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Non-Communitarians: Refugee and Asylum Policies

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I. INTRODUCTION

While the internal dimension of immigration policies has been an integral part of EC co-operation ever since the 1957 Treaty of Rome, immigration policies *vis-à-vis* third-country nationals, and the related issue of asylum, became a serious EC concern only in the mid-1980s. Developing the single market and abandoning internal border controls were seen as conditioned upon the establishment of common control at the external borders. This resulted in the attempts to harmonize immigration policies with respect to non-EC citizens, and asylum policies as well. As it will emerge, there are important disparities in harmonization of the two policy areas.

In this chapter we are going to discuss the human rights implications of the harmonization process. The focus of analysis will first and foremost be on asylum policies and other issues pertaining to refugee protection. Aspects of non-asylum immigration policies might be relevant, in so far as human rights commitments may raise questions relating to the entrance and residence of 'non-communitarians' in Member States; yet this topic goes beyond the scope of our discussion. The interrelatedness between migration control and refugee protection leads us to scrutinize the human rights implications of control policies, with a view to identifying different options for an EU refugee protection strategy in the years to come.

The Treaty of Amsterdam has provided new competencies for the EC institutions, as well as new procedures for their adoption of measures with respect to asylum and immigration. Setting out from this repartition of competencies and the new regulatory measures to be adopted, we are going to discuss those areas of the policy harmonization process which seem most relevant, and probably most challenging, from a human rights perspective. The existing EU asylum *acquis* will therefore be critically analysed, focusing especially on the various categories of persons in need of international protection; the dilemmas raised by the increasing tendencies to prevent the arrivals of refugees and asylum-seekers; questions relating to Member States'

* While this text as a whole should be seen as the result of a co-operative effort, Jens Vedsted-Hansen has focused on sections III, IV. B, IV. D, and IV. E, and Gregor Noll has focused on sections II, IV. A, IV. C, and IV. F.

burdens and responsibilities for examining asylum applications and extending protection, and the procedural safeguards in status determination; standards for the reception of asylum-seekers, including the crucial issue of detention; and the problems relating to return of unsuccessful asylum-seekers.

The possibility exists that the asylum *acquis* will simply be carried over from the third to the first pillar of the EU when adopting new legislative measures. To what extent this will happen obviously depends on political developments rather than legal considerations. In connection with our analysis of the *acquis*, however, an attempt will be made to assess which norms are most likely to persist in a new legal form, and which of them most strongly need to be improved in the future harmonization process, so as to enhance their effectiveness in ensuring compliance with international human rights standards.

In order to frame the analysis of the EU *acquis* and its future after the Amsterdam Treaty, the initial discussion will focus on the regulatory strategies and principles on which the Union may base its development of norms pertaining to asylum and immigration. Here the systemic conflict between migration control and human rights protection is the point of departure, leading to the attempt to identify various strategies for harmonization. The impact of the transfer of competencies to the EC institutions, and of harmonization in the form of binding acts, will then be discussed. We shall come back to these issues in the final section, where they will serve as a basis for our conclusions on policy priorities in this area.

II. REGULATORY STRATEGIES AND THEIR NORMATIVE BASIS

A. Universalism versus Particularism

By its very nature, migration and asylum law is situated in the conflict zone between particularism and universalism. In ultimate questions, participants in this discourse have a choice between two foundational paradigms—one striving for the global realization of human rights and another giving preference to the interests of a certain state population. Provided that resources for the realization of civil, political, economic, social, and cultural rights are scarce, should we opt for a limited level of their protection for an extensive group or for an extensive level of protection for a limited group? Is the vision of a good life most efficiently attained if an elitist *avant-garde* paves the way, or does justice demand that progress is made at the same pace for everybody? Or, finally, how should the resource of state protection be distributed?

Any differences in protection are regulated by means of thresholds. Within the context of state protection, a decisive threshold exists between non-citizens and citizens. This becomes clear in constitutional law as well as international human rights law, both according a more favourable position to state citizens. Another threshold of focal interest severs those within state jurisdiction from those outside it. The latter threshold is usually linked to a person's presence on state territory. Again, inter-

national human rights law may serve as an illustration, as its major treaty instruments extend a basic form of protection to all persons in the jurisdiction of States parties.

As a corollary of their territorial supremacy, states are entitled to control the composition of their populations,[1] which means nothing less than delimiting the group to which protection is extended. This prerogative entails a right to control borders understood in a literal and a metaphorical sense—covering physical borders as well as administrative thresholds severing citizens from non-citizens, participants from non-participants, beneficiaries from non-beneficiaries, and tolerated from non-tolerated. The means by which such controls are exercised stretch from naturalization to forcible removal.

These thresholds assist in forming a group of persons separate from the rest of the world population—a *demos*. The variety of decisions on inclusion and exclusion are all predicated on the foundational question of 'who is the *demos*'. The totality of these decisions in a given society forms its answer to that question. To justify such answers, a variety of assumptions on the ultimate link between individual and society are on offer: While some societies base their approach on kinship and descent, others focus on presence and integration. In brief, the *demos* is a formula by means of which a given society specifies the right balance between inclusion and exclusion. In the course of time, it attains a mythical quality, which moves the concrete balance out of the reach of rational discourse.

If identifying the *demos* is already painstaking at the level of the nation State, these difficulties are amplified in a supranational setting. For all that is certain, the project of a European Union can be described as simultaneously extending and limiting protection. Seen from the perspective of the Member States, the Union is about sharing protection with the populations of other Member States. Seen from the outside, the Union appears as a merger of mighty sovereigns promoting protection for its populations at the expense of others. Extending protection means giving up the established link between a preconceived *demos* and inclusion. Limiting protection begs the double question of where to draw the line and how to justify it.

Here, the necessary responsiveness to universality and equality poses specific problems for the intergovernmental particularist professing *d'abord l'Europe*. In the absence of any common 'national identity' predicated on a traditional *demos* concept of mythical force, integration and the ensuing sharing of resources can be justified only by the universality of certain values. If free trade is a common good, it is definitely so for all, not just for Member State populations. In the same way that the particularist argument of 'national interests' loses power within the Union, arguing the exclusion of non-Union interests becomes more difficult. Presently, there is no 'Union identity' capable of competing with the foundational qualities of its national counterpart.[2] In the absence of a mythically delimited *demos*, justification of

[1] In its judgments concerning Art. 3 ECHR, the European Court of Human Rights has repeatedly spelt out that States are entitled to control the entry of aliens on their territory. See e.g. *Nsona* v. *The Netherlands*, ECHR (1996) V, No. 22, at para. 92.

[2] Ultimately, the core of the legal regimes spawned within the Union framework is citizenship of a Member State. This becomes particularly clear in the formulation of European Citizenship in Part II of the EC Treaty. From a national perspective, the EU is a regulatory mechanism for the differentiated

exclusion hinges solely on functional arguments: that is, building the European Union is only justifiable as a *first step* in the global realization of freedom, security, and justice. For to be successful, this step needs to be taken in a secure and controlled environment, limiting the amount of outside interference. Thus, the move to an ever closer Union produces its own Orwellian paradoxes: integration is attained by means of exclusion, freedom achieved by means of control. The liberal paradigm behind the dismantling of borders is complemented by a control paradigm erecting new ones.

These paradoxes become particularly visible in the regulation of free movement in the European Union. The abolition of internal borders is bought at the expense of erecting ever higher external borders. Such a trade-off tends to undermine the very ideal of freedom of movement, as its justification hinges precisely on universality. The only defence would be, once more, to display the elitist solution as a first step to the universal implementation of rights.

But, for the time being, the European Union does not make any claims in that direction. On the contrary: while the realization of free movement for Communitarians is the object of a considerable amount of supranational and intergovernmental effort, the question of migration at large is met with a deafening silence and, ultimately, referred back to the single Member States. As long as the Union fails to develop a credible notion of its *demos*, the setting of thresholds remains a technical exercise, predicated on the tools designed for the framework of the nation State and governed solely by an underlegitimized rationale of controlling migration.[3]

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

B. Migration Control versus Refugee Protection

Since the inception of the Single European Act in 1986 and the elitist co-operation spawned by the Schengen States in 1985, refugee protection has figured mainly as a

treatment of aliens. Citizens from other Member States are generally accorded more favourable treatment than other citizens. Finally, the nation State's division between citizen and non-citizen remains intact.

[3] It is highly ironic that Member States enforce a control paradigm even if it rebounds on their own citizens. The so-called Spanish Protocol stipulates that all Member States shall regard each other as safe countries of origin when determining asylum claims from Union citizens. This is unique in so far as the EU consciously places citizens from other Member States in a *less favourable* position than citizens of third States. The Spanish Protocol has been rightly criticized for undermining a non-discriminatory application of the 1951 Convention relating to the Status of Refugees: Protocol on Asylum for Nationals of Member States of the European Union, annexed to the TEU and to the EC Treaty, 6 Oct. 1997, Doc. No. CONF 4007/97, TA/P/en 24.

technical problem within the context of free movement between the Member States. This may entail the—faulty—impression that refugee protection is subordinated to the accumulated sovereignty of the Union's Member States. However, it should be borne in mind that refugee protection is not a problem of migration control.[4] Refugees have lost the protection of their home community, which makes them conceptually different from migrants. Thus, migration control and refugee protection are separate systems pursuing different systemic goals. In order to realize these goals, the input of individual cases is processed in the light of accepted norms to produce outcomes. The systemic goal of migration control is to manage the inflow, presence, and outflow of non-citizens on state territory. In short, it is about the preservation of a particularistic community.

Any reasoning on the systemic goals of refugee protection should look back to the instrument representing the foundation of the international human rights system. In 1948, the General Assembly of the United Nations approved the Universal Declaration of Human Rights,[5] stating in Article 14 that '[e]veryone has the right to seek and to enjoy in other countries asylum from persecution'. Like the other civil, political, economic, social, and cultural rights enshrined in the Universal Declaration, Article 14 must be seen in the light of Article 28:

> Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

This provision assigns States to optimize the international order for an accommodation of the exercise of human rights. By the virtue of this Article, the Universal Declaration can be regarded as a starting point for the development of a comprehensive human rights regime. While the 1966 Covenants[6] were designed to safeguard human rights under national jurisdictions, the 1951 Refugee Convention,[7] the Convention relating to the Status of Stateless Persons,[8] and the Agreement relating to Refugee Seamen[9] were conceived as subsidiary means of human rights protection. Broadly speaking, their rationale was to safeguard human rights, when the country of origin had failed to protect individuals under its jurisdiction.

Thus, refugee protection is about the universal safeguarding of a certain level of human rights. It follows that refugee protection is not a sub-system of migration

[4] For an analysis of the tension between control and protection in the context of asylum procedures, see J. Vedsted-Hansen, 'Control v. Protection in Asylum Procedures', paper presented at the Technical Symposium on International Migration and Development (1998, forthcoming in the proceedings of the symposium).

[5] Universal Declaration of Human Rights, adopted by GA Res. 217 A (III) (1948). In United Nations, *A Compilation of International Instruments* (1994), i, Part 1, 1.

[6] International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), both adopted by GA Res. 2200 A (XXI) (1966): in *International Instruments*, note 5 above, at 8 and 20.

[7] Convention relating to the Status of Refugees, adopted on 28 July 1951 by the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under GA Res. 429 (V) (1950), hereinafter 1951 Refugee Convention: in *International Instruments*, note 5 above, i, Part 2, at 638. Reference to the 1951 Refugee Convention below covers the Convention as modified by the Prot. relating to the Status of Refugees, 31 Jan. 1967: in *International Instruments*, note 5 above, i, Part 2, at 655.

[8] Convention relating to the Status of Stateless Persons. Adopted on 28 September 1954 by a Conference of Plenipotentiaries convened by ESC Res. 526 A (XVII) (1954). In *International Instruments*, note 5 above, i, Part 2, at 625.

[9] Agreement relating to Refugee Seamen of 23 Nov. 1957: 506 UNTS 125.

control, as both pursue different systemic goals. However, their fields of operation overlap, and they share some norms guiding processes in each system. [10]

We are left with a formidable conflict between the State's prerogative to exclude and the human rights imperative to include. It should be made clear that the resolution in the conflict of rights hinges on our initial assumptions about international law. Do state interests trump individual interests, as international law is ultimately conceived by States and not individuals? Or is the protective content of human rights law, once unleashed, beyond the logic of state interest? In the absence of an arguable right of way for one or the other, all that can be done is to balance both interests.

If the earlier described prevalence of a control paradigm has tipped over the scale in favour of particularism, Article 6 (*ex* Article F) of the Treaty on European Union (TEU) as amended by the Treaty of Amsterdam offers itself as a counterbalance. It provides that the European Union shall respect fundamental rights as general principles of Community law. It follows from Article 2 (*ex* Article B) of the Treaty that the objectives of the Union shall be achieved in accordance with, and are thus subordinated to, the general principles set forth in Article 6.

Human rights, as embraced by the general principles, must therefore guide the adoption of measures under Title IV of the EC Treaty,[11] concerning visas, asylum, immigration and other policies relating to the free movement of persons, as well as other measures establishing the Union as an area of freedom, security, and justice, and related measures taken under Title V of the EU Treaty on a common foreign and security policy. This means nothing less than a reintroduction of the universalist perspective, albeit of considerable abstraction, in the discourse on how to delimit the protective commitments of the Union.

C. The Controlled Market of Deflection

In the system of refugee protection, two main areas of regulation can be discerned. The first is on administering movements; which means all measures impacting on the departure, itinerary, arrival, and allocation of asylum-seekers. Such direct administration of movements attempts to steer the physical presence of the asylum-seeker as well as the administrative responsibility for her. The second is on affording protection, which means all measures impacting on the human rights situation of the asylum-seeker. Both areas are interrelated—inevitably, the standard of protection to be expected in a certain country may be a factor taken into consideration by the asylum-seeker in the choice of destination country. Moreover, as the discourse on temporary protection and mass influx situations shows, the equation can be reversed: in practice, actual or even anticipated movements may also influence standards of protection.

Why would state actors wish to steer the movements of asylum-seekers? The most prominent reason is plainly to avoid becoming a State of destination. Another motivation may be to effect a distribution of asylum-seekers according to a certain

[10] Both systems are operated under the rule of law, which implies *inter alia* that they should produce outcomes in a predictable and non-discriminatory fashion.

[11] In this text, references to the EC Treaty as well as the EU Treaty comprise their amendment by the Treaty of Amsterdam unless otherwise indicated.

pattern. When this pattern is intended to bring about an equitable sharing of the protection responsibility, the exercise is referred to as 'burden-sharing'. Within a state grouping such as the European Union, there may be the double goal of deflection and burden-sharing. There is an interest in deflecting[12] at least parts of the movement of real or potential asylum-seekers to the region at large. Within the Union, however, this deflection by single Member States may lead to a burden on other Member States. Thus, in order not to undermine solidarity, measures of deflection must be taken in a concerted fashion. In combination, there is also an interest, at least with the presently most-affected States, in sharing the responsibility for those who manage to arrive in spite of deflective measures. Steering movements thus comprise two typecast relationships—one between the Member States and the individual asylum-seeker, another between the Member States themselves.

In the following sections, it will become clear that Member States have made a major effort in the regulation of movement. Apart from some feeble attempts to define a common policy, the area of protection has been left largely to the discretion of each single Member State. Drawing on another terminology, it could be claimed that the EU resorted to planning economy in steering movements. The dynamics of this economy are creating a thrust for restrictive solutions, which are developed by single Member States in a competitive market environment.

III. THE TREATY OF AMSTERDAM: REPARTITION OF COMPETENCIES AND NEW REGULATORY MEASURES

A. Communitarization of Asylum and Immigration Policies

1. Stages in the Harmonization Process The scenario following the entry into force of the Treaty of Amsterdam can be better analysed by looking back to pre-EU developments within asylum and immigration. As mentioned, the harmonization process took its beginning in connection with the introduction of the Single European Act of 1986. While the 1984 Fontainebleau European Council had proposed the abolition of police and customs formalities for persons crossing internal borders before mid-1985, it soon became clear that this would take more time to realize. Given the necessity gradually to introduce common policies towards third-country nationals, 1992 was set as a deadline for the adoption of such policies, in accordance with the 'Europe without Frontiers' plan advanced by the President of the Commission.[13]

Similarly, the Commission's 1985 White Paper on the Single Market recognized the necessity of common policies concerning third-country nationals. With a view to dismantling internal border controls in 1992 the Commission would therefore

[12] In the present context, deflection means any measure inhibiting any more lasting access to a territory. The concept thus comprises non-arrival policies as well as the mechanism of referral to safe third countries. See text accompanying note 68 below.

[13] *A People's Europe*: *Bull. EC Suppl.* 7/85, at 8–9.

initiate proposals for directives on immigration, asylum, and refugee status, and visa policies.[14] Some draft directives were actually submitted in 1988, yet they were never adopted. As the work of the *Ad Hoc* Group on Immigration, established within the parallel framework of European Political Co-operation, did not progress sufficiently, various steps towards a more structured harmonization process were taken during the preparations for the revision of the Treaty at the 1991–2 Inter-Governmental Conference.

As is known, the outcome was the adoption of Title VI of the Maastricht EU Treaty, concerning co-operation in Justice and Home Affairs within the Union's so-called third pillar. Under Article K.1 (now Article 29) Member States agreed to consider as issues of common interest, i.e. (1) asylum policies; (2) rules on the passage of persons across the external borders of Member States, and the exercise of control thereon; (3) immigration policy and policies towards third-country nationals as regards their entry and movement, conditions for their residence on the territories of Member States, including family reunification and access to employment, and combating illegal immigration. Measures to be unanimously adopted with a view to harmonization of these policy issues were, according to Article K.3 (now Article 31), 'joint positions', 'joint actions', and conventions.

Before we discuss the experience of third-pillar co-operation, an attempt will be made to categorize the efforts towards harmonization of asylum and immigration policies at the EC/EU level. This may serve as a basis for assessing the legal and political impact of co-operation in Justice and Home Affairs, while at the same time giving an additional overview of developments within an area of third-pillar co-operation which is particularly relevant from a human rights perspective.

2. Three Different Approaches to Harmonization The harmonization of refugee and asylum policies was perceived to be intrinsically connected to the development of the single market. For analytical purposes, however, this does not give a one-dimensional explanation of the forms of harmonization and the substance of measures taken to that effect. First, it might seem questionable whether the realization of such market structures actually depends on the dismantling of internal border controls. As mentioned, the absence of such controls is exactly what has been invoked as necessitating the reinforcement of external border controls; this in turn was often the reason given for restricting asylum policies.

As regards the latter issue, the point has been correctly made that establishing common external borders does not define the criteria under which these borders may be crossed by third-country nationals; such criteria still have to be established by political decision. Moreover, it is not evident that the functioning of the single market would require total abandonment of control on persons crossing internal borders. Summary forms of control, already known at borders where there is a practical need in that regard, do not seem to be blocking economic exchange between markets across the borders involved. Neither is the exercise of such control incompatible with the symbolic functioning of passport-free travel. In any event, common control of

[14] European Commission, *Completing the Internal Market. White Paper from the Commission to the European Council* COM(85)310 final, at 14–16.

external borders does not in itself mean restricted criteria of access, just as it does not lead automatically to repressive enforcement of such criteria. It is therefore hard to avoid contemplating whether EU Member States have taken advantage of the economic integration, making it an institutional pretext for restricting access for refugees in search of protection. In other words, what has been framed as a technical necessity turns out to be rather a political choice.

As posited by a North American observer, EC governments seem to have seized upon the impending termination of immigration controls at intra-Community borders to demand enhanced security at the external frontiers.[15] But does enhanced economic integration have to result in such increased external security measures? The same observer suggests an answer in the negative by concluding as follows with respect to the lessons of the European experience:

> First, that increasing levels of economic integration lead logically towards a policy of generalized freedom of movement within the economic zone, which in turn will require some coordination of strategy regarding external frontiers. Second, that the self-interested drive towards unification presents states with an opportunity to reconceptualize refugee flows as irritants to coordination, and to pursue with impunity generalized policies of deterrence. Third, that the intergovernmental structures requisite to detailed alignment of economic policy can be used in order to shield protectionist lawmaking from scrutiny or review, allowing the human rights mandate of refugee law to be effectively undercut. Finally, and most profoundly, the experience to date shows that the basic commitment to balance domestic self-interest with the human rights of those forced to flee in search of protection is now extraordinarily fragile, even in the very states which crafted the modern international human rights and refugee regimes.[16]

Assuming that there is no link of structural necessity between EC/EU integration and the reinforcement of external border controls, it would seem that control policies are in principle open to modification, according to political priorities allowing for human rights standards to influence the control strategy. With a view to our discussion of the possible impact of the Treaty of Amsterdam in this respect, it is noteworthy that during the past harmonization process quite different approaches have been taken by the EC/EU and Member States to designing asylum and immigration policies *vis-à-vis* third-country nationals. There may be some chronological coincidence of the three approaches described below; yet policy priorities seem to have been changing significantly over time, the emphasis being still more on the third approach.[17]

As a first approach, immigration policies and the inherent control strategies were kept *separate* from issues pertaining to refugee protection. This was the case for the EC Commission's 1991 Communications on the right of asylum and on immigration. In the former document the Commission stated that '[a]lthough both matters are linked and interrelated, they are each governed by *specific policies and rules* which reflect *fundamentally different* principles and preoccupations'.[18] While

[15] J. Hathaway, 'Harmonizing for Whom? The Devaluation of Refugee Protection in the Era of European Economic Integration' (1993) 26 *CILJ* 719.
[16] *Ibid.*, at 734–5.
[17] These approaches obviously can be seen as reflecting the systemic conflict discussed at II. B., above.
[18] European Commission, *Communication from the Commission to the Council and the European Parliament on the Right of Asylum*: SEC(91)1857, at para. 2 (emphasis added).

immigration from third countries was seen as primarily an economic phenomenon, the right of asylum was considered first and foremost a right and a humanitarian challenge. Here, the starting point was the 1951 Refugee Convention, 'a fundamental common legal instrument'; from this basis Member States had formulated national laws that remove the possibility of refusing in a discretionary manner to admit an asylum-seeker to their territory. As 'preventing abuse of the right of asylum' and 'harmonization of the formal and substantive right of asylum' were the two aspects of the common EC interest of the right of asylum, full respect for the humanitarian principles embodied in the 1951 Refugee Convention was declared the starting point.[19] In its 1994 Communication, the Commission appears by and large to have maintained this approach, although perhaps slightly adjusting towards the next category.[20]

There may be only a gradual difference from the second approach, rather than one of quality. Despite recognizing the *interrelatedness* of asylum and immigration policies, the measures adopted have not taken account of the practical consequences that flow from the interaction between the two policy areas. As a significant example, the 1991 Draft Convention on the Crossing of the External Borders stated that its provisions should apply 'subject to' the provisions of the 1951 Refugee Convention, in particular Articles 31 and 33.[21] Likewise, the 1990 Schengen Convention obliges Member States to impose penalties on carriers transporting aliens who do not possess the necessary travel documents, 'subject to' the obligations arising out of the accession to the 1951 Refugee Convention.[22] Thus, while compatibility with refugee protection was declared as the principled objective, *no operational measures* were taken to that effect;[23] not less importantly, key provisions of these instruments could hardly be implemented without affecting refugees and asylum-seekers in a manner violating the 1951 Refugee Convention, formally claimed to prevail.

Finally, as the third and most recent approach, immigration control and asylum policies are gradually merging. Having defined the prevention of 'irregular' arrivals as the overall rationale, this seems to be a process in which the control strategy is bound to take over from the exigencies of refugee protection. A striking example of this trend in EU asylum policies will be presented and discussed later in this chapter.[24] At the general policy level, a recent draft strategy paper has revealed some

[19] *Ibid.*, at paras. 4–5. See also para. 3: '[s]uch harmonization could not be used as an excuse for reducing the humanitarian commitments they have entered into under the Geneva Convention'.

[20] European Commission, *Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies*: COM(94)23 final; see in particular paras. 81, 85, 88, and 105.

[21] Art. 27 of the Draft Convention on the Crossing of the External Borders of the Member States of the EC: SN 2535/91 (WGI 829) (1991).

[22] Art. 26, 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, Schengen, 19 June 1990, reprinted in H. Meijers *et al.*, *Schengen: Internationalisation of Central Chapters of the Law on Aliens, Refugees, Privacy, Security and Police* (1992), 177.

[23] Cf. Hathaway, note 15 above, at 731: '[w]hile the [Draft Convention on the Crossing of External Borders] pays lip service to the legal rights of refugees, it contains no specific exemptions in fact to address the needs of genuine asylum seekers'. See also note 82, at 731–2.

[24] See IV. B. 4., below.

support for this approach.[25] Although both have caused concern about the EU's genuine commitment to human rights principles, a crucial question is to what extent the Treaty of Amsterdam may give such control-determined positions a chance to be substituted by a more significant role for protection norms and values.

3. Deficiencies of the Third-pillar Co-operation Ever since the entry into force of Title VI of the EU Treaty, various forms of criticism have been raised against the functioning of asylum and immigration policies under the Maastricht system. The issues and premises of this criticism appear to be partly divergent, in so far as some discutants have been focusing on substance in the texts adopted, while others were more concerned with organizational issues; redesigning the institutional framework was sometimes seen as the key to solving substantive problems as well. The most important criticism has been addressing the efficiency of the third-pillar co-operation; its impact on the domestic law of Member States; issues of consistency with relevant norms and principles of international law; and problems of democratic and judicial control. While the latter problems will be discussed in the following analysis of the Treaty of Amsterdam, the issues of efficiency and legal impact will be dealt with here.

As an indication of the lack of *efficiency* of harmonization activities under the third pillar, reference has been made to the limited output of instruments, compared to what might have been foreseen under Articles K.1 and K.3 (now Articles 29 and 31) of the EU Treaty. Instead, traditional non-binding instruments such as resolutions and recommendations have been resorted to more or less in the same manner as was practised under the pre-Maastricht inter-governmental co-operation.[26] Reasons for this may be the absence of specification in the Treaty about which legal measures should be taken, on which policy issues, and within which time frame. Furthermore, the fact that decisions require unanimity obviously can explain the lack of (formal) efficiency in the adoption of instruments. The organizational structure of the third pillar of the Union has also been mentioned as part of the explanation for slow movement towards harmonization; a rather complicated decision-making procedure has surrounded the so-called K.4 Committee, yet subsequently modified. This may be due entirely to Member States' reluctance to enter into binding commitments to harmonize asylum policies. Whatever the reason, the outcome does not suggest that the framework invented in Maastricht was the guarantor of fast and efficient harmonization.[27]

As far as the *impact* of harmonization efforts is concerned, the *non-binding* nature of most third-pillar instruments provides much explanation of why they may not have been implemented effectively by Member States. It must be taken into account, though, that the legally binding status of EC/EU instruments is not decisive to the degree of implementation at the domestic level. As an example one could mention

[25] 'Note from the Presidency to the K.4 Committee: Strategy Paper on Immigration and Asylum Policy' (9804/98, ASIM 170) (1998).

[26] See generally R. Bank, 'The Emergent EU Policy on Asylum and Refugees: The New Framework Set by the Treaty of Amsterdam: A Landmark or a Standstill?', *Nordic Journal of International Law* (forthcoming, 1999).

[27] *Ibid.*, at 8: 'the creation of the third pillar and the introduction of asylum matters into this framework has been formulated in Art. K.1 TEU as an issue which should serve the purposes and aims of the EU. It can hardly be argued that this can be achieved by inaction.'

the 1992 (pre-Maastricht) London resolutions which apparently have had great impact on 'safe third-country' practices and the utilization of special procedures for 'manifestly unfounded' asylum applications in Member States.[28] In contradistinction, certain elements of the measures adopted under Title VI of the EU Treaty do not seem to be effectively implemented in domestic law.[29] Again, one has to realize that such lack of implementation is not just a result of the legal nature of these instruments. Another explanation can sometimes be found in the drafting process, and the political compromises that were made in order to obtain unanimity.[30]

As a consequence of this state of affairs, it has been suggested that Member States may in reality compose their 'Europe *à la carte*' by returning to the European harmonization argument if they want to change their laws and practices accordingly, but without having to accept the whole menu.[31] While such selective implementation certainly is a possibility inherent in the political and administrative flexibility and the legal nature of third-pillar harmonization under the EU Treaty, it may at the same time serve as an illustration of the problems of accountability and transparency, both in the legislative stages and in the implementation. Behind closed doors, decision-makers may be in a position to invoke domestic legal arguments in the drafting process; subsequently they may implement the EU instruments adopted, or they may not, yet still without transparency and legal or public scrutiny.

4. The Treaty of Amsterdam: Towards Communitarization While the transfer of asylum and immigration policies from the third pillar to the first pillar of the Union was, in principle, provided for by Article K.9 (now Article 37) of the Maastricht EU Treaty, there never seems to have been any serious effort towards implementing this possibility of legal and institutional reform under the existing Treaty. Again, the lack of action may be seen as a result of the reluctance of Member States to commit themselves more formally to harmonization. Another possible explanation may be that they were well aware of the fact that the transfer of pillars would be on the agenda for the Inter-Governmental Conference stipulated to begin in 1996; this may obviously have been a disincentive for Member States to initiate the complex transfer discussion. Be that as it may, it is now clear that the outcome is a significant transfer of pillars regarding asylum and immigration policies.

As a background to the analysis of the EU asylum *acquis* we shall here briefly outline the impact of the Treaty of Amsterdam in this respect. The development towards communitarization of asylum and immigration policies occurs to varying degrees at different levels, i.e. the legal, the institutional, and the political level.

In a purely legal sense, the transfer of pillars has already taken place in the Treaty of Amsterdam. Under the new Title IV of the EC Treaty, visa, asylum, immigration,

[28] EC Ministers Resolutions of 30 Nov.–1 Dec. 1992 on a Harmonized Approach to Questions Concerning Host Third Countries (SN 4823/92), and on Manifestly Unfounded Applications for Asylum (SN 2836/93, WGI 1505). See also Bank, note 26 above, at 10.

[29] Cf. S. Peers, *Mind the Gap! Ineffective Member State Implementation of European Union Asylum Measures*, report prepared for the Immigration Law Practitioners' Association and the Refugee Council (1998).

[30] See at IV. A. 3., mentioning the example of the Joint Position of 4 Mar. 1996 on the harmonized application of the definition of the term 'refugee'.

[31] Bank, note 26 above, at 10.

and other policies related to the free movement of persons will be subject to the adoption of Community acts, as defined in Article 249 (*ex* Article 189). Thus, policy harmonization concerning asylum and immigration issues is going to take place in the form of traditional EC regulatory measures, binding upon Member States, and to a certain extent even directly applicable at the national level.

The political and institutional elements of communitarization, however, have been only half-heartedly included in the Treaty. During the transitional period of five years following the entry into force of the Treaty of Amsterdam, the adoption of policy measures under Title IV still requires unanimity, except for those decisions on visa requirements and visa uniform format which are already subject to qualified majority voting.[32] By the same token, the remaining measures concerning visa policies shall, after the five-year period, be adopted by the Council in accordance with the procedure under Article 251, i.e. by a qualified majority.[33] Hence, to the extent deficiencies in the Third Pillar co-operation can be attributed to the requirement of unanimous decision-making, there may be little hope for improvement during the first five years after the entry into force of the Amsterdam Treaty. Things may change after the transitional period, in so far as the Council shall then take a decision with a view to moving all or parts of the areas covered by Title IV into the qualified majority voting procedure under Article 251 (*ex* Article 189b).[34] The wording of this provision leaves some uncertainty about the real duration of the transitional period, in particular given that a decision to abandon the unanimity requirement must be taken unanimously. According to a declaration from the Inter-Governmental Conference, however, the future decision-making procedure will have to be revised at the end of the transitional period; thus preparations for the review must be made during this period.[35]

In terms of substance, it is noteworthy that a number of policy measures will have to be adopted within the five years after the entry force of the Treaty of Amsterdam, while others will not. There seems to have been a tendency to give more control-oriented measures priority here. As mentioned, visa policies will automatically be subject to majority voting. A number of other so-called flanking measures directly related to the free movement of persons, with respect to external border controls, asylum, and immigration, will have to be adopted within the transitional period, yet under the unanimity requirement, and thus with some political uncertainty. And importantly, certain measures bearing on refugee protection have expressly been exempted from the five-year time limit, such as the adoption of burden-sharing mechanisms pursuant to Article 63(2)(b) (*ex* Article 73k).[36]

[32] Art. 67(3) (*ex* Art. 73o) EC Treaty; cf. Art. 62(2)(b)(i) and (iii). See also the Maastricht EC Treaty Art. 100C(2) and (3) (now repealed).

[33] Art. 67(4) EC Treaty; cf. Art. 62(2)(b)(ii) and (iv).

[34] Art. 67(2) EC Treaty.

[35] Declaration on Art. 73o of the EC Treaty (Declaration No. 21 annexed to the Final Act of the Inter-Governmental Conference): '[t]he Conference agrees that the Council will examine the elements of the decision referred to in Article 73o(2), second indent, of the Treaty establishing the European Community before the end of the five year period referred to in Article 73o with a view to taking and applying this decision immediately after the end of that period'.

[36] See below at IV. C. 2.

B. Transparency, Accountability, and Judicial Control

As previously mentioned, much of the criticism of third-pillar EU co-operation has been focusing on problems of democratic and judicial control. From both a legal and a political viewpoint there has been concern about the low level of transparency in decision-making in Justice and Home Affairs. Strong tendencies towards secret decision-making under the 1990 Schengen Convention and within the EC co-operation on asylum and immigration policies were not remedied by the 1992 Maastricht Treaty, as the third pillar basically suffered from many of the same deficiencies regarding democratic and judicial control.[37] Thus, the Parliament has a rather marginal role, at best of a consultative nature, subject to the discretionary initiative of the Presidency and the Commission. The Court of Justice is, practically speaking, absent in this part of the Treaty, being given only a potential competence by conventions drawn up under Article K.3(2)(c) (now Article 31).[38]

These features of the third-pillar co-operation have been characterized as incompatible with fundamental principles of democracy and the rule of law. Not only would decisions normally be made in secret, but in certain circumstances the secrecy might even extend to the contents of policy decisions. Leaving aside the issue of democratic accountability of decision-makers at the EU level, it would often be difficult to establish the exact role of individual Member States in connection with the adoption of policy measures. At the domestic level, this would similarly result in non-transparent decisions on the implementation of EU instruments, likely to be much of the reason for the 'Europe *à la carte*' development earlier described.[39] Furthermore, due to the lack of jurisdiction of the Court of Justice, the opportunities for challenging the instruments adopted, as well as their implementation in national law, were equally lacking.

Have the hopes for improvement been met by the Treaty of Amsterdam? To some extent the answer is yes. Yet there are still deficiencies, some of which will not be remediable even after the transitional period of five years. As regards *transparency* and *democratic influence*, the role of the Parliament will gradually be increased, first, because the Council must consult the Parliament when acting on a proposal from the Commission or on the initiative of a Member State. This procedure will already exist during the transitional period, cf. Article 67(1) (*ex* Article 73o). Secondly, the procedure under Title IV may eventually be changed, in whole or in part, to be governed by Article 251 (*ex* Article 189b) providing the Parliament with significant competence. It has to be seen to what extent this could result in effective influence on the substance of decisions, and in which direction the Parliament might then influence the harmonization of asylum and immigration policies. The Parliament has, so far, been less restrictive and more focused on human rights protection than the Council and many Member States. This is obviously not bound to persist; furthermore, it seems uncer-

[37] Cf. D. Curtin and H. Meijers, 'The Principle of Open Government in Schengen and the European Union: Democratic Retrogression?' in H. Meijers *et al.*, *Democracy, Migrants and Police in the European Union. The 1996 IGC and Beyond* (1997), 13–44.

[38] See C. Groenendijk, 'The European Court of Justice and the Third Pillar' in *ibid.*, at 45–59.

[39] Bank, note 26 above, at 10; see above at III. A. 3.

tain whether the Parliament would be able to steer future humanitarian priorities through to the final decision-making process.

Not least importantly, transparency will be enhanced as a result of public access to proposed legislative acts at a much earlier point in time than is the case for the third-pillar co-operation. This improvement of the conditions for democratic debate and openness will already materialize during the transitional period, as the Parliament must be consulted on each proposal, even while having no formalized competence. In the same vein, consultation will be established with the United Nations High Commissioner for Refugees (UNHCR) and other relevant international organizations on matters relating to asylum policy.[40] This should provide for increased, and at least more systematic, dialogue on protection-related issues, contrary to the present situation where the attitudes of the incumbent Presidency seem to have been quite decisive in this respect.

With regard to *judicial control*, however, the solution provided for by the Treaty of Amsterdam is less satisfactory. According to Article 68 (*ex* Article 73p) of the EC Treaty, there will be access to preliminary rulings from the Court of Justice where a question on the interpretation of Title IV or on the validity or interpretation of EC acts 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. This implies two significant constraints on the role of the Court of Justice in comparison with the general jurisdiction to give preliminary rulings under Article 234 (*ex* Article 177): Firstly, it is only possible to have a preliminary ruling when an asylum or immigration case is pending before a court or a tribunal of *last instance*; under Article 234 lower courts, too, may request the Court of Justice to give a ruling. Secondly, even in the last instance (final court of appeal) access to a preliminary ruling is conditioned upon the court or the tribunal considering that a decision on the question is necessary to enable it to give judgment. This seems to give national courts and tribunals a certain amount of discretion when deciding whether to submit an issue to the Court of Justice; pursuant to Article 234, such discretion can be exercised by the lower courts, while courts and tribunals of final appeal are obliged to bring relevant matters before the Court of Justice.

The fact that judicial control at the EC level is thus contingent upon discretionary decisions at the level of national courts is likely to weaken the effective implementation of harmonization measures under Title IV.[41] It seems evident that the limited access to preliminary rulings within the area of asylum and immigration results from a perceived risk of overburdening the Court, and correspondingly causing delay in cases pending before national courts. Such fear may be well-founded, or it may be exaggerated; it is beyond doubt, though, that the arrangement under Article 68 (*ex* Article 73p) reduces the legal safeguards for individuals. It may also result in the reduced effectiveness of harmonization measures, by domestic courts competent to prevent themselves from being bound by preliminary rulings.

[40] See Declaration on Art. 73k of the EC Treaty, Declaration No. 17 annexed to the Final Act of the Inter-Governmental Conference.

[41] Cf. Bank, note 26 above, at 29–31.

Exemptions from judicial control at the EC level will exist where issues of national security can be invoked by a Member State. According to Article 64 (*ex* Article 73l), Title IV shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security. It may be questioned whether the establishment of such security issues may in itself restrain the competence of the Court of Justice. This appears inconceivable, though, not only because it would render judicial control partly ineffective, but also due to the wording of the Treaty itself. Article 68(2) provides that the Court of Justice shall not have jurisdiction to rule on any measure or decision taken pursuant to Article 62(1) (*ex* Article 73j(1)) relating to the maintenance of law and order and the safeguarding of internal security. The express exemption of specific security-related measures makes it clear that the Court is otherwise competent under such circumstances; at least, this competence allows the Court to review the validity of the security reasons invoked by a Member State under Article 64 (*ex* Article 73l).

It is important to notice that the exemption of the Court's jurisdiction under Article 68(2) relates only to measures with a view to ensuring the absence of controls on persons crossing *internal* borders. Hence, judicial control can be curtailed only to a limited extent due to circumstances affecting the maintenance of law and order or the internal security of a Member State.

IV. AREAS OF POLICY HARMONIZATION; THE EU ASYLUM *ACQUIS*

A. Protection Categories

1. The Acquis *and Protection Categories* In part II, B., refugee protection was identified as a subsidiary means of human rights protection. Of critical importance is the question who is determined to be a beneficiary of that system. Why is that so? To identify categories of persons entitled to some form of international protection also means to set the parameters for the whole system. By way of example, the legal logic underlying the 1951 Refugee Convention requires that the persons claiming to be its beneficiary are entitled to a determination procedure. The same logic requires that such procedure will be adapted to identify the existence of facts relevant for the Convention's definition. This goes to show that protection categories function as systemic centrepieces, towards which each single part of the system is geared.

How were protection categories emanating from refugee law, human rights law, and domestic law handled within the EU co-operation on Justice and Home Affairs? To be sure, the paramount importance of landmark instruments in the field has been acknowledged by the EU Council, when it made clear that the 1951 Convention as well as the 1967 Protocol are part of the EU *acquis* in the fields of Justice and Home Affairs. Both instruments have been qualified as 'inseparable from the realization of

the Union's objectives', and, consequently, States aspiring tor Union membership must accede to them.[42]

The European Convention on Human Rights (ECHR) has been endowed with the same status; accession to it now forms a precondition for candidate States' entry into the Union. Protocols Nos. 4, 6, and 7 to the ECHR also form part of the *acquis*, but merely on a non-obligatory basis.[43] It should be noted, though, that the ECHR and its protocols do not figure under the heading of asylum in the draft list of the *acquis*, but rather under the less specific heading of human rights.

However, recognizing the importance of the named three instruments does not imply that Member States are well on the way to a common system of protection categories. The rationale of harmonized categories is to counter an evolving market mechanism, where States compete to minimize the number of applications they will receive by restricting the categories of beneficiaries. Such competition would be detrimental not only for persons in need of protection, but also for the interest of those Member States whose burden of reception is increased by their more successful competitors.

Therefore, it comes as little surprise that the Commission's 1994 Communication on Asylum and Immigration Policy identifies three subjects of harmonization. The first is the refugee definition, the second relates to 'policies concerning those who cannot be admitted as refugees, but whom Member States would nevertheless not require to return to their country of origin in view of the general prevailing situation in that country', and the third to temporary protection.[44]

But a requirement of harmonization also flows from the operation of the Dublin Convention. As explained below, this instrument denies a claimant the right to choose between different countries of asylum in the EU. From the perspective of the claimant, predictability and equality in treatment require Member States to operate protection categories under international law with identical material scope.[45]

Thus, a successful harmonization of categories needs to fulfill two basic requirements: It has to be all-encompassing and binding. It will not do to harmonize some categories, while leaving others to the free interplay of forces. First and foremost, any legal instrument purporting to create uniform definitions of beneficiaries must be formally binding as such. But the categories posited in it need also be sufficiently concrete and devoid of any deference to national law in order to be effective.

[42] Item note from the Presidency to Coreper, 'Draft list of the "acquis" of the Union and of its Member States in the field of Justice and Home Affairs'. Doc. No. 6437/2/98 REV 3 (20 Mar. 1998) (hereinafter Draft List), para. I. A. b.

[43] *Ibid.*, at para. XII. A. b. and D. Prots. 4, 6, and 7 to the ECHR are considerered as 'instruments which have not all been signed and/or ratified by all Member States, and the Member States are not mutually bound to ratify them, although in the case of some of them there is a political commitment by their Governments to initiate the internal process of ratification. States applying to join the European Union should endeavour to become parties to these Conventions on the same basis as the Member States': *ibid.*, Introduction. Prot. 6 is of special interest in this context, as it contains a provision on the abolishment of the death penalty in Art. 1. See also Final Act of the Treaty of Amsterdam, Declaration on the Abolitition of the Death Penalty, CONF 4007/97, AF/TA/en2.

[44] SEC(91)1857, note 18 above, at 42, paras. 6, 8, and 9.

[45] This was acknowledged in a discussion paper on subsidiary protection prepared by the Danish delegation for the EU Council: note by the Danish delegation to the Migration and Asylum Working Parties, 'Subsidiary Protection', Doc. No. 6746/97 ASIM 52 (17 Mar. 1997), 4.

2. The Scope of Harmonization Hitherto, the only attempt to come to terms with the definitional and interpretational disparity between Member States[46] is the 1996 'Joint Position 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'.[47] The very existence of the 1996 joint position gives proof of an aspiration to inhibit this kind of market mechanism in a spirit of solidarity between Member States, which is perfectly in line with the principle of solidarity laid down in Article 1 (*ex* Article A) TEU. It is all the more lamentable that this effort has to fail on purely formal grounds. A mere look at paragraph 3 of the preamble confirms that Member States were not prepared to revamp their domestic asylum systems for the sake of harmonization:

> This joint position is adopted within the limits of the constitutional powers of the Governments of the Member States; it shall not bind the legislative authorities or affect decisions of the judicial authorities of the Member states.

Whatever the mandatory force of a joint position may be, this paragraph clearly indicates the non-binding nature of the definitional efforts enshrined in the instrument.[48] By way of conclusion, neither the requirement of all-encompassing harmonization nor that of bindingness has been satisfied hitherto. The task of harmonization still remains the responsibility of the informal spiral of restriction described above.[49] But apart from these functional reflections on the all-encompassing nature of harmonization, it is striking to see that a human rights protection category is conspicuously absent from the legislative work of the EU Council. This absence need not imply its non-recognition, as the case law of the European Court of Justice with relation to Article 3 ECHR generally enjoys acceptance amongst Member States.[50] It is, however, of concern that the triad of refugee law, human rights law, and domestic categories is presently reduced to a duality of refugee law and domestic categories by the EU Council. The wording of paragraph 1 of the 1996 joint position is indicative in this regard:

> This document relates to implementation of the criteria as defined in Article 1 of [the 1951 Refugee] Convention. It in no way affects the conditions under which a Member State may, according to its national law, permit a person to remain in its territory if his safety or physical integrity would be endangered if he were to return to his country because of circumstances which are not covered by the Geneva Convention but which constitute a reason for not returning him to his country of origin.

Lamentably, Article 63(1)(c) (*ex* Article 73k) of the EC Treaty seems to perpetuate this reductive approach to protection categories. It stipulates that, within five

[46] On the disparate interpretation of the refugee definition, see generally J.-Y. Carlier *et al.* (eds.), *Who is a Refugee? A Comparative Case Law Study* (1997).

[47] [1996] OJ L63. According to the draft list, this instrument is part of the *acquis*.

[48] Apparently, the cited para. was inserted on the intitative of the British and German delegations. See J. van der Klaauw, 'Refugee Protection in Western Europe: A UNHCR Perspective' in J.-Y. Carlier and D. Vanheule (eds.), *Europe and Refugees: A Challenge?* (1997), 240.

[49] See II. B. above.

[50] Some Member States relate explicitly or implicitly to the ECHR in domestic law. See, e.g., s. 53(4) of the German Aliens Act and Chap. 3, s. 3(1) of the Swedish Aliens Act.

years after the entry into force of the Treaty of Amsterdam, the Council shall adopt:

> (1) measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties, within the following areas:
> ...
> (c) minimum standards with respect to the qualification of nationals of third countries as refugees.

The wording of this provision must be reasonably understood to cover exclusively a harmonized interpretation of the 1951 Refugee Convention definition, as it expressly refers to the 'qualification . . . as refugees'.

It could be asked, though, whether Article 63(2)(a) should be regarded as an obligation on the Council to posit human rights-based protection categories within the same five-year time-frame. The Council shall adopt:

> (2) measures on refugees and displaced persons within the following areas:
> (a) minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection

A careful reading suggests an affirmative answer, as this provision actually covers two groups for which certain minimum standards shall be devised. One will contain certain displaced persons from third countries, and the other would consist of persons who otherwise need international protection. It should be noted that there is no express reference to the qualification of beneficiaries as in Article 63(1)(c). It could be argued that Article 63(2)(a) would allow for a stipulation of categories by the EU Council without laying down an obligation to do so. Presently, Member States seem to accept this provision as a basis for deliberations on the harmonization of protection based on human rights instruments.[51]

The discourse on temporary protection has indicated that Member States have been reluctant to define categories of beneficiaries of such an order. This reluctance is expressed quite unambiguously in the 'Council Resolution on Burden-Sharing with Regard to Admission and Residence of Displaced Persons on a Temporary Basis of 25 September 1995'.[52] Its personal scope comprises various categories of vulnerable persons 'whom Member States are prepared to admit on a temporary basis under appropriate conditions in the event of armed conflict or civil war, including where such persons have already left their region of origin to go to one of the Member States'.[53] Clearly, these categories must be taken as mere exemplifications without any definite character. The European Commission's proposal for a 'Joint Action on Temporary Protection'[54] uses the same technique of exemplifying rather

[51] One could also argue that Art. 63(3)(b), covering measures on illegal immigration, could lend itself as a basis for an express exemption of categories protected from repatriation. This alternative appears, however, somewhat far-fetched.

[52] [1995] OJ C262/1. According to the draft list, this instrument is part of the *acquis*.

[53] *Ibid.*, Art. 1(a).

[54] Amended proposal for a joint action concerning temporary protection of displaced persons (presented by the Commission pursuant to Art. 189a(2) of the EC Treaty): COM(1998)372 final/2.

than defining. Article 1 of this proposal contains a non-exhaustive list of beneficiary groups, at best serving inspirational purposes. Article 3 regulates how a temporary protection regime is initiated in a given situation. A relevant Council decision shall also determine the groups of beneficiaries. This solution may be characterized as an *ad hoc* harmonization of protection categories. While it retains a great margin of discretion for Member States in picking and choosing categories of beneficiaries for a given Temporary Protection regime, Article 3 of the Proposal has the advantage of blocking the spiral of restriction for the period after the launching of the regime.

As a consequence of a Danish initiative within the Council, a questionnaire on protection subsidiary to the 1951 Refugee Convention has been circulated amongst Member States.[55] Moreover, a study on the same subject has been undertaken by the Secretariat of the Council.[56] It is too early yet to predict the outcome of this initiative. For the functional reasons expounded above, the present state of affairs is clearly dissatisfying, as continued divergence between protection categories may result in reception inequalities between Member States as well as protection differences for individuals. It follows that future co-operation needs to widen the scope of harmonization from the refugee definition to other categories and has to be given a binding and concrete form devoid of exceptions.

3. The Substantial Content of the 1996 Joint Position In the preceding sub-section, we addressed the formal aspects of harmonization. Nevertheless, the sole achievement of category harmonization—the 1996 joint position—also has some material implications worthy of reflection. Thus, before adopting a 'measure' under Article 63(1)(c) (*ex* Article 73k), the criticism directed against the content of the 1996 joint position should be contemplated by the Member States. This criticism has been focusing mainly on the issue of the extent to which the 1951 Refugee Convention offers protection to the victims of persecution by third parties.[57]

Generally, the following situations must be kept distant when discussing persecution by third parties:

1. Persecution by state agents.
2. Acquiescence by state agents of persecution carried out by non-state agents.
3. Incapacity of state agents to hinder persecution carried out by non-state agents.

Cases of direct violations under the first and second categories are rather unproblematic in this context, while the third category represents the focal point of the dispute on persecution by third parties. Precisely as in the second category, violations are committed by private actors. But unlike the second category, however, the State

[55] Note from the General Secretariat of the Council to the Migration and Asylum Working Parties, 'Summary of replies concerning the national instruments of protection falling outside the scope of the Geneva Convention—Subsidiary protection': Doc. No. 13667/97 ASIM 267 (6 Jan. 1998).

[56] Note from the General Secretariat of the Council to the Migration and Asylum Working Parties, 'Study on the international instruments relevant to subsidiary protection': Doc. No. 10175/98 ASIM 178 (13 July 1998).

[57] See UNHCR RO Bonn, Press Release, 'UNHCR äussert Bedenken zur europäischen Asylpolitik', 24 Nov. 1995. ECRE, 'Note from the European Council on Refugees and Exiles on the Harmonization of the Interpretation of Article 1 of the 1951 Geneva Convention', June 1995.

is simply unable to offer protection. In extreme cases, inability to control is due to the vanishing of State structures altogether. For the latter situation, the term 'failed State' has been introduced. In times when civil war has become the dominant form of armed conflict, the implications for protection under the 1951 Refugee Convention, in terms of the numbers likely to be involved, can hardly be overestimated.

A comparative analysis commissioned by the Dutch Ministry of Foreign Affairs concludes that for Canada, the UK, Sweden, Italy, and the Dutch District Court (*Arrondissementsrechtbank*) governmental complicity in persecution is not essential, while the opposite is true for Germany, Switzerland, France, and the Dutch Council of State (*Raad van State*).[58]

The 1996 joint position mirrors the difference in interpretation between individual Member States in a very graphic fashion. To start with, paragraph 5.2 of the 1996 joint position states that:

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

This wording was the result of a French compromise proposal, mediating between inclusionary and exclusionary positions.[59] It seems to suggest deliberateness in state failure to act as the guiding criterion without entirely clarifying the consequences. One reading would be that such cases are either excluded from protection at large, or at least from protection offered under the 1951 Refugee Convention. Such a reading would point to the argument that the establishment of a guiding criterion is meaningless if free choice between inclusion under and exclusion from the scope of the 1951 Refugee Convention was intended to continue. But it could also be argued that the wording does not expressly inhibit States from including such cases under the scope of the 1951 Refugee Convention. This interpretation would point to the wording, 'in accordance with national judicial practice', in the second sentence and, 'in any event', in the third sentence as indicators of such a discretionary margin. More problematic than this ambiguity, though, is the fact that paragraph 5.2 condones the existence of irreconcilable interpretations of the refugee definition.

However, one Member State felt the need to state that the third category may very well be included under the scope of the 1951 Refugee Convention. In a statement for the Council Minutes, the Swedish delegation said it was:

> of the opinion that persecution by third parties falls within the scope of the 1951 Geneva Convention where it is encouraged or permitted by the authorities. It may also fall within the scope of the Convention in other cases, when the authorities prove unable to offer protection.

[58] B. Vermeulen *et al.*, *Persecution by Third Parties* (1998), 34.
[59] For the drafting history of the 1996 joint position, see *ibid.*, at 31–2.

This clear divergence proves a point made earlier, namely the limited harmonization potential of the 1996 joint position. It gives rise to concern, though, that a restrictive position gained entry to the document, while the inclusive position was relegated to a mere interpretatory statement. The least that can be said about the 1996 joint position is that it offers a presumption for the exclusion of cases under the third category.

Ultimately, the dispute on persecution by third parties hinges on the choice between particularism and universalism. The universalist approach focuses on the protective needs of the individual and denies a contingency of extraterritorial protection on state agency. Instead, it seeks to establish a direct legal relationship between the victim of a violation and the State from which extraterritorial protection is sought. The particularist approach relies mainly on an idea of international law as an inter-State phenomenon. Without state agency, there is no attributability of violations to a State. Without attributability, the violation is beyond the protective scope of international refugee law. In the case of failed States, particularists have to accept that the obligation to protect human rights vanishes in a black hole in the universe of state responsibility.

What would be a viable base for trespassing the ambiguity of the 1996 joint position in a future measure under Article 63(1)(c) (*ex* Article 73k)?

First, it has been shown that it is illogical to exclude *persecution* by third parties from the scope of the 1951 Refugee Convention while operating the concept of internal flight to the extent that it relies on the *protection* of third parties.[60] While third-party activities are stated not to have a bearing on the availability of extraterritorial protection in the former case, the opposite is true in the latter. Thus, legal coherence would be promoted if issues of persecution by third parties, 'failed States', civil war, and internal flight alternatives were dealt with in an interrelated manner.

Secondly, normative coherence would also demand that account be taken of the case law of the European Court of Human Rights. The Court has summarized its position by stating that the 'principle' of extraterritorial protection under Article 3 ECHR:

> has so far been applied by the Court in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanates from intentionally inflicted acts of the public authorities in the receiving country or from those of non-state bodies in that country when the authorities there are unable to afford appropriate protection.[61]

This position has been further expounded elsewhere in the Court's case law.[62]

While the European Court of Human Rights refrained from formulating a theoretical base for its findings, the doctrine of negative and positive obligations fits well as an explicatory framework. By signing human rights instruments, States have taken upon themselves a negative obligation to refrain from violating certain rights, as well as a positive obligation to protect certain rights. This positive obligation includes cases in which third parties act as perpetrators. Clearly, failure to protect may

[60] For the drafting history of the 1996 joint position, 14 and 22.

[61] *D* v. *UK*, ECHR Reports 1997–III, No. 37, at para. 49.

[62] *Chahal* v. *UK*, ECHR Reports 1996–V, No. 22; *Ahmed* v. *Austria*, ECHR Reports 1996–VI, No. 26; *HLR* v. *France*, ECHR Reports 1997–III, No. 36.

also represent a human rights violation when intention by the State is lacking. Thus, a particularist and restrictive reading of the 1951 Refugee Convention with regard to the third category would bring it at odds with the underlying structure of human rights law at large.

It should be emphasized that persecution by third parties is not the only issue on which Member States diverge in their interpretation of the 1951 Refugee Convention. By way of example, the question whether gender-related cases of persecution are within the scope of this instrument is far from clear in European practice. The 1996 joint position is silent on the issue, while strong legal arguments militate for the inclusion of such cases on the grounds of political opinion, religion, or membership of a particular social group.[63] A future instrument under Article 63(1)(c) would provide an opportunity to augment coherence in this regard.

4. The Future of Protection Categories in Europe Given the importance of protection categories as steering parameters for the whole system of protection, how is the latter affected by the current normative and political developments? The preceding analysis has exposed the following problems:

- The harmonization of protection categories lacks bindingness and comprehensiveness.
- As long as the framework of temporary protection contains no protection category in its own right, it is unfit for harmonization purposes.
- No provision is made for a protection category based on norms of human rights law prohibiting *refoulement*.
- Areas of protection properly covered by the 1951 Refugee Convention or human rights instruments such as the ECHR are relegated to national law and the normative grey zone of temporary protection.
- The scope of the protection category contained in the 1951 Refugee Convention is restricted by the exclusion of persecution by third parties which the State is incapable of controlling.

It is not easy to offer a diagnosis based on the variety of symptoms dealt with above. One possible reading would be that Member States' consensus does not go further than a restrictively interpreted 1951 Refugee Convention as the sole mandatory basis for protection, apart from a highly discretionary framework of either national law categories or a harmonized form of temporary protection. To say the least, such a conception would not only stretch the ordinary canons of interpretation with regard to the 1951 Refugee Convention, but also represent a systemic disregard of the protection imperatives enshrined in human rights law.[64]

[63] See generally H. Crawley, *Women as Asylum Seekers: A Legal Handbook* (1997); T. Spijkerboer, *Women and Refugee Status* (1994); K. Folkelius and G. Noll, 'Affirmative Exclusion? Sex, Gender, Persecution and the Reformed Swedish Aliens Act' (forthcoming 1999 in *IJRL*).

[64] The move from law to discretion would be exacerbated if Member States permitted themselves to postpone refugee determination under a temporary protection regime. The Commission's Proposal accomodates such decisions of postponement under national law. See its Art. 10(2).

B. Controlling or Preventing Arrival

1. Introductory Remarks on Non-admission and Non-arrival Policies The commitment to refugee protection is not exclusively a matter of protecting refugees who come within the jurisdiction of European States and request asylum in their territories. Although territorial asylum traditionally is the core feature of protection, and the present refugee regime was premised on the idea of free access to apply for asylum for those who managed to get out of their country of origin, it has become even more evident that protection needs go further than that. For many refugees moving to Europe or other developed regions is simply not an option, due to a variety of circumstances forcing them to remain within their region of origin.

In recent years this reality has been systematically reinforced by the policies of the very same States that were traditionally open to persons in search of protection. An array of mechanisms introduced by EU Member States since the mid-1980s have the effect of blocking access to European asylum procedures. While such policies are normally justified as combating illegal immigration and abuse of the asylum system, they have significantly changed the balance between immigration control and refugee protection. As further analysed below, these policies have undoubtedly been detrimental to the latter.

The existence of protection needs outside the EU territories is a fact that has to be taken into account within the framework of the common foreign and security policy, the objectives of which include the development and consolidation of respect for human rights and fundamental freedoms.[65] Devising mechanisms of extraterritorial protection is all the more called for as the needs partly result from the policies of the EU and its Member States. To the extent that protection problems remain unsolved, and are possibly even increased, by the asylum policies pursued, they ought to be met with compensating foreign policy measures. It is therefore relevant to look at policies and practices having the effect of 'externalizing' the problems of refugee protection.

Some procedural mechanisms can be seen as features of a *non-admission* policy, because they set up restrictive criteria of admissibility to the asylum procedure.[66] These mechanisms may reflect an inadequate balance between control and protection, yet they are still based on the principle that each and every asylum application must be examined on its merits. On the other hand, the policies discussed here are characterized by the *absence* of examination of applications; they operate as barriers for asylum-seekers to access a jurisdiction where they could seek protection and receive it, if necessary. Such policies simply keep asylum-seekers 'from the procedural door',[67] in the sense that they aim to prevent them from having their refugee status determined and their need for protection examined. This phenomenon can therefore be most precisely described as *non-arrival*[68] policies. At worst, they may result in exposing people to the risk of persecution, by blocking their flight from the country of

[65] Art. 11(1) (*ex* Art. J.1) EU Treaty. [66] See IV. D, below.
[67] G.S. Goodwin-Gill, *The Refugee in International Law* (1996), 333.
[68] The notion of *non-entrée* covers largely the same phenomenon: see J.C. Hathaway, 'The Emerging Politics of Non-Entrée' (1992) 91 *Refugees* 40–1.

origin or their onwards movement from unsafe transit countries from which they may be forcibly returned to the home country.

The legal mechanism around which non-admission and non-arrival policies have evolved is the requirement that citizens of certain States must be in possession of a visa to enter EU Member States. While visa policy as such is a traditional and legitimate element of States' control over the entry of foreigners to their territory, the *enforcement* of such requirements is the crucial matter from a human rights perspective. As long as compliance with visa requirements is being monitored by the country of destination, it is a normal feature of sovereign border control aimed at persons within its jurisdiction; this jurisdiction has to be exercised in conformity with international law, and accordingly entails the responsibility of the acting State.

European States have devised methods largely moving the control *away* from their own frontiers, thus apparently absolving themselves of the responsibilities that would otherwise be incurred. As the balance between immigration control and refugee protection is shifting, and control is 'externalized' to take place outside the territory of the State of destination, responsibility under international law may eventually become diffused. The extent to which this objective is actually achieved depends on the specific mechanisms employed by States.[69] Various legal notions have been introduced in this connection, some of which are turning into legal fictions, as will become clear from the following.

The particular role of the EU in this development of externalized immigration control is twofold. Under the harmonized policies visa requirements have been adopted for almost every country whose nationals would statistically have a well-founded claim to refugee status; although Member States might have invented similar policies on their own, the EU harmonization of visa policies implies that Member States are bound to adhere to such measures designed to prevent the arrival of asylum-seekers.[70] Furthermore, the means of control have been harmonized in a way which reinforces the tendencies of externalization. In sum, both the substantive policies and the enforcement measures adopted at the EU level are such that the Union must be considered an important actor in the development of non-arrival policies, and therefore ought to take this into account in designing future asylum *and* foreign policies bearing on refugee protection.

2. Carrier Sanctions The combination of visa requirements and sanctions on transport carriers for bringing passengers without a valid passport and visa engages carriers in immigration control. This mechanism reduces the costs of control and asylum procedures, and it may as well relieve States of their responsibility for actions taken by private companies. Their document inspection takes place within a framework not formally defined as border control. In reality, however, transport companies act under the instruction of States, under threat of being sanctioned for non-compliance.

[69] Cf. Goodwin-Gill, note 67 above, at 141–5 and 252; J.C. Hathaway and J.A. Dent, *Refugee Rights: Report on a Comparative Survey* (1995), 10–17.

[70] Council Reg. 2317/95 determining the third countries whose nationals must be in possession of a visa, adopted in pursuance of Art. 100 C EC Treaty [1995] OJ L234/1; see also Joint Action of 4 Mar. 1996, adopted by the Council on the basis of Art. K. 3 (now Art. 31) of the EU Treaty, on airport transit arrangements [1996] OJ L63/8.

From the nature of the sanctions system it seems to follow that carriers' refusal of embarcation is part of the enforcement of visa policies. Although indirect in terms of organizational setting, this is an expression of state sovereignty, like that carried out at the border of arrival. It is therefore arguable that it implies responsibility for the State engaged, in an essentially similar way to cases of ordinary exercise of jurisdiction. This obviously runs counter to the total absence of human rights considerations and the failure to introduce specific regulations for undocumented passengers in need of protection. Therefore, as concluded by various experts, the effects of carrier sanctions are incompatible with basic norms and principles of international refugee law.[71]

Notwithstanding its legal objectionability, this mechanism of immigration control has become even more widespread since the mid-1980s; perceived as efficient and at the same time invisible, it seems to be so well-established that it is rather unlikely to be discarded by States. Instead, international air transportation standards have been amended so as better to fit with this control strategy.[72] Particularly interesting in the context of EU asylum policies, carrier sanctions have been codified as a compulsory control mechanism under the 1990 Schengen Convention,[73] now in the process of being integrated into EU/EC law in consequence of the Treaty of Amsterdam. [74]

3. Extra-territorial State Jurisdiction Another version of 'external' control is the practice of some European States of posting immigration officers at their diplomatic missions in countries from which they want to reduce exit movements towards their borders. While these officers' jobs may partly be ordinary administrative activities, there are quite worrying examples of functions with evident human rights implications. Being carried out by official state authorities, such control functions effectively breach the illusion of privatized control so far asserted in relation to carrier sanctions.

Relatively little information has been published about these external (im)migration control activities. However, posted immigration officers have been reported to carry out training of airlines' check-in staff in airports which might serve as exit points for passengers with false documents or no documents at all.[75] This is already tantamount to taking over important elements of the functions from transport companies whose private organization might otherwise be the legitimate basis of delegating control, and thereby also responsibility.

[71] UNHCR, *Transport Carriers and Refugee Protection*, Working Paper for the Tenth Session of the ICAO Facilitation Division, ICAO Doc. FAL/10–WP/123 (1988); H. Meijers, 'Possibilities for Guaranteeing Transport to Refugees' in M. Kjærum (ed.), *The Role of Airline Companies in the Asylum Procedure* (1988), 17; E. Feller, 'Carrier Sanctions and International Law' (1989) 1 *IJRL* 48.

[72] Cf. J. Vedsted-Hansen, 'Amendments to the ICAO Standards on Carriers' Liability in Relation to Immigration Control' in M. Kjærum (ed.), *The Effects of Carrier Sanctions on the Asylum System* (1991), 23.

[73] Art. 26 of the 1990 Schengen Convention obliges States Parties to introduce carrier sanctions.

[74] Prot. to the Amsterdam Treaty, integrating the Schengen *acquis* into the framework of the EU. This is not the first attempt to introduce carrier sanctions as a formal element of EC law; a provision to the same effect was included in Art. 14 of the 1991 Draft Convention on the Crossing of the External Borders of the Member States of the EC (SN 2535/91 (WGI 829) (1991)).

[75] See, e.g., Danish Immigration Service, *Rapport om udlændingeattachéer* (Report on immigration attachés) (1997).

European immigration officers also personally carry out control of travel documents in foreign airports; in doing so, they may co-operate closely with the border police authorities of the exit or transit country in which they are acting. These controls may result in the refusal of transportation of some passengers, in accordance with the terms of reference of the officers in action.[76] Yet there is no indication of the nature of the inter-state police co-operation, nor of possible reservations due to the human rights record of the partner States. Similarly, it is unclear whether protection aspects will be taken into account in order to modify the purely technical control of travel documents, in accordance with human rights norms.

Again, what might already be invented and practised by Member States has now become a part of the EU *acquis*. In 1996 the EU Council adopted a joint position on 'pre-frontier assistance and training assignments', setting up objectives and guidelines for such extra-territorial control activities, such as the following:

> *Whereas* checks carried out on embarkation on to flights to Member States of the European Union are a useful contribution to the aim of combating unauthorized immigration by nationals of third countries, which, pursuant to Article K.1(3)(c) of the Treaty, is regarded as a matter of common interest;
> *Whereas* the posting to airports of departure of Member States' officers who are specialized in such checks, to assist the officers who carry out checks on departure locally on behalf of the local authorities or on behalf of the airlines, is a means of helping to improve those checks, as is also the organizing of training assignments aimed at airline staff;
> ...
> Article 1 Assistance Assignments
>
> 1. The joint organization of assistance assignments at third-country airports shall be carried out within the Council with full use being made of the possibilities for cooperation offered.
> 2. Assistance assignments shall have as their objective the provision of assistance to officers locally responsible for checks either on behalf of the local authorities or on behalf of the airlines.
> 3. Assistance assignments shall be carried out in agreement with the competent authorities of the third country concerned.
> 4. Assistance assignments may be of varying duration. For this purpose, a list of airports at which joint assignments could be carried out on a temporary or permanent basis shall be drawn up . . .[77]

In the absence of human rights and refugee protection considerations, it cannot be ruled out that these control activities affect people in need of protection, blocking their access to asylum procedures. This may in consequence lead to human rights violations, either in a country of transit where such people may be considered illegal entrants, or in their country of origin; some individuals will be prevented from leaving that country in the first place, others may be returned in spite of the principle of *non-refoulement*, and thereby eventually exposed to risk of persecution.

To the extent that such human rights violations result from the pre-screening of passengers in airports through which they might otherwise arrive at EU borders,

[76] *Ibid.*
[77] Joint position of 25 Oct. 1996 defined by the Council on the basis of Art. K.3(2)(a) (now Art. 31) of the TEU, on pre-frontier assistance and training assignments [1996] OJ L281/1.

carried out or assisted by officials of potential destination States, the involvement of EU States seems sufficiently active to engage their responsibility under international law. Thus, in contrast to the possible discharge by means of invoking the private nature of the agents of control carried out by transport companies, here States have abandoned the legal construction of delegated powers and exercise actual jurisdiction. It is consequently beyond doubt that they will be responsible for human rights violations that may occur following the extra-territorial immigration control. Yet the co-ordinated EU measures to this effect have apparently failed to take this aspect into account, by simply (re)defining the exercise as one of 'combating unauthorized immigration'.

4. Exit Control by Third Countries Replacing Immigration Control As a kind of ultimate step towards 'externalizing' immigration control, the EU has recently moved into more direct co-operation with third States in order to have their authorities undertake control functions which would otherwise be carried out upon arrival in EU States. Thus, immigration control is not only moving out to the extra-territorial sphere, but furthermore shifting into *exit* control and, according to the same logic, taken over by the authorities of third countries from which the unwanted persons in question are supposed to attempt to move on towards EU territory.

This may seem just a gradual development from the 'external' control practices described above. The formal organization, however, leads to qualitative differences when enforcement is left with a third State. Compared to posted immigration officers and 'pre-frontier assistance and training', control measures carried out by third-country authorities, fully under their terms of reference, are likely to be less transparent and less susceptible to influence from the EU States on whose behalf they have been undertaken. Another difference is the measures accompanying delegation of control. While assistance programmes in Central Europe have involved the reinforcement of border controls, they also aimed at enabling transit countries to improve their refugee protection systems. Indeed, preventing asylum-seekers from continuing towards the West, and allowing for the return on 'safe third-country' grounds of those who do so anyway, is an important element of assistance programmes.[78] What distinguishes them from the control delegation here discussed is the capacity-building effort which was normally an essential part of these programmes.

Similar efforts have not been given high priority in recent initiatives to prevent people from seeking asylum in EU countries. Following the quite high numbers of Iraqi asylum-seekers in Western Europe in the past few years, and in particular the increased numbers arriving in Italy during the winter of 1997–8, the EU Council adopted an action plan on the 'influx of migrants from Iraq and the neighbouring region'.[79] The language used and actions proposed are particularly remarkable given

[78] As an example, the Nordic States' programmes in Estonia, Latvia, and Lithuania, partly driven by fear that great numbers of asylum-seekers might arrive from transit countries further East via the Baltic States, could be mentioned. See J. Vedsted-Hansen, 'Immigration and Asylum in Scandinavia: Losing Innocence in Europe?' (1996) 7 *Oxford International Review* 24.

[79] EU action plan on the influx of migrants from Iraq and the neighbouring region, adopted by the EU General Affairs Council, 26–27 Jan. 1998 (5573/98 ASIM 13) (hereinafter EU Action Plan).

the fact that a mass influx had not occurred into any EU country, neither had such a situation been imminent.[80]

In a far-reaching version of the 'externalized' approach to immigration control, the action plan sets up an array of control measures. Some of these will engage the authorities of non-EU States; interestingly, Turkey plays a key role among the third countries.[81] The Union's protective response is relatively modest, being limited to exchange of information, policy review, monitoring of humanitarian needs, and the like.[82] In general, control measures seem far more operational than the few protection-oriented measures included in the action plan.[83] In the section entitled 'combating illegal immigration' it describes a number of measures to be taken by the EU or Member States, among which are the following:

> 26. The Council to ensure *effective application* of the Joint Position on *pre-frontier* assistance and training assignments in relation to *countries of origin and transit*.
>
> 27. Member States . . . to promote joint missions to *specific departure points* to train carriers in the detection of false documents in accordance with the Joint Position on pre-frontier assistance.
>
> . . .
>
> 29. Member States to arrange *training and exchanges* between officials of Member States and *third countries concerned* . . .
>
> . . .
>
> 32. Member States to *exchange officials* by mutual agreement, both between themselves and with the *third countries concerned*, in order to observe the effectiveness of measures to prevent illegal immigration.
>
> 33. Member States to *send experts to the third countries concerned*, by mutual agreement, to advise on the *operation of controls at land and sea frontiers*.
>
> 34. Member States with particular experience to share technical knowledge and expertise with other Member States and . . . with the *third countries most heavily affected*.
>
> 35. Routine and effective implementation by Member States at national level of *security measures and carrier's liability legislation* against carriers bringing undocumented passengers and passengers with forged documents to the EU . . .[84]

The action plan can be characterized as a strategy for the containment of asylum-seekers in 'third countries concerned', primarily Turkey. Whereas the affected individuals have been termed 'illegal migrants', and their displacement 'illegal immigration', the document does not provide any qualification of these notions as opposed to refugee protection. Although 'migrants from Iraq' may have complex motives to leave that country, they are to a large extent genuine refugees. Hence there is a presumption that they are in need of international protection which they

[80] This assessment is in accordance with UNHCR's position; in consultations with EU and Member States UNHCR held the view that, in spite of the increasing numbers and their concentration in a few countries, the number of Iraqi asylum-seekers could not be considered a mass influx.

[81] It is noteworthy that Turkey has made a geographical reservation pursuant to Art. 1 B of the 1951 Refugee Convention, thus having no Convention obligations towards non-European refugees.

[82] EU Action Plan, note 79 above, at paras. 4–6 (on humanitarian aid) and 7–12 (on 'effective application of asylum procedures').

[83] Cf. J. van der Klaauw, 'European Union' (1998) 16 *NQHR* 92–3.

[84] EU Action Plan, note 79 above (emphasis added). More specified proposals for implementing the Action Plan were set out by the Presidency in a note of 29 Jan. 1998 to the third pillar working groups on asylum, EURODAC, Migration, Visa and Europol, and CIREA and CIREFI (5593/98 ASIM 15).

have often not been able to find outside Europe.[85] Processing their cases might rebut this presumption, yet control measures blocking access to asylum procedures do not become more legitimate by redefining asylum-seekers into the non-deserving category 'illegal migrants'.

If this is the overall objective of the action plan, the main 'relevant third country' seems to have understood the message. On a follow-up mission EU representatives met Turkish officials who expressed their interest in increased information, exchange, and technical assistance in tackling 'illegal immigration'. Furthermore:

> [a]s regards asylum issues, the Turkish authorities mentioned their plans to establish reception centres for illegal migrants, but were reluctant to involve UNHCR in the process of screening asylum applicants . . .
>
> The Turkish authorities did not see UNHCR involvement in the reception houses as appropriate, since only illegal immigrants would be held there, nor were they happy to see closer co-operation generally on this issue with UNHCR. They could, however, accept a contribution (most obviously by UNHCR) in screening training provided to Turkish border guards.[86]

The EU involvement in organizing controls operated by third-country authorities provides strong reasons to assume that, if the action plan is implemented, EU States will incur responsibility for this more or less indirect exercise of jurisdiction. Considering the evident (and intended) implications for refugee protection, the disregard of human rights concerns is striking.

Given the extra-territorial framework, the very rationale of this kind of immigration control, it would be inadequate to pretend to mitigate the effects merely through external border-crossing measures as those to be adopted under Article 62(2) (*ex* Article 73j) of the EC Treaty. While certain human rights-based modifications will have to be included in such legislation, refugee policy has manifestly been brought into the arena of foreign relations, beyond the traditional scope of asylum and immigration policies. The logical consequence is therefore to develop future asylum strategies so as to make protection available extra-territorially for those asylum-seekers who are affected by the 'externalized' controls.[87]

C. Sharing the Burden of Responsibility

1. Burden-sharing in the EU? Under international law, there is no binding norm prescribing the sharing of costs in connection with inequitable reception of persons in need of protection.[88] Burden-sharing must be properly understood as a functional

[85] This is confirmed by UNHCR assessments of the status of the persons involved, and certainly also by the practices of national asylum authorities in European countries which would be likely to recognize the need of protection for many Iraqi asylum-seekers, were they to have their cases examined.

[86] Note from the Presidency to the K.4 Committee (6938/1/98 Rev. 1, ASIM 78), 21 Apr. 1998, at paras. 3 and 9. Police authorities also identified the need for 'enhanced co-operation and support from UNHCR to assist in the return of failed asylum seekers' (at para. 6).

[87] This has been recognized in principle, yet with limited protective ambition, in the proposals for implementing the action plan. In the note of 29 Jan. 1998 (5593/98 ASIM 15), the Presidency 'recognizes the clear Second Pillar element to this action point' (referring to point 7 of the action plan).

[88] However, an effort to endow burden sharing with the quality of an obligation under customary law is made in J-P.L. Fonteyne, 'Burden Sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees' (1983) 8 *AYBI* 175ff. Fonteyne holds that States are

prerequisite for the observation of the norm prohibiting *refoulement,* the preservation of protection capacities, and access to territory of potential host States. However, it is not a *legal* prerequisite for compliance with the norm of *non-refoulement*.

In Western Europe, norms levelling out inequalities in reception, making the onus for single States predictable and thereby maintaining States' willingness to receive those in need, are still lacking to a large extent.[89] This became particularly clear as the Balkan conflict dragged on. The largest populations of protection seekers from Bosnia were found in Western European countries which were either geographically proximate or already hosting immigrant communities from former Yugoslavia. In descending order, *per capita*, Austria, Sweden, Germany, and Switzerland[90] received most of these. In total numbers, Germany alone had accommodated 63 per cent of all Bosnian refugees hosted by EU Member States.[91]

It is of interest to track the relevant normative developments in the EU context. Burden-sharing was declared to be one of the issues to be examined by the Council in 1994 according to the priority work plan for that year. Accordingly, the German presidency presented an ambitious 'Draft Council Resolution on Burden-sharing with Regard to the Admission and Residence of Refugees'[92] in July 1994. However, the draft had difficulty in attracting the necessary support.

During the Spanish presidency, a limited consensus on burden-sharing had finally begun to develop, as the adoption of a 'Council Resolution on Burden-sharing with Regard to Admission and Residence of Displaced Persons on a Temporary Basis' on 25 September 1995 indicated.[93] This instrument is part of the asylum *acquis*.[94] How does the German draft of 1994 compare to the 1995 Resolution?

The most daring feature of the draft was to propose a specific distributive key which 'could be used by Member States'.[95] This key was based on Member States'

—percentage of the total Union population;
—percentage of Union territory; and
—percentage of the Unions' Gross Domestic Product.

obliged to practise burden-sharing by customary law. Perluss and Hartman argue that the international community chose not to mould burden-sharing into an obligatory form, as this would risk weakening rather than strengthening protection, providing front-line States with an excuse for *refoulement* if no assistance from less affected States were to materialise: D. Perluss and J. Hartman, 'Temporary Refuge: Emergence of a Customary Norm' (1986) 26 *Va.J.Int'l L.* 588.

[89] For a full account of the normative and factual developments regarding European burden-sharing in the 1990s, see G. Noll, 'Prisoners' Dilemma in Fortress Europe: On the Prospects for Equitable Burden Sharing in the European Union' (1997) 40 *GYIL* 405. For a global account on the topic, see Secretatiat of the Inter-Governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia, *Study on the Concept of Burden-Sharing* (1998).

[90] At the time, Austria and Sweden had not acquired membership of the European Union. Switzerland was not and is not a member of the EU.

[91] Address by Udo Heyder, Federal Ministry of the Interior, *Hohenheimer Tage des Ausländerrechts 1997*, 31 Jan. 1997.

[92] Doc. No. 7773/94 ASIM 124 (hereinafter the draft).

[93] [1995] OJ C262/1 (hereinafter the 1995 Resolution).

[94] Draft List, note 42 above, at para. I. C.

[95] The draft, note 92 above, at para. 7.

Each of these criteria should be given equal weight. The draft featured a table of indicative figures[96] for each Member State which were to be revised every five years by joint agreement. The possibility of departing from these figures by joint agreement was expressly provided for in paragraph 8 of the draft.

The centrepiece of the envisaged redistribution mechanism was contained in paragraph 9: '[w]here the numbers admitted by a Member State exceed its indicative figure under paragraph 8, other Member States which have not yet reached their indicative figure under paragraph 8 will accept persons from the first Member State'.

Accordingly, the draft intended to introduce compulsory resettlement, relying on a distributive key. However, a reduction of reception obligations was envisaged with respect to military expenditure triggered by intervention in the refugee-producing crisis[97] and the Convention refugee population already present in a Member State.[98] In terms of *realpolitik*, the resistance to the draft can be explained by the fact that Germany would have been its first beneficiary, with additional reception responsibilities falling upon all other Member States.

Turning to the 1995 Resolution, it is striking to see that the indicative figures have vanished and the stipulated distributive key is devoid of any precision:[99]

> 4. The Council agrees that the burden in connection with the admission and residence of displaced persons on a temporary basis in a crisis could be shared on a balanced basis in a spirit of solidarity, taking into account the following criteria . . .:
>
> —the contribution which each Member State is making to prevention or resolution of the crisis, in particular by the supply of military resources in operations and missions ordered by the United Nations Security Council or the Organization for Security and Cooperation in Europe and by the measures taken by each Member State to afford local protection to people under threat or to provide humanitarian assistance,
>
> —all economic, social and political factors which may affect the capacity of a Member State to admit an increased number of displaced persons under satisfactory conditions.

In a footnote linked to the first paragraph of this Article, it is said that '[t]hese criteria are norms of reference that may be supplemented by further criteria in the light of specific situations'. This statement reveals the contradiction contained in the present instrument. In the preamble, it is correctly stated that 'situations of great urgency . . .

[96] The draft, note 92 above, at para. 7. A look at these figures might help to understand both the German urge and the failing support of other large Member States. In descending percentage order, the figures read as follows: Germany (21.58), France (19.40), Italy (15.83), United Kingdom (14.28), Spain (13.63), Netherlands (3.55), Greece (3.20), Portugal (2.65), Belgium (2.42), Denmark (1.78), Ireland (1.54), Luxembourg (0.12).

[97] Para. 9 of the draft states: 'Member States which are helping, by means of particular foreign and security policy measures in the country of origin of the persons referred to in paragraph 1, to control the refugee situation in the State in question, need not admit the full figure assigned to them under paragraph 8. The resulting shortfall should be covered by the other States in proportion to their indicative figures. Measures of this nature include in particular peace-keeping or peace-making initiatives in the framework of the United Nations, NATO or the Western European Union.'

[98] According to para. 11 of the draft, Convention refugees are set off against the indicative figure in para. 8.

[99] With regard to the vagueness of the given criteria, we omit a detailed discussion of their implications. For a critical analysis, see ECRE, *Comments from the European Council on Refugees and Exiles on the 1995 'Burden Sharing' Resolution and Decision adopted by the Council of the European Union.*

require prompt action and the development beforehand of principles governing the admission of displaced persons'. However, these principles are developed *ex post facto* by the Council. The 'Decision on Alert and Emergency Procedure for Burden-Sharing with Regard to the Admission and Residence of Displaced Persons on a Temporary Basis'[100] operates along the same pattern of tackling a crisis after it has materialized. Consequently, a cautious State would rather block access for refugees than trust in the outcome of this *ad hoc* exercise in the Council.[101]

Nevertheless, the issue of burden-sharing resurfaced in March 1997, when the European Commission launched a proposal on a Joint Action concerning Temporary Protection of Displaced Persons.[102] The European Parliament proposed a number of amendments, but the real obstacles to adoption were some Member States, which were unable to accept a provision on burden-sharing inserted into the proposal. The Commission changed tactics and put forward a new proposal in June 1998. It divided the single draft text of March 1997 into two separate drafts. One joint action would deal with a Union-wide 'Temporary Protection Regime' and contain a number of minimum rights[103] and a mechanism for the common opening up and phasing out of such a regime.[104] Another joint action would be entirely devoted to burden-sharing or, rather, according to the terminology of the Commission, 'solidarity'.[105] With professional optimism, the Commission states that:

> [t]he proposed revision must facilitate the adoption of the text by the Council. In so far as the central question resides in possible solidarity measures, the following strategy is suggested:
>
> - on the one hand, to propose a specific text on solidarity, so that this subject does not delay the progress on temporary protection;
> - on the other hand, the two texts (temporary protection and solidarity in reception and residence) could only enter into force simultaneously, that is to say on the date of adoption by the Council of each of these two instruments.[106]

However, it cannot be ruled out that the Council condones the Temporary Protection Proposal, while rejecting the Solidarity Proposal.

[100] [1996] OJ L63/10. According to the draft list, note 42 above, at para. I. C., this instrument is also part of the *acquis*.

[101] The importance of a detailed and predictable burden-sharing framework seems to have been realized by the authors of the German Draft Resolution. See para. 5 of the draft, note 92 above: '[t]he Council is convinced that if Member States are to be able to react promptly in emergencies, they must first devise an appropriate range of measures for the admission of refugees from war or civil war. Such measures must include prior agreement on principles for distributing refugees. Otherwise there is a risk that, in situations in which prompt action is necessary to avert serious danger to human life, decisions which need to be taken urgently will be delayed by the fact that complicated consultation procedures must first be initiated.'

[102] [1997] OJ C106/13.

[103] European Commission, *Amended Proposal for a Joint Action Concerning Temporary Protection of Displaced Persons (Presented by the Commission Pursuant to Article 189a(2) of the EC Treaty)*: COM(1998)372 final/2 (hereinafter the TP proposal), Arts. 6–9. If the goal of harmonization is to be taken seriously, a deviation from these minimum rights in favour of beneficiaries is improbable.

[104] *Ibid.*, Arts. 3 and 4.

[105] European Commission, *Proposal for a Joint Action Concerning Solidarity in Admission and Residence of Beneficiaries of the Temporary Protection of Displaced Persons (Presented by the Commission Pursuant to Paragraph 2(b) of Article K3 of the EU Treaty)*: COM(1998)372 final/2 (hereinafter Solidarity Proposal).

[106] Communication from Mme Gradin to the Commission, attached to Doc. No. O/98/187, at para. 2.

What exactly is the content of the latter? Primarily, Member States would share the burden by way of a system of financial compensations. First, fixed emergency aid is proposed, limited to the first three months of a crisis and intended to cover accommodation, means of subsistence, and emergency medical assistance.[107] The budgetary support for this item remains to be created. Secondly, reception projects could be financed by using an existing item in the EU budget.[108] This longer-term measure would cover accommodation, social assistance, and education.

While financial burden-sharing is the core of the instrument, a subsidiary provision in Article 5 of the Solidarity Proposal envisages also distributing among different States the burden in terms of those receiving protection. A decision setting up a temporary protection regime 'may also, as a secondary measure, define the rules allowing the beneficiaries of temporary protection to be distributed between Member States, before or on arrival in the territory of Member States'. Lamentably, this is merely a variation on the *ad hoc* mechanism already put in place by the 1995 Resolution. By way of a metaphor, putting trust in this Article means attempting to sign an insurance policy after the occurrence of an accident.

In general terms, a system of financial burden-sharing would be an important step towards the safeguarding of openness *vis-à-vis* persons in need of protection. Such a system will find acceptance only if it moves beyond the present pattern of allocating responsibility and attains the quality of mutual insurance against a certain level of fiscal reception costs. In a long-term perspective, financial burden-sharing could allow for reintroducing liberal elements of choice into protection systems. In an attempt to exploit the integrative potential of family and social networks, Member States could permit claimants to choose a host country in which such a network already exists. The total cost of integration would be diminished, while the relative costs for single States would be redistributed by means of financial burden-sharing. However, the social and political costs of acceptance by and integration into host societies should not be underestimated. As it is difficult to convert the latter into fiscal terms, it is reasonable to assume that some Member States will insist on the development of schemes redistributing persons to be protected.

2. The Dublin Convention: Concentrating the Burden In their attempts to steer the movements of asylum-seekers, the European Union and its Member States have created a rather elaborate mechanism deflecting movements to the Union's territory. It comprises norms of non-arrival (carrier sanctions, pre-exit immigration controls, technical assistance to third countries' exit control, interdiction and containment of asylum-seekers in third countries) as well as norms of reallocation to safe third countries.

The mechanism of deflection impacts not only on single asylum-seekers, but also on the policies and practices of single Member States. The bottom line of the reallocation criteria in the Dublin Convention is that facilitation of entry and failure to re-

[107] Art. 4, Solidarity Proposal, note 105 above; financial statement attached to the Solidarity Proposal.
[108] For 1998, the proposal assumes a need for ECU 3,750,000 for these measures targeted at reception projects: financial statement, *ibid.*

move entails responsibility.[109] Moreover, the criteria disfavour countries with existing populations from countries of origin, as such networks will attract further direct arrivals. Finally, those countries having an external border of the Union will find themselves with a larger proportion of arrivals than countries without such borders. The example of Germany may serve as an illustration for the accumulated effects of the Dublin criteria. Initially, the German government had set high hopes for the Dublin Convention, just to find that its application leaves Germany with a net increase of cases. This increase affects not only applications, but also decisions on accepted requests and actual transfers:

Table 1. The Impact of the Dublin Convention on the Situation of Germany

	Total	*Acceptance*	*Denial*
Requests by other States Parties to Germany	7972	5956 (75%)	1109 (13%)
Requests by Germany to other States Parties	2533	752 (30%)	743 (30%)

Strikingly, the percentage of German acceptances in relation to the total number of requests is higher than the average acceptance percentage of all other States Parties. In the same period, 1,417 people were transferred to Germany, while Germany turned over 365 persons to other States party to the Dublin Convention.[110] This goes to show that the Dublin criteria provide for burden-concentration instead of burden-sharing.

Such consequences form a strong incentive for each single Member State to conduct ever more scrupulous and restrictive visa, admission, and border-control policies, as it cannot put its hope in other States sharing the responsibility for arrivals. Coupled with these restrictions on movements, affected States will downgrade protection benefits. The rationale for doing so is, first, to create a disincentive for potential asylum-seekers and, secondly, to stretch resources.

Turning around the logic of these developments, a burden-sharing mechanism is indeed the key to safeguarding refugee protection on the territory of the Member States. If combined with a material harmonization of protection categories and reception standards, it would mitigate competition for deflection as well as for the downgrading of territorial protection. Ideally, such a mechanism should have been launched concurrently with the mechanisms of migration control, so as to inhibit the latter setting the preconditions for the operation of the former.[111] When applying

[109] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the Community, Dublin, 15 June 1990 (hereinafter Dublin Convention), Arts. 5–7: entered into force, 1 Sept. 1997 [1997] OJ C254/1. It could be discussed whether the family reunion criterion in Art. 4 represents a disincentive for States to grant Convention status, as this may trigger the responsibility to process applications from family members. However, it would be hard to verify such a hypothesis in practice.

[110] Letter of 18 Aug. 1998 by the Federal Office for the Recognition of Refugees (Bundesamt für die Anerkennung ausländischer Flüchtlinge) on the implementation of the Schengen and Dublin Conventions (on file with the authors). Period: 97–09–01 to 98–07–31.

[111] In this respect, it is of interest to compare the development in the EU with the bilateral developments between Germany and Poland. The EU's Member States put a readmission mechanism in place

Article 6 TEU to the area of asylum, equitable burden-sharing imposes itself as a priority measure of decisive importance, irrespective of the exemption of the topic from the time limit set by Article 63 TEC. Sensibly, a viable solution could take into account and compensate for the concentration of claimants in certain countries as a result of the criteria laid down in the 1990 Dublin Convention.

D. Procedures for Admission and Examination of Asylum Applications

1. Allocation of Responsibility Among the measures on asylum to be adopted under the Treaty of Amsterdam is 'criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States' (Article 63(1)(a) (*ex* Article 73k) of the EC Treaty). This obviously aims to establish a first-pillar instrument replacing the 1990 Dublin Convention. It is reasonable to expect that there will be some incitement for copying the Convention into a legislative act, most likely a regulation. The recent coming into force of the Dublin Convention and the five-year time limit for the adoption of this measure increase the likelihood that this will be considered the most opportune solution.

However, there are good reasons for taking this opportunity to reconsider the Dublin Convention criteria and procedure for determining responsibility. In that respect there is an additional basis of experience to draw on, as a similar allocation mechanism has been applied under the Schengen Convention since 1995. Experience suggests that certain elements of the Dublin mechanism be adjusted, even while Member States may not want to re-open negotiations on the basic criteria, i.e. the authorization of applicants' entry or presence in the territory,[112] modified by family or cultural links to a certain Member State.[113]

When adopting an instrument under Article 63 (*ex* Article 73k), it will be timely to assess how the latter criteria are being implemented. Due to the *authorization* criteria asylum-seekers will often be transferred to another EU State for reasons totally unrelated to their personal situations. While the transfers' potentially arbitrary effects on access to protection should be resolved by other harmonization measures, personal and cultural sensitivity must be achieved under the provisions regarding links to a specific country. Here, it might be that too many cases depend on discretionary allocation because of insufficient operation of the criteria concerning family members; and it is possible that Member States do not apply the discretionary provisions in the same manner.

without any link to the question of burden-sharing. By contrast, the named bilateral arrangement seized the opportunity by linking readmission with rudimentary forms of burden-sharing. In both cases, the readmission agreements covering return of third-country nationals (a) contained a burden-sharing clause for cases of massive inflows and (b) was coupled to an agreement on financial assistance: Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Republik Polen über die Zusammenarbeit hinsichtlich der Auswirkungen von Wanderungsbewegungen, 7 May 1993, Arts. 6 and 2.

[112] Cf. Dublin Convention, Arts. 5–7; Schengen Convention, Art. 30(1)(a)–(g).

[113] Cf. Dublin Convention, Arts. 4 (close family; mandatory allocation) and 9 (cultural links; discretionary allocation); Schengen Convention, Arts. 35 and 36. Dublin Convention, Art. 3(4), and Schengen Convention, Art. 29(4), may operate in a similar way, yet also on a discretionary basis.

Moreover, the Dublin Convention has not fully secured access to protection, as was intended. At least two deficiencies can be identified, one being the problem of 'safe third countries' which remains unsolved by the Convention. The other protection-related deficiency partly results from the time-consuming procedure under Articles 11–13 for settling the issue of responsibility upon request for transfer to another State; this procedure may in itself be a reason for the lack of efficiency of the Dublin mechanism.[114]

In order to avoid such administrative complications, Member States may prefer to apply special accelerated procedures to rejecting cases on substantive grounds, even if they feel that another State would actually be responsible for examination. This happened under the Schengen Convention, and a similar practice is likely to occur, though arguably not compatible with Article 3(4) of the Dublin Convention.[115] Thus, the first-pillar instrument needs to include provisions to the effect that such *procedure-shifting* does not undermine the procedural safeguards in asylum cases. The phenomenon described here is connected with the issue of procedures for manifestly unfounded applications, both regarding the definition of this category and the permissible level of safeguard-reduction.[116]

Finally, the *burden-sharing* implications of the Dublin criteria for allocation of asylum-seekers, as discussed above, may be pertinent in the process of adopting measures under Article 63. Should experience prove the Dublin Convention to be evidently inequitable, this would be the chance for Member States to make the necessary adjustments. Alternatively, they may take heed of such problems in the burden-sharing measures to be adopted pursuant to Article 63(2)(b).

2. Pre-procedure Return: 'Safe Third Countries' An additional protection problem related to the Dublin Convention is the practice of returning asylum-seekers to 'safe third countries'. Article 3(5) allows for 'safe third country' clauses in domestic law to take precedence over the Convention mechanism. This results in asylum-seekers being returned to non-EU countries without having their application examined by the Member State that would be responsible according to the criteria in Articles 4–9, despite the objective of securing the examination of every application for asylum (cf. Preamble, paragraph 4, and Article 3(1)). Being another *procedure-shifting* mechanism, this significantly affects the Convention's reliability as an instrument securing access to fair and efficient asylum procedures.[117]

It goes beyond the scope of this chapter to analyse the legal basis and implications of the 'safe third country' notion, employed by States to refuse admission to the asylum procedure on the ground that an application should rather be dealt with by another State.[118] As this notion has become part of the EU asylum *acquis*, future

[114] For instance, bilateral readmission agreements have been concluded between Denmark and Sweden, and between Denmark and Germany, for the purpose of settling cases in a more expeditious manner than under the Dublin Convention procedure.

[115] Cf. van der Klaauw, note 48 above, at 235–6.

[116] See IV. D. 3, below.

[117] Cf. van der Klaauw, note 48 above, at 236–7.

[118] See generally, R. Marx, '*Non-Refoulement*, Access to Procedures, and Responsibility for Determining Refugee Claims' (1995) 7 *IJRL* 383–405; G. Goodwin-Gill, note 67 above, at 333–44; R. Byrne and A. Shacknove, 'The Safe Country Notion in European Asylum Law' (1996) 9 *Harv. HRJ* 185–228; G. Noll, 'Non-Admission and Return of Protection Seekers in Germany' (1997) 9 *IJRL* 416–452;

legislation is bound to deal with its harmonized application. The measure replacing the Dublin Convention would seem the most appropriate instrument to regulate the issue, assuming that this act under Article 63 (*ex* Article 73k) will still have the objective of securing access to examination for every asylum-seeker. Hence, the main legal concerns raised by the *acquis* concerning 'safe third countries' shall be identified. Not only does the problem of 'safe third country' practices persist under the Dublin Convention, due to the prevalence given to domestic law by Article 3(5), it has indeed been exacerbated by the 1992 London Resolution which provides that Article 3(5) must be applied *in advance* of settling the responsibility issue in accordance with the Dublin criteria.[119] In itself a remarkable combination of a Convention *allowing* domestic law to prevail, and a non-binding text *committing* Member States to utilize this scope of action to the widest extent possible,[120] this regulatory mechanism deserves quite thorough scrutiny; the process of adopting first-pillar measures will be the obvious occasion for doing so.

Experience has shown strong reasons for caution in applying the 'safe third country' notion. Apart from the fundamental problem of ascertaining individuals' safety on the basis of presumptions, more concrete problems have occurred regarding, for example, the procedure followed in deportations *vis-à-vis* the asylum-seeker as well as the third country in question; previous links between the individual and the third country presumed to be responsible for examining the case; and the criteria for establishing that a given country is 'safe' for asylum-seekers and refugees. Not surprisingly, a variety of national 'safe third country' practices have developed, and the 1992 London Resolution has not brought about effective harmonization between Member States in this area.[121]

The Resolution sets unfortunately low standards for so-called 'host third countries', hardly in accordance with the 1951 Refugee Convention and human rights instruments to which Member States have committed themselves. Focusing on negative requirements—such as the *absence* of threats to life or freedom within the meaning of Article 33 of the 1951 Refugee Convention, and the *absence* of exposure to torture or inhuman or degrading treatment—the Resolution fails to take account of the positive obligations under international law that have to be fulfilled by an asylum country to which responsibility may be transferred.[122] Whereas the Resolution modestly refers to 'fundamental requirements', thus not excluding the broader meaning of refugee protection obligations, a binding instrument under Article 63 of the EC Treaty ought to be more carefully drafted in this respect.

N. Lassen and J. Hughes, *Safe Third Country Policies in European Countries* (1997); J. Vedsted-Hansen. 'Non-Admission Policies and the Right to Protection: Refugees' Choice v. States' Exclusion?' in F. Nicholson and P. Twomey (eds.), *Refugee Rights and Realities* (forthcoming, 1999).

[119] EC Ministers Resolution of 30 Nov.–1 Dec. 1992 on a Harmonized Approach to Questions Concerning Host Third Countries (SN 4823/92), paras. 1(a) and (d), and 3(a).

[120] The authors are indebted to K.U. Kjær for pointing out this regulatory particularity.

[121] See description of cases and practices in Lassen and Hughes, note 118 above; Peers, note 29 above. 10–14 and 17–20; and in ECRE, *'Safe Third Countries'. Myths and Realities* (1995).

[122] Cf. EC Ministers Resolution, note 119 above, at para. 2. See also R. Fernhout and H. Meijers, 'Asylum', in P. Boeles *et al.*, *A New Immigration Law for Europe? The 1992 London and 1993 Copenhagen Rules on Immigration* (1993), 17–18; UNHCR, *An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR* (1995), 18–20; Goodwin-Gill, note 67 above, at 334 and 338.

3. Special Procedures for Manifestly Unfounded Applications Pursuant to Article 63(1)(d) (*ex* Article 73k) of the EC Treaty, 'minimum standards on procedures in Member States for granting or withdrawing refugee status' shall be adopted within the transitional period of five years. Again, notwithstanding the temptation to carry over the asylum *acquis* to the coming first-pillar measures, it will be timely to rethink the content and structure of existing instruments. As illustrated below, the texts on procedures are lacking precision in defining key concepts; in addition, they give prevalence to domestic law regarding crucial issues.

There is particular reason for reconsideration of the accelerated procedure that can be operated for 'manifestly unfounded' applications; within this category, the standards set for processing asylum cases at the border are likely to be the most problematic. The relevant instruments are deficient in terms of both definition of the cases undergoing accelerated procedures and the level of safeguards to be retained in such procedures. In general, the harmonization of asylum procedures is incomplete.[123] This may indicate a predilection in Member States for procedural flexibility in the international standards, enabling them to assert that national exceptions or restrictions are compatible with these standards.[124]

The 1992 London 'Resolution on Manifestly Unfounded Applications for Asylum' includes a wide range of vaguely defined cases and situations in this category. An application for asylum shall be regarded as manifestly unfounded if it is clear that it meets none of the substantive criteria under the 1951 Refugee Convention, either because 'there is clearly no substance to the applicant's claim to fear persecution in his own country' or because 'the claim is based on deliberate deception or is an abuse of asylum procedures'.[125] If this may be relatively uncontroversial, the examples of cases within the two subcategories are at risk of creating a presumption that applications are *a priori* 'manifestly unfounded',[126] just as they are far from the definition adopted by the UNHCR Executive Committee.[127]

It is not difficult to imagine that the criteria listed may lead from discretion to arbitrariness in allocating cases to special procedures. Certain of these criteria are not necessarily pertinent to the issues of refugee status and protection need; at least, it may take much more than an accelerated procedure to rebut the presumptions on which the criteria are based.[128] In order to balance fairness against efficiency it would be more appropriate to establish a special procedure for cases likely to result in a *positive* decision; 'manifestly well-founded' applications should be given special treatment, reversing the notion of accelerated procedures already recognized.

[123] See Peers, note 29 above, at 6–17.

[124] Cf. the 'Europe *à la carte*' metaphor suggested by Bank, note 26 above, at 10. See also A. Terlow and P. Boeles, 'Minimum Guarantees for Asylum Procedures' in Meijers, note 37 above, at 103–4.

[125] Resolution on Manifestly Unfounded Applications for Asylum, note 28 above, at para. 1(a).

[126] *Ibid.*, at paras. 6, 7, 9, and 10. Remarkably, the wide definition of cases to undergo accelerated procedures is accompanied by a rather modest description of the procedural safeguards involved: see paras. 2–4.

[127] See EXCOM Conclusion No. 30 (1983) in which the Executive Committee defined the category of 'manifestly unfounded' asylum applications in an objective and restrictive manner. Available at http://www.unhcr.ch/refworld/unhcr/excom/xconc/excom30.htm.

[128] Cf. Goodwin-Gill, note 67 above, at 346: '[t]his elision is manifestly inappropriate, begging precisely the question which refugee procedures exist to answer'.

Notwithstanding proposals to this effect,[129] this way of maintaining the balance is not known to have been considered in the EU harmonization process.

As a further cause for concern, some Member States have established accelerated procedures melding examination in *substance* with the formal *admissibility* decision. This was endorsed by the 1995 'Resolution on Minimum Guarantees for Asylum Procedures', irrespective of its expression of the principle that asylum procedures will be applied in full compliance with the 1951 Refugee Convention and other obligations under international law in respect of refugees and human rights.[130] While the asylum-seeker in 'manifestly unfounded' cases may still generally remain in the territory until the final decision,[131] this guarantee has been undermined by leaving the possibility open for Member States to deal with applications in the framework of *border control*. If that is happening, there is no longer any requirement as to the suspensive effect of appeal, and the organizational safeguards relating to the review may be significantly reduced:

> Member States may, inasmuch as a national law so provides, apply special procedures to establish, *prior to the decision on admission*, whether or not the application for asylum is manifestly unfounded. No expulsion measure will be carried out during this procedure.
>
> Where an application for asylum is manifestly unfounded, the asylum seeker may be refused admission. In such cases, the national law of a Member State may permit an *exception to the general principle of the suspensive effect of the appeal* . . . However, it must at least be ensured that the decision on the refusal of admission is taken by a ministry or comparable central authority and that *additional sufficient safeguards* (for example, prior examination by another central authority) ensure the correctness of the decision. Such authorities must be fully qualified in asylum and refugee matters.[132]

Although not a blank exclusion from having an application examined on its merits, this may in effect encourage States to merge substantive determination of the applicant's refugee status with the admissibility decision. Because of the risks inherent in fast decision-making in connection with the exercise of border control, it may consequently lead to a pre-screening of applications which allows access to full examination only for cases *not* considered manifestly unfounded in the summary pre-admission decision.

Combined with the broad and vague definition of 'manifestly unfounded' applications, this implies a possibility that the operation of ordinary asylum procedures will eventually be limited to those applicants who appear *prima facie* eligible for refugee status. Focused on admissibility, and further conditioned on summary assessment of the well-foundedness of applications, the examination mechanism may thus turn into what could be seen as a *proceduralised* approach to the protection issue.

In conclusion, both the 1992 London Resolution and the 1995 Minimum Guarantees Resolution will need to undergo fundamental revision if they are to be part of

[129] ECRE, *Fair and Efficient Procedures for Determining Refugee Status* (1990).

[130] EU Council Resolution of 20 June 1995 on Minimum Guarantees for Asylum Procedures [1996] OJ C274/13, at para. 1; cf. para. 2.

[131] *Ibid.*, at para. 19; cf. para. 17. In such cases the ordinary appeal possibility may be derogated from if an independent body, distinct from the examining authority, has already confirmed the decision.

[132] *Ibid.*, para. 24(2) (emphasis added).

the platform for future EC legislation on asylum procedures. If the wording of Article 63 (*ex* Article 73k), requiring 'minimum standards on procedures', is to be taken seriously, then something more than a formally binding instrument is called for. First and foremost, the repeated deference to domestic law must be abandoned, as the measure to be adopted will be setting out *minimum* standards. The necessity for such standards to be in conformity with generally recognized international standards is emphasized by the fact that under the Dublin Convention every single Member State processes asylum applications on behalf of *all* EU States.[133]

E. Reception During Asylum Procedures

Unlike most issues of future harmonization, the minimum standards on the reception of asylum-seekers to be adopted under Article 63(1)(b) (*ex* Article 73k) of the EC Treaty, will not be replacing any specific instrument already in the EU asylum *acquis*. Our analysis must therefore start by welcoming the fact that this question has now been put on the agenda of the harmonization process. One may naturally ask what kind of standards will be adopted, and which level they can be expected to set for the treatment of asylum-seekers during the period when their applications are being processed.

In the absence of common standards, it seems evident that asylum-seekers are largely left to the discretion and goodwill of the Member State which happens to examine their cases. To the extent that there is a choice of country of examination, the actual conditions for asylum-seekers may be one of the criteria for making that choice, even though hardly a key criterion for most applicants. Correspondingly, granting more favourable conditions than the average of States in the sub-region may be perceived by States as a threatening 'magnet effect'. This in turn could lead States to utilize such standards as one parameter in a 'market strategy' of deterring potential asylum-seekers.

As there is in reality still less freedom of choice for asylum-seekers, the present state of affairs has become unsustainable, rendering the basic living conditions of individuals and families dependent on incidental factors. Thus, the identification of one Member State to be responsible for examining an application on behalf of the whole EU should logically lead to the adoption of common standards not only for asylum procedures, but also for the treatment of applicants during the examination period.

Certain problems will arise in the process of adopting harmonized standards for asylum-seekers. Among these we would mention how reception standards should relate to the 1951 Refugee Convention to which reference is made in Article 63(1); under what circumstances are such standards for persons whose applications are under examination bound to take Convention rights into account? Although this is not normally the case, the result may be different under protracted asylum procedures, especially if procedures have been suspended.

[133] For that same reason, and given the decisive impact of rules of *evidence* in refugee status determination, the instrument should also attempt to harmonize this aspect of asylum procedures; cf. at IV. A. 4, above.

Thus, the treatment of asylum-seekers should be seen in connection with the minimum standards to be adopted under Article 63(2)(a) for temporary protection to displaced persons. Since the proposed temporary protection standards are premised on the suspension of individual case processing, it has to be clarified when, and to what extent, they should be more favourable than the standards of treatment for ordinary asylum-seekers. In any event, general human rights instruments must frame the drafting of reception standards; being at a minimum level, such standards cannot disregard the provisions of 'other relevant treaties' imposing certain obligations on Member States with respect to civil, social, and economic rights.

A particularly controversial issue to be dealt with by the Article 63 measure is the detention of asylum-seekers. Needless to say, the deprivation of liberty as such must be regulated in accordance with Article 5 ECHR and Articles 9–10 of the International Covenant on Civil and Political Rights (ICCPR). Perhaps more complex, the conditions for detained asylum-seekers will have to be settled as well. Here some guidance can be found in the recent Report from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) which includes a section on the standards of treatment for 'immigration detainees', among whom are asylum-seekers and persons refused entry.[134]

From a human rights perspective, it will be interesting to see whether harmonized standards can reverse current trends towards reinforcing deterrent policies by reducing social benefits to asylum-seekers, often combined with procedural restrictions or attempts to prevent individuals from using their procedural rights. In this sense reception standards are not only a logical imperative in the harmonization of asylum policy, but also somehow a litmus test of the commitments to protection in this common policy.

F. Return

1. Background Typically, the substantial determination of an asylum claim may produce two different outcomes. A claimant is either considered to be in need of protection or she is not. If there is a need for protection recognized by international or national law, the individual claimant will be allowed to stay. As a rule, temporary leave to remain pending the outcome of the determination procedure will be transformed into some form of status—from mere tolerance to full-fledged refugee status. However, if no such need for protection is established in determination procedures, the individual becomes a rejected asylum-seeker:

> The term rejected asylum seekers . . . is understood to mean people who, after due consideration of their claims to asylum in fair procedures, are found not to qualify for refugee status, nor to be in need of international protection and who are not authorized to stay in the country concerned.[135]

[134] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Seventh General Report* (CPT/Inf. (97) 10) (22 Aug. 1997), at paras. 24–36.

[135] 'Memorandum of Understanding between the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM)' (May 1997), at para. 29. It should be noted that IOM also uses the term 'unsuccessful asylum seekers', which includes in addition those persons who have chosen not to pursue further an asylum claim once filed.

Regularly, the State in question will ask a rejected asylum-seeker to leave its territory. Ideally, the individual complies with this order voluntarily, the country of origin receives her back, and the *status quo ante* is restored.

Comprehensive repatriation policies build on four considerations, which will be briefly presented in the following.[136] A primary consideration of repatriation policies is to ensure the rejectee's *voluntary compliance* with the obligation to leave the host country. Promotion of voluntary repatriation ranges from simple measures informing on the situation in the country of origin to programmes involving financial assistance. Concerning the latter, States are usually anxious not to create unintended incentives, where return assistance would attract further migrants.[137]

A second consideration for returning States is to devise measures responding to non-compliance with the obligation to leave. Some of these measures are intended to secure the *preconditions of removal*; they serve the identification (i.e. by means of fingerprinting, database checks, or language tests), localization (reporting obligations and detention), documentation (obligations to assist with travel document procurement) and, finally, the actual removal (expulsion orders and escorts).

Disputes on nationality, delays in issuing travel documents, or an outright denial of readmission by countries of origin may also inhibit efficient return practices. Thus, a third consideration of returning States is to ensure the co-operation of the country of origin.

Finally, a fourth consideration is to secure the co-operation of third States in return operations. This may take the form of setting up negotiating cartels to exert pressure on recalcitrant countries of origin. To name another example, repatriating States may also approach potential transit States lying *en route* on the migratory trajectory in order to negotiate agreements on the readmission or at least the transit of third-country nationals.

2. Co-operation on Return within the EU In the EU context, all four categories of repatriation activities have been the subject of continued intergovernmental deliberations. These have resulted in binding, as well as non-binding, norms. On a binding level, the 1990 Dublin Convention contains an obligation for States Parties to readmit a rejected asylum-seeker who has entered the territory of another State Party without being authorized to reside there, provided that it has not expelled the alien.[138] This obligation provides an incentive for a consistent expulsion strategy, as States Parties want to avoid the responsibilities flowing from the obligation to readmit.

Among non-binding instruments, the following have a direct bearing on return:

- Recommendation of 30 November 1992 regarding practices followed by Member States on expulsion;[139]

[136] For a comprehensive overview of the issue of return and a case study on Germany, see G. Noll, 'Unsuccessful Asylum Seekers: The Problem of Return', paper prepared for the Technical Symposium on International Migration and Development (1998, forthcoming in the proceedings of the Symposium).

[137] See the sixth recital in the preamble to the Council Dec. of 26 May 1997, note 150 below: '[w]hereas it should be avoided that such assistance leads to undesired incentive effects'.

[138] Dublin Convention, Art. 10(e). An identical obligation is contained in Chap. VII, Art. 34 of the Schengen Convention. Chap. VII of the Schengen Convention has been replaced by the Dublin Convention upon the entry into force of the latter.

[139] WGI 1266, reprinted in E. Guild and J. Niessen, *The Developing Immigration and Asylum Policies of the European Union* (1996), 219.

- Recommendation of 30 November 1992 regarding transit for the purposes of expulsion;[140]
- Recommendation of 1 June 1993 concerning checks on and expulsion of third-country nationals residing or working without authorization;[141]
- Council Conclusions of 30 November 1994 on the organization and development of the Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration (CIREFI);[142]
- Recommendation of 30 November 1994 concerning the adoption of a standard travel document for the removal/expulsion of third-country foreign nationals;[143]
- Recommendation of 30 November 1994 concerning a specimen bilateral readmission agreement between a Member State of the European Union and a third country;[144]
- Recommendation of 24 July 1995 on the guiding principles to be followed in drawing up protocols on the implementation of readmission agreements;[145]
- Recommendation of 22 December 1995 on harmonizing means of combating illegal immigration and illegal employment and improving the relevant means of control;[146]
- Recommendation of 22 December 1995 of concerted action and co-operation in carrying out expulsion measures;[147]
- Council Conclusions of 4 March 1996 concerning readmission clauses to be inserted in future mixed agreements;[148]
- Decision of 16 December 1996 on monitoring the implementation of instruments adopted by the Council concerning illegal immigration, readmission, the unlawful employment of third-country nationals, and co-operation in the implementation of expulsion orders;[149]
- Council Decision of 26 May 1997 on the exchange of information concerning assistance for the voluntary repatriation of third-country nationals.[150]

All of these instruments belong to the *acquis*.[151]

Regarding the promotion of voluntary repatriation, it is somewhat surprising that the Council did not bother to deal with the most dignified and least costly solution earlier than in 1997.[152] It was decided to collect information on Member States' programmes supporting voluntary return for purposes of comparison and dissemination.[153] This decision stands out alone amongst the earlier multitude of instruments dealing with implementation of return against the will of the individual.

[140] WGI 1266, *The Developing Immigration and Asylum Policies of the European Union* (1996), at 239.
[141] WGI 1516, *ibid.*, at 275.
[142] [1996] OJ C274/50.
[143] [1996] OJ C274/18.
[144] [1996] OJ C274/20.
[145] [1996] OJ C274/25.
[146] [1996] OJ C5/1.
[147] [1996] OJ C5/3.
[148] Doc. No. 4272/96 ASIM 6 and 5457/96 ASIM 37.
[149] [1996] OJ L342/5.
[150] [1997] OJ L147/3.
[151] Draft List, note 42 above, at 12–14.
[152] As early as in its 1994 Communication, the Commission had called for an approximation of voluntary repatriation schemes, emphasizing that such schemes are 'cost-effective, when compared with the costs of involuntary repatriation': Commission Communication, note 18 above, 30, at para. 111.
[153] Council Dec. of 26 May 1997, note 150 above.

Regarding the second consideration of securing the preconditions of removal and actually carrying it out, a basic rule is that people found to have failed definitively in an application for asylum and to have no other claim to remain should be expelled, unless there are compelling reasons, normally of a humanitarian nature, for allowing them to remain.[154] Where such a person is, or is likely to be, detained before expulsion, the period of detention should be used to obtain the necessary travel documents for expulsion.[155] Moreover, Member States are recommended to make use of a one-way travel document to facilitate the expulsion of persons lacking the necessary travel documents.[156]

With regard to the co-operation of countries of origin, Member States should implement specific mechanisms to improve the procurement of the necessary documentation from the consular authorities of the third State to which third-country nationals are to be expelled when they lack travel or identity documents.[157] It should also be noted that the Council has recommended Member States to conclude bilateral readmission agreements with third countries affirming the obligation to take back one's own nationals. To guide Member States in this respect, a specimen agreement as well as guidelines for readmission protocols have been drafted by the Council. This specimen contains provisions on readmission of persons proven or validly assumed to be nationals and former nationals.[158] In 1996, the Council took further steps to disseminate readmission obligations covering both nationals and third-country nationals. It laid down that the inclusion of *inter alia*:

- a clause stipulating an obligation to readmit nationals, and
- a clause stipulating an obligation to conclude bilateral agreement on the readmission of third-country nationals with Member States which so request into future mixed agreements between the Member States of the EU and third States shall be considered when adopting the guidelines for their negotiation.[159]

Concerning the co-operation of third States, it should be noted that the whole array of instruments adopted in the field represents an effort under this heading. In addition to the aforementioned norms, Member States are recommended to carry out expulsions, in appropriate instances, as a concerted effort with other Member States.[160] As an example of such co-operation, information exchange on available seats on expulsion flights may be mentioned.

Though not directly related to repatriation, a number of other EU initiatives improve Member States' control capacities. One of the more noteworthy attempts is a Council decision for the establishment of a Union-wide dactylographic database (EURODAC). Such a base would enable Member States to register, store, and

[154] Recommendation of 30 Nov. 1992, note 139 above, at para. 2; Recommendation of 1 June 1993, note 141 above, at para. 1.
[155] Council Recommendation of 22 Dec. 1995, note 147 above, at para. 10.
[156] Recommendation of 30 Nov. 1994, note 143 above. For a critical commentary, see Guild and Niessen, note 139 above, at 388.
[157] Council Recommendation of 22 Dec. 1995, note 147 above, at para. 1.
[158] Specimen Agreement annexed to the Recommendation concerning a specimen bilateral readmission agreement between a Member State of the EU and a third country, note 144 above, at Art. 1, para. 1.
[159] Conclusion of 4 Mar. 1996, note 148 above.
[160] *Ibid.*, at para. 6.

exchange fingerprints of asylum-seekers, thereby impeding double applications under different identities.

Return is also contained in the agenda set by the Treaty of Amsterdam. According to Article 63(3)(b) (*ex* Article 73k) of the EC Treaty, the Council shall adopt measures on 'illegal immigration and illegal residence, including repatriation of illegal residents' within a five-year time limit.[161]

Secondly, the Schengen *acquis* will be applicable for all EU Member States from the day on which the Amsterdam Treaty enters into force.[162] Article 23 of the 1990 Schengen Convention spells out the principle that an alien without permission to stay on the territory of a State Party must leave the common territories without delay. The same provision obliges State Parties to expel such an alien.[163] Moreover, the Schengen Convention comprises a comprehensive information exchange by means of the Schengen Information System (SIS), facilitating, *inter alia*, the identification of aliens illegally staying on the territories of State Parties.[164]

3. A Critical Assessment of the Acquis *Regarding Return* Throughout recent years, the issue of repatriation has been high on the agenda of asylum countries in the industrialized world. It was held that considerable numbers of rejected asylum-seekers never left the territory of the determining State and that this put the credibility of asylum-systems into question. While it is certainly true that there is a logical nexus between rejection and return, one should be aware that the lack of statistics makes it difficult to assess whether return policies are sufficiently effective in the EU today. While the number of claims as well as recognitions under various categories are known, it remains obscure how many rejected claimants return voluntarily and how many move on to third countries.[165] Consequently, it is extremely hard to estimate how many rejectees actually remain in the territory of the State in which the determination procedure was carried out. Given the absence of reliable data, one should be reluctant to make any definite claim on the legal-political significance of the problem.

It is quite another matter that some Member States devote large political and financial resources to forcible return. The EU co-operation reflects their concerns in the impressive number of instruments related to return. However, important normative *lacunae* remain. Member States have largely failed to address issues related to the rights and interests of rejected asylum-seekers.[166] We will focus below on four areas where major shortcomings exist: voluntary return, detention decisions, condi-

[161] Art. 63(3)(b) EC Treaty. Measures adopted under this para. do not prevent Member States from maintaining or introducing national provisions which are compatible with the Treaty of Amsterdam and with international agreements.

[162] 'Protocol integrating the Schengen *acquis* into the framework of the European Union', 2 Oct. 1997.

[163] Schengen Convention, Art. 23, para. 3.

[164] *Ibid.*, Art. 38.

[165] This is acknowledged in a recent document prepared by the Austrian Presidency for the K.4 Committee. Note by the Presidency to the K. 4 Committee, 'A Strategy for Migration and Asylum Policies', Doc. No. ASIM 170 (1 July 1998), at para. 72.

[166] This has been observed by the Commission in its 1994 Communication, where it recommended Member States to sign and ratify the International Convention on the Protection of the Rights of All Migrants Workers and Members of their Families, adopted by GA Res. 45/158 (1990): in *International Instruments*, note 5 above, i, Part 2, at 554. This instrument has a bearing on the matter, as it also covers illegal migrant workers. Hitherto, no Member State has followed this suggestion.

tions of detention, and the use of force during removal. Due to space constraints, other areas such as non-discrimination, mass expulsion,[167] and the content of readmission agreements[168] will be omitted.

4. Voluntary Return, In Dubio Mitius, *and Detailed Safeguards* Any observer of the EU co-operation in issues of return will be struck by the predominance of forcible return. It is generally undisputed that voluntary return is more dignified and incurs less financial, as well as political, cost than its forcible counterpart. In Germany, the average cost of an escorted expulsion by air was US$840 in 1995, which should be compared to the price-tag for an assisted voluntary return in co-operation with the International Organization for Migration (IOM) (US$490).[169] This suggests that a first approach to the problem of return should have been to offer incentives in a co-ordinated fashion. Only if such an approach had failed in a statistically determinable manner, would it be reasonable to move on to more intrusive and expensive measures. Instead, Member States were eager to establish co-operation on expulsion from an early stage. Any instrument adopted under Article 63(3)(b) should attempt to correct this by including the maxim *in dubio mitius* for the whole area of return. From a human rights perspective, this cautionary rule implies that a less intrusive measure is chosen in case of doubt.[170] Thus, a preference for voluntary return over forcible removal would be established.

Of course, the tool of voluntary return programmes would be worthy not only of comparison, as suggested in the 1997 Council Conclusions, but also of harmonized minimum standards. Practice hitherto suggests that increased attention must be devoted to the overall impact of repatriation programmes on stability in the country of origin, especially if the number of returnees is substantial. Devising mechanisms for the protection of individuals upon repatriation is another topical issue where a common solution for all Member States may increase both legitimacy and efficiency of repatriation policies.

However, the maxim *in dubio mitius* should apply equally to measures securing the precondition of removal and its implementation. But an abstract maxim alone will not suffice to ensure compliance with the dictates of international human rights law in this field. Experience has shown that there is a considerable risk of human rights violations flowing from non-voluntary return practices. Apart from the non-binding rights engulfing expulsion decisions referred to above, the present *acquis* does not lay down any safeguards for the individuals affected by practices of forcible removal. The risks entailed by such practices should be mitigated by a forthcoming EU instrument on return, setting binding and detailed minimum standards to be observed by all Member States regardless of domestic legislation. Of particular regulatory

[167] See further Noll, note 136 above, at chap. D. 2. c.

[168] See Meijers, 'Forced Repatriation: Towards Minimum Guarantees for Repatriation Treaties' in Meijers, note 37 above, at 105–15. A catalogue of minimum requirements to be inserted into readmission treaties can be found at 111. At large, neither the Specimen Readmission Agreement nor the Prot. recommendations adopted by the Council correspond to these requirements.

[169] Oral information provided by an official within the UN system.

[170] Thus, in our particular case, the maxim is used in analogy to penal law. In the context of interpretation of international law, *in dubio mitius* suggests that norms must not be interpreted in such a way as to exceed the intention of the States making them. In the latter case, the beneficiary of a more favourable outcome is the Contracting State, while it would be the individual rejectee in our case.

interest are detention decisions, the conditions of detention, and the use of force during removal.

5. Detention Decisions Decisions to detain rejected asylum-seekers must conform with Article 5(1)(f) ECHR. This implies not only that such a decision must be based on law and decided in a proper procedure, but also a limitation to a narrowly circumscribed purpose. A rejectee may only be detained when 'action is being taken with a view to deportation'. Detention for purposes other than those enumerated in Article 5(1) ECHR is illegal. Thus, it is important to identify the exact content of the wording in Article 5(1)(f). Trechsel has pointed out that the purpose of this provision is to allow for the implementation of removal.[171] Thus a deprivation of liberty in order to prevent an alien from going into hiding is covered by paragraph (1)(f), as well as the deprivation of liberty inherent in forcible removal itself. Trechsel emphasizes that the serious intention to remove, held by the authority in question, is of decisive importance. If it turns out that actual removal cannot be performed, this does not make past detention illegal. But, by the same token, it would be illegal to continue detention in spite of the fact that removal is rendered impossible.[172]

This entails two conclusions. First, it is illegal to detain a rejected asylum-seeker, who cannot reasonably be presumed to go into hiding. It must be emphasized that such an assessment must be made on a case-by-case basis. Rejection of a claim cannot automatically be equated with a risk of going underground. Accordingly, routinely detaining rejected asylum-seekers does not conform with Article 5(1)(f) ECHR. Secondly, it is illegal to detain a rejected asylum-seeker when removal proceedings have come to a halt. This can be the case if there are legal obstacles to removal (for example, under Article 3 ECHR), or if factual impediments render repatriation impossible (for example, if the home country declines to receive its nationals, or if it is logistically impossible to transport the individual to her country of origin). It should be emphasized that the turning point is not the absolute impossibility of removal, but its improbability within a reasonable time-frame.

In addition, it should be emphasized that detention for the purpose of punishing the rejected asylum-seeker for failing to co-operate is illegal. So is the use of detention merely to deter other aliens from exercising their right to seek asylum.

6. Detention Conditions The living conditions in detention facilities have been a recurrent source of reproach directed at state practices. Within the EU context, the 1996 *Annual Report of the Committee on Civil Liberties and Internal Affairs of the European Parliament* criticized the 'deplorable conditions' under which asylum-seekers are kept in detention for expulsion purposes.[173] The Parliament has designated the Committee to elaborate a specific report on that issue and to visit detention facilities in that context.[174] Further, the CPT has been noting inadequate state practices with regard to the holding of 'immigration detainees'. This group contains rejected asylum-seekers. The CPT in its seventh *General Report* emphasizes that persons deprived of their liberty for an extended period under aliens legislation should be held in centres specifically designed for that purpose.[175]

[171] S. Trechsel, 'Zwangsmassnahmen im Ausländerrecht' [1994] *Aktuelle Juristische Praxis* 48.
[172] *Ibid.* [173] EP Doc. A4–0034/98, at para. 26. [174] *Ibid.*
[175] CPT, note 134 above, at para. 29.

In general terms, detention conditions must correspond to relevant international standards, especially those flowing from Article 3 ECHR and Article 10(1) and (2) of the ICCPR. Reference should also be made to the UN Body of Principles for the Protection of All Persons under any Form of Detention and Imprisonment.[176] In numerous cases, rejected asylum-seekers are not separated from other groups in detention.[177] Thus, the findings in the discourse on detention conditions for asylum-seekers are largely applicable to the detention conditions prevailing for rejected asylum-seekers as well.[178] These normative sources should be expressly incorporated into a forthcoming EU instrument.

7. The Use of Force During Removal Apart from detention, other activities related to secure and effective removal fall under the ambit of human rights norms. At all stages of expulsion procedures, the alien must never be exposed to torture, inhuman or degrading treatment, or punishment. For the purposes of this text, it is perfectly sufficient to focus on the least intrusive of the measures falling under Article 3 ECHR. Drawing on the case law of the European organs relating to Article 3 ECHR, a refined understanding of the threshold of suffering regarding inhuman measures and the threshold of humiliation regarding degrading measures can be established. In the assessment of suffering or humiliation, it should be asked whether the treatment causing suffering is proportional with regard to legitimate goals the actor (in this case, the repatriating State) seeks to attain. By way of example, one might resort to cases of solitary confinement, where the additional suffering adduced by solitude has been regarded as motivated by the detainee's exceptional dangerousness. In such cases, the interests of the claimant are weighed against the interests of the State. In other words, a particular treatment or punishment is inhuman or degrading when the suffering or humiliation occasioned is disproportionate with regard to the legitimate goals the actor seeks to attain by it.[179]

The use of force in deportation should be seen against this backdrop of purposefulness, severity, and proportionality. Not all use of force is illegal under Article 3 ECHR. But state obligations under this provision are engaged when there is no proportionality between the legitimate goal of migration control and the measures taken to achieve it. Migration control on the whole is not an all-legitimizing goal. It must be recalled that an individual removal contributes to this goal only as a fraction

[176] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by GA Res. 43/173 (1988): in *International Instruments*, note 5 above, at 265.

[177] Taking the example of Germany, it has been established that three federal States generally separate rejectees from other groups, while four States do not maintain any separation of categories. See R. Göbel-Zimmermann, 'Die Anordnung und der Vollzug der Abschiebungshaft' and R. Wolf, 'Materielle Voraussetzungen der Abschiebungshaft' in K. Barwig and M. Kohler (eds.), *Unschuldig im Gefängnis? Zur Problematik der Abschiebungshaft* (1997), 25 and 59 respectively.

[178] On detention of asylum-seekers in general, see UNHCR, *Detention of Asylum Seekers in Europe* (1995); J. Hughes and F. Liebaut (eds.), *Detention of Asylum Seekers in Europe: Analysis and Perspectives* (1998).

[179] The Court also takes into account whether alternative means of pursuing that goal exist: '[a] further consideration of relevance is that in the particular instance, the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration': *Soering* v. *UK*, ECHR (1989), Series A, No. 161, 111. In that case, the legitimate goal of bringing a person suspected of murder before a court could be attained by trying him in the UK. Thus, the proportionality test is further supplemented by the maxim '*in dubio mitius*'.

of total removals. Thus, the use of handcuffs, sedative medication, and other intrusive measures in removal cases can give rise to serious legal concerns. In each individual case, the suffering and humiliation effected by it must be weighed against the contribution of the individual's removal to migration control. Any future EU instrument on removal should incorporate this proportionality test.

V. CONCLUSIONS : THE FUTURE OF THE *ACQUIS*

As indicated in the foregoing, the decision-making EU bodies may be inclined to take the asylum *acquis* as a starting point when adopting measures under Title IV of the amended EC Treaty. The impact of existing texts may be increased due to the obligation to adopt a number of measures within the five-year transitional period, in combination with the continued requirement of unanimity during this period. Taken together, this might lead to the *en bloc* adoption of third-pillar instruments in the form of EC legislation, a solution which would be unfortunate for several reasons.

First, such a legislative strategy would fail to take account of the regulatory difference between non-binding political texts, as those hitherto predominant within the third-pillar co-operation, and the binding acts stipulated under Title IV of the EC Treaty. Secondly, an unmodified upholding of the normative contents would disregard persuasive criticism that has been articulated towards essential parts of the *acquis*. Thirdly, as a related issue, there is a need for substantive revision of the texts concerning asylum and refugee protection in the light of the embracing of human rights as a guiding principle for the Union's legislative activities. Finally, but not least importantly, constraining the adoption of future measures by reference to the existing *acquis* would fall short of meeting the challenge of comprehensive solutions to the problem of forced displacement; the exigency of this approach has been frequently pointed out in policy debates during recent years, and is now being emphasized by the EU Treaty itself.

In accordance with the general framework for asylum and refugee policies established by the Treaty of Amsterdam, it should be a matter of priority for the EU to devise mechanisms for the protection of refugees outside the Union territory. Such protection mechanisms would be the logical consequence of measures already taken with respect to external border controls and, as a compensating strategy, they would amply reflect the evolving recognition of international obligations to respect basic human rights extra-territorially. Correspondingly, the exercise of control on the external borders of the EU will have to be sensitized towards protection needs of persons forced to leave third countries.

As there will undoubtedly be a continued need for the admission of persons requiring protection to the territories of the EU Member States, mechanisms for the equitable and efficient sharing of the burden and responsibility of protection among Member States should be adopted in order to enhance protection capacities. Such measures could take into account the burden-concentrating effect of the criteria for state responsibility already laid down in the 1990 Dublin Convention.

On the basis of the above principles and considerations of the future harmonization process, we will point out the most significant implications regarding concrete policy measures which are bound to be adopted within the five-year transitional period. Under the Dublin Convention, any Member State is acting on behalf of the whole EU when examining asylum applications. This must necessarily be reflected in the scope of harmonization measures to be adopted under Title IV, both for reasons of effective burden-sharing and management of asylum procedures, and in due regard for principles of the rule of law. Thus, it is indispensable that all categories of persons in need of international protection be included in the future legislation. Not only is the EU bound to do so in order to ensure compliance with human rights obligations, but this is also likely to be the area with the clearest links between formal burden-sharing and substantive harmonization.

In the same vein, EU standards for asylum procedures should ensure that everyone seeking asylum in a Member State will have the application examined in accordance with EU standards, i.e. in the State responsible under the Dublin Convention or parallel conventions that may be concluded in the years to come. When adopting standards for examination, procedural safeguards will have to be enhanced, taking full account of generally recognized guidelines and human rights obligations. In particular, access to the substantive examination of all applications must be ensured, irrespective of the asylum-seeker's formal status, possession of travel documents, etc. Any deference to national laws and practices of Member States should be ruled out, incompatible as this would be with the very objective of setting minimum standards on behalf of the whole Union.

Human rights obligations impact on asylum procedures beyond procedural safeguards. First and foremost, this should be taken into account when adopting minimum standards for the reception of asylum-seekers during procedures. Such standards must be in accordance with international obligations to respect human dignity and, as a matter of increased relevance, the minimum level of treatment must be complied with regardless of the applicant's utilization of legal remedies under domestic law. The same is true for the preparation and implementation of the return of rejected asylum-seekers: detention and forcible removal are particularly sensitive areas, where Member States need to transform general human rights obligations into context-sensitive standards. Most efficient would be to avoid intrusive practices by means of a Union-wide harmonized effort promoting voluntary return programmes.

As regards the contents of harmonization measures, it is of significant importance that the comprehensive definition of protection categories does not result in further restrictions of the application of universal protection instruments. On the contrary, it must be ensured that the harmonized application of the refugee definition fully corresponds with the well-established *acquis* under the 1951 Refugee Convention. Hence, all relevant forms of persecution, regardless of their perpetrator, should be considered to be covered by the definition. Furthermore, the measure should take account of an evolving sensitivity to gender-related forms of persecution, which is properly covered by the 1951 Refugee Convention.

To avoid the colonizing effects of migration control on issues of refugee protection, future control measures should be synchronized with protection measures. No

measure of control should be adopted without it being complemented by a measure safeguarding protection and ensuring rights in the area affected by the control measure. Forming such thematic links is nothing less than rebalancing particularism with the universalist content in Article 6 (*ex* Article F) of the EU Treaty.

A great deal of scepticism has been voiced about the *acquis* as it stands today. The entry into force of the Treaty of Amsterdam implies momentous changes within this policy area, as future harmonization will take place in the form of binding acts. This legal and institutional reform could provide the Union with the competencies to enhance refugee protection by means of more comprehensive policy strategies, as well as firmer commitments for Member States to protection-oriented standards. Whereas restrictionism has been implemented without the legal obligations to do so, the binding instruments to be adopted may prove more efficient in terms of implementation of human rights standards in the broad sense at the domestic level. It remains to be seen, though, whether the Treaty of Amsterdam represents a sufficient framework to meet the increasing challenges in this sensitive and controversial policy area.