4.4.2 The scope of application	30
4.4.3 The burden-sharing procedure	31
4.5 The Dublin Convention	32
4.5.1 Concept of exclusive competence	33
4.5.2 The competent state	34
4.5.3 Retroactive application	35
4.5.4 Family reunification	36
4.6 Concentration effects of the Dublin Convention	36

<b>4.7</b>	<b>Adjusting the Dublin Convention</b>	<b>39</b>
<b>4.8</b>	<b>The Experimental Instruments of 1997 to 1999</b>	<b>41</b>
4.8.1	The 1997 and 1998 Joint Actions	41
4.8.2	The 1999 Joint Action	43
<b>4.9</b>	<b>The European Refugee Fund</b>	<b>44</b>
4.9.1	The proposal of a European Refugee Fund	44
4.9.2	The approval of the European Refugee Fund	46
<b>4.10</b>	<b>The Temporary Protection Directive</b>	<b>48</b>
<b>5</b>	<b>CONCLUSION</b>	<b>53</b>
	<b>BIBLIOGRAPHY</b>	<b>60</b>

# Summary

This thesis deals with the development of the EU asylum law and policy with focus on the role of burden-sharing and temporary protection. The Geneva Convention is the legal framework for community action. This is laid down by Article 63.1 of the EC Treaty. Article 63 does not only refer to the Geneva Convention, but also to other relevant Human Rights Treaties such as the 1948 Universal Declaration of Human Rights and the 1965 Convention on the Elimination of All Forms of Racial Discrimination. It seems like all the EU asylum agreements dealt with in this thesis are in accordance with the Human Rights Treaties. In many cases the agreements even go beyond the Geneva Convention, since they concern displaced persons who are not qualified as refugees under the Geneva Convention. In general, the Member States have granted a more favourable legal status to asylum seekers than prescribed by the Geneva Convention.

The goal of the harmonisation of the Member States asylum based on the Geneva Convention was first mentioned in 1989, when the Palma Document was adopted. The most important steps in the harmonisation of European national refugee and asylum policies to date were taken with the Treaty of Amsterdam. The Amsterdam Treaty introduced far-reaching EC-Competencies in the field of asylum and refugee law. The Community competence regarding temporary protection allows for the establishment of minimum rights for temporarily protected persons and persons who otherwise need international protection. Concerning burden-sharing the Council is given a competence to adopt measures with the aim of promoting burden-sharing with regard to Geneva Convention refugees and displaced persons.

The 1995 Resolution on burden sharing comprises a series of guidelines for estimating how to share the burden of refugees in situations of mass influx. These guidelines are very general and they will have to be further specified if they are to provide an effective basis for burden-sharing measures. The 1996 Decision on burden-sharing attempts to set up a rapid response mechanism for situations of mass influx whereby the principles of the 1995 Resolution would be applied to a specific emergency situation. The Dublin Convention came into force in 1997. It created a system of exclusive competencies for the adjudication of asylum claims, which has effects for any burden-sharing mechanism. The role of the experimental programmes from 1997 to 1999 is to regulate the reception and voluntary repatriation of specific categories of protection seekers. The European Refugee Fund supports and encourages the efforts made by the Member States in receiving and bearing the consequences of receiving refugees and displaced persons. The financial reference for implementing this European Refugee Fund Decision is EUR 216 million. It has been doubted that this amount is sufficient. However, creating the Fund was a good initiative. If the projects undertaken are successful, maybe more money will be added to the Fund

later. In 2001 the Temporary Protection Directive, which is closely linked to the European Refugee Fund was adopted. It contains, among other things, minimum standards for giving temporary protection in the event of a mass influx of displaced persons.

# 1 Introduction

This thesis deals with the asylum law and policy of the European Union. The Geneva Convention of July 28 1951 relating to the Status of Refugees (hereinafter the Geneva Convention) and the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the ECHR) as well as some other Human Rights Treaties are the legal framework for Community action in the field of asylum law and policy. These treaties are, with other words, serving as a starting point for the EU asylum law and policy. Article 1 and 33 of the Geneva Convention are two important provisions. Article 1 defines a refugee as a person who has fled his country of origin, who is unable or unwilling either to return to it, or to avail himself of its protection. This impossibility is due to past persecution or to a well-founded fear of possible persecution on the grounds of race, religion, nationality, political opinion or membership of a particular social group. The non-refoulement principle in Article 33, which is applied to refugees within the meaning of Article 1, could in broad terms be defined as the prohibition on returning refugees to countries where they would be likely to face persecution.

The Member States of the European Union started the harmonisation of asylum and refugee law in the beginning of the 1980s by the concluding of agreements and conventions, the adopting of non-legally binding instruments and the creating of committees to deal with the problems of a European asylum and refugee policy. The goal of harmonisation of Member State asylum was first mentioned in the Palma Document from 1989. The Palma Document expressed the hope to realise measures in, among others, the following areas: uniform international obligations in the area of asylum law and establishment of a European system of responsibilities for the adjudication of asylum claims. The greatest innovation in the EU approach to asylum issues was the introduction into the Amsterdam Treaty of a new EC competence on asylum policy. The new Part III, Title IV of the Treaty establishing the European Community (hereinafter the EC Treaty) deals with visas, asylum, immigration and other policies related to the free movement of persons. It is added to the section of the EC Treaty concerning Community policies. The 1995 Resolution and the 1996 Decision, the Experimental Instruments of 1997 to 1999, the European Refugee Fund Decision and the Temporary Protection Directive are all agreements concerning the issues of burden-sharing and temporary protection. The Dublin Convention from 1997 contains a system of exclusive competencies for the adjudication of asylum claims, which has an interesting effect on burden-sharing.

The purpose of the thesis is to make an account of the development of the asylum law and policy of the European Union with focus on the role of burden-sharing and temporary protection. Here are some of the questions that will be dealt with in the thesis. What is the legal framework for

Community action? Is the EU law in line with the Human Rights Treaties? What is the function of burden-sharing and temporary protection? What is a fair burden-sharing mechanism? Are the different agreements contributing to an equitable sharing of the refugee flows between the Member States?

The EU asylum law and policy is a vast area and a lot has been written on this topic. It is not possible to go into detail about the development of the issue in this thesis. Therefore it has been necessary to make some delimits. I have chosen to focus on the following areas: the Human Rights Treaties, among other things the Geneva Convention, which are the starting point for the EU asylum law and policy. This gives the thesis a dimension of international law. Focus will be laid on the Articles 1 and 33 of the Geneva Convention. The thesis also gives, without going into detail due to space and time limit, an overview of some other relevant Human Rights Treaties. The thesis intends to give a general overview of the development of the EU asylum law and policy. In this regard an account will be given for some documents of central value, namely, the Palma Document and the new Part III, Title IV of the EC Treaty. I have chosen to focus on these agreements since the Palma Document is the very first document mentioning the co-operation of the Member States in the asylum field and the new Part III, Title IV of the EC Treaty since it has a key role in the EU asylum law and policy. There are numerous of other interesting documents, but due to space and time limit they will not be dealt with. An overview will be given of the Palma Document. The part concerning the EC Treaty will go into detail only about Part III, Title IV, which concerns the new Community competence. Other parts of the EC Treaty will not be dealt with. The thesis intends to give a general overview of the development of the EU asylum law and policy, at the same time it will go into depth about burden-sharing and temporary protection. The notions of burden-sharing and temporary protection will be given a detailed explanation. Moreover, a number of agreements concerning burden-sharing and temporary protection, namely the Dublin Convention, the 1995 Resolution, the 1996 Decision, the programmes on burden-sharing from 1997 to 1999 and the European Refugee Fund Decision and the Temporary Protection Directive will be reviewed in detail.

Concerning the method a critical-constructive method has been used. The literature and the agreements have been studied in a critical way. Some constructive proposals and ideas on what could be changed or completed have been given.

The thesis is divided into six chapters. The first chapter contains the introduction. The second chapter deals with the Human Rights Treaties. In the third chapter an overview of the development of the EU asylum law is given whereby the Palma Document and the Part III, Title IV of the EC Treaty are dealt with. The third chapter concerns burden-sharing and temporary protection. First, the notions of burden-sharing and temporary protection are explained. Thereafter, the agreements concerning burden-

sharing and temporary protection are dealt with. Chapter five contains the conclusion and chapter six the bibliography.



## **2 The framework of community action under human rights and the Geneva Convention**

### **2.1 Introduction to the framework of community action under human rights and the Geneva Convention**

The first section of this chapter deals with a number of Human Rights Treaties, which constitute the legal framework for Community action. The agreements aimed to protect refugees were laid down after the First World War when the Western World did focus its attention on the plight of refugees fleeing crisis areas. There is, as we are going to see, a clear link between the EU asylum law and the Human Rights Treaties. The Union must respect fundamental rights both as guaranteed by the Human Rights Treaties and as they result from the constitutional traditions common to all Member States. There are some problems in this area. Are the fundamental principles of the Geneva Convention adapted to their purpose? To what extent is the EU bound by its obligations under the Human Rights Treaties? Is the EU law in line with the Human Rights Treaties?

### **2.2 EU Asylum Law and Policy and the Human Rights Treaties**

Article 6 of Title I of the Treaty of European Union (hereinafter the TEU) confirms the basic principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law.<sup>1</sup> It also says that the Union shall respect fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law. Reference is, accordingly, made both to the Geneva Convention itself and to common constitutional traditions of Member States, which must be decided on the basis of comparative evaluation of their constitutional orders. Article 6(2) TEU reflects for this reason both aspects of human rights protection under the Community legal order.<sup>2</sup> Article 29 of Title VI of the TEU declares the EU's objective, to provide citizens with a high level of safety within an area of freedom,

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<sup>1</sup> "The Individual Refugee, the 1951 Convention and the Treaty of Amsterdam" Goodwin-Gill Included in: *Implementing Amsterdam Immigration and Asylum Rights in EC Law* p 141.

<sup>2</sup> *Immigration and Asylum Law and Policy of the European Union* Hailbronner p 38.

security and justice by developing common action among the Member States and by preventing and combating racism and xenophobia.<sup>3</sup>

The Treaty of Amsterdam has incorporated human rights provisions into the accession process for new Member States, allowing the suspension of a Member State for systematic breaches of human rights, and providing new legislative competencies in human rights, for example, in the area of discrimination.<sup>4</sup> Measures adopted pursuant to Chapter III Title IV Visas, asylum, immigration and other policies related to free movement of persons of the Treaty establishing the European Community (hereinafter the EC Treaty) (Articles 61-69) must be in accordance with certain standards prescribed in international agreements. Article 63(1) of the EC Treaty says that measures on asylum within the area of Article 63(1) (a-d) of the EC Treaty must be taken in accordance with the Geneva Convention.<sup>5</sup> The reference to the Geneva Convention gives standards for Community action. Consequently, this should be interpreted as a self-imposed limitation of the Community's competence regarding refugee policy.<sup>6</sup> The first paragraph of Article 63 of the EC Treaty does not only refer to the Geneva Convention but at the same time to other relevant treaties. Besides the Geneva Convention, all Member States are bound by some other international agreements relevant to the status of aliens in general and refugees in particular.<sup>7</sup> These include major declarations and international agreements, such as the 1948 Universal Declaration of Human Rights, the 1965 Convention on the Elimination of All Forms of Racial Discrimination, the 1966 Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, the 1979 Convention on the Elimination of All Forms of Discrimination against Women, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Human rights are inalienable and fundamental, but not necessarily absolute. Rights generally must be exercised with due regard to the rights of others; in certain circumstances and within the limits prescribed by international law, governments may restrict their exercise in favour of other community interests. But not necessarily absolute does not mean that individual human rights can be overridden or dismissed by group and category. States have a measure of freedom of action in determining whether and what restrictions may be called for in the light of local circumstances, but the standard of compliance remains an international one, involving elements of necessity and proportionality. Some rights, however, are non-derogable; no derogation is permitted, even in exceptional circumstances; they benefit everyone –nationals, foreigners, migrants and refugees –whether lawfully or

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<sup>3</sup> “The Individual Refugee, the 1951 Convention and the Treaty of Amsterdam” Goodwin-Gill Included in: *Implementing Amsterdam Immigration and Asylum Rights in EC Law* p 140.

<sup>4</sup> “The Individual Refugee, the 1951 Convention and the Treaty of Amsterdam” Goodwin-Gill Included in: *Implementing Amsterdam Immigration and Asylum Rights in EC Law* p 141.

<sup>5</sup> Hailbronner p 38.

<sup>6</sup> Hailbronner p 43.

<sup>7</sup> Hailbronner p 46.

unlawfully in the state, and regardless of any situation of emergency. All persons shall be free from torture, and cruel and unusual treatment or punishment, whether directly, within the state territory, or indirectly, in another state, as a consequence of removal or refusal of admission. There is also no clear justification for making a difference between citizen and non-citizen in the availability of legal remedies, such as habeas corpus, in the provision of a fair trial, or generally in regard to due process. In regulating entry to, residence in, and removal from its territory, therefore, the European Union and its Member States ought also to ensure that their laws and policies comply with these international legal requirements, and that otherwise permissible restrictions are not imposed in a discriminatory manner.<sup>8</sup>

## **2.3 The Geneva Convention on the Status of Refugees**

### **2.3.1 The refugee definition**

Refugees are not a twentieth century phenomenon. However, only at the end of the First World War did the Western world focus its attention on the plight of people obliged by unfavourable circumstances to flee their own homes and seek refuge elsewhere. Thus began a slow process of legal definition that finally led to the drafting of universal international instruments like the Geneva Convention and the creation of organisations such as the UN High Commissioner for Refugees.<sup>9</sup>

Article 1 of the Geneva Convention says that for the purpose of the Geneva Convention, the term refugee shall apply to any 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, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who not having a nationality and being outside the country of his former habitual residence as a result of such to return to it.<sup>10</sup>

Following Article 1 of the Geneva Convention refugees are characterised by four elements:

1. they have fled their country of origin,
2. they are unable or unwilling either to return to it, or to avail themselves of its protection,
3. this impossibility is due to past persecution or to a well-founded fear of possible persecution,

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<sup>8</sup> “The Individual Refugee, the 1951 Convention and the Amsterdam Treaty” Goodwin-Gill Included in: *Implementing Amsterdam Immigration and Asylum Rights in EC Law* p 146-147.

<sup>9</sup> *Europe and Refugees Towards an EU Asylum Policy* Boccardi p1.

<sup>10</sup> *Materialsamling i Folkrätt Traktater, FN-Resolutioner m m* Bring, Lysén p 4-5.

4. they fear persecution on the grounds of race, religion, nationality, political opinion or membership of a particular social group.<sup>11</sup>

According to the first element, a claimant to refugee status must be outside his or her country of nationality. The fact of having fled, of having crossed an international border, is an important part of the quality of refugee. Certain States may provide for those who would be considered as refugees once they took flight, and a growing body of practice has aimed to bring some measure of protection and assistance to the internally displaced, but this in no way alters the basic international rule.

Well-founded fear is the third element of the refugee definition. The fear may derive from conditions arising during an ordinary absence abroad (for example as student, diplomat or holidaymaker), while the element of well-foundedness looks more to the future, than to the past. Subjective and objective factors are thus combined. Fear, reflecting the focus of the refugee definition depends on factors personal to the individual. Fear may be exaggerated or understated, but still reasonable. All the circumstances of the case have to be considered, including the relation between the nature of the persecution feared and the degree of likelihood of its happening. At each stage, hard evidence is likely to be absent, so that finally the asylum seeker's own statements, their force, coherence, and credibility must be relied on, in the light of what is known generally.<sup>12</sup>

Concerning the second element, Article 1 of the Geneva Convention contains separate provisions for refugees with a nationality and for those who are stateless. For the former, the relevant criterion is that they should be unable or unwilling to return to their State of former residence. In cases of dual or multiple nationality, refugee status will only arise where the individual in question is unable or unwilling, on the basis of well-founded fear, to secure the protection of any of the States of nationality. Statelessness and refugee status are by no means identical phenomena. On occasion, those fleeing may be deprived of their nationality, but it is quite common also for the formal link to remain. Following the Russian revolution in 1917, large numbers of citizens were stripped of their status and for years Soviet Jews leaving the country permanently were required to renounce their citizenship. Refugee status in such cases might appear determinable in the light of the situation prevailing in the country of origin as the country of former habitual residence. However, in addition to internal repressive measures applied to those seeking to leave that, the denationalization itself is provided persuasive testimony of denial of protection. Whether it severs the effective link for all purposes of international law, including the responsibility of States, is less clear, but the expulsion of an unwanted minority could not justifiably be predicated upon the municipal act of deprivation of citizenship.<sup>13</sup>

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<sup>11</sup> Boccardi p 4.

<sup>12</sup> *The Refugee in International Law* Goodwin-Gill p 40-41.

<sup>13</sup> *The Refugee in International Law* Goodwin-Gill 41-42.

Fear for persecution for reason of race or religion falls within Article 1. Regarding race, account should be taken of Article 1 of the 1965 Convention on the Elimination of All Forms of Racial Discrimination which defines that practice to include distinctions based on race, colour, descent, or national or ethnic origin. Given legal developments over the last thirty years, the broad meaning can be considered valid also for the purposes of the Geneva Convention. Persecution on account of race is all too frequently the background to refugee movements in all parts of the world. The international community has expressed particular abhorrence at discrimination on racial grounds, as shown by repeated resolutions of the General Assembly. Concerning religion account should be taken to Article 18 of the 1966 Covenant on Civil and Political Rights, elaborating Article 18 of the 1948 Universal Declaration of Human Rights, which prescribes that everyone shall have the right to freedom of thought, conscience, and religion, which shall include the freedom to have or adopt a religion or belief of choice and the freedom to manifest religion or belief. Religion has long been the basis upon which governments and peoples have singled out others for persecution. This century has seen large-scale persecution of Jews under the hegemony of Nazi powers up to 1945, while more recent targets have included Jehova's Witnesses in Africa, Moslems in Burma, Baha'is in Iran, Ahmadis in different Islamic countries, believers of all persuasions in totalitarian and self-proclaimed atheist States.<sup>14</sup>

Further, the Geneva Convention also makes reference to persecution for reasons of nationality. This reference is somewhat strange, given the absurdity of a State persecuting its own nationals on account of their membership of the body politic. Those who possess the nationality of another State will, in normal circumstances, be entitled to its protection and so fall outside the refugee definition. Imaginably, the nationals of State B resident in State A could find themselves persecuted on account of their nationality, driven out to a neighbouring country and yet still denied the protection of State B, particularly that aspect which includes the right of nationals to enter their own State. However, nationality in the meaning of the Geneva Convention is usually interpreted broadly, to include origins and the membership of particular ethnic, religious, cultural, and linguistic communities. It is not necessary that those persecuted should form a minority in their own country, for oligarchies traditionally tend to have recourse to oppression. Nationality, interpreted broadly, illustrates the points of distinction, which can serve as the basis for the policy and practice for persecution. There may be some overlap between the various grounds and, likewise, factors derived from two or more of the criteria may contribute cumulatively to a well-founded fear of persecution.<sup>15</sup>

Moreover, persecution for reason of membership of a particular social group falls within Article 1. The travaux préparatoires provide little explanation

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<sup>14</sup> *The Refugee in International Law* Goodwin-Gill p 43-45.

<sup>15</sup> *The Refugee in International Law* Goodwin-Gill p 45-46.

for why social group was included. Probably contemporary examples of such persecution may have been in the minds of the drafters, such as resulted from the restructuring of society then being undertaken in the socialist States and the special attention reserved for landowners, capitalist class members, independent business people, the middle class and their families. The initial intention may thus have been to protect known categories from known forms of harm. It is still not unusual for governments publicly to write of sections of their population –the petty bourgeoisie, for example, or the class traitors. In Vietnam in the late 1970s, the bourgeoisie were seen as an obstacle to economic and social restructuring. The characteristics of the group and its individual members were what counted. Membership of a particular social group may be at the root of persecution because there is no confidence in the group’s loyalty to the government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Governments policies. The essential element in any description would be the factor of shared interests, values, or background –a combination of matters of choice with other matters over which members of the group have no control. In determining whether a particular group of people constitutes a social group within the meaning of the Geneva Convention, attention should therefore be given to the presence of linking and uniting factors such as ethnic, cultural, and linguistic origin; education; family background; economic activity; shared values, outlook, and aspirations. Also highly relevant is the attitude to the putative social group of other groups in the same society and, in particular, the treatment accorded to it by State authorities. The importance, and therefore the identity, of a social group may well be in direct proportion to the notice taken of it by others, the view which others have of us, particularly at the official level.<sup>16</sup>

Finally, the Geneva Convention makes reference to fear of persecution for reasons of political opinion. The term political opinion should be understood in the broad sense, to incorporate, within substantive limitations now developing generally in the field of human rights, any opinion on any matter in which the machinery of State, government, and policy may be engaged. The typical political refugee is one pursued by the government of a State or other entity on account of his or her opinions, which are an actual or perceived threat to that government or its institutions, or to the political agenda and aspirations of the entity in question. Political opinions may or may not be expressed, and they may be rightly or wrongly attributed to the applicant for refugee status. If they have been expressed, and if the applicant or others similarly placed have suffered or been threatened with repressive measures, then a well-founded fear may be made out. Problems arise, however, in assessing the value of the political act, particularly if the act itself stands more or less alone, unaccompanied by evident or overt expressions or opinions.<sup>17</sup>

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<sup>16</sup> *The Refugee in International Law* Goodwin-Gill p 46-48.

<sup>17</sup> *The Refugee in International Law* Goodwin-Gill p 48-49.

### 2.3.2 The principle of non-refoulement

Article 33 of the Geneva Convention says that no Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.<sup>18</sup>

Article 33 of the Geneva Convention affirms the principle of non-refoulement. This principle could be defined as the prohibition on returning refugees to countries where they would be likely to face persecution.<sup>19</sup> The principle of non-refoulement, applies clearly and categorically to refugees within the meaning of Article 1 of the Geneva Convention. It also applies to asylum seekers, at least during an initial period and in appropriate circumstances, for otherwise there would be no effective protection. Those with a presumptive or prima facie claim to refugee status are therefore entitled to protection. Equally irrelevant is the legal or migration status of the asylum seeker. It does not matter how the asylum seeker comes within the territory or jurisdiction of the State; what counts is what results from the actions of State agents. If the asylum seeker is forcibly repatriated to a country in which he or she has a well-founded fear of persecution or faces a substantial risk of torture, then that is refoulement contrary to international law. The status of personal circumstances of the asylum seeker, however, may control the options open to the receiving State. In the case of a stowaway asylum seeker, for example, the port of call State may require the ship's master to keep him or her on board and travel on the next port of call; or it may call upon the flag State to assume responsibility where the next port of call is unacceptable; or it may allow temporary disembarkation while waiting for removal elsewhere. Thus, by itself, a categorical refusal or disembarkation can only be equated with refoulement, if it actually results in the return of refugees to persecution. Similar considerations apply also to rescue at sea cases seeking disembarkation, and even to boats of asylum seekers arriving directly.<sup>20</sup>

The Geneva Convention refugee definition is not an absolute guarantee of protection, and non-refoulement is not an absolute principle. National security and public order, for example, have long been recognised as potential justifications for restriction. Article 33(2) expressly provides that the benefit of non-refoulement may not be claimed by a refugee, "whom there are reasonable grounds for regarding as a danger to the security of the country...or who, having been by a final judgement of a particularly serious

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<sup>18</sup> Bring, Lysén p 7-8.

<sup>19</sup> Boccardi p 10.

<sup>20</sup> *The Refugee in International Law* Goodwin-Gill p 137-138.

crime, constitutes a danger to the community of that country". The exceptions to non-refoulement are thus formed in terms of the individual, but whether he or she may be considered a security risk appears to be left very much to the judgement of the State authorities. It is unclear to what extent, if at all, a person found guilty of a particularly serious crime must also be shown to constitute a danger to the community. The jurisprudence is relatively sparse and the notion of particularly serious crime is a principle of natural justice and due process of law require something more than mere mechanical application of the exception. An approach in terms of the penalty imposed alone will be somewhat arbitrary, and the application of Article 33(2) ought always to involve the question of proportionality, with account taken of the nature of the consequences likely to affect the refugee on return. The offence in question and the perceived threat to the community would need to be extremely grave if danger to the life of the refugee were to be disregarded, although a less serious offence and a lesser threat might justify the return of an individual likely to face only some harassment or discrimination. This approach has not always been understood or endorsed by national tribunals, although practice overall appears compatible with such an interpretation.<sup>21</sup>

## **2.4 The content of the commitments undertaken by the Community under the European and Geneva Conventions**

It has been disputed to what extent the Community is bound by its obligation to the ECHR. The Community, it has been stated, is forced to respect not only the conditions of the ECHR as such but also any relevant jurisprudence of the European Court of Human Rights. However, taking into consideration the supposition of the European Court of Justice that the Community legal order is autonomous, bearing in mind, further, that Article 6(2) of the TEU means equal legal force of human rights irrespective of whether they are retained in the ECHR or as they result from the constitutional traditions common to the Member States, as general principles of Community law, and, finally, having respect to the possible conflicts between human rights derived from these sources which must be solved within the framework of the structure and objectives of the Community it is hardly envisageable that either the Member States have intended to bind the European Court of Justice to the European Court of Human Rights' jurisprudence or that the Luxembourg Court will accept a position inferior to that of the Strasbourg Court. Rather the European Court of Justice will in due course consider, as a guideline, relevant jurisprudence of the European Court of Human Rights. So far the European Court of Justice has done so. The idea of construing human rights as independently as other parts of the Community legal order derives additional support from the character of the judgements handed down by the European Court of

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<sup>21</sup> *The Refugee in International Law* Goodwin-Gill p 139-140.



Human Rights. Under Article 46 of the ECHR such judgements are binding between the parties of a dispute only, complaints under the ECHR are not to solve abstract conflicts of law, but those of a particular case. Although Strasbourg judgements mean that the defendant States should discontinue a breach of the ECHR and change national law and practices it is still a question of debate whether the Strasbourg jurisprudence has a binding effect for states not involved in particular cases. Such binding effect could certainly be derived from provisions entrusting the European Court of Human Rights with a general power such as to authentically interpret the ECHR. Nothing, however, in the ECHR indicates that such general power exists. Similarly, the European Court of Justice will be autonomous when interpreting the Geneva Convention. At the same time, Member States' practice under the Geneva Convention will inform the interpretation of Article 63(1) of the EC Treaty. When deciding the meaning of Geneva Convention provisions the European Court of Justice should apply a technique similar to the elaboration of general principles of Community law. In that course the European Court of Justice will have to consider that the Geneva Convention has left state actors a large margin of appreciation. In particular, the Court may not prefer interpretations by Member States, which have retained more political and administrative freedom of action under the relevant domestic jurisprudence to restrictive interpretations as developed by the judiciary in some Member States.<sup>22</sup>

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<sup>22</sup> Hailbronner p 43-45.

# 3 Asylum law and policy of the European Union

## 3.1 Introduction to the asylum law and policy of the European Union

In the 1980s the Member States started to work on a common approach in matters relating to refugees. This chapter deals with the first agreement in the field of refugee law, namely, the Palma Document. Why did the Member States start to make common asylum agreements? The answer is that the free movement of persons led to the need to create an area without internal frontiers, which would necessitate tighter controls at external frontiers. Therefore, it was necessary to establish a set of legal instruments concerning, among other things, the grant of asylum and refugee status. However, these measures may not go beyond what is “strictly necessary for safeguarding security and order”. It is not clear what is meant by this expression, which is a problem since it may lead to arbitrary decisions. Later, as a lead in the harmonisation process of asylum law and policy the EC Treaty which grants the Member States wide competencies in the asylum was agreed upon. This document contains an exhaustive list of asylum measures to be taken, for instance, agreements on burden-sharing. As we will see, a problem in this area is to establish fair distribution mechanisms.

## 3.2 The Palma Document

The Member States of the European Union have advanced the harmonisation of asylum and refugee law since the beginning of the 1980s through the conclusion of agreements and conventions, as well as through the adoption of non-legally binding instruments and the creation of numerous committees to deal with the problems of a European asylum and refugee policy. The goal of harmonisation of Member State asylum based on the Geneva Convention was first mentioned in 1989, when the European Council adopted the Palma Document, which established the so called group of co-ordinators.<sup>23</sup>

In the Palma Document it is stated that the co-ordinators are responsible for co-ordinating, giving an impetus to and unblocking the whole of intergovernmental and Community work in the field of the free movement of persons and submitting to the Madrid European Council a report on the free movement of persons and the establishment of an area without frontiers, including the measures to be adopted by the responsible bodies

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<sup>23</sup> Hailbronner p 360.

and a timetable for their implementation. The co-ordinators' group initially drew up a catalogue of the measures which must be adopted, making a distinction between essential and desirable measures as well as defined, with due regard for their respective fields of competence, the main fora within which the measures could be examined with a view to taking a decision: the ad hoc Working Group on Immigration for the conditions governing the crossing of barriers, the Trevi Group and in particular the Trevi 1992 Group with regard to co-operation on law enforcement and, if necessary, related legal problems, the Working Group on Judicial Co-operation as part of European Political Co-operation (international treaties, national and Community legislation) and Community bodies for matters within the Communities' jurisdiction. These Groups would keep the Co-ordinators Group regularly informed of their activities; proposed the priorities for adopting these measures and suggested target dates for adopting all the measures.<sup>24</sup>

In the Palma Document, reference is made to the The Single European Act which sets as an objective for the Community the establishment by 31 December 1992 of "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty". The creation of an area without internal frontiers would necessitate tighter controls at external frontiers. Controls carried out at those frontiers are in fact valid for all the Member States. Those controls must be highly effective and all the Member States must be able to rely on them. If necessary, consideration should be given to the conditions and the manner in which the Community might contribute to financing certain types of infrastructure, bearing in mind that controls at its external frontiers are being strengthened. To this end, a set of legal, administrative and technical instruments should be established, as criteria will need to be harmonised on treatment of non-Community citizens. Amongst the legal measures, attention should be drawn to the following: grant of asylum and refugee status; a common policy will be based in the Member States' obligations pursuant to their accession to the Geneva Convention and the New York Protocol. This policy will initially focus on the following aspects: uniform international obligations in the area of asylum law, determining the State responsible for examining the application for asylum, simplified procedures for manifestly unfounded asylum applications, conditions governing the movement of the applicant between Member States, study of the need for a financing system to fund the economic consequences of implementing the common policy. In keeping with the traditional values of the Member States of the Community, the Co-ordinators insist that the stepping-up of controls at external frontiers should not go beyond what is strictly necessary for safeguarding security and law and order in the Member States. They also draw attention to the Declaration against Racism and Xenophobia adopted in 1986 by the European

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<sup>24</sup> *The Developing Immigration and Asylum Policies of the European Union Adopted Conventions, Resolutions, Recommendations, Decisions and Conclusions* Compilation and Commentary: Elspeth Guild Introduction: Jan Niessen p 443-445.

Parliament, the Council, the Representatives of the Member States and the Commission.<sup>25</sup>

### **3.3 The new Part III, Title IV of the Treaty establishing the European Community**

The most important steps in the harmonisation of European national refugee and asylum policies to date have been taken in the framework of the European Union. The Treaty of Amsterdam confirms the will of the Member States to advance the process of harmonisation through the introduction of far-reaching EC-Competencies in the field of asylum and refugee law. Within the structure of the EU, Member States asylum and refugee policy harmonisation is recognised as an indispensable requirement for the achievement of the goals of the EC Treaty.<sup>26</sup> The Treaty of Amsterdam was agreed by the Amsterdam Council of June 1997. Among its objectives, it set down the maintaining and developing of the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external borders controls, asylum, immigration and the prevention and combating of crime. The greatest innovation in the EU approach to asylum issues was the introduction into the Treaty of Amsterdam of a new EC competence on asylum policy. The new Part III, Title IV of the EC Treaty deals with visas, asylum, immigration and other policies related to the free movement of persons (Articles 61-69) and it was added to the section of the EC Treaty concerning Community policies. This title set, as a new EC objective, the progressive establishment of an area of freedom, security and justice. As reflected by the title, its legal justification comes from the necessity of guaranteeing the free movement of persons. It is therefore firmly grounded in the general objective of the establishment of the Internal Market. The Treaty of Amsterdam finally codified that the free movement of persons did necessarily give rise to an internal border-free Europe.<sup>27</sup>

Article 61 of the EC Treaty establishes the general scope of the new Community competence. In order to establish an area of freedom, security and justice, the Council shall adopt, among other, measures in the fields of asylum, immigration and safeguarding the rights of nationals of third countries, in accordance with the provisions of Article 63. The measures concerning the crossing of external and internal borders and common visa rules are laid down in Article 62. 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, among others, measures setting out the conditions under which nationals of third countries shall have the freedom to travel within the territory of the Member States during a period of no more than three months. Article 63.1-2 regulates the

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<sup>25</sup> Guild, Niessen p 443-448.

<sup>26</sup> Hailbronner p 356.

<sup>27</sup> Boccardi p 131-132.

new EC competence in the asylum field. 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, among other, measures on refugees and displaced persons within the following area: promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons. Article 64 concerns the safeguarding of internal law and emergency situations. Article 65 deals with measures in the field of judicial co-operation in civil matters and Article 66 with procedural matters. Article 68 and 69 concern matters relating to the interpretation of the Title.<sup>28</sup> Below Article 61-64 will be treated in detail.

Article 61 of the EC Treaty lays down the general scope of the new Community competence. This competence involves five different areas. It mainly concerns the establishment of an internal border-free area and its related measures, thereby involving:

- a) the asylum, immigration and crime control fields,
- b) judicial co-operation in civil matters,
- c) administrative co-operation, and,
- d) finally police and judicial co-operation in criminal matters.<sup>29</sup>

Article 62 establishes the measures concerning the crossing of external and internal borders and common visa rules. A transitional period of five years from the entry into force of the Treaty of Amsterdam is set as a deadline for the Council to adopt all measures necessary for the setting up of a common external borders area, including rules on border checks and short-term visas.<sup>30</sup>

The new EC competence in the asylum field is regulated in Article 63.1-2 of the EC Treaty. The measures to be in accordance with the Geneva Convention and other relevant treaties are restricted to a number of fields that are specifically listed. The careful wording chosen to define this list indicates that it is to be considered exhaustive and not merely of indicative value. The asylum measures to be adopted within a period of five years from its entry into force considers mainly:

1. matters relating to the Dublin Convention determining Member States responsibility on asylum claims, minimum standards,
2. minimum standards of reception for asylum seekers in Member States,
3. minimum standards in the Member States' definition of the concept of refugee,
4. minimum standards for national procedures on granting or withdrawing refugee status,
5. minimum national standards of temporary protection for de facto refugees and displaced persons and,

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<sup>28</sup> *European Union Selected Instruments taken from the Treaties Book 1 Volume 1 1999* p 129-135.

<sup>29</sup> Boccardi p 132.

<sup>30</sup> Boccardi p 133.

## 6. burden-sharing of refugee flows between Member States.<sup>31</sup>

Concerning the first point, matters relating to the Dublin Convention this Convention contains such criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a third-country national in one of the Member States. Chapter VII (Articles 28-38) of the Schengen Implementation Convention equally contained provisions establishing a responsibility system for asylum requests. However, since the entry into force of the Dublin Convention on 1 September 1997 these provisions no longer apply.<sup>32</sup>

According to the second point, minimum standards of reception for asylum seekers in Member States shall be adopted.<sup>33</sup> This provision aims at assimilating the legal position of asylum seekers in the Member States during the asylum procedure, including everything but the procedure itself. Questions such as the right to work, access to education, family reunion, social assistance, free movement and identity and travel documents can be addressed. Whilst the Council may merely establish minimum standards, Member States may always grant a more favourable legal status to asylum seekers, uninhibited by the Council.<sup>34</sup>

The third point calls upon the Council to adopt minimum standards in the Member States' definition of the concept of refugee.<sup>35</sup> In light of the Joint Position defined by the Council on the basis of Article K.3 TEU on 4 March 1996 which concerns the harmonised application of the definition of the term refugee in Article 1 of the Geneva Convention, the new Community competency makes it possible to improve this instrument and tackle its weak points. A legally-binding directive, for example, could be adopted. It must be emphasised, however, that the Council has no competence to establish binding comprehensive standards. It cannot forbid a Member State to interpret the Geneva Convention more generously than determined by the Council.<sup>36</sup>

Further, following the fourth point, minimum standards for national procedures on granting or withdrawing refugee status shall be adopted.<sup>37</sup> This provision, in particular, foresees improvement and further development of numerous Council acts which were adopted either before or after the entry into force of the TEU in the field of asylum procedures. The Council does not have the competence to issue final and comprehensive regulations on all details of asylum procedures; it may only adopt minimum standards.<sup>38</sup>

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<sup>31</sup> Boccardi p 133-134.

<sup>32</sup> Hailbronner p 368.

<sup>33</sup> Boccardi p 134.

<sup>34</sup> Hailbronner p 368.

<sup>35</sup> Boccardi p 134.

<sup>36</sup> Hailbronner p 368-369.

<sup>37</sup> Boccardi p 134.

<sup>38</sup> Hailbronner p 369.

Finally, following the fifth and sixth points, minimum national standards of temporary protection for de facto refugees and displaced persons, burden-sharing of refugee flows between Member States shall be taken.<sup>39</sup> Which persons are included in the scope of Article 63(2)(a) and (b)? Although Title IV of the EC Treaty does not expressly define the term refugee, a systematic interpretation of Article 63(2) views refugees as persons who fulfil the conditions of Article 1 of the Geneva Convention. Displaced persons, contrary, are persons who do not fulfil the requirements of this provision. Article 63(1) of the EC Treaty calls on the Council to adopt measures on asylum in accordance with the Geneva as well as with other relevant treaties. As a result, the qualification of nationals of third countries as refugees mentioned in Article 63(1)(c) of the EC Treaty means qualification as a refugee under the Geneva Convention. The same understanding must apply when interpreting Article 63(2) of the EC Treaty. What is meant by person who otherwise need international protection in Article 63(2)(a) of the EC Treaty is not exactly clear. Several acts adopted by the Council under ex-Article K.3(2)(a) of the TEU, the 1995 Resolution, the 1996 Decision and, in particular, the Resolution of 14 October 1996 laying down the priorities for co-operation in the field of justice and home affairs for the period from 1 July 1996 to 30 June 1998, indicate that the first clause, temporary protection to displaced persons, mentioned in Article 63(2)(a) of the EC Treaty refers to situations of mass-influx of refugees, while the second clause, persons who otherwise need international protection, covers persons granted temporary protection for reasons of public international law, or for humanitarian reasons on an individual basis, rather than as a member of a group of refugees. What is the community competency laid down in Article 63(2)(a) and (b)? The Community competence laid down in Article 63(2)(a) of the EC Treaty allows, first, for the establishment of minimum rights for temporarily protected persons and persons who otherwise need international protection. This concerns, for example, issues such as the right to work, access to education, the right to family reunion, social assistance, free movement, and identity and travel papers. The term minimum standards is broad enough to further include provisions on the scope of application (the beneficiaries) of rules on temporary protection and humanitarian residence permits, the procedure of establishing temporary protection and the relationship to the asylum procedure. Article 63(2)(b) of the EC Treaty gives the Council a competence to adopt measures with the aim of promoting burden-sharing with regard to Geneva Convention refugees and displaced persons. Whether the promotion of a balance of effort may result in a final and binding imposition of criteria and mechanisms for burden-sharing has deliberately been left open. The word promotion is vague in comparison with other possible terminology; a restrictive interpretation of this provision, therefore, seems to be justified.<sup>40</sup>

Some very important exceptions to the application of this new Community competence are contained in Article 64 of the EC Treaty. It specifically lays

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<sup>39</sup> Boccardi p 134.

<sup>40</sup> Hailbronner p 370-371.

down that nothing in Title IV of the EC Treaty shall affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.<sup>41</sup> Article 64(2) of the EC Treaty contains a very important new innovation, which allows the Council to adopt provisional measures for a maximum duration of six months to benefit an affected Member State in the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries, without prejudice to paragraph 1 and accepted by a qualified majority on a proposal from the Commission. In cases of emergency, this Article allows for a simplified voting procedure, as this will promote timely decision-making and action.<sup>42</sup>

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<sup>41</sup> Boccardi p135.

<sup>42</sup> Hailbronner p 370-371.



# 4 Burden-sharing and temporary protection

## 4.1 Introduction to burden-sharing and temporary protection

In this chapter the issues of burden-sharing between the Member States and temporary protection are dealt with. Which functions are these institutions having? Which common steps were taken in the EU asylum law and policy after the Palma Document and the EC Treaty? Burden-sharing is, as we are going to see, motivated by the idea that equitable distribution of costs and responsibilities in protection will lead to both a maximum of fairness among states and a maximum of openness against protection seekers. Here, in this area, problems concerning equitable burden-sharing between Member States arise. How should a balance of efforts between countries be obtained? For example it can be regarded as fair that a country which by humanitarian, economic and political means assists in resolving a crisis in a country should receive less refugees than a passive country. The first instruments dealing with the issue of burden-sharing were the 1995 Decision and the 1996 Resolution. The Dublin Convention is another document on the same theme. Its burden-sharing mechanism has led to an unequal distribution of refugees. As we will see there are some proposals on how to resolve this dilemma i.e. on how to adapt the Dublin Convention. The issues of burden-sharing and temporary protection were further developed by the Experimental Instruments and the ERF and the TPD. What will happen to the refugees when the period of temporary protection has come to an end? How should means from the ERF be distributed in a fair way? Is the TPD containing a fair distribution mechanism? Should an equal distribution of the burden resulting from the reception of displaced persons be obtained just through financial compensation or should temporary protected persons, if necessary, be transferred from one Member State to another?

## 4.2 The objective and scope of burden-sharing

Responsibility for refugees is not equally shared between the countries in the world. Globally, one could mention Iran, which has been at the top of the reception statistics for seven years, sheltering nearly two million refugees. Regionally, Germany hosts 1,2 million refugees, which is more than all other Western European States taken together. Burden-sharing is motivated by the idea that equitable distribution of costs and responsibilities in protection will lead to both a maximum of fairness among states and a maximum of openness against protection seekers. Where a group of states shares the task of protection, peak costs will be avoided, while existing resources will be fully exploited. There are two beneficiaries to such

arrangements –host States and protection seekers. First, states engaging in burden-sharing cut their total costs. Second, the number of protection seekers finding protection is larger than it would be in the absence of burden-sharing arrangements. What does it mean to distribute costs and responsibilities more equitably? Determining the scope of burden-sharing is at first, rough selection of risks as part of the underwriting process. This selection process may be split into two steps. The first is about determining the group of participants in a burden-sharing, and the second is about delimiting the specific risks these participants are willing to share with each other. Regarding the first step, most actors in the North agree that regional burden-sharing is a more realistic option than a global scheme. One of the reasons is that risks in a regional scheme are more limited than those in a global one, which increases predictability and makes consensus easier among would-be participants. Thus, the question of which states should participate in any given scheme is of the great importance for its problem-solving capacity. The participating states could share the following specific risks:

1. sharing the burden of preventing and resolving refugee crisis,
2. sharing the burden of preventing and deflecting arrivals, and,
3. sharing the burden of reception.<sup>43</sup>

The first issue, sharing the burden of preventing and resolving refugee crisis, stretches from diplomatic efforts to the expenses of military intervention. While the linkages to refugee reception are clear, the scope of such burden-sharing is extremely large and difficult to delimit. Preventing refugee crises is probably the most complicated of the three items listed above. It is highly reminiscent of the discussion on distributing defence burdens within the framework of NATO, and links the availability of refugee protection to the inconsistently regulated area of international peace and security. This form of preventing burden-sharing will definitely remain on the agenda, but due to its complexity, it is problematic to make other forms of burden-sharing contingent on its availability. Therefore, it is highly questionable that the 1995 Resolution with regard to the admission and residence of displaced persons on a temporary basis deals with military action and refugee reception under one single sharing criterion. Bringing the different contributions together into one and the same instrument risks weakening its focus and decreasing possibilities for its negotiation and practical functioning.<sup>44</sup>

Regarding the second item, sharing the burden of preventing and deflecting arrivals, persuasive examples of the practicability of burden-sharing already exist. The area of visa requirements, the control of aliens' movements within a group of states and border control in general have been made the subject of such sharing. Other examples are the rather inexpensive instrument of common visa lists, the Schengen Information System, which

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<sup>43</sup> *Negotiating Asylum The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* Noll p 263-268.

<sup>44</sup> Noll p 268-269.

is a costly computer network jointly financed by the Schengen Parties and measures ensuring control of external borders of the European Union as well as its financial and training support to Central and Eastern European neighbours' border control under the PHARE, TACIS and ODYSSEUS programmes. The costs of these co-operations were not trivial, however, their sharing could be successfully negotiated. To sum up, governments seem to find little difficulty in acting in a spirit of solidarity when it comes to the burden of deflection.<sup>45</sup>

Precisely as for the two forms of preventive burden-sharing, co-operation on the actual reception of refugees may take many forms. It is reasonable to distinguish between three main approaches: harmonising refugee and asylum legislation (sharing norms), reallocating funds (sharing money) and distributing protection seekers (sharing people). Below these three main approaches will be analysed in detail.<sup>46</sup>

First, considering sharing norms, a relatively simple step is to harmonise domestic refugee and asylum legislation within a group of States, thereby neutralising inequalities in distribution due to differences in the protection offer made by single countries. In this sense, binding instruments such as the Geneva Convention can be understood as a basic starting point for burden-sharing. In the EU context, variations in the protection offered by Member States have been perceived as creating imbalance in an equitable distribution of protection seekers among the Fifteen. As a consequence, the Council has issued a number of instruments to promote normative harmonisation. Besides protection categories and procedural aspects, variations in social rights offered to asylum seekers have also been presumed to affect their distribution. Why is the adoption of common norms a form of burden-sharing? By agreeing to maintain a minimum level of protection, states make a commitment not to minimise reception by means of normative dumping. Let us suppose that the prohibition of *refoulement* had not been laid down as a legally binding norm in the Geneva Convention. Apart from moral and political restrictions, states would then be free to compete with each other in the area of returning refugees to persecution, thus disclaiming themselves from protection costs. Laying down a prohibition of *refoulement* pacifies the area of return from interstate competition. The state commitment made by accepting this norm is costly. It can be regarded as an insurance fee paid to a solidarity system, guaranteeing both refugees and states a minimum level of protection. Harmonising the protection offered is a liberal solution, drawing on the idea of self-regulation and trusting the protection seeker's capacity to make rational decisions. However, harmonisation can merely address those forms of unequal distribution based on differences in domestic legislation. Refugee legislation is just one factor influencing the choice of destination made by a person seeking protection. Other factors, such as geographical proximity of a potential destination country or the availability of social networks there,

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<sup>45</sup> Noll p 269-270.

<sup>46</sup> Noll p 270.

could be of far greater importance. Further, harmonisation may indeed extend the concentrating effects of such factors. Where a more remote country offers better protection to a certain group of persons in need, these may choose to go to this country, instead of states closer to the crisis region. Obviously, a marketplace of protection may also even out inequalities in distribution. Finally, due to the situation of existential distress a refugee is in, it would be unrealistic to see her as a perfectly rational customer, picking and choosing on a market of varying protection offers.<sup>47</sup>

Regarding the second approach, sharing money, contrary to the other approaches, harmonising the protection offer is largely a preventive approach in that it tries to avoid the occurrence of unequal distribution. The reallocation of funds, on the other hand, is reparative in nature, as it strives to even out existing inequalities through different forms of financial transactions. A major difficulty in fiscal burden-sharing is the establishment of a distributive key. This involves decisions about what shall be regarded as a loss under the scheme and how such loss should be rated. In this context, defining a loss means determining the level of reception and expenses, where other states are obliged to assist. Rating such losses means translating refugee reception into fiscal terms. And, finally, based on these considerations, the contributing which participating states need to offer to the common scheme has to be specified. Are there any examples of fiscal burden-sharing as it is? In fact, UNHCR could be described as such a reallocation mechanism, despite in an imperfect form. Donors make means available to UNHCR, enabling the office to run various forms of assistance programmes in refugee hosting countries. Finally, this form of distribution depends on, first, yearly decisions to be taken by the Executive Committee and the General Assembly and, secondly the charity of donors. In all, this allows for considerable variations in funding, thus diminishing the predictability of such burden-sharing. Moreover, funding is inequitably distributed among regions and crises. On the other hand, UNHCR operations have an almost global coverage, which gives the mechanism a universal potential. It must be held in mind, however, that UNHCR was not conceived as a burden-sharing mechanism and should not necessarily be judged as one. Fiscal burden-sharing also takes place through other channels. States may support other states on a bi- or multilateral basis. States or non-state actors fund NGOs, which support refugees in other countries, thus relieving public expenses there. Even in that case, variation in funding is a considerable threat, preventing receiving countries from trusting the availability of assistance in the long term. The persistence of the burden-sharing debate indicates that reallocations through UNHCR as well as other channels are perceived as insufficient to secure openness in the reception of refugees.<sup>48</sup>

Third, regarding sharing people, the underlying presumption of fiscal burden-sharing is that reception costs are quantifiable. Obviously, this is not

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<sup>47</sup> Noll p 270-271.

<sup>48</sup> Noll p 272-273.

entirely true. While it is comparatively easy to determine the costs of food and housing in terms of Euros, Dollars or Yen, setting numbers on the costs of integration is much more difficult, if not impossible. This is why some major receiving countries argue for sharing schemes involving the redistribution of protection seekers. From a state perspective, the attraction of people-sharing lies in the redistribution of the perceived source of all conceivable costs linked to reception, be they fiscal, social or political. Clearly, redistributing protection seekers is more intrusive against the individual than sharing money. First, people-sharing may lead to an undesirable second uprooting. Second, the presence of family members or the existence of social networks in a specific country can play an important role in the protection seeker's possibilities for integration. Where a sharing scheme denies the protection seeker access to this advantage, it may augment the total cost of protection in the group of receiving states. By sending and receiving protection seekers under such schemes, states share responsibility rather than mere cost. Therefore, these forms of co-operation are properly designated as responsibility-sharing. Precisely as for fiscal burden-sharing, the feasibility of responsibility-sharing depends on the establishment of a distributive key.<sup>49</sup>

### **4.3 The concept of temporary protection**

Temporary protection is not an established part of public international law but a political instrument developed to cope with specific situations. It is granted by the national authorities as an autonomous act in reaction to a specific crisis situation of mass influx based upon a special decision to admit a specific group of persons and for a specific duration of time and can therefore not be legally claimed before a judiciary body. Nevertheless, temporary protection must be framed and evaluated in the light of international obligations of states. The concept of temporary protection is designed to be applied to groups of persons as a spontaneous reaction to their urgent needs in situation of mass flight as an emergency situation. It has the benefit of offering immediate and flexible protection to individuals in need. Though temporary protection schemes are not meant to replace the institution of asylum, they can, nonetheless, offer immediate humanitarian protection to larger groups of people who have been forced to flee from their homes and country. Temporary protection is, by definition, limited to the time during which the conditions in the country of origin do not allow a safe and dignified return of the individuals involved. The wording of the concepts suggests its two key elements. On the one hand, temporary protection is not designed to be a durable, and thus permanent, solution for refugee crisis. Displaced persons must return to their country of origin after the situation has improved to an extent that international protection is no longer needed, and their return in safety and dignity is possible. On the other hand, the concept embodies the idea of international protection, compromising, *inter alia*, admission to a host country, the granting of basic

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<sup>49</sup> Noll p 273-275.

rights during residence and compliance with the principle of non-refoulement.<sup>50</sup>

#### **4.4 The 1995 Resolution on Burden-sharing and the 1996 Decision on Burden-sharing**

The dismantling of the Iron Curtain and the violent dissolution of the Federal Republic of Yugoslavia were two issues of extreme importance for the migrational agenda of Western European States. The Balkan crisis had set off the largest refugee flow in Europe since the end of the Cold War, and the number of asylum applications filed with European States peaked in 1992.<sup>51</sup> The crisis in former Yugoslavia acted as a catalyst, for the first time forcing Western European governments to realise their inability to face situations of mass influx. Their first reaction was to impose visa requirements on all the countries where most asylum seekers originated from. For instance, since mid-1992 all Member States progressively imposed visas on nationals from Bosnia-Herzegovina. These tactics, however, failed to stop the flows. Over half a million people sought asylum in Europe, both in 1991 and 1992, and most of them did not qualify for the Geneva Convention status of refugee. In 1992 the recognition rate was below 10 percent in most European States. Former Yugoslavia topped the list of the countries of origin in most European States in 1991-1992. The asylum applicants were mostly fleeing situations of civil war and internal armed conflict and therefore did not satisfy, in the eyes of Member States, the territory of a Member State, it proved impossible to remove them due to the obligation of non-refoulement in Article 33 of the Geneva Convention. All Member States had developed some form of exceptional leave to remain for persons who feared persecution outside the definition of the Geneva Convention, but practices varied greatly. The acknowledgement of these differences was one of the factors that pushed forward the idea that some sort of harmonisation in the field was needed. However, the strongest motivational factor for harmonisation was the uneven distribution of these mass influxes. Germany alone coped with 80 percent of all EU applications. In 1992, Germany and Austria received 450 000 refugees from former Yugoslavia, the Nordic countries 110 000 and Spain, Italy, France and Great Britain together only 55 000. The strain on international resources was enormous and through Third Pillar asylum co-operation the worst hit Member States started to apply considerable pressure to promote the concept of burden-sharing.<sup>52</sup>

Based on the inequitable reception of Bosnian refugees and the difficulties to negotiate even non-binding European instruments, burden-sharing was declared to be one of the issues to be examined by the Council in 1994 according to the priority work plan for that year. Accordingly, the German

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<sup>50</sup> Hailbronner p 425.

<sup>51</sup> Noll p 285.

<sup>52</sup> Boccardi p 111-112.

presidency presented an ambitious draft Council Resolution on burden-sharing regarding the admission and residence of refugees in July 1994. However, the draft had difficulties in attracting the necessary support and was successively watered down in later compromise drafts. During the Spanish presidency, a limited consensus on burden-sharing had finally begun to develop, and the Council Resolution on burden-sharing with regard to admission and residence of displaced persons on a temporary basis on 25 September 1995 was adopted, followed in 1996 by a Decision on an alert and emergency procedure for burden-sharing with regard to the admission and residence of displaced persons on a temporary basis.<sup>53</sup>

The Council Resolution of 25 September 1995 on burden-sharing with regard to the admission and residence of displaced persons on a temporary basis (hereinafter the 1995 Resolution) consists of the preamble and seven paragraphs. The first paragraph lays down the scope of persons on which the resolution applies. The second paragraph deals with harmonised action while the third paragraph treats prompt action. The fourth paragraph concerns criteria for burden-sharing. The fifth paragraph says that the allocation of persons from the crisis regions is a matter of priority. According to the sixth paragraph the 1995 Resolution does not affect practices relating to admission on humanitarian grounds followed by individual Member States. The seventh paragraph says that 1995 Resolution does not apply retroactively.<sup>54</sup>

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 (hereinafter the 1996 Decision) consists of the preamble and four paragraphs. According to the first paragraph an urgent may meeting may be held on the initiative of the Presidency, a Member State or the Commission. Following the second paragraph the agenda for the meeting may, among others, cover the following: a study of the situation and an assessment of the extent of population movement as well as the appraisal of the expediency of urgent intervention at European Union level. The third paragraph lays down the procedure for decision on burden-sharing and the fourth paragraph regulates the monitoring of the situation.<sup>55</sup>

#### **4.4.1 The legal effect**

These two agreements represented a re-arrangement and generalisation of the previous initiatives on former Yugoslavia.<sup>56</sup> The 1995 Resolution has been based on Article K.1. of the TEU, while the 1996 Decision cites

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<sup>53</sup> “Temporary Protection and Burden-Sharing: Conditionalising Access Suspending Refugee Rights?” Noll, Vedsted-Hansen Included in: *Implementing Amsterdam Immigration and Asylum Rights in EC Law* p 198.

<sup>54</sup> *O J (1995) C 262/10* p 1-4.

<sup>55</sup> *O J (1996) L 63/10* p 10-11.

<sup>56</sup> Boccardi p 113-114.

Article K.3(2)(a) of the TEU as its legal basis. No explicit answer is given in the wording of the provision to the question of whether the acts adopted under the second alternative of Article K.3(2)(a) of the TEU are binding or not. Nor can a clear answer be drawn from the system of Article K.3 and the TEU as a whole. The Member States has informally agreed to define the legal effect of each individual joint position in the act itself. However, no such agreement exists with respect to the co-operation under the second alternative of ex-Article K.3(2)(a) of the TEU. Whether the Member States will bind themselves to a regulation will, therefore, be decided anew for each individual act. An examination of the texts of the two acts with regard to both formal characteristics and substance shows the general unwillingness on the part of Member States to enter into strict legal obligations.<sup>57</sup>

The 1995 Resolution has been published in series C of the Official Journal, which is devoted to the publication of non-normative communications and information. Furthermore, according to paragraph 1(a), the 1995 Resolution applies solely to persons, whom the Member States are prepared to admit. This formulation is evidence of the fact that it was not intended to create new obligations to recognise additional categories of persons pursuant to this Resolution. In addition, paragraph 2 of the 1995 Resolution says that harmonised action may be required under certain circumstances. Neither harmonised action, nor acceptance of the criteria for burden-sharing set down in paragraph 4 of the 1995 Resolution are mandatory. It is laid down in this provision that the burden “could be shared taking account of the following criteria”. In general, the 1995 Resolution does not contain any phrase, which would make it binding, either in individual parts, or as a whole.<sup>58</sup>

The 1996 Decision was published in series L of the Official Journal. It is called decision, and, in the same formal language, introduces an alert and emergency procedure. It does not, however, create legally binding obligations. An urgent meeting of the Co-ordinating Committee referred to in Article K.4 may be convened, pursuant to paragraph 1 of the 1996 Decision. According to paragraph 1(a), harmonised action will be implemented when envisaged, i e if, and when the Member States are willing to do so. Under paragraph 2, clause 5, the Member States only indicate the numbers of persons who will be admitted. The 1996 Decision does not oblige Member States to admit persons or to make compensatory payments.<sup>59</sup>

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<sup>57</sup> Hailbronner p 419-420.

<sup>58</sup> Hailbronner p 420.

<sup>59</sup> Hailbronner p 420.



#### 4.4.2 The scope of application

The scope of application of the 1995 Resolution is set down in paragraph 1(a). The instrument applies to persons who Member States are prepared to admit on a temporary basis under appropriate conditions in the event of armed conflict or civil war. Such persons who have already left their region of origin to go to one of the Member States are included. The persons concerned are in particular those who have been held in a prisoner-of-war or internment camp and who cannot otherwise be saved from a threat to life or limb, those who are injured or seriously ill and for whom medical treatment cannot be obtained locally, those who are, or have been, under a direct threat to life or limb and whose protection in their region of origin can not otherwise be secured. Further, persons concerned are those who have been subjected to sexual assault under condition that there is no suitable means for assisting them in safe areas situated as close as possible to their homes and those who, having come directly from combat zone, are within the borders of their countries and cannot return to their homes because of the conflict and human rights abuses. According to paragraph 1(b), the 1995 Resolution does not apply to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision regarding such crimes and/or committed a serious non-political crime prior to being admitted by one of the Member States on a temporary basis.<sup>60</sup> An exclusion clause similar to Article 1 F (a) and (b) of the Geneva Convention has been inserted. It emerges clearly that no state obligation to admit is envisaged. Any decision on admission remains within the discretion of the relevant Member State. The 1995 Resolution does not apply retroactively, i.e. to persons admitted before its adoption.<sup>61</sup> Thus, persons already admitted to a Member State's territory at the time of the adoption of the 1995 Resolution are not included in the scope of its application, pursuant to paragraph 7. The 1995 Resolution is intended to cover persons in need of protection regardless of their potential qualification as refugees under Article 1 of the Geneva Convention. Both instruments apply in situations of mass influx, as well as for individuals temporarily admitted to the territory of a Member State on humanitarian grounds. Paragraph 1(a) of the 1995 Resolution allows for request for temporary protection in a limited number of cases: exclusive coverage exists for situations of armed conflict or civil war. However, the need for temporary protection might result from numerous of other factors, such as floods, droughts, epidemics, earthquakes, other environmental catastrophes, or other extraordinary and temporary conditions in a state that prevent persons who are nationals of that state from safely returning to their state of origin. One may argue that such other causes for a mass flight, however, ought to have been included in an EU burden-sharing mechanism. Otherwise, in a mass influx situation resulting from, for example, a natural disaster, or one of the other events listed above, Member States could reject

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<sup>60</sup> Hailbronner p 420-421.

<sup>61</sup> Noll p 296.

their common responsibility on the ground that co-operation had only been agreed upon in case of mass influx resulting from armed conflict or civil war. A blanket clause would have been preferable, providing for co-operation and burden-sharing in all cases of mass influx. Furthermore, the scope of application of the two instruments has been criticised as being overly restrictive even in cases of armed conflict or civil war by the listing of exemplary cases. This list is not, however, final or exhaustive. To that extent, the criticism seems to be unfounded.<sup>62</sup> As the remaining personal scope is imprecise and ultimately refers back to the assessment made by each Member State, it is not clear how Member States are to single out a group of persons which could be the subject of burden sharing according to Article 4 of the 1995 Resolution.<sup>63</sup>

#### **4.4.3 The burden-sharing procedure**

Member States state in paragraph 4 of the 1995 Resolution that they will share the burdens of a harmonised admission action equally.<sup>64</sup> Instead of a setting-up of a burden-sharing mechanism, the 1995 Resolution proposes a series of guidelines for estimating how to share the burden of refugees in situations of mass influx. Criteria include the contribution of each Member State to the solution of the crisis, humanitarian assistance and all economic or political factors that might have reduced the capacity of a State to admit large numbers of refugees. Tellingly, the 1995 Resolution closed with a provision on the non-retroactivity of such guidelines: in other words, people admitted during previous conflicts constituted no bargaining chip for further refugees.<sup>65</sup> The Member States have listed a number of factors as possible criteria for the distribution of burden resulting from the admission and residence of displaced persons on a temporary basis in crisis situations. The first factor is the contribution which each Member State is making to prevent or resolve the crisis, especially by the supply of military resources in operations and missions ordered by the United Nations Security Council and by the measures taken by each Member State to afford local protection to people under threat or to provide humanitarian assistance. The second factor consists of all economic, social and political factors, which may effect the capacity of a Member State to admit an increased number of displaced persons under satisfactory conditions. The optional character of these criteria, according to paragraph 4 the burden could be conferred based on the criteria listed, must be viewed as a major weakness in the 1995 Resolution. Besides that, the above criteria are so general that they will have to be further specified if they are to provide an effective basis for burden-sharing measures.<sup>66</sup>

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<sup>62</sup> Hailbronner p 421-422.

<sup>63</sup> Noll p 297.

<sup>64</sup> Hailbronner p 422.

<sup>65</sup> Boccardi p 114.

<sup>66</sup> Hailbronner p 422.

The 1996 Decision tries to set up a rapid response mechanism for situations of mass influx whereby the principles of the 1995 Resolution would be applied to a specific emergency situation. An urgent meeting of the K.4 Committee would be convened at the request of the Presidency, any Member State or the Commission and a report would be prepared on the situation in the light of the opinion of the UNHCR. The agenda for the emergency meeting would consider the feasibility of local intervention and how many refugees Member States would be willing to admit according to the criteria laid down in the 1995 Resolution. The detailed arrangements for admitting the displaced persons would be set up by each country. Both agreements were put to the test during the Kosovo crisis. Although the emergency mechanism provided for by the 1996 Decision was correctly started, it proved impossible to achieve any consensus on refugee quotas. This led to quarrels among Member States, proving once more that a better temporary protection framework was urgently needed. The delays in approving this framework indicated clearly the lack of consensus on the matter.<sup>67</sup>

The importance of these agreements do not lie in their ability to achieve efficient results, but in the fact that they constitute a further departure from the flanking measure aspects of asylum co-operation. They prove that (at least some) Member States had come to realise the full potential of the generic definition of Article K.1.1 and were willing to exploit it to tackle any common concern on asylum matters and not just security issues derived from the Internal Market objectives. The fact that these initiatives were so strongly resisted and eventually disapplied indicate that this expansion of the asylum co-operation field was still in a delicate transitional phase and many Member States still needed time to adjust to these new developments.<sup>68</sup>

## 4.5 The Dublin Convention

The Dublin Convention was established by an ad hoc immigration group, set up at an informal meeting of the Community immigration ministers in London on 10 October 1986. The Convention determining the State responsible for examining applications lodged in one of the Member States of the European Communities (hereinafter the Dublin Convention) was signed in Dublin on 15 June 1990 by the (at the time) twelve Member States, with the exception of Denmark, which signed the agreement on 13 June 1991. Austria, Sweden and Finland accepted the Dublin Convention as part of the EU *acquis* upon accession to the EU. The Dublin Convention entered into force for the twelve original Contracting Parties on 1 September 1997, and for Austria and Sweden on 1 October 1997.<sup>69</sup>

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<sup>67</sup> Boccardi p 114.

<sup>68</sup> Boccardi p 114-115.

<sup>69</sup> Hailbronner p 382-383.

The Dublin Convention consists of the preamble and twenty-two articles. Article 1 contains an explaining of the terminology of the Dublin Convention. Article 2 comprises a reaffirmation of the Member States' obligations under the Geneva Convention. Article 3 contains general provisions concerning the application for asylum. The Articles 4-8 contain criteria for determining which Member State shall examine the application for asylum. Article 9 says that a Member State, which is not responsible under the criteria laid down in the Articles 4-8 may for humanitarian reasons examine an application for asylum at the request of another Member State. Article 10 lays down the obligations of the Member State responsible for examining an application for asylum. Article 11 concerns transfer of an application for asylum from one Member State to another. Article 12 contains an exceptional clause for determining the State responsible for examining the application. Article 13 lays down rules for the procedure concerning taking back application. Article 14 contains rules about mutual exchange. Article 15 says that each Member State shall communicate information to any other Member States that so requests. Article 16 gives provisions for proposals for revision of the Dublin Convention. Article 17 regulates the rules for suspension of application of the provisions of the Dublin Convention. Article 18 provides rules concerning the Committee, which shall examine any question of general nature concerning the application or interpretation of the Convention. Article 19 contains some rules on territorial issues. Article 20 says that the Dublin Convention shall not be subject to any reservations. Article 21 provides that the Dublin Convention will be open for the accession of any future Member States of the European Union. Article 22 regulates the procedure for the accession to the Dublin Convention.<sup>70</sup>

#### **4.5.1 Concept of exclusive competence**

According to the preamble of the Dublin Convention it was the experience of ineffective removal of asylum seekers to third countries, and the recognition of the dangers and inhumanity of lengthy and uncertain disputes between Member States that led the states of the European Communities to seek agreement on the basis by which states should readmit asylum seekers.<sup>71</sup> The Dublin Convention determines the State responsible for examining applications lodged in one of the Member States of the European Communities. The general objective of the Dublin Convention is to guarantee that only one Contracting Party is held responsible for processing an asylum application made by a third country national (the so called one-chance-only principle). The purpose of this solution is, on the one hand, to stop asylum seekers from being passed from one country to another without any one country accepting responsibility for processing the asylum application (refugee-in-orbit phenomenon). On the other hand, it should also

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<sup>70</sup> *O J (1997) C 254/1* p 1-12.

<sup>71</sup> "The Dublin Convention and Rights of Asylum Seekers in the European Union" Blake Included in: *Implementing Amsterdam Immigration and Asylum Rights in EC Law* p 104.

work to minimise uncontrolled further migration of the asylum seeker within the treaty area, particularly through the initiation of parallel or successive asylum applications (asylum shopping). The Dublin concept is based on exclusivity. In principle, the Member States responsible for examining and taking a decision on an asylum application also has a duty to make sure that the asylum seeker leaves the Dublin territory if his application is rejected. The application for asylum is processed according to the relevant provisions of the national law of the country. The Dublin Convention therefore harmonises neither substantive asylum law nor procedure.<sup>72</sup>

The Dublin concept of responsibility creates a possibility for Member States to recognise a foreign decision on an asylum application. The exception clauses provided for in the treaty allow, in special circumstances, for the investigation of an asylum application in cases where another state has or had responsibility for examination and reached a negative decision. Exercising this right shifts responsibility away from the previously responsible State. This salvation clause was included in the treaties, on the one hand, in the light of the interest held by Member States in maintaining sovereignty in the sensitive area of asylum law. On the other hand, however, it also takes account of the legal situation in those countries in which a constitutional right to asylum is recognised.<sup>73</sup>

#### **4.5.2 The competent state**

Article 1 of the Dublin Convention defines an application for asylum as a request whereby an alien seeks protection from a Member State under the Geneva Convention by claiming refugee status within the meaning of Article 1 of the Geneva Convention. It is not, for that reason, necessary to file a formal application for asylum according to the usual national procedures. It is sufficient that the refugee assures in a general way that he has been the subject of political persecution succeeding investigation is not relevant to the question of the applicability of the Dublin system for determining responsibility.<sup>74</sup>

Objective criteria are used to decide the state responsible for dealing with an asylum application. The principle in the Dublin Convention in this area is that the State which takes the greatest share of responsibility for the presence of the asylum seeker in the Dublin Convention area should be the one to process the application. A hierarchically ordered catalogue, which contains six basic criteria and several modifications and exceptions, has grown out of this principle.<sup>75</sup> The criteria for selection of the determining state are, in descending priority: state where a spouse or child under 18 (or in the case of such a child a parent) has been recognised as a refugee within

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<sup>72</sup> Hailbronner p 383.

<sup>73</sup> Hailbronner p 384.

<sup>74</sup> Hailbronner p 386-387.

<sup>75</sup> Hailbronner p 385.

the meaning of the Geneva Convention (Article 4), state that issued the applicant with a valid residence permit or visa (Article 5), state where illegal entry was made from outside the European Union except where the application was made after six months' residence in another Member State (Article 6), state responsible for controlling the entry across the external frontiers of the Member States (whether actual entry was supervised, except where there has been subsequent lawful entry into another state where visa requirements were waived) (Article 7), in all other cases, state of the first application for asylum, including any previous applications for asylum that have been refused (Article 8). States are free to apply more generous criteria and accept humanitarian obligation for an asylum seeker if they want to. But these broader criteria were not defined and states were under no obligation to establish such criteria and apply them. Further, assumption of responsibility for determining a claim do not prevent a Member State returning the asylum seeker elsewhere outside the European Union in accordance with the state's own laws and practices. Thus, the Dublin Convention does not guarantee substantive determination within the European Union. National practices deciding which are safe third or fourth countries could continue to be promoted outside the Dublin Convention. Germany has declared by legislative amendments to its Constitution that all its flanking neighbours outside the European Union are safe and asylum seekers could be returned there in absence of a significant change of circumstances. In theory at least the outcome of a Dublin Convention exchange application between two Member States could be a transfer outside the European Union to a further country which might return to a fourth or a fifth. The problem of refugees in orbit thus is thus not resolved or removed; the Dublin Convention merely identifies the start of the potential chain of return.<sup>76</sup>

### **4.5.3 Retroactive application**

The Dublin Convention is not applicable retroactively. Asylum applications submitted prior to the entry into force of the Dublin Convention do not fall into the scope of application of the Convention. Whether evidence used to determine the allocation of responsibility which took place before 26 March 1995 (such as the issue of visa, residence permits e t c) are to be taken into account is still a matter of debate. Although the Schengen States have not reached agreement on this issue, a pragmatic consensus has been reached, which allows that visa and residence permits issued before Schengen entered into force are to be taken into account for asylum proceedings still pending at that time. In addition, recognition as a refugee and the granting of a right of residence are relevant for the determination of responsibility, even if this recognition was granted prior to 26 March 1995. No agreement, however, could be reached on the determination of responsibility in cases in which an asylum seeker was rejected before Schengen entered into force. The majority of the Contracting States refuse responsibility on the basis of

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<sup>76</sup> Blake p 105.

previous rejections of asylum applications, with the argument that consideration of such applications would, in effect, amount to a retroactive application of the Convention.<sup>77</sup>

#### **4.5.4 Family reunification**

Use of the consultation procedure established in Article 9 of the Dublin Convention becomes a matter of considerations if visas are issued to spouses by different Dublin Member States. Under this provision, a Contracting Party other than the one responsible under the above mentioned criteria can be asked to accept responsibility at the request of the asylum seeker, if the request can be justified by humanitarian reasons based in particular on family or cultural grounds. Adjudication of this request is, in principle, left to the Member State to which it is submitted. A duty to bring families together exists under Article 4 of the Dublin Convention only when a Member State has already granted refugee status to one member of the family. In principle, both agreements operate on the basis that asylum applications from members of the same family may be dealt with in different countries. Digression from the rules for determining responsibility is only permitted in cases in which special humanitarian and family grounds exist. The Dublin Agreement does not establish criteria to determine what constitutes a special humanitarian ground. Examples of special humanitarian and family grounds could conceivably include serious illness or other particular need for care of a family member, as well as a minority, pregnancy or birth. Despite the above-mentioned principle, it remains questionable whether, under the conditions in Article 9 of the Dublin Convention, a Contracting Party may be obliged to accept responsibility under Article 8 of the ECHR. It could be argued that Article 8 of the ECHR is breached if the asylum procedure takes longer for reasons beyond the control of the asylum seeker, thus separating an existing family, or if it can be shown that the separation of a family member from the rest of the family should be deemed intolerable. The same argument could be used in relation to children who are dependent on the care of one or both parents. State responsibility in cases in which different Member States are responsible for different family members could be determined according to the majority principle, whereby responsibility would be attributed to the Member State with the greatest number of family members.<sup>78</sup>

### **4.6 Concentration effects of the Dublin Convention**

The rules laid down in the Dublin Convention serve, among other things, to eliminate the processing of multiple applications filed in different Member States. A Member State responsible for a certain application will take over

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<sup>77</sup> Hailbronner p 397-398.

<sup>78</sup> Hailbronner p 399.

the task of processing the application together with the obligation to take charge of the applicant. Regarding allocation, two stages must be distinguished. After the responsibility of a certain state has been established an applicant is temporarily allocated to the state. After a positive status decision by that state, the latter will normally allow an applicant to remain on its territory subject to its national legislation. A positive status decision will turn the temporary allocation into a more permanent one. In a formal sense, the Dublin Convention only has a bearing on temporary allocation. But in cases falling under some of the protection categories of the responsible state, more permanent allocation measures may be indirectly triggered. At this point, it could be objected that burden-sharing, as understood by the Member State of the European Union, mainly focuses on other categories of protection seekers than refugees, while the application of the Dublin Convention explicitly has been limited to applicants for asylum under the Geneva Convention. In other words, it would be unnecessary to deal with the Dublin Convention within the framework of this section. Such an objection would, however, leave out of account the fact that even protection seekers not falling under the Geneva Convention to a very large extent apply for asylum. Furthermore the mandate of Article 63 (2) (b) of the EC Treaty covers both refugees and other categories of protection seekers. In this respect, the Dublin Convention must be examined even with a view to its effect on cases in need of protection, which do not necessarily fulfil the criteria of the Geneva Convention definition. Moreover, it is difficult to see how the categories of the Geneva Convention refugees on one hand and other protection seekers on the other hand can be kept apart before an individual examination is carried out. The development of temporary protection practices and the put off of individual status examination of protection seekers from former Yugoslavia illustrates the problem of mixed categories in a very clear way. Affected states claimed that the process of breaking up that group along different categorisations in an individual procedure would have consumed too much time and too many resources. Neither the 1995 Resolution nor the various Solidarity Proposals provide a solution to this problem. Therefore, an analysis of protection schemes for other categories than Geneva Convention refugees must include the factual allocation effected by the Dublin Convention, which is, in that respect, of importance for any burden-sharing mechanism to be developed. This is so because the allocation criteria in the Dublin Convention risk stabilising an inequitable distribution of processing and reception burdens. An estimation of this risk motivates a closer look at the distributive key inherent in both instruments, namely the criteria along which the responsibility for examination is allocated. We recall that, in order of priority, the following criteria are decisive for the allocation of responsibility:

1. family,
2. residence and entry permits,
3. entry, and
4. state in which the application was first lodged.<sup>79</sup>

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<sup>79</sup> Noll p 317-318.



It has been stated earlier that geographical proximity to crisis regions and family ties were among the factors leading to the inequitable distribution of protection seekers fleeing the Balkan crisis. In this respect, it must be asked how the responsibility criteria relate to these factors. Do they work against concentration tendencies, or do they reinforce them? The top priority of family ties is indispensable from a human rights perspective. From a distributive point of view, however, it must be acknowledged that it may lead to a further accumulation of refugees in major recipient countries. Inequitable sharing of protection seekers is aggravated by family reunion. Nevertheless, it must be noted that the group of persons falling under that norm is narrowly defined in two ways. Firstly, the concept of family is reduced to a core of spouse and children under 18; secondly, the family reunion criterion is only triggered by the presence of a family member who is recognised as a Geneva Convention refugee. Other protection categories fall outside the scope of this norm and, accordingly, under the discretion of the states involved. The criterion concerning residence and entry permits may not be as important for a fair distribution of protection seekers, since states can reduce the risk of attracting the responsibility for applications by simply being very restrictive in the issuing of such permits. The criterion on entry, however, is of big importance as it is closely related to geographic proximity. To some extent, states can resort to more effective entry control through visa requirements linked to carrier sanctions and reinforced border control. However, borders cannot be sealed hermetically. Accordingly, states whose borders are more exposed to illegal entry attempts will automatically be subjected to larger of number of asylum applications. All in all, the criterion on entry and the criterion on the state in which the application was first lodged are more prone to further reinforce concentration in States that already carry a considerable processing and reception burden. To a limited extent, the same goes for the criterion on family reunion. As will be shown in the following, statistics have confirmed the correctness of that analysis. Let us take Germany as an illustration of the accumulated effects of the Dublin criteria. Initially, the German government had set high hopes for the Dublin Convention. However, the application of the Dublin Convention is giving Germany a net increase of cases. This increase affects not only applications, but also decisions on accepted requests and actual transfers. During 1 July-30 September 1998 Germany received 5390 applications, while 1517 applications were submitted to other Member States. This shows that the number of applications received by Germany was more than three times the number of applications it submitted to other Member States. When looking at the outcome of applications, that is, actual transfers, the same proportions prevail. Germany received 1199 persons, while the other Member States received 363 persons. Thus, Germany received three times the number of cases it sent out to other Member States. Of the total 26 399 asylum applications during the period examined, the number of transfer requests received by Germany represented 20,41 percent. Thus, in the same period, the Dublin Convention supplied one fifth of the total asylum applications in the German protection bureaucracy. In total numbers, Germany topped the statistics with regard to

both applications and transfers. Apart from Germany, statistics have shown that the net receivers of applications and transfers are Austria, France, Greece, Italy, Portugal and Spain. With exception of France, these countries have in common that they host an external border at the Eastern or Southern flank of the Union. Thus, the statistics collated by the Member States prove that the Dublin criteria provide for burden concentration instead of burden-sharing. What does this mean for the future development in the field of protection? On a national level, more affected states will be inclined to cut back protection and benefits for those groups not covered by international law. The reason for doing so is, firstly, to create a disincentive for potential asylum seekers and, secondly, to stretch resources. In this context, it should be remembered that Germany received the majority of Bosnian protection seekers. However, most of these protection seekers were merely tolerated. This must be compared with other more affected countries like Sweden that accorded a comparably favourable humanitarian status to the majority of Bosnian protection seekers. Translated into real terms, this means that a feasible burden-sharing strategy first and foremost would need to break free from the conservation of inequality by the Dublin Convention. Considering the geographical and demographic differences among European States, the effect of this instrument and the striving for equitable burden-sharing are simply not compatible. It is a bit ironic that the strategy of appeasing protection responsibility by means of migration control not only strikes back at those in need of protection, but also at one of the major supporters of this strategy, Germany. But there are good reasons to suspect that other safe third country-mechanisms have the same harmful effect. Inspired by the Western European pioneers, governments in Central and Eastern Europe, in Africa and in North America have started to copy the concept. The number of agreements on the readmission of third-country nationals is multiplying at an amazing pace. These developments ignore the forceful warning signal originating from the experiences with the Dublin system. Based on the logic of these developments, a burden-sharing mechanism stretching over both Geneva Convention refugees and other categories is indeed the key for safeguarding refugee protection on the territory of the Member States. Such a broad mechanism is mandated by Article 63 (2) (b) of the EC Treaty. If combined with a material harmonisation of protection categories and reception standards, it would appease competition for deflection as well as for the downgrading of territorial protection. Ideally, such a mechanism should have been launched concurrently with the mechanisms of migration control, so as to block the latter setting the preconditions for the operation of the former.<sup>80</sup>

## 4.7 Adjusting the Dublin Convention

The burden-sharing mechanism of the Dublin Convention is premised on the concept that only one state is responsible for determination of refugee claims. So far this system should be preserved and integrated into

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<sup>80</sup> Noll p 319-325.

Community law. It suffers, however, from some weaknesses, which should be removed before a binding instrument is developed. The Council and the Commission in its joint action plan consider the effectiveness of the Dublin Convention also a matter of high priority. Firstly, from a conceptual point of view the agreed set of criteria to allocate responsibility to a Member State seem acceptable but uncertain procedures for establishing responsibility prejudice Member States in the Eastern part of the Community, in particular Germany. Secondly, lengthy procedures to identify the responsible state in cases of applicants illegally crossing national borders is in opposition with the agreed objective to accelerate procedures and take decisions at the earliest time possible. Therefore implementing the proposal to establish a system of financial compensation for Member States receiving high numbers of asylum seekers and refrain from applying time-consuming and often useless procedures in cases of illegally arriving applicants to identify the state responsible should be considered. Although statistics available about the actual outcome of transfers within the Dublin system are rare, the observation seems to be realistic that in most instances the Member State where the first application is made is in the long run also the state responsible for the processing of the claim. So, when reflecting on the Dublin system the principle that only one Member State should be responsible for determining asylum claims should be maintained. However, in cases of illegally arriving claimants lengthy procedures to establish the responsible state should be avoided, unless there is clear evidence regarding the way the claimant reached the territory of the Community. When transfer of the claimant is undertaken the sending Member State must inform the responsible Member State that the claim was only found inadmissible and the responsibility to take a decision on the merits of the claim rests with the responsible Member State. Additionally, Article 9 of the Dublin Convention should be redefined and provide for a humanitarian clause in order to avoid separation of family members or other situations impacting negatively the protection needs of asylum seekers. Generally, it should be prescribed that family reunion should take place if the claim cannot be dealt with through accelerated procedures. Finally, to uphold the common right of asylum readmission agreements must satisfy the concept of adequate protection. They must also contain specific safeguards against refoulement. In the long run transfer of responsibility to non-EU states should only be based on a multilateral agreement between the Union and specific third states, provided the determination criteria and procedural rules in the receiving states meet the level already established within the Union. It is in this context that the Commission endorsed the active interest the Union should take in neighbouring countries of Central and Eastern Europe, since the successful application of the third host country will depend on how these countries can cope.<sup>81</sup>

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<sup>81</sup> “Adjusting the Dublin Convention: New Approaches to Member State Responsibility for Asylum Applications” Marx Included in: *European Journal of Migration and Law* 3 p 18-19.

## 4.8 The Experimental Instruments of 1997 to 1999

### 4.8.1 The 1997 and 1998 Joint Actions

Although the issues of burden-sharing and temporary protection had been on the table ever since the Bosnian crisis, it had proved impossible to achieve an overall consensus. Once again, Member States seemed unable to agree on a comprehensive strategy, instead preferring small, topical solutions to individual crises. The initial focus had been almost exclusively on the thorny problem of burden-sharing. In this respect, the big disproportion in the reception of refugees across the EU during the Balkan conflicts had clearly dominated the agenda. Over the years a concept of financial solidarity had begun to gather consensus, notably due to relentless German lobbying. In essence, the solution envisaged consisted of setting up contributions from the Community budget to help Member States with their expenses for the reception of refugees. Initially, however, there was no attempt to define the categories of refugees beyond a general definition of displaced persons. Their actual determination was still left to the legislation of Member States.<sup>82</sup>

The first pair of instruments was launched in 1997. That was the Joint Action of 22 July 1997 adopted by the Council on the basis of Article K.3 of the TEU concerning the financing of specific projects in favour of asylum-seekers, and the Joint Action of 22 July 1997 adopted by the Council on the basis of Article K.3 of the TEU concerning the financing of specific projects in favour of displaced persons who have found temporary protection on the Member States and asylum-seekers. The first Joint Action consists of six articles. Article 1 lays down that specific projects intended to facilitate the voluntary repatriation of displaced persons who have found temporary protection in the Member States and asylum-seekers shall be undertaken on an experimental basis during 1997. The measures are intended to cover, among others, the following areas: educational facilities for persons concerned who are under the age of eighteen and vocational training. Articles 2-4 concern budget matters. Article 5 says that the Commission shall keep the Council informed about the results of the specific projects and Article 6 lays down the date of entry into force of the Joint Action.<sup>83</sup> The second Joint Action also consists of six articles. It is identical with the previous Joint Action, except for Article 1.2, which says that the specific projects are intended to implement, among others, the 1995 Resolution.<sup>84</sup>

In March 1998, the Council adopted another pair of Joint Actions. That was the Joint Action of 27 March 1998 adopted by the Council on the basis of Article K.3 of the TEU, concerning the financing of specific projects in

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<sup>82</sup> Boccardi p 164.

<sup>83</sup> *O J (1997) L 205/3* p 3-4.

<sup>84</sup> *O J (1997) L 205/5* p 4-5.

favour of asylum-seekers and refugees and the Joint Action of 27 March 1998 adopted by the Council on the basis of Article K.3. of the TEU, concerning the financing of specific projects in favour of displaced persons who have found temporary protection in the Member States and asylum-seekers. The first Joint Action consists of seven articles. Article 1 states that specific projects intended to make the voluntary repatriation easier of displaced persons who have found temporary protection in the Member States and asylum-seekers shall be undertaken on an experimental basis during 1998. These measures are intended primarily to cover, among others, the following areas: education facilities for persons concerned who are under the age of 18 and vocational training. Articles 2-4 regulate budget matters and Article 5 says that the Commission shall keep the Council informed of the results of the specific projects. Article 6 lays down the day of entry into force of the Joint Action and Article 7 says that it shall be published in the Official Journal.<sup>85</sup> The second Joint Action also consists of seven articles. It is identical with the first Joint Action, with exception for Article 1.2, which says that the specific projects are intended primarily to implement, among other instruments, the 1995 Resolution.<sup>86</sup>

The redistribution of means for the Experimental Instruments was challenged through the Community budget and subjected to quite complex decision-making procedure, which makes the redistributory effects rather difficult to predict and reconstruct. The first instruments in each year's pair are explicitly construed as implementing the 1995 Resolution. They deal with projects intended to improve admission facilities for asylum-seekers and refugees in the Member States. The second instruments in each pair treat supporting projects intended to make the voluntary repatriation of displaced persons as well as asylum-seekers easier.<sup>87</sup> According to Article 1.1 of these Joint Actions, they were to be implemented on an experimental basis during 1997, although they were renewed unaltered both in 1998 and 1999. These measures provided for the financing of two main types of projects: those dealing with improving admission facilities for asylum seekers and refugees and those aiming at facilitating the voluntary repatriation of displaced persons who have found temporary protection in the Member States and asylum seekers. Both initiatives were mainly aimed at displaced persons rather than traditional asylum seekers. The term displaced persons had hitherto been used to define persons who were not perceived to be covered by the Geneva Convention, but who were nonetheless in need of protection. They constituted the great majority of the refugees that had fled to Europe during the Balkan conflicts of the early 90's. It was clear from the situations covered by these initiatives that Member States intended their protection to be only of a temporary nature, hence the stress on repatriation. Thus, reception and repatriation became the two fundamental tenets of the new temporary protection equation.<sup>88</sup>

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<sup>85</sup> *O J (1998) L 138/6* p 6-7.

<sup>86</sup> *O J (1998) L 138/8* p 7-8.

<sup>87</sup> Noll p 309-310.

<sup>88</sup> Boccardi p 164-165.

## 4.8.2 The 1999 Joint Action

In 1999, the Council adopted the Joint Action of 26 April 1999 on the basis of Article K.3 of the TEU, establishing projects and measures to provide practical support in relation to the reception and voluntary repatriation of refugees, displaced persons and asylum seekers, including emergency assistance to persons who have fled as a result of recent events in Kosovo. The Joint Action consists of sixteen articles. Article 1 concerns principles and objectives of the projects and measures and says that the European Union shall support projects and measures in relation to the reception and voluntary repatriation of refugees, displaced persons and asylum-seekers, which shall qualify for Community financial support. Article 2 says that the financial reference for implementing the programme for the year 1999 is EUR 15 million. Article 3 contains a number of definitions and Article 4 examples of measures to improve the conditions in which refugees, displaced persons and asylum seekers are received in the Member States and measures to support asylum procedures which are fair, efficient and accessible to persons in need of international protection. Article 5 concerns voluntary repatriation and Article 6 emergency assistance to persons displaced following recent events in Kosovo. Articles 7-10 regulate budget matters. Article 11 concerns general management provisions and Article 12 submission of projects and measures. Article 13 treats procedural questions, Article 14 monitoring and evaluation, while Article 15 concerns entry into force and Article 16 publication.<sup>89</sup>

The development of the new temporary protection system was further reinforced when, in 1999, the two Joint Actions of 1997 and 1998 were combined in a far more elaborate initiative, which for the first time included a clear reference to temporary protection. The intervening Kosovo crisis undoubtedly played a large role in increasing the sense of urgency to implement the measure. A comparison between the initial Commission proposal in January 1999 and the final text approved the following April shed an interesting light on the complexities of the negotiations going on at the time. On the surface the new 1999 Joint Action appears to be a streamlined integration of the two old ones. On a closer view, a great deal of new definitions has been added. Most importantly, a distinction has been made between displaced persons and asylum applicants. The first are defined as persons granted permission to stay in a Member State under temporary protection, or under subsidiary forms of protection in accordance with Member States' international obligations and national law, and persons seeking permission to remain on such grounds, who are awaiting a decision on their status'. Asylum applicants' were instead those individuals who had lodged an asylum claim under the Geneva Convention and whose application was still pending. This distinction was of particular importance to the development of the concept of temporary protection as a parallel track

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<sup>89</sup> *O J (1999) L 114/2* p 2-6.

to the Geneva Convention. The new Joint Action specified in much greater detail the concept of reception and repatriation measures. Under the first term, projects to receive Community financing would have to aim at improving reception infrastructures, enhancing the fairness and efficiency of asylum procedures, ensuring basic standards of living conditions, affording special assistance to vulnerable groups and enhancing public awareness. Under the term repatriation the measures included were those aimed at the collection and dissemination of information on the economic/legal/political situation in the country of origin, at providing counselling, training and education, as well as those covering repatriation transport costs and post-repatriation monitoring. In the final version of the Joint Action another section was added to cover projects relating to emergency assistance in Member States to persons displaced as a consequence of the Kosovo crisis. These contributions were, however, only limited to those countries, which received a significant number of refugees and for a maximum of period of six months. They covered basic emergency needs, from accommodation to health care and means of subsistence.<sup>90</sup>

## **4.9 The European Refugee Fund**

### **4.9.1 The proposal of a European Refugee Fund**

There was a need to create a financial instrument suited to emergency situation of mass influx and the European Parliament had already repeatedly suggested the unification of all the different budget lines relating to refugees into a single budget heading entitled European Fund for Refugees. The Commission followed up these requests by presenting in December 1999, a proposal for a comprehensive five-year funding plan for all refugee-related initiatives. The proposal was to cover all the same areas that had been previously funded through specific projects. It envisaged a system of financial redistribution to balance the refugee burden borne by Member States. It offered support in the following areas:

- a) improvement of reception conditions in terms of infrastructure and services (accommodation, material and social assistance, assistance with asylum formalities);
- b) integration of recognised refugees and others benefiting from stable protection forms;
- c) voluntary repatriation and reintegration into the country of origin (access to reliable information, advice, vocational training and assistance in resettlement); and
- d) emergency measures in the event of a mass influx of refugees (accommodation, food, healthcare, administrative and transport costs).<sup>91</sup>

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<sup>90</sup> Boccardi p 165-166.

<sup>91</sup> Boccardi p 180-181.

The Fund was designed to cover a very wide range of people, from recognised refugees and otherwise protected displaced individuals including those under temporary protection status, to asylum seekers and those seeking temporary protection status. Member States would have to apply for funding on a yearly basis. The Commission would then decide on these applications, while Member States would thereafter be in charge of managing and selecting the individual projects. The distribution of the Fund's resources between Member States would be proportional to the number of asylum seekers they had received (65 percent) and the number of recognised refugees and displaced persons they sheltered (35 percent). Projects could only be co-financed for up to 50 percent of the costs, or 75 percent in the case of Member States qualifying for cohesion funds. As for the funding of emergency measures, a double decision-making process was envisaged. As long as the temporary protection initiative had not been approved, the Council was to decide on the financing by acting unanimously on a proposal of the Commission. After the entry into force of the Temporary Protection Directive, the Council was to act by qualified majority following the same decision-making procedure as envisaged for declaring temporary protection. Financing in these cases could not exceed 80 percent of the project costs and could only last for six months. The resources had to be distributed according to the numbers of people having entered each Member State during the mass influx. The Refugee Fund proposal indicated a change of perspective on the temporary protection issue. By the end of 1999 it was clear that too many Member States were dissatisfied with the original 1997 Temporary Protection Proposal. In November 1998, the Austrian Presidency had presented a new Temporary Protection Draft Joint Action, which echoed the 1994 German one, but this too was considered unacceptable. Relying on a few fundamental points established by the German Presidency as a basis for negotiations, in the spring of 2000 the Commission presented a brand new initiative. The temporary protection regime being suggested was considerably different. To begin with, its length had been shortened to a maximum of two years. The decision to declare a temporary protection status would be taken on the proposal of the Commission only, but Member States could make requests to the latter on this matter. Decisions on adopting or withdrawing temporary protection could be taken at any time by qualified majority. The original deeply controversial terms referring to ethnic and religious persecution as grounds for protection were fortunately dropped. They were replaced by armed conflict, endemic violence and systematic or generalised violations of Human Rights. On a further positive note, consultations with the UNHCR were instituted at all stages of the procedure and the concept of family reunification extended. This was widened to include non-married partners (if recognised by the Member State's national legislation) and all dependants of any age. A temporary protection decision had to be based on a set of specific criteria, but unfortunately they appeared intentionally general and lacked any specific guidelines. In this respect, it would have been far more preferable to link the adoption of a temporary protection regime to a Commission decision, possibly to be taken in co-operation with the UNHCR. Access to asylum procedures could be temporarily suspended



in the event of a mass influx, but had to be granted at the end of temporary protection. The turning down of an asylum application could not overturn the effects of temporary protection while it was in effect. Finally, temporary protection status beneficiaries would be granted the same level of benefits as Geneva Convention refugees. The proposal contained some remarkable new provisions on solidarity among Member States in the reception of refugees. Solidarity rules of a financial nature were obviously linked to the Refugee Fund. Measures of a physical nature, entailing the distribution of refugees across the Community were envisaged both before and after the adoption of the temporary protection regime. In the initial phase, Member States would be requested to indicate, in figures or in general terms, their respective reception capacities. Subsequent additional capacities would also have to be communicated to the Commission. Following the entry into force of the temporary protection regime, Member States could also request to transfer excess refugees between them. A specific format for the transfer pass was included in the annex of the proposal. These transfers would obviously have to rely on the solidarity spirit of less affected Member States. This necessity appeared the greatest weakness of this provision, given that the Commission itself had stated in its proposal that the major resistance to approving the previous temporary protection package had been caused by its solidarity provisions. In the new proposal, the only positive commitment consisted of the initial capacity declaration. However, it appeared obvious that it would not be in the interest of any Member States to declare generous capacities.<sup>92</sup>

#### **4.9.2 The approval of the European Refugee Fund**

The Council Decision of 28 September 2000 establishing a European Refugee Fund (hereinafter the European Refugee Fund Decision) was eventually approved in 2000. The Decision consists of the preamble and 26 articles. Article 1 says that the Fund shall be established to support and encourage the efforts made by the Member States in receiving and bearing the consequences of receiving refugees and displaced persons. The Fund shall operate from 1 January 2000 to 31 December 2004. According to Article 2 the financial reference amount for implementing the Decision shall be EUR 216 million. Article 3 enumerates the groups targeted by the action. The target groups comprise, among others, any third-country nationals or stateless persons having the status defined by the Geneva Convention and permitted to reside as refugees in one of the Member States. Following Article 4 in order to achieve the objective of the Fund and with regard to the relevant categories of persons, the Fund shall support Member States' action relating to: conditions for reception, integration of persons whose stay in the Member States is of lasting and/or stable nature and repatriation, provided that the persons concerned have not acquired a new nationality and have not left the territory of the Member State. Article 5 concerns the financing of innovatory actions and Article 6 emergency measures to help one or more or

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<sup>92</sup> Boccardi p 181-183.

all of the Member States in the event of a sudden mass influx of refugees or displaced persons. Article 7 concerns matters related to the question of implementation of action supported by the Fund, Article 8 requests for co-financing for the implementation programme of the Member States and Article 9 selection criteria for the selection of individual projects. Article 10 regulates the distribution of resources. For the year 2000 each Member State shall receive EUR 500 000 of the European Refugee Fund's annual allocation, for the year 2001 EUR 400 000, for the 2002 EUR 300 000, for the year 2003 EUR 200 000 and, finally, for the year 2004 EUR 100 000. Article 11 regulates the timetable for, among others, the estimation of the amounts to be allocated and Article 12 the special allocation which may be set aside for technical and administrative assistance. Articles 13-17 concern budgetary matters. Article 18 regulates financial checks, Article 19 financial corrections and Article 20 measures necessary to monitor and evaluate action. Article 21 comprises provisions concerning the committee that shall assist the Commission and Article 22 special provisions regarding emergency measures. Article 23 concerns transitional provisions, Article 24 matters related to the implementation of the European Refugee Fund Decision and Article 25 a review clause. Finally, Article 26 states that the European Refugee Fund Decision is addressed to the Member States.<sup>93</sup>

The decision to approve the European Refugee Fund is based on Article 63 (2) (b) of the EC Treaty and it applies also to the UK and Ireland, but not to Denmark. Overall, the consolidation of all previous funding initiatives into a single instrument structured along the lines of most other Community funding programmes is indeed a great advance in the building of a true EU asylum policy. As in the case of most other Community policies, comprehensive funding has always played a important role in their consolidation. One of its most important consequences would certainly be the strengthening of the Commission's role and of its independence. It was also remarkable that Member States could eventually overcome their resistance to abandoning unanimity voting in favour of qualified majority. However, the European Refugee Fund would only be able to have a positive impact on building a fairer system of burden-sharing if its resources proved adequate to its task. Considering that only EUR 216 million are allocated to this Fund over a five-year period, the sums involved appeared unlikely to have any relevant impact on the majority of Member States. The United Kingdom alone spent more than 1 billion EUR on asylum seekers in the year 2000. Further, suggestions to improve the fairness of the financing distribution was not taken into consideration. A distribution mechanism that takes into account the ratio between numbers of refugees entering the territory of a Member State and the latter's population would have been fairer than the chosen one based only on absolute numbers of refugees in the previous three years. Furthermore, the distribution of resources is disproportionately tilted in favour of measures concerning asylum seekers instead of recognised refugees and other displaced persons. This could be seen as a clear warning message to Member States not to increase their

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<sup>93</sup> *O J (2000) L252/12 p.*

refugee recognition rates. Similarly, restricting emergency aid to a mere six month time limit also appears to be an indirect encouragement for Member States to dispose of sudden mass influx in a speedy manner which might not always be compatible with good levels of protection. Finally, the European Refugee Fund does not mention any physical solidarity measure. However, the small amount of financial contributions envisaged would certainly not make up for failing national infrastructures in the future. Likewise, most often in the event of a real mass influx, there might be no substitute for a physical redistribution of refugees. In the context of the doubts raised by the implementation of the Temporary Protection Directive rules on refugee redistribution, the concept of Community solidarity appear far from being effective.<sup>94</sup>

## 4.10 The Temporary Protection Directive

As we have seen, the necessity to harmonise temporary protection policies of the EU Member States was first recognised when a great number of persons came to seek protection in the EU during the conflict in the former Yugoslavia in the early 1990s. The Commission submitted proposals for a joint action on temporary protection based on Article K.3(2)(b) of the TEU on March 5, 1997 and June 24 1998. However, divergences of opinion among Member States mainly on the question of burden-sharing and later on the approach to be taken vis-à-vis the Kosovo crisis delayed the debates on the instrument, which as a result, has never been adopted by the Council. After the entry into force of the Treaty of Amsterdam, the European Commission on 24 May 2000 adopted a proposal based on Article 63.2(a) and (b) of the EC Treaty 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. The proposal was first debated by the Council on May 29, 2000 and then referred to the Working Party on Asylum. The Council finally adopted on July 20 2001 the Directive on minimum standards for giving temporary protection in the event of mass influx of displaced persons and on promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (hereinafter the Temporary Protection Directive).<sup>95</sup>

The Temporary Protection Directive consists of the preamble and 34 Articles. Article 1 says that the aim of the Temporary Protection Directive is to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin and to promote a balance of effort between Member States in receiving and bearing the consequences of receiving such

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<sup>94</sup> Boccardi p 183-184.

<sup>95</sup> “The Temporary Protection Directive” Kerber Included in: *European Journal of Migration and Law* 4 p 193-194.

persons. Article 2 contains definitions. Article 3 says, among other things, that human rights must be respected. Articles 4-7 lay down the duration of temporary protection. Articles 8-16 deal with the obligations of the States towards persons enjoying temporary protection. Articles 17-19 concern access to asylum procedure in the context of temporary protection. Articles 20-23 deal with matters concerning return and measures after temporary protection has ended. Articles 24-26 deal with burden-sharing and Article 27 with administrative co-operation. Article 28 lays down when a Member State has the right to exclude a person from temporary protection. Articles 29-34 contain some final provisions, which concern, among other things, the day of entry into force of the Directive.<sup>96</sup>

The Temporary Protection Directive is based on Article 63.2 (a) and (b) of the EC Treaty. Pursuant to Article 1 the Directive has two objectives; to establish minimum standards for giving temporary protection and to promote a balance of efforts between Member States in receiving displaced persons. The standards and measures of the Member States for temporary protection are laid down in one single legal instrument for reasons of effectiveness, coherence and solidarity and in order, in particular, to avert the risk of secondary movements. According to Article 1 the Temporary Protection Directive applies to cases of mass influx of displaced persons from third countries that are unable to return to their country of origin. The term displaced persons is defined in Article 2 (c) as third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, in particular in response to an appeal by international organisations, and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1 of the Geneva Convention or other international instruments giving international protection. The Temporary Protection Directive defines mass influx in Article 2 (d) as arrival in the Community of large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme.<sup>97</sup>

Articles 8-16 lay down the obligations of Member States towards temporary protection beneficiaries. It is important to note that these articles speak of obligations of the Member States and not of rights of persons enjoying temporary protection. This implies that the Member States are internationally obliged to grant temporarily protected persons a certain minimum treatment. However, temporarily protected persons have no subjective rights towards the Member States that can be judicially enforced. Above all, the Member States shall adopt the necessary measures to provide persons enjoying temporary protection with residence permits for the entire duration of the protection. The Member States are obliged to register the personal data of the protection beneficiaries in order to guarantee the effective application of the regime. The Member States shall authorise

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<sup>96</sup> *O J (2001) L 212/12* p.

<sup>97</sup> Kerber p 194-196.

persons in employed or self-employed activities during the temporary protection regime subject to the rules applicable to the profession. The Member States ensure either suitable accommodation, which may be provisional reception centres, public accommodation or single living units, or, if necessary, provide the means to obtain housing. If a person enjoying temporary protection does not have sufficient resources, provision shall be made for social welfare and means of subsistence. The assistance for medical care is also provided for. Persons under 18 are granted access to the respective national education system under the same conditions as nationals of the host state. Adults will be granted educational opportunities, vocational training and practical workplace experience.<sup>98</sup>

After the end of a temporary protection regime the general aliens' laws of the Member States on a temporary protection apply. The Temporary Protection Directive primarily envisages the voluntary return of the formerly temporarily protected persons. Enforced return shall be carried out with due respect for human dignity. Any compelling humanitarian reasons that make return impossible or unreasonable in specific cases shall be considered. This formulation is wider than the legal obligations flowing from Article 33 of the Geneva Convention. Especially mentioned are persons whose state of health does not allow travelling. They shall not be expelled as long as an interruption of treatment would lead to negative effects. Other compelling reasons against forced return are the continuation of an armed conflict or serious human rights violations, or the fact that return is not realistic due to an ethnic conflict or other affiliation of a person or group of persons or not possible due to an imminent danger of torture or cruel or inhuman treatment.<sup>99</sup>

A mechanism to reach a balance of effort between Member States in receiving and bearing the consequences of receiving displaced persons in the event of a mass influx has been agreed upon. The mechanism consists of two elements, financial sharing and sharing of the actual reception of persons. The question whether an equal distribution of the burdens resulting from the reception of displaced persons ought to be obtained just through financial compensation, or if persons seeking protection ought to be allocated by numbers to certain Member States and, if necessary, transferred from one Member State to another, was one of the more controversial topics. In the beginning of the negotiations France was in favour of solely financial solidarity, while taking into account a Member State's contribution in other areas, such as military. Several other delegations favoured physical solidarity, i.e. the transfer of persons according to the reception capacities.<sup>100</sup>

The financial aspect of solidarity is laid down in Article 25; measures of temporary protection benefit from the European Refugee Fund. As explained above the Fund of 216 million Euro was established for the period

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<sup>98</sup> Kerber p 201-204.

<sup>99</sup> Kerber p 208-209.

<sup>100</sup> Kerber p 209-210.

of 1 January 2000 to 31 December 2004 in order to support and encourage the efforts made by the Member States in receiving and bearing the consequences of receiving refugees and displaced persons. The Fund also covers persons benefiting from temporary protection arrangements in a Member State and persons whose right to temporary protection is being examined. The primary goal of the Fund is, according to Article 4 of the European Refugee Fund Decision, is to support action of a Member State relating to the conditions for reception, the integration of persons whose stay in the Member State is of lasting and/or stable nature, and repatriation, under condition that the persons concerned have not acquired a new nationality and have not left the territory of the Member State. This includes measures in the fields of infrastructure, accommodation, material aid, health care, social assistance, help with administrative and judicial formalities, social assistance in areas such as housing, means of subsistence and health care, or to enable beneficiaries to adjust to the society of the Member State, or to provide for themselves, information and advice about voluntary return programmes and the situation in the country of origin and/or general or vocational training and help in resettlement. Further, according to Article 6 of the European Refugee Fund Decision, the Fund may be used for emergency measures to help one or more or all Member States in situations of mass influx of refugees and displaced persons or, if it is necessary, to evacuate them from a third country, particularly in response to an appeal by international organisations. The emergency measures cover reception and accommodation, provision of means of subsistence, including food and clothing, medical, psychological or other assistance, staff and administration costs incurred as a result of the reception of persons and implementation measures, as well as costs of logistics and transport. Usage of the Fund is established by decision of the Council by unanimous vote on proposal of the Commission. It is laid down in Article 6, paragraphs 1 and 2 of the European Refugee Fund Decision that after entry into force of the Temporary Protection Directive the decision of the Council will be taken under the conditions set out in the said Directive. It is not entirely clear what this means. However, it might be a good solution to include the decision on the usage of the Fund in the Council decision establishing temporary protection, according to Article 5 of the Temporary Protection Directive. It is important to note that the Fund does not guarantee coverage of all costs incurred by a Member State. Only a fixed proportion of the Fund, as set out in Article 10 of the European Refugee Fund Decision, is distributed proportionally between the Member States according to the number of received persons.<sup>101</sup>

In Articles 25 and 26 a type of physical solidarity is set down. It is based on the principle of double voluntariness, i.e. voluntariness on the side of the receiving state and on the side of the person seeking protection. Before, the decision establishing temporary protection is adopted, each Member State has to indicate its capacity of reception in figures or in general terms. These numbers of persons are included in the decision. The Member States may

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<sup>101</sup> Kerber p 210-211.

also declare that they are not able to receive people without giving reasons. In the original Commission proposal it was provided that the Member States either indicate their capacity to receive people without giving reasons or state the reasons for their incapacity to do so. In the present version of the Temporary Protection Directive the only obligation is laid down in Article 25, para 1, first sentence: the Member States shall receive persons who are eligible for temporary protection in a spirit of solidarity. Additional reception capacity may be notified to the Council and the Commission after the adoption of the Decision. The information will be passed on to UNHCR. The Member States only receive persons who have expressed their willingness to be received in the EU. This provision was included in the Temporary Protection Directive in order to avoid forced expulsions by States of their own citizens and inhabitants. In the number of persons actually entering into a Member State exceeds the reception capacity, the Council shall, as a matter of urgency, examine the situation and take appropriate action, including recommending additional support for Member States affected. The Temporary Protection Directive leaves open what appropriate action might be. In particular it leaves open whether this could also be the physical distribution of persons. Article 26 sets out the procedure of physical distribution of temporarily protected persons: for the duration of temporary protection the Member States shall co-operate with each other with regard to transferral of the residence of persons enjoying temporary protection from one Member State to another, subject to the consent of the persons concerned to such transferral. If a Member State has received displaced persons beyond its capacity, it may communicate a request for transfers to the other Member States and notify the Commission and UNHCR. Thereafter, the Member States will inform the requesting state of their remaining reception capacity for receiving transferees. For the practical evolution of the transferral, a model pass, an identification document as found in Annex I of the Temporary Protection Directive is used. If a transfer takes place the residence permit in the first state of temporary protection and all obligations of this State towards the beneficiary expire.<sup>102</sup>

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<sup>102</sup> Kerber p 211-213.

## 5 Conclusion

As we have seen Community action must be in line with the Human Rights Treaties, among other things, the Geneva Convention. Refugees, as defined by the Geneva Convention, are characterised by four elements, namely, they have fled their country of origin, they are unable or unwilling either to return to it, or to avail themselves of its protection, this impossibility is due to past persecution or to well-founded fear of possible persecution and they fear persecution on the grounds of race, religion, nationality, political opinion or membership of a particular social group. The principle of nonrefoulement in the Geneva Convention says that a refugee may not be expelled or returned to the frontiers of territories where his life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion. These principles are covering a wide range of situations under which a person can be threatened and/or persecuted. However, some other factors should be added to these principles. There are countries in the world where persons are persecuted due to their sexual character. For this reason both the refugee definition and the nonrefoulement principle should cover the aspect of sexual character as well. As an objection, it can be said that it is not necessary to include this aspect since as long as the persons in question are concealing their sexual character, they do not risk persecution or threats. This is not a tenable argument since for instance homosexuals should not be obliged to conceal their character. The concept of gender should also be included in the refugee definition and the nonrefoulement principle. Women are threatened to life and even killed by their families or by their husbands and their families for a variety of reasons for example by honour. In many cases the local authorities are passive concerning the problems of the women and unwilling to help them. Therefore gender should be added to the Geneva Convention so that persecuted or threatened women can be offered protection in other countries.

In all treaties dealt with in this thesis it is clearly said that the EU is bound by its obligations under the Human Rights Treaties. However, it has been disputed to what extent the Community is bound by them. Is the EU forced only to respect the conditions of the ECHR, or should it be obliged to follow any relevant jurisprudence from the European Court of Human Rights? As we have seen, a number of arguments speak for the opinion that the Member States do not intend to bind the European Court of Justice to the European Court of Human Rights' jurisprudence. First of all, the European Court of Justice supposes that the Community legal order is autonomous. Further, Article 6(2) of the TEU means legal equal force of human rights irrespective of whether they are laid down in the ECHR or as they result from the constitutional traditions common to all the Member States as general principles of Community law. Possible conflicts between human rights derived from these sources must be solved within the framework of the structure and the objectives of the Community. Also, the idea of construing



human rights as independently as other parts of the Community legal order is supported by the character of the judgements handed down by the European Court of Human Rights which according to the ECHR are binding between the parties of the dispute only. Accordingly, the judgements can be seen only as guidelines for the European Court of Justice. However, despite these points there is an argument speaking against the opinion that the European Court of Justice is not bound by the jurisprudence of the European Court of Human Rights. Firstly, it must be underlined that it is important that the European Court of Justice is an independent court free from pressure from for example governments. The Court should be independent, but it cannot act too independently. It must follow the guidelines set by the European Court of Human Rights. A strange situation will appear if the European Court of Justice is making own interpretations of the Human Rights Treaties, which are distinct from the European Court of Human Rights' judgements. In this case, two autonomous jurisprudences will develop side by side. The European Court of Human Rights is specialised on human rights issues. This court is setting the guidelines, which should be followed and respected by other courts. The European Court of Human Rights can be seen as a last instance, which is having the last word. It is important that the European Court of Justice is an independent court, but it must carefully consider the judgements of the European Court of Human Rights.

Is the EU law in line with the Human Rights Treaties? As we have seen all the documents dealt with in this thesis cite the Geneva Convention and assure that all action will be in line with the Geneva Convention and the other Human Rights Treaties. In theory, the Member States act in accordance with the Human Rights Treaties. All the asylum agreements are correct in the way that they mention the Human Rights Treaties, but it can be questioned if this is sufficient in order to assure the observance of the Human Rights Treaties. Who is in reality checking that the content of the agreements and the actions undertaken by the authorities are in line with the international agreements? Since this is not clear, it is necessary to establish a human rights institution within the EU. The assignment of this institution would be, first, to control and supervise that the actions of the Member States are in accordance with the Human Rights Treaties and, second, to report any breaches to the European Court of Justice.

In the early 1980s the Member States started to make agreements in the field of asylum law as a consequence of the establishment of an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. The creation of this area necessitated tighter controls at external frontiers. Different legal measures concerning the grant of asylum and refugee status were taken. As formulated in the Palma Document this strategy initially focused on, among others, the following aspects: determining the State responsible for examining the application for asylum and study of the need for a financing system to fund the economic consequences of implementing the common policy. This is, as we can see, the basis of the Dublin Convention and the ERF. There is one limit laid

down in the Palma Document, namely, that “the stepping-up of controls may not go beyond what is strictly necessary for safe-guarding security and law and order in the Member States”. It is not clear what is meant by “strictly necessary for safe-guarding security and law and order in the Member States”. This is a problem, since it leaves the door open for arbitrary decisions. The paragraph should contain a list of examples, which should clarify in which situations it would necessary to undertake actions “necessary for safe-guarding security and law and order”. For example the list could give a statement on how an application from a person who has committed crime against humanity should be dealt with. It could say that if there are serious grounds for considering that a person has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international agreements drawn up to make provision in respect of such crimes he or she should not be admitted in the EU. The paragraph should close with a prescription saying that a person not admitted or expelled for whatever reason due to security and law should be treated with respect and dignity.

The greatest innovation in the EU approach to asylum issues was the introduction, as a lead in the harmonisation process in the field of asylum law, into the Treaty of Amsterdam of a new EC competence on asylum policy. The new EC competence considers, among others, burden-sharing of refugee flows and temporary protection. The role of burden-sharing is to establish an equitable distribution of costs and responsibilities of refugees. This will lead to both a maximum of fairness among states and a maximum of openness against protection seekers. States can share the burden of preventing and resolving refugee crisis, the burden of preventing and deflecting arrivals and the burden of reception of refugees. One difficulty linked to burden-sharing is the establishing of a fair burden-sharing mechanism. Temporary protection gives immediate and flexible protection to the urgent needs of persons in situation of mass flights as an emergency situation. Are there any problems concerning temporary protection? Temporary protection is not aimed to be a durable, thus permanent, solution for refugee crisis. Displaced persons must return to their home countries when the situation has improved to an extent that international protection is no longer needed. Temporary protected persons are granted some basic rights for example the right to education for children during the residence in the host country. This is good, but it must be traumatic for a child who is suffering from the trauma of the war to be obliged to return to the home country with his or her family when he or she has started to adapt him or herself to life in the host country. For this reason it is desirable that temporary protected persons who do not want to return should be given a chance to stay in the host country. In case it is impossible to let them stay, they should be offered some help when returning, for example, they should be given social and economic assistance. This assistance could consist of information of the labour market in the home country and material assistance covering the immediate needs in case they have lost everything in the home country.

After the Palma Document and the EC Treaty, the Member States continued to work on a common approach on matters relating to refugees. As a reaction to the inequitable reception of refugees from former Yugoslavia in 1991-1992 when Germany alone coped with a large deal of the EU applications the 1995 Resolution and the 1996 Decision were agreed upon. The documents deal with the problems of equitable burden-sharing and how to reach a balance of efforts between the Member States. Instead of a setting-up of a burden-sharing mechanism, the 1995 Resolution proposes a series of guidelines for estimating how to share the burden of refugees in situations of mass influx. Criteria include the contribution of each Member State to the solution of the crisis, humanitarian assistance and all economic or political factors that might have reduced the capacity of a State to admit large number of refugees. The 1996 Decision tries to set up a rapid response mechanism for situations of mass influx whereby the principles of the 1995 Resolution would be applied to a specific emergency situation.

What is a fair burden-sharing mechanism? Do these documents contribute to an equitable sharing of the refugee flows between the Member States? The benefit of the guidelines of the 1995 Resolution is that they offer a flexible system. By giving humanitarian, economic and political assistance in a crisis situation Member States can help people that do not want to leave their country to stay. The Member States can by this assistance protect potential refugees and make life possible in their countries of origin so that they do not need to leave them. The assistance in crisis situations contributes to prevent large refugee streams from arising. However, in a crisis situation there are always going to be some people that will be obliged to flee. A system of guidelines offers a flexible system, but it leaves the door open for arbitrary decisions since it does not give a clear ground on how refugees should be shared between the countries. Since it is in the interest of all the parts to make quick decisions it is necessary to use a clear distribution mechanism. So, for the sake of effectiveness and fairness the system of guidelines should be completed by a clear a distribution mechanism. This could for example state that each country should receive a number of refugees that is in proportion to the population of the country. The exact number of refugees that each country should admit should be based on the distribution mechanism. The role of the guidelines would be to support this decision. There is another important lack in the 1995 Resolution. A plan for dealing with the situation that the number of persons who are eligible for temporary protection following a sudden and massive influx exceeds the reception capacity of the Member States needs to be added to the 1995 Resolution. It is important to be prepared in case of an emergency. For example such a plan could state that a country that receives extra refugees should get funding to cover the costs incurred by the situation.

The Experimental Instruments implement the 1995 Resolution and concern the issue of facilitating voluntary repatriation of persons who have been granted temporary protection. The Experimental Instruments mainly focus on education, vocational training and, thus, on young people and people in

the working age. There are no prescriptions on how pensioners should be supported. Something should be said about projects concerning pensioners in the Experimental Instruments. Concerning the selection criteria for the projects it is mainly the Commission and the Committee that are deciding which projects are going to be supported. At least one expert not linked to any organisation applying for support and who is knowing the place and understanding the needs there should be a part of the Committee. Concerning financial matters the first Experimental Instruments lack financial control. A financial control instrument should be added, since it is important to check that the organisations in question are reliable and that the money is used for the right purpose. However, in the Experimental Instrument from 1999 it is said that the Commission and the Court of Auditors shall provide for monitoring and financial control, so in this case the matter of financial control is satisfactory.

As we have seen the Dublin Convention is stabilising an inequitable distribution of refugees. However, the set of criteria for allocating responsibility to a Member State seems acceptable. Concerning the first family based criteria, it is important from a humane point of view that families are united. The right to family life is a basic human right. Also, if families are separated the Member States risk losing control of the situation, since people will be moving across the continent in search of their relatives. The criteria on residence, entry permits, country of first entry and state in which the application was first lodged are all in theory fair and rational and facilitate a quick process, but in practice, as we have seen, they lead to inequalities in distribution between the Member States. So what could be done to solve this problem and to establish fairness in distribution between Member States? A system of financial compensation for Member States receiving high numbers of asylum seekers could be established. The Member State in question could be compensated for the costs for accommodation, health care, social assistance, help with judicial and administrative formalities, information and advice about voluntary return programmes and help in resettlement e t c. Physical solidarity i e transfer of persons between countries is also an imaginable option, but I think that financial solidarity is preferable to physical solidarity. The second alternative will lead to another difficult uprooting for people who have already suffered from the war and to the separation of close family members. The system of financial compensation also seems to be best in line with the objective of the Dublin Convention, namely, to make rapid procedures and take decisions at the earliest time possible. Another problem is the procedures in cases of illegally arriving applicants to identify the state responsible. These procedures are often time-consuming and sometimes even useless. Uncertain procedures for establishing responsibility prejudice Member States in the eastern part of the Community, in particular Germany. The lengthy procedures to identify the responsible state in cases of applicants illegally crossing national borders are in opposition with the objective to accelerate procedures and take decisions at the earliest time possible. However, it is important not to refrain from the procedures and accept the arriving persons automatically. This could encourage refugee

smuggling. Once the applicants have crossed national borders in an illegal way and they are within the EU a process should take place to find the State responsible. However, the problem of illegally arriving persons should not be ignored. It is important to take measures against the problem for example by strengthening the international co-operation in the search of international gangs that are devoted to refugee smuggling.

The issues of burden-sharing and temporary protection were further developed by the ERF and the TPD. The ERF shall support Member States' actions relating to conditions for reception, integration of persons whose stay in the Member States is of lasting and/or stable nature and repatriation, provided that the concerned persons have not acquired a new nationality and have not left the territory of the Member States. As we have seen it is questionable if EUR 216 million is having any relevant impact on the majority of Member States. Each Member State gets a fixed amount per year from the ERF. It would be fairer if each Member States would get an amount, which is in proportion to its refugee quota. A country receiving high numbers of refugees should get more money from the ERF than a country, which receives small numbers of refugees. Persons having the status defined by the Geneva Convention are in a less favourable position than for example persons enjoying temporary protection since less funding is distributed on the first category of people. This could be seen as a signal to the Member States that they should not increase their number of Geneva Convention refugees. Instead, money from the ERF should be distributed equally among the different categories of protection seekers.

Is the objective of the TPD to establish minimum standards for protection seekers and to promote a balance of efforts between Member States fulfilled in a satisfactory way? The persons granted temporary protection will enjoy suitable accommodation, necessary assistance in terms of social welfare, medical or other assistance and the possibility to engage in employed activities. Children have the rights to education and grown-ups are permitted to work. These standards are quite generous. However, like in the previous documents concerning temporary protection, not much is said about pensioners and their needs. A prescription should be added saying that pensioners granted temporary protection will get the needed care and assistance. Moreover, the paragraph, which is saying that persons who have enjoyed temporary protection and who cannot in view of their health be expected to travel when the period is over, should be reformulated. It should be added that close relatives may stay with the person in question, for example parents will have the right to stay with their children. The burden-sharing mechanism of the TPD, consists of two elements, namely, financial sharing and sharing the actual reception of persons. The financial aspect of solidarity in this context concerns measures of temporary protection benefiting from the ERF. The rules of the ERF are applied to the measures of the TPD. The pertinent rules of the ERF should have been inserted in the TPD. This would facilitate the situation for the reader. Concerning the physical solidarity it is basically said that the refugees should be received in a spirit of Community solidarity. A more efficient burden-sharing

mechanism is needed so that quick and effective decisions can be made and fairness between Member States can be obtained. With a vague burden-sharing mechanism there is a risk that arbitrary decisions are made and that there will be an unfair sharing of the refugees. For example the burden-sharing mechanism could say that each country should receive a number of refugees that is in proportion to the population. The final decision should be based on a clear distribution mechanism and on guidelines, taking into account the fact that Member States have given humanitarian, economic, and political assistance to a crisis area.

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