red

Introduction to the Tool Boxes

Introduction to the Tool Boxes

With the signing of the Amsterdam Treaty in 1997, the European Union has embarked on an ambitious project to work towards a common asylum system, based on agreed minimum standards. The UN refugee agency, UNHCR, considers this a challenge as well as an opportunity, with important repercussions for the protection of refugees and asylum seekers, both within the EU and beyond.

To help understand this process, we have developed the UNHCR Tool Boxes on asylum Matters - or "Tool Box" for short. We hope this will prove to be an essential companion for those involved in migration and asylum issues, and that it will help them get a better grasp of the EU mechanisms and the implications of the developing EU asylum system for the international protection regime.

The purpose of this Tool Box is to provide a systematic overview of the institutional set-up, the legislative instruments and the political concerns surrounding the ongoing development in the EU towards the creation of an area of freedom, security and justice (AFSJ) and, more specifically, a common European asylum policy.

What the Tool Box is not

As this Tool Box deals mainly with the development of the European Union's asylum policy, it does not provide detailed information on other important policy areas of the EU within and outside the area of Justice and Home Affairs (JHA).

Furthermore, the Tool Box does not intend to be an exhaustive overview of the EU asylum policy development process, and does not include comments by academics or by NGOs such as ECRE, Amnesty International and other specialist NGOs.

What is in the Tool Box?

The Tool Box is structured as follows:

Tool Box 1 contains information on:

- The EU institutions;
- The European decision making process;
- The history and the challenges of the asylum harmonisation process;
- The EU enlargement process;
- The external dimension of JHA EU policy;
- The co-operation between UNHCR and the EU.

Each Chapter in Tool Box 1 is followed by a series of questions meant to trigger a discussion on these subjects.

Tool Box 2 contains:

– All relevant adopted texts constituting the asylum and migration acquis;
– UNHCR's comments and observations on these texts.

As new texts are adopted, these can be added to the binder, while obsolete versions can be removed.

Tool Box 3 contains:

– Various training tools: power point presentations, overheads, quizzes, role plays and a CD Rom containing the contents of the three Tool Boxes.

These tools accompany the texts of Tool Boxes 1 and 2. Together the texts and related tools form a single package. Therefore, it is recommended that the reader / trainer use them in tandem.

Who should use the Tool Box?

The Tool Box is primarily meant for trainers. Sections of the Tool Box can also be used for self-study in skills development or as briefing material. In addition, we hope that the Tool Box will serve as a useful reference tool for government practitioners, NGOs representatives, and other individuals working or interested in the European asylum policy development and its impact on third countries.

Final remarks

– The Tool Box should be considered as a work in progress. As developments take place, certain parts will need to be updated, or new notes will be drafted. These updates and additions should be introduced in one of the three Tool Boxes, as appropriate.

– Among the many experts involved in the creation and completion of this Tool Box, UNHCR Brussels would like to extend its thanks and appreciation to all interns who have contributed to this ambitious project, and to the editor, Ms Sarah Perman. We would also like to thank the Europe Bureau of UNHCR headquarters for its continuous support, as well as all the UNHCR offices in EU Member States and acceding countries without which the production of the Tool Box would not have been possible.

– For any comment or suggestion on the contents of the UNHCR Tool Box on EU asylum matters, please write to the Office of the United Nations High Commissioner for Refugees in Brussels at :
UNHCR Brussels
11 b rue van Eyck
1050 Brussels
Tel: 00 32 2 649 01 53
Fax: 00 32 2 627 17 30
E mail address: belbr@unhcr.be

UNHCR Brussels
November 2003

TOOL BOX 1:
THE FUNDAMENTALS

Introduction to the Tool Boxes

Table of Contents

Part 2: Creating an Area of Freedom, Security and Justice: From Intergovernmental Co-operation To a Common Asylum and Migration Policy

General Introduction

Chapter 1

Early Co-operation in Asylum and Migration: Pre-Maastricht (1985-1993)

Chapter 2

Asylum Harmonization: Maastricht (1993-1999)

Chapter 3

Towards a Common European Asylum System: Amsterdam (1999-2004)

Chapter 4

The Next Steps (after 2004)

Chapter 5

Main Instruments of the Asylum Harmonisation Process

A. Amsterdam Treaty and European Asylum Policy Development
B. Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on Area of Freedom, Security and Justice (Vienna Action Plan)
C. Presidency Conclusions of Tampere European Council
D. Scoreboard to review progress on the creation of an Area of Freedom, Security and Justice in the European Union
E. Nice Treaty
G. Presidency Conclusions of Laeken European Council

Chapter 6

A European Immigration Policy

Part 3:
The EU Enlargement Process and The External Dimension of the EU JHA Policy

Chapter 1

The European Union Enlargement Process

Chapter 2

External Dimension of the EU Asylum Policy

Chapter 3

Regional approaches of the EU external JHA policy

A. Eastern Europe

B. Western Balkans

C. The Mediterranean Basin

Part 4:
UNHCR and the EU

Chapter 1

UNHCR and the EU

Chapter 2

Extracts from an article from Johannes van der Klaauw, Senior EU Officer at UNHCR

- The developing EU asylum agenda and UNHCR's response
- UNHCR liaison function with the European institutions
- Towards a strengthened EU – UNHCR partnership

Chapter 3

EU funding support to UNHCR

red

Introduction to the European Union and the European Asylum Harmonisation Process

green

Chapter 1: Main Themes and Developments of the European Asylum Harmonisation Process

EC/EU BASICS

Chapter 1
Main Themes and Developments of the European Asylum Harmonisation Process

I. Introduction

This introductory chapter will provide an overview of the main themes and developments in the European asylum harmonisation process. This process began with the inter-governmental co-operation framework in 1985 and culminated in the creation of an Area of Freedom, Security and Justice (AFSJ) by the Amsterdam Treaty (1997-1999).

The issues addressed in this chapter are presented in greater detail in Part 2 of the Tool Box 'Creating an Area of Freedom, Security and Justice: from intergovernmental co-operation to a common European asylum system'

This chapter includes the following:

II. The pre-Amsterdam era

The development of a common EU asylum policy is a relatively recent process in the context of European integration. The need for harmonised asylum laws and practices and eventually the establishment of a common European asylum system became apparent with the removal of internal borders as well as the increasingly complex challenges of dealing with a mixture of population flows, including asylum-seekers, economic migrants, trafficked persons, and irregular movers.

Discussions about the need for harmonised and co-ordinated asylum policies first began in 1985 in the context of the gradual establishment of the single market and the abolition of internal frontiers. In that year, the Commission issued a White paper on the completion of the Internal Market. This was also the year in which the Schengen Agreement was signed between the BeNeLux countries, Germany and France. The main aims of Schengen were the

abolition of internal frontiers (in order to allow freedom of movement), strengthening of the control of external borders, and co-operation in combating cross border crime.

From the mid-eighties, informal consultations between the Ministers for Immigration and senior officials of the Member States were held at regular intervals. These meetings addressed issues of mutual interest and common concern and led to the adoption of non-binding resolutions and recommendations, including ones on asylum and migration. Discussions also resulted in the preparation and adoption of international Conventions, such as in 1990 the Dublin Convention regarding allocation of responsibility for dealing with an asylum claim (entry into force 1997), and the (draft) Convention on the crossing of external borders.

As measures were adopted to establish the free movement of persons within the single market, it was considered necessary to put in place a number of measures in the area of external border control, including visa policy, police co-operation and judicial co-operation. At the heart of these measures were instruments aimed at harmonising the asylum and migration policies of Member States, as regards admission, residence and return of third country nationals. These initial steps to harmonise some elements of Member States' asylum and migration policies were therefore taken as a result of measures ensuring the free movement of persons, not by virtue of the policies themselves. However, already at an early stage, it was accepted that national policies could no longer provide an adequate response to the growing pressures of immigration on most Member States, and that therefore common approaches were needed. In 1991 an important working document (WGI-930) was adopted under the Dutch Presidency which included an outline of a European work programme on migration and asylum policy harmonisation for the years to come.

Upon entry into force of the Maastricht Treaty in November 1993, a formal mechanism for inter-governmental co-operation, as well as new instruments, was created in the policy area of justice and home affairs. These were listed in the so-called Third Pillar (Title VI) of the Maastricht Treaty which set out provisions for co-operation in justice and home affairs. It was hoped that with the adoption of a single institutional framework and the availability of specific instruments the harmonisation process in these fields would be taken a decisive step further.

These hopes however were dashed. The inter-governmental co-operation under the Maastricht Third Pillar did not yield much noticeable result and led to the adoption of incomplete and non-binding resolutions. The status of these instruments remained unclear and their contents were often considered too general and lacking in ambition. In fact, Member States were not willing to incorporate these instruments into their national laws, policies and procedures.

A political decision was required at the highest level and a subsequent Treaty amendment needed in order to push forward the European integration process as developed under Maastricht. This step change was also needed for a new conceptual approach and commitment to justice and home affairs, including a common policy on asylum and migration. With the signature in June 1997 and subsequent entry into force on 1 May 1999 of the Amsterdam Treaty, the EU made a start with the establishment of a Common Area of Freedom, Security and Justice. The development of a common European asylum policy would be part of this common area, and a review of national asylum legislation, policy and practice would be required in order for a common system, based on shared principles and common objectives, to be established.

III. The context of the 1990s

The early 1990s saw a marked increase in asylum applications in the EU Member States from both European (Western Balkans, Turkey) and non-European countries (Iraq, Afghanistan). As a result of the end of the Cold War, new conflicts emerged, often of an internal nature, which at times led to a sharp increase in the number of asylum-seekers arriving at EU borders. The conflict in the Western Balkans is one of the best-known examples, but continuing conflict in Turkey, Iraq (after the crisis in 1991), Afghanistan, Sri Lanka and Somalia contributed to large flows of refugees and displaced persons.

This influx put the processing systems of individual countries under pressure, and led Member States to develop different systems for temporary protection and other kinds of provisional status, instead of granting full refugee status. Member States were also faced with an increasing number of applications which they considered "manifestly" unfounded, since they were presumed to be lodged by economic migrants in search of a better life, or lodged for reasons without a protection element. National legislation drafted in response reflected the aim to rapidly identify and filter out these unfounded applications.

In the second half of the 1990s, there was rising concern about the increase in human smuggling or trafficking. Poorly treated by their smuggler or trafficker and often undocumented, asylum seekers were seen as part of criminal networks which created an extra burden on the responsible state authorities. The smuggling and trafficking networks appeared to be well informed about the different asylum procedures and practices of Member States. Their efforts were increasingly targeted at states which were considered to provide good prospects for accepting asylum claims, easy access to the labour market, and various possibilities for integration into the host society.

These developments led to a growing demand for harmonisation of rules and practices. Another factor was the very different and piecemeal responses by individual Member States who had their own legal frameworks and their own procedures, tools and concepts.

The harmonisation of asylum policies took place therefore against the background of increased pre-occupation with irregular migration, migrant smuggling and human trafficking, perceived or real abuse of the asylum procedure by those in search of a better life, the increasingly complex nature of asylum applications, and large-scale influxes of persons forcibly displaced by civil war and internal conflict. There was also growing concern about lengthy and multi-layered asylum procedures as well as the lack of return opportunities for unsuccessful asylum-seekers. This put the integrity of screening systems in jeopardy and resulted in a loss of public support for asylum systems in Member States.

Some observers have argued that Member States have become unreasonably preoccupied with these concerns, wishing to create a "Fortress Europe". They argue that Member States place an emphasis on quickly dismissing unfounded asylum claims, rejecting applicants unable to prove their identity and travel route, restricting access to the state territory and the asylum procedure for those who could or should have sought protection elsewhere, narrowly defining who qualifies for refugee status, and making extensive use of detention of asylum-seekers upon entry or prior to expulsion.

IV. The impact of the EC institutional structure on moves towards harmonisation of the European asylum process

The influence of certain Member States, particularly when holding the rotating Presidency of the Council (see chapter 2, B), has marked the various stages of the harmonisation process. Asylum issues, as part of the developing Area of Freedom, Security and Justice, may or may have not received priority depending on the emphasis placed on them by the Presidency. Negotiations on certain issues dear to a particular Member State have often been given decisive impetus when that Member State assumes the Presidency. With time, however, the Presidency's agenda has had to follow the Amsterdam agenda, hence there has been less room for individual priorities.

The role of the Commission and Parliament have been recently strengthened, and this has contributed to a more systematic approach to the asylum harmonisation process. During the pre-Maastricht period of inter-governmental co-operation, the role of both institutions was limited to addressing issues through policy/strategy papers, and the issuance of non-binding resolutions and recommendations. Their contributions were considered by the Council as useful opinions yet were not given any follow-up, nor did they play a major role in Council negotiations on draft instruments.

With the entry into force of the Maastricht Treaty, the Commission was entitled to take the initiative in policy-making. However, in the area of asylum, this was limited to a proposal on temporary protection and the publication of a Communication calling for a comprehensive approach to refugee issues. The European Parliament could issue comments on decisions and instruments yet only following their adoption in Council.

Once the Amsterdam Treaty had entered into force in 1999, the role of the Commission in asylum policy changed considerably. It was given the task, endorsed by the Tampere European Council, of drafting a full legislative package of asylum instruments. In many areas, including migration, border management and visa policy, the Commission shared this task with Member States. UNHCR was asked to provide expert input into the drafting of asylum instruments on invitation by the Commission, on the basis of Declaration No. 17 to the Amsterdam Treaty.

The role of the European Parliament in asylum and migration issues remained a consultative one, although it was strengthened by Amsterdam in so far as the Parliament was asked for its non-binding amendments to draft legislative proposals prior to their adoption in Council. Since the entry into force of the Amsterdam Treaty, discussions have been on-going on ways to strengthen further Parliament's role, including co-decision-making in justice and home affairs.

The Convention for the Future of Europe (see Appendix 2 of this chapter) has produced a draft constitution for the European Union, based on a full revision of the Treaties and the development of new mechanisms for the functioning of EC institutions in the enlarged Union (25 Members). If agreed by the EU Council at the end of 2003, the constitution will have an impact on the future role of the institutions in justice and home affairs, notably the power of the European Parliament.

V. Amsterdam achievements

Measures adopted before Amsterdam were considered insufficient in a Union which was developing its own basic values and legal framework, and in which asylum and immigration matters were accorded a value of their own. The development of a common European asylum system and a common European migration policy became two important elements in the establishment of the Area of Freedom, Security and Justice. Conceptually and politically, the shaping of this area was considered to be as important as the creation of the single market.

The development of a common European asylum system required binding legislative instruments establishing common standards and operational strategies. However, the common minimum standards needed to allow Member States to retain a large margin of discretion in the management of their own asylum systems. It was recognised that in the asylum and immigration area the subsidiarity and proportionality principles (see chapter 3) would have to be duly taken into account: the Community should only take action if, and in so far as the objectives of the proposed action would not be sufficiently achieved by the Member States individually. Therefore, most of the asylum instruments were developed as Directives setting the common minimum standards yet leaving Member States the choice of the most appropriate form and method of implementing them in their national (legal) systems.

Article 63 of the Amsterdam Treaty identified the building blocks of the common asylum policy, and Article 67 a five-year timeframe for implementation. On the timeframe, Member States adopted an Action Plan at the Vienna European Council in December 1998. According to this plan, most of the asylum instruments would be adopted within a two-year timeframe. Following the entry into force of the Amsterdam Treaty in May 1999, Heads of State and Government met in Tampere in October 1999 to adopt the key elements and political focus of future common policy in the various areas of the AFSJ.

By the time the Commission could start preparing the range of instruments for asylum and migration, the timetable for the Vienna Action Plan had become obsolete. The Commission therefore prepared a scoreboard mechanism, or "road map", which indicated a new timeframe for preparing, negotiating and adopting the various proposals. The JHA Scoreboard was to be updated every six months, in an effort to facilitate internal monitoring by the EU institutions of progress in adopting legislative and other instruments needed to establish the AFSJ. As outlined in the Tampere Conclusions, progress in implementation was reviewed by the European Council in Laeken which took place in December 2001. The Laeken Conclusions reaffirmed the EU's commitment to the policy directions and objectives defined at the Tampere Summit, and the need for a new impetus and guidelines to put in place the foundations of the common European asylum system.

Building blocks: first steps towards a common asylum system
The elements or "building blocks" of the AFSJ can be found in the Amsterdam Treaty, Title IV. We reproduce below the main building blocks constituting the common asylum system and the common immigration policy (Article 63). According to Article 67, the JHA Council shall decide unanimously on the various proposals, as submitted by the Commission - or a Member State - and after consulting the European Parliament:

Extracts from the Amsterdam Treaty, Title IV, Article 63

On asylum:

1. 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 (Art. 63.1a);
2. Minimum standards on the reception of asylum seekers in Member States (Art. 63.1b);
3. Minimum standards with respect to the qualification of nationals of third countries as refugees (Art. 63.1c);
4. Minimum standards on procedures in Member States for granting or withdrawing refugee status (Art. 63.1d);
5. 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 (Art. 63.2a);
6. Promoting balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons (Art. 63.2b);

On migration, with possible consequences for asylum seekers and refugees:

7. Measures on immigration policy, particularly regarding conditions of entry and residence, and measures addressing illegal immigration and illegal residence, including return (art. 63.3a&b);
8. Measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States (Art 63.4).

VI. Conclusion

The office of UNHCR has welcomed the EU's harmonisation initiatives as an important test case of regional concerted actions to address refugee and asylum matters, and of the willingness and ability of States to define their interests and objectives in these areas collectively. Since the early 1990s, the office has actively sought to contribute to the successful development of harmonised European asylum policies which could result in clear distinction between refugee protection and migration control, ensure fair treatment for all those in need of international protection and reduce friction in the sharing of responsibility for asylum.

VII.Chapter review

– Discuss the context in which discussions about a common European asylum system first took place.
– What were the pressures facing national governments in the 1990s in relation to asylum and migration policy?
– How did the Treaty of Amsterdam change the impact of European institutions on the asylum harmonisation process?
– Discuss the main building blocks of the AFSJ as set out in the Amsterdam Treaty. Which of these elements do you think are likely to be the most controversial?"

Appendix 1

Milestones of the European Integration Process: from Rome to Nice

Some form of European political co-operation emerged with the establishment of the Council of Europe (1949). Although there was no federal project nor any agreement for transfer of policy to a supra-national body, a structure was nevertheless born which allowed for some inter-governmental co-operation. Furthermore, the Council drafted several Conventions, most notably the European Convention on Human Rights, adopted in 1950.

In 1950, French Foreign Minister Robert Schuman and Economist Jean Monnet, both great visionaries, proposed as a first step, a plan to link European states' coal and steel industries as a way of avoiding the possibility that one state would be able secretly to develop military power. This became a reality with the conclusion of the Treaty of the European Coal and Steel Community by six European States: France, Germany, Italy and the Benelux countries in 1951 (the Treaty of Paris).

In Rome, in 1957, these six countries created the European Atomic Energy Community (EURATOM) and more importantly the European Economic Community (EEC) (initiated at the Conference of Foreign Ministers in Messina in 1955). There, the idea of giving up some national sovereignty was agreed upon. The creation of the EEC was based on the assumption that four basic freedoms should be guaranteed: 1) free movement of goods (lifting of tax and customs barriers), 2) free movement of services, 3) free movement of capital, and 4) free movement of workers.

In 1952, a Treaty establishing the European Defence Community was signed but defeated in 1954 by the French National Assembly. The idea of a common defence policy was thereafter abandoned for a long time. In 1966, France also defeated an initiative which would have allowed the Council of Ministers to agree on a number of issues by a qualified majority instead of the traditional unanimity rule. From thereon, the dynamic of European integration lost momentum.

In 1972, the first enlargement took place when the United Kingdom, Ireland and Denmark joined the European Community. Norway, which had expressed strong interest and was also accepted by the Community, rejected membership through a referendum.

In 1971/72, the then Member States agreed to create an economic and monetary Union by 1980. In 1979, the European Monetary System was established. In 1981, Greece joined the European Community, followed by Spain and Portugal in 1986.

One of the cornerstones of European integration was the Single European Act of 1986, which set the deadline for the completion of the internal market by 31 December 1992 (i.e. the lifting of all internal borders and close co-operation on additional issues such as the environment).

In 1992, Member States signed the Maastricht Treaty which paved the way for further economic and monetary Union (First Pillar), as well as for European foreign and security policy to be reinvigorated (Second Pillar). Among other things, the Maastricht Summit called for the creation of European citizenship and for closer co-operation in justice and home affairs (Third Pillar). The powers of the European Parliament were increased. Furthermore, Maastricht created the 'European Union' which cancelled previous titles such as 'European

Economic Community'. This increased the idea of a political union rather than a mere gathering of States for commercial purposes.

With the Treaty of Maastricht, respect for human rights was recognised as an essential element governing the general principles and common provisions of the European Community and of the nascent EU Common Foreign and Security Policy. Article 8 of the Treaty of Maastricht introduced the notion of citizenship of the Union. From this notion derives the right to move within and reside freely in a Member State and the right to vote and stand as candidates at municipal elections in the Member State where the citizen resides. Article 100 C set out a common visa policy.

In 1995, the EU further expanded with the accession of Finland, Austria and Sweden.

In 1997, the 15 Member States agreed for a new revision of the Treaty including an increased "communautarism" in certain areas, including in justice and home affairs. The Treaty of Amsterdam entered into force on 1 May 1999. The Treaty of Amsterdam has marked another significant step in integrating human rights into the legal order of the EU. Article 6 of the Treaty of the European Union (TEU) asserts that the EU is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. Article 6 also includes a direct reference to fundamental rights as guaranteed by the European Convention on Human Rights to which the EU had, at times, considered joining.

In 2000, at the Nice Summit, Member States agreed to yet another revision of the Treaty (referred to as the Nice Treaty) in view of the then forthcoming EU enlargement with some ten candidate countries. The Nice Summit introduced some institutional changes and adopted the Charter of Fundamental Rights, as a non-binding but nevertheless important reference document.

In December 2002, the Copenhagen Summit paved the way for a historic enlargement of the EU with ten new Member States by 1 May 2004. The acceding countries are: the Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

The Athens Summit in April 2003 approved the accession of these ten countries.

Appendix 2

The Convention on the Future of the European Union

In view of the shortcomings of the Nice Treaty in fully reforming the EU institutions and the issues raised by enlargement of the EU, the Laeken European Council decided on 14/15 December 2001 to convene a Convention on the Future of the European Union with the objective of drafting a Constitutional Treaty for the EU.

Mr Valery Giscard d'Estaing, a former President of France, was appointed Chairman of the Convention. The Convention itself was composed of representatives of the Governments and national parliaments of Member States and candidate countries, members of the European Parliament, and two representatives of the European Commission.

The Economic and Social Committee, the Committee of the Regions, Social Partners and the European Ombudsman participated as observers. Candidate countries could participate fully in the debates but had no right to veto any consensus which emerged among the fifteen Member States. Several Working Groups were established in the course of 2002, among which were ones on Justice and Home Affairs, the European Charter of Fundamental Rights, External Relations, and Defence/Conflict-Prevention. In June 2003, the Presidium – the Convention steering committee - presented a final draft Constitutional Treaty.

The draft EU Constitutional Treaty, produced by the Convention, will be discussed at the Inter-Governmental Conference towards the end of 2003 during the Italian Presidency.

With regard to asylum: the Convention agreed to the following measures as recommended by the Working Group on Justice and Home Affairs:

– Abolition of the Third Pillar structure: all JHA issues will be brought together under a single title of the Treaty, with the provision that procedures can still vary according to the action envisaged at EU level. Legislative activity in asylum should use the traditional Community method, yet in police and criminal matters some mechanisms for reinforced inter-governmental co-ordination on operational matters may have to stay.

– The place of asylum in the new Treaty: the new Treaty should include one paragraph serving as the legal basis for future harmonisation beyond the Amsterdam agenda (which is limited in time to 2004). The paragraph should make reference to the 1951 Convention as well as to the need to develop a common policy on asylum and temporary protection with a view to offering appropriate status to any third country nationals requiring international protection and ensuring compliance with the principle of non-refoulement.

– An additional provision in this section should call for responsability-sharing and solidarity as a general principle of the EU to create an area of freedom, security and justice. Under Amsterdam, the reference to burden-sharing has been limited to its financial implications (in the European Refugee Fund) and exceptional situations of mass influx (the Temporary Protection Directive).

– Legislative activity in asylum should be subject to qualified majority voting in Council and co-decision with the European Parliament.

– a provision should call for partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.

With regard to migration:

– Immigration policy: the objective of a common immigration policy - similar to a common asylum policy - should also be enshrined in the Treaty, but the immigration paragraph should be limited to the Union taking incentive and support measures to what remain basically Member States' responsibilities for admission and integration. No further legislative harmonisation (as is the case in asylum) is needed beyond what is included in Art 63 par. 3 and 4 of the Amsterdam Treaty, except for the goal of combating trafficking in persons, in particular women and children. These articles in their present form allow the Union to move forward in combating irregular immigration, including its criminal aspects. To that effect, the draft Treaty provisions also stipulate that the Union may conclude readmission agreements with third countries.

Another provision specifies that Member States retain the right to determine volumes of admission of aliens coming to seek work.
Qualified majority voting and co-decision should also be adopted here.

Conclusion

It seems that sufficiently general and flexible provision on asylum will be included in the new Treaty which will allow for the next steps of harmonisation to be taken. A reference to the 1951 Convention as the basis of the common asylum system is likely to stay. Qualified majority voting and co-decision will be the principle rule. The asylum paragraph will call for responsability-sharing, an idea also underlying UNHCR's Agenda for Protection.

green

Chapter 2: EU Institutions

Chapter 2
Institutions

A - Introduction to the EU Institutions

I. Introduction

The preparation of legislation and the development of policy is maintained by complex interaction between the institutions of the EU. The EU institutions, along with the Member States, are responsible for the development of the EU acquis communautaire including the acquis on asylum.

The acquis communautaire refers to the body of legislation, standards and practices which govern Member states' actions in matters within the competence of the Community. It includes the founding Treaty of Rome as revised by the Single European Act and subsequently by the Maastricht, Amsterdam, and Nice Treaties as well as judgements of the European Court of Justice, which has jurisdiction over the application of the treaty provisions. The acquis on asylum refers to the body of standards developed under the Third Pillar of the EU Treaty, most of which are still of non-binding in nature.

This chapter includes the following:

In this chapter the main EU institutions (the single institutional framework), their make up and basic functions are introduced. We also look into the relationship between the EU and Member States at the institutional level. A more complete description of the EU institutions and their role in the asylum policy development process will be given in subsequent sections of this chapter. Community legislation will be discussed in chapter three.

In the Tool Box we sometimes refer to treaties and conventions with two dates. The first date represents the signature date of the States who are party to the treaty or convention, the second date refers to the date the treaty or convention was implemented. For example, the Treaty of Amsterdam (1997-1999) was signed in 1997 and entered into force on 1 May 1999.

The Treaty of Amsterdam is divided into a number of Titles. Title I is concerned with provisions common to all Member States. Titles II, III and IV make up for Community Law (First Pillar). Title V is concerned with common foreign and security policy (Second Pillar) and Title VI is concerned with police and judicial co-operation in criminal matters (Third Pillar). Title IV, envisaging the establishment of an Area of Freedom, Justice and Security (AFSJ), contains provisions on asylum, immigration and other matters related to the freedom of movement of persons. We will refer to this as TEC Title IV throughout the Tool Box.

II. A brief look at the machinery of the EU

The development of the EU has been marked by the shaping of legislation, policies and common action as well as the development of the institutions and their relationship with each other. Each institution has struggled for its identity and role in the European integration process.

The EU is made up of five primary institutions:

– The European Council, made up of the Heads of State and Government of the Member States, meets normally twice during each Presidency and sets the political agenda for the EU as a whole.

– The European Commission, currently made up of 20 Commissioners, provides the administration for the development and implementation of Community law and policy. It is the guardian of the Treaties, executes the Community budget and represents it externally. Commissioners are nominated by the Member States, and the President and his or her team are approved by the EU Parliament. Commissioners do not represent their States but are nominated to serve the interests of the European Community.

– The Council of Ministers of the European Union represents the governments of the Member States. The Council meets in 25 thematic formations at ministerial level. The agenda is set by the Presidency which rotates every six months between the Member States within the EU Council. Voting is weighted.

– The European Parliament, made up of 626 Members (MEPs), is elected directly by EU citizens based on their national voting regulations. It represents the interests of the European citizens. MEPs are elected for five year terms (1999, 2004, 2009, etc.). The number of MEPs from each Member State is based on the size of its population. They are organised in various political groups.

– The European Court of Justice (ECJ), made up of 15 judges from the Member States, enforces EU law and serves as the last judicial authority on Community issues. Judges are appointed for renewable six-year terms.

The institutions have different roles and responsibilities under the three pillars structure as outlined by the Maastricht Treaty and modified by the Amsterdam Treaty and also depending upon the issue concerned. This is addressed in further detail in Part 2, chapters two and three.

Under EU legislation, there is no document officially referred to as the Constitution. The founding Community Treaties (European Steel and Coal Community, European Economic Community and European Atomic Community) can be considered as the Constitution of the EU as they set out general principles and standards for the functioning of the European Communities. The Treaties of Maastricht, Amsterdam and Nice can be considered as its Amendments. In June 2003, the Convention on the Future of Europe published a draft constitutional treaty for the European Union with a view to its adoption at the Inter-Governmental Conference towards the end of 2003.

III. The relationship between the EU institutions and the Member States

The relationship between the EU institutions and the Member States is considered by many to be similar to the relationship between the central authority and provincial authorities at national level. Definitions of this relationship are however controversial, and the unique make-up of the EU does not allow for proper comparison with a federal state. The institutions of the EU have a sui generis relationship with the authorities at Member State level. This relationship is even more ambiguous and unclear for the area of justice and home affairs, where the delegation of powers has been partial.

1. Definition of EC powers

Although in some areas, they can be broad and far-reaching, the powers of the EC are strictly defined. Member States have not wished to ascribe to the EC general powers to act but have instead chosen to lay down in each area the extent of the power to act. This way, Member States are able to keep control of the process of integration and keep their sovereignty prerogatives intact.

However, the EC has also been given powers to act when it proves to be necessary for the attainment of one of the objectives set out in the Treaty. In practice this power has been increasingly used and has allowed the Commission to propose legislation in areas not necessarily foreseen, such as the protection of the environment or of consumers.

Lastly, the Community has been given the power to take such measures as are indispensable for the effective and meaningful implementation of powers that have been expressly conferred: these are referred to as the implied powers. For example this allowed the Community to take action towards third countries in areas where it had vested powers. This is how the external competence of the Community has grown over the years.

2. Principles of subsidiarity and proportionality

The guiding concept regulating the relationship between the EU and the Member States is that of subsidiarity. Subsidiarity has two basic dimensions:

– right of the European institutions to act within the framework of the Community objectives on issues affecting all Member States; and
– the right of Member States to retain control over issues where Community intervention is unnecessary.

The aim of subsidiarity is to guarantee that powers are executed at the most appropriate level. The separation and sharing of powers between the Member States and the EU must always follow the principle of subsidiarity.

Subsidiarity means that the Member States remain generally responsible for competencies that they are better able to manage, maintain or develop unless:

– the area concerned falls within the Community's exclusive competence, OR
– the objectives of the proposed action cannot be sufficiently achieved by the Member States, AND
– the action can be more effectively implemented by the institutions of the EU.

In practice this means that the EU institutions but more specifically the Commission must always prove that there is a necessity and an added value for action at the Community level.

To this principle is linked the principle of proportionality. Once it is demonstrated that the Community should act in a certain area, the question is in what way (which legal instruments to use, see Part 1, chapter 3) and to what extent it should act. The jurisprudence of the European Court of Justice has developed the idea that any Community action is justified to the extent that it does not go beyond what is necessary to achieve the objective: in other words the means should be proportionate to the aim, and the Community should not overtake its role. That is one of the reasons the Community usually prefers adopting Directives - laying down general objectives to attain and which need to be transposed into national legislation - to Regulations – laying down directly applicable detailed rules – since Directives are less prescriptive for Member States. That holds particularly true for matters related to justice and home affairs.

Asylum policy and subsidiarity

The development of asylum policy at the European level is to a great extent influenced by Member States' policies and practices and thus by the principle of subsidiarity. As a classical national prerogative, issues relating to asylum policy were originally listed under the inter-governmental co-operation of the Third Pillar. With the limited transfer to the First Pillar, the EU institutions, other than the Council, still have very limited competence over the development of asylum policy. Although the Commission has been tasked with drafting all asylum legislation, it still shares this right of initiative with Member States. The European Parliament has no right to co-decision and the powers of the European Court of Justice are also limited. Moreover, unanimity voting is required for the adoption of the first series of legislative proposals setting minimum standards, which therefore limits the ambition of the proposed instruments in terms of harmonisation.

IV. Conclusions

Institutional development, seen most recently through the Treaty of Nice (2000-2003) and the work of the Convention on the Future of Europe, is on-going. Enlargement will alter Member States' representation in the various institutions. Member States, and all other actors involved, will have to decide the best way to progress. Signals show strong support for an EU that allows certain groups of States to move ahead with pilot initiatives ("a two-speed Europe"). This will have an effect on the institutions as well.

V. Chapter review

– What are the primary institutions of the EU and what is their role?

– What comparison can be made between the EU institutions and their counterparts at the Member State level?

– What do the principles of subsidiarity and proportionality mean? What role do they play?

– Hold a discussion on the issue of "federalism" versus "communautarism."

B - The Council of Ministers of the European Union

Address: Rue de la Loi 175
B-1048 Brussels
Tel.: 0032/2/285.61.11
Internet: http://ue.eu.int/en/summ.htm

Meeting Place:
Brussels, Belgium, except during April, June and October when meetings are held in Luxembourg

Legal basis: TEC articles 202 – 210, Council Rules of Procedure

I. Introduction

This Section introduces the structure, function and internal decision-making procedures of the Council of Ministers of the European Union, commonly referred to as the EU Council.

To help simplify the complexities of the Council which is composed of several entities, we have divided this Chapter into the following parts:

I. Introduction
II. The European Council
III. The Council of Ministers
IV. The Presidency of the Union
V. Main bodies of the Council
VI. Structure of the present JHA Council
VII. UNHCR and the Council
VIII. Conclusions
IX. Chapter review

Particular attention is paid to the present state and function of the Justice and Home Affairs Council (JHA Council), including an overview of the JHA Council decision-making process and structures. The Council is responsible for visa, asylum, immigration and other policies related to the free movement of persons under TEC Title IV which aim for the creation of the AFSJ.

II. The European Council

The European Council, not to be confused with the Council of Ministers or the Council of Europe (created in 1949 and based in Strasbourg), began informally in 1971 as a meeting of Heads of State and Government of the then nine European Economic Community Members. At the Paris Summit in December 1974 it was decided to call these Summit

meetings the European Council. Article 2 of the Single European Act (1986-1987) formalised the European Council in that it stipulated that at least two European Council meetings should be held each year and specified that members of the European Council should be the Heads of States and Governments of the Member States together with the President of the EU Commission. The Treaty of Maastricht, ex-article D now article 4, firmly established the European Council as the "Supreme Executive" of the EU.

There has been no substantial change to the official role of the European Council from the Treaty of Maastricht to the Treaty of Amsterdam. Between the entry into force of the two Treaties, the European Council demonstrated that it is clearly the Supreme Executive of the EU, maintaining its policy guidance role over the three pillars of the EU. In short, the European Council is responsible for :

– energising the construction of Europe at the highest level,

– resolving obstacles and blockages between the Member States, and

– defining the general guidelines for economic and political co-operation in Europe.

The European Council sets the political priorities of the EU and suggests initiatives to the Council and Commission on behalf of the Member States. General meetings at the beginning and Summits at the end of each Presidency allow the European Council to set priorities and evaluate work. Summits are an important occasion for reassessing the goals and aims of the EU. Often the decisions taken at a given Summit by the European Council translate into EU policy, legislation and practice.

Guidelines, Reports and in particular Presidency Conclusions of each closing Summit are tools that are available to the European Council to keep the process moving. Close co-operation with the EU Member State holding the Presidency is an important element in this process.

Drawing up the priorities is an exercise in diplomacy and co-operation, with a number of consultations taking place at the national and Brussels level. Priorities tend to be broad-based goals and gradually develop through the institutions into legislation.

As a rule, the European Council meets in conjunction with the General Affairs Council (refer next page) - the co-ordinating Council - and uses its administrative structures. The European Council is also charged with resolving disputes that cannot be resolved at ministerial level.

The European Council provides the framework for discussing key political issues including those relating to EU policy on asylum, enlargement and humanitarian assistance. Ultimately it directs the decisions of other relevant Councils to conform to the goals that the European Council has identified.

From 2003 Summits will be held in Brussels, rather than in the Member State which holds the Presidency.

III. The Council of Ministers

The Council of Ministers of the European Union (or "the Council", as it is known) has important legislative functions, as it has – where the co-decision procedure applies, together

with the European Parliament - the power of final adoption of both Community and EU legislation.

The 15 Member States make up the Council of Ministers. It serves as the Member State representative body with a further role to set the political objectives of the EU, co-ordinate and make more coherent the various national policies of the Members States, and act as mediator of discrepancies between the Member States.

The Council meets in 25 different formations, each responsible for different issues.

The General Affairs Council (GAC)

The General Affairs Council, chaired by the Presidency, is seen as the "main council" of all the 25 Council formations. It is attended by Member States' Foreign Affairs Ministers. In addition to taking decisions regarding the EU's Common Foreign and Security Policy, the General Affairs Council assists the European Council with the political agenda of the EU. It is the only Council to do so. The General Affairs Council meets with the European Council at least twice a year at the EU Summits. In 2002, it was decided to split the on average monthly two-day meeting of the GAC into one day for general affairs and one day for external relations .

The 24 other Councils are all made up of the relevant Ministers from the Member States, therefore the Transport Council is made up of the Transport Ministers, the Justice and Home Affairs Council of the Justice and Home Affairs Ministers and so on.

Voting procedures in the EU Council vary depending on the issues subject to the vote. If a piece of draft Community legislation is on the table, in most cases a system of qualified majority voting (QMV) applies. With qualified majority voting, Member States are awarded different weightings for votes, and Commission proposals must receive 62 out of a total of 87 votes in order to be approved.

Current Weighted Voting

10 Germany
10 France
10 Italy
10 United Kingdom
8 Spain
5 Belgium
5 Greece
5 Netherlands 5 Portugal
4 Austria
4 Sweden
3 Denmark
3 Ireland
3 Finland
2 Luxembourg

Qualified majority: 62/87

However, under the Amsterdam Treaty, which transferred certain areas of justice and home affairs from the Third Pillar to the First Pillar, certain issues are decided on unanimously. This rule of unanimity applies to the way asylum policy is decided by the JHA Council, subject to review by the JHA Council once "common rules and essential principles in matters pertaining to asylum" are adopted as per the Nice Treaty. The Nice Treaty also decided to change the weighting of votes between Member States after enlargement.

IV. The Presidency of the Union

The Presidency of the Council is held by each Member State in turn for six months, changing hands on the 1st of January and 1st of July each year.

There is in fact no individual "President" of the EU. A Member State holds the Presidency, with the Head of State acting as the President of the various Council bodies, committees, and working groups.

The EU Presidency is designed to give the Member States an opportunity to serve as the executive of the Union for a six-month period.

EU Presidencies: 2000 – 2007

	First Half	Second Half
1997	The Netherlands	Luxembourg
1998	United Kingdom	Austria
1999	Germany	Finland
2000	Portugal	France
2001	Sweden	Belgium
2002	Spain	Denmark
2003	Greece	Italy
2004	Ireland	The Netherlands
2005	Luxembourg	United Kingdom
2006	Austria	Finland
2007	Germany	Portugal

Even though the EU will be enlarging with ten new Member States in May 2004, it is envisaged that the Presidency will continue to rotate among the 15 Member States until 2006 so that new Member States have time to prepare for holding a Presidency. In addition, the result of the Convention on the Future of Europe and subsequent decisions adopted at the next Inter-Governmental Conference in 2003 are likely to change the present institutional set up as from earliest 2005.

Presently, continuity is maintained through the "Troika" structure composed of the actual and the incoming presidencies and the Secretary General of the Council who also acts as the High Representative for the Common Foreign and Security Policy (CFSP) of the EU. At present this is Mr. Javier Solana.

Together with the European Council and the President of the EU Commission, the Presidency sets the basic agenda for action to be taken by the Council for the duration of the Presidency.

The Presidency is responsible for convening the Council and ensuring its organisation. It represents the EU regarding foreign policy issues in international organisations and at international conferences (this role is shared with the EU Commission), and must keep the Parliament informed of all Council actions under any of the three pillars.

The Presidency is expected to remain impartial and serve as the voice of compromise when necessary.

It is also the Presidency that is responsible, through the various bodies of the Council, for informing and updating regularly the other institutions of the EU on progress and new developments in its areas of competence.

In view of the often diverging interests of Member States, the Presidency will normally mediate conflicts between Member States, between Member States and the Commission, and between the Council and the Parliament. The need for conflict mediation is particularly important in those areas where the European Parliament has a greater say in the legislative process.

The Presidency has a great deal of influence regarding not only the types of legislation to be considered but also the speed at which legislation is considered.

V. Main bodies of the Council

1. The General Secretariat

The Council is presided over by the Secretary General who is also the High Representative for Common Foreign and Security Policy. The Deputy Secretary General, who oversees the work of the General Secretariat, assists this office.

High Representative for Common Foreign and Security Policy

The Treaty of Amsterdam (TEU article 18(2), (3) and TEC article 207(2)) created a new responsibility for the Secretary General of the Council in the form of the "High Representative for the Common Foreign and Security Policy". In order to facilitate the functioning of the General Secretariat, Amsterdam created the position of a Deputy Secretary General (same articles as above).

The General Secretariat administers the Council with over 2000 officials. This includes the legal service, translation and press services, and ten administrative Directorates General (DGs). General Directors, who work in close co-operation with the Deputy Secretary General, head the DGs.

TEC articles 202 – 210 outline the general role and function of the EU Council and article 207 (3) provides that "the Council shall adopt its Rules of Procedure" (CRP). The Council Rules and Procedures have existed in one form or another since 1952. They govern the

administrative functions of the Council and its bodies. In addition, the details of the various committees and working groups which operate within the Council structure are defined in the Rules and Procedures.

2. COREPER

The work of the Council is prepared by the Committee of Permanent Representatives (COREPER). COREPER's 15 members are the Permanent Representatives/ambassadors appointed by the Member States through their Permanent Missions in Brussels. In most cases, once a Working Group has come to a decision on a piece of legislation or instrument, it is forwarded directly to COREPER. It operates in conjunction with the Secretary General and the staff of the General Secretariat. COREPER is divided into two parts: COREPER I (Member State Representatives to the EU) and II (Deputies).

In some cases, such as with the development of agricultural, monetary or asylum policy, the proposal of the Working Group will be forwarded to a Special Committee. These Special Committees are made up of high officials (civil servants) who approve the proposal before it reaches COREPER.

3. Working groups

Proposals for Community legislation or instruments are discussed by one of over two hundred Working Groups made up of experts and officials from the Member States.

VI. Structure of the present JHA Council

The JHA Council serves as the EU's primary decision making body for asylum and migration policy and other areas of AFSJ development. It consists of an administrative structure and a number of political bodies, namely working groups and committees, which are responsible for legislative development in home affairs within the EU and in the accession countries. It also acts as an information clearing house.

1. Administrative structure

Directorate General JHA (DG H): Four Sections exist within DG H of the JHA Council, which provide the administrative framework for the Working Groups for JHA issues. The Sections are:

- Section I: Immigration, Frontier and Asylum
  Composed of several Groups: Group Asylum, Group Migration/Admission, Group Migration/Expulsion, EURODAC, Visa, External Frontiers, False Documents, CIREFI, CIREA (since July 2002 taken over by the Commission and re-named EURASIL)
- Section II: Police Co-operation and Customs
  Drugs, Organised Crime, Terrorism, Customs Co-operation
- Section III: Judicial Co-operation
  Extradition, Organised crime, Customs
- Section IV: General Affairs

Legal service: this unit is responsible for final scrutiny of all legislative instruments that will make up the EU acquis. Represents the JHA Council before the European Court of Justice (ECJ) (see Part 1, chapter 2, E - the ECJ).

The inclusion of the Schengen acquis into the Amsterdam Treaty meant that the Schengen structures became an integral part of the JHA Council.

We should mention here that a body was already created by Article 18 of the Dublin Convention (1990-1998) which legally operated outside the JHA Council framework, though in practice served as an integral part of the JHA Council structure. The so-called Dublin Committee was made up of high level civil servants responsible for asylum policy. This Committee was responsible for developing implementation guidelines related to the Convention as well as for taking decisions on issues arising from the application of the Convention. Now that the "Dublin II" Regulation replacing the Dublin Convention has been adopted, a new Specific Committee will be formed within the Commission structures.

2. Decision making bodies

JHA Council: The final decision making body in justice and home affairs is composed of Ministers of Justice and Home Affairs. Normally, the JHA Council meets formally three times a year during each presidency (and additionally once in an informal session), generally twice at the beginning and twice at the end of each Presidency. JHA Council meetings are used to introduce and adopt draft Directives, take stock of progress and set new priorities.

COREPER: This is the Committee of Permanent Representatives of Member States which prepares Council agenda including the JHA Council agenda. Once the political decision has been taken on an asylum proposal by SCIFA (see below), the proposal is sent to COREPER II (deputies). This body determines whether the JHA Council should immediately agree upon this proposal ("A" item) or of they should debate the item ("B" item). COREPER II's decision is based upon the work and recommendation of the relevant Working Group and SCIFA. If the asylum proposal leaves either of these bodies without the unanimous agreement of its members, the JHA Council will have to discuss the problems related to the proposal ("B" item). If, however, the other bodies are in complete agreement, it is likely that COREPER II will label the proposal an "A" item and the JHA Council (or any other Council in the case of an "A" item which calls for approval) will adopt it unanimously. Close co-operation between Group Asylum, SCIFA and COREPER II is maintained for these reasons.

Asylum Special Committee of the Council: Strategic Committee on Immigration Frontiers and Asylum (SCIFA): These are senior officials responsible for migration and asylum issues. They take political decisions within the JHA Council on the work completed by Group Asylum (see below). Introduced by the Treaty of Amsterdam to replace the K.4 Committee, SCIFA is made up of the most senior civil servants from the Member States with responsibility for home affairs.

SCIFA is responsible for giving opinions to the Council and for contributing to the Council's discussions on migration and asylum issues. SCIFA generally takes the political and practical decisions regarding any proposal that it receives from Group Asylum. SCIFA, along with COREPER, also assists in co-ordinating the asylum developments in the Working Groups. Like any other Council body, SCIFA sessions are closed to outsiders. Initiatives or conflicting positions from the individual Member States find their way to SCIFA, and from here the JHA Council receives its signal as to whether an asylum proposal is acceptable.

JHA Council decision-making and administrative structures in brief

Step 1. Draft asylum Directives or Regulations are initiated by the EU Commission. Group Asylum works with Member State officials to review the text from the Commission and harmonise all States' opinions.

Step 2. If agreement is reached in Group Asylum, often on a substantively amended version of the text, the draft is forwarded to SCIFA for political approval. The draft is once again checked with the national governments of Member States.

Step 3. If SCIFA has reached a conclusion on the draft, it is forwarded to COREPER II and labelled an "A" item and sent to the JHA Council where the Council passes it by unanimous vote. If SCIFA has not come to a conclusion on the instrument, it is forwarded to the JHA Council by COREPER as a "B" item for further discussion by the Council.

Step 4. The draft Directive becomes part of the body of Community Law, if the JHA Council agrees on it unanimously. If not, it is sent back to Group Asylum for more discussions or it is tabled for further discussion at a later date.

Working Party on Asylum: Group Asylum is made up of expert delegates from the Member States, generally from the Ministry of Interior. In addition, a representative from the Legal Service must be present as well as members of the Commission. All asylum proposals submitted by the Commission are first discussed in Group Asylum, through various stages of reading. The results of these discussions are normally forwarded to SCIFA. The latter is expected to decide on issues which have proven to be controversial at the level of Group Asylum.

Group Asylum is chaired by a representative from the Presidency. Any communication to and from Group Asylum is facilitated by the Chair.

3. Other asylum related policy bodies

Asylum policy development in the EU, and in accession, candidate and other third countries, is also within the purview of the JHA Council. Two sub-bodies in particular have been developed for this purpose. The first, the High Level Working Group, deals with third countries while the second, the Working Group Enlargement, deals primarily with accession and candidate countries.

A. High Level Working Group on Migration and Asylum (HLWG)

Established under the Austrian Presidency in the second half of 1998 on the basis of a Dutch proposal, the HLWG is composed of senior migration and asylum officials and experts and is meant to be a "cross pillar" body which addresses migratory and refugee movements from a comprehensive policy approach, involving foreign affairs, trade and aid policies, human rights and social policies. The HLWG's responsibility is to develop a cross pillar common strategy and over-all framework approach to asylum and migration policy. This is done in an effort to improve the EU management of (forced) migratory flows from selected countries of

origin and transit. Members of the HLWG are representatives from Ministries of Foreign Affairs, Interior, Justice, Development and Co-operation.

In January 1999 the Council chose six countries and/or regions for this cross pillar approach: Afghanistan/Pakistan, Albania and neighbouring region, Morocco, Somalia and Sri Lanka. The work of the HLWG has been further strengthened by the Conclusions of the Tampere (October 1999) and Laeken (December 2001) Summits. The mandate of the Group was modified in Council on 4 June 2002, with a view to achieving greater efficiency in its work. More emphasis is laid on strategic policy development, based on increased monitoring and analysis, a more flexible geographic scope to its work, more emphasis on regional approaches, real partnership with countries of origin and transit, and close involvement of Second Pillar Council working parties. Co-operation with international organisations such as UNHCR should also be enhanced, for example through the joint submission of funding proposals for operational activity. In November 2002, the Conclusions of the General Affairs/External Relations Council called for intensified co-operation in the management of migration flows with nine selected third countries which are Albania, China, Russian Federation, Ukraine, Federal Republic of Yugoslavia, Morocco, Tunisia, Libya and Turkey.

Whenever deemed appropriate, the HLWG is assisted by a number of expert groups per country or region. For example, while not directly involved in the decision-making process, the HLWG may share its work with SCIFA and other Council (Second Pillar) groups.

B. Working Group Enlargement or the "Chevènement Group"
This is a group of senior officials and experts established by COREPER (Joint Action of 29 June, 1998), concerned with enlargement, maintaining collective evaluation and application of the EU acquis in justice and home affairs in the thirteen candidate countries, mainly the Central European States, Baltic States, Malta, Cyprus and Turkey. It is also known as the "Chevènement Group" after the then French Minister of the Interior. Group Enlargement uses questionnaires as the basis for its assessment. It co-operates with the Commission DG Enlargement and DG JHA.

4. Information clearing houses

Two information clearing houses have served the EU Member States through the JHA Council. The first, the Centre for Information, Reflection and Exchange on Asylum or CIREA, has been concerned primarily with asylum seeker data, application trends and conditions in countries of origin and transit. The second, the Centre for Information, Reflection and Exchange on Frontiers and Immigration or CIREFI, provides migration-related data and statistics.

Centre for Information, Reflection and Exchange on Asylum or CIREA: this was established in 1992 as a clearing house for information on countries of origin and for exchanges on asylum. It was transferred to the management of the Commission in 2001, and renamed thereafter EURASIL.

The 1990 Dublin Convention created certain obligations related to the transfer and exchange of information on asylum seekers and refugees. As a result the Centre for Information, Reflection and Exchange on Asylum (CIREA) was established by a 1992 Joint Decision of the Council. CIREA's function was to facilitate the exchange of asylum related statistics, data and information regarding asylum issues between the Member States, including country of origin assessments.

The Centre for Information, Reflection and Exchange on Frontiers and Immigration (CIREFI) is another information clearing house. It is similar to CIREA in its function though it deals mainly with issues related to external borders and (irregular) migration.

VII. UNHCR and the Council (see also Part 4 of this Tool Box)

1. UNHCR and the External Relations Council

In relation to asylum in Europe, UNHCR's main focus is clearly the JHA Council as this is the final decision-making body for EU asylum instruments. The External Relations Council mainly affects UNHCR's work and policy on refugee challenges in third countries. This Council provides political guidelines and support for humanitarian and development aid, diplomatic action and human rights activities where it affects UNHCR's work directly.

UNHCR is also consulted on specific issues by the HLWG, both at expert and senior political level. These meetings are used to discuss policy and implementation of programmes. UNHCR also receive funding from the HLWG, mainly for asylum institution and capacity-building in regions of origin, as well as voluntary return and sustainable reintegration programmes.

2. UNHCR and the JHA Council

The core development of EU asylum legislationtakes place in Group Asylum, where early commentary and reconciliation of Member States' diverging positions takes place at an early stage. Efforts have been increased by UNHCR to develop relationships with members of Group Asylum at the Member State level. UNHCR Brussels maintains contacts with the Brussels based representations (JHA Counselors), the Commission and the Council Secretariat.

The relationship with SCIFA is through formal and informal exchanges at national and Brussels levels. SCIFA representatives regularly meet with UNHCR to discuss negotiations on EC instruments or the need for changes to legislation at the national level. Similar discussions are held at the Brussels level. UNHCR has been invited occasionally for presentations in both SCIFA and Group Asylum.

In addition, UNHCR has regularly been invited to meetings of CIREA (now EURASIL within the Commission) in order to provide information to Member States on developments in certain countries of origin, and guidance on the eligibility of asylum seekers originating from these countries.

3. UNHCR and Group Enlargement

UNHCR has been supportive of the work of Group Enlargement, providing the group with detailed and comprehensive information on the needs and strengths of the asylum systems in the candidate countries. Meetings regularly take place where information from UNHCR field offices is shared with Group Enlargement.

VIII. Conclusions

The JHA Council is the primary force behind the establishment of the Area For Freedom, Security and Justice including the development of a common asylum and migration policy. Understanding its mechanisms, decision-making structures, procedures and priorities is crucial to efforts to influence asylum policy development in the European context. The future of the EU asylum harmonisation process rests with the decision-making bodies of the JHA Council, namely Group Asylum, SCIFA and the JHA Council itself.

Five years after the entry into force of the Amsterdam Treaty, or once Community legislation setting out the common rules and essential principles in matters pertaining to asylum has been adopted as prescribed by the Nice Treaty, the JHA Council will have to make new decisions regarding its own role in the decision-making process, moving to qualified majority voting as in other Community areas.

IX. Chapter review

– What is the difference between the Council, the European Council and the Council of Europe? What are their main responsibilities?

– Describe in brief the decision-making process of the JHA Council.

– Which JHA Council sub-bodies are the most important in the development of asylum legislation?

– What might be the role of the JHA Council in the development of asylum legislation after 2004?

C - The European Commission

Address: European Commission
Rue de la Loi 200
B-1049 Brussels
Tel.: 0032/2/29.911.11
Internet: http://europa.eu.int/comm/index-en.htm

Headquarters:
Brussels, Belgium, with offices in Luxembourg, representation offices in the Members States, and delegations in the accession, candidate and other third countries.

Commissioners/Members 1999-2004:
20 (two from France, Germany, Italy, Spain and the United Kingdom, one each from the other Member States. According to the 2000 Nice Summit, when enlargement of the EU occurs, the future Commission will be capped at 27 Commissioners with a maximum of one per Member State).

Staff: 17,500 (not including consultants) (2001)

Legal basis: Art. 211 – 219 TEC

I. Introduction

This section introduces the structure, function and internal decision-making of the Commission of the European Union.

To help simplify the complexities of the Commission, we have divided this Chapter into the following parts:

I. Introduction
II. The Commission in brief
III. Main bodies of the Commission
IV. Commission decision-making
V. Commission bodies concerned with asylum and migration policy
VI. Conclusions
VII. Chapter review

The role of the Commission regarding the development of a common EU asylum system and asylum policy in the context of the creation of the AFSJ will be highlighted.

II. The Commission in brief

1. Who are the Commissioners?

Twenty Commissioners are chosen based on their qualifications and impartiality. Each Commissioner has a "portfolio", or areas of competence. A "Cabinet", which serves in an advisory and co-ordinating role, assists each Commissioner.

2. How is the President chosen?

According to TEC Article 214, the President of the Commission is nominated by the common agreement of the Member States subject to approval by the European Parliament. The European Parliament has to approve the President and the other Members of the Commission as a body.

3. The role of the President of the Commission

The Commission is led by its President. Like the other Commissioners, the President carries a portfolio, with inter alia, responsibility for the Secretariat General.

The President is responsible for the overall functioning of the civil service as well as that of the various agencies of the Commission. Together with the High Representative of the Council, the Presidency and the Commissioner for external relations, the President also serves as the official representative of the Union in the international arena. He is a member of the European Council.

The President leads the administrative bodies of the Commission, the Secretariat General and the Directorates General. In addition, the President co-ordinates the activities of the other Commissioners and helps the resolution of disputes which may arise.

The President is assisted by two Vice-Presidents, both of whom are Commissioners with their own portfolios. They help carry out the representative and administrative tasks of the President.

The Treaty of Amsterdam strengthened the role and powers of the President in several ways:

1. The President's legitimacy, in that (s)he is now appointed by the common agreement of the Member States with the approval of the European Parliament as well as the nomination of the other Members of the Commission (TEC article 214 §2).
2. Its members undertake to resign, if requested to do so by the President. (This will become an institutional requirement with the entry into force of the Nice Treaty).
3. The Commission shall work under the political guidance of the President (TEC article 219 §1).
4. The President decides on the allocation of portfolios among the Commissioners and any reshuffling of portfolios during the Commission's term of office.

4. Responsibilities

The Commission serves as the guarantor of Union concerns and Community issues through the following four main functions:

- Guardian of the Treaties
- Right of Initiative
- Executive Power
- Representation in international forums

A. Guardian of the Treaties

As Guardian of the Treaties of the EU, the Commission is responsible for watching over the proper implementation of Community law. If a breach is reported, the Commission may bring the alleged violator (a Member State or an EU institution) before the Court of Justice.

B. Right of Initiative

Under the First Pillar, the Commission normally has the sole right to initiate legislative proposals (TEC article 251). The only exception to this is in the area of justice and home affairs (JHA). In derogation of TEC article 251, TEC article 67 §1 provides that initiatives may be taken by either a Member State or the Commission (shared right of initiative). (Further deviations from the usual community procedure in the JHA domain are that the Council decides unanimously rather than by qualified majority vote and that the European Parliament has only a right to be consulted rather than to co-decide with the Council.)

C. Executive Power

The Commission carries out the decisions of the Council but has at the same time discretionary power in certain fields determined by the Treaties. For example, the Commission is empowered to administer the various funds of the EU.

Implementation of Community policy

The Commission carries out the implementation of Community policies in a number of ways:

- the establishment and management of Community programmes;
- the establishment of Community funding arrangements;
- investigative measures (regarding the breach of Community law);
- imposition of fines;
- negotiation of trade agreements (with authorisation of the Council);
- agreements with potential Member States;
- drawing up and implementing the Community budget.

In order to accomplish the tasks identified above the Commission had developed, by 2001, a civil service with a workforce of 17,500 employees and a budget of over 4.9 billion euros in 2001. The overall 2001 budget of the EU totals 96.2 billion euros in spending commitments.

D. External Representation

The Commission represents the Community on international bodies and for a where it deals with areas subject to Community competence. For example, the Commission currently participates in UNHCR's Executive Committee with an observer status.

III. Main bodies of the Commission

This section provides an overview of the main administrative organs of the Commission. These are the:

– Secretariat General
– Directorates General
– Task Forces
– Legal Service
– Humanitarian Aid Office (ECHO)
– Europe Aid Cooperation Office (AIDCO)
– Specialised Services: EUROSTAT

1. The Secretariat General

The role of the Secretary General

The Secretary General (SG), appointed by the President of the Commission, heads the Secretariat General of the Commission and is accountable to the President of the Commission. S/he has responsibility for monitoring the decision-making processes of the Council and Parliament, as well as ensuring that all the relevant services of the Commission are informed of proposals and legislative initiatives. The SG also manages relations with the more remote regions of the EU (former colonies, island States etc.).

The SG is responsible for co-ordinating the Specialised Services of the Secretariat General including the Legal Service, the Press and Communication Service, EUROSTAT, and additional services (interpretation & conferences, translation, Anti-Fraud Office, etc.), and also co-ordinates the activities of the 23 Directorates General (DGs) and offices.

2. The Directorates General (DGs)

The administrative foundation of the Commission

The bulk of administrative and policy development is carried out by the 23 Directorates General (DGs) of the Commission. The DGs have specific areas of competence that generally conform to one or more of the "portfolios" of the Commissioners.

The role of the Directorates General

Each DG is led by a Director General (DG Director General) and a Deputy Director-General.

A DG is further divided into Directorates and then into Units and Desks. Directors, Heads of Unit and Desk Officers manage the corresponding organs of the DG. DGs also include Task managers who often have "horizontal" responsibilities.

The various Desks and Units of a DG are responsible for preparing draft legislative instruments and policy and opinion papers based on the request of a Commissioner or their Cabinet. This is the main activity of most DGs and this gives content to the duty of the Commission to draft measures to be presented to the Council, and to ensure that they are implemented.

The 20 Commissioners are provided administrative support by the 23 DGs as well as by the Secretariat General and the different services.

3. Task Forces

The Commission maintains several Task Forces. These Task Forces provide the Commission with a policy-making apparatus regarding a number of issues. The Inter-governmental Conference Task Force, for example, provided the Commission with input into the drafting of revisions of the Treaties (Amsterdam, Nice). Task Forces are created to allow the Commission to be more flexible and specialised in certain subjects (such as enlargement). When subjects are particularly important, some Task Forces are transformed into a DG. This is for example true for the JHA Task Force which used to operate within the Secretariat General as long as JHA matters were purely inter-governmental yet which, with the entry into force of the Amsterdam Treaty in May 1999, was transformed into a full-fledged Directorate – DG Justice and Home Affairs.

4. The Legal Service

The Legal Service is accountable, through the Secretary General, to the President of the Commission. It serves as the in-house advisor to all the departments of the Commission and is, if requested, present at meetings of bodies of the Commission. In addition, the legal service represents the Commission before the Court of Justice, the Court of First Instance, the European Free Trade Agreement Court, the World Trade Organisation Panels and other judicial bodies. The Legal Service also has the right to take part in all proceedings for preliminary rulings for questions put to the European Court of Justice by national courts.

The Legal Service includes a Legal Advisors Group, which ensures legal and linguistic consistency of legal instruments issued by the Commission and the Codification Group responsible for the codification of Community acts.

IV. Commission decision-making

The Commission takes decisions on most issues through consensus, as these issues need to reflect the needs of the EU rather than the individual Member States. Proposals for legislative instruments including those of policy papers (White Papers, Communications) are adopted by the Commission as a collegium.

Proposals originating with the Commission

Although the Commission has the right of initiative, it should not be assumed that the actual emergence of draft legislation is always a one way process. The content of the Commission's proposal is the result of interaction between the Commission, interest groups, national experts, and senior civil servants from Member States. Within the Commission itself, the relevant Commissioner will assume overall responsibility for a proposal which comes within his/her area of competence. Once the Commissioner is satisfied with the draft, and all of those who are directly involved with the proposed measure have given their approval, the proposal will be submitted to the College of Commissioners for their endorsement. The proposal is then forwarded by the Secretary General to the Council and Parliament, by which time it will be in the public domain.

The Council challenges the Commission:

The Luxembourg Compromise of 29 January 1966
While the Commission does reserve the right to initiate Community policy in matters of Community competence, it would be incorrect to think that the Commission acts free from outside political pressure. The Member States, acting through the Council, have a great deal of influence over whether the Commission will initiate legislative or policy proposals. According to the Luxembourg Compromise of 29 January 1966, the Commission should consult the Member States through COREPER, regarding the desirability or necessity of proposals.

It is important to note that although the Commission is the starting point for Community action it is not completely free to choose whether and how to act, but has to respect Community law. Thus, it is obliged to act if the Community interest so requires. In return, the guidelines agreed by the European Council in December 1992 on the principles of subsidiarity and proportionality, as laid down in TEC article 5, allow action at Community level only in so far as it constitutes an added value in comparison to action taken at the national level.

V. Commission bodies concerned with asylum and migration policy

Under Amsterdam, the Commission's role regarding asylum and migration policy development is manifold. It includes the drafting of EC asylum and migration legislation as well as the drafting of policy proposals and operational measures related to broader refugee issues. It also includes the administration of programmes for refugee protection and assistance both within and outside the EU and programmes which benefit governments, international organisations, practitioners, NGOs and academics. In order to effectively co-ordinate its activities in the field of asylum, the Commission has adopted a number of instruments and tools, and has established a number of bodies, including tasks forces, co-ordination groups and specialised services.

1. The role of the Commission in the European asylum harmonisation process

A. Strengthened Role under Amsterdam

Under Title IV, the Amsterdam Treaty changed the role of the Commission in the area of asylum policy development. In an effort to create the European Community as an Area of Freedom, Security and Justice (AFSJ), asylum policy became a Community competence. However, for an initial transitory period of five years, the Commission had to share its right of initiative with Member States.

The Commission, therefore, created the position of a JHA Commissioner to ensure the Commission fulfilled its new role. The ultimate responsibility for decisions taken within the Commission regarding EU asylum issues lies with the JHA Commissioner (currently Antonio Vitorino, whose term ends in 2004).

The JHA Commissioner is responsible for co-ordinating the work of its own Directorate General as well as the work of the various Commission bodies involved in decision-making and policy formulation in the area of justice and home affairs such as, among others, the Legal Service, DG External Relations, DG Social Affairs and the Secretariat General.

The JHA Commissioner has direct contact with the JHA Council, the Presidency, and the European Parliament and its relevant Committees and other EU institutions (the European Court of Justice, the Economic and Social Committee and the Committee of the Regions). The JHA Commissioner also maintains regular contacts with relevant Ministers from the Member States.

In order for the office of the JHA Commissioner to carry out its various tasks, it is supported by DG Justice and Home Affairs (DG JHA).

DG JHA consists of a number of Policy Units, each with a specific area of competence (asylum, migration, visa, external borders, judicial co-operation, drugs, human rights, communications, external relations, and so on). These Policy Units are responsible for drafting new legislative initiatives and for reviewing initiatives submitted by the JHA Council, the EU Member States or communications by the Parliament. The Units also implement the various JHA programmes in, for example, training, exchange support, and studies.

With regard to the role of JHA in external relations, the Heads of State and Government stated at the Feira European Council in June 2000, about a year after the entry into force of the Amsterdam Treaty, that the need for external action should be justified by the existence of internal policies and measures. The EU's external priorities in the field of JHA had to be incorporated in the Union's overall external strategy as a contribution towards the establishment of an Area of Freedom, Security and Justice.

B. JHA programmes managed by DG JHA

European Refugee Fund

The European Refugee Fund (ERF) was launched in 2000 to support existing programmes and new initiatives in the Member States in the areas of reception of asylum seekers;

integration of recognised refugees and others in need of protection; and voluntary repatriation.

Open to national, regional and local authorities, international organisations, practitioners and NGOs, ERF funds are annually distributed to the Member States based on the number of recognised refugees and applications received for an average period of three years. The ERF reserves a portion of its funds for emergency situations including mass influxes as well as 5% for Community work programmes directly funded by the Commission. As it is a decentralised fund, each Member State has its own allocation procedure, subject to DG JHA approval.

The creation of the ERF was formally mentioned in the Vienna Action Plan, the Tampere conclusions and the AFSJ Scoreboard. Prior to the Amsterdam Treaty, four independent budget lines preceded the ERF.

Odysseus/Argo
The Odysseus Programme was launched in 1998 primarily to support practitioner training, exchange and studies in EU Member States and EU candidate countries. The Odysseus Programme ran until 2002 when the Commission created a new programme called ARGO. Some UNHCR initiated projects received Odysseus funds. These projects consisted of targeted training events and study visits. The current programme finances, for example, the European Migration Information Network, which provides online information related to migration issues, as well as a university network for legal studies on immigration and asylum in Europe.

Co-operation with third countries in the area of migration (see Part 3)
Budget line B7 – 667 entitled "Co-operation with third countries in the area of migration" is administered by DG JHA. It provides funding for programmes and projects in the framework of partnership with the countries of origin and transit in relation to asylum and immigration. Projects should be in line with the overall philosophy of the Council High Level Working Group (HLWG). Priority is given to activities relating to third countries, subject to the action plans of the HLWG.

2. Inter-institutional decision-making procedures

Once draft legislative proposals have been cleared by the respective Policy Unit, they are forwarded to the JHA Commissioner for approval of the main focus and key elements. Following approval by the Commissioner, the drafts are sent to other relevant DGs and the legal service as part of inter-service consultation. The relevant cabinets discuss the texts prior to their adoption by the Commission as a whole. The legislative proposal is then communicated to the JHA Council and European Parliament. Once the European Parliament has been consulted, and following often lengthy, technical negotiations in Council working groups, the Council of Ministers votes unanimously on the proposal.

Since the final decision on asylum issues rests with the JHA Council and it is here where the Commission proposals are further developed, the relationship between the JHA Commissioner and DG JHA on the one hand, and the EU Member States and JHA Council on the other, is a dynamic one. Thus, staff of DG JHA are in regular contact with representatives of Member States during and outside meetings of Council working parties to discuss amendments to legislative initiatives. DG JHA is invited to all meetings of JHA Council

groups and COREPER. This helps to foster co-operation between the two institutions.

N.B. The final instrument often departs considerably from the original Commission proposal. This is particularly true of policy instruments on asylum and admission of third country nationals. For example, the original version of the draft Directive on minimum standards for the reception of asylum seekers was substantially different and far more prescriptive than the Directive adopted after a year and a half of negotiations at the Council.

3. European Commission proposals in the area of asylum policy under the Treaty of Amsterdam

Benchmarks of the asylum harmonisation process

(See Part 2 of Tool Box 1 for more details on these benchmarks)

Soon after the entry into force of the Amsterdam Treaty, the Special European Council of Tampere, Finland, on 15-16 October 1999 adopted a series of "milestones" which gave political impetus to and set the main direction for future EU policy on all JHA areas, including asylum and migration. At the invitation of the Tampere Summit, the European Commission, in March 2000, introduced a scoreboard mechanism to keep under constant review the progress made towards implementing the necessary measures and meeting the deadlines set by the Amsterdam Treaty, the Vienna Action Plan and the Tampere Conclusions for the creation of the Area of Freedom, Security and Justice. Scoreboards are published biannually by the European Commission. Progress in implementing the Tampere Summit Conclusions were reviewed by the December 2001 Laeken Summit during the Belgian Presidency.

Since the entry into force of the Treaty of Amsterdam, the Commission, through DG JHA, has initiated or provided support for the following elements of the future European common asylum system:

Legal instruments and initiatives (some adopted)

- Amended Proposal Council Directive on minimum standards on procedures in Member States for granting or withdrawing refugee status of 18 June 2002, (COM (2002) 326 final) – negotiations started early 2003.
- Council Directive on the right to family reunification 2003/86/EC of 22 September 2003.
- Council Decision of 28 September 2000 establishing a European Refugee Fund (OJ L 252, 12–18 of 6 October 2000).
- Council directive laying down minimum standards on the reception of applicants for asylum in Member States, 2003/9/EC of 27 January 2003.
- Council Directive on minimum standards for granting temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof of 20 July 2001 (OJ L 212, 12–23 of 7 August 2001).
- Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States 2003/343/EC of 18 February 2003 – OJ L 050.
- Proposal for a Council Directive laying down minimum standards for the qualification and status of third country nationals and stateless persons as refugees, in accordance with the 1951 Convention relating to the status of refugees and the 1967 protocol, or

as persons who otherwise need international protection of 12 September 2001 (COM(2001) 510) – negotiations expected to terminate by early 2004.

Policy documents

- Communication from the Commission to the Council and the European Parliament: Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum of 22 November 2000 (COM(2000)755 final).
- Communication from the Commission to the Council and the European Parliament on a Community immigration policy of 22 November 2000 (COM(2000)757 final).
- Charter on Fundamental Rights of the European Union declared on 7 December 2000 (OJ C 364, 1 – 22 of 18 December 2000).

Action plans and score boards

- Scoreboard to review progress on the creation of an area of freedom, security and justice in the European Union (COM(2000)167 of 24 March 2000, latest version of 16 December 2002).

All the above-mentioned texts can be found in Tool Box 2 accompanied by UNHCR's comments.

4. Other relevant DGs in the development of asylum and migration policy

DG Employment and Social Affairs

The DG is made up of seven directorates dealing with social policy, employment, free movement and resource management. Among these is a directorate which co-ordinates migrant policy and the promotion of free movement of workers. It also deals with issues relating to the free movement of workers/persons, refugee integration, anti-racism issues and related infrastructure. In June 2003, the Commission, through a joint initiative of DG Social Affairs and DG JHA, issued a Commission Communication on the integration of third country nationals, including refugees, in EU Member States.

DG Budget

The Commissioner responsible for the EU budget calculates and regulates the income of the EU each year. In addition, DG Budget prepares and reports on the various expenditures within each Member State and outside the EU. DG Budget is also responsible for instigating the budget process in the EU. Budgetary inputs are collected from the various DGs, Commissioners, Presidential Departments of the Commission (Legal Services, Translations etc.) and other sources. The budget is then approved by the Commission and forwarded to the Budget Authority consisting of the responsible budget institutions of the Council of Ministers and European Parliament. The budget is then resubmitted to the Commission for final approval of Budget Authority amendments and/or changes. The process lasts approximately one year.

DG Budget is responsible for drawing up the available budget for refugee matters, broken down under various budget headings administered by DG JHA, DG External Relations, DG Development and DG Enlargement.

EUROSTAT
Established in 1953, the Statistical Office of the European Communities or EUROSTAT, is responsible for providing the EU with statistical information, including that relating to asylum, refugees and immigration (for instance for CIREA - now EURASIL - and CIREFI). EUROSTAT also provides information on the accession, candidate and Newly Independent Countries (NIS) countries.

5. Asylum system capacity building in candidate countries (Central Europe and Baltic States, Cyprus, Malta, Turkey)

DG Enlargement
DG Enlargement has been responsible for implementing the accession process and pre-accession strategies for EU candidate countries. The pre-accession strategies lay down country-specific strategies for meeting the criteria for membership adopted by the EU at the 1993 Copenhagen summit. They include the need for stable institutions guaranteeing democracy and the rule of law, a functioning market economy and the ability to take on the obligations of EU membership, i.e. transposition and implementation of the EU standards, including in the asylum area.

The Commission's programme for the political and economic strengthening of the Central European and Baltic States, PHARE (originally Poland, Hungary Assistance for Restructuring of the Economy, now applied to all candidate countries), was initiated to provide technical assistance to the candidate countries in the take-over of the acquis communautaire (see Part 1, chapter 2, A). It has been largely administered by DG Enlargement and in part delegated to the Commission delegations in the candidate countries themselves. This also holds true for similar but separate pre-accession assistance programmes for Malta, Cyprus and Turkey.
The Commission's assistance and preparatory work led to the successful conclusion of these strategies at the Copenhagen Summit in December 2002 when the Council accepted and welcomed ten candidate countries to accede to the EU by May 2004, namely Cyprus, the Czech Republic, Estonia, Hungary, Lithuania, Latvia, Malta, Poland, Slovakia and Slovenia.

6. Humanitarian aid and long-term support for countries of origin

DG External Relations
DG External Relations is currently headed by Commissioner Christopher Patten. It co-ordinates the EU's external relations to all regions and countries of the world. It is equally responsible for the management of delegations and external offices of the Commission around the world. It co-operates with the Ministries of Foreign Affairs in the Member States.

Development aid and humanitarian assistance
With the inauguration of Romano Prodi as President and a change in the apportioning of responsibility, the portfolios of humanitarian aid and development have been grouped together under the same Commissioner to ensure the Commission's coherence of action. To date, both the Humanitarian Aid Office (ECHO) and DG Development are under the responsibility of Commissioner Poul Nielson.
ECHO provides emergency assistance and relief to the victims of natural disasters or armed conflict outside the European Union. Funding comes from the general EC budget and the European Development Fund.
EuropeAid Cooperation Office (AIDCO or EuropeAid)

Set up by the Commission on 1 January 2001 in an effort to reform its external services, the EuropeAid Co-operation Office implements the external aid instruments of the European Commission which are funded by the European Community budget and the European Development Fund. It does not deal with pre-accession aid programmes (Phare, Ispa and Sapard), humanitarian activities, macro-financial assistance, the Common Foreign and Security Policy (CFSP) or the Rapid Reaction Facility. The Office is responsible for all phases of the project cycle management established by the Directorates-General for External Relations and Development and approved by the Commission. It operates under the responsibility of the Commissioners responsible for External Relations and Development, Christopher Patten and Poul Nielson.

VI. Conclusions

The Treaty of Amsterdam has broadened the scope of issues where the Commission has the right of initiative, though in many cases this right remains a shared one with the Council. This is the case regarding the development of the AFSJ and the common asylum system.

Since the retirement of the Santer Commission in 1999, the role of the President has been strengthened, and the Commission has been reorganised under its new President, Romano Prodi, in order to make it more accountable and transparent.

VII. Chapter review

– What are the main functions of the Commission?

– What role does the Commission play with regard to the development of EC legislation?

– What role does the Commission play regarding EU asylum policy development?

– What role does the Commission play regarding refugee protection and assistance in non-EU countries?

D - The European Parliament (EP)

Address: Brussels Rue Wiertz 63
B-1047 Brussels
Tel.: 0032/2/2842111

Strasbourg Palais de l'Europe
Av. l'Europe
F-67070 Strasbourg
Tel.: 0033/88/174001

Luxembourg Plat. du Kirchberg
L- 2950 Luxembourg
el.: 00352/43001

Internet: http://www.europarl.eu.int/

Meeting places:
- Strasbourg for monthly plenary sessions,
- Brussels for Committee meetings and additional mini and extraordinary plenary sessions.

Membership:
626 Members of European Parliament (MEPs) representing over 370 million citizens. MEPs are organised in political groups plus non-attached members. Elections are held every 5 years (1994, 1999, 2004, 2009….)

Number of seats corresponding to size of population:
Germany: 99; France, Italy, United Kingdom: 87 each; Spain: 64; the Netherlands: 31; Belgium, Greece, Portugal: 25 each; Sweden: 22; Austria: 21; Denmark, Finland: 16 each; Ireland: 15; Luxembourg: 6 (to be modified when EU candidate countries enter the EU as per the Nice Treaty).

Voting: qualified majority, simple majority.

Legal basis: TEC articles 189 – 201.

I. Introduction

This chapter introduces the structure, function and internal decision-making of the European Parliament (EP).

To help simplify the complexities of the European Parliament, we have divided this chapter into the following parts:

I. Introduction
II. The European Parliament in brief
III. Membership, representation and voting
IV. The EP's legislative powers as they relate to Community issues and inter-governmental co-operation
V. Main powers of the European Parliament
VI. Role, function and organisation
VII. Political groups
VIII. Committees of the European Parliament
IX. EP Committees involved in asylum and refugee matters
X. Chapter review

It should be noted that the December 2000 European Summit in Nice provided for changes to the treaties which would strengthen certain elements of the European Parliament. Under the draft Treaty produced by the Convention for the Future of Europe, the role of the Parliament would be further reinforced in certain areas such as justice and home affairs, including asylum.

II. The European Parliament in brief

1. What is the European Parliament and what does it do?

The European Parliament represents the peoples of the Member States. It has no power to initiate legislation, only to amend. Together with the Council it approves EC legislation (co-decision). Furthermore, it adopts the Union budget, approves the accession of new Member States, supervises and comments on the workings of the various institutions of the Union, approves the appointment of the President and the Commission as a whole, undertakes research, and adopts resolutions on various topical political issues. It can also bring cases of interpretation of Community law and validate acts of the other institutions before the European Court of Justice, where it is directly and individually concerned.

In addition, the EP may issue reports and holds hearings on its own initiative. The EP maintains relations with EU Member State national parliaments and, through inter-parliamentary delegations, with third country parliaments, particularly parliaments of candidate countries. It also forms the European element of Joint Parliamentary Assembly of EU and ACP parliamentarians.

The role of the EP in the decision-making process of the EU, which began as the European Assembly of the ECSC in 1952, has increased dramatically. This has been one major theme of European integration. The EP and the Council have been constantly struggling with the increasing influence of the EP in the Community decision-making process.

2. Making laws, changing laws

The EP is not comparable to a national legislature in so far as it cannot directly initiate laws. The EP's role is to comment, amend, approve or defeat proposals that come from the Commission and the Council. The extent of its legislative powers (co-decision, consultation) depends on the area of law in question.

3. Asylum Matters

Through the Council, asylum issues are kept firmly in the hands of the Member States, and the EP has the right to be consulted on legislative proposals only. Its amendments to draft legislation are of non-binding nature. Therefore, in order to influence the development of the EU asylum system the EP has been forced to look to other avenues of action, rather than the legislative one. This is done through the organisation of hearings, publication of reports or adoption of resolutions. Though these do not have direct effect on the process, they generate public support and interest among interested groups and parties.

4. Calendar

The EP meets in committees for two weeks a month for consultation and contact with the Council and Commission in Brussels. The third week is reserved for discussions between the political groups and the fourth is for the Plenary Session in Strasbourg. The European Council decided at the Edinburgh Summit in 1992 to maintain Strasbourg as the official seat of the EP, where twelve periods of monthly plenary sessions are held.

III. Membership, representation and voting

1. MEPs

There are currently 626 MEPs. According to the December 2000 Nice Treaty, which set the ground rules for the EP after EU enlargement, there will be up to 732 MEPs once the ten future member States have joined the EU i.e. by May 2004. The principle will remain that each Member State will be accorded a certain number of MEPs depending on the size of population.

2. Elections

Elections are held every five years, according to the general election laws of the individual Member States. Universal suffrage or the direct election of MEPs began in 1979. Since then, there have been elections in 1984, 1989, 1994 and 1999. The next elections are planned for June 2004 with the election of MEPs from the ten new Member Sates. Citizens of the European Union are not represented based on their national or geographic identities, but through political groups. This will be discussed in more detail below.

IV. The EP's legislative powers as they relate to Community issues and inter-governmental co-operation

1. Community issues (First Pillar)

As set out in The Treaty of Maastricht (see part 2, chapter two), the First Pillar of the European Union is the Community that is made up of the ECSC, EC and EURATOM. Depending on the issue concerned, the European Parliament has the right to co-decision, assent, co-operation, or, as is the case with asylum policy, mere consultation. The EP's current competencies and influence are largely limited to Community issues. It should be recalled that asylum, migration, border management and visa issues are part of the First Pillar, yet by way of a specific Treaty provision, the EP's role in the decision making process has been limited in comparison to other areas of Community law.

2. Common Foreign and Security Policy (Second Pillar)

The Second Pillar, the Common Foreign and Security Policy (CFSP), is based on inter-governmental negotiations, so does not provide the EP with any decision-making powers. The EP's procedural rights are limited to consultation.

3. Police and Judicial Co-operation in Criminal Matters (Third Pillar)

As in the Second Pillar, the EP's position in the Third Pillar (known as Police Co-operation and Judicial Co-operation in Criminal Matters) is restricted to the right to consultation.

However, the EP's strength regarding both the Second and Third Pillars is its ability to make public positions and organise initiatives. Also, under The Treaty of Amsterdam, with the transfer of some formerly Third Pillar elements (including asylum) into the First Pillar, the competence of the EP has increased.

V. Main powers of the European Parliament

The European Parliament has three basic powers:

– the shared power to legislate;
– the power of budgetary control;
– the power to supervise the Executive (i.e. the Commission and the Council).

1. Co-legislative power

The EP has the right to approve or amend Community legislation through co-decision, assent, or consultation depending on the area. Final approval rests always with the Council. Regarding asylum legislation, the EP has only the right to be consulted and its opinion (suggestions for amending proposals for a Regulation, Directive or Council Decision) is non-binding.

Where the co-decision procedure applies, the European Parliament's approval or amendments are binding on the Council. Before a joint decision is reached, a specific

procedure has to be followed which culminates, when necessary, in the so called Conciliation Committee (see below). After a first reading at the Parliament, the Council can adopt the act as approved or amended by the European Parliament or adopt a Common Position accommodating some of the EP concerns. Where the Council approves the amendments, the act is adopted as amended. If the Council adopts a Common Position, it is resubmitted to the EP (second reading) which can in turn either approve, amend or reject it. In the latter case, the act is not adopted and a Conciliation Committee is convened. If the Committee can agree on a joint position adopted by both the Council and the European Parliament (third reading), the act is adopted according to the joint position. Otherwise, the act is considered as rejected.

With the changes introduced by The Treaty of Amsterdam, the EP has acquired:

– the right of co-decision in most areas formerly subject to co-operation procedures. Thus, it now extends to social policy, health, freedom of movement, non-discrimination, the single market, transport, research, the environment, development co-operation, transparency, fraud prevention, customs cooperation, statistics and data protection.
– the right to be consulted in the areas of employment, common commercial policy, international negotiations and agreements on services and intellectual property.

The assent procedure applies to the accession procedure (article 49 TEU Amsterdam), the Structural and Cohesion Funds (article 161 TEC), the introduction of a uniform election system for the European Parliament (article 190 § 4 TEC), the conclusion of certain international agreements (article 300 § 3 second indent TEC), and the sanctions applicable in the event of a serious and persistent breach of fundamental rights by a Member State as introduced by The Treaty of Amsterdam (article 7 TEU Amsterdam).

With regard to police and judicial co-operation in criminal matters, the EP will be consulted on the Framework Decisions and Conventions taken pursuant to article 34 b) and d) of The Treaty of Amsterdam (article 39 TEU Amsterdam). The EP will also be consulted under the so called "passerelle clause" of article 42 of Amsterdam, which provides for the transfer of issues regarding police and judicial co-operation in criminal matters from intergovernmental co-operation to Community policy.

(See Part 1, chapter 3 for further information on the EC legislative process).

2. The European Parliament and the budget process: the "power of the purse"

Budgetary powers and responsibilities

The powers of the European Parliament are still limited in many areas. However, one area where the EP has a great deal of control is in relation to the budget of the EU, as the EP must adopt the EU budget each year, and without the EP's approval there is no EU budget.

The EP may exercise its influence over the budget and help to create programmes which it feels are lacking or delete those which are considered unnecessary or of less priority. This influence highlights further the importance of the work of the EP's Budget and Budgetary Control Committees and their ability in effect to alter the policy direction of the EU.
The EP has executed its budgetary powers on a number of occasions. In particular, the European Commission was forced to resign in March 1999 following the refusal of the EP to

discharge the Commission with regard to the implementation of the 1997 EU budget.

EU funds are allocated to a number of areas of interest to UNHCR, such as to justice and home affairs within the external relations policy of the EU. This includes the Balkans (corresponding financial instrument: CARDS), the Middle East and South Mediterranean countries (MEDA), the Newly Independent States countries (TACIS), enlargement (PHARE), or the EU development (European Development Fund) and humanitarian aid (ECHO).

3. Democratic supervision

A. The European Parliament and the Commission

The EP must approve the Commission President appointee as well as the body of Commissioners. The EP may also adopt a motion of censure, as set out in article 201 of the EU Treaty. This requires a 2/3rd majority to pass. The EP reviews the monthly budget and other reports submitted by the Commission. Members of the Commission appear routinely before the EP in Plenary Sessions to answer questions and supply information. Commission Members are also present at Committee meetings.

1999 resignation of the Commission

In March 1999 the entire Commission was forced to resign by the European Parliament after the initiation of the process to censure the Commission. At the request of the EP, a Committee of Independent Experts, also known as the "Three Wise Men", produced a report on the allegations of fraud, mismanagement and nepotism in the Commission. This led directly to the Commission's resignation and to a more prominent EP role in monitoring the transparency and accountability of the Commission's operations.

B. The European Parliament and the Council

The President-in-Office of the Council presents the Council's program to the EP at the beginning of each Presidency (every six months) and gives an account of the Presidency at its conclusion. Chairpersons of specific Councils are expected to do the same thing in the relevant parliamentary Committees and attend parliamentary sessions on topics under their competence.

C. The European Parliament and its Committees

The EP, through its various Committees, supervises the transparent and democratic functioning of the other institutions of the EU. This is done largely through the Committee on Constitutional Affairs, the Committee of Petitions and the Ombudsman.

The Committee on Constitutional Affairs is, inter alia, responsible for matters related to the implementation of the EU Treaty and the assessment of its operation as well as general relations with the other institutions or bodies of the European Union. Thus, it has, for example, pronounced itself on the comitology rules i.e. the institutional division of powers and the internal investigations conducted by the European Anti-Fraud Office (OLAF).

D. European Ombudsman
The first European Ombudsman was appointed by the EP in 1995 to consider complaints about administrative irregularities by the Community institutions or bodies. This is considered a non-judicial means of redress for citizens of the EU. The relevant provisions are found in article 195 of the EU Treaty and the Decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman's duties.

The Ombudsman hears complaints directly from the citizens of the Member States. The Ombudsman may also consider complaints that concern work relationships between the Community institutions and bodies and their officials and other servants. These are subject to the exhaustion of remedies through the submission of internal administrative requests and complaints. The Ombudsman is responsible to the President of the EP and routinely reports to the EP.

The Ombudsman considers complaints regarding the following institutions of the Union: Commission, Council, the European Parliament, Court of Justice, Court of Auditors, Economic and Social Committee, Committee of Regions and the European financial institutions. The ombudsman has competence in the following areas: discrimination, unfairness, misinformation, access to documents, irregularities in administrative practice, violations of rights, misuse or abuse of power, waste and mismanagement.

VI. Role, function and organisation

The European Parliament is intended to represent the people's interests in the EU integration process. The EP meets in public sessions and is charged with defending the rights of EU citizens. The EP shares the decision-making power with the Council through a series of mechanisms further defined below.

1. Organisation

The European Parliament, headed by a President, is made up of the Members of the European Parliament (MEPs). The MEPs are organised around transnational political groups, although a few remain "non-attached".

The political groups meet in the plenary sessions of the EP. They also have regular internal meetings. The group's secretariats are based in Brussels as are the secretariats of the various EP Committees and inter-parliamentary delegations. The EP General Secretariat and some specialist EP services are located in Luxembourg.

A. The President
The President of the EP, chosen by a vote of absolute majority, presides over the EP and must ensure that the proceedings are conducted properly. The President, like all other officers of the EP, must abide by the Rules of Procedure (see below). The President is elected every two and a half years.

B. The Vice-Presidents
Fourteen Vice-Presidents, elected by absolute majority, support the President on all matters and replace the President e.g. in presiding over part sessions of the plenary.

C. Quaestors
Five Quaestors, elected by secret ballot, serve as the responsible parties for financial and administrative matters directly concerning MEPs. They are accountable to the Bureau.

D. The Bureau
The Bureau serves as the EP's management. The Bureau is made up of the President of the EP and the 14 Vice-Presidents, the five Quaestors and the Chairpersons of the political groups. They are elected for terms of two and a half years.

It maintains the consistency of information and exchange and is responsible for financial, administrative and organisational decisions concerning MEPs, the internal organisation of the EP and its bodies.

The Bureau appoints the EP Secretary General, approves meetings of Committees and sets regulations related to administrative and organisational practice.

E. Conference of Presidents
The Conference of Presidents is a meeting between the President and the Chairmen of the political groups which draws up the agenda for the plenary sessions and serves as a platform for discussion and debate.

F. The Conciliation Committee
During the legislative Co-decision procedure, as set out in article 251 of the Treaty of the EU, the European Parliament can amend a legislative proposal which must then be approved by the Council. If the Council does not agree, it issues a Common Position which the EP has to approve. If the EP instead amends the Common Position, a Conciliation Committee is convened between the President of the Council and the President of the EP consisting of members of the Council or their representatives and an equal number of representatives from the EP, plus a representative of the Commission (article 251 TEC).

The other members of the Conciliation Committee include the Chair and Rapporteur of the Parliamentary Committee concerned and other members nominated by the political groups. The Conference of Presidents fixes the number of members from each political group. Majority vote governs the Committee.

The Conciliation Committee is charged with finding a solution and moving the legislative process forward. If the Committee reaches no decision, the Council may confirm the common position by qualified majority voting. If the EP rejects the proposal by a qualified majority then the proposal is not adopted.

2. Rules of Procedure

The functioning of the EP, its officers, its bureaucracy and its daily operations are governed by the Rules of Procedure. The Rules of Procedure is a list of over 200 rules that guide the operations of the EP. The 14th edition of the Rules of Procedure was published in the Official Journal of the EC in August 1999.

VII.Political groups

There are currently seven political groups as well as a number of independent non-attached members in the European Parliament. A Chairperson represents each group at plenary sessions. The political groups have spokespersons and co-ordinators for different policy areas.

The minimum number of members required to form a political group is 29 if they all come from one Member State, 23 if they come from two, 18 if they come from three and 14 if they come from four or more.

The following political groups are, at present, represented in the European Parliament:

– European People's Party/European Democrats (EPP/ED)
– European Socialist Party (PES)
– European Liberal Democrat and Reform Party (ELDR)
– Confederal Group of the European United Left – Nordic Green Left (EUL/NGL)
– Greens/European Free Alliance (Greens/EFA)
– Union for Europe (UEN)
– Europe of Democracies and Diversities (EDD)
– Non-attached : Independents (IND)

The groups have a large influence:

– own resources entered in the budget of the EP;
– own secretariat;
– the Permanent Administrators of the Political Groups prepare the group's work in committee and plenary session. These administrators specialise in policy areas;
– active participation in drawing up agenda;
– sustained contribution to debate (designation of an official spokesperson);
– own activities (symposiums, study days, information bulletins, etc.).

Chairpersons

Chairpersons organise their political groups, meet with the President of the EP in the Conference of Presidents, represent their groups in the EP, convene meetings with national parliaments called "Parliamentary Assises", maintain contact with parliaments from Member States with Accession or Associate Agreements, maintain contact with other non-EU parliaments and lobby the Council and Commission on various issues.

1999 elections

The European parliamentary elections held in May 1999 produced a change in the proportions of members of the different political groups. For the last three legislative terms the PES, or the left of centre, group had held the majority of seats. In the 1999 elections, the EPP, or the centre right, group gained control of the largest numbers of seats (232), although they did not secure enough votes for an absolute majority.

2004 elections

In June 2004 elections will be held for 732 members. By that time, ten new countries will have joined the EU, which may change considerably the political spectrum of the EP.

VIII. Committees of the European Parliament

1. What are the Committees?

The preparation for and facilitation of the plenary sessions of the EP are the responsibility of the Parliamentary Committees. There are currently 17 Standing Committees dealing with a range of policy domains such as foreign affairs, employment, financial matters, development aid, and justice and home affairs. Committees meet for two weeks a month in Brussels and one week in Strasbourg, provided the plenary sessions and other parliamentary activities allow for such Committee work during plenary.

The EP may also establish Sub-Committees to deal with issues which require more substantial review or issues that do not immediately fit within the agenda of one of the Committees. In addition, the EP may establish Temporary Committees and Committees of Inquiry. Informally MEPs meet in "Inter-groups" to discuss 'horizontal', crosscutting topics of mutual concern or interest.

Each Standing Committee or Sub-Committee has a Chairperson who is responsible for the overall functioning and accountability of the Committee. One or more Vice-Chairperson assists the Chairperson in these duties.

2. Informal work by the political groups

The Commission's legislative proposals for discussion are also debated informally by the political groups prior to Committee sessions. In each Committee, a Rapporteur is appointed to draw up a report and resolution – in case of a legislative act, this consists of a set of amendments. The Rapporteur serves as the liaison between the relevant groups in preparing the EP legislative or political or financial contribution.
In so doing, the Rapporteur can seek assistance from the Parliament's secretariat, the secretariat of his/her own political group, from the research services which each MEP

possesses, and from expert outsiders (such as UNHCR). The Rapporteur will then present the draft report to the Committee which will adopt or reject the Rapporteur's suggestions for amendments or comments to the original text. The Rapporteur will usually act as the Committee's spokesperson on the matter.
Once agreement is reached in Committee, the proposal is read and adopted in the plenary session of the European Parliament (often with further amendments).

3. Joint Parliamentary Committees

Relations with the parliaments of States with Associate Agreements, such as EU candidate countries, are maintained through the Joint Parliamentary Committees. Delegations of the EP and its foreign counterparts hold regular meetings to exchange views on matters of common concern, such as on the enlargement process, and to adopt related declarations and recommendations addressed to the European institutions or the national authorities concerned. There is also a Joint Parliamentary Assembly between the African, Caribbean and Pacific group of states and the EC and its Member States.

4. Inter-Parliamentary Delegations/Parliamentary Co-operation Committees

Similar to the Joint Parliamentary Committees, the Inter-Parliamentary Delegations maintain contact with Parliaments of third countries with which the EU has Co-operation Agreements (Switzerland, Norway and South Eastern European countries) or another type of co-operation such as Asian, Central American or Middle East countries. The European Parliament also maintains co-operation with third countries from Eastern Europe and Central Asia through Co-operation Committees. Delegations of the EP and its foreign counterparts hold regular meetings to exchange views on matters of common concern, adopt related declarations and recommendations addressed to the European institutions or the national authorities concerned.

IX. EP Committees involved with asylum and refugee matters

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (referred to as the LIBE Committee) is responsible for matters relating to:

- human rights and civil liberties in the EU;
- racism and xenophobia;
- asylum and migration policy, visa policy, and border management;
- judicial co-operation in civil and penal matters;
- police co-operation, organised crime, including Europol;
- customs co-operation;
- police co-operation;
- EUROPOL;
- Drugs;
- Terrorism.

The Foreign Affairs, Human Rights, Common Security and Defence Policy Committee is concerned with common foreign and security policy (i.e. the Second Pillar of The Treaty of Amsterdam), which includes:

- Common Foreign Policy, conflict prevention and crisis management;
- human rights and democratisation in third countries;
- common defence and disarmament;
- relations with third countries and international organisations;
- opening, monitoring and concluding negotiations concerning the accession of European States to the EU;
- opening, monitoring and concluding negotiations concerning Association and Co-operation Agreements and other international agreements;
- co-ordination of the work of Inter-Parliamentary delegations and Joint Parliamentary Committees;
- consultation with the Committee on External Economic Relations and economic and trade matters.

The Budget and Budgetary Control Committees are responsible for budgetary matters including:

- definition and exercise of the EP's budgetary powers;
- the EU budget;
- final implications of Community Acts;
- preparation and co-ordination of the Conciliation Procedure on issues having financial implications;
- accounting and management;
- transfers of appropriations;
- the control of financial, budgetary and administrative measures of the budget of the EU, including the EP budget.

The Development and Co-operation Committee is responsible for matters relating to:

- humanitarian aid, emergency aid and food aid;
- Co-operation Agreements and relations generally with developing countries;
- the African, Caribbean and Pacific (ACP) Convention (Cotonou Agreement, ex-Lomé Convention);
- technical, financial and educational co-operation;
- industrial, agricultural and rural development;
- relations with international organisations which specialise in development, co-operation and humanitarian aid.

The Women's Rights and Equal Opportunities Committee is responsible for matters relating to inter alia:

- the definition and evolution of women's rights in the EU;
- implementation and improvement of directives relating to equal rights for women;
- social and employment policies;
- information dissemination;

– women's role in EU institutions;
– women in the international sphere; and
– the role of migrant and refugee women in Europe.

Employment and Social Affairs Committee
Employment and Social Affairs Committee is responsible for matters relating to inter alia:

– living conditions;
– employment;
– wages and other funding schemes;
– free movement of workers and other social issues.

X. Chapter review

– What are the main powers of the European Parliament?

– What is the role of the President of the EP?

– Describe the Committee structure of the EP. Describe the political group structure.

– What is the role of the Conciliation Committee ?

– What is the EP's relationship to the other institutions of the EU? UNHCR? Member States?

– What influence do the committees of the European Parliament have on the development of EU asylum policy?

E - European Court of Justice (ECJ)

Seat: Luxembourg

Address: Plateau du Kirchberg
L-2925 Luxembourg
Tel.: 00352/43031

Internet: www.curia.eu.int

I. Introduction

The purpose of this chapter is to introduce the structure, function and internal decision-making of the European Court of Justice, commonly referred to simply as the ECJ. The workings of the European Court of First Instance, referred to as the CoFI will also be described.

To help simplify the complexities of the ECJ and CoFI, we have divided this Chapter into the following parts:

I. Introduction
II. The ECJ in brief
III. Composition of the ECJ
IV. Jurisdiction
V. ECJ and national courts: Preliminary Rulings
VI. Composition of the CoFI
VII. ECJ and asylum
VIII. Conclusions
IX. Chapter review

The following presentation is based on the law in force, i.e. the provisions of the Nice Treaty. The entry into force of the Nice Treaty has resulted in a number of procedural and institutional changes designed to enhance the functioning of the ECJ in view of the accession of new Member States to the European Union.

II. The ECJ in brief

1. Institutional structure

The European Court of Justice is governed by TEC Art. 220 –245 and some additional dispersed provisions of the Treaty, its Statute and Rules of Procedure. To handle a growing case load, the Council, responding to a request made by the Court, attached in 1987 to the Court, the Court of First Instance. This was done to allow the Court to focus on the interpretation of Community Law, while allowing the Court of First Instance to adjudicate on

cases brought forward by natural or legal persons (with the exception of Member States), subject to appeal to the Court. The Court is assisted by Advocates General, who deliver opinions on the cases brought before the Court, whereas the Court of First Instance is not. The Court and the Court of First Instance are facilitated by their own Registrar.

2. Role

According to TEC Article 220, the ECJ "shall ensure that in the interpretation and application of this Treaty the law is observed." This involves:

– the settling of disputes in adversary proceedings
between Member States,
between European Institutions and Member States,
between European Institutions,
between individuals and European Institutions;

– preliminary rulings at the request of a national court on the interpretation of the Treaty and the interpretation and validity of acts of the institutions;

– opinions at the request of the Council, the Commission or a Member State on the compatibility of envisaged international agreements with the provisions of the Treaty (TEC Article 300 VI).

In practice, the preliminary proceedings play a dominant role in the work of the Court. It is mainly in this type of proceedings that the Court's jurisprudence became over the years one of the main sources in the development of Community law.

III. Composition of the ECJ

1. The members

The Court of Justice is comprised of one judge per Member State (at the moment 15 Judges) and 8 Advocates General. They are appointed by the governments of the Member States, in common accord, from jurists who demonstrate independence and competency. The Judges and the Advocate Generals hold office for a renewable six year term.

2. The President

The Judges select one of their members to be President for a renewable 3 year term. The President presides over the Court and directs its work. The President:

– distributes cases among the Chambers,
– appoints a Judge Rapporteur for each case,
– appoints the dates of hearings and deliberations,
– deals in chambers with applications for provisional measures.

3. The Advocates General

As laid down in TEC Art. 222, the Advocates General are charged "with making reasoned submissions in open Court with complete impartiality and independence, on cases brought before the Court of Justice, in order to assist the Court in the performance of the task assigned to it."

A First Advocate General is designated each year who decides on the distribution of cases among the Advocates General as soon as the Judge Rapporteur has been appointed for each case by the President of the Court.

4. Law Clerks

Each Judge and each Advocate General is assisted by three law clerks of their choice. These lawyers carry out research and prepare the documents, such as the Court's decisions and the Advocate General opinions.

5. The Registrar

The Registrar is appointed by the Court. He holds office for a term of six years (renewable). He or she receives cases, allocates procedural documents, draws up the minutes of the hearings and directs the functioning of the administrative departments. The Registrar oversees the Court's administrative apparatus including translation and interpretation services.

IV. Jurisdiction of the Court of Justice

The Court is the Supreme Judicial Authority of the Community. Its judgements cannot be referred to any higher authority.

The Treaty of the EU attributes to the ECJ jurisdiction for a range of actions, including the following:

1. Action for failure to fulfil Treaty obligations (TEC Art. 226)

An action for failure to fulfil Treaty obligations allows the Court to determine whether a Member State has fulfilled its obligations under Community Law. An action may be brought to the Court by the Commission (Art. 226 ECT) or by another Member State (227 ECT), yet not by the European Parliament or an individual. These decisions only have a declaratory power. However, penalties may be imposed by the Court following a proposition of the Commission, if a Member State does not comply with an earlier decision by the Court (Art. 228 ECT).

2. Proceedings for annulment (TEC Art. 230)

In these proceedings, the Court reviews the legality of the acts of the Community institutions. A Member State, the Council and the Commission may apply to the Court for an annulment

of all or part of an act of a European institution. The Parliament, the Court of Auditors, and the European Central Bank may initiate such proceedings for the purpose of protecting their prerogatives. An individual may apply to seek annulment of a decision that is of direct and individual concern to him. If the Court considers the action to be well founded it declares the act null and void taking effect ex tunc, that is of the moment that the act would have had legal effects. It can however declare that the effect only exists ex nunc – as of now.

3. Proceedings for failure to act (TEC Art. 232)

These proceedings are applied when an institution fails to act, contrary to the terms of the Treaty. Member States or EU institutions are allowed to initiate proceedings. If the Court establishes a failure to act, it obliges the institution concerned to take the respective measures, but has no power to enforce this.

4. Actions for liability (TEC Art. 288, par. 2)

The Court rules on the liability of the Community for damages caused by its institutions or servants (officials) in the performance of their duties. The burden of proof is on the plaintiff.

5. Proceedings by officials (TEC Art. 236)

The ECJ has jurisdiction in any dispute between the Community and its servants. It awards damages if necessary.

6. Power of opinion (TEC Art. 300 par. 6)

When doubts exist on the compatibility of a draft of an international agreement with the terms of the Treaty, the Council, the Commission or Member States may request the opinion of the Court.

7. Conditional proceedings (TEC Art. 238)

The Court acts as an arbitrator in relation to arbitration clauses in contracts governed by public or private law, concluded by or on behalf of the Community.

8. Request for Preliminary Rulings (TEC Art. 234)

In case a question concerning the interpretation of Community law or the validity of acts of the institutions arises in a national court, this court may consult the ECJ and request a Preliminary Ruling. This question is however obligatory wherever the validity of a Community act is concerned. It is equally obligatory where a problem of interpretation of Community law arises in a national court against the decisions of which there is no further legal remedy at national level.

The ECJ "pronounces Community law" without prejudging the result of the litigation since this is a matter for the national judge applying EC law. This presents a unique way of ensuring the

uniform application and interpretation of Community law in all Member States (see V below).

9. Appeals against judgements of the Court of First Instance (TEC Art. 225, par. 1)

The ECJ hears appeals against judgements by the CoFI.

V. Court of Justice and national courts: Preliminary Rulings

If a national court is in doubt regarding the interpretation or validity of one or more Treaty provisions or acts of the institutions, it may seek a "Preliminary Ruling" from the ECJ. Any court against whose decision there is no judicial remedy under national law is obliged to seek a decision of the ECJ. The same is true, where the validity of a Community act is in question.

The procedure develops as follows:

- The national court brings before the ECJ questions related to the interpretation or validity of Community acts.
- The Registrar has the application translated, notifies the parties concerned (Member States, Commission or the Council) and publishes the essentials of the case in the Official Journal.
- The parties have two months to make their comments known.
- The President appoints a Judge Rapporteur, whose duty is to follow the progress of the case. The First Advocate General chooses the Advocate General.
- At the end of the preliminary inquiry the case is argued by the parties at a public hearing before the judges.
- Some weeks or months later, the Advocate General delivers his opinion.
- Finally the ECJ decides on the basis of a preliminary report drawn up by the Judge-Rapporteur.
- The ruling is binding on all Member States.

This procedure applies in principle to all the other procedures brought before the Court.

VI. The Court of First Instance

1. Composition

The Court of First Instance (CoFI) is comprised of at least one judge per Member State (now: 15 judges), appointed by the Member States, acting in common accord, for a renewable term of 6 years. The members of the Court of First Instance choose one of their own as President for a renewable three year term. The Registrar is appointed by the Court of First Instance and serves as clerk for the Court. Administrative services are handled by the Court of Justice.

2. The jurisdiction of the CoFI

This includes:

– actions for annulment brought by natural or legal persons against the Community;
– actions for failure to act and for damages;
– competition proceedings
– disputes between the Community and its officials and other servants.

NB: While the Council is attributed the power to determine the cases for which the CoFI is competent, the Treaty of the EU rules out a competency of the CoFI in cases of Preliminary Rulings (TEC Art. 225).

With the Treaty of Nice, there is provision for some of the work of the CoFi to be dealt with by judicial panels, with an appeal to the CoFI itself.

3. CoFI procedures

A. Direct actions
A written application must be sent to the Registry by a lawyer. The application is recorded and the action and claim are published in the Official Journal of the European Communities. A Judge Rapporteur is appointed to review and follow the case. The other party also receives the application and has one month to lodge a defence. Both the defendant and plaintiff have one month to respond to each other's remarks. Time limits are observed by the President of the CoFI.

B. Preparatory inquiries
The President sets the date for the public hearing. A Report for the Hearing summarises the case. The hearing takes place before the judges and the Advocate General.

C. Judgements
Judgements are reached by majority vote. The judges deliberate on the basis of the report made by the Judge Rapporteur. When a final text has been agreed upon, the judgement is proclaimed in open court. There are no dissenting opinions. Judgements are published in the Reports of Cases before the Court of Justice and Court of First Instance.

D. Legal Aid
Legal Aid will be provided by the Court after the review of an application for legal aid and supporting evidence has been completed. The Chamber to which the Judge Rapporteur belongs decides whether or not to grant legal aid.

VII. The Court and asylum

Under TEU article 68 and in contrary to Community law in other areas, a national court, against whose decisions there is no judicial remedy shall, if it considers that a decision on the questions is necessary to enable it to give judgement, request the Court for a Preliminary Ruling on the interpretation of the provisions of Title IV. The Council, the Commission and Member States may also seek a decision of the ECJ concerning the interpretation or validity of acts of the institutions based on this Title.

As the Court of Justice is unable to issue rulings on questions of interpretation at the request of lower level national courts – which is the case in other areas –, the implementation of Community measures in these areas risks remaining variable among Member States.

Furthermore, the ECJ does not have jurisdiction to rule on any measure or decision regarding the crossing of internal borders, if issues of internal security or the maintenance of law and order are concerned, as per article 68 §2 TEC.

It is expected that the new treaty, to be adopted by the Inter-Governemental Conference end of 2003, will redress this situation of exception and grants the ECJ usual competence over asylum and migration issues.

VIII. Conclusions

The longer term impact of the Treaty of Amsterdam on the Court will depend upon the JHA Council, which will decide on the Court's future role regarding the EU asylum acquis after the Treaty has been in force for five years (TEC article 67 §2). The Council will decide whether the Court will have increased competencies in this field equivalent to those in other First Pillar areas, or whether these powers of judicial control should remain restricted. The work of the Convention on the Future of Europe will also be important in determining the future role of the Court in justice and home affairs.

The future role of the Court will not only be an important indication of the EU's commitment to accountability and the legal control of its actions, but will also show its willingness to further the harmonisation process through binding interpretative Court rulings. An enlarged competence of the ECJ, will contribute, through the establishment of a body of case law, to the development of the EU common asylum and immigration policy and, hence, its coherence and consistency.

IX. Chapter review

– How many judges sit on the ECJ? For how long are they appointed?

– What is the role of the President of the ECJ?

– What is the significance of the Preliminary Rulings, particularly in immigration and asylum matters?

– Who can petition the ECJ and how?

– What is the difference between the ECJ and the CoFI?

– What role can the ECJ generally play in the development of the common asylum and immigration policy?

F - Other Institutions of the EU

I. Introduction

This section is mainly dedicated to the description of two EU bodies which are also involved in the development of EU asylum policy: the Economic and Social Committee and the Committee of the Regions.

Although they only have a tangential link with asylum matters, two other bodies are also presented: the Court of Auditors and the European Investment Bank.

Finally, to complete the presentation of the EU and other European institutions, a brief mention is made of the European Central Bank.

II. The Economic and Social Committee

Address: Rue Ravenstein 2
B-1000 Brussels
Tel.: 0032/2/546.90.11

Internet: http://raven.ces-cdr.eu.int

1. Role

The Economic and Social Committee (ESC) was established by the Treaty of Rome in 1957 (TEC articles 257-262) with the responsibility for representing the various economic and social groupings in the European Community, in particular in relation to the completion of the single market. These groups are employers, workers, and various interest groups (self-employed, civil society). It has since become a Committee that delivers its opinion on any issues of Community interest.

The Commission and the Council are obliged to consult the ESC during the law making process in various areas, such as:

– free movement, asylum and immigration,
– internal Market,
– social policy,
– vocational training, and
– research and technological development.

The ESC has also the right to issue opinions on its own initiative. It is a strictly consultative body that issues legally non-binding opinions. Its role is important in that the ESC provides a forum where representatives of economic and social activity may exchange views and offer opinions to the institutions of the EU. Recently, the ESC has started to issue comments and opinions on the various Commission proposals for legislative instruments on asylum and migration, as well as Commission policy documents. The ESC has organised hearings and

thematic Conferences on these proposals, for instance on the issue of integration of migrants, and has sought UNHCR's inputs into its various activities.

On some occasions, the ESC opinions have had considerable political implications. For example, the ESC adopted in 1989 an opinion on basic social rights in the Community, which paved the way for the Commission to draft the 'European Social Charter'.

2. Composition

The ESC has 222 members, appointed by the European Council of Ministers for a period of four years on the basis of lists drawn up by the Member States. One third of the seats goes to employers, one third to employees, and one third to various interest groups such as farmers, tradesmen, professionals and craftsmen. Membership can be renewed.

3. Organisation

ESC has its own organisational Bureau comprised of 30 members. The Bureau is responsible for ensuring the smooth running of the day-to-day business of the ESC. The ESC also disposes of a Secretariat with various administrative services (including interpretation and translation services).

III. Committee of the Regions

Address: Rue Belliard 78-81
B-1000 Brussels
Tel.: 0032/2/282.22.11

Internet: http://cor.eu.int

1. Role

The Committee of the Regions (CoR) is an independent advisory body to the European Commission and the Council, representing the interests of regional and local authorities in the Union. It is established by TEC articles 263–265. The Committee provides the Commission and the Council with non-binding opinions, either at their request or on its own initiative.

2. Composition

The Committee has 222 representatives and an equal number of alternates. They are appointed for four-year renewable terms by the Council acting on proposals from the Member States. The representatives are selected from the various regional and local authorities of the EU, such as the German Länder, Belgian regions, or the French provincial authorities. A Chairperson is elected from among its members and a Bureau established for a term of two years. It establishes its own Rules of Procedure, but unlike the ESC, must submit

them for approval to the Council, acting unanimously. The CoR disposes of a Secretariat with similar administrative services to those in the ESC.

3. Areas of consultation

The Committee of the Regions must be consulted by the Commission or the Council on issues related to areas of direct competence and relevance such as education, vocational training and youth, culture, public health, trans-European networks, telecommunications and infrastructure, economic and social cohesion and legislation.

The Committee of the Regions can be consulted on any other matter if the Council or the Commission considers it appropriate. It may also offer its unsolicited opinion in a number of areas ranging from urban affairs to tourism to the environment. It has eight specialised Committees which assist in the development of opinions on these issues. The Committee has delivered opinions on EU asylum-related issues which have a direct link to regional and local management, such as the legal basis for the European Refugee Fund, the Directive on Temporary Protection and the Directive on minimum standards for the reception conditions of asylum seekers.

IV. European Court of Auditors

Address: 16, rue Alcide de Gaspari
L-1615 Luxembourg
tel.: 00352/43981

Internet: www.eca.eu.int

1. Role

The European Court of Auditors (ECA) was set up by the Treaty of Brussels which came into force on 1 June 1977. The ECA was created to assist the Council and European Parliament in exercising control over the budget. Its members regularly take part in parliamentary meetings of the Committees on Budget and Budgetary Control. Since the entry into force of the Maastricht Treaty, the Court has been elevated to the rank of a European institution by TEC article 7 (1).

2. Composition

The Court consists of 15 members (one from each Member State). They are appointed for a renewable term of six years by a unanimous Council decision after consultation with the Parliament. Only the Court of Justice can remove members. Their required qualities are competence and independence. The 15 members elect their President for a duration of three years, likewise renewable.

3. Aims

The Court is responsible for examining all Community and EU revenue and expenditure in order to ensure the financial integrity of the Union. It looks after the external control of European public expenditure and gives opinions on the financial and budgetary plans of the European Union. All institutions of the Union are subject to its scrutiny. Amendments which require an increase or decrease in financing must be approved by the Court (article 279 TEC). Therefore, the Court is competent to issue reports, on its own initiative, on any budgetary matters. For example, the Court of Auditors has published important reports on the granting of humanitarian aid, including EU funding for refugee assistance operations conducted by UNHCR and its implementing partners.

In addition, the Court can publicise any of its findings and produces an annual report at the end of each budgetary year.

V. European Investment Bank

Address: 100 Boulevard Konrad Adenauer
L-2950 Luxembourg
Tel.: 00352/43.791

Internet: www.eib.org

1. Role

The European Investment Bank (EIB) was created in 1958 as an autonomous body set up to finance long–term capital investment which would further the development of the common market on the basis of (now) article 9 TEC.

The not-for-profit EIB is not a Community institution in the strict sense. It is a financial body governed by public law. Its main goal is to assist in the economic development of poorer regions within the EU, as well as inter alia the improvement of transport and telecommunications structures, protection of the environment and urban living conditions, energy, and support for small and medium sized enterprises.

It also provides development funds for states which have entered into agreements with the EU such as African Caribbean and Pacific states, Maghreb and Mashreq countries. The field of financing is described in TEC article 267.

2. Organisation and operation

The European Investment Bank is managed by a Board of Governors which consists of the 15 Finance Ministers from the Member States. They are responsible for laying down directives, approving the annual balance sheet and deciding on increasing capital and appointing the Members of the Board of Directors, the Management Committee and the Audit Committee.

3. Resources

The EIB has two major resources: capital, which is subscribed by the Member States depending on their economic performance and reserves, and borrowing, through the issuance of public bond issues.

Since 1995 the capital of the EIB, subscribed by the Member States, has amounted, after the accession of Finland, Sweden and Austria, to 62 billion Euro. The available borrowing has amounted to about 18 billion Euro. In 1994 loan contracts have been signed with about 60 countries for more than 2.25 billion Euro.

VI. The European Central Bank (ECB)

The task of the Frankfurt based ECB is to maintain the stability of the Euro and control the amount of currency in circulation. The ECB is independent from EU institutions, national governments or any other body.

green

Chapter 3: Community Legislation

Chapter 3
European Community (EC) Legislation

I. Introduction

This chapter is divided as follows:

Under the umbrella of the European Union, it is possible to distinguish three broad categories of law:

(1) the law of the European Community, which is the most extensive and significant so far;
(2) the law of the Second Pillar (Common Foreign and Security Policy), which remains a form of international, inter-governmental law, although linked in certain ways with the Community institutions and objectives; and
(3) the law of the Third Pillar (Justice and Home Affairs), which is a hybrid of the first two, sharing more of the features of EC law while remaining essentially inter-governmental.

Currently, other types of EU law are emerging, under both existing and new Treaty provisions on "closer co-operation." These are increasingly difficult to categorise either as classic Community law or as the law of the other two pillars. Hence, the Convention for the Future of Europe, which prepared a radical overhaul of the Nice Treaty, has issued a draft constitution for the EU which includes a thoroughly revised law-making system based on simplification and reduction of the Union's legislative instruments.

The chapter will concentrate on EC law and the way in which it is formulated and enacted, with a focus on the transfer of asylum policy from the Third to the First Pillar under the Amsterdam Treaty. It is broken down into three parts. Firstly, the sources of EC law will be described. Secondly, a brief overview will be given of the nature of Community legislation. Thirdly, the procedural aspects of the promulgation of EC legislation will be considered, with due attention to the procedure envisaged for the transitional period of five years following the entry into force of the Treaty of Amsterdam for the area of asylum. Finally, the general characteristics of the Community decision-making process will be examined and, in this context, avenues for lobbying by interest groups will be explored.

II. The sources of Community law

Apart from the founding legal acts of the EC and the EU (successive Treaties, Protocols and Annexes, instruments amending and supplementing them) which, together with the general principles of law, constitute the primary source of Community law, the following sources of

EC law can be identified: EC secondary legislation; international agreements concluded between the EC and third countries or organisations; case-law of the European Court of Justice (ECJ); and various other "soft law" instruments.

1. EC secondary legislation

The principal forms of Community secondary legislation are set out in Article 249 of the Treaty of the EU and include four major types of instruments which can be adopted by the EC institutions: regulations, directives, decisions, and recommendations and opinions.

A. Regulations

Regulations have general application and ensure the uniform implementation of EC law in Member States. Regulations are binding in their entirety and are directly applicable in all Member States. They have to be published in the Official Journal and enter into force on the date which is specified in the particular regulation or, otherwise, on the twentieth day following publication.

B. Directives

Directives differ from regulations in that they are binding only as to the result to be achieved, while leaving choice of form and method to national authorities. The directives are passed generally following the "co-decision" procedure (refer below for exceptions) and have to be published in the Official Journal. The date of their entry into force is the same as that of Regulations, however, Member States are given a time period of usually 1 to 2 years to adopt an appropriate act at national level in order to transpose the Directive into national legislation.

Directives provide the Community with valuable flexibility. Thus, in areas where it might be difficult to devise Regulations and in respect of the subsidiary and proportionality principle, Directives are generally the most useful instruments serving the purpose of harmonising laws and practices within certain areas.

C. Decisions

Decisions are binding in their entirety on those to whom they are addressed (specific natural or legal person/s or a Member State). Decisions which are adopted pursuant to the "co-decision" procedure must be published in the Official Journal. They take effect from the date specified therein or, in the absence of any date, on the twentieth day following their publication. Like Directives, Decisions must be transposed into national legislation by an act of the legislature of the concerned Member State.

D. Recommendations and Opinions

Article 211 TEC provides the European Commission with the power to formulate recommendations or deliver opinions on matters dealt with in the Treaty, either where the Treaty expressly so provides, or where the Commission believes that it is necessary to do so to achieve certain objectives. According to Article 249 TEC, recommendations and opinions do not have legally binding force. Nevertheless, it is open to a national court to refer to the European Court of Justice concerning the interpretation or validity of such instruments.

2. EC International Agreements

By virtue of Articles 281 TEC and 300 TEC, the Community (unlike the Union) has legal personality and is empowered to enter into contractual relations with third countries or

international organisations. As examples, the Community has concluded Partnership and Stabilisation Agreements with some countries of the Western Balkans and Trade Agreements with the World Trade Organisation. All of the above constitute Community acts and form part of the EC legal order. In this context, it should be recalled that there is a long standing debate whether the Community should acceed to the European Convention on Human Rights - as it has done to other international and Council of Europe Agreements.

3. European Court of Justice jurisprudence

Decisions taken by the European Court of Justice and the Court of First Instance, within their respective jurisdictions, also constitute sources of EC law. Included within this category, moreover, are what the ECJ refers to as the "general principles" of law (including international human rights and refugee law). These principles are derived by the Court from the constitutional traditions and rules common to Member States as well as from international agreements and conventions to which Member States are party. Furthermore, the European Court of Justice has increasingly included in its rulings a reference to the EU Charter of Fundamental Rights, which without having binding force constitute nevertheless "a source of guidance as to the true nature of Community rules of positive law" (opinon of the Advocate General in the case Hautla, 10 July 2001).

4. Soft law

There are other less formal types of Community law, such as guidelines, communications, resolutions, declarations, etc. As will be shown in the section below, the main distinguishing feature between the "hard law" and "soft law" is that the former has direct effect, while the latter are legally non-binding and are used in order to pave the way towards consensus, or mark points of agreement or convergence between Member States. Prior to the communautarisation of asylum law, all asylum matters adopted constituted soft law (with the exception of the Dublin Convention).

III. The nature of Community Law

The European Community has developed into an organisation with a relatively autonomous legal system. The norms within this system are binding upon Member States and are internalised into their domestic legislative systems in many cases without recourse to national implementing measures. Development of the Community's legal system has been given decisive impetus by the rulings and the interpretative practice of the European Court of Justice (ECJ).

Already in the early 1960s, the ECJ outlined what has become known as the direct effect of Community law. In two cases (Van Gend en Loos [1963], and Costa v. ENEL [1964]), the ECJ held that the Community constitutes "a new legal order of international law" which presumes automatic internalisation of Treaty rules into Member States' legal administration and judicial practice, to which individual applicants should have recourse (the ECJ recognised, however, that in order to be enforced, the provisions of the EC law should be sufficiently "precise and clear").

Also, the Court developed the principle of primacy or supremacy of Community law. Thus, it

argued that if the Treaty goals of creating a common market and an "ever closer union" among Member States were to be realised, then the laws of the single Community would have to apply to the same extent and with equal force in each Member State. Consequently, in cases of conflict between the Community law and national laws, the former should always prevail over the latter.

EC law and Member States' national law

Still, it is important to bear in mind that the implementation and effectiveness of EC law ultimately relies on Member States national legal systems. In order to facilitate the implementation of Community law, Article 10 TEC specifically provides that "Member States shall take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations" arising out of the Treaty or "resulting from action taken by the institutions of the Community." Furthermore, Member States are required to contribute to the achievement of the Community's tasks and abstain from any measure which can jeopardise the attainment of the objectives of the Treaty.

IV. Procedural aspects of the legislative process

The Community legislative process is very complex: there are at least six legislative procedures which apply in different contexts. The distinguishing feature among them is the degree of power exercised in each by the European Parliament. In order to determine which procedure applies, one should simply consult the Treaty Article which will refer to one of the procedures listed below.

1. Commission Acting Alone

Under this procedure, the Commission has powers to make legislation without any intervention from the other institutions. These cases, however, are rare and of specific nature (for example, Article 86(3) TEC concerning the role of the State in relation to public undertakings, empowers the Commission to promulgate, if necessary, Directives or Decisions to ensure the application of that Article).

2. Council and Commission Acting Alone

There are a number of areas, such as the free movement of workers, capital, common economic policy, and common commercial policy, where the above institutions can take action without intervention by the European Parliament (EP). The Council will act on a proposal from the Commission and take the decision in accordance with the voting requirement laid down in the relevant Treaty Article. The Council may choose to consult the Parliament, but does not have to do so.

3. Consultation Procedure

In this case, the legislative process is still dominated by the Council and the Commission, as there is just a bare requirement to consult the Parliament. Nevertheless, a failure to do so may lead to the measure being annulled, and the Parliament may have to be re-consulted

where there are important changes to the measure, not promoted by the EP itself. The range of topics falling under this procedure includes, inter alia, Article 67 (1) TEC, concerning visas and asylum; Article 13 TEC, dealing with measures to combat various forms of discrimination; Article 21 TEU, concerning the general direction of common foreign and security policy; and Article 39 TEU dealing with police and judicial co-operation in criminal matters.

4. Co-operation Procedure

This procedure applies whenever the Treaty provides that the adoption of an act has to be in accordance with Article 252 TEC (this Article applies now mainly to issues related to the Economic and Monetary Union). The procedure essentially creates two readings of the proposed measure in Parliament. During the first reading, the Parliament gives an opinion on the measure before the Council adopts a Common Position. The second reading takes place after the Council has adopted its common position. If, within three months, the EP has either approved the Common Position or has not taken a decision, the Council shall adopt the act, in accordance with the Common Position. However, if the EP has rejected it and, within three months has, proposed amendments by an absolute majority of its members, the Council has to revisit its position by considering EP amendments. Acting by qualified majority, it shall adopt the proposal which often only partially meets the request by the Parliament for modifications. The EP however has no competence to oppose the Council's final decision under this procedure (as it has under the co-decision procedure).

5. Co-decision Procedure (Article 251)

This procedure is known as "co-decision", both because it is designed to prevent a measure from being adopted without the approval of the Council and the European Parliament, and because the procedure aims at reaching a jointly approved text. This procedure has gradually become the norm during the successive Treaty revisions, demonstrating the increasing competencies of the Parliament.

The Parliament again has two readings under this procedure. The first reading occurs when the EP gives its opinion to the Council before the latter adopts a common position. The second reading takes place on the assumption that the Council has not approved all the EP's first-reading amendments. The Council communicates its Common Position to the EP, which then has the option to approve, reject, or propose amendments to the measure. In cases where the EP suggests amendments not all of which are acceptable to the Council, the Conciliation Committee comes into play. The Conciliation Committee is composed of an equal number of members of the Council and of the Parliament, and is charged with finding a solution and moving the legislative process forward. If the Committee reaches no decision, the Council may confirm the common position by qualified majority voting. If the EP rejects the proposal by a qualified majority then the proposal is not adopted.

Particular Treaty articles may add the requirement to consult the Committee of the Regions and/or the Economic and Social Committee.

6. Assent Procedure

This procedure was introduced for important matters such as the expansion of European Community membership or the rectification of association agreements. According to this

procedure, the act can only be adopted if both the Council and the European Parliament have approved it. Parliament's rules now provide for the possibility of reviewing an interim Council/Commission report with a draft resolution allowing for modification to an agreement before its final approval. The Parliament has also unilaterally introduced a conciliation procedure with the Council under this procedure.

V. Transitional arrangements for implementing TEC Title IV "Visas, Asylum, Immigration and other Policies related to the free movement of persons"

In accordance with Article 67 TEC, during a transitional period of five years following the entry into force of the Treaty of Amsterdam (i. e. 1 May 1999 - 1 May 2004), the consultation procedure (see above) has been maintained in the areas of asylum and immigration. Importantly, during this period, Member States will share the right of initiative with the Commission, and, as well as after the expiration of this timeframe, the Commission will have to continue to examine any request emanating from a Member State. It should be noted however that in the area of asylum, the Tampere Summit requested the Commission to prepare all legislative acts.

Also, after the transitional period expires, the Council, acting unanimously after consulting the European Parliament, shall take a decision with a view to providing for all or parts of the areas covered by this Title to be governed by the "co-decision" procedure referred to in Article 251 TEC.

This provision, however, does not apply to:

– Article 62(2)(b)(i) TEC on visas for intended stays of no more than three months, including the list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, and Article 62(2)(b)(iii) TEC, concerning a uniform format for visas. Immediately upon entry into force of the Treaty of Amsterdam, these measures were to be adopted through the co-decision procedure; and

– Article 62(2)(b)(ii) TEC on the procedures and conditions for issuing visas by Member States, and Article 62(2)(b)(iv) TEC on rules on a uniform visa, where measures, after a period of five years following the entry into force of the Treaty of Amsterdam, shall be adopted by the Council pursuant to the Article 251 TEC "co-decision" procedure.

In December 2002, the Nice Treaty amended Article 67 in that the Council shall switch automatically to the co-decision procedure "after the adoption of Community legislation setting out the common rules and basic principles in matters pertaining to asylum". A unanimous vote in Council for this change is no longer necessary.

Following the Convention for the future of Europe, it is expected that the inter-governmental conference (IGC) will endorse inter alia proposals to change towards co-decision (and qualified majority in Council) in asylum matters.

VI. Chapter review

– What constitutes EC law?

– What are the differences between the four instruments which can be adopted by EC institutions?

– How is Community law enacted?

– Explain how TEC Title IV will be enacted during the transitional period which follows the entry into force of the Amsterdam Treaty.

rot

Creating an Area of Freedom, Security and Justice: From Intergovernmental Co-operation to a Common Asylum and Migration Policy

green

Chapter 1: Early Co-operation in Asylum and Migration: Pre-Maastricht (1985-1993)

Creating an Area of Freedom, Security and Justice: From Intergovernmental Co-operation To a Common Asylum and Migration Policy

Chapter 1
Early Co-operation towards European Integration (1985-1993)
The Pre-Maastricht Period

I. Introduction

This chapter will introduce the early stages of European integration and co-operation in the field of justice and home affairs, i.e. from 1985 to 1993, a period when the harmonisation of asylum policy entered the dialogue between the Member States.

II. Background and main conceptual developments

The founding of the European Economic Community or EEC (1957-1958 the Treaty of Rome, TEEC, now TEC) addressed the freedom of movement of persons through its guarantee of the four economic freedoms: the free movement of goods, capital, services, and dependent and non-dependent labour. Justice and home affairs, considered by the Member States as a question of national sovereignty, remained outside the EC dialogue and framework. The principle of freedom of movement was meant to apply to certain categories of workers, but would not apply more generally to Member States' citizens and third country nationals legally residing in the Member States. Thus, internal borders were meant to remain.

This changed in June 1985, when the European Council, made up of the Heads of State and Government of the Member States, agreed to the Commission's White Paper on Completing the Internal Market. The purpose of this White Paper was to set a deadline (1992) for achieving the internal market, including the complete abolition of internal border controls. The White Paper revealed that, despite the Community's long existence, many barriers existed to the achievement of a single internal market. This led to an inter-governmental process that resulted in the drafting and ratification of the Single European Act in 1986 (entry into force 1987). The purpose of the Single European Act (SEA) was the elimination of the remaining barriers to the internal market within the set deadline of 31 December 1992. In the Final Act of the SEA, Member States laid down that "in order to promote the free movement of persons, the Member States shall co-operate, without prejudice to the powers of the Community, in particular as regards entry, movement and residence of third country nationals".

During this period, asylum applications in the EC Member States increased remarkably . This raised a number of immediate concerns regarding the ability of Member States to handle the increasing number of asylum seekers, as well as long term questions relating to how the common market and the removal of internal borders, set to take effect on 1 January 1993, would influence the movement of asylum seekers within the Community.

Thus, the pre-Maastricht period was characterised by the desire to achieve a common internal market. No direct actions were taken in the field of asylum until very late in this period under the pressure of increasing asylum applications and public debate. Yet, as this chapter will show, these actions were taken outside of the framework of the European Community.

III. Main institutional developments

As we have seen in Part 1 of this Tool Box, this period saw the development of the four main institutions of the European Community: the Council of Ministers, the European Commission, the European Parliament and the Court of Justice. As asylum matters did not fall within the direct competencies of these institutions, inter-governmental co-operation on asylum developed in an ad hoc manner and took place mostly outside the formalised procedures provided for in the Treaty of Rome.

During this time a number of ad-hoc groups were set up which would later develop further to form the basis of more permanent structures for justice and home affairs.

One such ad-hoc attempt, outside the Community framework, was the creation of the TREVI groups. Created by a Dutch initiative in 1975, TREVI's goal, through the regular meeting of relevant senior ministry officials, was enhanced co-operation of Member States in the fight against terrorism (TREVI I), exchange of information, training and technical equipment (TREVI II), and was later extended in 1985 to include organised crime issues (TREVI III). In 1988, TREVI "1992" was established to examine the issues raised by the abolition of internal borders in the light of a common market.

In 1986, the British Government initiated a further step regarding co-operation in justice and home affairs through the creation of the ad hoc group on immigration. This ad hoc group was composed of six sub-groups covering admission, expulsion, visas, false documents, asylum, and external borders.

In 1988, the European Council of Rhodes, Greece, created a network of National Co-ordinators on the Free Movement of Persons (Rhodes Group). This group was made up of high level civil servants responsible for asylum, refugee and immigration issues. The Rhodes Group was delegated the task of setting up the European Information System (EIS) on JHA matters.

In general, the role of the European Parliament and Commission vis-à-vis these groups, with few exceptions, was limited to one of observer.

IV. Legislative programme and instruments

The inter-governmental discussions on Member States' asylum policies and practices and the search for a coherent approach to problems such as the growing number of unfounded claims for asylum led the European Community to adopt several non-binding recommendations, as well as one binding Convention on asylum.

The Schengen Agreement

Parallel to the debates taking place at the Community level, France, Germany, Belgium, Luxembourg and the Netherlands began their own discussions in 1984 regarding aspects of the freedom of movement of persons and the removal of border controls. The five States designed what some consider to be a pilot project or experiment to test out the open border concept. It was a system that would gradually reduce internal limits to the free movement of goods, services, capital and persons. On 14 June 1985, on a small boat moored on the Moselle River in the town of Schengen in Luxembourg, representatives of the five States concluded the Schengen Agreement. The Schengen Accord (1985) on the removal of common borders was signed by participating States acting outside the EC framework. In June 1990, the same States signed a Convention on applying the 1985 Schengen Agreement.

Schengen today consists of the original 14 June 1985 Schengen Agreement, the 19 June 1990 Schengen Convention implementing the Schengen Agreement, the Accession Protocols, as well as decisions and declarations taken by the Schengen Committee. By 1998, 13 out of the 15 Member States (including Denmark, excluding the United Kingdom and Ireland) plus Norway and Iceland were part of the Schengen agreement. This group of instruments is known as "the Schengen Acquis " and was later incorporated into the Treaty of Amsterdam (1997-1999). It is now part of the EU Acquis (see Part 1, chapter 2, A).

The Schengen States identified several asylum related issues which needed to be considered in relation to the removal of frontiers:

– the assignment of exclusive responsibility for examining asylum requests to a single country according to established criteria;
– the obligation of the responsible country to readmit asylum seekers;
– rules on visits by asylum seekers to other countries; and
– exchange of information, including specific details regarding individuals, and general data on countries of origin.

The Dublin Convention

In Copenhagen, on 9 December 1987, Ministers of Interior of Member States made the first step towards an agreement on "rules for determining State responsibility for examining an asylum request". It was decided that responsibility should lie with the Member State that first issued a residence permit or visa unless a close family member was already living in another Member State as a recognised refugee. In the case where no visa or residence permit had been issued the Member State responsible for the crossing of the external border would be responsible. These discussions gave birth to the Dublin Convention determining the state responsible for examining an asylum application. The Dublin Convention, signed in 1990 (Denmark in 1991), was a major step in the long term political dialogue that marked the pre-Maastricht period in justice and home affairs. It took until 1 September 1997 for the Agreement to enter into force following ratification by all participating Member States.

The Dublin Convention in brief

The Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities (the Dublin Convention, 15 June 1990) is an international convention which was concluded between the (then) twelve Member States belonging to the EC. Currently all fifteen EU Member States have ratified the Dublin Convention. It came into effect on 1 September 1997, except for Austria and Sweden (1 October 1997), and Finland (1 January 1998). It was signed outside the

framework of the EC since the EU Treaty did not provide a legal basis for its adoption. The Dublin Convention replaced a chapter with similar provisions of the Schengen Implementation Agreement.
The aim of the Dublin Convention is to set up common criteria to determine the single Member State which is responsible for examining an asylum request. These criteria have been identified in order of importance to facilitate this process: presence of a family member as refugee; visa or valid residence permit issued by a certain Member State; irregular crossing of the border of a Member State; and the responsibility for controlling the entry. Once determined, the State responsible must apply its national laws and the provisions of the 1951 Refugee Convention and 1967 Protocol. The Dublin Convention should ensure that asylum requests are examined by at least one of the Member States, thereby avoiding situations where responsibility for refugees and asylum seekers falls between States. It also includes rules for taking charge and taking back asylum seekers.

As per the Amsterdam agenda, on 18 February 2003 the Dublin Convention was replaced by a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application lodged in one of the member States by a third country national.

The WGI 930

In 1991, the then Dutch Presidency drafted a document which provided a work plan for the harmonisation of future asylum and immigration policy. The work programme (referred to as the WGI 930 or Plan of Action) set out an agenda for immigration and asylum policy. It drew its contents from related European Parliament Reports (1987 Vetter report), Council Work Document (Palma report) and two Commission Communications on the Right to Asylum and on Immigration issued in the same period in late 1991.

The 1992 London Resolutions

Increasing co-operation between Member States and the marked rise in asylum applications also led to the London Resolutions of 1992 (concluded in London on 30 November and 1 December 1992). Non-binding instruments, they contain guidelines for handling manifestly unfounded claims and applications from third country nationals who passed through a "safe third country" or who are from a "safe country of origin".

The London Resolutions in brief

The Resolution on Manifestly Unfounded Applications for Asylum defines what is considered to be a manifestly unfounded application and which accelerated procedure applies in handling this application. Applications may be considered unfounded if they do not meet the criteria of the 1951 Refugee Convention and its 1967 Protocol for one of the following reasons: either the applicant cannot substantiate his claim of fear of persecution in his own country or the claim is based on deliberate deception or is an abuse of asylum procedures.

The Resolution on the Harmonised Approach to Questions Concerning Host Third Countries defines the criteria for determining a country as a host third country and the principles applicable for the return of an asylum seeker to such a country. Host third country is often referred to as "safe third country".

The Conclusions on Countries in which there is no Serious Risk of Persecution define the concept of the "safe country of origin" as one which has not generated refugees or where past events that had warranted the application of the 1951 Refugee Convention no longer exist. In addition, the Conclusions provide for a number of criteria to define safe countries of origin, such as respect for human rights, and the effective operation of democratic institutions and the rule of law.

CIREA, CIREFI

In addition to the preparation and adoption of non-binding instruments in asylum and immigration, Member States also promoted practical co-operation particularly in the collection and dissemination of statistical data and the common analysis of trends and developments in refugee and migratory flows and country of origin situations. Since 1992 Member States have been working together in CIREA, the Centre for Information, Reflection and Exchange on Asylum, and in CIREFI, the Centre for Information, Reflection and Exchange on the crossing of Frontiers and Immigration - two organisations for discussing and researching asylum and migration in EU Member States (see Part 1, chapter 2, B).

In 2002, CIREFI was renamed EURASIL and the Commission became responsible for its management. UNHCR has participated as an observer in CIREA meetings since early 1995, providing expert advice on country of origin situations and evaluations to aid the assessment of the eligibility of asylum seekers originating from countries under review. Common analysis and information exchange have become important features of European co-operation in asylum and migration matters.

The Council on trial: need for more transparency

In 1998, a group of Dutch lawyers sought information from CIREA, including country reports, analyses, evaluations and a list of CIREA contact people in Member States. They were refused much of this information by the Council, on the grounds that the information was sensitive and disclosure could harm international relations. No further explanation of the reasons for confidentiality were given and no partial access to certain documents was granted.

Subsequently, one lawyer initiated proceedings with the Court of First Instance (for an explanation of the role of the Court see Part 1, chapter 2, E). The Court ruled on 6 April 2000 that the Council's response in which it declared that an entire document was confidential based on the fact that a portion of the document might be sensitive, violated the 1993 Council Decision 93/731 on access to information. The Council, in disagreement with this ruling, initiated appeal procedures which are currently pending before the European Court of Justice.

V. The role of the European Parliament

Since asylum issues did not fall within the competence of the EC, legislative action by the European Parliament was not possible during the pre-Maastricht period. The European Parliament did produce, though, a number of reports and passed non binding Resolutions which would influence the inter-governmental consultations, including the preparations for WGI 930 outlined above.

VI. Conclusions

The development of asylum policy during the pre-Maastricht period took place outside the Community framework and was by and large directed by the WGI 930 work plan. Whilst the Commission and European Parliament played a minor role during this period, they should not be discounted completely as both institutions contributed to the content of WGI 930.

As well as the lack of a Community legislative framework, the slow development of a common asylum policy can be attributed to the following factors:

– uncertainty relating to the full realisation of the 1985 White Paper and Single European Act;
– lack of knowledge of Member States' asylum regimes; and
– varying degrees to which States were willing to adopt common measures in these areas.

Member States approached developments in the asylum field with caution. The WGI 930 work plan can be seen as a rational response to this as it set out to identify those areas where co-operation between Member States would be needed to achieve the free movement of persons whilst taking into account the presence of asylum seekers, refugees, and legal and

irregular immigrants. High priorities for the WGI 930 work programme were a common approach to external borders, definition of the State responsible for taking a decision on an asylum application, admission criteria, and elements of substantive asylum law.

Progress was limited to the extent to which Member States were willing to subject their national laws to conformity with those of the other Member States. The entry into force of the Maastricht Treaty would later give impetus to this process, albeit at a modest pace.

VII. Chapter review

– What is the significance of a common market that guarantees freedom of movement for persons within its borders? How would this affect recognised refugees in one of the States of the common market?

– How would you describe co-operation on asylum between Member States during the pre-Maastricht era?

– Discuss the main legislative programme and instruments of this period, focussing on the Schengen Agreement, the Dublin Convention and the London Resolutions

– What is the significance of the WGI 930 work plan?

– What elements of asylum policy development were not addressed during the pre-Maastricht era?

green

Chapter 2: Asylum Harmonization: Maastricht (1993-1999)

Chapter 2
Harmonisation of asylum policy (1993-1999)
The Maastricht Era

I. Introduction

This chapter reviews the institutional and legislative development of a common asylum policy during the Maastricht Era. This period is characterised by slow progress and reluctance on the part of the Member States to give up their sovereignty in the field of justice and home affairs.

II. Background and main conceptual developments

The entry into force of the Treaty of Maastricht in November 1993 created the European Union and introduced a three pillar structure. The three existing European Communities (EC, ECSC, EAEC) were combined under the First Pillar. The Second and Third Pillars concerned inter-governmental co-operation in the fields of Common Foreign and Security Policy (Second Pillar) and Justice and Home Affairs (Third Pillar). The pillars operate under a single institutional framework.

Under the framework for the First Pillar, the EC institutions have supranational powers. This means that they can pass, in certain cases by majority vote, binding Community law that has primacy over national law in the form of Regulations, Directives, Decisions. They can also adopt non-binding instruments, such as Recommendations and Opinions. The European Commission normally has the exclusive right of initiative, while the Council, alone or jointly with the European Parliament, adopts legislation. Community law is interpreted by the European Court of Justice.

The Second Pillar concerns formalised inter-governmental co-operation in the Common Foreign and Security Policy (CFSP) under new Title V, Article J. Member States, acting unanimously within the framework of the Council, were entitled to adopt Joint Actions and Common Positions. These instruments were binding on the Member States but had no direct effect on EU citizens. The Court of Justice had no jurisdiction. The powers of the European Commission and European Parliament were limited to a right to be informed.

Finally, Member States had already recognised that the area of justice and home affairs needed closer co-operation. However, Member States sought to maintain their sovereignty over JHA issues and limit the role of the Community Institutions. Rather than place JHA issues within the Community framework of the First Pillar, Maastricht created a Third Pillar. The Member States placed asylum, along with other justice and home affairs issues, in a new Title VI, Article K, entitled "Provisions on Co-operation in the Field of Justice and Home Affairs". While this did not provide for supranational decision making, it allowed for formalised inter-governmental co-operation in the framework of the Community institutions.

The Maastricht Treaty allowed the possibility of "communautarisation" of asylum and immigration policies - that is the adoption of asylum legislation by the Community institutions by consensus in the form of binding instruments (Article K.9 of TEU). The provision was

known as the "Passerelle clause". Yet the application of the provision was thought too cumbersome, in addition to being an infringement on Member States' sovereignty, and therefore was never used in the field of asylum.

III. Institutional development

The most important institution for the development of asylum policy under the Maastricht Treaty was the newly created Justice and Home Affairs Council, part of the Council of Ministers of the European Union (see Part 1, chapter 2). The JHA Council did not serve as a Community institution since it acted outside the decision making procedures provided for in the First Pillar. Instead, it provided a forum for inter-governmental co-operation, taking decisions with unanimity.

Under the Third Pillar, Joint Positions and Joint Actions could be adopted by the JHA Council on an initiative by a Member State or the Commission. A political "Co-ordinating Committee", the K.4 Committee, consisting of senior officials from the Member States, was created to support the JHA Council. The role of the European Commission was to be one of full involvement with the work of the JHA Council on Title VI issues. Like the Member States the Commission had the right to initiate legislation. The European Parliament was to be informed and consulted on all issues related to Title VI but in practice this happened only after instruments were adopted. The European Court of Justice did not have jurisdiction over legislation adopted under Title VI, unless explicitly specified in an instrument.

The procedure for decision making in JHA was as follows:

– preparation of the Council meetings by COREPER – the Committee of Permanent Representatives of the Member States;
– political co-ordination of legislative preparation by the K.4 Committee, named after the Treaty article on which it was based;
– asylum instruments drafted by Group Asylum, made up of high level officials and other asylum experts from the Member States.

The Parliament and Commission played a back seat role to the JHA Council in the development of formal asylum policy during this period. Thus, asylum issues remained, to a large extent, the domain of the Member States acting through the JHA Council and K.4 Committee.

The Commission's main organ for formulating and drafting asylum policy was the JHA Task Force. The Task Force, a unit in the Commission General Secretariat, produced two proposals for Joint Actions during the Maastricht Era: one in 1997 on temporary protection, the other in 1998, a revised proposal on temporary protection combined with a separate proposal on burden sharing based on the principle of solidarity among the Member States.

IV. Towards a harmonised asylum policy: legislative programme and instruments

Maastricht, through Title VI, Article K.1, identified several issues as areas of common interest including asylum and immigration policy, and policies towards third country nationals as

regards their entry and movement, conditions for their residence and family reunification. Drugs policies and combating illegal immigration were among Third Pillar priorities. The Treaty did not, however, provide a strategic plan of policy development in these areas.

Measures adopted during the Maastricht period were the following:

1. Measures relating to the application of the Dublin Convention (EURODAC)

Member States worked towards the creation of an identification system which would allow the fingerprints of asylum seekers to be compared across Member States (EURODAC). The aim was to facilitate the identification of the Member State responsible for handling individual applications, thereby improving the implementation of the Dublin Convention. In 1998, a draft EURODAC Convention was agreed upon. It called for the creation of a Central Unit in Brussels with an electronic database of files and fingerprints that could be accessed by the Member States. Later on, a EURODAC Protocol was adopted extending the scope of EURODAC to include other third country nationals. The Convention and Protocol never entered into force. However, under the Treaty of Amsterdam (1997-1999), a corresponding Council Regulation was adopted on 11 December 2000. EURODAC began to operate on 15 January 2003.

2. Harmonisation of substantive asylum law

In the field of substantive asylum law, a Joint Position was adopted in 1996 regarding a consistent application of the definition of refugees in the 1951 Refugee Convention. In its preamble, the Joint Position makes specific reference to the UNHCR Handbook as a valuable source of interpretation, and refers to the importance of the role of Member States in guaranteeing protection for those in need in accordance with the 1951 Refugee Convention. However, a major point of contention,- the application of the Convention definition in cases of non-state persecution - could not be resolved.

3. Harmonisation of asylum procedures

In the field of procedural harmonisation, the JHA Council adopted a Resolution on Minimum Guarantees for Asylum Procedures in 1995, and in 1997 a Resolution on Measures to Protect Minors in the European Union which made reference to the specific needs of unaccompanied minors during asylum procedures. The 1995 Resolution abandoned the automatic suspensive effect of appeals against first instance decisions taken in accelerated or admissibility procedures.

4. Common standards for temporary protection and rules for burden sharing in cases of mass influx of refugees

In 1995, with the recent crisis in Bosnia and Herzegovina in mind, the Council adopted a resolution with regard to the temporary reception of displaced persons, including an alert and emergency procedure for burden sharing. Efforts were made in 1997 to develop a Joint Action on temporary protection as proposed by the Commission, but it was rejected as going too far. It was revised and resubmitted in 1998. The Commission also submitted a draft

Joint Action concerning Burden Sharing in 1998. Both were rejected. Member States were not prepared to adopt such legislation until issues relating to physical and financial burden sharing were better formulated.

V. Political and strategic developments

In February 1994, the European Commission issued a Communication on Immigration and Asylum Policies, in response to the pace of harmonisation, the future enlargement of the EU, as well as the rising number of asylum seekers, refugees and other immigrants. The Communication was particularly a response to the need to formulate more forward-looking, comprehensive approaches to refugee and migration challenges.

The paper outlined the current status of harmonisation with regard to the WGI 930 work programme and submitted a plan of action to guide the future development of measures to be taken in countries and regions of origin to reduce migration pressures, the reception and admission of immigrants in EU Member States, and the integration of legally residing third country nationals. The Communication was drafted with a view to influencing the forthcoming Inter-governmental Conference which would be reviewing the Treaty of Maastricht.

VI. Conclusion

Progress towards the development of harmonised asylum policies was limited during the Maastricht Era. Inter-governmental co-operation led to the adoption of a number of non-binding instruments which represented more of a snapshot of Member States' practices rather than a concerted attempt to harmonise procedural and substantive asylum policies based on common standards.

Yet, the Maastricht Era was important for a change in attitude towards harmonisation by the Member States. This was due to a number of factors. Close co-operation between Member States' authorities in the context of the Schengen Agreement and the Dublin Convention, and the formalisation of inter-governmental co-operation in the JHA Council and its bodies, exposed the inconsistencies between the policies and practices of Member States and created a greater awareness of the need to address these differences.

The growing problems of unfounded applications and illegal trafficking were shared concerns, and also created a need for a common approach. There was also a perception that the rights of asylum seekers, refugees and migrants were not always being met, which created a further pressure on Member States.

Many Member States understood the ineffectiveness of the approach adopted during the Maastricht era. Non-binding instruments had an unclear status and remained without practical effect. Many governments saw the need for a coherent and consistent body of binding instruments, based on common standards, which, while more difficult to achieve, would serve better the interests of the Member States. This approach would also help candidate countries in their preparations for accession.

In 1996, three years after the entry into force of the Maastricht Treaty, an Inter-governmental Conference was convened to assess the strengths and weaknesses of Maastricht. The pace

of legislative development in asylum and migration policy, the powers of the Parliament and Commission, and decision making procedures in the Council were identified as important issues for improvement. This implied the need for amendments to the EU Treaty.

VII. Chapter review

– Identify the main differences in the treatment of asylum policy by the EU between the pre-Maastricht and Maastricht periods.

– What were the main characteristics of the three pillar structure of the Maastricht Treaty?

– How would you explain the role of the JHA Council, Commission and Parliament in the asylum harmonisation process during the Maastricht period?

– What is the difference between communautarisation and harmonisation? How does this affect asylum policy development?

– To what extent do changes in asylum applications affect the development of a harmonised EU asylum policy?

green

Chapter 3: Towards a Common European Asylum System: Amsterdam (1999-2004)

Chapter 3
Towards a Common European Asylum System (1999-2004), Amsterdam

I. Introduction

Important changes in the movement of refugees and migrants, and criticism of the slow process of asylum harmonisation during the Maastricht era prompted Member States to make substantial changes to their own asylum policies and to consider common European solutions to asylum issues. The goal was now more substantial harmonisation, underpinned by credibility and visibility, to be achieved through a revision of the EU Treaty. This was achieved - at least partially - through the adoption of the asylum paragraph of the Amsterdam Treaty.

This chapter introduces the new framework and building blocks of a common EU asylum policy, and the development of an Area of Freedom, Security and Justice as introduced by the new Treaty. It includes an analysis of the components of a future EU asylum system and related legislative developments. The political concerns related to the asylum and migration dichotomy will also be outlined.

II. Background to the process

The Inter-governmental Conference (IGC) that began in Turin on 29 March 1996 assessed the need for the completion of the common market. On 16 and 17 June 1997, the European Council met in Amsterdam to finalise the IGC. The result of the Amsterdam European Council was a revised Treaty on the European Union, the Amsterdam Treaty (TEU Amsterdam). It was signed on 2 October 1997 and entered into force on 1 May 1999.

Amongst other goals, the Amsterdam Treaty sought to enhance and accelerate the harmonisation of EU asylum and migration policy created under Maastricht.

To this effect, the institutional basis for JHA policy as regulated by the Maastricht Treaty was profoundly changed. The provisions related to asylum and migration policy were moved to the First Pillar and are now found in TEC Title IV. Provisions on judicial co-operation in criminal matters and police co-operation remained within the Third Pillar in TEC Title VI. However, although asylum matters are now part of Community law, special rules apply to decision-making procedures and judicial control. These will be discussed in more detail below.

Amsterdam also incorporates the Schengen Acquis (see Part 2, chapter 1) into the body of EU legislation and action. It offers the possibility of opt ins to the Schengen Acquis for those states not signatories to the Schengen Accord and related instruments, namely Ireland and the UK. Denmark, a signatory to the Schengen Accord applies the Schengen Acquis but has a general opt out in all JHA matters not covered by Schengen.

Denmark, Ireland and the UK

Denmark can participate fully in Council discussions on JHA issues but without voting rights. It follows that future Schengen instruments, adopted under the First Pillar structure, will not apply to Denmark.

The UK and Ireland opted out of Title IV but retain the possibility of opting into individual asylum or migration instruments - within a deadline of three months after the proposal has been presented to the Council. In practice, the UK has so far opted in for all asylum-related instruments and Ireland for most of them (it did not for the Directive on reception conditions of asylum seekers).

The Amsterdam Treaty provides the legal basis for the gradual implementation of an Area of Freedom, Security and Justice (AFSJ). In this respect, freedom relates to measures in the field of human rights, asylum and migration; security refers to measures in the field of police co-operation in organised crime, trafficking and drug control; and justice refers to judicial co-operation, access to justice and convergence of civil law.

The Treaty of Amsterdam and the development of asylum policy

The Amsterdam Treaty in many ways represents a radical departure from the previous institutional set-up for asylum policy. As we have seen in the previous chapter, co-operation between the Member States before and during Maastricht mainly focused on the creation of non-binding guidelines and recommendations. The new TEC Title IV on "Visas, asylum, immigration and other policies related to the free movement of persons" calls for the development of several elements of the AFSJ, such as binding Community legislation in the area of common asylum and migration policy.

TEC Title IV outlines the main policy areas of the AFSJ. The Treaty has set out a five year transitional period from its entry into force for most of these measures to be adopted by the Council.

The whole set of measures to be adopted under Title IV is as follows:

- Control of internal and external border control (Arts. 61.a; 62). All measures with a view to ensuring the absence of any controls on persons when crossing internal borders, measures on the crossing of external borders and measures setting out the conditions under which nationals of third countries shall have the freedom of travel within the territory of the Member States during a period of no more than three months, to be adopted within a period of five years;
- Specific measures on asylum and refugees and displaced persons (Arts 63.1 and 63.2), see below for specification;
- Immigration (Arts. 61b, 63.3), see below;
- Rights of nationals of third countries within the EU (including limited freedom of movement) (Arts. 62.3, 63.4), see below;
- Measures in the field of judicial co-operation in civil matters having cross border implications (Art 65);

– Police and judicial co-operation in criminal matters with reference to TEU Title VI (Arts. 61e, 65);
– Measures to encourage and strengthen administrative co-operation (Art. 66).

Article 63 sets out the building blocks for the development of asylum and migration policy. It seeks to fill in the acquis on asylum with all relevant substantial, institutional and procedural elements. Once adopted as Regulations, Directives or Decisions by the JHA Council, these elements will replace the existing fragmentary body of non-binding instruments. The building blocks are the following:

1. 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 (Art. 63.1a);
2. Minimum standards on the reception of asylum seekers in Member States (Art. 63.1b);
3. Minimum standards with respect to the qualification of nationals of third countries as refugees (Art. 63.1c);
4. Minimum standards on procedures in Member States for granting or withdrawing refugee status (Art. 63.1d);
5. Minimum standards for giving temporary protection to displaced persons from third countries (Art. 63.2a);
6. Minimum standards for persons who otherwise need international protection (Art. 63.2a);
7. Promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons (Art. 63.2b).

In addition, the implementation of the migration-related elements of Article 63.3 and Art. 63.4 have a direct bearing on the developing common asylum system:

8. Conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion (Art 63.3a);
9. Measures within the area of illegal immigration and illegal residence, including repatriation of illegal residents (Art. 63.4).

The Amsterdam Treaty provisions in asylum and migration are subject to the Community method of law making, albeit with certain exceptions. According to Article 67, for a period of five years (1999-2004), EU Member States have the right to initiate legislation with the Commission. Draft Regulations, Directives and Decisions are submitted to the JHA Council for decision making by unanimity rather than by qualified majority voting. The role of the EU Parliament is limited to consultation on proposals. The European Court of Justice (ECJ) generally has no jurisdiction unless a court of the Member States, against whose decision there is no remedy in national law, refers a question of interpretation, or one of the Member States, the European Commission or the Council requests such a ruling. The Court can then issue a Preliminary Ruling.

As an annexe to the Amsterdam Treaty, a Protocol on asylum concerning nationals of Member States of the EU was adopted (the so called "Spanish Protocol"). The assumption underlying this instrument was that EU Member States, "given the level of protection of fundamental rights and freedoms by the Member States of the EU'", may be considered safe countries of origin. Therefore any application for asylum from a citizen of a Member State would be declared prima facie inadmissible. A Member State could process such an application, on the presumption that the application was manifestly unfounded, yet in such a case would have

to inform the Council. Belgium issued a Declaration referring to the Protocol in which it stated that it would carry out individual examinations of asylum requests made by a national of another Member State. At the time of its adoption, UNHCR expressed concern that the Protocol would restrict EU citizens' access to asylum, and argued that the principles of international refugee law required unqualified and non-discriminatory access to asylum procedures, irrespective of the nationality of the asylum seeker.

Declaration 17 annexed to the Amsterdam Treaty provides for UNHCR and other relevant international organisations to be consulted on matters relating to asylum policy.

III. Institutional co-operation

In moving justice and home affairs to the First Pillar, Amsterdam specified the new institutional relationship between the Council, the Commission, the Parliament and the European Court of Justice. This relationship consists of the Member States and Commission sharing the right of initiative regarding new instruments, the Council retaining the sole right of decision making, the Parliament having only a consultative role, and the ECJ having limited powers of interpretation (prejudicial rulings).

1. The Council

Migration, external borders and asylum issues are dealt with at the political level by SCIFA, the Strategic Committee on Immigration, Frontiers and Asylum (see Part 1, chapter 2, B). Similar in constitution to the Maastricht K.4 Committee, SCIFA is made up of high level officials from the Member States. However, before reaching SCIFA, a proposal is first extensively discussed and negotiated in the Council Asylum Working Party, the Migration Working Party or the External Borders Working Party, where experts from Member States meet to review the proposal's contents. Where disagreements persist at technical level, SCIFA is asked to take political decisions in order to bring negotiations to a successful conclusion at COREPER level.

2. The Commission

In the European Commission considerable changes took place. The former JHA Task Force in the Secretariat General was transformed into a separate Directorate General (DG) for JHA. DG Justice and Home Affairs is responsible for drafting asylum and migration related legislation, and for preparing and implementing policies and operational strategies, including co-operation programmes. It should be noted that, following an informal agreement at the Tampere Summit, all asylum instruments were prepared by the Commission DG JHA at the request of Member States (who therefore renounced their right to initiative). In addition, DG JHA manages funding mechanisms that support the reception, integration and repatriation of refugees, such as the European Refugee Fund, as well as programmes for administrative co-operation such as ARGO.

Other relevant Commission bodies for UNHCR's work include the DGs for External Relations, Development, and Budget as well as the Humanitarian Aid Office (ECHO) and the Commission Legal Service.

3. The European Parliament

In the European Parliament, the former Civil Liberties and Internal Affairs Committee, after restructuring, became the Citizen's Rights and Justice and Home Affairs Committee. Though not directly involved in asylum policy development at the legislative level, the Committee reviews all draft instruments and provides non-binding amendments and comments. In addition, the Committee supports the development of asylum policy through its own reports and studies. All Parliament documents are in the public domain and therefore help to inform the public and civil society. They generate debates on important matters where the EU decision making process is not transparent. The Parliament regularly calls for the Council's negotiations on asylum and legal admission policies to be speeded up, a balance in control versus protection measures, and for moves towards qualified majority voting in Council and the co-decision procedure.

IV. The framework for a common EU asylum policy

Each of the instruments referred to below is presented in greater detail in the following chapter, Main Instruments.

1. The Vienna Action Plan

While the Amsterdam Treaty itself provides little in terms of political direction or substantive priorities, these were partly provided during the ratification process which prepared for the coming into force of the Treaty. The successive Presidency discussions on these matters culminated in the adoption in December 1998 by the Vienna Summit of an Action Plan for implementing the AFSJ agenda. This plan covers all elements for the AFSJ. The Vienna Action Plan marks the first time that Member States and the Commission jointly agreed upon a detailed time frame for implementation and a set of priorities that would require intense co-operation at various political and officer levels. Implementation began under the German Presidency during the first half of 1999.

2. Tampere Conclusions

A milestone in asylum harmonisation was reached during the Finnish Presidency at the Tampere Summit. In Tampere, Finland, on 15 and 16 October 1999, the European Council held a special meeting with members of the Commission and the then President of the European Parliament, to discuss the possibilities and ramifications of the AFSJ, including the building of a future common asylum and immigration policy. In the area of migration and asylum, four pillars were identified: 1) partnership with countries of origin, 2) a common European asylum system, 3) fair treatment of third country nationals, and 4) management of migration flows at all their stages. In building a common asylum system, the Summit adopted a two staged approach: in the short term, common minimum standards would be adopted, while in the long term, Community rules would be established which would go beyond minimum levels of harmonisation and aim for a common asylum procedure and a uniform refugee status valid throughout the Union.

UNHCR's expectations of the Tampere Summit

UNHCR set out five key proposals prior to the Summit. These five elements related to:

1. **A common interpretation of the international definition of who is a refugee in line with the 1951 Refugee Convention.**
2. **Accessible, fair and expeditious asylum procedures, complemented by new approaches to particular refugee situations, such as temporary protection in the case of mass influx.**
3. **Fair sharing of responsibility for receiving asylum seekers without shifting the burden to those least able to accept responsibility.**
4. **Appropriate systems and procedures for effecting the return of persons not in need of international protection.**
5. **A preventive policy to address human rights violations and other causes of flight and forced displacement.**

In addition to these five elements, UNHCR encouraged Member States to move the asylum debate out of a framework of restriction and deterrence into one that would take a pro-active rights-based approach to asylum and a more constructive outlook on foreign and development policy. In this regard, it was mentioned that the work of HLWG, the High Level Working Group on Migration and Asylum (see Part 1, chapter 2, B), should be developed further. UNHCR called for the development of the external dimension of EU asylum policy, including capacity building in countries of first asylum in order to find durable solutions for refugees in their regions of origin.

Tampere did not provide solutions to all the proposals put forward by UNHCR but the general framework, developed at Tampere, is supportive of UNHCR's recommendations.

In relation to a common European asylum system, the Tampere Conclusions emphasised the full and inclusive application of the 1951 Refugee Convention, absolute respect for the right to seek asylum, as well as the need to guarantee access to territory and the asylum procedure.

In relation to migration, the Summit called for a vigorous integration policy aimed at guaranteeing legally resident third country nationals rights and obligations comparable to those of EU citizens. The EU also called for a comprehensive approach to migration, addressing political, human rights and development issues in countries of origin and transit. Furthermore, the Summit situated the development of a common asylum and migration policy within the broader framework of the management of migration, based on the capacity to combat and prevent irregular migration, the integrated management of borders, and the development of readmission and return policies.

Finally, the Tampere Summit called on the Commission to develop an implementation tool that would review progress in implementing the political and legislative agenda for the AFSJ which Amsterdam and Vienna had set out. This so called Scoreboard was introduced by the Commission for the first time in March 2000 and has since been updated bi-annually.

3. The Nice Treaty Revision

Amsterdam did not deal with certain institutional gaps which needed addressing before the enlargement of the EU could take place. These mainly concerned the composition of the Commission, Council's decision making procedures, and the powers of the Parliament. The Nice Summit of December 2000 approved a further Treaty revision which touched on a limited number of institutional reforms.

On asylum, Nice modified the relevant provisions of the Amsterdam Treaty by introducing qualified majority voting in Council and the co-decision procedure with the Parliament on condition that the "Council has previously adopted Community legislation defining the common rules and basic principles governing this issue." It is generally understood that this means adoption of the Amsterdam legislative package. Thus, following adoption of the entire set of instruments, future procedures will no longer require unanimity in Council, and the Parliament will have the right to co-legislate.

4. Laeken Summit Conclusions

As requested by the Tampere Summit, the Council undertook an evaluation of the progress achieved in justice and home affairs at the end of 2001. Under the Belgium Presidency, the Laeken Summit reaffirmed the EU's commitment to the policy guidelines and objectives defined at the Tampere Summit, and emphasised the need for a new impetus and guidelines to establish the common asylum system as a matter of priority within the agreed time frame.

The Summit produced a progress report and set deadlines for the adoption and review of a number of important instruments, including the draft legislative instruments for asylum. It also called on the Commission to submit amended legislative proposals on minimum standards for asylum procedures and on family reunification. The Summit did not, however, comment on the contents of standards and policies nor on the level of harmonisation to be achieved. Generally speaking, the Laeken Conclusions concentrated on developing means for combating illegal migration and trans-national organised crime rather than on asylum and legal admission.

5. Seville Summit Conclusions

The June 2002 Seville Summit Conclusions marked another benchmark towards establishing the ASFJ. The Summit called for speeding up the implementation of the Tampere Conclusions, and the need to give continued attention to the migration issue during future Presidencies. There needed to be a fair balance between admission and integration policies on the one hand, and combating illegal immigration and human trafficking on the other.

The Conclusions were grouped in four parts: 1) combating illegal immigration, 2) integrated management of external borders, 3) integrating migration issues in relations with third countries, and 4) speeding up the asylum and migration agenda. With regard to the latter, the Seville Summit called on the JHA Council to adopt the Dublin II Regulation by December 2002, the qualification directive (refugee definition/subsidiary protection) and family reunion directive (new proposal) by June 2003, and the asylum procedures directive (new proposal) by the end of 2003. By June 2003, the Heads of States were expected to review the practical implementation of the guidelines laid down in the Seville Conclusions on the basis of a Council/Commission report.

V. Legislative programme and other instruments

1. Legislative instruments

Since the Tampere Summit, the following asylum related legislative instruments have been drafted by the Commission and proposed for adoption in Council, based on the provisions of Article 63 TEC. Some of these instruments have subsequently been adopted:

1. Based on Art. 63.1a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national (proposed in July 2001, adopted in February 2003).
2. Based on Art. 63.1b Council Directive laying down Minimum Standards on the Reception of Applicants for Asylum in Member States (proposed April 2001, adopted January 2003).
3. Based on Art. 63.1c and 63.2a Proposal for a Council Directive laying down Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees, in Accordance with the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, or as Persons who Otherwise Need International Protection (proposed September 2001).
4. Based on Article 63.1d Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (September 2000, amended proposal June 2002).
5. Based on Article 63.2a Council Directive on Temporary Protection (proposed May 2000, adopted July 2001).
6. Based on Article 63.2b Council Decision establishing a European Refugee Fund (proposed December 1999, adopted September 2000).
7. Based on Article 63.3a Council Directive on the Right to Family Reunification (proposed December 1999, amended May 2002, adopted - provisionally - February 2003).
8. Based on Article 63.4, Proposal for a Council Directive on Long Term Residents Status (proposed March 2001, adopted – provisionally –June 2003).
9. In addition, Article 63.3b provides the legal basis for the adoption of readmission agreements to be concluded with, among others, Hong Kong, Sri Lanka, Morocco, Russia, Pakistan, Turkey, China, Albania, Algeria and Ukraine. In November 2002, the European Community adopted its first readmission agreement with Hong Kong.

Please see Tool Box 2 List of Texts for an overview of the full set of instruments of direct interest to UNHCR as well as accompanying UNHCR comments.

2. EU Charter of Fundamental Rights

On 7 December 2000 at the Nice Summit, the Charter of Fundamental Rights was solemnly proclaimed by the European Parliament, the Council and the Commission. It had been drafted by a Convention which was set up following the decision of the 1999 Cologne European Council to draw up a Charter of Fundamental Rights. The Charter is legally non-binding yet it provides a solid basis for action by the Council and the Commission and for interpretation by the ECJ. Since its proclamation, calls have been made for its incorporation into the EU Treaty (to become part of its "constitutional" chapter). The Convention on the Future of Europe (see below) heeded this call when preparing a new constitutional treaty.

The Charter makes visible the fundamental rights of the EU citizens and third country

nationals. Chapter II, Article 18 guarantees the absolute right to asylum. It states that "the right to asylum shall be guaranteed with due respect for the rules of the 1951 Refugee Convention and in accordance with the Treaty establishing the European Community". Article 19 forbids the removal, expulsion or extradition of a person "to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment".

3. The Convention for the Future of Europe: towards a new Constitutional Treaty for the EU (see Part 1, chapter 1, appendix 2)

The Nice Treaty failed to address the full reform of the EU institutions required for EU enlargement. In response, the Laeken European Council decided to convene a Convention on the Future of Europe with the objective of drafting a new constitutional treaty for the EU. The Convention brought together during 2002 and 2003 Government representatives, members of the European Parliament and members of national parliaments from EU Member States and candidate countries, and was presided by Mr. Valery Giscard d'Estaing, a former President of France. The Convention has not only proposed a new constitution but has also undertaken a complete overhaul of the structure of the treaty, aimed at simplification and rationalisation. Provisions for the establishment of the AFSJ, with mention of a common asylum and migration system, are included in the Convention's draft treaty. The proposals are likely to be adopted by Member States at an Inter-governmental Conference at the end of 2003.

VI. Practical co-operation and programming

1. The European Refugee Fund (ERF)

The European Refugee Fund was launched in September 2000 to support existing programmes and new initiatives in the Member States in the reception of asylum seekers, the integration of recognised refugees and others in need of protection, and voluntary repatriation. Open to national, regional and local authorities, international organisations, practitioners and NGOs, ERF funds are distributed annually by the Commission to Member States based inter alia on the number of recognised refugees and applications received over an average period of three years.

The total ERF budget for the period 1999-2004 is 216 million Euros, available to ERF participating Member States (ie excluding Denmark). The ERF reserves a portion of its funds for emergency situations including mass influxes as well as 5% for Community programmes directly managed by the Commission. As it is a decentralised fund, each Member State has its own allocation procedure, subject to approval from DG Justice and Home Affairs. Before Amsterdam, four independent budget lines preceded the ERF.

2. ARGO

The ARGO Programme was launched in 2002 to support administrative co-operation in the fields of external borders, visas, asylum and immigration. In particular, ARGO supports practitioner training, exchange of staff and studies in EU Member States and candidate countries, as well as activities aimed at strengthening co-operation between NGOs and

government authorities. The programme replaced a similar Odysseus programme in place since 1998. DG Justice and Home Affairs is in charge of managing ARGO funds. The total available budget is 25 million Euros for the period 2002-2006.

3. The European Initiative for Democracy and Human Rights

In 1999, merging a number of separate budget lines, the European Initiative for Democracy and Human Rights (EIDHR) was launched to assist the reinforcement of pluralist democratic society governed by the rule of law and respect for human rights. It finances projects world-wide. Beneficiaries can be NGOs, international organisations and national authorities. EIDHR is administered by the EuropeAid Co-operation Office, attached to the Commission's DG External Relations. Most of the budget is administered locally by EC delegations in the form of micro projects. Funding can be made available to NGOs involved in, for example, social and legal counselling of refugees and asylum seekers.

4. The High Level Working Group (see Part 1, chapter 2, B)

In addition to legislation, EU Member States and the Commission have begun developing joint strategies aimed at improving the management of migratory and refugee flows through strengthened partnership with countries of origin and transit. In early 1999, a so called High Level Working Group on Migration and Asylum (HLWG) was established within the Council. The HLWG was tasked with drawing up a number of action plans for the joint analyses of migratory flows from or through selected countries, and proposals to address the causes of these flows, enhance reception capacities in the region, promote human rights actions, foster political dialogue, and explore possibilities for readmission and return to the country or region of origin. Countries such as Afghanistan, Albania, Iraq, Morocco, Somalia, and Sri Lanka were the first targets of the HLWG.

Following the Tampere Summit, the HLWG was given a mandate to continue strategy development with regard to selected countries of origin. In 2003, the HLWG mandate was modified and expanded further in order to allow for a more flexible approach and a better geographical balance in its actions, including provision for regional approaches, an increased emphasis on analysing the relationship between the Union's migration management and trade, aid policy and foreign relations, and a stronger emphasis on partnership with third countries in joint migration management.

VII.The emerging external dimension of EU policy in justice and home affairs

Even before the entry into force of the Amsterdam Treaty, European asylum and migration standards proved to have an "export value" with third countries. They were either used by the EU to measure the quality of nascent asylum systems in EU candidate countries or as stated objectives in developing closer co-operation with those countries aspiring to become candidate countries or third countries (such as Ukraine, Moldova, Macedonia or Croatia).

The Tampere Summit called for the development of the external dimension of JHA policy for the purpose of strengthening the Union's internal order and security. Since then, the EU has increasingly included this dimension in its political agenda.

The 2000 Feira European Council devoted a detailed discussion to the issue on the basis of a Presidency report, while the 2001 Laeken Summit confirmed the priority given to JHA within the EU's external relations. In subsequent meetings of the General Affairs Council, the EU has emphasised the need for co-operation with third countries in managing migration. Since 11 September 2001, the need for anti-terrorist measures and joint actions to combat organised crime has been added to the agenda. This is particularly the case in relations with countries neighbouring the EU in Eastern Europe and the Western Balkans (see Part 3, Chapter 2, the External Dimension of JHA).

In 2002, the EU adopted three separate but inter-related action plans, on combating illegal immigration and human trafficking, on repatriation and return, and on border management. These plans highlight the need for co-operation with countries of origin and transit. The June 2002 Seville Summit considered combating illegal immigration a top priority and called for a range of initiatives aimed at an integrated management of external borders and integrating migration issues in relations with third countries. The Summit underlined the need for a comprehensive and balanced approach to tackle the root causes of illegal immigration, which, in order to be effective, should make more extensive use of development assistance, trade relations and conflict prevention measures in close co-operation with countries of origin and transit. The Summit also stressed that any future co-operation or association agreement must include a clause on joint management of migratory flows and on compulsory readmission of irregular residents, including rejected asylum-seekers.

VIII. The longer term: beyond the Amsterdam agenda

In November 2000, the Commission issued a Communication, Towards a Common Asylum Procedure and Uniform Status Valid throughout the Union. This document is important because it presents a strategic and forward-looking approach to the development of a common asylum system beyond the minimum standards prescribed by the Amsterdam Treaty. The Commission proposes inter alia the establishment of a single procedure in each of the Member States to determine all protection needs. It also explores new avenues for improved management of asylum systems by suggesting protected entry schemes, more effective burden sharing, and a common resettlement scheme, on the basis of enhanced co-operation with countries of origin and first asylum.

In 2001, a first EC annual report on asylum was issued, taking stock of progress made in implementing the Amsterdam asylum agenda and introducing the open co-ordination method in asylum. Under this method the Commission produces guidelines for accelerating the harmonisation process and monitoring state practice in implementing EC instruments. It focuses on the exchange of good practice and the development of practical tools and training programmes to aid the implementation of EC Directives. It also reviews the need for improved collection, analysis and exchange of data and the feasibility of creating a European Migration Observatory for migration and asylum issues. In short, these initiatives should result in a deepening of the harmonisation process and the development of complementary tools to implement common standards.

In 2003, a second annual report was issued, addressing in particular the contribution of the EC to the implementation of UNHCR's Agenda for Protection. This document highlighted the present malaise in Member States' asylum systems, the growing misuse of procedures, and the challenges posed by the complexity of mixed migratory flows, including the problems of smuggling and trafficking. The Communication called for new tools and avenues to states

asylum system management to complement the legislative agenda of Amsterdam and the stage by stage approach adopted at Tampere. It recommended the following complementary objectives:

– improving the quality of decision making in the asylum systems of Member States (through 'frontloading');

– strengthening the capacities for protection and reception in regions of origin; and

– treatment of asylum requests as close as possible to the home countries of refugees, through, for example, protected entry procedures and resettlement programmes.

IX. Conclusions

The Treaty of Amsterdam contained a number of practical and political proposals for guiding the development of EU asylum policy – in particular, an agreed framework of common minimum standards. The willingness of Member States to give up part of their sovereignty and control over their own asylum systems is essential to the process and, to a large extent, determines its pace. The institutional balance remains tilted in favour of the JHA Council.

The Amsterdam Treaty represents a unique opportunity to strengthen refugee protection in the EU, as it enables Member States to resolve the considerable differences between their national asylum systems. At the same time the reality is that new EU-wide arrangements tend to be based on the lowest common denominator, or, failing common agreement, emptied of meaningful substance.

These opportunities and threats have been recognised by UNHCR and other interested parties, including representatives of civil society, NGOs and academics. In UNHCR's view, the development of a coherent EU asylum policy requires attention to the following:

– Common EU measures to combat irregular border crossing must not obstruct access by asylum seekers to Member States' territory. Therefore, mechanisms for sharing the responsibility for processing an asylum claim, based on the Dublin Convention, the "safe third country" notion, or readmission agreements, need to contain appropriate safeguards to ensure that the applicant will receive a fair examination of his/her claim by an identified State.

– To maintain a strategic and principled approach to the development of a common EU asylum policy, a common interpretation of the refugee definition according to the 1951 Refugee Convention must be accepted. In this context, the 1951 Refugee Convention must be applied in a consistent and inclusive manner, which gives due recognition to the persecutory nature of much contemporary conflict, whether inflicted by State or non-State agents.

– Common standards are needed for a fair, efficient and quick asylum procedure, based on international standards of procedural asylum law. A single asylum procedure would help to identify those in need of international protection in a holistic manner.

– Common standards of treatment, including legal, security and socio-economic, need to be adopted to prevent secondary movement of asylum seekers and refugees. A common EU asylum policy should deal effectively with, and result in the return of, those screened out after a fair and satisfactory procedure, in order to preserve the integrity of Member States' asylum systems.

Despite the momentum generated by Amsterdam and Tampere, the reality is that Member States' own interests often conflict with ambitions for harmonisation and the high level and comprehensive scope of standards put forward by the Commission. Negotiations in Council are protracted and often blocked by the uncompromising attitude of some Member States on certain specific issues. This forces the Commission to amend its proposals and to scale down its ambitions. This has been the case for example with the proposal for a Directive on the right to family reunification and the proposal for a Directive on asylum procedures.

The initial results of the Amsterdam period show that Member States are more inclined to defend their national practices than to adopt common EU standards which would force them to reform their asylum systems.

X. Chapter review

– Describe the main changes in asylum policy development between the Maastricht and Amsterdam eras. What effect might these changes have on refugee protection?

– Discuss the various stages in the development of a common EU asylum policy, from the Vienna Action Plan to the Seville Conclusions.

– Which are the main institutions responsible for asylum policy development under Amsterdam? What role does each institution play?

– What is meant by "Five Year Window" and "AFSJ"?

– Name the main elements of your national asylum system. Are there asylum elements not addressed by the asylum building blocks of Article 63? And if so, which ?

green

Chapter 4:
The Next Steps (after 2004)

Chapter 4
Conclusion: The Next Steps (after 2004)

The introduction of the concept of an Area of Freedom, Security and Justice into the Treaty of Amsterdam marked a new approach to the development of EU asylum and migration policy. The development of this policy was no longer solely perceived as a measure to help establish the free movement of persons. Developing the new asylum system is now considered as a legitimate exercise in its own right, as an expression of the Union's commitment to absolute respect for the right to seek asylum, as well as a recognition that contemporary problems need responses at a European rather than national level.

The implementation of the asylum agenda as set by the Amsterdam Treaty should be considered as a first step in the development of the common asylum system. As early as at the Tampere Summit it was acknowledged that the adoption of the package of common minimum standards laid down in Directives should be followed by additional initiatives introducing a common asylum procedure and uniform status, valid throughout the Union. In November 2000, the European Commission published a Communication on the second stage of harmonisation, indicating which steps would have to be taken after the completion of the transition period indicated by the Amsterdam Treaty. The proposed asylum article for the new Treaty which is to succeed the Amsterdam Treaty in 2004 indeed allows for further harmonisation towards the establishment of a single asylum system as regards both its internal and external dimension.

The adoption of the full package of Directives under the Amsterdam Treaty should be considered the starting point for new initiatives aimed at deepening and expanding the harmonisation process rather than the culmination points in completing the common asylum system. The first phase of harmonisation has not met with the expectations put forward by the Tampere Summit. In negotiating the various Commission proposals, Member States so far have shown increasing reluctance to adopt a set of detailed, prescriptive and forward-looking policies and standards. Rather they have adopted texts which allow them sufficient flexibility to continue implementing agreed national policies and practices. Hence, the various Directives adopted so far must be reviewed in the near future, or complemented by additional instruments, if meaningful harmonisation in the form of a truly common procedure and uniform status is to be achieved.

A next phase of harmonisation is expected to address at least the following areas. First, the adopted Directives need to be transposed in national law and practice. Some Member States have started this process, yet others are lagging behind so far. Following adoption of a Directive Member States normally have 18 to 24 months to complete the transposition process. Also, given the various 'grey areas' in the text which are subject to divergent interpretation and application, there may be need for the EC Court of Justice to issue rulings on the correct interpretation of these provisions. The EC Court of Justice is expected to become an important actor in the future harmonisation process both for providing the correct interpretation of certain provisions, and in obliging Member State to implement the various Directives. The European Commission will also have an important role to play in monitoring State practice. The transposition of the Directives should result in the upgrading of various aspects of States' asylum systems, notably as regards reception conditions and procedural guarantees, not least in the new Member States joining the Union in 2004. This process

needs to be scrutinised carefully by the Commission in order to ensure that improvements are effectively made.

Second, legislative harmonisation needs to be complemented by approximation of the asylum practice between Member States, inter alia through increased exchange of information and analysis between practitioners. This can be the case for the treatment of specific groups of asylum-seekers or the application of certain legal or protection concepts and tools. It can also relate to the collection and interpretation of asylum statistics or country of origin information. Or it can concern the division of labour and co-operation between the various instances in the asylum procedure - at the border, in country or during appeal. Proper exchange, common analysis of problems and developing joint lines of action may all contribute to harmonisation in practice. It is at this practical level that real harmonisation can make itself felt in the approximation of decision-making and the common use of tools and mechanisms.

Third, there is a need for additional legal and policy instruments to complement the package of common minimum standards. For instance, some provisions of adopted Directives may call for additional common guidelines for their implementation. Also, the Commission intends to propose a Council instrument introducing a single asylum procedure in each of the Member States. Such a procedure should allow one single asylum body to determine the need for protection in a holistic manner, first on the basis of the 1951 Convention, and if that fails, on the basis of grounds for subsidiary protection or for humanitarian reasons. Furthermore, the Commission wishes to prepare a common system by which refugees can apply for asylum in embassies of Member States within, or close to, their countries of origin, as an element of more orderly and managed entry procedures. These would have to serve as a complement to asylum processing of spontaneous arrivals. The Commission is also exploring the feasibility of a common EU resettlement scheme in which all EU Member States could participate, governed by common rules and shared responsibilities. These are just some of the proposals which should constitute the package of measures representing the second stage of harmonisation.

It is clear that the establishment of a single asylum system, based on a common procedure and resulting in a uniform status, is still a distant aim. The harmonisation process is in its initial stage, yet some important first steps have been set. It is now a matter of creating new momentum in the process to take it decisively forward.

green

Chapter 5:
Main Instruments of the Asylum Harmonisation Process

Chapter 5
Main Instruments

A - Amsterdam Treaty and EU Asylum Policy Development

The Treaty of the European Union (TEU) II (Amsterdam) was concluded during the night of 17-18 June 1997, at the end of the Intergovernmental Conference (IGC) on institutional reform called for by Maastricht. Negotiations had commenced two years earlier. The Treaty was officially signed by the EU Heads of State and Government on 2 October 1997. Following ratification by all EU Member States, either by parliamentary votes or in referenda, it entered into force on 1 May 1999.

I. Nature of the provisions of TEU II

The Amsterdam Treaty represents a series of amendments to the 1957 Treaty of Rome, subsequent EC Treaties and TEU I (Maastricht). The amendments introduced in the Amsterdam Treaty were meant to broaden and deepen the competences of the EU in various areas while at the same time clarifying the principles of subsidiarity and proportionality. The new Treaty also allowed for "closer co-operation" between a group of states for example in incorporating the Schengen acquis into the Treaty or establishing a euro zone between those Member States wishing to participate. Several amendments are of relevance to the freedom of movement of persons, particularly in the field of asylum and immigration.

II. Significance of the provisions of TEU II

As with its predecessors, the Inter-governmental Conference (IGC) which resulted in the Amsterdam Treaty intended to advance European integration as well as provide impetus towards further reform and improvement of the structures of the EU.

TEU II (Amsterdam) created a greater emphasis on citizenship and the rights of individuals, more areas subject to co-decision by the European Parliament, a new EU competence for employment, establishment of a Community Area of Freedom, Security and Justice, further consolidation of the foundations of a Common Foreign and Security Policy, and initial reform of EU institutions in the run-up to enlargement in Central and Eastern Europe.

As reform of the institutions under Amsterdam was incomplete, the IGC called for further Treaty reform to consider, inter alia, the structure of the Commission, Member States' voting weight in Council, number of MEPs and so on. These reforms would be adopted by the Nice Council in December 2000, although, in the view of many, still in an unsatisfactory way.

III. Structure of TEU II

The Amsterdam Treaty brought amendments to the Maastricht Treaty. It added amendments to all three pillars (Pillar I under the Treaty of the EC and Pillars II and III under the TEU). The Treaty of Amsterdam is structured as follows:

1. Text of the Treaty of the EU

Preamble

Title I Common Provisions (Art. 1-7)

- Art. 1 (ex Art. A) declares that the European Union is founded on the European Communities.
- Art. 2 (ex Art. B), Art. 3 (ex. Art. C) and Art. 4 (ex Art. D) set up the objectives of the Union
- Art. 5 (ex. Art. E) names the institutions that shall exercise their powers under the conditions set out in the Treaty: the European Parliament, the Council, the Commission, the Court of Justice and the Court of Auditors.
- Art. 6 (ex Art. F) lays down the principles on which the Union is founded: liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the Member States. Article 6 further indicates that the Union shall respect fundamental rights as guaranteed by the European Convention on Human rights and as they result from the constitutional traditions common to Member States and as general principles of Community law.
- Art. 7 (ex Art. F.1) provides for action which might be taken in case of breach of principles mentioned in Art. 6(1) by a Member State.

Title II Provisions amending the EEC Treaty (TEC) (Art. 8, ex Art. G)

Title III Provisions amending the ECSC Treaty (Art. 9, ex. Art. H)

Title IV Provisions amending the EAEC Treaty; (Art. 10, ex. Art. I)

Title V Provisions on CFSP (Art. 11-28)

Title VI Provisions on police and judicial co-operation in criminal matters, (Art. 29-42)

Title VII Provisions on closer co-operation (Art. 43-45)

Title VIII Final provisions (Art. 46-53)

2. Text of the Treaty of the European Community, as found in above mentioned Title II Provisions amending the EEC Treaty

The EC Treaty is split into six parts:
- Part one: Principles
- Part two: Citizenship of the Union
- Part three: Community policies. This part is divided into twenty chapters. Title IV deals

with visas, asylum, immigration and other policies related to the free movement of persons.
– Part four: Association of the overseas countries and territories
– Part five: Institutions of the Community
– Part six: General and final provisions

3. Protocols adopted in Amsterdam annexed to TEU II relevant to EU asylum policy

– Protocol integrating the Schengen acquis into the framework of the European Union
– Protocol 6 on asylum for nationals of Member States of the European Union (refers to part IV, 4.)
– Protocol on external relations of the Member States with regard to the crossing of external borders.

4. Main Declarations relevant to EU asylum policy

Declarations adopted by the Conference :

– Declaration n. 17 on consultations with UNHCR and other relevant international organisations in asylum-related matters;
– Declaration n. 48 and 49 are also relevant to the extent that they specify further the intention of Member States with regard to the Protocol on asylum for nationals of Member States.

Declaration of which the Conference took note :

– Declaration n. 6 by Belgium on the protocol on asylum for nationals of Member States of the European Union in which Belgium declares that it is not bound by protocol 6 on asylum.

IV. Contents of TEU II

1. Revised structure of the EU

As early as one year following its entry into force, the Treaty of Maastricht (TEU I) had come under scrutiny by the various Community institutions. In Corfu in June 1994, the European Council laid the foundation for an evaluation and possible revision of TEU I. It believed that a revised version of TEU I was needed to improve the quality and speed of the EU integration process.

Thus, the Amsterdam Treaty superseded TEU I (Maastricht). It maintained the general structure of an overarching European Union embracing the "Three Pillars" of competence. The "supranational" First Pillar was composed of the EC, the European Coal and Steal Community and the European Atomic Energy Community. The inter-governmental Second Pillar remained as the Common Foreign and Security Policy (CFSP). The inter-governmental Third Pillar, which housed Co-operation in the Fields of Justice and Home Affairs (JHA), was reduced to Police and Judicial Co-operation in Criminal Matters, while visa, asylum,

immigration and other policies related to the free movement of persons as well as judicial co-operation on civil matters, were communautarised, i.e. integrated into the First Pillar.

2. New democratic elements

The scope of the co-decision procedure was extended to most policy areas. Co-decision is the legislative procedure involving the European Parliament and the Council as joint decision making bodies. However, under Title IV, the European Parliament has only the right to be consulted.

Since Amsterdam, the European Parliament has to approve the nomination of the Commissioners as a body ensuring political accountability of the Commission to the European Parliament.

Subject to certain conditions, the Amsterdam Treaty allows for closer co-operation between Member States to prevent the need for countries to adopt structures outside the EU framework as was the case with the Schengen Agreement and its implementing agreements. The Schengen acquis was integrated into the Community acquis where some Member Stateswho were not ready, obtained an opt out in regard to Title IV (see below).

3. Title IV TEU II

A. Substantive Changes

By introducing Title IV Article 63, the TEU II provides the legal basis for the adoption of Community instruments in the area of asylum, immigration and other policies related to the free movement of persons such as minimum standards on asylum procedures, the application of the refugee definition, reception conditions of asylum seekers, minimum standards for granting temporary protection to displaced persons, and measures concerning immigration and the crossing of external borders. It sets out a five year transitional period from its entry into force for the adoption of these instruments. In some cases these instruments will replace existing law and policy which were developed outside the Community framework.

The provisions of Article 63 of the Amsterdam Treaty have to be interpreted in the light of Article 61 which sets out the aim to "establish progressively an area of freedom, security and justice" (AFSJ). According to Article 61, the concept of the AFSJ implies ensuring the freedom of movement of persons on the territory of the EU by adopting a number of Community measures on the entry and residence of migrants and asylum seekers, as well as measures on integration, combating irregular migration and managing flows of migration. Action in the area of asylum and immigration is not restricted to the adoption of "flanking" measures, but is accorded a value of its own as part of the concept of AFSJ.

Control of internal and external borders

The measures relating to internal and external border control are provided in Article 62 (ex Article 73j). The Council is required to adopt measures ensuring the absence of any internal border controls regarding EU and third country nationals alike. External borders shall be strengthened through measures which include checks on all persons crossing external borders,

common rules on visas including a list of third country nationals who require a visa, procedures and conditions for issuing visas by Member States, and a uniform format for visas. UNHCR has pointed out that the strengthening of external borders - in order to compensate for the abolition of internal border controls - must not lead to the obstruction of access for those seeking asylum on the territory of EU Member States.

Specific measures on asylum and refugees and displaced persons

The Amsterdam Treaty in Article 63 (ex Article 73k) requires the Council to introduce specific measures relating to asylum and refugees. This article also calls on Member States to introduce certain measures in relation to immigration policy which could have a direct impact on refugees and asylum seekers, for example measures on conditions for entry and residence of all third country nationals, family reunion, and measures for illegal immigration and residence (including repatriation of illegal residents). The Treaty stipulates that the Council should adopt:

1. criteria and mechanisms for determining which Member State is responsible for considering an application for asylum;
2. minimum standards on the reception of asylum seekers;
3. minimum standards with respect to the qualification of third country nationals as refugees;
4. minimum standards on procedures in Member States for granting or withdrawing refugee status.

Article 63 also calls on the Member States to introduce measures on:

5. 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;

6. promoting a balance between Member States in receiving and bearing the consequences of receiving refugees and displaced persons (burden sharing).

In Article 64 (2), in a situation of large-scale flight to particular Member States, the Council may adopt provisional measures for the benefit of the Member States concerned.

UNHCR emphasises that the minimum standards agreed upon in implementing the Article 63 provisions must be sufficiently high to provide genuine protection to those who are in need of international protection.

Maintenance of law and order

According to Article 64 (1), Title IV does not affect Member States' ability to adopt measures regarding the maintenance of law and order, or internal security. Article 68 (2) stipulates that the European Court of Justice shall not have jurisdiction to rule on any measure or decision taken with regard to the abolition of internal border controls and relating to the maintenance of law and order and the safeguarding of internal security.

B. Institutional and procedural changes

Transitional period

Due to the sensitive nature of much of justice and home affairs - traditionally perceived to form the core of national sovereignty - special decision making procedures apply to this area, including those JHA issues which have been moved to the First Pillar. These procedures differ from the rules otherwise applicable to Community policies.

The European Parliament has the right to be consulted on new instruments prior to their adoption, yet it does not have the right to amend or veto measures. Member States, in addition to the European Commission, have the right to initiate new instruments. Decisions continue to be taken by unanimity in the Council.

With the entry into force of TEU II, asylum matters are no longer exempt from judicial scrutiny, yet this is limited in comparison to that exercised over other Community matters. The ECJ has the power to issue decisions regarding the interpretation of measures on the basis of TEC Title IV at the request of the Council, the Commission or a Member State, yet not at the request of the European Parliament or an individual. It also has the power to issue Preliminary Rulings but only at the request of a national court against whose decision there are no further remedies. The ECJ is not empowered to rule on measures taken pursuant to Article 61 (1) TEC on the abolition of internal border controls where these measures were taken with regard to the maintenance of law and order or the safeguarding of internal security.

Post-transitional period

According to Article 67 (2) of the TEU Amsterdam, at the end of the five year transitional period, the Council shall decide unanimously to extend the right of the European Parliament to co-decision to matters pertaining to Title IV, to adopt qualified majority voting in the Council and to adapt the rules on the jurisdiction of the ECJ. The Commission will have the exclusive right of initiative, although Member States may submit proposals to the Commission for consideration. The Nice Treaty amendments brought some changes to this institutional structure, (see this chapter, section E, Nice Treaty).

Member States' exceptions

For Denmark, Ireland and the United Kingdom the application of Title IV is subject to their reservations made in Protocols 5 and 4 to the Treaty.

Protocol 5 to the Amsterdam Treaty establishes an opt out clause for Denmark which excludes it from taking part in the adoption of measures pursuant to Title IV. These measures are therefore not binding on Denmark. However, Denmark may decide on the implementation of a Council decision to build on the Schengen acquis within six months after the adoption of the decision. It is also able to, at any time, withdraw its reservations either in part or in whole.

According to Protocol 4 to the Amsterdam Treaty, Ireland and the United Kingdom, due to their "Common Travel Area", do not participate in the adoption and are exempt from implementing measures taken pursuant to Title IV. However, the United Kingdom and Ireland may inform the Council that they will participate in any individual measure taken under these headings and, with few exceptions (such as Ireland for the Directive on Minimum Standards of Reception Conditions for Asylum Seekers), they have used this opt in for each of the asylum instruments. Ireland can withdraw its general opt out at any time in the future.

4. Protocol on asylum (Protocol 6 annexed to the Treaty)

According to the Protocol on asylum for nationals of Member States of the EU, Member States will consider each other as "safe countries of origin" and only declare admissible asylum applications lodged by a citizen from another Member State in cases where that other Member State violates the fundamental principles of Article 6 TEU. Other applications are to be presumed to be inadmissible or, where a Member State decides to admit the application, it should declare it manifestly unfounded and consequently deal with it under an accelerated procedure. In a separate Declaration (No. 6), Belgium states that, in accordance with its obligations under the 1951 Refugee Convention and the 1967 Protocol, it will carry out an individual examination of any asylum request made by a national of another Member State.

UNHCR criticised the Protocol prior to and at the time of its adoption. While the Protocol states that it "respects" the finality of the 1951 Refugee Convention, in reality it represents a geographical limitation to the 1951 Refugee Convention and does not respect the Convention's object and purpose.

5. Protocol integrating the Schengen acquis

The Schengen Agreement (which has been signed by all EU Member States except for the United Kingdom and Ireland) abolishes border controls between the signatory states and provides for flanking measures such as joint efforts in combating trans-national crime. The Schengen Agreement, its implementing agreement and decisions based thereupon, were concluded outside the EU framework since, at the time, the Treaty did not provide a legal basis for action in the areas concerned. The Protocol now integrates the Schengen acquis into the EU framework. It is presumed to have been concluded as a set of Third Pillar instruments as long as no use has been made of the power to adopt Community legislation and policy under Title IV.

6. Declaration 17 on consultation of UNHCR

Declaration 17 states that consultations shall be established between the EU institutions and UNHCR and other international organisations working in asylum. This provides a legal basis for relevant international organisations to contribute to preparations for and negotiations on draft asylum instruments and related policies and programmes.

7. Respect for human rights

Article 6 (ex Article F) sets out that the EU is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. It requires the Member States and the EU to respect the European Convention of Human Rights (ECHR). For the first time, Article 7 provides for sanctions should a Member State seriously and persistently breach the principles laid down in Article 6, including the possibility of suspending rights derived from the application of the Treaty (ie, the right to participate in decision making and to obtain money from the Community budget).

Furthermore, Declaration 1 to the Amsterdam Treaty recalls Protocol 6 of the ECHR that provides for the abolition of the death penalty. The Declaration notes that the death penalty has been abolished in most Member States and is not applied in any of them. At the time of Amsterdam, some States still included the death penalty in their military penal codes. It has since been abolished in all Member States.

B – Vienna Action Plan

I. Background

In response to the Cardiff European Council's request to the Commission and the Council, an Action Plan on the implementation of the Amsterdam Treaty provisions on an Area of Freedom, Security and Justice (AFSJ) (Titles IV and VI) was formally endorsed by the European Council meeting in Vienna in December 1998.

Previously the informal Pörtschach Summit in October 1998 had agreed to hold a special European Council on the Area of Freedom, Security and Justice during the Finnish Presidency. This Summit would become known as the Tampere Summit held in October 1999.

When the Vienna Action Plan was adopted, special mention was made of the integration of the Schengen acquis into the EU legal framework, the need to give priority to the implementation of the asylum and immigration provisions of the Amsterdam Treaty (Articles 62, 63), the fight against trafficking in human beings, the development of Europol (the European police force), and strengthening judicial co-operation. The fight against organised crime was considered an overriding priority.

II. Purpose

The Action Plan is one of the instruments that has guided the development of one element of the AFSJ - the common EU asylum system. The other instruments are the Conclusions of the successive Tampere and Laeken European Councils (October 1999; December 2001) and the Commission's bi-annual AFSJ Scoreboard reviewing progress on the creation of the area within the European Union.

The document reflects the philosophy inherent in the concept of an Area of Freedom, Security and Justice. These three notions are closely inter-linked. Freedom loses much of its meaning if it cannot be enjoyed in a secure environment and with the full backing of a system of justice in which all Union citizens and residents can have confidence. Maintaining the right balance between these three elements is the guiding principle for Union action in these areas.

The purpose of the Action Plan also lies in ensuring that the spirit of inter-institutional co-operation laid down in the Amsterdam Treaty is translated into reality.

III. Content

The Action Plan includes a timetable as well as a number of substantive guidelines for the implementation of the AFSJ related provisions of the Treaty of Amsterdam. It deals with the following issues:

Area of freedom

Freedom - in the sense of free movement of persons within the European Union - remains a fundamental objective of the Treaty. The Schengen Agreement provides the foundation on which to build. However, the Treaty of Amsterdam also opens the way to giving "freedom" a meaning beyond free movement of persons across internal borders. This includes the development of policies in the areas of admission and residence for legal (migration) and humanitarian (asylum) purposes. It also includes vigorous integration measures.

Area of security

The Treaty of Amsterdam provides an institutional framework for developing common action among the Member States in criminal matters, thereby improving security for EU citizens and defending the Union's interests, including its financial ones.

The declared objective is to prevent and combat crime at the appropriate level, "organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud". The new Treaty provides for further co-ordination and support for operational tasks by Europol.

Area of Justice

Justice is seen as facilitating the day-to-day life of people as well as bringing to justice those who threaten the freedom and security of individuals and society. It includes access to justice and full judicial co-operation among Member States both in civil and criminal matters. Procedural rules should be based on the same standards, ensuring that people are not treated differently according to the jurisdiction dealing with their case.

Enlargement

The Action Plan recognised the issues raised by the enlargement process. The pre-accession strategies of candidate countries needed to take into account the evolution of the EU acquis.

Relations with third countries and international organisations

The Amsterdam Treaty was expected to enhance the Union's role as a player and partner on the international stage. Building on the dialogue the EU had already started in justice and home affairs with an increasing number of third countries and international organisations (eg Interpol, UNHCR, Council of Europe, G8 and the OECD), this external aspect of the Union's work was expected to take on a new and more demanding dimension.

Structure of work in the field of justice and home affairs

According to the Action Plan, the reform of the working structures set up by the Amsterdam Treaty should be based on the following principles:

a) rationalisation and simplification (an appropriate number of working parties to meet the objectives laid down in the Treaty and avoid duplication),
b) specialisation and responsibility (working Parties to consist of experts having an adequate degree of responsibility in their Member States, appropriate allowance for operational structures – Europol, European judicial network),
c) continuity (permanence of working parties to reflect the permanent objectives of the Treaty, mechanism for following up all the instruments adopted),

d) transparency (clarity of terms of reference and of relations between working parties),
e) flexibility (possibility of short term adjustment of structures to deal with new problems requiring urgent and specific handling).

Time frame

The Action Plan devised a calendar for adoption of the full set of JHA matters within two or five years. This calendar, however, was not respected even though it served as a guideline to subsequent European

Council meetings reviewing progress made and setting new deadlines for the adoption of individual instruments.

C - Tampere Conclusions

I. Background

On 15 and 16 October 1999, a special meeting of the European Council on the Establishment of an Area of Freedom, Security and Justice was held in Tampere, Finland. There, heads of States and Governments of the European Union set out objectives and priorities in all areas of justice and home affairs. The Summit aimed to identify the main goals and key elements for a common operational strategy in this area for the coming five years.

The Tampere Conclusions set out a number of milestones for establishing common policies in asylum and migration, judicial co-operation and police co-operation. They also called for strengthening the external dimension of the EU's common policies and strategies in these areas. These milestones are explained below:

– The common asylum and migration policy focuses on four policy strands: strengthened partnership with countries of origin and transit; the establishment of a common European asylum system; a more vigorous integration policy and improved management of migratory flowsat all its stages , including common measures to create legal immigration channels, combating irregular migration and human trafficking; and a return and readmission policy.

– Strengthening judicial co-operation should result in the creation of a genuine European area of justice, based on better access to justice, including the establishment of minimum standards on the protection of crime victims and their rights to compensation. Such an area also envisages the mutual recognition of judicial decisions, such as on extradition and expulsion.

– Strengthening police co-operation would involve the Union developing a comprehensive approach to the fight against organised crime, focusing in particular on EU measures in the area of crime prevention and investigation. This would also include the development of common definitions and the harmonisation of incriminations and sanctions in areas such as human trafficking, particularly exploitation of women and children, money laundering, drug trafficking, financial crime and environmental crime.

– Stronger external action in the area of justice and home affairs was seen as a means of strengthening the internal freedom, security and justice of the EU. The integration of justice and home affairs in the Union's external relations should contribute to a better management of migration, and solutions to refugee problems closer to regions of origin. The Western Balkans, Eastern Europe and the Mediterranean basin would be priority regions for strengthening co-operation in justice and home affairs.

The Cologne Summit in June 1999 launched the idea of drawing up an EU Charter of Fundamental Rights as an indispensable element for the establishment of the AFSJ. The Tampere Summit also agreed on the composition and the methods of work of the body, known as The Convention, which was tasked with preparing the Charter (finally adopted by the Nice European Council in December 2000).

II. Summit Conclusions on asylum and migration

In relation to the common European asylum system, the Summit reaffirmed the absolute right to seek asylum as well as the EU commitment to the 1951 Refugee Convention. It stressed that the principle of non refoulement shall be maintained throughout all areas of future policy. It acknowledged that any control and management measures needed to include guarantees for those who seek protection in or access to the European Union.

1. Tampere and asylum

The main conclusion on asylum was that a future common asylum system must be based on the full and inclusive application of the 1951 Convention. The building blocks of this system should include: determination of the State responsible for the examination of the asylum application ("Dublin mechanisms"), common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of refugee status to be complemented with subsidiary forms of protection. The Summit also called for an agreement to be reached on the issues of temporary protection for displaced persons, based on solidarity and burden sharing.

Given that these were long-term objectives, the Commission was requested to present a feasibility study within one year regarding the possibility of establishing a common asylum procedure and uniform status valid throughout the Union. A Communication on the subject was issued by the Commission on 22 November 2000.

2. Tampere and the wider migration debate

The Conclusions referred to asylum and migration as separate, yet inter-related issues, each requiring separate policy initiatives at European level.

The Summit called for the Union to establish a more vigorous integration policy for those legally residing on the territory of the Member States aimed at granting them "rights and obligations comparable to those of EU citizens". It called for further harmonisation of Member States' legislation and policies on legal forms of migration in order to stem the growth of irregular immigration and trafficking in human beings. Tampere also asked for the fight against racism and xenophobia to be stepped up.

The efficient management of migration, based on partnership with countries of origin and transit, is another important priority. In this regard, the Summit called for co-operation projects with countries of origin and transit to combat illegal migration and trafficking, including widespread dissemination of information on legal forms of migration. It also called for capacity building to increase protection for refugees in regions of origin and countries of first asylum.

Integrated migration management should be based on comprehensive strategies encompassing foreign relations, human rights, development co-operation, humanitarian aid and social policy. In this respect, the Conclusions explicitly referred to the new role of the High Representative for the Common Foreign and Security Policy, who should promote the migration and asylum component of foreign and security policy. The mandate of the EU High Level Working Group on Migration and Asylum should be extended, and the Group should

draw up further action plans.

Greater coherence between the Union's internal and external policies would need to be achieved. Promoting voluntary return and assisting source countries in coping with their readmission obligations were seen as important aspects of this policy.

3. UNHCR's perspective

The Summit's intention to move beyond minimum levels of harmonisation and to aim for a common asylum system was welcomed by UNHCR. From UNHCR's perspective, it was interesting that the Conclusions did not include any reference to abuse of the asylum system, or manifestly unfounded claims. It was refreshing to see the asylum issue dealt with up-front in the Conclusions and protection considerations preceding measures addressing border control and illegal immigration.

The close relationship between asylum and migration calls for a reflection on the relationship between the instruments and policies to be developed in these areas, as well as the sequence of their development. The Conclusions do not spell out how to balance guarantees of protection with measures to stem illegal immigration. UNHCR is concerned that access to territory and to asylum procedures will be undermined if stringent controls are put in place without sufficient guarantees for people seeking protection.

The Conclusions' language on temporary protection and burden sharing was rather timid and limited to "step up" efforts to reach agreement "on the basis of solidarity between Member States". The Summit suggested that consideration be given to some form of "financial reserve" for temporary protection in mass influx situations.

The Conclusions included a welcome reference to the need for consultations with UNHCR and other international organisations (in accordance with Declaration No. 17 attached to the Amsterdam Treaty).

Despite their positive tone, the Conclusions do not actually determine the level of standards for the common asylum system. The risk that minimum standards develop into the maximum, particularly as a result of maintaining the rule of unanimity voting, remains ever present. UNHCR has called on the Council to negotiate a consistent and comprehensive set of common standards for each instrument, to be developed within a coherent framework, and avoiding the acceptance of the lowest common denominator.

III. Conclusions: The Tampere milestones

The Tampere Milestones provided the political approval necessary for the development of a common EU asylum policy and rationalised the objectives and time frame laid out by the Vienna Action Plan.

Tampere did not deal with the question of whether the EU in the future would adopt a single asylum system (in line with the wishes of the Commission and some Member States) or simply an asylum policy based on common minimum standards and guidelines. The Summit did agree that future asylum systems must be based on the full and inclusive application of the 1951 Refugee Convention.

Since the adoption of the Tampere milestones, the European Council has been keeping under constant review progress made towards implementing the necessary measures and meeting the deadlines set by the Treaty of Amsterdam, the Vienna Action Plan and the Tampere Conclusions. The Summit invited the Commission to establish a regular scoreboard to review progress on the creation of an AFSJ. The Summit also underlined the importance of transparency and of keeping the European Parliament regularly informed. It called for a review of progress in implementing its conclusions two years on. The December 2001 Laeken Summit would end up undertaking this task.

D – An Area of Freedom, Security and Justice The Scoreboard

I. Background

The Tampere Summit called on the Commission to make a proposal for an "appropriate Scoreboard mechanism" for the purpose of "keeping under constant review, progress made towards implementing the necessary measures and meeting the deadlines" set by the Treaty of Amsterdam, the Vienna Action Plan and the Conclusions of Tampere for the creation of an Area of Freedom, Security and Justice. The first Scoreboard was adopted by the Council meeting of 27 March 2000 and it is, since then, updated bi-annually.

II. Purpose

The Scoreboard is a "road map" which is intended to facilitate monitoring by the EU institutions of progress in adopting legislative and other instruments needed to establish an Area of Freedom, Security and Justice, including measures related to asylum and migration.
The Scoreboard is meant to increase the transparency and visibility of the Commission's legislative and policy work and provides impetus for meeting agreed deadlines. It displays the areas where progress is on track as well as those where it is lagging behind schedule. It identifies precise targets to be reached by the end of each calendar year.
Since in almost all areas of justice and home affairs, the Commission and Member States share the right of initiative for legislation, the Scoreboard lists which tasks have been attributed to which institution. Where the Scoreboard indicates that responsibility for taking the initiative lies with the Commission rather than with a Member State, this normally reflects a decision made at the Tampere Summit, which specifically requested certain actions from the Commission such as in asylum. There are also a limited number of items where action is attributed to the Commission because the Treaty article on which it is based provides for exclusive right of the Commission (eg Article 18 TEC for action in the field of European citizenship). The Scoreboard also lists the Member States who have indicated they would make use of their right of initiative.

II. Structure and contents

The first editions of the Scoreboard included an extensive introduction which was rather critical of Member States' reluctance to meet the deadlines for adoption of substantive asylum and migration instruments and urged the Council to speed up the process of harmnisation. In the latter versions and particularly following the December 2001 Laeken and June 2002 Seville Summits, - both setting new deadlines - this introduction was no longer included and the role of the Scoreboard was limited to a technical reference document.

Issues addressed in the Scoreboard:

– a common EU asylum and migration policy;
– a genuine European Area of Justice or European law enforcement area;
– Union-wide fight against crime;
– issues or policy related to internal and external borders and visa policy, implementation of Art. 62 TEC and converting the Schengen Acquis;
– citizenship of the Union;
– co-operation against drugs;
– stronger external action

The Scoreboard is a living document. It is used by the European Parliament as a major component of its annual debate on progress in this area. It also opens to public scrutiny the steps being taken to achieve some of the Union's main political objectives in an area that has in the past not been easily accessible to non-specialist observers.
The proposed Scoreboard is structured in tabular form. It follows as close as possible the chapter headings used in the Tampere Conclusions and is divided into the following columns:

– The form of follow-up action needed.

– Where responsibility lies for taking steps forward.

– The "timetable for adoption", where it is already indicated in the basic texts or has been added or subsequently adjusted to take account of later developments.

– The "state of play". This column serves to identify what has been achieved as well as where progress is lagging.

The Scoreboard is divided into nine areas related to the establishment of the Area of Freedom, Justice and Security. Some of the nine areas go beyond those contained in Title IV of the Treaty establishing the European Community and in Title VI (Third Pillar) of the Treaty on European Union. It includes, for example, a number of measures needed for the concept of European citizenship and some additional subjects not specifically mentioned in the Amsterdam Treaty, the Vienna Action Plan or the Tampere conclusions but subsequently raised by individual Member States.

Of immediate interest to UNHCR is chapter 2 "A common EU asylum and migration area" paragraph 2, on the common asylum system. This table includes all draft proposals and the related state of negotiations as they stand at the date of publication of the Scoreboard.

E – Nice Treaty

I. Background

The Inter-governmental Conference (IGC) called for by Amsterdam concluded its work on 11 December 2000 in Nice with an agreement on the institutional issues which had not been settled at Amsterdam and which had to be resolved before enlargement, as well as agreement on a few other points such as the decision making process.

II. Contents

The Treaty of Nice set out the principles and methods for changing the EU's institutional structure to take account of the enlargement process. In particular, the Treaty introduces:

- a new distribution of seats in the Parliament: with a maximum of 732, looking ahead to a Union of 27 Member States, applicable as of June 2004 when the next Parliamentary elections will be held;
- a new composition of the Commission: with effect from November 2004, the Commission will have 25 members, comprising one national per Member State (meaning no longer two Commissionners for the bigger States). Its President and the whole body of Commissionners will be nominated by the European Council with qualified majority voting and with the approval of the European Parliament. The role of the President is strengthened in relation to the internal management of the Commission;
- a number of votes allocated to new Member States as well as a new definition of qualified majority threshold within the Council;
- a major reform of the Union's judicial system in order to solve the backlog of cases and speed up the process.

1. Decision making by qualified majority and co-decision

In twenty-seven areas, the Treaty of Nice widens the scope of decision making by qualified majority (to replace the existing unanimity rule) and co-decision, including anti-discrimination measures and some measures listed in Title IV of the EC Treaty (visas, asylum, immigration and other policies related to the free movement of persons). According to the amended Article 67 of the Nice Treaty, the Council shall switch to the qualified majority voting and co-decision procedure (Article 251) "after the adoption of Community legislation setting out the common rules and basic principles in matters pertaining to asylum." It is generally understood that these common rules and basic principles refer to the full legislative package drawn up by the Commission to implement Article 63 of the Amsterdam Treaty.

These changes will however not concern the Treaty provisions related to "'burden sharing" or the conditions for entry and residence of nationals from third countries.

In parallel to changing the voting system in Council, the Treaty of Nice extends the scope of the co-decision making process. This means the full involvement of the European Parliament

in the decision making process. This will apply to asylum related instruments.

2. Fundamental rights

The Treaty of Nice has also brought other changes particularly with regard to fundamental rights.

Pursuant to Article 7 of the Amsterdam Treaty, the European Council can declare the existence of a serious and persistent breach of fundamental rights in a Member State. If this occurs the Council may suspend certain rights of the country concerned. The Nice Treaty has supplemented this procedure with a preventive instrument: the Council can declare that a clear danger exists of a Member State committing a serious breach of fundamental rights and address to that Member State appropriate recommendations, before the sanction mechanism of Article 7 has to be invoked. The Court of Justice will be competent over the procedural aspects of this provision but not for the appreciation of the justification or the appropriateness of the decision taken against a Member State.

III. Entry into force

Ireland was the last of the 15 Member States to ratify the Treaty by way of referendum. As the Nice Treaty is due to enter into force on the first day of the second month after the lodging of the ratification instrument by the Member State which is the last to complete this formality, the Treaty of Nice entered into force on 1 February 2003.

F – Laeken Conclusions

I. Background

The Laeken Summit completed the Belgian Presidency on 14 and 15 December 2001. Among other issues, it reviewed progress made in the field of JHA as called for by the Tampere Summit. For this occasion the Belgian Presidency prepared a report outlining achievements as well as areas where new impetus was needed and new deadlines to be imposed.

II. Analysis

1. Strengthening the AFSJ

The Laeken Summit was never intended to be a second Tampere Summit: its ambition was limited to establishing a progress report and providing impetus to negotiations on a number of important dossiers, including the draft legislative instruments in asylum. The Belgian Presidency had made it known from the outset that, as regards the common European migration and asylum policy, its main focus would be on the management of migration and combating illegal immigration rather than the development of the common asylum system.

The Summit's Conclusions, therefore, do not include much forward looking language on asylum, except a reaffirmation of the policy guidelines and objectives defined at Tampere and the need for new impetus in building the common asylum system. However, the Summit did ask the Commission to submit modified proposals on asylum procedures and family reunion by 30 April 2002.

The Laeken Conclusions refer to the need to maintain a balance between protection principles (including a reference to the 1951 Geneva Convention) and migration control, including the need to take account of the reception capacities of host countries. This paragraph is however ambiguous and may give rise to an interpretation suggesting that States' protection obligations can be dependent on their capacities for reception.

The Laeken Conclusions emphasised the need to develop the external dimension of the Union's migration policy. Given the Belgian Presidency's concern with migration management, combating illegal immigration and strengthening border controls, it is unfortunate that no reference was included on the development of the EU's strategy on asylum capacity building and durable solutions for refugees in its relation with third countries. The Conclusions also lack a reference to comprehensive strategies to deal with migration and refugee challenges, to be developed in close partnership with countries of origin, countries of first asylum and international organisations, including UNHCR.

Of interest are references in the Conclusion to the need to develop a European system for the exchange of information, including statistical data, developments in asylum law and practice, trends in migratory flows and situations in countries of origin and countries of first asylum. These references refer to preparations for a European migration observatory, a new forum for exchange and analysis of asylum information to replace CIREA, and new mechanisms for the collection and exchange of asylum and migration data at European level.

These issues are also addressed in some detail in the November 2000 and November 2001 Commission Communications on asylum and migration.

2. Laeken and the Convention for the Future of Europe

The Laeken Summit adopted a Declaration on the future of the European Union, and agreed to the establishment of a Convention, chaired by former French President Mr. Giscard d'Estaing, to pave the way for treaty reforms in 2004 in view of the forthcoming enlargement of the EU.

green

Chapter 6:
A European Immigration Policy

Chapter 6
A European Immigration Policy

I - Introduction

With the intensification of co-operation between EU Member States in migration matters, and particularly since the adoption of Community competence in this area, the European Union has adopted a number of instruments in an effort to regulate the movement of third country nationals to Member State territory. The goal has been to improve migration management at all its stages: combating irregular migration, human trafficking and migrant smuggling; opening legal admission channels for third country nationals into the EU; improving external border control; co-ordinating return and readmission policy, and strengthening integration policy for long term migrants.

This chapter will review some of the instruments and activities the EU has developed to confront the issues related to migration management. It will address these from two angles: the development of a European immigration policy and the activities of the EU in combating irregular migration, smuggling and human trafficking. These policies are of interest to UNHCR as they have a direct influence on access to territory of asylum seekers and the integration of refugees.

II - Background

The Amsterdam Treaty (article 63 par. 3 and 4) invested the Community institutions with a number of powers to develop a common immigration policy in conjunction with the establishment of the common asylum system. The Tampere Conclusions (Part 2, chapter 5, C) called for a more efficient management of migration, a more vigorous integration policy for long term migrant residents, and strengthened partnership with countries of origin and transit. In its Communication on a Community Immigration Policy of November 2000, the Commission set out its ideas for a new approach to the management of migration flows, in particular for a common policy on legal admission for economic reasons. The EU argued that a common policy on migration management should be developed through the establishment of a common legislative framework as well as practical co-operation between the Member States, based on common institutional arrangements. Yet the policy should also include co-operation with countries of origin and transit, without which the root causes and the various push and pull factors of population displacement would not be addressed effectively.

III - Preliminary steps towards a common immigration policy

1. The building blocks

In the field of legal immigration, a set of four Directives has been prepared aimed at establishing common rules and regulations as regards admission of third country nationals for

the purposes of:

– family reunion,
– employment,
– study and vocational training, and
– unpaid activity.

So far, only one of these Directives on the right to family reunion has been agreed (February 2003) following difficult negotiations in Council. These negotiations resulted in a lowering of the ambition for harmonisation and a much less prescriptive, detailed, and protection-oriented text than originally proposed by the Commission. As for legal admission for economic purposes, Member States remain reluctant to agree on an EU policy given great differences in national needs. However, various studies tend to conclude that Europe needs more migrants to counter the adverse effects of a declining demography and an ageing population. Therefore, the Commission remains committed to putting in place legislation and operational strategies for an increased contribution of migrants to the labour market.

In addition to these legal instruments, the Commission wants to improve practical co-operation between Member States, for example in developing information services in third countries on legal ways of obtaining admission to the EU, including information on procedures for applications for residence and work permits. It also wants to promote co-operation between Member States' consular services as regards visa policy, and launch information campaigns in countries of origin on the risks of migrant smuggling and human trafficking.

2. Integration of migrants

Integration of migrants and equal treatment of third country nationals was one of the four elements of the October 1999 Tampere Summit Conclusions in matters of asylum and migration. The Summit called for vigorous integration policy aimed at granting third country nationals rights and obligations comparable to those of EU citizens.

As regards equal treatment policy, Community legislation has been adopted to promote equal treatment irrespective of racial or ethnic origin and combat racism and discrimination particularly in the economic sector. However, those Member States which do not yet benefit from comprehensive legislation and proper institutional and administrative practices in the area of anti-racism and anti-discrimination, have failed so far to integrate the new EC rules on racial discrimination into national law. On the eve of the deadline (July 2003) within which transposition had to be completed, no single notification of complete transposition of the racial equality directive had been received by the Commission.

In addition, a proposal for a Directive on the long term residence of migrants, including their free movement within the Union, has been approved in Council, yet the instrument explicitly excludes refugees from its scope, on the understanding that a separate proposal for improving the integration of refugees will be submitted by the Commission in 2004.

In June 2003 the Commission published a comprehensive Communication 'on Immigration, Integration and Employment' which includes a number of proposals for improving the integration of migrants and refugees in EU Member States. It has also created a funding instrument (referred to as INTI) for projects in this field. Such a fund is meant inter alia to improve the exchange of information and analysis between Member States on integration

practice as well as the co-ordination of relevant policies at national and EU level. Following the publication of this Communication, the Thessaloniki Summit adopted Conclusions on a common integration policy in June 2003. These Conclusions had been preceded in October 2002 by a set of Council Conclusions on the key elements of States' integration policies.

IV. Combating irregular migration

1. Introduction

The Community policy on combating irregular immigration, smuggling and human trafficking has been the subject of a series of policy documents, a Community Action Plan, various legal instruments and a number of joint operational strategies. Legal instruments have been adopted to define and harmonise the penalties imposed on migrant smuggling and human trafficking. The imposition of sanctions on carriers transporting undocumented passengers has also become part of Community law. Since the late 1990s, the posting of immigration/liaison officers in countries from which the reduction of immigration is desirable, has become a growing practice of EU Member States and this is now to be based on Community law instruments. Member States have also devoted a great deal of effort to strengthening co-operation in joint border management activities.

The Commission has put forward a number of documents proposing common standards and operational strategies in relation to return. In the area of visa policy, a Community Regulation lists third countries whose nationals must be in possession of a visa before entering any of the EU Member States. The Regulation is being reviewed from time to time. A common Visa Information System is under development to facilitate the fight against visa fraud, contribute to the prevention of "visa shopping", improve Member States' administration of the common visa policy, and contribute towards internal security.

Some of these elements are addressed in more detail below.

2. Smuggling of migrants and trafficking of human beings

In December 2000, the international community committed itself to combating organised international crime by signing the UN Convention against Trans-national Organised Crime in Palermo in December 2000. At the same time, UN members negotiated two Protocols on Smuggling and on Trafficking which were also adopted in Palermo.

At the EU level, and in response to both a French and a Commission initiative, instruments were developed for defining and penalising migrant smuggling and penalising trafficking in human beings. In July 2002, a Framework Decision aimed at strengthening the fight against human trafficking and harmonising sanctions was adopted. In November 2002, the EU adopted a Framework Decision on the facilitation of entry and residence of illegal migrants, aimed at harmonising Member States' sanctions for smuggling, as well as a Directive defining the facilitation of unauthorised entry, transit and residence.

Although these instruments include some safeguards to ensure the protection of refugees and asylum seekers, most of these provisions have been made optional to Member States. In regard to the Framework Decision penalising smuggling activities, UNHCR and non-governmental organisations strongly advocated the non-punishment of perpetrators of

smuggling where carried out for humanitarian purposes (i.e. without any element of financial or other material gain). However, this humanitarian clause was made optional. Similar criticism can be made of the Council Framework Decision on Combating Trafficking in Human beings (July 2002) which lacks mandatory provisions with regard to victims' protection and assistance and which does not secure access to asylum procedures for victims of trafficking who may have become refugees as a result of having been trafficked.

Whereas the Protocols to the Palermo UN Convention recognise the need for a proper balance between measures for controlling crime and measures for supporting, and protecting in certain cases, smuggled migrants and trafficked persons, the EU legislation in this area falls short of international standards.

3. Sanctions against carriers

Sanctions against carriers currently form an essential element of the EU immigration control strategy, as they are perceived as an efficient instrument for preventing the arrival of undesirable illegal immigrants into Europe. These sanctions oblige international transport carriers to engage increasingly in immigration control, thereby constituting an example of the "privatisation" of state responsibilities in the areas of asylum and immigration.

Article 26 of the Schengen Convention imposes an obligation on carriers to ensure that third country nationals have travel documents necessary for entry into the EU. Without prejudice to obligations under the 1951 Refugee Convention, it also requires Member States to impose penalties on carriers who transport third country nationals, not in possession of appropriate travel documents, from a third state to EU territory, by air, sea or coach. In cases where a third country national is not allowed to enter EU territory, the carriers have to take responsibility for such a person and, at the border authorities' request, return him or her to a state from which the person arrived, or any other state willing to guarantee his or her (re-)entry.

In June 2001, the Council adopted a Directive, supplementing the provisions of Article 26 of the Schengen Convention, with the aim of harmonising and strengthening penalties imposed on carriers transporting undocumented passengers. In particular, the Directive proposed three optional models for penalties for carriers which do not fulfil their obligations. Member States were requested to comply with the Directive not later than February 2003.

As far as the protection of asylum seekers is concerned, the Directive includes an exception for general humanitarian reasons but fails to afford an adequate level of protection to this vulnerable category of persons. Furthermore, the Directive raises a number of questions with respect to the duty of carriers to "take charge" of persons and to arrange for their "onward transportation" in cases where return is not possible. UNHCR has expressed its concern that the imposition of sanctions on carriers may interfere with the ability of persons at risk of persecution to gain access to safety. UNHCR has therefore suggested the insertion of a provision exempting carriers from liability if the third country national, brought into the territory of a Member State without the required documentation, lodges an asylum application and has a plausible claim to be in need of international protection. However, this provision was not included in the Directive which merely recalls Member States' international obligations in cases where a third country national seeks international protection.

In November 2001, the transport industry and the Commission organised a round table on this issue in which government officials, international organisations, including UNHCR and NGOs, participated. A Steering Committee was set up and organised a series of expert

meetings on agreed themes such as the humanitarian dimension and the legal aspects of this policy.

4. Joint border management

An important element of a common policy to combat irregular migration is the development of the joint management of the Union's external borders. Following the publication of a Communication in May 2002 and an EU Action Plan the following month, a number of pilot projects and joint operations have been developed, involving the border guards of various groupings of Member States who are responsible for jointly patrolling external borders at land and sea. A common core curriculum for the training of border guards was approved by the Council in 2003. Together with a common model for risk analysis, this curriculum should promote awareness among border guards of the need to ensure an equal level of security at all external land and sea borders. A Common Unit will be established at Council level to co-ordinate the various pilot projects and joint actions.

5. European return and readmission policy

An effective return policy, another essential element of a common policy on migration management, has been the subject of a Commission Green Paper, a Communication and an EU Return Action Programme, all adopted in 2002. Without a Community return policy on irregular residents including unsuccessful asylum seekers, the credibility and integrity of Community policies on legal admission and asylum risk being undermined. A number of measures are envisaged for improving co-operation between Member States in return operations, including joint charter flights, common standards and rules for return procedures, and mutual recognition of return decisions.

In November 2002, the Union adopted a pilot programme for the return of Afghans, aimed at improved co-ordination between Member States at the pre-departure stage, in the implementation of return and upon arrival in the country of origin. It remains to be seen whether this programme will be followed by other country-specific EU return programmes in the future.

The conclusion of Community readmission agreements with countries of origin and transit is considered a further important tool in combating secondary movements and improving management of migratory flows. Originally, such agreements spelled out the mutual responsibilities and commitments of the contracting parties for the readmission of their respective nationals. Increasingly, however, readmission agreements address the situation of third country nationals who are intercepted crossing a border in an irregular way, or who are present on the territory of one of the contracting parties without authorisation. This is also the case with readmission clauses inserted in co-operation and partnership agreements the EU has concluded with third countries. The problem from a UNHCR perspective is that the readmission agreements and clauses that relate to the return of third country nationals do not make any distinction between an irregular migrant and a person seeking international protection. At stake are the guarantees that the claim will be processed and the determination of the state responsible for receiving and adjudicating the asylum claim of the person intercepted who will be admitted or returned to the other contracting state. Readmission should not be requested if a person has applied for asylum and a decision on the merits has not yet been taken, including when the person has entered the territory irregularly or has been stopped at the border.

V. Conclusion

A common immigration policy cannot be developed by the EU without the co-operation of third countries, whether these are countries of origin or countries of transit. The improved management of population displacement depends on the political will and effective capacity of both EU Member States and third countries to prevent and combat irregular migration and transit.

There is still a long way to go in establishing a sound, forward-looking and comprehensive common immigration policy that goes beyond the adoption of a number of separate legal instruments. As long as Member States continue to express strongly divergent views on what sort of admission and integration policy for migrants is required, and as long as controversy reigns among Member States over the admission of economic migrants, the Union will lack common policy objectives and strategies in the area of immigration.

VI. Chapter review

– Outline the main steps the EU has taken to establish a common immigration policy.

– Explain the problems involved with imposing sanctions against carriers.

– What steps have been taken to develop the joint management of the Union's external borders and a European return and readmission policy?

red

The EU Enlargement Process and The External Dimension of The EU JHA Policy

green

Chapter 1: The European Union Enlargement Process

The EU Enlargement Process and The External Dimension of the EU JHA Policy

Chapter 1
Enlargement of the European Union

I. Introduction

Basic conditions for enlargement can be found in the EU Treaty Article 49 "Any European State which respects the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law may apply to become a Member of the Union". The country concerned lodges its application to join the EU with the Council which acts unanimously after consulting the Commission and securing the assent of the European Parliament (whose vote must be decided by an absolute majority).

The EU was originally founded by six States: Belgium, France, Germany, Italy, Luxembourg and the Netherlands. They were joined by Denmark, Ireland and the UK in 1973, Greece in 1981, and Spain and Portugal in 1986. (In 1990, the new East German Länder were incorporated.) In 1992, the Member States formed the European Union, which was enlarged in 1995 to include Austria, Finland and Sweden.

Official applications for EU membership were lodged by Turkey in 1987, Cyprus and Malta in 1990, and by all ten Central European and Baltic States (CEBS) in 1994, 1995 and 1996. In December 2002, the Copenhagen Summit completed accession negotiations with Cyprus, the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovakia and Slovenia. These countries were officially approved to enter the EU at the Summit of Athens in April 2003. Negotiations with Bulgaria and Romania are continuing with a view to accession in 2007. In December 2004, the EU will review whether Turkey meets the 1993 Copenhagen criteria (see below) and whether accession negotiations can begin.

In February 2003, Croatia lodged an official application for becoming a member of the European Union. In May 2003 the EU declared other Balkan countries - Serbia and Montenegro, Bosnia and Herzegovina, FYROM (Macedonia) and Albania - natural candidates for EU accession.

The enlargement of the EU - with the ten Central European and Baltic states and the two Mediterranean countries - is unprecedented in size. When these twelve states join the EU, the EU territory will increase by 34 % and its population by 105 million.

Of interest to UNHCR is the fact that many of these countries were, in the past, countries of origin and producers of refugees, while most of them were not party to the 1951 Refugee Convention or its Protocol and had no asylum system in place.

Accession criteria

In June 1993, the Copenhagen European Council took the historic and political decision to

open the door to EU membership to associated countries by setting up specific criteria. As a prerequisite for membership, a candidate country must fulfil the following conditions, known also as the "Copenhagen criteria":

– stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
– the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union;
– the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.

Preparations for future accession by candidate countries were launched at the closing of the Copenhagen Summit.

II. The pre-accession strategy

Following the 1993 Copenhagen Summit, Europe Agreements or Association Agreements were concluded with the candidate countries from Central Europe and the Baltic region. These form the legal framework for association with the EU, with a view to the gradual integration of these countries into the EU. The agreements cover trade-related issues, political dialogue, legal approximation, and co-operation in areas such as industry, environment, transport, customs, and justice and home affairs. Article 6 of the Agreements stipulates "respect for democratic principles and human rights established by the Helsinki Final Act and the Charter of Paris for a new Europe".

It is interesting to note that the very first Association Agreements were signed with those countries whose applications for EU membership were accepted the latest, i.e. Turkey in 1963, Malta in 1970, Cyprus in 1973.

In December 1995, the Madrid European Council called on candidate countries to transpose the EU acquis into their national legislation and also to ensure that it is effectively implemented through appropriate administrative and judicial structures, as a requisite of EU membership (for an explanation of the acquis, see Part 1, chapter 2, A). The Council also called upon the Commission to provide an assessment of the candidates' applications for membership and to prepare an analysis of what enlargement would mean for the EU. Moreover, the Commission was tasked with developing the pre-accession strategy for each candidate country, including short and medium term objectives for political dialogue and assistance measures in preparation for membership. Justice and home affairs figured increasingly in these strategies.

In June 1997, the Commission presented a blueprint for enlargement, Agenda 2000: For a Stronger and Wider European Union. The document outlined the impact of enlargement on the EU and the future financial framework beyond 2000, including a reinforced accession strategy composed of several new instruments. As part of the Agenda 2000, the Commission issued for the first time an Opinion on the progress made by candidate countries generally and individually towards meeting the Copenhagen criteria and reaching European standards. A chapter on justice and home affairs, including an assessment of asylum and migration sectors, was included, although it was not considered particularly critical at this stage. The Commission's Opinion has since become an annual progress report, in which the extent to which the acquis has been adopted and implemented is scrutinised. Five regular reports have

been issued so far, consisting of a general report and one detailed document for each of the candidate countries.

In 1997 and 1998, the EU institutions and the Member States had already started promoting justice and home affairs issues in their accession dialogue with candidate countries. Emphasis was put on combating organised crime, border control and migration management rather than on legal admission and protection policies.

In its strategy paper of late 2000, the Commission concluded that all candidate countries – with the exception of Turkey which was accepted as a candidate country at the 1999 Helsinki Summit - fulfilled the Copenhagen political criteria, although judiciary reform, the prevalence of corruption, the increasing problem of trafficking in women and children, and the Roma remained issues of concern in some candidate countries.

In November 2001, the Commission published a new strategy paper which proposed ways of monitoring and assisting candidate countries, during the final stages of preparations for accession, in reaching an acceptable level of preparedness for effectively implementing the acquis in all fields. The Goteborg European Council, held in June 2001, indicated that accession would be possible for up to ten new Members by the end of 2003, so that they would be able to participate in the June 2004 European Parliament elections. At this stage, the focus had shifted strongly to candidate countries' capacity to implement and enforce the acquis. Particular attention was paid to candidates' administrative and judicial capacity to take on the obligations of membership. Negotiations on accession to the EU terminated at the Copenhagen European Council at the end of 2002. The accessions to the EU of Cyprus, the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovakia and Slovenia were thus officially approved at the Athens Summit in April 2003.

1. Instruments of the pre-accession process, including technical and financial assistance to candidate countries

In 1998, the Council launched an Accession Partnership (AP) as part of accession preparations for each of the candidate countries of Central Europe and the Baltic (CEBS). Accession Partnerships with Cyprus and Malta were concluded in 2000 and with Turkey in March 2001. The Accession Partnership can be regarded as a kind of road map in which priorities are identified for adaptation of domestic laws and practices to the EU acquis in the short term (one year) and medium term (two years). The instrument also highlights the main tools and financial resources available for achieving the goals set out in the Accession Partnership document. The Accession Partnership was revised for all candidate countries in 1999, 2001 and 2003, taking into account progress made. In 2003, additional Road Maps for accession were issued for Romania and Bulgaria.

As a complement to the AP, candidate countries formulated a National Programme for the Adoption of the Acquis (NPAA) setting time frames for achieving the priorities set out in the AP and presenting the country's strategy for integration into the EU. This document is regularly updated. In the early years of both the AP and the NPAA, asylum matters received less consideration than border security and management, migration control and organised crime.

The main instrument utilised by the EU to grant assistance to candidate countries in the CEBS region is the Phare programme, managed by the Commission's Directorate, DG Enlargement. Phare, which stands for Poland Hungary Assistance for the Reconstruction of the Economy, was established in 1989 to support the reforms taking place in Poland and Hungary, then

extended to cover all Central European Baltic States. Over 20 billion US Dollars have been invested in the Phare programme since its inception. Phare projects were initially economic in nature.

At the Essen European Summit in 1994, when the pre-accession strategy for candidate countries was formally launched, it was decided that Phare would also focus on administrative and legislative support, including justice and home affairs and support for democratisation and civil society. Phare funds were therefore specifically allocated to institution and capacity building and this topic was also included within "structured dialogue", the first multilateral framework for discussion between the EU institutions, the Member States and candidate countries.

There have been two main types of Phare programmes:

– Phare National Programmes (PNP): each year, candidate countries negotiate individually with the Commission to receive allocations under the Phare National Programme. Normally, a matching contribution from candidate countries is required.

– Phare Horizontal Programmes (PHP): horizontal projects are typically two to three year projects involving several or all candidate countries and a number of EU Member States. They generally focus on one or two main areas of co-operation and provide technical and financial support for the period of the project.

These programmes are explained in further detail on the following pages.

In addition to the Phare programme, two important new programmes were launched in 2000: ISPA helps finance investment in the fields of environment and transport with an annual amount of 1,04 billion Euro and SAPARD provides aid for agriculture and rural development with a yearly amount of 520 million Euro.

A. Phare National Programmes

The overall objective of the National Programmes is to help the candidate countries prepare for joining the EU. In 1997, the Commission fundamentally reorganised the PHARE programme. As part of its reinforced accession strategy, outlined in Agenda 2000, the Commission decided to double the financial assistance available for the period 2000–2006 (amounting to 3,12 billion Euro made available annually) and to direct it more specifically towards the objectives and the priorities set out in the Accession Partnerships. The Phare assistance programme has thus changed from a demand-driven instrument before 1998 to an accession-driven one which helps candidate countries to meet EU requirements for membership. As of 2000, Turkey, Malta and Cyprus benefited from similar tailor-made support schemes under the MEDA programme.

Under the Phare programme, a twinning mechanism was put in place in 1998 with a view to assisting candidate countries in developing modern and efficient administrations necessary to implement the acquis communautaire. Under this scheme, experts from Member States were sent to candidate countries for a period of one to two years to assist them in integrating and implementing the EU acquis in a particular field regulated by the EU. As of 2000, seven twinning arrangements in migration and asylum matters have taken place: two each in

Hungary and Slovakia, and one in Romania, Slovenia, and Bulgaria. Hungary, Romania, Slovakia and Bulgaria are the only countries to have benefited from a Phare twinning arrangement focused exclusively on asylum related issues.

From 1997 to 2002, the Commission approved some 15 Phare National Programmes in the field of migration and asylum. In asylum, these projects have focused on harmonising national asylum legislation with the acquis, providing equipment, software and advisory support, setting up country-of-origin documentation centres, strengthening the capacity of refugee agencies' staff, and the rehabilitation of reception centres. In many cases, UNHCR offices in the countries concerned supported governments in submitting Phare project proposals and lobbied for their approval at the EU Delegations and at the Commission in Brussels.

National Phare allocations for asylum related projects have remained relatively low. From 1997 until 2001, candidate countries received some 13 million Euro of Phare assistance for projects related to asylum, migration and visa policy, almost half of which was spent in 2001. This can be compared with total Phare spending of over 502 million Euro for all JHA projects in the ten Central European and Baltic States. The bulk of funds has been allocated to border control, customs, and the fight against organised crime.

B. Phare Horizontal Programmes

Horizontal Programmes involve the candidate countries and EU Member States in co-operation projects. There are several programmes in justice and home affairs covering asylum, migration, strengthening of external borders, police co-operation, and support for institutions fighting corruption.

From 1998-2000, UNHCR, in close co-operation with the German Federal Office for Refugees, was involved in the preparation and implementation of the Phare Horizontal Programme (PHP) on Asylum in the ten Central European and Baltic States, with the further collaboration of seven EU Member States. The programme aimed to identify and address the needs and priorities of each applicant country for setting up fair and efficient asylum systems in line with EU standards. On the basis of a gap analysis, each candidate country drew up a National Action Plan with the EU experts and UNHCR, indicating how they intended to fill the present gaps, and, thus, how their progress could be measured. The programme mainly included round tables, seminars for senior political staff and practitioners' training workshops on specific issues.

In 2000, the PHP on Asylum was evaluated and deemed to have raised awareness on asylum matters in candidate countries and to have helped the Commission to develop national support policies on the basis of need assessments and the National Action Plans. Expert missions, as well as the Commission's Directorates for Enlargement and for Justice and Home Affairs, have often referred to the results of the PHP as indicators for measuring the progress made by candidate countries in this field as well as the foundation for subsequent assistance measures.

France led the Phare Horizontal Programme on Migration in partnership with Austria, Denmark, Germany, the Netherlands and the UK. The International Organisation for Migration and the International Centre for Migration Policy Development, played important support roles. The Programme was broken down into the following modules: regular and irregular immigration (led by Denmark), external border control (France), visas (Austria), false documents (UK).

Additional horizontal programmes focused on the fight against corruption and organised crime (Octopus II, led by the Council of Europe), and on police (led by the European Association of Police Colleges). The aim of Octopus II was to identify, in a detailed manner, the gaps between the acquis and the legislation and practice of the CEBS and to put forward proposals for improvement. The police project aimed to draft a common training curriculum for the police force.

3. Other funding programmes

A. ODYSSEUS/ARGO

Several other EU initiatives have contributed to the promotion of co-operation and information exchange in asylum and migration matters. The Odysseus programme, launched in 1998, was focused on the training and exchange of public officials in the EU in the fields of asylum, migration and border enforcement. The programme also included candidate countries. In 2002, Odysseus was replaced under similar terms by the ARGO programme.

UNHCR, working with government officials, designed and implemented various asylum related projects, financed under Odysseus, in Hungary, Poland, Romania, Slovakia and Slovenia. In addition, UNHCR has supported project submissions to Odysseus by partner organisations such as the International Association of Refugee Law Judges.

B. EIDHR

UNHCR has also supported project submissions by some NGOs for funding from the European Initiative for Democracy and Human Rights Programme. EIDHR provides yearly support to institutions and NGOs for democratic development initiatives, including in candidate countries.

III. The negotiation process

Following the Luxembourg Summit in December 1997, accession negotiations were opened on 31 March 1998 with six countries: Cyprus, the Czech Republic, Estonia, Hungary, Poland and Slovenia (referred to also as the Luxembourg Group). In December 1999 at the Helsinki Summit, the European Council decided to open accession negotiations with six further candidates: Bulgaria, Latvia, Lithuania, Malta, Romania and the Slovak Republic (the Helsinki Group). Helsinki also confirmed that Turkey is a candidate for EU membership.

Since 1998, accession negotiations have taken place between the EU and the candidate countries to determine the conditions under which each candidate country will join the EU and the terms under which each candidate will adopt, implement and enforce the acquis communautaire.

Negotiations are based on the principle that each candidate country must adopt the entire set of existing EU rules and legislation. The acquis itself is not negotiable but there are negotiations about how and when to implement the acquis, and, in some areas, transitional arrangements may be agreed. For example, on the freedom of movement of persons, a period of up to seven years has been negotiated before citizens of acceding countries may freely go to work or settle in another Member State. In principle, accession negotiations are conducted individually and each candidate country is judged on its own merits.

Successive European Councils endorsed the principle of "catching up" by candidates that started negotiations in 2000. This meant that these countries could reach the level of the first applicants if they had made sufficient progress in their preparations.
In contrast to the pre-accession strategy process which was mainly a technical exercise, the negotiation process was clearly a political exercise: negotiations took place between the ministers of EU Member States and the ministers of the candidate countries.

The negotiation process can be divided into two phases: a preparatory phase known as "screening", and the negotiation as such. The screening exercise consisted of multilateral and bilateral meetings. In the former, a presentation of the complete EU acquis was given to the candidate countries. In the latter, the screening consisted of an "analytical examination" of the main pieces of the acquis in order to determine major gaps in terms of legislation and implementation capacity, as well as the potential difficulties the candidate countries would encounter in adopting and implementing the acquis. The results of the screening of a given chapter of the acquis helped in deciding whether this chapter could be opened for negotiation or whether further progress was still necessary.

For the purposes of these negotiations, the acquis or body of EU rules is divided into 31 chapters:

1. Free Movement of Goods
2. Free Movement of Persons
3. Freedom to Provide Services
4. Free Movement of Capital
5. Company Law
6. Competition Policy
7. Agriculture
8. Fisheries
9. Transport Policy
10. Taxation
11. Economic and Monetary Union
12. Statistics
13. Social Policy and Employment
14. Energy
15. Industrial Policy
16. Small- and Medium-sized Undertakings
17. Science and Research
18. Education and Training
19. Telecommunication and Information Technologies
20. Cultural and Audio-visual Policy
21. Regional Policy and Co-ordination of Structural Instruments
22. Environment
23. Consumer and Health Protection
24. Co-operation in the Field of JHA
25. Customs Union
26. External Relations
27. Common Foreign and Security Policy (CFSP)
28. Financial Control
29. Financial and Budgetary Provisions
30. Institutions
31. Others

After two to four rounds of high level negotiations, each followed by a series of bilateral

meetings at a more technical level, and once a country is considered to have reached the desired level of preparedness in a certain area, the chapter may be "closed". All chapters, however, are only provisionally closed as, depending on policy and political developments in the EU or in a candidate country before effective accession takes place, a chapter may theoretically be reopened for further negotiations. This, however, has yet to occur.

At the end of 2002, the Copenhagen Summit accepted that Cyprus, the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovakia and Slovenia would accede to the EU by 01 May 2004, since all 31 chapters were closed with these candidate countries. Negotiations on many important chapters, including chapter 24, continue with Bulgari and Romania while they have not yet begun with Turkey, as the situation there does not fulfil the pre-conditions for starting negotiations, i.e. the 1993 Copenhagen criteria.

The most controversial chapters to be negotiated were free movement of persons, agriculture, transport, financial control, regional policy and co-ordination of structural development, financial and budgetary provisions, and, importantly from UNHCR's point of view, chapter 24, JHA.

Chapter 24, JHA

In 1998, the Council adopted a list fixing the acquis in the field of asylum. This document was made available to candidate countries and was the basis for a preliminary screening exercise. The exercise was led by the Commission's DG JHA and the Presidency of the Council, and was carried out in co-operation with Member States because of the importance of justice and home affairs to the Member States.

In 2001, the Justice and Home Affairs chapter of the EU acquis was opened with all candidate countries, except for Romania with which it opened in April 2002, and Turkey. The EU issued a Common Position (a non-public document) for each of the eleven countries, on the basis of which official negotiations were started with a first group of countries at the end of the Swedish Presidency and a second group during the Belgian Presidency. Negotiations on the JHA chapter were closed by the end of 2001 for Hungary, Cyprus, Slovenia, Czech Republic and Estonia, and in 2002 for the remaining countries. Under this chapter, no transition period is required - with the exception of some parts of the Schengen acquis - as all criteria are supposed to be met and the level of preparedness should be high enough to ensure an effective implementation of all aspects of the JHA acquis directly upon accession.

IV. The monitoring process until accession

In many cases, chapter 24 was closed on the basis of commitments made by candidate countries to continue reforms and increase their administrative and judicial capacity to implement effectively the acquis upon their accession.

The closure of chapter 24 notwithstanding, the Commission has therefore adopted a thorough monitoring process in justice and home affairs which will continue until accession, and beyond for the implementation of the Schengen acquis. To that purpose, the Commission has developed monitoring tables which are reviewed every six months, and it sends peer review bodies, made up of experts from Member States, to monitor reform in specific and problematic areas.

V. Other actors in the pre-accession and negotiation processes

To complement the Commission's technical approach to accession, the Council has, as of 1999, also taken part in the assessment of the candidate countries' progress in preparations for EU membership. It has done this by setting up a mechanism for collective evaluation of the implementation of the JHA acquis. The information collected and analysed by the Council Collective Evaluation Group is essentially dependent upon Member States' input. However, the Council has lately opened up its process to external partners such as UNHCR and some NGOs. The evaluation group has drawn up its own assessment of the state of preparations which has resulted in bilateral assistance measures and the despatch of monitoring missions.

The European Parliament has also become increasingly involved in the dialogue with candidate countries. Its Committee on Citizens' Freedoms and Rights, Justice and Home Affairs holds joint meetings with parliamentary committees in candidate countries to discuss problems of organised crime, migration and asylum. In addition, the Committee of Foreign Affairs, Human Rights, Common Security and Defence Policy issues a yearly report and adopts resolutions on candidate countries' applications for membership and the state of negotiations.

Representatives of civil society are playing an increasing role in monitoring the accession process. In 2001, the Open Society Fund, representing a number of NGOs in each of the CEBS candidate countries, developed an EU accession monitoring programme and published reports on the protection of minorities and judicial independence for the EU to make use of in its evaluation of progress made by candidate countries.

VI. UNHCR and EU enlargement

UNHCR has worked closely with the European Union institutions on asylum related aspects of the enlargement process. It has sought to promote the establishment of fair and effective asylum systems in the candidate countries and to ensure that UNHCR concerns are taken into account in EU programmes and budgets for the region. UNHCR has tried to influence and participate in EU assistance programmes to applicant countries by providing expertise and by sharing experience. The aim, at all times, is to ensure that EU assistance gives precedence to the development of functioning asylum systems which meet the highest possible standards.

VII. Conclusions

Following widespread political upheaval in the region, candidate countries have started to put in place - virtually from scratch - the legislation and institutions to deal with asylum. This is a considerable task, not least because the Central European and Baltic States were still a refugee-producing region only a decade ago. Since 1990, UNHCR has played a major role in helping governments to develop preliminary asylum laws and institutions. It has also monitored operational practice and provided extensive training to those working in the asylum system.

Since the mid 1990s, the driving force behind developments in asylum has undoubtedly been the European Union's accession procedures. As in other legislative areas, the EU acquis has had to be incorporated into relevant domestic legislation, and the establishment of fair and efficient asylum procedures has been one of the conditions upon which accession has been predicated.

As of 1998, when the acquis on asylum acquired full status in accession negotiations, the EU institutions have assessed progress by candidate countries in reaching European and international asylum standards and in establishing appropriate procedures and institutions. One next step for the EU will be in assisting candidate countries to develop integration assistance mechanisms for recognised refugees and more favourable reception conditions for asylum seekers.

VIII. Chapter review

– Describe the main instruments of the accession process.

– Do you have any direct experience of the Phare programme?

– What are the main steps of the negotiation process?

– If you are from a candidate country, outline your organisation's involvement in the accession process.

– What do you anticipate are the main problems for candidate countries in establishing effective asylum procedures? How can UNHCR help?

green

Chapter 2: External Dimension of the EU Asylum Policy

Chapter 2
The External Dimension of the Asylum and Migration Policy of the European Union

I. Introduction

The EU's evolving asylum and migration policy has gradually acquired an important role in the EU's external relations and development co-operation with third countries that are confronted with the movement of refugees and migrants. In order to ensure an adequate level of freedom and security within its territory, the European Union wants to protect itself from irregular immigration, migrant smuggling, human trafficking and other, sometimes criminal, forms of population movement. In this chapter, we intend to briefly analyse recent development in EU policy and assistance programmes aimed at enhancing capacities for a joint management with partner countries of migratory flows and joint efforts to combat irregular migration and human trafficking.

II. Background

The need to create the so-called external dimension of the common asylum and migration policy has been recognised since the beginning of its development. The 1999 Tampere Summit (see Part 2, chapter 5, C) emphasised that all competencies and instruments at the disposal of the Union in its external relations should be used to build the Area of Freedom, Security and Justice. Ever since the integration of migration, refugee and asylum issues in the Union's external relations, particularly in relations with the countries and regions neighbouring the enlarging Union, has received increasing attention, even if the main focus in asylum remained the harmonisation of Member States' domestic policies and practices. Political dialogue and co-operation, particularly with the countries of the Western Balkans and Eastern Europe and, to a lesser extent, the Mediterranean Basin, has been marked by growing attention to migration and refugee issues (see chapter 3)

The June 2002 Seville Summit gave a significant boost to the development of the external dimension of the EU asylum and migration policy through the adoption of an elaborate set of Conclusions. However, these mainly addressed concerted action to combat irregular migration and human trafficking, establish a programme for common border management, and a more effective policy for the readmission and return of irregular residents. The Summit concluded that economic co-operation, trade expansion, development assistance and conflict prevention should all be used to promote economic prosperity and stability in countries prone to forcible population displacement. It was agreed that future co-operation, association or partnership agreements between the EU and third states should include a standard clause on joint migration management and compulsory readmission in the event of irregular movement.

The Summit also asked that relations with selected partner countries be assessed on a systematic basis with a view to identifying needs for additional support in managing migration. The aim was to reduce irregular movement and combat smuggling and trafficking. These assessments were also intended to increase pressure on those countries which displayed a lack of political will in working with the EU in combating irregular movement, with

the threat of reduced assistance from the EU. There was little attention, if any, in the Seville Conclusions on the needs of partner countries in providing protection and assistance to refugees.

At the end of 2002, the European Commission issued a Communication on integrating the migration dimension in the Union's external relations. The document included a number of comments on the so-called "migration and development nexus". It called on the EU to develop a coherent policy for addressing the root causes of migratory flows through the eradication of poverty, institution building, conflict prevention, strengthening the rule of law, and promoting respect for human rights. The document also made a clear plea for extra EC funding to be allocated to better migration management by partner countries, with proposals which included ensuring the readmission and return of third country nationals.

The Communication was commented on by the Council in its Conclusions on the migration and development nexus in May 2003. These Conclusions called strongly for the targeted use of EU development aid in the search for durable solutions for refugees. Long-term EU intervention is required for sustainable improvements in the situation of refugees as well as to support local host communities in developing countries. Improving self-reliance and the local integration of refugees in their region of origin is considered an important EU contribution to the implementation of some of the core objectives of the UNHCR Agenda for Protection. These relate, in particular, to better access to protection, increased support for durable solutions, and fairer responsibility sharing with partner countries.

III. Main themes of the EU external migration and asylum policy

1. The priority: improved management of migratory flows

The main theme of the EU external policy on migration and asylum is the need for improved management of migratory flows, with a strong focus on combating secondary movements of migrants and refugees and the fight against smuggling and human trafficking. The EC increasingly provides partner countries with technical and financial support in establishing migration, asylum and visa policies and upgrading their border management. The EC also helps partner countries to develop the capacity of institutions and practitioners to intercept and return irregular movers and trafficked persons as well as, though to a much lesser extent, help with the admission and integration of refugees and economic migrants.

As part of this process, partner countries are invited to conclude agreements with the EC on the readmission and return of persons (nationals and third country nationals) who are present in EU Member States in an irregular situation, including unsuccessful asylum seekers. The Seville Conclusions of June 2002 provide the key elements and main orientations for this control-driven approach.

2. Focus on asylum system development

Building the capacity of third countries to deal with asylum is an increasingly recurring theme in the EU's co-operation with neighbouring countries. It has been prevalent in the EU's relations with candidates for EU membership and more recently with countries in Eastern

Europe and the Western Balkans. The focus on the development of effective asylum systems recognises the fact that refugees count for a substantial proportion of broader migratory movements. The EU is keen to develop the processing, reception and protection capacity of partner countries, even though its interests seem to be limited to those countries neighbouring the Union's external borders, in an effort to reduce secondary movement from these countries to EU Member States. However, attention for asylum matters has had to compete with the EU's priority of combating irregular migration, human trafficking and organised crime, strengthening police and judicial co-operation, and border management. The latter areas of co-operation have received considerably more attention in political dialogue and operational assistance.

Nevertheless, the EC has recently launched a number of asylum projects, to be implemented by UNHCR among others, in the Western Balkans and Eastern Europe. The focus of these projects is on establishing asylum legislation in line with international and European standards and principles, developing proper asylum procedures, building asylum institutions such as competent processing and review bodies, enhancing the capacity for hosting refugees and asylum seekers, and fostering the involvement of civil society and specialist NGOs in the asylum process.

3. Reception and protection in regions of origin

The EU has recently made policy proposals for increased support for the protection and reception of refugees in regions of origin. The aim is to use EU development funds more effectively in the search for durable solutions for refugees. The May 2003 Council Conclusions are an important document in this regard in so far as they call for EU development aid to target the return and reintegration of refugees as well as measures to increase the self-reliance of refugees and host communities in protracted refugee situations.

In June 2003, the Commission published a Communication 'Towards More Equitable, Accessible and Managed Asylum Systems'. This set out policy options for EU support for enhancing the capacity for effective protection in regions of origin. This should be complemented with an EU resettlement scheme, coupled with a programme of humanitarian visas ('protected entry procedures'), in an effort to achieve a more orderly and managed entry of refugees and asylum seekers into the EU. Other proposals concerned the establishment of processing facilities for asylum seekers in regions of origin and closer co-operation between the EU and countries of origin and first asylum in the return of rejected asylum seekers.

4. The High Level Working Group

In early 1999, a High Level Working Group on Migration and Asylum was established (see Part 1, chapter 2, B) in order to formulate comprehensive strategies and joint policies to address migration and refugee challenges in co-operation with selected countries of origin and transit. The HLWG developed Action Plans for Albania, Afghanistan, Iraq and the neighbouring region, Morocco, Somalia and Sri Lanka which incorporated instruments of foreign policy, development co-operation, economic relations, and justice and home affairs. These Action Plans were mainly concerned with eliminating the causes of flight and involuntary migration, strengthening the management and reception capacity of countries in the region, and facilitating the return of rejected cases and illegal immigrants from EU Member States.

The implementation of the above Action Plans, however, has been hampered by many obstacles and internal disagreements. There have been considerable delays in implementing the Action Plans, due to problems with embryonic co-ordination between Member States, the absence of substantial funding commitments (a separate EU budget line - B7-667 - was created following a recommendation of the European Parliament), and the reluctance of the beneficiary/target countries to enter into a dialogue on migration and refugee matters (e.g. on readmission). There has also been a lack of agreement between Member States on integrating migration issues into foreign policy and development assistance. Furthermore, the protection dimension of the Group's activities has been given relatively little weight in comparison to measures aimed at combating irregular immigration, readmission and return of irregular residents.

It therefore remains to be seen whether a proper balance will be struck between protection and control measures and between the priorities of partner countries and those of the EU. The mandate of the HLWG was expanded in 2003 to allow for a more strategic, flexible approach without geographical limitation in its actions. This could include the potential for regional approaches, an analysis of the relationship between the Union's migration management and trade, aid policy and foreign relations, and a stronger emphasis on partnership with third countries and international organisations in joint migration management.

IV. Conclusion

UNHCR believes that solutions to refugee problems should be found first and foremost in regions of origin. Measures to strengthen partnership with countries of origin and first asylum in the management of broader migratory flows are to be welcomed, in so far these include a distinct focus on asylum and refugee issues. The Agenda for Protection promotes better responsibility sharing arrangements to shoulder the burdens of first asylum countries. Enhancement of capacities to offer effective protection and durable solutions in regions of origin - through asylum capacity-building, local integration of refugees, repatriation and resettlement - requires increased and targeted use of technical assistance and development aid. States should consider including refugee issues in their national development strategies. Resettlement of refugees from poor developing countries to industrialised countries could be more effectively used as a tool of burden sharing. In all these activities the EU's contribution is paramount.

green

Chapter 3: Regional approaches of the EU external JHA policy

Chapter 3: Regional approaches

A - The EU's Justice and Home Affairs Policy in Eastern Europe and Central Asia

I. Introduction

This chapter focuses on the EU's relations with the countries of Eastern Europe and Central Asia in the area of justice and home affairs (JHA).

Since the collapse of the Soviet Union, the EU has been supportive of the transition of the thirteen Newly Independent States (NIS) towards democratic society and a market economy. The NIS states are Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgystan, Moldova, Mongolia, Russia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan. With the EU enlargement process east, the number of EU countries sharing a border with NIS countries will soon increase and this fact has substantially influenced the dialogue between the European Union and countries from Eastern Europe and Central Asia.

Following the conclusion of Agreements on Trade and Co-operation in the early 1990s, a Partnership and Co-operation Process between the EU and Eastern European and Central Asian countries was launched towards the end of the 1990s focusing on the promotion of co-operation in selected policy areas. The priorities were environment, transport, energy and telecommunication networks, and justice and home affairs, including cross border issues. Partnership and Co-operation Agreements (PCAs) with Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Ukraine and Uzbekistan were signed and entered into force in 1998 and 1999. These agreements have not yet entered into force for Belarus, Turkmenistan, Tajikistan and Mongolia.

PCAs provide for wide-ranging co-operation in the field of justice and home affairs, and this has become increasingly important for the EU. Organised crime and illegal activities such as trafficking in human beings, drugs and corruption, are considered to be a threat to stability and security in the NIS and, given the trans-national nature of these activities, a threat to the internal security of the EU. In addition, since Member States pay increasing attention to migrant and refugee flows from and through this region, EU assistance for NIS countries in the field of border, migration and asylum management has needed to be reinforced (see TACIS programme below).

II. Western NIS: Russia, Ukraine, Moldova and Belarus

Co-operation on justice and home affairs by the EU and the Western part of the Eastern European region has increased in the past few years, focusing on combating illegal immigration and organised crime, including human trafficking. This is reflected in bilateral relationships concluded between the EU and individual countries.

With Russia, in 1999, the EU developed an Action Plan on the implementation of the EU Common Strategy in which the fight against terrorism and organised crime, and co-operation on JHA matters were highlighted. A first JHA ministerial meeting took place in April 2001, a

second in April 2002. In addition, regular meetings of the EU-Russia Council (Heads of States and Governments) address JHA matters, including the issue of the status of Kaliningrad, and, more importantly, the right of free movement of persons, once Lithuania becomes an EU member. In 2001, discussions were launched on the possible conclusion of an EC readmission agreement with Russia and the exchange of expertise in combating illegal immigration.

The EU considers co-operation with Ukraine in the JHA sphere as equally vital. As with Russia, the EU adopted a Common Strategy for co-operation between the EU and Ukraine in 1999. This document established a framework for co-operation in which JHA plays an important part. This was followed by the adoption in December 2001 of an EU Action Plan on Justice and Home Affairs and a subsequent Scoreboard for the implementation of the Action Plan. The Scoreboard lists institution and capacity building in the areas of asylum and migration as high priorities. Due to Ukraine's location bordering the future EU external frontier, the prospect for concluding a readmission agreement with Ukraine appear to be more promising than for Russia. In fact, concluding such agreement is listed as a top priority in the EU JHA Action Plan.

Relations might be more tense, but Belarus is still an important partner for the EU as it too will be one of the future neighbours of an enlarged Union, sharing common borders with Poland, Lithuania and Latvia. The EU envisages a structured dialogue with Belarus in JHA especially in combating organised crime, smuggling migrants and trafficking human beings.

Once Romania joins the EU, Moldova will also be a future neighbour of the enlarged Union. The EU is increasing its focus on JHA issues in Moldova although to a lesser extent than with other countries.

III. TACIS Programme

TACIS is the EU's main financial instrument for supporting the implementation of Partnership and Co-operation Agreements, thereby assisting all NIS countries in their transition process. In planning assistance, the EU enters into a dialogue with each partner country on two or three main areas of co-operation. Where applicable, the area related to JHA is called 'Institutional, Legal and Administrative Reform'.

TACIS has both a regional and a national approach. At both levels, TACIS develops Indicative Programmes, which set out priorities and areas of co-operation on a multi-annual basis, and Action Programmes, which develop operational projects and allocate funds on an annual basis, within the guidelines defined by the Indicative Programme.

Assistance for justice and home affairs at a national level has, until 2002, focused on fighting organised crime and drug trafficking. In plans for 2003 and beyond, Russia, Moldova and Ukraine will receive funds for improving their border, migration and asylum management.

At the regional level, the TACIS Regional Action Programme 2002-2003 has allocated 2 million Euro for an asylum management project in the Western NIS region, benefiting Ukraine and Moldova. This project aims to support, through UNHCR, the capacity building of the nascent asylum systems in these three countries. It focuses on improving legislation, helping the authorities to upgrade reception facilities, creating relevant databases, and training practitioners.
The Regional Indicative Programme 2004-2006 foresees a continued and enhanced co-

operation at regional level in the field of asylum and migration with a view to better managing migratory movements through the NIS.

IV. Central Asia

The EU's focus on Central Asia increased in 2001, even before the events of 11 September. The December 2001 General Affairs Council reaffirmed the EU's commitment towards the region and welcomed the region's support in the international coalition against terrorism and for the transport of humanitarian aid to Afghanistan. The Council indicated a number of areas in which it wanted to step up co-operation with the region, including justice and home affairs.

Subsequently, the TACIS programme reoriented its regional strategy approach for 2002-2006. In the Regional Indicative Programme for 2004-2006, the EU is willing to develop a co-operation programme designed to promote good relations in areas where the EU has strategic interests. One area of support will be justice and home affairs focusing mainly on strengthening border management through the reform and training of border guards. UNHCR appreciates that asylum management is an integral part of this programme.

V. Regional Co-operation Processes

The EU has shown increasing interest in the 1996 Geneva Conference Follow Up Activities (former "Commonwealth of Independent States - CIS Conference Process") and its related regional and sub-regional activities. The objective of the CIS Process was to provide a forum for the countries of the region to discuss problems of population displacement, review population movements in the region, and reach an understanding on persons of concern. The aim was also to devise an integrated strategy, enabling the countries of the CIS to cope better with and prevent population displacement, as well as to manage and regulate other types of migratory movements taking place on their territories. The CIS Conference Process has had a considerable impact on the resolution of problems related to the displacement of populations in the region, which, if left unattended, could have led to serious inter-state conflict. This applies, for example to the regularisation of the legal status of formerly deported people and, subsequently, the reduction of statelessness. As regards non-CIS nationals, the CIS Conference Process has also greatly contributed to the creation of national institutions in line with international standards, including, for example, asylum systems.

The EU has also participated in some regional Conferences and seminars of the Cross-Border Co-operation Process (CBCP or "Soderkoping" process). These seminars focus on bilateral and multilateral co-operation among those Western NIS countries that will, in future, border EU Member States. In 2003, the EU committed funding for a Cross Border Co-operation Process Secretariat based in Kiev, Ukraine. The Secretariat's main tasks are to serve as an information center and to run and coordinate all CBCP's activities including those of the three sub-regional clusters along the future external border of the EU. Cluster I, based on the original Soderkoping process, is composed of Belarus, Ukraine, Poland, Lithuania, Latvia and Estonia. Cluster II or the Uzghorod process is composed of Ukraine, Slovakia and Hungary. Cluster III is composed of Ukraine, Romania and Moldova.

VI. Co-operation with UNHCR

UNHCR works closely with the Commission's DG Relex (External Relations) and EC Delegations in capitals to develop joint projects aimed at setting up effective asylum systems in Eastern Europe and Central Asia. Such assistance focuses on the capacity building of authorities in order that they can implement relevant international and European standards for migration and refugee issues. This includes upgrading the infrastructure for a modern migration and asylum management system, improving reception conditions for migrants and asylum seekers, developing training programmes and partnership arrangements with the counterpart administrations of EU Member States.

B - The EU's Justice and Home Affairs Policy in the Balkans and the Stability Pact

I. The European Union Stabilisation and Association Process

1. Background

In May 1999, the European Commission launched the Stabilisation and Association Process (Sap) for the five countries of the Western Balkans – Croatia, Bosnia and Herzegovina, the Federal Republic of Yugoslavia, the Former Yugoslav Republic of Macedonia and Albania - as a means to associate these countries closely with the European Union and offer them a clear prospect for future EU membership through the development of privileged political and economic relations. The process is supported by a substantial financial assistance programme, Community Assistance for Reconstruction, Development and Stabilisation - CARDS. This chapter outlines the Sap process, the CARDS programme and the Stability Pact for the Western Balkans.

The Sap is a long-term commitment to the region both in terms of political effort and financial and human resources. It is based on the recognition that the main motivation for the needed reforms - the consolidation of democracy, the strengthening of the rule of law, the promotion of human rights, the stabilisation of institutions and the introduction of a free-market economy - would be a credible prospect of EU membership. This prospect was offered explicitly at the Feira European Council in June 2000 and reaffirmed at the December 2002 Copenhagen Summit. In the Communication 'The Western Balkans and European Integration' of May 2003, the Commission states that 'the unification of Europe will not be complete until these countries join the European Union'.

2. Stabilisation and Association Agreements

The November 2000 Zagreb Summit formally sealed the Sap process as the way ahead for the region. The Ministerial Justice and Home Affairs meeting in Sarajevo in March 2001 adopted a Declaration on Asylum and Immigration and a meeting of senior officials took place in November 2001 as a follow-up. In June 2003, the Tessaloniki Summit adopted an agenda for a deepened and extended co-operation. The Sap process was reconfirmed as the basic framework for the future integration of the Western Balkan countries into the European Union. In effect, the Sap draws heavily on the Europe Agreements with the candidate countries and the experience of the enlargement process. So far, Stabilisation and Association Agreements (SAA) have been signed with the Former Yugoslav Republic of Macedonia in April 2001 and Croatia in October 2001. An agreement with Albania is under negotiations. For Bosnia and Herzegovina and the Federal Republic of Yugoslavia, Consultative Task Forces have been established to prepare for reforms with a view to negotiating a SAA agreement in the future.

The SAA agreements with the EU are the basis for the implementation of reforms in the institutional, political and economic sector. They include provisions on justice and home affairs, with reference inter alia to the need to adopt and implement asylum legislation, co-operate in migration management, conclude readmission agreements and take effective

measures to combat migrant smuggling and human trafficking. Under the SAA agreements, mechanisms for political dialogue and technical assistance are established for implementing the objectives and provisions of the agreements.

A. Country reports
Implementing the Sap for each of the five countries is guided by the publication of an annual general report and individual country reports. A first series was issued by the Commission in April 2002. Each of the country reports includes paragraphs on minority rights and refugees (within the chapter on human rights), as well as on asylum and migration (within the chapter on co-operation in justice and home affairs).

B. Refugee return
The only country papers (and related financial allocations) in which issues to do with refugees and internally displaced persons are organic to the strategy developed are those for Bosnia and Herzegovina and Croatia. In other papers, the emphasis is more on economic development in areas of return, which should be to the benefit of the local population, and not on durable solutions for returnees. As of 2003, CARDS (see below) is progressively phasing out its assistance for refugee return.

3. The CARDS programme

The CARDS programme is the single Community aid programme for the five Western Balkan countries participating in the Sap. It is endowed with 4.65 billion Euro over the period 2000-2006. The programme supports the democratic, economic and institutional reforms needed in the five countries concerned. The programme is based on a regional strategy and a country-by-country strategy. Both regional and national annual strategies are first designed in multi-annual indicative programmes, indicating budgetary provisions.

A. Regional programme
The CARDS programme has an important regional component aimed at improving regional co-operation through the establishment of contractual relationships, including bilateral free trade agreements, the gradual re-integration of the Western Balkans region into European infrastructure networks in transport and energy, and co-operation in border management, visa policy, illegal immigration, and organised crime. The regional programme counts for ten per cent of the total of the CARDS budget.

The regional priorities - in line with those of the Sap - are to promote integrated border management, institutional capacity building, democratic stabilisation and regional infrastructure development. Some 117 million Euro of the total of 197 million Euro for regional programmes for the period 2002–2004 is allocated to the heading "integrated border management". Under the regional priority of institution-building, justice and home affairs is one of the areas mentioned. In preparing the programmes for 2003, CARDS has made use of the field missions of the asylum experts of EU Member States. The contents of their reports have influenced the 2003 regional CARDS programme in which an asylum, migration and visa policy has been included. This programme should aim for the development of a regional strategy based upon common benchmarks that translate the commonly accepted EU standards and practices into national law and practice in each of the Western Balkan countries. The programme also envisages regional co-operation and networking in order to exchange information and analysis, undertake joint training and improve practices in asylum, migration and visa policy.

B. National CARDS programmes
National programmes are based on country strategy papers and multi-annual indicative programmes for each of the five countries. These were formally adopted in December 2001 (early January 2002 for the Federal Republic of Yugoslavia –FRY-, now 'Serbia and Montenegro'). Justice and home affairs is one of five priorities for each of the countries - with the exception of FRY - with specific focus on strengthening the rule of law, the independence of the judiciary, border management, combating organised crime and policing. The only country strategy paper which mentions asylum issues in detail under the justice and home affairs priority is the paper on Albania. In 2003, a financial allocation of 1 million Euros was granted to UNHCR in Bosnia and Herzegovina for the management of legal aid centres. Bosnia and Herzegovina is expected to be granted assistance for infrastructure support, improvement of asylum procedures, institution and capacity building including the training of staff, judges and lawyers, improvement of reception conditions for asylum seekers, and upgrading national legislative standards in line with the European and international asylum acquis.

4. The European Agency for Reconstruction (EAR)

The EAR came into existence in February 2000. It emerged from a previous EC commitment - made towards the end of the crisis in Kosovo in June 1999 - to assist in the reconstruction of Kosovo. From the outset the EAR focused its assistance on the rehabilitation and repair of Kosovo's infrastructure and public utilities (energy, housing, transport and water supply). Following changes in Serbia in late 2000, the EAR extended its activities to the whole of FRY and obtained its mandate for this extension in January 2001. In December 2001, the mandate was further extended to cover FYROM where it is responsible for the reconstruction of areas affected by the conflict in early 2001 there and for support for confidence building measures.

II. The Stability Pact for South-Eastern Europe and the Migration and Asylum Initiative

1. Background

The Stability Pact for South-Eastern Europe was launched at a major international summit in Sarajevo in July 1999. It represents a political commitment by the countries and organisations concerned to ensure the stability of South-Eastern Europe. This includes the whole region and was not limited to the five Western Balkan countries. The Pact is aimed at promoting human rights and democratisation, creating vibrant market economies and fostering economic co-operation, and combating organised crime, corruption and all criminal and illegal activities. The Pact runs in parallel to the EU Stabilisation and Association process and shares to a large extent the objectives and priorities of the Sap.

Under the Pact, a conference for donors was held in March 2000, which brought together representatives of donor governments, the countries of the region, international organisations and financial institutions. The conference identified how the Pact's activities would be financed and brought donor pledges together but did not generate fresh contributions. The Pact also organises annual regional conferences.

2. Membership

In addition to the 15 EU Member States and the countries of South-Eastern Europe, participants in the Pact are the USA, Russia, Turkey, the European Commission, the Chairman in Office of the Organisation for Security and Co-operation in Europe (OSCE), and the Council of Europe. There are eleven facilitators, and five regional initiatives supporting the aims of the Pact and taking part in its structures, including Canada, Japan, the UN, UNHCR, NATO, the IMF, World Bank, and the European Bank for Reconstruction and Development. A number of countries participate as observers, such as the Czech Republic, Switzerland, Norway, Ukraine, as well as guests of the chair (Montenegro, UNMIK –UN force in Kosovo -, Office of the EU High Representative, and the European Parliament).

3. Structures

The Special Co-ordinator is appointed by the European Union and his or her mandate is renewed once a year, after consultation with the OSCE Chairman in Office and other participants. The Pact is run under the auspices of the OSCE. To realise its objectives, the Stability Pact is co-ordinated by a Regional Table and three Working Tables.

The Regional Table brings together all participants, facilitators and observers once a year to review progress and provide strategic guidance for future work. It acts as a clearing-house for all questions of principle related to the substance and application of the Pact. It also ensures co-ordination of the activities of the three Working Tables and gives them advice.

At the end of 2002, following the arrival of the new Special Co-ordinator, the Regional Table endorsed the Pact's new policy objectives for 2003 in the following areas: media, local democracy and cross border co-operation, infrastructure/energy, trade and investment, managing population movements (migration and asylum/refugees), and organised crime. In addition, the Pact has an important role to play in a number of other areas such as social cohesion, corruption, reconciliation and increased inter-parliamentary co-operation.

UNHCR's engagement in the process is reflected in its role within each of the three Working Groups:

– in Working Table I (democratisation and human rights):
UNHCR is supporting Regional Return Initiative - Agenda for Regional Action (AREA);

– in Working Table II (economic reconstruction and development):
UNHCR has attempted to link the reintegration of refugees and internally displaced persons to the wider effort of development and reconstruction assistance;

– in Working Table III (security – sub-table justice and home affairs):
UNHCR is sponsoring asylum capacity building activities.

4. Refugee return and asylum capacity building

The Sarajevo Summit Declaration also reaffirmed the right of all refugees and displaced persons to return freely and safely to their homes. Moreover, the Pact has identified institution and capacity building in asylum and migration matters as one of its priority areas within the justice and home affairs chapter .

While return matters were first the responsibility of the Regional Return Initiative (RRI) under Working Table I, migration and asylum fell under JHA in the Migration and Asylum Initiative (MAI) under Working Table III. In December 2002, at the Pact regional meeting in Tirana, Albania, these two initiatives were merged into a regional initiative to manage and stabilise population movements in South-Eastern Europe, referred to as the Migration, Asylum and Refugee Return Initiative (MARRI). A Programme of Action was adopted with the aim of contributing to the creation of national and regional systems for managed migration, suppressing irregular flows, and ensuring protection for all those in need.

As for asylum, an asylum element of the programme will be implemented during a four year period in each of the countries concerned. This should result in the establishment of a sound legal and institutional framework, enhancement of practitioner capacities and skills, introduction of asylum procedures for applications lodged at the border and in-country, improvement of reception and integration facilities, support for refugees and asylum seekers in society, and the establishment of sustainable asylum policies supported by sufficient human and financial resources.

With regard to return, the foundations for this can be found in the Agenda for Regional Action for Return (AREA II) which lists specific actions in the area of housing, including winding up accommodation centres, and property related information exchange aimed at ensuring the sustainability of return and reintegration.

III. UNHCR's co-operation with the EU Sap and the Stability Pact for South-Eastern Europe

UNHCR provides inputs into the various activities undertaken within the EU Sap process in relation to refugee return and asylum capacity building. This is done through the provision of situational assessments, policy recommendations and co-operation with the CARDS framework, both at national and regional level.
In regard to the Stability pact, UNHCR was instrumental in ensuring that the Pact took up a clear responsibility on refugee issues from the outset. From the early days of the Pact, UNHCR has been active in providing expert advice as regards refugee protection and return in the region, securing financial resources for refugee return, and putting forward proposals for asylum and refugee related initiatives. UNHCR seconded two of its staff to the Pact, one based in Brussels at the Co-ordinator's office, the other in the Pact's Vienna-based support unit for inter alia asylum matters.

IV. Outlook

In early 2002, the EU reviewed its involvement in the Stability Pact. The EU agreed that the Pact's activities should be refocused on a manageable number of issues. The EU called for the Pact to support the Stabilisation and Association process by emphasising five or six priority objectives with a regional dimension. For 2002 these priority areas are trade and investment, infrastructure (including energy), refugee issues (to provide sustainable solutions for at least 100,000 refugees and internally displaced persons - with a focus on housing and employment), cross-border co-operation, reduction of trafficking in small arms and light weapons, and organised crime.

The EU Council also emphasised that the main value of the Pact lay in its ability to promote greater regional co-operation and thereby contribute to the prevention of conflict and destabilisation. The Pact should therefore focus on complementing the EU accession process (Bulgaria, Romania) and Sap process (Western Balkans) by prioritising cross-border and regional issues. In order to ensure the best co-ordination between the Pact and the Sap, an informal Consultative Committee was set up.

C - The EU's Justice and Home Affairs Policy in the Mediterranean Basin

This brief chapter looks at the EU's relationship with the countries of the Mediterranean Basin in relation to justice and home affairs.

I – Multilateral framework of co-operation: the EUROMED Partnership

1. Introduction

The EU policy in the Mediterranean basin focus on: Algeria, Cyprus, Egypt, Israel, Jordan, Lebanon, Malta, Morocco, Palestinian Authority, Syria, Tunisia and Turkey. The European Union has been pursuing regional co-operation with these twelve Mediterranean partner countries through the Euro-Mediterranean Partnership (also referred to as the "Barcelona Process") launched in 1995 at the Barcelona Conference. Libya, Mauritania, the Arab Maghreb Union and the Arab League enjoy an observer or guest status.

Under this process, the countries concerned have been invited to set up an Euro-Mediterranean free trade area by 2010. The Barcelona Process aims in particular to create an area of dialogue, exchange and co-operation guaranteeing peace and stability, and partnership in the political, economic, financial, cultural, social and human fields. It is judged that this framework will serve as an important instrument of conflict prevention - both in the difficult context of the Middle East peace process and in relation to actual and potential tensions in the region.

In May 2003, the Commission issued a Communication setting up strategic guidelines for 'Reinvigorating EU actions on human rights and democratisation with Mediterranean partners'.

2. The EUROMED process

Since 1995, EUROMED Conferences take place at the level of Foreign Ministers, sectoral ministers and government experts. An EUROMED Committee follows the regional aspects of the process. It meets at senior official levels on a quarterly basis.

Following the adoption of the EU Common Strategy for the Mediterranean in June 2000 and the first Euro-Mediterranean Conference in Marseilles in November 2000, the fourth ministerial conference took place in November 2001. This Conference discussed for the first time migration and asylum matters although no agreement could be reached at this stage on the place and significance of asylum in the forthcoming Euro-Mediterranean co-operation programme in justice and home affairs.

In preparation for the Euro-Mediterranean Ministerial session in April 2002 in Valencia, Spain, the European Commission published in February 2002 a Communication on the Euro-

Mediterranean Partnership. This drew up a balance sheet of progress achieved, and proposed new ideas. In Valencia, EU Mediterranean ministers adopted an Action Plan specifying the many different initiatives and commitments, evolving around three areas of partnerships : 1) Political and Security Partnership, 2) Economic and Financial Partnership and 3) the Social, Cultural and Human Partnership. Within the latter partnership, Ministers agreed to a Regional Programme for Freedom, Justice and Governance, also referred to as the 'regional programme on justice, combating drugs, organised crime and terrorism and the social integration of migrants, migration and the movement of people' or more commonly, the regional JHA programme. This framework document includes a reference to asylum capacity building as an element of mutual interest and co-operation. It should be followed by operational projects developed under the auspices of the MEDA programme (se below).

As a result of the situation in the Middle East, Syria and Lebanon did not attend the Valencia conference and hence did not sign up to the various texts adopted. Both countries are expected, however, to continue their co-operation within the framework of the Barcelona Process.

In May 2003 ministers met for a mid-term review in Crete, Greece. For the first time, this meeting was attended by the eight future Member States (the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia - Cyprus and Malta are already included in the process). Prospects for strengthening the partnership between a Union at 25 members and Mediterranean countries were examined. In this meeting it was agreed that the forthcoming Ministerial meeting on migration and the social integration of migrants scheduled for late 2003 will represent an opportunity to develop further a balance approach to the management of migratory flows and the integration of migrants.

3. EU-Mediterranean Parliamentary relationship

An EU Mediterranean parliamentary forum was organised in Bari, Italy in June 2002, where Members of the European Parliament, members of parliament in Mediterranean partner countries, and members of national parliaments in EU Member States adopted a non-binding Resolution on migration. This Resolution included a number of observations aimed at a more balanced and reciprocal approach to migration management between the EU and the Mediterranean Basin. However, with the exception of one of the preliminary paragraphs, the text does not include specific asylum related observations. The text does refer to the need to find solutions to population movements in the region through sound partnership with countries of origin and transit and shared responsibility. It also calls for the use of development aid to promote economic and social development in those countries and regions with the potential for high migration levels.

It is expected that this parliamentary forum will turn itself into a Parliamentary Assembly, similar to the EU-ACP Joint Parliamentary Assembly (established under the Cotonou agreement). A further session of the Forum took place in Greece during the Greek EU Presidency in 2003.

II - Bilateral relations

At a bilateral level, the European Union has concluded Association or Co-operation Agreements with Algeria, Egypt, Jordan, Lebanon and Syria, Tunisia, Israel, Morocco and the

Palestinian Authority. Under the framework of the Association Agreements, a dialogue on migration issues has started with Morocco and Tunisia.

III. MEDA Programme

The EU programme of financial assistance for implementing the EUROMED partnership is called MEDA. A first MEDA programme, MEDA I, covered the period 1996-1999 and MEDA II covers the period 2000-2006. It is endowed with 5.35 billion Euro. MEDA assistance programme has a regional and a bilateral dimension. Regional programmes are meant to reinforce and complement bilateral programmes. They cover a wide range of issues relating to the three Partnerhsips of the EUROMED process (Political and Security Partnership, Economic and Financial Partnership and the Social, Cultural and Human Partnership - in which is found the above-referred JHA Programme -. Migration is given special attention in the regional programme with a focus on developing co-operation in joint migration management, in particular in combating illegal immigration and human trafficking.

UNHCR has established a dialogue with the Commission's Directorates DG Justice and Home Affairs and DG External Relations on the implementation of the migration and asylum chapters of the JHA Programme. UNHCR has called for a progressive co-operation programme on asylum starting with awareness raising activities followed by an analysis of existing gaps in asylum systems, including training and information exchange, NGO capacity building, and a regional dialogue among all partners concerned.

IV. High Level Working Group's focus on some of the Mediterranean countries

Following the November 2002 Council Conclusions on strengthening co-operation in the management of migration flows with third countries, the HLWG held meetings in 2003 on improving dialogue and co-operation with selected Mediterranean countries such as Morocco, Tunisia, Libya and Turkey. With these countries being both countries of origin and countries of transit, the issues are sensitive and complex. In the case of Morocco, the Commission has set aside some 40 million Euros to strengthen the country's border management, provided Morocco is ready to sign a readmission agreement with the EC. Although negotiations have opened recently to that effect, Morocco insists on linking this point to the issue of free movement and the position of Moroccans in the EU.

red

UNHCR and the EU

green

Chapter 1: UNHCR and the EU

UNHCR and the EU

Chapter 1
UNHCR and the EU Asylum Agenda

Background

In early 1990, UNHCR established a liaison function in its Brussels office to monitor developments and provide inputs into the nascent EU harmonisation process in the areas of asylum and migration. Contacts were maintained and developed mainly with the Presidency as the driving force behind the preparation and subsequent adoption of the first soft law instruments (non-binding resolutions and recommendations adopted outside any formal Community structure). UNHCR developed simultaneous contacts with the European Commission (Task Force on Justice and Home Affairs in the Secretariat General) and the European Parliament. Both institutions had only an advisory role in the process, the Commission participating in Council discussions in an expert capacity, and the Parliament issuing non-binding opinions following adoption of instruments and decisions in Council.

With the entry into force of the Maastricht Treaty in 1993 and its Third Pillar structuring Member States' co-operation in justice and home affairs, the EU Commission was given a right to initiate and submit legislative instruments, as well as a more prominent place in the deliberations on draft instruments. The European Parliament's right to comment on soft law instruments (following adoption in Council) was also enshrined in the Treaty. UNHCR's relations with the Commission and the Parliament intensified: the office advised Commission staff on draft positions, including those submitted by the Commission itself (on Temporary Protection) and provided inputs into parliamentary opinions on Council instruments.

In response to the increased co-operation between Member States in asylum matters under the Third Pillar, UNHCR strengthened its relations with Member States other than those holding the Presidency. UNHCR's office in Brussels started a process of networking UNHCR branch offices in national capitals through the establishment of EU focal points in these offices. These were charged with monitoring and influencing their government's positions in negotiations on EU asylum instruments. The office also established an EU Task Force, consisting of people from selected EU focal points, including those from Troika countries (precedent, actual and incoming presidencies) and UNHCR HQ staff to reinforce inter-office cooperation, particularly as regards the preparation of lobbying papers, and the development of strategies and setting of priorities regarding UNHCR's involvement in the EU harmonisation process.

With the entry into force of the Amsterdam Treaty in 1999, Member States decided to relinquish their sovereign right to pursue national asylum policies and practices, and assigned competence to the European institutions to develop Community legislation in asylum - although limited to the adoption of common minimum standards. UNHCR's relations with the EU institutions subsequently intensified and the office in Brussels is now liaising with the EU Commission's Directorate General for Justice and Home Affairs, the Council secretariat, Member States' permanent missions and the European Parliament on a permanent basis. UNHCR provides expert input into the drafting of legislative instruments and comments on

proposals once under negotiation in Council.

In July 2000, the Commission DG JHA and UNHCR signed an exchange of letters in order to reinforce co-operation in asylum and refugee matters, as a concrete expression of implementing Declaration No. 17 of the Amsterdam Treaty. This stipulates that UNHCR must be consulted by the EU institutions in matters pertaining to asylum. In addition to day-to-day contacts, formal strategic consultations are now being held with the Commission DG JHA at senior level on a six monthly basis, following the standard agenda agreed during the signature of the exchange of letters.

Since the entry into force of the Amsterdam Treaty, UNHCR Brussels' co-ordination role has further developed vis-à-vis branch offices in the EU in regard to inputs in Member States' negotiations in Council on draft legislative instruments. The office co-ordinates lobbying activity by branch offices in order to influence effectively Member States' positions during negotiations in Council. UNHCR is also actively involved in the preparation of reports and resolutions by the European Parliament, particularly as regards parliamentary amendments to legislative drafts, and proposed EU asylum strategies and policies.

The quantity and quality of UNHCR's contacts with the EU institutions have increased considerably not only as a result of the institutional developments in asylum at EU level, but also following the EU's decision to make justice and home affairs (JHA) matters, including asylum, a priority in its strategy to prepare for enlargement and, hence, in its contacts with candidate countries. The office in Brussels maintains close and frequent contacts with Commission desks responsible for programming pre-accession assistance in JHA and asylum matters. It also monitors closely the Commission's and Council's regular "screening" of candidate countries' developing capacity to take on the obligations of the EU asylum acquis, and provides inputs into these processes.

Ever since the Commission and Council started to develop the exernal dimension of EU asylum and migration policy, aimed at improved co-operation in the joint management of migratory flows, UNHCR has monitored this process closely and has provided expertise and policy inputs as regards EU co-operation with third countries (Eastern Europe, Western Balkans, Mediteranean basin) in asylum and migration matters.

UNHCR has also welcomed the Union's efforts to develop a more comprehensive approach to refugee producing situations as pionneered by the High Level Working Group on Migration and Asylum (HLWG, see Part 1, chapter 2, B). The Group has developed close co-operation with UNHCR since its inception in 1999. UNHCR has tried to ensure that the protection dimension of HLWG Action Plans is given due emphasis by ensuring a balance in implementing deterrence and control measures on the one hand, and access and protection measures on the other. UNHCR has also asked for concrete and substantial support for the programmes and actions of UNHCR and its partners aimed at providing protection and assistance to refugees and displaced persons in the regions under review by the HLWG.

Summary of key UNHCR concerns in relation to harmonisation

The harmonisation of European asylum policy represents both an opportunity and a danger. It is an opportunity for the development of a principled and coherent asylum policy in Europe which provides a consistent standard of protection to refugees throughout the Union. There is, however, a pervasive danger that harmonisation proceeding from a migration control perspective may lose sight of refugees' need for protection. There is a risk of reinforcement of restrictive measures and of a movement towards the lowest common denominator of current national practice.

UNHCR continues, therefore, to urge Member States to commit themselves collectively to the highest standards of refugee protection and to preserve asylum as a right rooted in international law, rather than as an act of political discretion. UNHCR also urges governments to take a strategic approach to the development of asylum policy and law, starting from a common and inclusive interpretation of the refugee definition in the 1951 Convention.

green

Chapter 2:
Extracts from an article from Johannes van der Klaauw, Senior EU Officer at UNHCR

Chapter 2
Extracts from an article by Johannes van der Klaauw, Senior European Affairs Officer, UNHCR Brussels, 'European Asylum Policy and the Global Protection Regime: Challenges for UNHCR'[1]

Ever since the member states of the European Community (EC), now European Union (EU), undertook to harmonize their policies and practices in asylum and migration, the effects of these efforts have had a significant impact on the policies and activities of the Office of the United Nations High Commissioner for Refugees (UNHCR). Initially, UNHCR adopted a rather reactive stance, commenting on some of the asylum-related resolutions and recommendations adopted in the early nineties. With the preparations for a Community policy on asylum and migration matters as required by the provisions of the Amsterdam Treaty, the Office took a more supportive position on the EU harmonization process, provided it would result in the adoption of a coherent and comprehensive European asylum policy, based on common standards of protection consonant with internally agreed standards.

UNHCR's support is predicated on the recognition that Western European countries have played a fundamental role in shaping the international framework of refugee protection. Moreover, UNHCR, in discharging its mandate and its duty of supervising the application of the provisions of the 1951 Convention, acknowledges that it relies heavily on support from Western European states to remain in the forefront of preserving and strengthening the global protection regime. UNHCR therefore has put its weight behind the construction of the European common asylum system, expressing the hope that the process would result in the adoption of accessible, fair and expeditious asylum processes in each of the member states, based on common standards of procedural and material asylum law. The system would also have to encompass a workable mechanism for determining responsibility for examining asylum requests, proper burden-sharing without shifting the burden to countries the least able to accept responsibility, a temporary protection mechanism to confront situations of mass influx, coordination in the effective return of persons not, or no longer, in need of protection, and common strategies to address human rights violations and other causes propelling forced population displacement (UNHCR 1996; UNHCR 1999).

UNHCR believes the EU harmonization process in asylum represents a unique opportunity to establish a consistent and coherent body of high protection standards, sufficiently detailed and "communitarizing" all key legislative elements of States' asylum systems. Yet it has also warned for the real danger that the outcome of the harmonization exercise will be a rather general and unambitious package of standards representing the lowest common denominator among Member States and creating some serious "protection gaps." UNHCR has called on Member States to show political leadership during negotiations to take a rights-based approach to asylum and not to subordinate the various standards to the political, security, and socio-economic dimension of migration policy, predominantly directed by efforts to combat illegal immigration and trafficking in human beings.

UNHCR has recognized the significance of the future European asylum standards, tools and

mechanisms for countries and regions outside the Union - as they are bound to influence the attitude of non-EU asylum countries towards certain groups of refugees and asylum-seekers that are less welcome in the EU. The emerging European asylum and migration regime has acquired an increasingly prominent place in the Union's external policies. Justice and Home Affairs (JHA) are now an essential, if often controversial, element in dialog and partnership between the Union and third countries. UNHCR has called on EU members and partner countries to adopt a protection-based approach to asylum in their negotiations, ensuring the fundamental rights of refugees and asylum-seekers, and full commitment to guarantee access to territory and protection to those in need of it.

The Office has also called on the Union to put the existing, somewhat fledgling consultative arrangements between successive Presidencies and UNHCR on a more formal footing. This would enable UNHCR to become fully associated with the preparations and subsequent implementation of the relevant provisions of the Amsterdam Treaty, as well as the related operational strategies and policy orientations to complement the common asylum system. This call resulted in the adoption of Declaration No. 17 to the Treaty stipulating that, in asylum matters, the Union is to consult UNHCR and other concerned international organizations[2] Following the entry into force of the Treaty, the European Commission and UNHCR entered into a formal exchange of letters to give substance to the text of the Declaration.

The Developing EU Asylum Agenda and UNHCR's Response

UNHCR considers the developing common asylum and migration policy of the EU as both an opportunity for and a danger to the preservation and strengthening of the international protection regime. Provided that EU members will demonstrate the political will to resolve existing differences, the process constitutes a unique opportunity to establish a principled and coherent asylum policy based on a consistent set of common standards of protection of refugees throughout the Union. Recent proposals and options put forward by the European Commission (2000) to establish a common asylum procedure and a uniform status throughout the EU are to be welcomed as an important step in the direction of a more strategic and outward-looking approach to the development of a common asylum policy. Were the Union to honor fully its solemn commitment to the "absolute respect for the right to seek asylum," as adopted at the Tampere Summit and enshrined in Article 18 of the European Union's Charter of Fundamental Rights, the establishment of a common European asylum system on the basis of the "full and inclusive application of the Geneva Convention" (Council of the European Union 1999) may contribute positively to the strengthening of the international regime for refugee protection.

In developing its common asylum policy based on common standards as part of the acquis communautaire the European Union should be guided by not only the core refugee law instruments—the 1951 Convention, the 1967 Protocol, and EXCOM Conclusions[3] —but also by the standards of international human rights law which are part of the foundation on which the global refugee protection regime is based. As has been pointed out by human rights review bodies and courts, member states' compliance with international human rights standards related to asylum and refugee matters is often found wanting. This concern for non-compliance is aggravated because the EU is not a party to any of the international or regional human rights instruments and hence escapes supervision by the bodies established on the basis of these instruments to scrutinize contracting parties' observance of the rights and obligations enshrined therein (for a summary of these concerns, see Amnesty International European Union Association 2000).

UNHCR has raised concern about the pervasive danger that the harmonization of asylum policy and practice in the EU may lose sight of refugees' need for protection. The Union's adoption of concepts and tools limiting access to asylum and restricting the application of international standards of material and procedural asylum law may result in other States also restricting access to asylum and curtailing asylum rights, and collective undermining of the international protection framework.

At the time of entry into force of the Amsterdam Treaty provisions, UNHCR asked the EU Commission and EU members to take a strategic approach to the development of the legislative package in asylum, starting from a common and inclusive interpretation of the refugee definition of the 1951 Convention. However, the preparations of the instrument on the refugee definition have been left for the last stage of the drafting process even though the Tampere Conclusions state that the common European asylum system must be based on the full and inclusive application of the 1951 Convention[4]. The focus of the Union's legislative work in asylum has been predominantly on the elaboration of procedural law standards, since the preceding intergovernmental cooperation had yielded most results in that area.[5] In implementing the Amsterdam asylum agenda the EU has taken inspiration from the existing soft law acquis, although it has tried to avoid a simple codification of the existing resolutions and recommendations in view of the gaps included in these instruments. By the time the Laeken Summit will review the progress made since the adoption of the Tampere milestones, all the Community legislative instruments in asylum have been put forward by the Commission. EU member states should seize this opportunity to rethink the order in which they want to adopt the various instruments, in order to ensure the coherence and completeness of the package, which should be centered on the core instrument related to the common interpretation of the refugee definition.

Beyond the adoption of common standards, UNHCR has advocated in favor of a common European asylum procedure, by suggesting the adoption of a single asylum procedure in each of the member states so that all international protection needs arising from all forms of risks would be considered in a holistic manner. This could bring the search for communality in member states' procedures a decisive step forward. UNHCR's suggestion has been echoed in the EU Commission Communication on the prospects of a common asylum procedure and uniform refugee status, prepared following a call by the Tampere Summit (paragraph 15), and has also been the subject of further study and consultations between the Commission and the EU member states (see Swedish Presidency 2001). With regard to the possible introduction of a uniform status, UNHCR has called on the European Commission and EU member states to respect the specificity and distinct nature of Convention obligations, which militates against the introduction of a common system granting the same undetermined status to all persons found to have a valid claim against expulsion, whether they are refugees under the 1951 Convention or persons who cannot be returned on other grounds (UNHCR 2001a).

UNHCR has commented critically on a number of soft law instruments adopted by EU member states prior to the entry into force of the Amsterdam Treaty, such as the London Resolutions on safe third country, safe country of origin and manifestly unfounded applications, the model agreement for a bilateral readmission agreement, the EU Resolution on minimum standards for asylum procedures, and the EU Joint Position on the harmonized application of the definition of "refugee." The Office has also commented, generally in positive terms, on the Commission proposals for legislative instruments on a Community temporary protection regime, minimum standards for asylum procedures, family reunion rules, minimum standards for reception of asylum seekers and minimum standards for the qualification as a refugee or as beneficiary of a subsidiary form of protection. Whereas the

resolutions and recommendations adopted in the pre-Amsterdam context of inter-governmental cooperation include a number of problematic elements, the Commission proposals for Community instruments reflect relevant international standards to a greater extent. The close and regular cooperation between UNHCR and the EU Commission during the preparations of these instruments has certainly contributed to this positive outcome of the drafting process, even if UNHCR remains concerned about a number of draft provisions in each of the instruments.[6]

However, the negotiations in Council have so far shown that many of the provisions proposed by the Commission are amended by EU member states. A case in point is the Directive on temporary protection, the first substantive Community asylum instrument adopted under the Amsterdam Treaty on 20 July 2001. These negotiations represent a major challenge for UNHCR to preserve the positive elements of the Commission proposals and to amend the weaker points through interventions by member states, but most importantly to prevent the introduction of amendments that may result in a departure from international standards and UNHCR recommendations. During the negotiations on the draft Directive on temporary protection, thanks to timely and coordinated interventions by UNHCR offices in capitals and by UNHCR's Brussels office with the EU institutions, substantial alterations of the contents of the Commission proposal could be avoided. The final product of the Council negotiations therefore could be welcomed by UNHCR as a positive contribution to the development of regional arrangements for temporary protection to be resorted to in mass influx situations where individual processing systems are unable to cope (UNHCR 2001b)[7].

The adoption of other Community asylum rules and regulations (mostly secondary legislation in the form of Directives laying down minimum standards) is still some way ahead, as a result of protracted, often difficult negotiations in Council. It is thus too early to say whether the future common standards, individually and in their totality, will reflect a high standard of protection and a sufficiently ambitious and detailed level of legislation. Past experience, however, does not augur well for the end result of these negotiations. EU member states, in negotiating legal instruments, have more than once diverted from established international standards arguing that its own standards provide more detail than related international standards and cover areas where no international consensus has been reached so far.[8] Member states have also justified their agreement on more restrictive measures with reference to the particular needs of highly sophisticated yet overburdened and costly asylum systems. Moreover, member states have argued that much of existing international instruments in procedural and material asylum law—EXCOM Conclusions, UNHCR guidelines, including the UNHCR Handbook—are not legally binding and need not be followed when codifying European asylum standards. This position is reflected in the Union's attitude towards UNHCR in developing its asylum standards, whereas the Office is considered its privileged partner whose guidance and expertise is badly needed, its criticism related to content of proposed or adopted European standards is best done without. (…)

UNHCR Liaison Function with the European Institutions

The emerging common asylum policy and practice at EU level does not only have major repercussions for the future of internationally agreed standards and mechanisms, it also has a significant impact on the operational responsibilities of UNHCR as the body tasked with supervising state practice in implementing the 1951 Convention. Where relatively few international treaty bodies exist to scrutinize state practice in JHA, it comes as no surprise that the EU is establishing its acquis in this area, including asylum and migration, without accounting for the contents and quality of its standards and practices in respect of existing

international standards, guidelines and recommendations. At the level of the European Union, UNHCR's role should be seen as one of advising and consultation during the negotiations and preparations of draft Community legislative instruments and operational strategies in asylum matters.

In future, however, UNHCR may find an important ally in the European Court of Justice (ECJ) in its task to supervise the correct application of international refugee law principles. According to Article 68 of the Amsterdam Treaty, the ECJ will be able to issue preliminary rulings on the interpretation and application of the common asylum standards as laid down in future Community legislative instruments, in order to ensure that implementing these standards does not violate internationally agreed norms and practices. The Court can be asked for such a preliminary ruling by the Council, Commission, or a member state, as well as a national court against whose decisions there is no judicial remedy under national law. The Court, albeit indirectly, will thus be given the competence when asked for a ruling on a question of the validity of an act of any of the EU institutions in relation to any of the Community asylum instruments, to decide on the interpretation and application of the provisions of the 1951 Convention, since the 1951 Convention lies at the basis of these instruments and is considered to be an integral element of the EU acquis. In view of this modest, yet important enlargement of the ECJ's competence to issue rulings in asylum matters, UNHCR may have to consider to be allowed to make submissions to the ECJ in the form of amicus curiae briefs, statements or letters, similar to its practice at national level, as a natural extension of its role to monitor the development of EU asylum standards and their implementation in the law and practice of EU member states. It remains to be seen, however, whether the ECJ rulings will follow the body of jurisprudence in asylum matters as developed by other regional courts, notably the European Court of Human Rights in Strasbourg.

Monitoring the preparations and negotiations in respect of draft EU legislative instruments in asylum, as well as the various policy discussions and the asylum-related aspects of the migration debate at European level, has required an increased UNHCR presence in Brussels and a more prominent role for EU asylum developments in the work of UNHCR staff in Geneva and in local offices in EU member states and applicant countries. Following the creation of a senior liaison post in Brussels in 1989, a network of correspondents in UNHCR offices in EU member states was created to follow the EU-related elements of the asylum discussion at national level and to undertake joint lobbying on UNHCR recommendations for improvement of draft EC law and policy proposals. Through its Brussels office, UNHCR coordinates its inputs into the developing body of asylum instruments and combines an international perspective with a familiarity with national practices, sensitivities and concerns. These qualities place the office in a unique position of not only providing expert advice but also playing an "honest broker" in often thorny negotiations among member states.

In addition to monitoring legislative and policy work within the European Commission and the Council bodies responsible for asylum and migration matters, UNHCR participates, since 1995, in an observer capacity in CIREA (Center for Information, Discussion and Exchange on Asylum), the Council forum for discussing and researching issues pertaining to asylum in EU member states. Through its participation in CIREA, UNHCR provides the EU member states with up-to-date country-of-origin information on a regular basis in order to influence positively the admissibility and eligibility practice of EU member states regarding asylum-seekers originating from countries under review by CIREA. On an ad hoc basis, the Office is also asked to provide its expertise and guidance on eligibility questions related to specific issues and themes. UNHCR's participation in CIREA affords the Office an invaluable opportunity to influence asylum processes regarding particular nationalities of asylum-seekers in all fifteen EU member states, and at regular intervals also in applicant countries, the USA and Canada,

when participating in CIREA in an observer capacity as well. In addition, as already referred to, UNHCR is involved in the work of the HLWG by contributing to the preparations of country assessments and the drafting of priority actions, as well as submitting operational proposals for enhancement of refugee protection and assistance capacities in countries under review by the HLWG.

Toward a Strengthened EU-UNHCR Partnership

UNHCR's relationship with the European institutions has intensified as a function of the increasing involvement of these institutions in asylum and refugee policies. With the entry into force of the Amsterdam Treaty and the subsequent relinquishing by member states of their sovereign right to pursue national asylum policies and practices—limited to adopting common minimum standards—UNHCR has considerably stepped up its cooperation with the Brussels-based institutions, primarily the European Commission as the driving force behind the preparation of a body of asylum regulations. UNHCR's cooperation with the European Commission in asylum matters has been marked by openness and transparency. The dialog on draft legislative instruments and the development of programs and operational strategies has been substantive and productive so far. UNHCR has been consulted on all the Commission's proposals for legislative instruments and most of its observations and comments have been taken into account prior to the publication of these proposals. As for the Council, UNHCR's comments on Commission proposals for legislative instruments are being distributed among delegations, and they are being referred to by delegations at regular intervals. The negotiations in the Council, however, continue to be marked by a lack of openness and transparency, as well as absence of accountability as regards the compatibility of proposed legislative standards with international law principles.

Upon the request of the European Commission, UNHCR concluded an exchange of letters with the Commission Directorate General for JHA in July 2000, building on Declaration No. 17 of the Amsterdam Treaty. The exchange of letters seeks to further develop the existing cooperation between the two institutions by establishing regular channels for exchange of information and documentation on ongoing and planned activities of mutual concern, providing mutual assistance in the study and implementation of programs on refugee and asylum questions and the holding of senior level semestrial consultations, alternately in Brussels and in Geneva, to coordinate cooperation, review progress in joint action and areas of mutual concern, and identify potential areas for further collaboration.[9]

In May 2001, the European Commission adopted a Communication on strengthened partnership with the United Nations, including UNHCR, in the areas of development assistance and humanitarian aid (European Commission 2001). In releasing this Communication the Commission announced that it would address in a future document the question of the overall EC/UN relationship, including cooperation in conflict prevention and crisis management. Prior to submitting its Communication, the Commission had been approached by UNHCR to consider the conclusion of an EU-UNHCR Partnership Framework which should identify in some detail the different areas of common interest between the EU and UNHCR, as well as put in place appropriate consultation mechanisms to facilitate concrete action in these areas. The latter were identified by UNHCR as to include asylum and migration, EU enlargement and asylum capacity-building, refugee assistance and humanitarian aid, and the refugee dimension of EU external relations, including development aid. For UNHCR, in addition to the need to deepen cooperation in these areas in order to ensure full commitment by the EU to protection principles and support for operational strategies, the proposed partnership with the EU would pose two particular challenges: the

role of the EU Commission in UNHCR's governance structure (EXCOM), and the funding relationship. UNHCR committed itself to ensure that the European Union is adequately represented in its Executive Committee, particularly in view of the Commission's competence in developing common asylum policies and standards, and the importance of the European Commission as a collective donor. In presenting its proposal for a reinforced partnership with the European Commission UNHCR also aimed at ensuring predictable, flexible, timely and sufficient financial resources considered essential for the efficient functioning of the Office and the implementation of its core mandate. The immediate response from the European Commission and the Council, however, has been to put the UNHCR proposal on hold, not being convinced of the value of further formalizing existing arrangements at this juncture.

Conclusion

The EU harmonization process in asylum has had a significant impact on the international protection regime so far, and this will be even more noticeable once the common European asylum system is put into place. The future common standards, policies and practices are expected to curtail some of the international standards, yet they may reinforce and expand on others, mostly in the area of procedural asylum law. The Tampere Conclusions stipulate that the Common Asylum System must be firmly rooted in the full and inclusive application of the 1951 Convention. The Union, however, has not yet indicated what such "full and inclusive" application means, either at the conceptual level or as regards implementation (Feller 2001). In developing specific instruments, standards, tools and mechanisms, the Union has so far adopted a rather narrow and exclusive approach to some legal and protection issues and its common concepts of procedural and material asylum law have contributed to lowering rather than raising the level of protection afforded by international standards. While the existing soft law standards developed in the last decade represent a step backwards in the strengthening of the international protection regime, the developing Community standards may contribute in a more positive way to revitalize the international protection system, provided they will be based on a high level of protection, address all core elements of procedural and material asylum law, and are prepared from a rights-based approach rather than a migration-control perspective.

As regards the external dimension, the EU has been rather successful in exporting its standards and practices to third countries, particularly where these are aimed at controlling entry and residence, reducing the admission of asylum-seekers, and limiting the options for local integration of refugees which are considered as a burden on the often fragile social fabric. In so far EU assistance programs provide potential leverage for UNHCR with the authorities to develop full-fledged asylum systems, the EU's interest has been generally limited to transfer and implementation of EU standards and practices in applicant countries. Also, the EU's support programs have aimed at promoting the EU's internal stability and security by managing migration to and from the Union in a more orderly and predictable manner, through inter alia equipping third countries to control their borders and combat organized crime, including the fight against trafficking in human beings. Where the EU has responded positively to UNHCR's repeated calls to develop comprehensive strategies to refugee and migration challenges, it has not necessarily developed the protection dimension of such approaches, but rather focussed its energy on the need to improve its management of migration flows. UNHCR's involvement in non-EU countries, however, is much wider in that it aims at ensuring the availability of protection and transforming transit countries into countries of destination for refugees. UNHCR's also tries to ensure that migration and border control are effectively reconciled with refugee protection principles in its cooperation with, and assistance to, third countries.

The developing EU asylum and migration standards and operational strategies have also had an impact on UNHCR as the body tasked with supervising state performance in adhering to the international refugee law instruments. In both its policy development and organizational arrangements, UNHCR's protection agenda has been heavily influenced by European developments. Many of the recent policy documents prepared for EXCOM meetings address issues of direct interest and concern to European states. The global consultations, launched in the context of the fiftieth anniversary of the 1951 Convention, also focus on a number of issues which are figuring prominently on the EU harmonization agenda, such as the need to ensure protection in mass influx situations, improve the fairness and effectiveness of asylum processes, and clarify the nexus between migration and asylum by better reconciling the legitimate concerns of States to control irregular migration with their obligations to provide protection to refugees. The consultations, moreover, are examining specific interpretative aspects of the Convention, which have been a source of contention between European States and UNHCR in recent years. The consultations should place the EU harmonization process in a more global context and encourage the EU to base its legislative instruments on the required high level of protection standards. Through the consultations, the developing common policies and practices in Europe can be exposed to a wider audience and receive constructive criticism, particularly where these may impact on international cooperation for sharing responsibilities in addressing specific refugee problems. Conversely, the consultations can draw inspiration from the various EU legislative and operational initiatives.

The negotiations between member states in the period up to 2004, when the full legislative package in asylum must be concluded, represent a crucial period for UNHCR to ensure that the forthcoming EU legislation is aligned to international standards of refugee law and human rights law. Yet the process does not end there: the European Commission has already started to look beyond the legislative Amsterdam agenda and develop options for the adoption of common asylum policies and strategies. UNHCR has to remain closely involved in the post-Amsterdam developments in European asylum policy, and as the guardian of the 1951 Convention, has to continue to fight a hard battle to preserve the spirit of the Tampere Conclusions by ensuring the "full and inclusive application" of the 1951 Convention and preserving the integrity of the asylum institution, within and outside the European Union. The EU standards and policies have to be developed with due regard to internationally agreed protection standards and strategies, rather than allowing the EU law and policy-makers to make undesired inroads into the carefully crafted international framework of refugee protection. And the Office of the High Commissioner for Refugees must be given the political space and the human and financial resources to remain in the forefront of this process.

References

Amnesty International European Union Association. A Common Asylum System for the EU: The International Regime for the Protection of Refugees at Stake? Brussels: Amnesty International, December 2000.

Council of the European Union. Guidelines for a European Migration and Asylum Strategy. 11162/99, ASIM 38 JAI 68. Brussels: Council of the European Union, 24 September 1999.

———. Presidency Conclusions: Feira European Council. SN 200/00 ADD 1. Brussels: Council Secretariat, 19-20 June 2000a.

———. Press Release 7653/00. Brussels: Council of the European Union, 6 June 2000b.

———. Presidency Conclusions: Goteborg European Council. Council of the European Union Press Release 9526/1/01. Brussels: Council of the European Union, June 2001a.

———. Presidency Programme Concerning External Relations in the JHA Field (2001 - 2002). 5146/01 JAI 2. Brussels: Council of the European Union, 11 January 2001b.

European Commission. Presidency Conclusions: Tampere European Council, 15 and 16 October 1999. SI (1999) 800. Brussels: European Commission Secretariat General, 15 and 16 October 1999.

———. Towards a Common Asylum Procedure and a Uniform Status, Valid Throughout the Union, for Persons Granted Asylum. COM (2000) 755 final. Brussels: European Commission 2000.

———. Communication: Building an Effective Partnership Wit the United Nations in the Fields of Development and Humanitarian Affairs. COM (2001) 231 final. Brussels: European Commission, 2 May 2001.

Feller, Erika. "Challenges to the 1951 Convention in Its 50th Anniversary Year." Paper presented at the conference on "International protection within one single asylum procedure," Norrkoping, Sweden, 23-24 April 2001.

HLWG. Report to the 2000 Nice European Council. 13993/00 JAI 152, AG 76. Brussels: HLWG, 29 November 2000.

van der Klaauw, Johannes. "The EU Asylum Acquis: History and Context." Pp. 9 - 20 in The Asylum Acquis Handbook, edited by van Krieken, P. J. The Hague, 2000.

Langdon, A.J. European Commission, Justice and Home Affairs Cooperation with Associated Countries. PHARE Programme 95-0683.01. October 1995.

Presidency of the European Union. Austrian Presidency Strategy Paper on Immigration and Asylum Policy. 9809/98 CK 4 27 ASIM 170. Brussels: Council of the European Union, 1 July 1998.

Swedish Presidency. International Protection within One Single Asylum Procedure. Norrkoping, Sweden, 23 - 24 April 2001.

UNHCR. The 1996 Inter-Governmental Conference: a UNHCR Contribution to the Review Process. Brussels: UNHCR, November 1996.

———. Setting the European Asylum Agenda: UNHCR Recommendations to the Tampere Summit, October 1999. 23 July 1999.

———. UNHCR Preliminary Observations on the EU Commission Communication 'Towards a Common Asylum Procedure and a Uniform Status, Valid Throughout the Union, for Persons Granted Asylum.' UNHCR: Brussels, January 2001a.

———. UNHCR Welcomes EU Agreement on Temporary Protection. Brussels: UNHCR, 1 June 2001b.

Footnotes

1 Reprinted with the courtesy of the editors Emek Ucarer, Bucknell University USA and Sandra Lavenex, Zurich University and the publisher Lexington Books, New York, USA. Manuscript was completed in summer 2001.

2 It is to be recalled that in an earlier draft of the Amsterdam Treaty submitted by the (then) Irish Presidency to the 1996 Dublin European Council, a provision on "close and regular consultations with UNHCR" was included in the body of the Treaty text (Article D of the draft chapter on "free movement of persons, asylum and migration," CONF 2500/96, 5 December 1996)

3 Since 1957 the UNHCR Executive Committee advises the High Commissioner in the exercise of his functions and undertakes an annual review of the UNCHR assistance programmes. EXCOM approves UNHCR's programs and scrutinizes all financial and administrative aspects. EXCOM meets in formal session in October of each year and adopts Conclusions, including Conclusions on international protection, which represent an important body of opinion on detailed aspects. At the moment, more than fifty States parties to the 1951 Convention are formal members of ExCOM.

4 A directive on minimum standards for the harmonized application of the refugee definition and the provision of complementary forms of protection was introduced by the Commission in the Council and the European Parliament in September 2001. This was the last piece of the set of Commission proposals for Community legislative instruments in asylum as called for by the Amsterdam Treaty.

5 Examples are the 1992 London Resolutions on accelerated procedures for manifestly unfounded applications, a harmonized approach to the application of the "safe third country" notion, and common conclusions on the notion of "safe country of origin," as well as the 1995 Council Resolution on minimum standards for asylum procedures. The very first piece of the EU asylum acquis, the 1990 Dublin Convention, is essentially an instrument regulating the joint responsibility of EU Member States regarding the admissibility of asylum claims.

6 As an example, the draft Directive on minimum standards for asylum procedures includes provisions on the "safe third country" notion and the suspensive effect of appeal which have met with UNHCR criticism. Another example of UNHCR criticism is the proposed preservation of the basic criteria of the Dublin mechanism (Member State responsibility for controlling entry into the common territory as the over-riding criterion rather than the Member State where the asylum application is actually lodged).

7 Although the provisions of the Directive stipulate that temporary protection is not an alternative to refugee status under the 1951 Convention, but only a practical device aimed at meeting urgent protection needs during a mass influx situation, the provisions of the Directive allow for inception of a temporary protection regime prior to the emergence of a mass influx, when individual processing would still be possible. However, such possibility, as formulated, should be ruled out if UNHCR would oppose such a move (consultations with UNHCR on the establishment, implementation and termination of the system are mandatory).

8 This, for instance, has been the Union defense against criticisms that its legal instruments to combat migrant smuggling and trafficking in human beings do not follow the agreed language of the relevant protocols attached to the UN Convention Against Transnational Organized Crime ("Palermo protocols").

9 A similar biannual senior-level dialog between UNHCR and the European Commission Humanitarian Office (ECHO) was instituted in December 2000.

green

Chapter 3:
EU funding support to UNHCR

Chapter 3
EU's Funding Support to UNHCR

Over the last decade, Europe has consistently provided the largest part of the financial support given by the international community for humanitarian assistance, including well over fifty per cent for refugees and displaced persons. The European Commission provides a significant contribution but still much less than Member States collectively. Over the past ten years, the assistance given by the Commission has been increasingly channelled directly to the countries concerned and less and less through UN agencies.

The Commission's contribution to UNHCR amounted to some 70 millions US dollars in 2002. The EC contribution represented over 8 per cent of all contributions to UNHCR in 2002, compared to 22 per cent in 1994.

The main funding sources within the Commission budget are the following:

– the European Community Humanitarian Office (ECHO, created in 1992) - some 70 per cent of the overall EC contribution,
– the Directorate General for External Relations with its dedicated funding line for uprooted people in Asia and Latin America,
– the Directorate General for Development and the Directorate General for Justice and Home Affairs.

The EC has restructured the way it provides external aid, and established a EuropeAid Co-operation Office in January 2001 to handle the identification of specific projects and contractual arrangements for DG External Relations and DG Development. This authority will now be gradually transferred to the Commission delegations.

1. Key issues for UNHCR

The Commission does not act as a traditional donor but more as an actor of humanitarian and development assistance. As a consequence, the EC does not provide unearmarked funding and favours projects rather than programmes. UN agencies are often seen as possible implementation partners in the framework of EC funded projects. The submission of proposals, the monitoring of projects, and reporting are demanding, and require an exceptional mobilization of UNHCR and partner personnel.

There are a number of incompatibilities in the financial rules and regulations of the United Nations and the European Community (for example, on questions of verification and eligibility and on the procurement of goods and services). A new framework agreement between the UN and the EC, which was concluded in April 2003 will to some extent alleviate these difficulties.

Increasingly, the Commission channels funds directly to the countries concerned or through NGOs. In the Commission's view, certain activities can be implemented as well, better or more cheaply through NGOs. Direct funding of NGOs is also considered to provide better visibility for EC funding.

2. An improved dialogue and partnership with the EC

The European Commission has stated at regular intervals that it is committed to strengthening its partnership with the United Nations. This was forcefully translated into a Communication, issued in May 2001, entitled Building an Effective Partnership with the UN in the Fields of Development and Humanitarian Affairs. It was also expressed in the revision of the 1999 UN/EC framework agreement on administrative and financial issues. (refer above)

UNHCR has an annual strategic dialogue with the EC's ECHO where refugee situations are reviewed and analysed. This has helped to ensure that ECHO funding for UNHCR's activities is predictable, timely and consistent.

Efforts are made to obtain more predictable and timely financial support from other services of the Commission, notably from the EuropeAid Cooperation office. The EC pays particular attention to post-conflict situations and issued a Communication in 2001 on Linking Relief, Rehabilitation and Development. Funding from the European Development Fund (EDF) - the EC budget for developing countries mainly in Africa - has so far been provided for the repatriation and/or reintegration of refugees in Burundi, Eritrea and Angola. The budget for Aid to Uprooted People in Asia and Latin America has also been an important funding source for protracted refugee situations and return operations in the countries covered by this fund (such as Afghanistan, East Timor).

In parallel, discussions continue to grant the European Commission an enhanced position as special observer in the Executive Committee of UNHCR. As competence for many refugee matters is transferred to the Community, the EC will have to play a more important role in the future in the governance of global refugee problems.

In the future, with a general decentralization within the EC of the management of external aid, it will be essential for UNHCR offices in the field to maintain close cooperation with the EC delegations. Indeed, the EC delegations will manage directly the entire cycle of contractual arrangements with partners, from submissions of proposals to reporting.