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The asylum and immigration law in the European Union

- Respect for human rights or Fortress
Europe?

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Summary

The realisation of the inner market meant that all border controls between the Member States of the European Community were to disappear, so that the four freedoms, workers, capital, services and goods, could cross the borders without problems. But in order to keep the security in a Community with no borders, the external border controls had to be strengthened. This was necessary to keep out drugs, international criminality and illegal immigration.

The Member States realised that the best way to control the external borders was to co-operate. This was done with an intergovernmental approach, like the Schengen co-operation, and within the Community. This co-operation were very much focused on hindering massive groups of asylum-seekers to enter the Community. Measures to prevent immigration and refugees coming were taken, like the introduction of visa, where nationals of certain countries had to get a visa to enter the Community, departure controls in third countries, information systems and carries sanction.

As the European Community developed into the European Union, the co-operation on external border control was integrated into the Community. The Maastricht Treaty introduced the three-pillar structure, with the asylum and immigration policies in the third pillar, with mainly intergovernmental structure, but yet an improvement in the influence of the Community. The Amsterdam Treaty went further, by integrating the asylum issues into the Community framework, with its legal and democratic instruments.

At the same time as common rules and policies on asylum and immigration developed, the Community became gradually more aware of international law and conventions on these issues. To prevent the Community rules from clashing with international obligations of the Member States, efforts were made to respect fundamental and human rights. In the Treaty, respect for the 1951 Geneva Convention on refugees and the European Convention on Human Rights were stated to shine through all the work in the Community, and a European Charter on Fundamental Rights has been developed, although not binding.

But the law and policies of the EU when it comes to asylum and immigration have as its main background to prevent crimes like illegal immigration and to protect the security within the Union. Because of this and the fact that they sometimes have been created without the proper democratic procedures, some of the rules could clash with international law and human rights created to protect people who are defined as refugees.

Abbreviations

EC	European Community
EEC	European Economic Community
ECSC	European Coal and Steel Community
EU	European Union
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECRE	European Council on Refugees and Exiles
EPC	European Political Co-operation
IGC	Intergovernmental Conference
NGO	Non Governmental Organisation
SEA	Single European Act
SIA	Schengen Agreement
SIS	Schengen Information System
TEC	Treaty on the European Community
TEU	Treaty on the European Union

1 Introduction

1.1 Presentation of the subject

Asylum and immigration issues have always been considered to be a matter for the individual Member States of the European Union, and have never been subject to discussions on a Community level. At the same time, migration from countries outside the European Union has always been important for the institutions and countries in the Community and the Union. At the beginning of the European co-operation in EC, migration for employment was considered to be a good thing since the European Community needed all the work force it could get. But the situation in Europe has changed, and since it has become more important with the realisation of the internal market with a borderless Europe and free movement of EU-citizens, the tendency has gone towards more control and measures to keep migrants and asylumseekers out. The co-operation on border control towards third countries had to compensate the disappearance of inner border control. Harmonisation was necessary to fight crimes such as terrorism and drug trafficking, but also illegal immigration. The countries in the European Union have developed immigration and asylum policies that in many aspects are very restrictive.

The general tendency in the European Union in recent years has been to give more respect and freedom to the individual with free movement of persons, an increased respect for fundamental values such as human rights and equal treatment. At the same time, the emerging common policies on migration and asylum issues seem to be more and more restrictive and have ingredients that seem to have as its main purpose to shut people out. Some people even relate to this as “Fortress Europe”.

1.2 Purposes and limits of the topic

The purpose of this essay is to look at the development of a common law and policy on asylum and migration in the European Union, and what it looks like today. This development has taken place in different forum and with different methods. There has been much activity, at first mainly in an intergovernmental co-operation procedure, such as the Schengen Agreement and Convention and the Dublin Convention. With the Maastricht Treaty, the introduction of Justice and Home affairs in the so-called third pillar established co-operation between member states on these issues, as well as some Visa-regulations in the first pillar. Furthermore, with the Amsterdam-Treaty these policies have been moved from the third pillar to the first, while a Community approach on asylum and migration was introduced.

This development of law is unusual, first developing as governmental co-operation, and then gradually becoming incorporated into Community law. It thus affects the competencies of the Community institutions, since the law has not emerged in the same way as community law usually does. I will look at this and see if it leads to democratic deficits and how the democratic and judicial control of the legal rules works. I will also see how transparency and effectivity of the law of asylum is affected.

The functioning of the asylum law and policies in the Amsterdam Treaty is one of the main purposes of this essay. Another purpose is to look at the common asylum law's conformity with the international obligations of the Member States, in particular concerning Human Rights. The European Union have in recent years developed more respect for fundamental rights, a respect that is to influence all decision-making. I will mainly look at the 1951 Geneva Convention on Refugees and the ECHR. The Community as such is not part to those, but has made clear in the Treaties that they will respect them. I am going to see if the asylum law infringes on these instruments of international law, and on the Charter of Fundamental Rights, which is the new source of Human Rights in the Community, although its legal status is still unclear.

1.3 Methods and material

The method I have used when writing this essay has been to study relevant literature. I have studied the doctrine, books and articles in journals dealing with EC law and international law, and also used relevant case law and texts of treaties and conventions. This literature study is used to explain the development of the common asylum and immigration law, its deficiencies and its positive sides, up to today. The material has been analysed and conclusions have been drawn from it.

At the same time a comparative perspective has been used, by putting the law and policies of EC in relation to international law and obligations of the EC Member States. Another comparison has been made with the way that asylum issues were dealt with in the Maastricht Treaty and in the Amsterdam Treaty

A large part of the material I have used has been literature and law journals. But I have also used documents from the website of the European Union and its institutions. When comparing the EC law with international law, like the ECHR and the 1951 Geneva Convention, I have used comments from NGO:s, especially from the ECRE (European Council on Refugees and Exiles), and the UNHCR.

1.4 Contents

I will start by looking on the development of the goal of EU, namely to create a Community without borders. The realisation of the internal market with the freedom of workers, services, capital and goods, is an important factor to the development on common rules on immigration from third countries. When the Member States lost their right to control persons at their borders to other Member States, they had to compensate this with extra control towards the rest of the world. It was important to have harmonisation in this area, since the result could otherwise be that operators in illegal immigration and other criminal activity could get into the Member State which was easiest to enter, and then spread in the rest of the Community, since there are no longer any border controls.

After this I will deal with the way in which the law and policies in this field have emerged. There have been mainly two ways, namely by intergovernmental co-operation and within the Community institutions. I am going to discuss this development, the different forms of co-operation and the legal status of it. I will look at the developments both within the Community institutions and the intergovernmental co-operation. In the next chapter I look at the Maastricht Treaty with its third pillar, where the intergovernmental co-operation on immigration and asylum continued, with gradually more involvement of the Community institutions. The Maastricht Treaty had certain deficiencies in this area, which I will describe.

The next chapter, then, deals with the Amsterdam Treaty. I am going to look at the construction of the new treaty, the incorporation of asylum and immigration and the Schengen *acquis* into the first pillar. Does it solve the deficits of the Maastricht Treaty?

When I have gone through the framework on asylum and immigration in the EU, I will see if it is compatible with the international obligations that the Member States have. Can the common law in this area be used without violating the 1951 Geneva Convention and the ECHR?

Finally, the terrorist attack in New York on September 11th has had effects on the European Union as well. There has been much activity in creating instruments to enhance the security of the Union, and this activity can affect the situation of the asylum-seekers in Europe too. I am going to look at some relevant proposals for new instruments, and some comments on them.

2 The development of the internal market

2.1 Introduction

The Treaties of 1957, the European Atomic Energy Community (Euratom) and the European Economic Community (EEC), had mainly an economic focus, creating, together with the European Coal and Steel Community (ECSC), a common market. This common market had the aims of promoting the economic development in the Member States, to harmonise economic activity throughout the whole Community, to increase stability and the standard of living and to bring the Member States closer together. Barriers to trade were to disappear and a custom union was to be set up, with a common customs tariff, leading to an internal market. The EEC Treaty did not mention political integration, but the Member States gradually developed political co-operation, although with some friction regarding the form and structure of this common work.¹

The EEC-Treaty mentioned four freedoms to be established in order to achieve the goals of the Community, in particular harmonious development of economic activities, higher standard of living and closer relation between the Member States. These freedoms are freedom of movement for workers, services, capital and goods. The free movement of workers gives people in the Community the right to look for and accept offers of employment in other Member States than their own. It also abolishes any discrimination based on nationality between workers of Member States as regards conditions of employment and work, including social and fiscal advantages. These rights belong only to nationals of any of the Member States. Thus nationals from non-member States do not possess a right to access to this market. Instead, national laws decide admission and residence rules for these third country nationals.

The main goal of the EC in this respect was set out in 1986 in Article 7 a of the EEC Treaty.² This article said that:

1. The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provisions of this Article and of Articles 7b, 7c, 28, 57(2), 59, 70(1), 84, 99, 100a and 100b and without prejudice to the other provisions of this Treaty.

¹ Paul Craig, Grainne de Burca “EU Law”, 2nd edition, 1998, Oxford University Press, New York, p 11.

² This article was amended after Amsterdam, and is now Article 14.

2. The internal market shall comprise 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.

During the eighties it became increasingly important to commit to the economic and political integration, in order to realise the internal market, as explained in the next section. In 1984 the Commission thus proposed a Directive on the abolition of internal border controls. Discussions on this directive, together with the 1992 – operation in Article 7a, led to the insight that harmonisation of asylum and immigration policies were necessary.³ The realisation of the internal market with the removal of internal borders, meant that the Member States would in a way share the external borders towards the rest of the world. It has been repeatedly stressed that abolishing internal frontiers must remain compatible with the need of security, for example combating terrorism, drug-trafficking and not least illegal immigration. The Member States realised that this had to take place with some sort of common policies towards third countries. What could not be controlled on the borders inside the Community had to be controlled even more at the external borders.

2.2 The White Paper and the Single European Act

In 1985, the Milan European Council adopted the White Paper on completing the Internal Market. This was a timetable for the completion of the internal market and set up a list of the different barriers which had to be removed in order to realise the abolishment of border controls in 1992, aiming at the single internal market. It laid down goals of the complete abolishment of internal border control and said that asylum law and the situation of refugees had to be considered when discussing measures that would compensate the loss of this control.

Following the White Paper, the Single European Act was signed in 1986. The SEA was significant in its institutional and substantive reforms. It gave the 1992 – operation and the European Political co-operation its legal basis and it introduced the Court of First Instance as a complement to the European Court of Justice.⁴ It also changed the decision-making procedures of the Community. Qualified majority voting in some fields, for example free movement, replaced unanimity. A new legislative procedure, the co-operation procedure, was introduced with an enhanced consultative role for the European Parliament. But unanimity was still needed in the areas of social security needed to establish freedom of movement.⁵

³ Elspeth Guild, Jan Niessen “The developing Immigration and Asylum Policies of the European Union”, 1996, Kluwer Law International, Netherlands, p 21.

⁴ Craig, de Burca, 1998, p 20.

⁵ Guild/Niessen, 1996, p 25.

By inserting the Article 7a in the EC Treaty, free movement of persons became a Community matter. But there were different meanings on how to interpret and implement this article. The Member States agreed in a Declaration on the free movement of persons attached to the SEA, that they would co-operate on matters related to the entry, movement and residence of third-country nationals, and in combating terrorism, crime and drug trafficking. Therefore, they laid down the following statement:

In order to promote the free movement of persons, the Member States shall co-operate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of nationals of third countries.⁶

But this declaration was a bit contradicted by another declaration saying that this co-operation should not affect the Member States from taking what they considered to be necessary action to control immigration from third countries and to combat terrorism and crime, areas which were found to belong to the sovereign powers of the Member States.⁷ But the co-operation in these fields did continue, and led among other things to the intergovernmental group adopting the Schengen Convention and the Dublin Convention. This intergovernmental co-operation continued until the entry into force of the Treaty on the European Union 1993.

⁶ Final Act, Political Declaration by the Governments of the Member States on the Free Movement of Persons, annexed to the Single European Act. O.J. (1987) L 169/26.

⁷ General Declaration on Articles 13 to 19 of the Single European Act. Annexed to the Final Act of the Single European Act, O.J. (1987) L 169/25.

3 Harmonisation and policy making

3.1 The need of harmonisation

Because of the realisation of the internal market, everyone seemed to agree that there was a need for harmonisation in the asylum and migration area. But ever since the work on harmonisation started, there have been different views on how to conduct it. Some say it should be merely co-operation with the main control on a national level, others that it should be done by rules that are to be applied and interpreted in the same way throughout all Member States.⁸ The first option would probably not be very effective, because of the different cultural and legal differences between the Member States, both in applying national law and international instruments. If all the Member States applied their own law, and not common rules interpreted in the same way, harmonisation would not be achieved.

Thus, to have effective harmonisation we need common rules. After these common rules have been adopted, it is necessary to implement them in the Member States and to have an independent body that interprets them in a unified and dynamic way.⁹ Once harmonisation is created in an intergovernmental forum, no enforcement instrument or sufficient judicial control is available. When the harmonisation was realised through the third pillar in the Maastricht Treaty, the process worked better, but still it was not sufficient; for instance, the jurisdiction of the European Court of Justice was very limited. In this paper I will look at the changes that the Amsterdam Treaty brought about, in particular if the harmonisation procedure is in conformity with democratic criteria.

Besides the realisation of the internal market, there were other factors that made harmonisation on asylum necessary. First of all, the legal developments in the EU had made common law indispensable. This was because of the internal market, as mentioned above, but also the general developments in asylum issues. The Dublin Convention set out criteria for determination of the state responsible for examining an asylum claim. This required that the Member States had the same rules and a mutual trust, because otherwise asylum seekers would be gravely deprived of their right to choose where to seek asylum. This was also closely connected with another good reason for harmonisation, namely burden-sharing. Some European countries apply more liberal approaches to asylum seekers, and

⁸ Roland Bank "The emergent EU Policy on Asylum and Refugees - The New Framework set by the Treaty of Amsterdam: Landmark or Standstill?" *Nordic Journal of international Law* 68 (1999) p 14.

⁹ Bank, 1999, p 16.

therefore receive more refugees than other Member States. In order to spread the amount of asylum seekers among the Member States, burden sharing is important, and it is made possible by harmonisation of asylum law. Since asylum is granted for humanitarian reasons, it should not be dependent on national interests.¹⁰

3.2 Different approaches to policymaking

In the past, mainly two different approaches have been used in European policy-making.¹¹ *The intergovernmental approach* means that there are consultations between the Member States only, while *the Community approach* means that the Community institutions are actively involved in the process.

The realisation of the internal market was difficult to achieve; the different Member States had difficulties in agreeing on several things concerning a Europe without borders. It was even more difficult for them to agree on common instruments in the area of immigration and asylum. As mentioned above, the Member States regarded those as matters of national concern and were not willing to give sovereignty in this area to the Community. But, at the same time it was obvious that some form of co-operation was needed to compensate for the loss of control inside the Community. As a result, co-operation started to emerge mainly in an intergovernmental forum (the intergovernmental approach) but the Community approach emerged beside it. The intergovernmental approach made it possible for the Member States to agree on some common policies, and still remain in control.

So, the asylum and migration policies started out mainly with an intergovernmental approach and a few agreements with the Community approach. But a new approach was developed with the Maastricht Treaty, namely *the pillar approach*.¹² The Maastricht Treaty introduced the three-pillar structure, where the matter of immigration from outside the Community was dealt with in the third pillar, concerning co-operation in Justice and Home Affairs. The pillar approach, as such, and the policy making in the third pillar, was a mix of the two other approaches, but it mainly takes place by intergovernmental co-operation, with very limited possibilities for the Community institutions to influence.

3.3 The Community approach

The intergovernmental approach thus prevailed in the asylum area after the Single European Act, since the Member States were not ready to let the Community deal with it. Regulations were made within the Community in the area of free movement and equal treatment of third-country nationals

¹⁰ Bank, 1999, p 15.

¹¹ Guild/Niessen, 1996, p 3.

¹² Ibid.

already living within the Union. Since this essay mainly deals with the entry of the borders of the Union, when people seek asylum, I will not go further into that. But the institutions were not completely inactive under this period of time. In 1991 the Commission issued two communications on the right of asylum and immigration.¹³ In these communications there were two major points, namely prevention of asylum abuse and harmonisation of the right to asylum. The prevention of asylum abuse should be given priority, but at the same time the Commission said that any measures in this area should be made with full respect for the humanitarian principles embodied in the Geneva Convention.¹⁴ The Communications were supposed to give guidance on how to harmonise the interpretation of asylum law and the administrative practices in the different Member States. Apart from this, there was not much activity within the Community institutions until the Maastricht Treaty was signed, except in the European Political Co-operation.

3.3.1 The Schengen Group

The intergovernmental co-operation in the Schengen group started in 1985, as an outcome of negotiations between Germany and France to relax the control at the common French-German border.¹⁵ In 1985 five EC Member States, France, Germany, Belgium, the Netherlands and Luxembourg, signed the Schengen Agreement (SIA), on the gradual abolition of checks at their common borders. It was a framework for the abolishment of internal border controls and compensatory measures, for example harmonisation of visa policies. Negotiations followed and led to the Schengen Convention¹⁶ in 1990. After a long ratification process, the Convention entered into force on 1 September 1993, and has been applied since 26 March 1995. Other EC Member States acceded in time to both the Schengen instruments. By 1996 Italy, Spain, Portugal, Greece, Austria, Denmark, Finland and Sweden had all signed Accession Agreements. Ireland and Great Britain remained outside for a number of reasons.¹⁷

¹³ Commission Communication to the Council and the European Parliament on immigration (SEC (91) 1855 final) and Communication from the Commission to the Council and the European Council and the European Parliament on the right of asylum (SEC (91) 1857 final).

¹⁴ Guild/Niessen, 1996, p 16.

¹⁵ Hans Ulrich Jessurun d'Oliviera "Expanding External and Shrinking Internal Borders: Europe's Defence Mechanisms in the Areas of Free Movement, Immigration and Asylum, Eds. David O'Keeffe and Patrick M Twomey "Legal issues of the Maastricht Treaty" London 1994, p 269.

¹⁶ Convention applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, 19 June 1990.

¹⁷ Gregor Noll "Negotiating Asylum, The EU Aquis, Extraterritorial Protection and the Common Market of Deflection" 2000, Kluwer Law International, p 126.

The main goal in the Schengen Agreement and Convention was that it should be possible to pass the internal borders of Contracting parties at any point without any checks on persons.¹⁸ This was followed by compensatory measures to prevent the realisation of free movement of persons from creating security problems. These compensatory measures are, for example:

- The implementation of unified, stricter external border controls (Arts. 3-8 SIA)
- The unification of entry and visa requirements (Arts. 9-27 SIA)
- Co-operation between national police forces (Arts. 39-47 SIA)
- Judicial co-operation regarding mutual assistance, extradition and the handing over of criminals (Arts. 48-69 SIA)
- The creation of a central databank of people, the Schengen Information System (Arts. 92-119 SIA).

3.3.1.1 The concept of the responsible state

One important purpose of the Schengen Agreement and Convention was the concept of responsibility, to make sure that only one Signatory State was responsible for the investigation of an asylum seeker. The intention is to prevent the states from just sending the asylum seekers between each other, without anyone taking responsibility for the applications, but also to prevent the asylum seekers from placing asylum applications in several states at the same time, so called asylum shopping.¹⁹

The responsible state should not only exclusively decide on the asylum seeker's application. It must also ensure that the asylum seeker leaves the Schengen area if he/she was not granted asylum. The application is examined in accordance with the national law in the responsible state, but the Schengen states have all signed the 1951 Geneva Convention on Refugees and must follow it.²⁰

The asylum seeker is not free to choose a state in which to make an application. The state responsible is decided by a number of objective criteria. The state that has the main responsibility for the existence of the asylum seeker in the Schengen area should also be responsible for the asylum application. The most important criteria is if the asylum seeker has relatives in the state. Other criteria are residence in the state, grant of visa or grant of residence permit.²¹

The Schengen Agreement and Convention only determine the state responsible for the asylum application. It does not say anything on how to determine whether a person has right to asylum or not. This is entirely up to

¹⁸ Article 2, Schengen Convention.

¹⁹ Kay Hailbronner, Claus Thiery "Schengen II and Dublin: Responsibility for Asylum Applications in Europe, CMLR 34 (1997) p 964.

²⁰ Ibid.

²¹ Hailbronner, Thiery, 1997, p 967.

the national legislation of the state, which is of course also bound by its international obligations.

A state can always send an asylum seeker to a third state (outside EC) in accordance with its national law or agreements with third states.²² For example, agreements have been made with countries like Poland, Hungary, Slovakia and the Czech Republic. These agreements oblige the non-Schengen state to readmit persons found in the Schengen area, who entered from the non-Schengen state, even if the asylum seeker was not a national of that state, but merely passed through it on the way to the Schengen state.²³ This makes it very difficult to get any Schengen state to take responsibility for an asylum application. It is of course very unfortunate to send asylum seekers back to countries which often do not have the resources necessary to help them.

3.3.1.2 Exchange of information and visa lists

The Schengen co-operation introduced a system, which made it possible to exchange information of general and personal data, the Schengen Information System (SIS). Transfer of information on a person who seeks asylum is permitted if it is necessary in order to examine which state that has responsibility for the asylum application. It may only be used for that purpose, and cannot be kept when the purpose is achieved. In order for exchange of information about the reasons for asylum seeking to take place, the applicant must leave a written consensus.²⁴ There are problems with this information system, for example the lack of protection for the individual. Asylum seekers do not have an absolute right to bring a claim for correction of the data, and it cannot guarantee the identification of the applicant, because of different national rules on fingerprints.²⁵ In the Schengen Information System, information on asylum seekers who have been expelled or deported is made available. This includes information on persons who entered a country illegally.

Schengen has issued visa lists; lists of countries whose nationals need a visa to enter into the Schengen area. Visas are often needed from countries that have a large group of refugees fleeing from it. The Schengen Convention provides both a positive list of 44 states and a negative list of 132 states, and it is legally binding. The visas are durable for three months and the Schengen State issuing it must make an analysis of the true intentions of the person applying for a visa. If there are any doubts on whether the applicant will return to its country of origin, a visa should not be issued.²⁶ The Schengen Convention entails no instructions for cases where refugees are

²² Hailbronner, Thiery, 1997, p 975.

²³ d'Oliviera, 1994, p 275.

²⁴ Hailbronner, Thiery, 1994, p 976.

²⁵ Ibid.

²⁶ Noll, 2000, p 172.

seeking visas in order to seek asylum. A Schengen State may allow asylum seekers entry on humanitarian grounds, and if there are rights to entry flowing from international obligations on human rights or refugees, these must override the Schengen rules.²⁷

Methods have been established to make the visa rules effective. Among these are pre-frontier assistance, where the Schengen States send staff to the third countries to control the visa issuing and departure control, since the visa requirement is a precondition for departure from third countries.²⁸ Another method is article 26 in the Schengen Convention, which obliges the States to have national rules that place a responsibility on the carriers for transporting persons without a valid visa. This obligation was made subject to the obligations in the 1951 Refugee Convention. Since it is too expensive for the airlines to pay the sanctions involved, they tend to reject passengers travel documents rather than accepting them as valid visas.²⁹

The Schengen Agreement and Convention have developed in an intergovernmental co-operation outside the Community. It is an example of how regulations in Europe developed at two speeds. The products of the Schengen co-operation developed at quite high speed while the Community did not develop much at all on the same issues. But the actors in the Schengen co-operation were all EC member states and in many respects they seemed to act on the conclusions made in the White Paper 1985.³⁰ The Schengen Convention was meant to be an instrument that abolished the border controls between the agreeing states. But that abolishment seemed to require immense control on the external borders. The measures that compensate the loss of control between the countries are very restrictive towards immigrants and asylum seekers, for example the visa policies. This is also apparent from the definitions in the Convention of what an external or internal border is. The internal borders are as few as possible, while the definition of external border is extremely wide, including almost all air- and seaports, and even the Channel Tunnel between England and France.³¹

The Schengen instruments have also been very criticised of lacking in democratic values. The Schengen Convention created an Executive Committee that had the authority to issue binding regulations on a number of issues.³² All the work in the Executive Committee was confidential, the meetings took place without the possibility of public presence and the Committee could decide that their own binding decisions were confidential. The secrecy precluded parliaments of the countries involved from

²⁷ Noll, 2000, p 174.

²⁸ Noll, 2000, p 176.

²⁹ Noll, 2000, p177.

³⁰ Noll, 2000, p 126.

³¹ d'Oliviera, 1994, p 270.

³² Noll, 2000, p 124.

controlling and correcting matters, and there was no judicial review of the executive powers of the Schengen Committee.³³

3.3.2 The European Political Co-operation

Co-operation in political fields had started already in the beginning of the 1970s. It was an essentially intergovernmental forum for co-operation in foreign policies, and it became known as the European Political Co-operation (EPC). The Single European Act governed the EPC in its Title III, as operating outside the Community structures.³⁴

The SEA made a time plan for the realisation of the internal market. To compensate for the loss of control at the borders, the Member States committed to co-operate on crime protection, to combat terrorism, drug trafficking and illegal immigration. For that purpose the national ministers responsible for immigration created the Ad-hoc Group on Immigration, which was to produce a working programme dealing with, for example: improved checks at the external frontier, harmonisation of visa policies, exchange of information and achieving common rules to eliminate asylum abuse.³⁵

The twelve Member States co-operated on these issues between 1985 and 1993, and resolutions and recommendations were adopted, for example a common visa list, like the one developed in the Schengen group.³⁶ Just as the visa list in Schengen, the countries whose nationals needed visa were those who produced a large number of asylum seekers.

3.3.2.1 The Dublin Convention

One of the major results of the EPC co-operation is the Dublin Convention³⁷, which was signed by all Member States in June 1990, and went into force in September 1997. This convention places the responsibility among the Member States for the examination of asylum applications that have been lodged in one of the states. It is very much like the Schengen Agreement and Convention, but it deals exclusively with how to allocate the asylum applications³⁸, and since all Member States have signed it. The aims of the Dublin Convention are about the same as Schengen, namely to prevent asylum seekers from being sent from one state to another without

³³ Noll, 2000, p 125.

³⁴ Craig/de Burca, 1998, p 21.

³⁵ Guild/Niessen, 1996, p 32.

³⁶ Guild/Niessen, 1996, p 34.

³⁷ Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities, 15 June 1990.

³⁸ Noll, 2000, p 127.

anyone trying the asylum application, and to prevent the lodging of asylum applications in more than one state (asylum shopping).³⁹

The Dublin Convention first allocates the responsibility for one Member State to examine the asylum seeker, and then lays down obligations on readmission of the asylum seeker. To decide which state is responsible, the Convention puts up certain criteria, quite similar to the ones in the Schengen Convention, and just as Schengen the responsibility falls on the state that is responsible for the presence of the asylum seeker on the territories of the Member States.⁴⁰ There are five criteria. The first is family⁴¹; if the applicant has a spouse or a child in one of the Member States, who has been recognised as a refugee, that state should handle the asylum application. The second criterion is residence and entry permits⁴². If a Member State has issued a residence permit or a visa, that state is responsible for the application. If the asylum seeker entered illegally into the European Union, the state in which the applicant first entered is responsible, which is the third criterion.⁴³ The fourth is controlled entry⁴⁴, where the responsible state is the one that controls the entry of the asylum applicant into the territory of the Member States. The last criterion for responsible state is the state in which the application was first lodged⁴⁵, if no other responsible state can be made out.

There is a clause, which makes it possible for states to examine an asylum application although it does not have the responsibility under the abovementioned five criteria, namely the so-called sovereignty clause.⁴⁶ This clause can be beneficial to the applicant, if the state using it has more liberal asylum rules than the Member State who was responsible under the Dublin Convention. But it can also be the other way around when the state has a more restrictive practice, and uses it to reject the asylum seeker.⁴⁷ To use the sovereignty clause the asylum seeker must have given its consent, but for example Germany has considered that the fact that the asylum seeker put its application in that state was implicitly a consent to use the clause.⁴⁸

A committee has been established, under Article 18 of the Convention, to examine questions on application and interpretation of the Dublin Convention. It consists of representatives from all the contracting states and

³⁹ Guild/Niessen, 1996, p 34.

⁴⁰ Noll, 2000, p 189.

⁴¹ Art 4 Dublin Convention

⁴² Art 5 Dublin Convention

⁴³ Art 6 Dublin Convention.

⁴⁴ Art 7 Dublin Convention.

⁴⁵ Art 8 Dublin Convention.

⁴⁶ Art. 3(4) Dublin Convention.

⁴⁷ Noll, 2000, p 190.

⁴⁸ Ibid.

from the European Commission. It has adopted a number of instruments⁴⁹ to clarify the Convention, and a Programme of Action in June 1998.⁵⁰

Just as the Schengen Agreement and Convention, the Dublin Convention has been very criticised, mostly for moving away from protection values, and for ineffective functioning. There has been criticism over the long processing delays and that the convention puts too much burden on Member States that have external borders towards migration areas.⁵¹ The responsibility to handle asylum applications is put on states that issues residence permits and visas, and because of that, states might be more reluctant to accept visa applications and residence permits to people in need.

3.3.2.2 Other results from the EPC

The Dublin Convention was the most important result from the work within the European Political Co-operation. But there were also other results of the co-operation. Just as the Schengen group, the Ad-hoc Group on Immigration in the Member States also drew up a visa list, a list of countries whose nationals needed a visa to be able to enter one of the Member States. This list was to be based on solidarity between the Member States, and the countries listed were known to have a large number of asylum seekers coming from them. The list was finally drawn up in 1995.⁵² It is not as comprehensive as the Schengen visa list, which consists of 132 countries, this only have 101. These lists are so called negative lists; Schengen also has a positive list, consisting of 44 countries whose nationals do not need a visa. The EPC meant to draw up such a list too, but did not succeed.⁵³

The EPC also launched four non-binding instruments, which have been known as the London Resolutions. The texts deals with:

- *Manifestly unfounded applications for asylum.* An application is manifestly unfounded if there is clearly no truth in the applicant's claim to fear persecution, or where the claim is based on deception or abuse of asylum procedures. In these cases a more accelerated asylum procedure is used.⁵⁴
- *The concept of safe third countries.* If the asylum applicant has left a safe third country before coming to the Member State, the application will not be considered in that Member State, or will be considered in an

⁴⁹ For example Decision 1/97 of 9 September 1997 concerning provisions on the implementation of the Dublin Convention, Decision 2/97 of 9 September 1997 establishing the Rules of Procedure of the Committee set up by Article 18 of the Dublin Convention and Decision 1/98 of 19 June 1998 of the Article 18 Committee of the Dublin Convention, concerning provisions for the implementation of the Convention,

⁵⁰ Noll, 2000, p 187.

⁵¹ Noll, 2000, p 197.

⁵² Guild/Niessen, 1996, p 35.

⁵³ Noll, 2000, p 163.

⁵⁴ Guild/Niessen, 1996, p 36.

accelerated process, because the country that is considered to be safe has the responsibility for the asylum seeker. For an explanation of the safe third country concept, see under 3.2.2.3.

- *The concept of safe countries of origin.* Safe countries of origin are countries in which there is generally no risk of persecution. When deciding whether there is such a risk, considerations that are taken into account are previous numbers of refugees, observance of human rights, the level of democracy and risks of dramatic events in the future.⁵⁵
- *The expulsion of illegal third countries.* Common practices on expulsion of people who have unlawfully entered the Member State or whose asylum applications have been rejected.⁵⁶

3.3.2.3 Safe Third Countries

There are different rules for granting asylum in different European countries. Naturally, more asylum seekers turn to states that have a higher recognition rate than states where very few asylum seekers are accepted. It is also natural to seek asylum in more than one state, to maximise chances. This has been known as “asylum shopping”, and is something that the European states want to avoid. One way to do that is the concept of Safe Third Countries.

The concept of Safe Third Countries is that states fictive the equality of all the systems of the states, and allocates asylum seekers under a mechanic rule. This mechanic rule says that if an asylum seeker has passed through a country that has been recognised as safe, and could have sought asylum there, the application should be rejected in the next state, and the asylum seeker should be told to go back to the first state.⁵⁷ This concept was first introduced in the Danish domestic legislation in 1986, but can be found both in the Schengen and the Dublin Conventions. The basic principle of the Dublin Convention is that the Member States mutually recognise each other as “safe third countries”.

There are two elements in the concept of Safe Third Countries. First, there are criteria that decide which country that is responsible for the processing of an application. Second, there must be rules on the readmission of the asylum seeker to the safe third country. There are no obligations of readmission in international law, but the issue is regulated in the Dublin Convention. Readmission to safe third states outside the Union is usually regulated by readmission agreements between the states.⁵⁸

In 1992 a non-binding resolution was taken on a harmonised approach to questions concerning host (safe) third countries.⁵⁹ It deals with the allocation

⁵⁵ Guild/Niessen, 1996, p 37.

⁵⁶ Ibid.

⁵⁷ Noll, 2000, p 183.

⁵⁸ Noll, 2000, p 184.

⁵⁹ EC Ministers Resolution of 30 November – 1 December 1992 on Harmonised Approach to Questions Concerning Host Third Countries.

of responsibility for asylum seekers between Member States and third countries. If there is a safe third country, the application for asylum may not be examined, and the applicant must be sent to that country.⁶⁰

The qualification of a safe third country is made out of certain criteria, in Article 2 of the Resolution. The life or freedom of the asylum seeker must not be threatened in that country; neither can he/she be exposed to torture or inhuman treatment there. Before the applicant came to the Member State he/she must already have been granted asylum in the third country, or have had the opportunity to make an asylum application in that country. The applicant must also be offered protection against refoulement in the third country, within the meaning of the 1951 Geneva Convention. All these criteria must be fulfilled in order to determine a third country as safe. Article 3 of the Resolution says that the decision whether the concept of Safe Third Country should be applied is to be made before deciding responsibility under the Dublin Convention. Only if the Member State decides that a safe third country does not exist, is it possible to go on to decide if the Member State is responsible for examining the asylum application. But the right to send asylum seekers to a safe third country remains after a state has been made responsible under the Dublin Convention.⁶¹

There has been criticism on this Resolution. For example, the possibility to send an asylum seeker to a Non-Member State without examining the person's right to asylum has been argued to be against the 1951 Geneva Convention on Refugees.⁶² The countries do not have the same view on which countries that are safe and which are not, since some have readmission agreements that others don't. This can lead to a situation that in my opinion is very dangerous. A Member State sends back an asylum seeker to the Member State that is responsible. If that Member State considers the asylum seeker's country of origin to be a safe third country, he/she is much worse off than in the first Member State where his/her country is not regarded safe. The concept of Safe Third Country and the Dublin Convention have concentrated on assuring that only one Member State is responsible for an asylum seeker, instead of harmonisation of the national rules on examining asylum applications. As long as those rules are not harmonised, countries can not just assume that other countries have the equal system as they do. That assumption can have detrimental effects for the individuals that are seeking asylum.

It also seems to be forgotten that the reasons for asylum seekers to place applications in different countries are based on their fear of persecution and are not intentions to become international criminals. The developing systems with information exchange and fingerprinting to complement the concept of Safe Third Countries have many similarities with crime investigations. It is

⁶⁰ Article 1 Resolution on Safe Third Countries.

⁶¹ Article 3 (c) Resolution on Safe Third Countries.

⁶² Noll, 2000, p 202.

very unfortunate to create systems of law and policies that regards the asylum seekers as criminals. Not only does persecuted individuals have a right to seek asylum according to the international law on human rights, it is also very important out of a humanitarian point of view that refugees are regarded as people seeking a safe place to live, not committing crimes. The law and policies could spread to the society and create problems of racism and xenophobia that are most unwanted.

4 The Maastricht Treaty

The Treaty on the European Union (TEU) was signed in Maastricht in February 1992 and entered into force in November 1993. The EEC Treaty was at the same time renamed the Treaty on the European Community (TEC).

The TEU established fully the economic and monetary union, promoting economic and social progress through the realisation of the internal market. It introduced the concept of an ever-closer union, requiring decisions to be taken as closely to the citizens as possible, to respect the national identities of its Member States and to respect fundamental human rights.⁶³ Although vague, it was a first step to recognise human rights values. Citizenship of the Union was established to protect the rights of individuals and close co-operation on Justice and Home Affairs was to be developed. But its most different feature was the new institutional form, a union with a three-pillar structure.

4.1 The three pillar structure

Since TEU entered into force the Union is divided into three pillars. The first is the Community framework, with supranational features. The other two dealt with issues of common interest to the Community, but were based on intergovernmental co-operation and decision-making. The second pillar deals with the field of Common Foreign and Security Policy, and the third with Justice and Home Affairs. Justice and Home Affairs embraced in Title VI, Article K, matters such as asylum, immigration, co-operation on external border control and international crimes.⁶⁴

Thus, co-operation on asylum and immigration was hereby introduced into the Union, but still on an intergovernmental basis. Decision-making by the Council had to be made unanimously, except on matters of procedure. The measures were taken in forms of joint positions, joint actions or conventions. Only the conventions were binding instruments. There is no clear definition of what joint positions are, but they have been compared with recommendations and declarations. They are not binding on the Member States.⁶⁵ To assist the Council a Co-ordinating Committee was set up, the so-called K4 Committee. This committee had replaced the former Ad-hoc Group.⁶⁶ The Commission is fully associated with the work in these areas, but the European Court of Justice originally had no jurisdiction under

⁶³ Craig/de Burca, 1998, p 26.

⁶⁴ Ibid, p 29.

⁶⁵ Guild/Niessen, 1996, p 53.

⁶⁶ Dearden, Stephen J.H. "Immigration Policy in the European Community" Discussion Paper No. 4, March 1997, European Development Policy Study Group, p 9

pillar three, except for regarding uniform interpretation of conventions adopted under Article K.3 TEU.⁶⁷ Despite the commitment in the TEU to fundamental rights and the European Convention on Human Rights, the ECJ had no jurisdiction to check if acts issued under pillar three were in conformity with that commitment.⁶⁸ The European Parliament was regularly informed and its view taken into consideration. It could ask questions and make recommendations to the Council (Art K.6)

The only part of the asylum area that was moved into the Community Framework at this stage was the visa policy. Article 100c of the EC Treaty empowered the Council to, under Community law, unanimously determine which non-EU nationals would require visas to enter the Community. The unanimity requirement was in 1996 changed to qualified majority voting. In cases of a sudden, threatened inflow of refugees, visa requirements could be imposed on nationals of that country, for a period of six months, with a simplified procedure (Art 100c 2 ECT).⁶⁹

Article K.9 TEU contained the so-called *passerelle*, the possibility to move matters of asylum and immigration over to Community competence, so that they would be covered by Article 100c, just as the visa policy. This was because the asylum area was considered to be a matter of priority, and it was important to harmonise it. Such a decision would require a unanimous decision from the Council and would have to be in conformity with the constitutions of the Member States.⁷⁰ But the *passerelle* was never used. Instead the Amsterdam Treaty moved the asylum and immigration issue to the first pillar, which will be dealt with in the next chapter.

The Maastricht era was significant for its lack of binding instruments on issues of asylum and immigration. The only area that seemed important enough to regulate was the control of external borders. However, two regulations in the asylum area are worthy of mentioning, namely the 1995 Resolution on Minimum Guarantees in Asylum Procedures and the 1996 Joint Action on the Harmonised Application of the Refugee Definition.

The Council adopted resolutions, recommendations and conclusions in this field, which were not legally binding but may have had legal implications, for example when interpreting national law.⁷¹

The Schengen Agreement and Convention and the Dublin Convention were used outside the Maastricht Treaty. They had a lot more impact on the Member States, since they were binding, and were a lot more efficient than the rules in the Treaty.

⁶⁷ Guild/Niessen, 1996, p 52.

⁶⁸ Bank, 1999, p 5.

⁶⁹ Bank, 1999, p 4.

⁷⁰ Noll, 2000, p 134.

⁷¹ Bank, 1999, p 7.

4.2 Deficiencies with the asylum policy in the Maastricht Treaty

The Member States had difficulties in agreeing on the level of integration within the Community. Because of that, the Maastricht Treaty became a compromise, a Union with economic, monetary and political features, but still vague in many areas. Since it was a compromise, many Member States were unsatisfied with the Treaty, and the Article N was created. This Article stated that an Intergovernmental Conference was to be held in 1996, to examine the measures taken under the Treaty.⁷² There were lots of deficiencies with the way in which the Maastricht Treaty governed the asylum policy. I will now examine some of the criticism against it.

First of all, there have been some democratic deficits in the policy area. The European Parliament had a very restrictive role. The obligation in Article K.6 to inform the Parliament and consider its views had often not been done until after the decision was taken, which very much deprived the Parliament of any influence.⁷³ There was no right of parliamentary control such as the right to investigate and the right for citizens to make complaints to the Ombudsman, since it does not apply to issues under the third pillar.⁷⁴ Another democratic deficit was the transparency problem. As I have discussed earlier in the Schengen co-operation, most of the activity was done in secrecy, with no control at all, although some of the decisions had effects on individual's rights. This was also a problem on the EU level, but it was improved a bit in 1995 when the Council published all the measures taken in this area in the Official Journal.⁷⁵

Lack of efficiency is another criticism towards pillar three. As mentioned above, not very much was achieved. The Council adopted resolutions and recommendations, but hardly any new instruments. Additionally, the Member States were left with too much discretion on how to implement, and when to take action. One major reason for this lack of efficiency was the requirement of unanimity in almost all decision-making. It was evidently very difficult for the Member States to find common ground on these issues. They often had to settle for the lowest common denominator, which mostly was restrictive.⁷⁶ The legal status of instruments like the Joint Position was very uncertain. The whole co-operation had no real common vision, which left the actors without clear direction. The mix of intergovernmental co-operation and some supranational features made the situation even more unclear.

⁷² Joakim Nergelius, *Amsterdamfördraget och EU:s institutionella maktbalans*, Norstedt Juridik, 1998, p 24.

⁷³ Bank, 1999, p 10.

⁷⁴ *Ibid*, s 11.

⁷⁵ *Ibid*.

⁷⁶ Guild/Niessen, 1996, p 62.

Another serious deficit was the judicial control. The European Court of Justice had a very restrictive role when it came to the third pillar. The measures adopted were not binding, and could not be subject to ECJ:s jurisdiction. The only jurisdiction it had was concerning the compatibility with the EC Treaty, usually the Commission challenging the Council's competence for taking action, which often was a result of competencies clashing. In one case the Commission challenged the Council's competence to issue a Joint Action listing countries whose nationals required visa when in transit through international airports.⁷⁷ The Commission argued that this area was a matter of Community competence for establishing visa lists under Article 100c EC Treaty. But the ECJ rejected the opinion of the Commission and said that airport transit visas did not concern the crossing of external borders of Member States, and therefore did not fall under Article 100c of the EC Treaty.

One of the main purposes with this essay is to look at the conformity of the asylum policies in EU with the respect for international law. The main concern here is regarding the Joint Position on the interpretation of the refugee definition in Article 1A of the Geneva Convention. This Joint Position is contrary to the Geneva Convention when it comes to conditions for recognising asylum seekers as refugees if they are claiming persecution by parties other than the state. The Joint Position requires that persecution by such a third party must be encouraged or permitted by the authorities in the country. The Geneva Convention does not have such a requirement, and the UNHCR has stated in its Handbook of Procedures and Criteria for Determining Refugee Status, that persecution exists even if other parties than the authorities of a country commit it.⁷⁸

⁷⁷ C-170/96, Commission v. Council.

⁷⁸ Bank, 1999, p 13.

5 The Amsterdam Treaty

The massive criticism against the co-operation within the third pillar of the Maastricht Treaty led to a debate on reform of the Treaty on European Union. This was dealt with in the 1996/1997 Intergovernmental Conference (IGC). On this Conference the Justice and Home Affairs became one of the most important areas of reform, the Member States felt the need for this in order to cope with increased immigration and international crimes. Also, the planned enlargement of the Union to the countries in the Eastern Europe made it necessary to have functioning rules in immigration and asylum matters.

After long negotiations between the Member States, aiming at remedying the shortcomings of the Maastricht Treaty, the Amsterdam Treaty was adopted in June 1997, and entered into force on May 1, 1999. It situates the asylum and immigration issues within a new institutional framework, by transferring these matters from the third pillar to the first. In the first pillar they have been introduced in a new Title IV, which covers asylum, immigration and external border control. It has been a step forward to move these issues into the Community framework, although the institutional rules are different from the rest of the framework. Judicial co-operations in criminal matters and police remains under pillar three. Another major change with the Amsterdam Treaty is the decision to incorporate the Schengen Agreements into the Community framework.

5.1 The new Title IV

Article 61 TEC gives an overview of what Title IV regulates.⁷⁹ It delimits the competencies of the Community:

In order to establish progressively an area of freedom, security and justice, the Council shall adopt:

- a) within a period of five years after the entry into force of the Treaty of Amsterdam, measures aimed at ensuring the free movement of persons in accordance with Article 14, in conjunction with directly related flanking measures with respect to external border controls, asylum and immigration, in accordance with the provisions of Article 62(2) and (3) and Article 63(1)(a) and (2)(a), and measures to prevent and combat crime in accordance with the provisions of Article 31(e) of the Treaty on European Union;
- b) 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; (...)

⁷⁹ Michael Wollenschläger, "Das Asyl- und Einwanderungsrecht der EU", Europäische Grundrechte Zeitung, 2001, p 357.

With this Article a new concept is adopted, when switching from “abolishment of internal border controls” to “an area of freedom, security and justice”. The timetable of five years makes the Amsterdam Treaty different from the Maastricht. By setting out a binding schedule for achievements, it is more efficient.⁸⁰ The five-year transitory period will end on 1 May 2004.

Article 62 and 63 of the Title IV lists the Community competencies. It is an exhaustive list and issues that are not dealt with here are within the competence of the Member States. The Member States are also free to legislate as long as the Community has not made use of its competence.⁸¹ National legislation can also be made where the Community has only adopted minimum standards, since the Member States may always go further in those cases.⁸² The measures mentioned in Article 62 and 63, which are to be adopted within a five-year period, are the following:

- Measures to abolish internal border controls.⁸³
- Measures establishing procedures for checking persons at external borders.⁸⁴
- Measures on issuing visas for visits no longer than three months.⁸⁵
- Measures which set up the conditions under which nationals of third countries have the right to travel within the territory of the Member States for no longer than three months.⁸⁶
- Criteria and mechanisms for determining which Member State that is responsible for examining an asylum claim.⁸⁷
- Minimum standards on reception of asylum seekers.⁸⁸
- Minimum standards with respect to the qualification of third country nationals as refugees.⁸⁹
- Minimum standards on procedures for granting and withdrawing refugee status.⁹⁰
- Minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country and persons otherwise in need of international protection.⁹¹
- Measures on illegal immigration and illegal residence, including repatriation of illegal residents.⁹²

⁸⁰ Noll, 2000, p 137.

⁸¹ Article 5 TEC, the subsidiarity principle.

⁸² Noll, 2000, p 137.

⁸³ Article 62 (1) TEC.

⁸⁴ Article 62 (2) (a) TEC.

⁸⁵ Article 62 (2) (b) TEC.

⁸⁶ Article 62 (3) TEC.

⁸⁷ Article 63 (1) (a) TEC.

⁸⁸ Article 63 (1) (b) TEC.

⁸⁹ Article 63 (1) (c) TEC.

⁹⁰ Article 63 (1) (d) TEC.

⁹¹ Article 63 (2) (a) TEC.

⁹² Article 63 (3) (b) TEC.

In Article 63 there has been some exceptions from measures that have to be achieved within five years, for example burden-sharing and legal immigration, in the last sentence of Article 63. By leaving these issues outside the five year period, making them facultative instead of compulsory⁹³, the Community shows that they are not as important as keeping illegal immigration out. Does this mean that the Member States can decide for themselves conditions for immigration, independently of Community law? It is clear that the Member States can not legislate without making sure that the legislation is in conformity with international standards and with the TEC. The question is whether the national authorities have to follow the secondary instruments from the Community, like regulations and directives. But this would mean that these instruments and the purpose of creating the new Title IV would be useless. Despite the wording of the last sentence of Article 63, Community law, including secondary law, still prevails over national law when there is a conflict.⁹⁴

Article 64 contains an ordre-public restriction in the first passage, namely that Title IV does not affect the Member States responsibility for maintenance of law and order and protection of inner security. The second passage gives the Council the power to adopt provisional measures in the case of a sudden inflow of third country nationals creating an emergency situation in one or several of the Member States.

One very positive aspect of the move from the third to the first pillar is that the instruments used in the third pillar, such as the Joint Positions, whose legal effects used to be unclear and debated, have been replaced by the Community legal instruments. The instruments in the third pillar have been modified by the Amsterdam Treaty. In particular, the Joint Positions have disappeared and been replaced by “framework decisions” and “decisions”.⁹⁵

5.1.1 Decision making

The decision-making within the third pillar was the most criticised, and one of the main issues of the IGC of 1996/1997. As mentioned above, with the move to the first pillar, the Community instruments were to be used, that is Article 249 and 251, regulations, directives and decisions. But at the IGC there were difficulties in agreeing on the decision-making, especially the voting rules. Germany had anxieties about their immense immigration and refugee pressure and blocked the introduction of qualified majority voting on immigration and asylum issues.⁹⁶ This, and objections from other states, for example the United Kingdom, led to the compromise that Title IV is, with the five year transitional period. Until 1 May 2004, the decisions made

⁹³ Noll, 2000, p 139.

⁹⁴ Wollenschläger, 2001, p 358.

⁹⁵ Jörg Monar, “Justice and Home Affairs in the Treaty of Amsterdam: Reform at the price of Fragmentation” *European Law Review*, 23, 1998, p 326.

⁹⁶ Monar, 1998, p 328.

by the Council in Title IV must be taken unanimously. Excepted from this are the measures on visas, which already existed in the TEC, where decisions are taken with qualified majority. Two new visa issues have been introduced, covering measures on the procedures and conditions for issuing visas by Member States and rules on a uniform visa.⁹⁷ Measures on these are also subject to the transitional unanimity decisions.⁹⁸ These decisions are to be taken after an initiative by the Commission or a Member State, and after consulting the European Parliament.⁹⁹ With this transitional period, the Member States have assured that they stay in control of the decision making. Thus, the difference from the decision-making in the previous third pillar is minor.¹⁰⁰ After the transitional period, the Council shall unanimously take a decision whether to make all or parts of the Title IV subject to the procedure in Article 251 TEC, that is to introduce decision-making by qualified majority voting.¹⁰¹ Thus, there is a risk that the Council will not be able to move on to qualified majority voting, if it can not take a unanimous decision. There is also the possibility that the Council decides just to move a few of the issues in Title IV over to the procedure under Article 251. The positive thing is the five-year deadline, forcing the Community to take some sort of standpoint. But unless they decide to start using qualified majority voting, the transfer of the area of asylum and immigration to the first pillar has been useless.

The role of the Commission remains weak under the transitional period, since it has to share its right of initiative with the Member States in all the areas in Title IV. After the five-year period, the Commission will have an exclusive right of initiative.¹⁰² The European Parliament, too, has a rather weak position during the transitional period, since it only has a consultative role in the decision-making under Title IV. After the five-year period there could be a move towards the co-decision procedure in Article 251, which would give the Parliament more influence when decisions are made.¹⁰³ The decision procedure in Article 251 means that proposals from the Commission is sent both to the Council and the European Parliament, and the Council has to hear the opinion of the European Parliament before it adopts a decision. If the Council does not accept the view of the European Parliament, they have to communicate until they reach a common position. This leads to an improved position of the European Parliament, since they have an equal role with the Council in the legislative process and can veto legislation it disapproves of.¹⁰⁴

⁹⁷ Article 62 (2) (b) ii and iv TEC.

⁹⁸ Article 67 (4) TEC.

⁹⁹ Article 67 (1) TEC.

¹⁰⁰ Noll, 2000, p 140.

¹⁰¹ Article 67 (2) TEC.

¹⁰² Article 67 (2) TEC.

¹⁰³ Monar, 1998, p 329.

¹⁰⁴ Craig/de Burca, 1998, p 137.

Although the Amsterdam Treaty has brought a better structure and an improved role of the Commission and the European Parliament in this area, the transitional period does not provide a sufficient decision-making system in order to satisfy the goal of an “area of freedom, security and justice”.¹⁰⁵ In order to complete that, the Community institutions must have the same possibilities under Title IV as in the rest of the Community.

5.1.2 The role of ECJ

One of the most important implications of the transfer to the first pillar is the change of the role of the European Court of Justice. The Maastricht Treaty had excluded asylum and immigration matters from the jurisdiction of ECJ. This is improved since the ECJ now has judicial control over the areas that have been transferred into the Community framework. But there are limitations on this jurisdiction, given by Article 68 TEC. The first passage of Article 68 says:

Article 234 shall apply to this Title under the following circumstances and conditions: where a question on the interpretation of this Title or on the validity or interpretation of acts of the institutions of the Community based on this Title is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgement, request the Court of Justice to give a ruling thereon.

There is a significant difference here from the normal procedure under Article 234. Usually, any national court that wishes can send a request for a preliminary ruling, but here, only the court of last instance can do it. Under article 234, such a court is under an obligation to make such a request, but here the court should send for a preliminary ruling only if it considers it necessary in order to give a judgement. Article 68 hereby gives the national courts some margin of discretion, although limited since the provision uses the word “shall” and not “may”.¹⁰⁶ That the national court shall refer questions to ECJ in cases of uncertainty is something of an obligation. The limitation on preliminary rulings in Article 68 is positive since it takes away some of the work-load of the ECJ, but at the same time it limits the court’s possibility to make sure that the interpretation of Community law on asylum and immigration is made properly. Since it can take years before cases come up in a court of last instance, asylum seekers may have to wait unacceptably long before their case comes up before the ECJ.¹⁰⁷ This is very unfortunate from a humanitarian point of view.

Article 68 (2) gives a second limitation of the jurisdiction of the ECJ:

¹⁰⁵ Monar, 1998, p 330.

¹⁰⁶ Noll, 2000, p 143.

¹⁰⁷ Monar, 1998, p 330.

In any event, the Court of Justice shall not have jurisdiction to rule on any measure or decision taken pursuant to Article 62(1) relating to the maintenance of law and order and the safeguarding of internal security.

The wording in this passage is very vague, there is no clarity on what “maintenance of law and order” and “safeguarding internal security” really includes. There is a risk that some Member States interpret this passage too widely.¹⁰⁸ But the passage is not very relevant when it comes to asylum and immigration, since it refers to Article 62(1), which only concerns internal border controls, not external.¹⁰⁹

In addition to the preliminary ruling, Article 68(3) creates a new procedure, the interpretative ruling:

The Council, the Commission or a Member State may request the Court of Justice to give a ruling on a question of interpretation of this Title or of acts of the institutions of the Community based on this Title. The ruling given by the Court of Justice in response to such a request shall not apply to judgements of courts or tribunals of the Member States which have become *res judicata*.

The last sentence means that these interpretative rulings will not affect previous judgements of national courts, but only produce effects for the future. Thus, individuals are not able to benefit retroactively from those rulings.¹¹⁰

The Amsterdam Treaty also introduced another change for the ECJ, namely the competence to regard human rights as laid down in the European Convention on Human Rights. Article L (d) of TEU (now Article 46) stated that where ECJ has jurisdiction under the TEC or the TEU, it can apply the ECHR.¹¹¹ Thus, ECJ can control the compatibility of measures on asylum taken under the Title IV with ECHR. Areas that can be affected by this are protection against extradition, expulsion and deportation, family reunification and detention of asylum-seekers, areas that have been legislated in ECHR.¹¹²

After the transitional five-year period, the Council can, according to Article 67(2), with a unanimous decision revise the competencies of ECJ. But it is only the parts of Title IV that the Council decides to transfer to the procedure under Article 251, which will be under the full jurisdiction of ECJ.

¹⁰⁸ Monar, 1998, p 331.

¹⁰⁹ Bank, 1999, p 25.

¹¹⁰ Monar, 1998, p 331.

¹¹¹ Nergelius, 1998, p 60.

¹¹² Bank, 1999, p 19.

5.1.3 United Kingdom, Ireland and Denmark

On the IGC it was considered very important that the new Treaty was more flexible than the previous. It was important that Member States were able to use the Union's institutional framework, decision-making and judicial review in order to achieve progress, instead of turning to alternative co-operation outside the Union, like the Schengen co-operation. This flexibility was necessary, since it was considered that work in instruments outside the Union would only weaken the work of the European Union.¹¹³

One result of this emphasis on flexibility was the special position of Denmark, Ireland and the United Kingdom. Those three states were not willing to accept further integration in the area of asylum and immigration. They accepted the move of those issues to the first pillar, but claimed to remain unaffected by it. Thus, the three countries are outside the improvements of integration brought by the move to the first pillar. Two instruments have been laid down to arrange this, the Irish-British Protocol¹¹⁴ and the Danish Protocol.¹¹⁵ The basic result of these protocols is that the three states do not participate in the adoption of instruments under Title IV TEC. Thus, measures or decisions in this area are not binding on them.¹¹⁶

The Irish-British Protocol, Article 4, guarantees the United Kingdom and Ireland a complete opt-out from Title IV. But the Article 3 of the Protocol offers a possibility for an opt-in, to adopt any measures taken under Title IV within three months. Article 8 gives Ireland the right to withdraw from the Protocol. The United Kingdom and Ireland were not part of the Schengen co-operation either, but Denmark was. The situation therefore is a bit different when it comes to Denmark. It has been granted an opt-in similar to that of the United Kingdom and Ireland in Article 5 of the Danish Protocol. Here, Denmark has six months to decide if it wants to adopt decisions built on the Schengen *acquis* (see 5.2, incorporation of Schengen). If it decides to do it, an obligation is created between Denmark and the other Schengen members, not within the Union but under international law.¹¹⁷

Another example of the flexibility of opt-outs is Belgium. In a Declaration to the Spanish Protocol on asylum for nationals of the Member States (see 5.3), Belgium declares that it will carry out an individual examination of any asylum request made by a national of another Member State, in accordance with relevant international conventions. This is considered to be a partial

¹¹³ Monar, 1998, p 332.

¹¹⁴ Protocol on the Position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, 6 October 1997, Doc. No. CONF 4007/97, TA/P/en 15.

¹¹⁵ Protocol on the Position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, 6 October 1997, Doc. No. CONF 4007/97, TA/P/en 19.

¹¹⁶ Articles 1 and 2 of the Irish-British Protocol and Articles 1 and 2 of the Danish Protocol.

¹¹⁷ Monar, 1998, p 334.

opt-out from the agreement in the Spanish Protocol that Member States automatically should be regarded as safe countries of origin.¹¹⁸

5.2 The incorporation of Schengen

The flexibility was a very strong argument for the incorporation of the Schengen Agreement and Convention into the Union framework. This was provided for in the Schengen Protocol¹¹⁹, where the signatories of the Schengen agreements decide to establish closer co-operation within the Schengen *aquis*. The protocol provides that this should be achieved within the institutional and legal framework of the European Union.¹²⁰

The so-called Schengen *aquis* consists of:

- The Schengen Agreement
- The Schengen Convention
- The Accession Protocols
- Decisions and declarations adopted by the Schengen Executive Committee.¹²¹

Article 2 replaces the Schengen Executive Committee with the Council. Proposals and initiatives that are built upon the Schengen *aquis* become subject to the relevant Treaty provisions.¹²² The problem with the incorporation is the legal basis. The Council must unanimously decide the legal basis for every single text in the Schengen *aquis*.¹²³ This is a very extensive work, since the *aquis* consists of over 3000 pages.¹²⁴ The legal basis is either under Title IV in the first pillar (asylum regulations), or under the third pillar (police co-operation measures). The norms that are based on the first pillar are EC law, while those based on the third pillar are international law. As long as measures to transfer Schengen texts into the first pillar are not taken, they shall be regarded as acts based on Title VI TEU.¹²⁵ There is a danger that measures concerning free movement end up in the third pillar, because the Council could not achieve the unanimity that is required to move the measure into the Community framework.¹²⁶

The ECJ has jurisdiction over the decisions in accordance with the provisions in the TEC. As said before, the competencies of the ECJ are much wider under the first pillar than they are under the third pillar. The

¹¹⁸ Ibid.

¹¹⁹ Protocol integrating the Schengen *aquis* into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty establishing the European Community, 6 October 1997, Doc. No. CONF 4007/97, TA/P/en 5.

¹²⁰ Article 1, the Schengen Protocol.

¹²¹ Noll, 2000, p 146.

¹²² Article 5(1), the Schengen Protocol.

¹²³ Article 2(1), the Schengen Protocol.

¹²⁴ Monar, 1998, p 333.

¹²⁵ Article 2(1), the Schengen Protocol.

¹²⁶ Bank, 1999, p 20.

Schengen Protocol contains an ordre-public reservation, Article 2(1) says that ECJ shall have no jurisdiction on measures or decisions relating to the maintenance of law and order and the safeguarding of internal security. This is the same clause as Article 68(2) TEC, but much wider, since Article 68(2) only relates to measures relating to the abolishment of checks at internal borders, whereas the Schengen *acquis* consists of so much more. Thus, the jurisdiction of the ECJ on Schengen measures is more restricted than other measures in the first pillar.¹²⁷ This definitely creates a problem for the consistency of the framework, and the rule should therefore be restrictively interpreted.¹²⁸

Here too, the United Kingdom, Ireland and Denmark have special treatment. The United Kingdom have not been participating in the Schengen co-operation, and Article 4 of the Schengen Protocol states that they are not bound by the Schengen *acquis*, but may at any time request to take part in some or all of it. The Council should decide unanimously on such a request with the Schengen Member States present, which means that there is no automatic right to join.¹²⁹ Since Denmark is not part of the co-operation under Title IV, but is part to the Schengen co-operation, their situation is even more special. They are bound differently by measures taken depending on whether the measures, after the entry into force of the Amsterdam Treaty, belong to the first or the third pillar. If they belong to the third pillar, Denmark is bound by measures on an intergovernmental basis, and if they belong to the first pillar, Denmark is bound by them under international law.¹³⁰

Norway and Iceland are not members to the European Union, but they are associated with the Schengen co-operation, in order to keep the Nordic Passport Union functioning.¹³¹ With the incorporation of the Schengen *acquis*, special arrangements were made for Norway and Iceland.¹³² The results of this Agreement are for example that the Schengen *acquis* and some EC acts, like the Visa Regulation, are applied and implemented by Iceland and Norway. Measures taken by the EU building upon these norms shall be implemented and applied by Iceland and Norway, and an agreement filling the same purpose as the Dublin Convention (establishing the responsible state regarding asylum applications) shall be concluded.¹³³

¹²⁷ Noll, 2000, p 147.

¹²⁸ Wollenschläger, 2001, p 359.

¹²⁹ Monar, 1998, p 333.

¹³⁰ Nergelius, 1998, p 138.

¹³¹ Monica den Boer, "Not Merely a Matter of Moving House: Police Co-operation from Schengen to the TEU", Maastricht Journal of European and Comparative Law, 2000, Vol 7, Nr 4, p 350.

¹³² Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen *acquis*, signed on 17 May 1999.

¹³³ Articles 2 and 7, the 1999 Agreement.

5.3 The Spanish Protocol

In 1997 a protocol on asylum for EU nationals was adopted. It was based on a Spanish proposal, and is therefore called the Spanish Protocol.¹³⁴ The background to the proposal was a conflict between Spain and Belgium on Basque separatists seeking asylum in Belgium. Spain wanted to avoid that presumed terrorists filed asylum applications in other EU Member States in order to delay their extradition to Spain.¹³⁵

The Spanish Protocol did receive lots of protests from UNHCR and NGOs, because of the bad positions it places EU nationals in.¹³⁶ Belgium is one country that did not fully accept the protocol. As mentioned in 5.1.3. Belgium has an opt-out from the Spanish Protocol, saying that they will examine any asylum application from an EU national in accordance with international obligations.

The Spanish Protocol determines that an asylum application filed in a Member State by a national of another Member State basically must be rejected, since the EU Member States are considered to be safe countries of origin.¹³⁷ There are two exceptions to this. The first is when the Member State from where the asylum seekers comes is considered to breach human rights principles, or are simply not measuring up to the human rights protection that is required in international law.¹³⁸ Those rights derive either from Article 15 ECHR or from principles in Article 7(1) TEU. The other exception is in point d) of the sole Article in the Spanish Protocol, which says that a Member State can decide in an individual case to examine an asylum application of an EU national. But the Member State examining the application must notify the Council, and must examine the application under the presumption that it is “manifestly unfounded”. This means that an accelerated examination process should be used and that higher demands of credibility and evidence are required. Then, the possibility of a rejection is very high.¹³⁹

¹³⁴ Protocol on Asylum for Nationals of Member States of the European Union, annexed to the Treaty on European Union and to the Treaty establishing the European Community, 6 October 1997, Doc. No. CONF 4007/97, TA/P/ en 24.

¹³⁵ Bank, 1999, p 21.

¹³⁶ Noll, 2000, p 224.

¹³⁷ First passage in the sole article of the Spanish Protocol.

¹³⁸ Points a-c in the sole article of the Spanish Protocol.

¹³⁹ Bank, 1999, p 22.

6 Effects of the Amsterdam Treaty

6.1 Remedial of the deficiencies in Maastricht

In the new title on free movement of persons, asylum and immigration, the Amsterdam Treaty gave the European Community powers to enact a regulatory framework for European immigration and asylum policy. Title IV TEC remedies some of the grave deficits in the Maastricht Treaty, such as the non-binding nature of the intergovernmental co-operation within Title VI TEU. The institutional and legal instruments of the Community have replaced the intergovernmental approach and the setting of a timetable for creating new measures and instruments in the area shows the will to harmonise. Especially the extended jurisdiction of the ECJ is an improvement.

But although the Amsterdam Treaty does a lot to overcome the deficits of the Maastricht Treaty, it still doesn't solve all the problems. Since the area of asylum and immigration has left the stage of just co-operation and has become part of the Community framework, the Amsterdam Treaty must not just solve the deficits that appeared in the third pillar of the Maastricht Treaty, but must also meet high requirements of democratic and judicial values.¹⁴⁰

With the transfer from the third to first pillar, the institutions of the Community have received more power in the asylum and immigration matters. The Council adopts legally binding instruments, the European Parliament has more influence in the decision-making and the ECJ has an extended jurisdiction. The inefficiency of asylum policies in Maastricht has been remedied because of this. The efficiency is improved because of the legally binding instruments. Therefore the discussions on the legal effects of the third pillar instruments, like joint positions, are no longer necessary.¹⁴¹ But although the five-year transitional period can be seen as a positive statement of the aims of harmonisation, it is also problematic. The problem with unanimity still remains; the Council must take decisions unanimously during the five years. And the Commission must share its usually exclusive right of initiative with the Member States.¹⁴² In this aspect, during the transitional period, not much has changed since Maastricht.

¹⁴⁰ Bank, 1999, p 22.

¹⁴¹ Ibid.

¹⁴² Hailbronner, Kay "The Treaty of Amsterdam and Migration Law" European Journal of Migration and Law 1(1999) p 16.

The role of the ECJ has definitely been strengthened with Amsterdam, since all the measures taken by the Council in the area of asylum and immigration can be challenged. But there are still serious gaps in the jurisdiction. The preliminary ruling procedure in Article 234 does not apply in the same way in Title IV as it does in other Community areas, which creates problems. The fact that only national courts of last instance shall request a preliminary ruling creates the risk that the law will be applied differently in different countries. This is confusing, in particular since the predominance of the ECJ: s interpretation of EC law is disturbed. It also makes it harder for individuals to challenge Community law before the ECJ, and makes the protection of the individual weaker.¹⁴³

The previous inconsistency with instruments spread among different pillars and conventions has been remedied with the transfer of issues in the third pillar to the first, and with the incorporation of the Schengen acquis into EC law. The transparency in the Schengen acquis has improved since it came under the Community framework. All the measures adopted by the Schengen Executive Committee, which¹⁴⁴ so far have been inaccessible, are now open for the public. But the fact that decisions taken within the Schengen co-operation were often adopted without democratic control neither from national nor Community parliaments could affect the democratic values in a negative way. Some observers even talk about the “legal contamination” that the Schengen acquis could bring into the Community, as it is integrated without further judicial control.¹⁴⁵ To just integrate Schengen, which has mostly been negotiated behind closed doors and with no participation of Community institutions, would be very unsatisfying.¹⁴⁶ This problem is relevant for all the decisions taken under the third pillar. To transfer texts that are based on their non-binding character into legally binding instruments is not to be done without serious scrutiny and revision.¹⁴⁷ The area of asylum and immigration has started from co-operation between states, trying to harmonise their national rules. That means that the only norms that are accepted are the norms equal to the lowest common denominator, norms that often are not very effective or comprehensive.

The Member States can keep national provisions in the area of asylum and immigration, if they are compatible with the Treaty and with international agreements. The immigration policy is a domain simultaneously assigned to both the Member States and the Community, which is confusing. As always, Community law prevails over national law, but the exact scope of the Community instruments, such as letters and declarations, are unclear. According to Article 64(1) TEC, it is up to the Member States to safeguard their internal security. This is one of those confusing clauses where the exact

¹⁴³ Hailbronner, 1999, p 18.

¹⁴⁴ Bank, 1999, p 24.

¹⁴⁵ See e.g. den Boer, 2000, p 338.

¹⁴⁶ Craig/de Burca, 1998, p 711.

¹⁴⁷ Bank, 1999, p 24.

scope is undefined. For example, Germany considers that alien legislation belongs to the safeguarding of the internal security, which no other Member State agrees with. Article 64 must be restrictively interpreted, so that it doesn't set up limits for Community action.¹⁴⁸

I will not say much about the respect for international law here, since it will be dealt with further on. But the Amsterdam Treaty means a stronger influence for international law, for example when it comes to the 1951 Geneva Convention. Article 63(1) says that some of the measures that are to be taken by the Council have to be taken in accordance with the Geneva Convention. Those measures are the determination of a Member State responsible for examining an application for asylum, minimum standards on reception and procedures and the qualification of a refugee. This obligation existed in the third pillar of Maastricht too, but the difference is that ECJ can now check if taken measures are in accordance with the Geneva Convention, thus making the provision more efficient.

But the Spanish Protocol, on the other hand, is a significant setback for this positive development. Article 3 of the Geneva Convention obliges countries to determine who is a refugee irrespective of the country of origin. To exclude applicants from the procedure because of geography, like the Spanish Protocol does, is against Article 3. Since the Member States are under an obligation to observe the Geneva Convention, they cannot turn down asylum seekers from other Member States. Thus, the Spanish Protocol must be interpreted in another way.¹⁴⁹ To find ways to interpret the Protocol in accordance with both the Geneva Convention and the Article 13 in ECHR (the right to an effective remedy) will be an issue of balancing diplomatic and political decisions. The member states will be forced to disregard the central elements of the Protocol, since they will otherwise be in breach of their international obligations.¹⁵⁰

6.2 Proposed changes in the Nice Treaty

At the conference in Nice in December 2000, attempts were made to go from unanimity voting to qualified majority voting, on as many issues as possible. The conference wanted to move to qualified majority voting before 2004. The negotiations were difficult since the Member States all had different opinions.

The only binding agreement that was made was that qualified majority should be applied on decisions based on Article 65, co-operation in the area of civil law, when the Nice Treaty enters into force. Qualified majority was decided to apply to Article 63(1), measures in accordance with the Geneva Convention, and Article 63(2)(a), measures on temporary protection, but not

¹⁴⁸ Hailbronner, 1999, p 14.

¹⁴⁹ Noll, 2000, p 539.

¹⁵⁰ Noll, 2000, p 557.

until the Council unanimously and after consultation with the European Parliament decides rules and principles governing the area.¹⁵¹

In a non-binding declaration, the Member States promised to decide on transfer to qualified majority from May 1, 2004, for measures based on Article 62(3), free movement for third country residents, and Article 63(3)(b), illegal immigration.¹⁵²

This means that the use of qualified majority voting has been postponed until 2004, except for Article 65. The important areas like Article 63(2)(b), burden sharing, and Article 63(3)(a), conditions for entry and stay for third country residents, were not mentioned at all. It is a setback that must be remedied. It is vital that qualified majority voting is introduced in this area, otherwise the changes with the Amsterdam Treaty will be of no use. It will be extremely difficult to decide anything with unanimity voting. The progress that Title IV brings must not be just pretty words, but used in the every day work of the European Union.

¹⁵¹ Staffan Holmlund "Nicefördraget" Europarättslig tidskrift, nummer 2, årgång 4, 2001,p 190.

¹⁵² Ibid.

7 Compatibility with human rights and international obligations

“The aim is an open and secure European Union fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments and able to respond to humanitarian needs on the basis of solidarity. A common approach must also be developed to ensure the integration into our societies of those third country nationals who are lawfully resident in the Union”

This declaration was made by the European Council at the Summit in Tampere, Finland, in October 1999. The Summit was established in order to deal with the creation of an area of freedom, security and justice. It laid down the political guidelines for the next years, including in the fields of asylum and immigration. The Council agreed to work towards establishing a Common European Asylum System, based on the application of the Geneva Convention, in order to maintain the principle of non-refoulement.¹⁵³ The intention to act in respect of human rights is one step in the development of the Union to put more emphasis on respect for fundamental rights and the importance of the international obligations of the Member States.

The first major step was taken with the creation of the Amsterdam Treaty. Article 6 of the TEU states that the European Union shall respect fundamental rights as general principles of Community law. This means that human rights must be considered when adopting measures under the Title IV of the TEC, concerning visas, asylum, immigration and other policies relating to the free movement of persons.

States have a right to control the migratory inflow, but at the same time they have to respect the right of persons to seek asylum. Article 14 of the 1948 Universal Declaration of Human Rights states that “everyone has the right to seek and enjoy in other countries asylum from persecution”. The law and policies within the EU have emphasised the control of borders. But all the Member States have signed international instruments like the 1951 Geneva Convention on Refugees and the European Convention on Human Rights (ECHR), and therefore must respect the right for refugees to seek protection in their countries. A common European migration policy is not exempted from external obligations. Agreements binding for the EU Member States under international law and rules of customary law create minimum standards on the treatment that third-country nationals receive by Member States. Such obligations have to be taken into account even if they are not

¹⁵³ http://www.europa.eu.int/comm/justice_home/unit/immigration_en.htm.

obligations of the European Community.¹⁵⁴ Although, recently, respect for human rights values have been made part of the Treaties, some of the measures and instruments are very close to clashing with these international instruments. In this chapter I am going to look at some of these clashing areas.

7.1 The Geneva Convention

Article 63(1) TEC makes a reference to the 1951 Geneva Convention by stating that measures in the asylum area should be taken in accordance with the Convention. This is a limitation of the Community's competence with regard to refugee policy, and gives ECJ the jurisdiction to determine whether the Community institutions are acting in accordance with the limits imposed by the Geneva Convention.¹⁵⁵ All Member States are bound by the Convention and it is one of the most important international instruments of refugee protection.

The Geneva Convention gives the contracting parties a large margin of interpretation. This results in divergences in interpretation between the different states, which can lead to difficulties.¹⁵⁶ Therefore the Member States of the EU have tried to harmonise the interpretation of the Geneva Convention. The only, not too successful, achievement in this area is the definition of the term refugee.

7.1.1 The refugee definition

There is a Joint Position on the definition of the term refugee within the meaning of Article 1 of the Geneva Convention.¹⁵⁷ This is the only achievement on harmonisation in this area, but it has been severely criticised. This is because the Joint Position has failed when it comes to situations where the Geneva Convention offers protection to victims of persecution by third parties. These situations exist when state agents have been unable to hinder persecution carried out by non-state agents. The Member States could not agree on whether these situations were covered by the Geneva Convention or not. They agreed on paragraph 5.2 of the Refugee Joint Position, which states that persecution by third parties were to fall under the Geneva Convention if "it is individual in nature and is encouraged or permitted by the authorities". If the authorities fail to act on behalf of the persecuted, this could fall under the Geneva Convention if the failure to act

¹⁵⁴ Kay Hailbronner "Immigration and asylum law and Policy of the European Union" 2000, Kluwer Law international, the Netherlands, p 3.

¹⁵⁵ Hailbronner, 2000, p 43.

¹⁵⁶ Hailbronner, 2000, p 372.

¹⁵⁷ Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term refugee in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees, O.J. 1996, L 63/2.

was deliberately. This could be interpreted to mean that persecution by third parties would be excluded from the protection in the Geneva Convention if the persecution was not permitted with the consent of the state, which would exclude many of today's protection seekers.¹⁵⁸

To just apply the Refugee Joint position would result in a conflict between EC law and the Geneva Convention, since the Convention by many authors is considered to give protection regardless of the source of persecution.¹⁵⁹ The UNHCR for example has another view than EU; in paragraph 65 of their handbook, the Geneva Convention is said to give protection from persecution in all forms, wherever it might derive from.¹⁶⁰ But the Refugee Joint Position is not a binding instrument, so the conflict is merely a political one. But it is important that the Community institutions adopt a measure under Article 63(1)(c) that is different from the Refugee Joint Position.¹⁶¹

Article 63(1)(c) obliges the Council to adopt minimum standards with respect to the qualification of nationals of third countries as refugees. That it is a minimum standard means that the Member States can have more liberal rules on the definition of refugees, which is contrary to the idea that there is a single definition of who is a refugee under the Geneva Convention in Community law.¹⁶² The Commission has now made a proposal for a Council Directive on minimum standards for the qualification of refugees, it remains to be seen if it will be adopted.¹⁶³ It remains to be seen if this proposal will be adopted.

7.1.2 The Dublin Convention

The Dublin Convention is an attempt by the EU Member States to steer the movements of asylum seekers in Europe. Its main purpose is to avoid asylum shopping, to make sure that asylum seekers do not apply for asylum in more than one Member State. It comprises norms to stop asylum seekers as well as norms of reallocation to safe third countries.

The norms in the Dublin Convention, that asylum seekers should be sent back to the country that, according to the Dublin Convention, have responsibility for the asylum application, could be contrary to the

¹⁵⁸ Noll, 2000, p 241.

¹⁵⁹ Noll, 2000, p 520.

¹⁶⁰ Handbook on Procedure and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, (1979), Geneva.

¹⁶¹ Noll, 2000, p 521.

¹⁶² Elspeth Guild "Immigration law in the European Community" 2001, Kluwer Law International, p 320.

¹⁶³ Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection (COM(2001)510final).

prohibition of refoulement in Article 33 of the Geneva Convention. Article 33 (1) states:

No contracting party 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.

Article 3(1) of the Dublin Convention states that the Member States shall undertake to examine asylum applications that are made at their border or in their territory. Since all the Member States are also signatories to the Geneva Convention and have expressed their obligation to respect it, they can not use rules in the Dublin Convention that are contrary to the Geneva Convention. The non-refoulement clause in the Geneva Convention applies also to the situation where asylum applications are made at the border. Under the Dublin Convention, Member States might send back asylum seekers to countries regarded safe, but who have more restrictive recognition rules, and who might send the protection seekers back to their country of origin. This principle violates the non-refoulement in the Geneva Convention.¹⁶⁴

In order not to violate the Geneva Convention, Member States should use the opt-out clause in Article 3(4) of the Dublin Convention, the sovereignty clause. The Article allows a Member State to assume responsibility for an asylum application made on its territory, although it is probable that the Dublin Convention would place the responsibility on another Member State.

There have been some cases dealing with the Dublin Convention’s compatibility with the Geneva Convention, many of them with different outcomes. In *Jahangeer and others*¹⁶⁵ the U.K. High Court dismissed three citizens from Afghanistan, who had claimed political asylum on arrival in the United Kingdom. The Secretary of State declined to consider their applications and wanted to send them back to Germany, from where they had come, since Germany was a safe country. The Judge in the case argued that the Dublin Convention and the Geneva Convention were not in conflict, since the parties to the Conventions did not consider that such a conflict existed. He meant that the Dublin Convention could be seen either as an agreement on the interpretation of Article 33 of the Geneva Convention, or as an amendment of it. But the contracting parties to the Dublin Convention are not identical to the contracting parties of the Geneva Convention, so it can’t be seen as an agreement on the interpretation. Article 42(1) of the Geneva Convention states that Article 33 is a non-negotiable provision, so it can’t be seen as an amendment either.¹⁶⁶

¹⁶⁴ Noll, 2000, p 432.

¹⁶⁵ R v Secretary of State for the Home Department ex parte Jahangeer and Others, Queen’s bench Division (1993) Imm AR 564, 11 June 1993.

¹⁶⁶ Noll, 2000, p 499.

A case with a different result was *Adan and others*,¹⁶⁷ where the Court of Appeal in the United Kingdom had to consider a decision from the Secretary of State returning three asylum seekers from the U.K. to Germany under the Dublin Convention. The case was about protection from persecution by non-state agents, which U.K. considered to fall within protection under the Geneva Convention, while Germany did not, so the asylum seekers would probably be rejected asylum in Germany. The Court considered the removal of the applicants to Germany to constitute a violation of the Geneva Convention, since the German interpretation of Article 1 in the Geneva Convention was too narrow. This outcome is probably more in line with international obligations than previous decisions (for example from Sweden¹⁶⁸), where a country's commitment to international instruments have been enough to assume that they act accordingly to them, although there has been inequalities in the application of these instruments.

7.1.3 Allocation of Responsibility – replacing the Dublin Convention?

According to Article 63(1)(a), criteria and mechanisms for determining which Member State that is responsible for considering an application for asylum submitted by a third country national within the Union's territory, are to be adopted within the five year transitional period. This provision aims to establish a first-pillar instrument replacing the Dublin Convention.

The Commission has made a proposal for a Regulation replacing the Dublin Convention.¹⁶⁹ The proposal is very much like the Dublin Convention, although there are differences when it comes to family reunification, since an asylum seeker can be allocated to a country other than the responsible one, if he/she has family there. The Commission has stated that it is aware of the shortcomings of the Dublin Convention, especially the problems that the different approaches among the Member States to persecution by third parties and the application of the safe country notion have created.¹⁷⁰ One suggestion to solve this problem is that the responsible state is the one where the asylum application was lodged, thus making the asylum process governed by the free choice of the asylum seeker. This option is very much

¹⁶⁷ U.K. House of Lords, *Regina v. Secretary of State For The Home Department, Ex Parte Adan*.

¹⁶⁸ See for example Decisions of 7 March 2000 and Decision of 2 June 1998, Swedish Aliens Appeals Board.

¹⁶⁹ The Commission of the European Communities, *Proposal for a Regulation laying down the criteria and mechanism for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*.

¹⁷⁰ Commission of the European Communities, *Revisiting the Dublin Convention: Developing Community Legislation for Determining Which Member State is the Responsible for Considering an Application for Asylum Submitted In one of the Member States*, SEC (2000) 522.

in line with respect for human rights, but is in another way detrimental to one of the principles behind the harmonisation of asylum law, namely to share the burden between the member States. It remains to be seen how the final regulation turns out.

7.2 The European Convention on Human Rights

In Article 6 of the TEU, reference is made to respect for the human rights values in the ECHR. The idea of EU acceding to the ECHR has often been raised. But, ECJ has stated in an opinion given on 28 March 1996¹⁷¹, that EU could not accede to the ECHR because the TEC does not provide any powers to lay down rules or to conclude international agreements in the matter of Human Rights. Still, ECJ said that the EU should respect the ECHR, and that the Court should examine the compatibility of various EU measures with the ECHR. There is no obligation for ECJ to interpret ECHR in the same way as the European Court of Human Rights in Strasbourg, but the ECJ will normally take the judgements from Strasbourg into account. The Strasbourg Court has in *Cantoni v. France* declared that it considers itself to have jurisdiction over measures that are determined by Community law. Since the Member States are bound by the judgements in Strasbourg, ECJ should take those judgements into account.¹⁷²

The non-refoulement principle in Article 33 of the Geneva Convention is also expressed in Article 3 of the ECHR. This Article states that:

No one shall be subjected to torture or inhuman or degrading treatment or punishment.

This provision is considered absolute, since Article 15(2) ECHR states that no derogation from this norm in term of war or other public emergency is permitted. There have been different opinions on whether this provision only covers action within the territory of the state, but the Court in Strasbourg has stated that it also covers situations of removal.¹⁷³ Thus, removals of asylum seekers that might lead to this forbidden treatment constitute a violation of this Article.¹⁷⁴

Article 1 ECHR says that contracting parties must secure rights and freedoms to everyone within their territory. The term territory is more administrative than geographical; responsibility can exist when the country is exercising administration abroad or at the borders. This Article combined with Article 3 implies a right to access to territory for persons seeking

¹⁷¹ Opinion 2/94 on Accession of the Community to the ECHR (1996) ECR I-1759.

¹⁷² Hailbronner, 2000, p 3.

¹⁷³ *Soering vs. the U.K.* Judgement of 7 July 1989, European Court of Human Rights, Series A, No. 161. *Vilvarajah and Others vs. the U.K.* Judgement of 30 November 1991, European Court of Human Rights, Series A 215.

¹⁷⁴ Noll, 2000, p 371.

asylum. The EC Visa Regulation and the visa list in Schengen seem to create a conflict with this rule. If a person seeks a visa to enter one of the Member States, and the visa is denied, a violation against Article 3 ECHR exists, if the denial leads to exposing that person to torture.¹⁷⁵

But such a conflict could be avoided if the visa rules are applied in line with ECHR. The regulations on visa contain exemption rules, allowing Member States to make exceptions to the common visa requirements.¹⁷⁶ If the member States use these exemption clauses in protection related cases, the visa regulations do not violate ECHR. But in reality, Member States probably violate ECHR by not issuing visas in certain cases where they should have, according to Article 3 ECHR.¹⁷⁷

7.3 The EU Charter of Fundamental Rights

The decision to create a common catalogue of rights for the Member States was taken by the Council in Cologne in June 1999, and more detailed procedures were presented at the Summit in Tampere in October 1999. The main reason for the catalogue was to enlighten Article 6 TEU, which provides for general respect for fundamental rights, and make it more precise. The Charter of Fundamental Rights was presented and adopted at the meeting in Nice in December 2000.

The Charter contains the right to asylum in Chapter II, called Freedoms. Article 18 states that

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention and the 1967 protocol relating to the status of refugees and in accordance with the Treaty of the European Union.

Article 19 deals with protection in cases of removal, expulsion or extradition.

The inclusion of a right to asylum in the Charter has been welcomed, but there have been raised concerns because the right does only apply to third country nationals. This means that EC nationals are excluded from the right to asylum, which is a violation of the Geneva Convention. To limit the application of the Convention on grounds of national origin is inconsistent with Article 3 of the Geneva Convention.¹⁷⁸ This is the same problem as in the Spanish Protocol, as explained in chapter 6.

The effects of the Charter of Fundamental Rights are uncertain, since it is not incorporated into the EC framework, and thus not a binding instrument.

¹⁷⁵ Noll, 2000, p 443.

¹⁷⁶ Article 4(1) Visa regulation, Article 15 Schengen Convention.

¹⁷⁷ Noll, 2000, p 478.

¹⁷⁸ <http://www.ecre.org/statements/rights.shtml>

To create such a charter was a positive step forward for the development of respect for fundamental rights, but without binding effects and jurisdiction of ECJ, it will probably be just a toothless document without much effect. The future legal qualities of the Charter will be discussed within the Community institutions in a near future. When the Charter was adopted in Nice 2000, the legal effects of it were to be decided on the meeting of the European Council in Laeken in December 2001. It was discussed in Laeken, but no results were achieved, but a convention is to be formed in March 2002, where the discussion will go on. It is obviously very difficult to agree to make the Charter part of the Community law, but in order to make it effective, the Member States have to accept that it needs to be legally binding and under the jurisdiction of ECJ.

7.4 The aftermath of September 11th

The tragic events of the terrorist attacks in New York on September the 11th this year, have caused the European Union to act. The Union has shown its solidarity with the United States and its people, and stressed its support for the military action in Afghanistan. On October 16th the American President Bush sent a letter to the European Commission with demands of action to combat terrorism, for example on information exchanges on immigration lookouts for terrorists and improved co-operation on the removal of supposed terrorists. The Commission responded by developing a comprehensive set of instruments in the area.¹⁷⁹

Many of the instruments taken deals with strengthening of the security, with air safety, freezing of the financial assets of terrorists and police co-operation. Efforts have also been made to stabilise the financial market. Measures are to be taken to make the EU legislation “terrorism proof”, especially when it comes to asylum and financial areas.¹⁸⁰

The Commission has made two proposals for instruments that are of interest when it comes to the matter of asylum. One is a proposal for a framework decision on combating terrorism¹⁸¹, and the other is a proposal for a framework decision on arrest warrants¹⁸². UNHCR has then made some observations on these proposals.

When it comes to the proposal for a framework decision on combating terrorism, the UNHCR welcomes the initiative to facilitate the prosecution

¹⁷⁹ <http://www.statewatch.org/news/2001/nov/06uslet.htm>.

¹⁸⁰ Report from the Commission. Overview of EU action in response of the events of the 11 September and assessment of their likely economic impact. COM(2001) 611 final.

¹⁸¹ European Commission Proposal for a Council Framework Decision on combating terrorism (COM(2001) 521 final 2001/0217 (CNS)).

¹⁸² European Commission proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between Member States (COM(2001) 522 final 2001/0215 (CNS)).

of persons suspected of terrorist acts. But they have some comments on the compatibility of the proposal with the 1951 Geneva Convention. One of these concerns regards the definition of terrorist offences that the proposal mentions, which can lead to the activation of the exclusion rules in the Geneva Convention. The offences that according to the proposal can constitute a terrorist offence are not always as grave as required to activate exclusion in the Geneva Convention. These exclusion rules mean that perpetrators of serious and unjustifiably harmful crimes are excluded from refugee protection. This means that persons committing acts that are terrorist acts in the proposal can be excluded from refugee status, although it is not as serious as required in the Geneva Convention. Some of the offences can, according to UNHCR, even be viewed as legitimate exercise of human rights, not terrorist acts.¹⁸³ Even if the perpetrators of those crimes should be prosecuted and punished, they should not be deprived of their refugee protection.¹⁸⁴

The proposal for a framework decision on arrest warrants regulates the transfer of a person from one state to another for the purpose of criminal prosecution. UNHCR has commented the effect the proposal has on refugees and asylum-seekers. Under the proposal, a refugee could be transferred from one Member State to another for prosecution. The UNHCR stresses that it is important that this transfer does not affect the refugee protection of the prosecuted, and that the protection against expulsion and refugees in Articles 32 and 33 in the Geneva Convention continue to apply. After the prosecution, or after serving the sentence, the refugees should be returned to the Member State where they are protected as refugees.¹⁸⁵

A similar situation applies for asylum-seekers. UNHCR suggests that if an asylum-seeker is transferred from one Member State to another, the asylum procedure in the first state should be suspended. After the prosecution and possible sentence, the asylum-seeker should be sent back to the state responsible for the asylum application and the asylum application should continue.¹⁸⁶ If the asylum-seeker is not sent back, the asylum-seeker could be returned to his country of origin if the other Member State has more restrictive rules on asylum.

It is vital that the European Union looks at its framework and improves it so that terrorist attacks are made more difficult and the system to prosecute the terrorist organisations is made easier. It is very important that the citizens of the European Union feel safe. But with all the emphasis put on the strengthening of the security, asylum-seekers and refugees could be trapped

¹⁸³ UNHCR Preliminary Observations, European Commission Proposal for a Council Framework Decision on combating terrorism, p 1, part 2.

¹⁸⁴ UNHCR Preliminary Observations on combating terrorism, p 2, part 4.

¹⁸⁵ UNHCR Preliminary Observations on the European Commission Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between Member States, p 1, part 2.

¹⁸⁶ UNHCR Preliminary observations on arrest warrant, p 1, part 3.

in the middle. When trying to keep terrorists out of Europe, other asylum-seekers might be looked at and treated as criminals, which could lead to a climate of xenophobia and discrimination. It is of utmost importance that the respect for fundamental rights and the right to seek asylum is upheld also in difficult times.

8 Conclusions

The realisation of the inner market with the freedom of movement made it necessary to co-operate on protection of the external borders in order to keep unwanted elements out. The issue of asylum and immigration became a question of security. To harmonise the national rules is the most effective way to prevent unwanted elements like criminality to enter into the Union. There is no doubt that harmonisation in these areas is a good, probably even necessary thing. The question is whether the harmonisation has been done, and is done, in the right way and with the right methods. To harmonise at the European level is probably the best way. It gives the common texts on the issue better impact and the judicial control is improved. But the development of harmonisation on asylum and immigration has lacked sufficient democratic control and the Member States have been reluctant to change their own legislation. One of the main reasons for having harmonisation on asylum is to be able to share the burden between the Member States. But the issue of burden sharing has been left out of the work done.

The development of common rules on asylum and immigration was during the intergovernmental co-operation of Schengen and the Dublin Convention, as well as the Maastricht Treaty, based on the strong goal to keep the asylum seekers out. People fleeing from their countries were spoken of as criminals in terms like international criminality, terrorists and illegal immigration. Especially asylum seekers trying to place asylum applications in more than one country were to be avoided. Asylum shopping was, and still is, treated like a serious crime. The strengthening of the external borders and measures like visa lists and carrier sanctions diminished the opportunities to even enter Europe in order to seek asylum, forcing the protection seekers to become illegal immigrants.

With the Amsterdam Treaty, the Member States committed themselves to create an area of “freedom, security and justice”. For the first time, it was agreed that common standards for asylum had to be established within the European Union, with shared responsibility. The Treaty could mean momentous changes, since future harmonisation will take place in the form of binding acts. The intergovernmental approach has been replaced by the institutional and judicial instruments of the Community, which can lead to better refugee protection and more comprehensive policy-making. The previous inconsistency with different policies and instruments with doubtful legal status has been remedied, by placing them under the instruments of the EU. In many ways, the Amsterdam Treaty can be seen as a golden opportunity to set legislative standards on asylum and immigration, in accordance with respect for human rights and international obligations of the Member States. The expanded role of the ECJ could mean an opportunity for the Community to control that the Member States follow their

international obligations in those areas, obligations that are fully in line with the statements made by representatives of the European Union.

But this golden opportunity has not yet been fully taken. The Amsterdam Treaty does mean that harmonisation will be made, before the time limit runs out in 2004. So far, not much has been achieved. The Commission has drafted proposals on several of the issues under Title IV in the Amsterdam Treaty, but the Member States have been very reluctant to accept them.

The reluctance of the Member States to agree on common rules on asylum and immigration is a big problem. For most of them the emphasis still seems to be on immigration control, instead of refugee protection. This reluctance has led to the fact that decision making under Title IV still has intergovernmental features, despite the possibilities that the Amsterdam Treaty opened up. The decision-making remains unanimous during the five year long transitional period, and unless the Member State all agrees, the unanimity voting can remain. Although it is more likely that qualified majority voting will eventually replace the unanimity requirement, the decision making during the transitional period is still represented by the strong national interests of the Member States. Harmonisation is unavoidable, because measures under Title IV have to be taken before 2004. But the efficiency of the new measures might be impaired by the necessity to find unanimous solutions. There are problems with the different levels of protection in the different Member States. Some of the Member States have been reluctant to transfer these competencies to the EU at all, and are even more reluctant to accept a higher level of protection than in their national legislation. Thus, the only achievement when adopting measures under the Title IV is probably the lowest common denominator, which means a low level of protection and a high level of control and security measures. This could be defended by the fact that the measures under Title IV are minimum standards, which means that Member States can keep or adopt standards going beyond the ones adopted under Title IV. But it is not very likely that the Member States will go beyond the minimum standards, partly because of the safety and control emphasis, but also because they fear attracting a higher number of asylum seekers than the Member States with a more restrictive approach.

The decision whether or not to transfer more powers from the Member States to the European institutions, by introducing majority decisions and co-decision of the European Parliament, has been postponed to a date when most parts of the measures under Title IV already shall be adopted. Thus, although qualified majority will replace the decision making under Title IV in 2004, the measures are to be adopted before that, by unanimity voting, probably leading to measures that entails low protection to asylum-seekers, since that is all that the Member States can agree on. It is vital that the European institutions try to avoid that and aim at measures with a high level of protection.

The flexibility of the Amsterdam Treaty is another cause for trouble. Harmonisation is made very difficult by all the different decision making configurations that have been created by all the opt-ins and opt-outs. Denmark has one special way of participating in the harmonisation, the UK and Ireland another. The incorporation of the Schengen acquis into the Community framework made a special protocol on the relationship to Norway and Iceland necessary. This is confusing and could lead to legal fragmentation. In my opinion, at least the Member States Denmark, UK and Ireland should participate in the common framework in the same way as the other Member States, in order to create an effective harmonisation on asylum and immigration, both from a security and control point of view, as well as from the protection view.

The incorporation of the Schengen acquis into pillar one is another example of the continuance of the intergovernmental co-operation. But this action is basically a good thing, an attempt to replace the intergovernmental co-operation with Community harmonisation. Maybe that harmonisation would have more chances of succeeding if the Schengen acquis would have been replaced by a new set of rules governing the same issues, instead of just taking the Schengen concept into the first pillar. With the incorporation, many bilateral and multilateral arrangements have been brought within the scope of the EU. The Council must unanimously decide the legal basis for every text in the Schengen acquis. If they can't agree to place the norms under Title IV, they are regarded as norms of the third pillar, outside the instruments of the first pillar. This means that the deficits of Schengen, the democratic deficits like the transparency problem, will not be remedied. The European institutions will have a very limited control over the norms; especially the limited jurisdiction of the ECJ is disturbing.

This is also a problem for the rest of the asylum instruments. Because of the difficulties in agreeing on new asylum measures, the EU institutions might take the easy way out in adopting the measures under Title IV, by using the existing instruments as starting points, despite their deficits. The troublesome requirement of unanimity and the obligation to adopt the measures within the transitional period might lead to an increased impact of existing texts, since it might be difficult to agree on new ones. This would be unfortunate for several reasons. Nothing is done in order to remedy the deficits of the instruments taken under pillar three or by intergovernmental co-operation, deficits that made the transfer of asylum matters into the first pillar important in the first place. There is also the fact that respect for human rights has not been part of the creation of these instruments, but on the other hand the EU has declared that all new instruments should be adopted in the light of human rights. Especially the measures under Title IV should be in conformity with international law on human rights and refugee protection, since Article 63 makes a reference to the Geneva Convention and other relevant instruments. It is thus very unfortunate to use the existing instruments, since such considerations have not been part of their making.

By doing that, the Member States are in great risk of violating international refugee law.

One of the most important reasons for harmonisation in asylum and immigration law is to be able to share the burden of asylum seekers. The Amsterdam offered an opportunity to establish a system of sharing the responsibility, an opportunity that has not been taken. Article 63 exempts the issue of burden sharing from the measures that must be taken under the transitional period. It is very unfortunate that this has been left outside the obligation to adopt measures on asylum, since it means that the issue of burden sharing will probably not be dealt with in some time.

A big threat to the concept of burden sharing is the Dublin Convention, that places the responsibility of an asylum application on one of the Member States. The distribution of protection seekers among the Member States is not very even. The countries with borders towards east and south, where most asylum seekers first enters the EU, have the largest number of asylum application. The new proposal for determining the responsible state means no improvement in this respect. This is not consistent with the idea that the Member States should share the burden. It could tempt the most affected Member States to return people or turn down their application for visa or asylum rather than processing their applications, which could violate the principle of non-refoulement in international refugee law. The lack of a functioning system for burden sharing means a risk that all the Member States will treat asylum seekers restrictive, in order not attract more protection seekers than any other Member State. Here, we come back to the problem of Member States making sure that they do not have more liberal asylum rules than other states, not going beyond the minimum rules under Title IV, which reflects the lowest common denominator of the national rules on asylum in Europe.

Throughout this, a pattern can be seen. The introduction of the asylum area in the Treaty of Amsterdam was a positive event, which opened up major opportunities to harmonise issues of asylum and immigration. But these opportunities have not been taken, mostly due to the reluctance of Member States to move competencies in this area to the Community. Unanimity decisions and restrictive refugee protection has led to a situation where not very much has changed since the Maastricht Treaty. As I have mentioned before, I find that harmonisation of asylum is an important development, and best done at the European level. But this harmonisation must be achieved through measures that go beyond the lowest common denominator and ensure a fair burden sharing, so that the Member States can have liberal asylum rules and respect their obligations to international refugee law.

Although there have been some doubts of the European asylum instruments when it comes to human rights and maintenance of the Member States international obligations, the development is positive. Declarations have been made by the EU with the aim to work towards a more humane asylum

framework. Article 6 of the Amsterdam Treaty opened up the intention to work in accordance with human rights. This was continued by the summit in Tampere in October 1999. It was a definite step forward, when European leaders in the conclusions stated their absolute respect of the right to seek asylum and promised to work towards a Common European Asylum System, based on the Geneva Convention and offering guarantees that nobody is sent back to persecution. The Charter on Fundamental Rights in the European Union is another positive step in the right direction, since it guarantees the right to asylum.

But these signs of a positive development have not yet remedied the existing problems. As I have described in this essay, the existing asylum framework can be used in a way that violates several important parts of the international refugee law. The concept of safe third countries is an example of the emphasis Member States still puts on keeping foreigners from entering into the Union. Since the Member States have not succeeded in adopting a common list of countries that can be considered safe, it is completely up to each state to determine to which countries asylum seekers can be sent back without risking persecution. This shows what an illusion it is to believe that all the Member States of the EU are equal when it comes to refugee protection, and the danger in sending asylum seekers back to a Member State that is considered responsible according to the Dublin Convention. The safe third country concept risks violating the non-refoulement prohibition, one of the most important rules in the international refugee law.

Furthermore, a significant setback to the positive development is the Spanish Protocol. The Article 3 of the Geneva Convention is a fundamental rule, which obliges states to examine asylum applications irrespective of their country of origin. To refuse protection for asylum seekers from Member States definitely means violating this rule and the non-refoulement provision in Article 33, although there were reasons for adopting the Protocol. It could have dangerous effects, for example when it comes to the planned enlargement of the Union. Although the EU demands of the future Member States that they have a fully developed respect for human rights, the states in eastern Europe do not have a very long experience of democracy, and what remains of the past system of government could still have negative effects. An alarming example would be if Turkey became a Member. It is not very likely that this will happen in the near future, and when it does the requirements of following international obligations will be important, but it is still alarming that there are discussions of Turkey as a future Member State since Turkey is the cause of a large part of the refugees in Europe. The Amsterdam Treaty did introduce a new Article 7 in the TEU, to prevent such situations with the future enlargement. The Article 7 enables the Council to suspend some of the rights of a Member State under the TEU, which has been found responsible for a serious and persistent breach of these fundamental principles on which the Union is said to be founded (Article 6 TEU). This is a commitment to the respect for human and fundamental rights, which is positive for the future, and Article 7 will hopefully prevent

situations where the future Member States act in breach of human rights and international refugee law.

The Dublin Convention also risks violating the non-refoulement provision in Article 33 of the Geneva Convention. Apparently the proposal for a Regulation replacing it does not solve this. As mentioned above, the Convention also risks placing a large part of the burden at the Member States with borders to the east and south. This shows that there has been little or no progress on access. The emphasis is still on immigration controls, like visa obligations, carrier sanctions and controls in the country of origin. Even in an emergency situation, visa controls and other restrictions will not be lifted in order to ease access to the EU. From my point of view, that strict visa policy leads to increasing illegal immigration, forcing protection seekers to become criminals and risk their lives, in the hands of ruthless traffickers and human smugglers. People will not stop fleeing for their lives just because Europe makes it harder to enter into its territory. Concentrating on solving conflicts in the countries causing the refugees to flee and burden sharing between the Member States in receiving asylum seekers would be more efficient and humane than to keep people out.

The developed respect for human rights and international obligations of the Member States is positive, especially the results of the Tampere Summit. The work towards a Common European Asylum System with guarantees to those who seek protection and full respect for international refugee law is important and necessary in order to reach an area of security, freedom and justice as declared in the Amsterdam Treaty. But to do this, the instruments of the European asylum framework must change, so that they do not risk violating the Geneva Convention and the ECHR. The Dublin Convention and the Spanish Protocol, for example, can be used and interpreted in line with international refugee law, but the real and planned functioning of the instruments definitely violates it, since the new proposals that have been made for the new asylum system does not change this. The proposal for determining the responsible Member State or the directive for refugee definition both fail to meet the requirements of the Geneva Convention, for example. In order to really develop a common asylum system including respect for human rights and international refugee law, EU must develop instruments that do not lie at the borderline of violating exactly those rules.

It is also important to make the framework on asylum more coherent. Some of the instruments are not very clear and it is difficult to see the outcome of the application of them, which is negative from a perspective of legal certainty. Individuals can not clearly see the effects their action has when the instruments apply. This incoherence comes partly from the attempt to combine the instruments with international refugee law. The European attempt to find a definition of the term refugee in Article 1 of the Geneva Convention is one example. The EU can not have a definition of this term that is different from the way in which the international society interprets it.

The instrument must be altered so that it includes all kind of persecution, whether stemming from the authorities or not.

Despite doubtful instruments with even more doubtful interpretation, steps are now taken towards a more open and humane European Union. But the situation in the world has changed since the horrible events on September 11th, and that might lead to a backlash to the European development. International terrorism should be fought in order to prevent a repeat of the World Trade Centre attacks, and the European Union should take action just as it has done. But there is a risk that the focus will once again be on security, leaving the protection of asylum seekers in the dark. It is vital that the fundamental rights which the EU is founded on, including the human rights, are not compromised in the fight against terrorism and search for improved security.

Harmonisation of asylum rules and the making of a Common European Asylum System are positive and necessary features, not least to make sure that the Member States follow their international obligations. With the Amsterdam Treaty, ECJ did get jurisdiction to make sure that measures taken are in conformity with the ECHR and the Geneva Convention. The European Union develops more and more towards a guardian of fundamental and human rights. The common asylum policy must follow this development, not build walls making it nearly impossible for protection seekers to enter. It is important that the European institutions work against this picture of a "Fortress Europe". The norm in EU today is to identify asylum seekers and immigrants as illegal, a result of the asylum policies that put emphasis on security and keeping people out of the territory. This attitude must change and emphasis should instead be on providing protection to those in need. In making this change and developing a new asylum framework with respect for human rights, new measures must be adopted that reflect this. To just adopt measures based on the old instruments, without remedying their deficits, leads to no progress at all. Combined with a more restrictive security policy in order to fight terrorism, this could even be detrimental to the international refugee law and all the protection seekers trying to find a sanctuary in the European Union. The Member States should instead use their capacity as role model for other parts of the world and try to extend the human rights protection within their territories to protection seekers outside the European Union.

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