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

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

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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?

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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?

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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 ?

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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.

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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.

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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?