ASYLUM HARMONIZATION PROCESS AND ITS IMPACTS WITHIN THE CONTEXT OF THE EU ENLARGEMENT

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ABSTRACT

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Since 1980s, a number of factors caused an overall enhancement in the number of persons applying for asylum in Europe. This rapid increase in asylum applications and the end of the ideological gains towards refugees with the end of the politicized Cold War environment, necessitated European countries to re-focus on their immigration and asylum policies in a more systematic manner, especially after the ratification of the 'Single European Act'. Following the transfer of competencies in asylum and migration to the Community level, discussions were quickly moved within a European framework although harmonization of divergent national practices about an issue directly related to state sovereignty, has not been deemed as a trouble-free task for the Member States. On the other hand, the *acquis* regarding this problematic and state-centric issue has already started to be transferred to the Applicant Countries for the EU membership, as part of the pre-accession strategy,

and also to the third countries though bilateral agreements. This thesis work will focus on the concerns regarding the extension of these European asylum *acquis* to the third countries as well as on the advantages of creating a Common Asylum Policy within the Union and its Associates.

Keywords: EU, Harmonization on Asylum, Common European Asylum Policy, Third Countries, Enlargement

ÖZ

AB GENİŞLEMESİ BAĞLAMINDA İLTİCA UYUMLAŞTIRMA SÜRECİ VE BU SÜRECİN ETKİLERİ

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1980'li yıllardan itibaren birçok faktör, Avrupa'ya sığınma başvurusunda bulunan kişilerin sayısında genel bir artışa neden oldu. Sığınma başvurularındaki bu hızlı artış ve de Soğuk Savaş'ın politize ortamının son bulması ile mültecilere yönelik ideolojik kazançların nihai hale gelmesi, Avrupa ülkelerini, özellikle 'Tek Avrupa Senedi'nin onaylanmasının ardından, göç ve iltica politikalarına daha sistematik bir şekilde yeniden yaklaşmaya itti. Göç ve iltica konularındaki yetkilerin Topluluk düzeyine aktarılmasını takiben, doğrudan devlet egemenliği ile ilgili olan bir konuya yönelik farklı ulusal uygulamaların uyumlaştırılması Üye Ülkeler için de sorunsuz bir görev olarak kabul edilmese de, tartışmalar hızlı bir şekilde Birlik çerçevesi içerisinde gerçekleşmeye başladı. Diğer taraftan, bu tartışmalı ve devlet-merkezli konuya ilişkin Topluluk mevzuatı çoktan Avrupa Birliği üyeliğine aday olan ülkelere katılım

öncesi stratejinin bir parçası olarak ve de üçüncü ülkelere ikili anlaşmalar vasıtası ile aktarılmaya başlanmıştı bile. Bu tez çalışması, Avrupa iltica müktesebatının üçüncü ülkelere yaygınlaştırılmasına ilişkin endişeler ile Birlik içerisinde ve Aday Ülkelerde ortak bir sığınma politikasının oluşturulmasının avantajları üzerine yoğunlaşacaktır.

Anahtar Kelimeler: AB, İltica Harmonizasyonu (Uyumlaştırması), Ortak Avrupa İltica Politikası, Üçüncü Ülkeler, Genişleme

To a great educationist,

To my dear grandfather Süleyman VARLI…

Büyük eğitimci,

Sevgili dedem Süleyman VARLI'ya…

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I would also like to express my deepest gratitude to the United Nations High Commissioner for Refugees where I interned and then worked as a Senior Protection Clerk under the EU's High Level Working Group's project; and where I received the greatest pragmatic knowledge on refugees. I would like to thank especially to the head of Public Information Department Metin Corabatir and Associate Legal Officer Işıl Tokcan, for the invaluable moral support they provided me all the time.

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CHAPTER I

INTRODUCTION:

A single refugee is a heroic figure, welcome to asylum.
A thousand are a problem. A million are a threat.[1]

A number of factors like the dismantling of communist block and the facilitation of transportation with the removal of the Cold War borders; re-emergence of ethnic and religious wars with the end of the ideological war; and the increase in economic inequalities in the developing world -contrary to the increase in European prosperity- caused an overall enhancement in the number of persons applying for asylum in Europe since 1980s. This rapid increase in asylum applications and the end of the ideological gains towards the refugees with the end of the politicized Cold War environment necessitated European countries to re-focus on their immigration and asylum policies in a more systematic manner. As UN High Commissioner for Refugees Sadako Ogata stated, after the Cold War "the political and strategic value of granting asylum have diminished while the financial costs have rocketed".[2] In addition to the high costs of States' asylum systems (resulting in relatively few positive decisions), the real or perceived abuse of these systems, the increasingly

[1] Wallace, William, 'Seeking refuge in a maze', the Guardian, 29 October 1991
[2] Manners, Ian, 'Negotiation of an Asylum Policy for the EC', in Substance and Symbolism: An Anatomy of Cooperation in the New Europe, 2000, p.94

complex flows of migrants and refugees, and the rise in trafficking in human beings -particularly through regions neighboring the EU territory- have been other factors which prompted Member States into a discussion as to how these challenges could be confronted within a coherent strategy.[3]

On the other side, as political and economic co-operation has developed between the Member States of the EU, the necessity of a common approach to the issues such as immigration, border control and asylum policy has become apparent, as made obvious in the Single European Act of 1986, which identified the free movement of persons as one of the four main elements of the Single Market. The basis for European Union's involvement in asylum policy, derived from this objective as the control of shared external borders is considered a necessary prerequisite for establishing freedom of movement within the Union since the decision of one Member State to accept a third-country national into its territory could easily affect the others in a Single Europe. As Ian Manners, in his article 'Substance and Symbolism: An Anatomy of Cooperation in the New Europe' stated, the continuing breakdown of borders in a physical, political and economic sense was seen as one of the recent security issues in the new Europe and EU came to a point as to develop more systematic immigration and asylum policies to balance its security concerns.[4]

Against this background, EU Member States have sought to strengthen their cooperation on immigration and asylum matters during the last decade. Following the transfer of competencies in asylum and migration to the Community level, discussions were quickly moved within a European framework. Member States have

[3] Van der Klaauw, Johannes, 'Building Partnerships with Countries of Origin and Transit', in Clotilde Marinho (ed.), Asylum, Immigration and Schengen Post-Amsterdam: A First Assessment, 2001, p. 24
[4] Manners, Ian, 'Negotiation of an Asylum Policy for the EC', in Substance and Symbolism: An Anatomy of Cooperation in the New Europe, 2000, p. 82

committed themselves to creating an 'A*rea of Freedom, Security and Justice*'[5] within the Union and initiated a legislative program to develop the principal elements of a common asylum and immigration policy. For the first time in 1992, *the Maastricht Treaty* defined these subjects as matters of common interest to Member States and created some role –although limited- for the institutions of the Union in creating policy and legislation on immigration and asylum matters. The entry into force of the *Amsterdam Treaty* on May 1, 1999 marked a new stage in EU asylum policy under which asylum and immigration have been decided to be transferred from the 'third pillar' - where unanimity of Member States is required in decisions, and the decision-making process is inter-governmental - to the 'first pillar' -where the EU institutions would play a larger role on the field of asylum within five years (in an evaluative clause, which became known as a *'passerelle'* or bridge process).

However, it is not so easy to say that creating a common European asylum system within the Union, which has various standoffs itself, has been deemed as an unproblematic task for the Member States, who fall short of having consistent immigration policies and policy coordination. As Graham Watson states:

> The biggest obstacle to progress is the continued existence of third pillar. The system is needlessly complicated. In some areas, there is dual legislation, some in the third pillar and some in the first. In many areas, Member States seek to progress by Convention rather than Directives. Some countries are in Schengen and some are not.[6]

Despite the many similarities in both the immigration related challenges confronting the EU Member States and their political strategies for addressing them, astonishing differences remain. These dividing forces are the results of different national

[5] The areas of European integration that are addressed under this heading include those relating to asylum and immigration, cross-border criminal issues, drugs and terrorism, and judicial and police cooperation and as matters of Justice and Home Affairs in the European Commission.

[6] Watson, Graham, 'EU Asylum and Immigration Policies: The Point of View of the European Parliament', in Clotilde Marinho (ed.), Asylum, Immigration and Schengen Post- Amsterdam: A First Assessment, p.53

histories, varying economic and social structures and distinct political cultures –the kinds of factors that are not easily transcended.[7]

On the other side, although harmonization of divergent national practices about an issue directly related to State sovereignty, is not a 'trouble-free' task for the Member States, and there are still many problems on the way to the development of a common asylum system as mentioned above; the *acquis* regarding this problematic and State-centric issue has already started to be transferred to the Applicant Countries for the EU membership, as part of the pre-accession process. For these Associate States, obligations of membership are one of the preconditions for accession, and even the non-binding *acquis* becomes *de facto* binding for them through its conditional linkage to the future Union membership. Moreover; the neighboring countries to the Union, as the countries of transit and sometimes of origin, are affected from the process of the *communitarization* of the European asylum policies, too, because the Union wants to solve its intensive migration flow problem as containing these refugees at these countries to prevent them from entering to the territories of the EU States.

In the light of the above-mentioned attempts to maintain the objectives set with the Amsterdam Treaty to harmonize and *communitarize* European States' asylum policies, and to transmit EU's *acquis* to the Applicant Countries (faster than Europeans' commitments), this thesis work will try to reflect several problematic issues ongoing on the way to this *communitarization* and its enlargement beyond the Union. It will explicate the external dimension of the EU Policies in the field of asylum and migration; and reflect the wide-ranging concerns as regards the transference of the asylum *acquis* to third countries, especially to the Applicant States, through the pre-accession process. By doing that, both the negative

[7]Angenendt, Steffen (ed.), Asylum and Migration Policies in the European Union, 1999, p. 4

implications of the enlargement of restrictive policies and practices of EU States; and the advantages of creating a 'Common Asylum Policy' (CAP) within the EU and its Associates will be illustrated.

Throughout this thesis work, a variety of methods will be used in explaining different sections of the thesis subject. However the general flow will be provided from a critical reflection, which will objectively reflect both the positive and negative implications as regards the establishment of a European asylum regime and its transference beyond the Union. The general criticisms on the establishment of a Common Asylum Policy in Europe, based on lowest protection standards, will be revealed; and the extension of restrictive policies and practices of the EU States to third countries will be criticized; while on the other side the benefits of establishing a Common Asylum System (which provides a comprehensive protection framework), the enlargement of the basic protection standards beyond Europe and establishment of asylum capacities in the Candidate Countries (CCs) will be appraised.

During the thesis work, although the negative implications regarding the EU State policies and practices on asylum, which have been quite restrictive up to now, and their extension to third countries will be criticized impartially, the main position will be that a Common Asylum System and a single and systematic policy and practice within the Union and in the Associate States, which is fair, humane, effective, comprehensive, in line with legal obligations towards refugees and asylum seekers and based on real cooperation and burden sharing, and on the optimum protection standards, should be welcomed. The EU harmonization process, which has set two key objectives -a common standard of protection and assistance for refugees and asylum seekers, and an improved asylum system- will be beneficial both for the refugees and the Member States; thus, it should be welcomed for more developed and unified protection standards both in EU Member States and third countries.

However EU has a lot to do to realize this aim, like the Candidate Countries, which will have to establish new-fangled protection systems.

The thesis work, after an introduction, will start with presenting a historical overview of refugee protection within Europe, starting from the emergence of the refugee regime during the inter-war period and the signature of 1951 Geneva Convention relating to the Status of Refugees. It will continue with covering the major developments on asylum and migration in Europe, in 70s, 80s and in the aftermath of the collapse of the Berlin Wall. The restrictive measures adopted by the European countries with the rise of asylum applications, mixed migration flows and the abuse of asylum mechanism will be also mentioned.

In the third chapter, the emphasis will be given to the motives for and the milestones towards the formation of a Common European Asylum Policy within Europe. Especially the emergence and the development of a common position in Europe on asylum and migration and the factors behind it will be reviewed. The milestones in the formation of a Common European Asylum Policy and the difficulties of the *communitarization* will be also covered. The chapter, which will be reflected through an interpretative-textual method, will cover the legal instruments like official texts of the EU and the major developments in EU *acquis* on asylum. The outcomes of 80s' and 90s' early intergovernmental cooperation in asylum and immigration issues, like the Schengen and Dublin Conventions or London Resolutions; and of the mid 90s' concrete developments towards a Common Asylum System within the Union, like the Maastricht and Amsterdam Treaties and many others will be also addressed.

The following chapter will focus on the external dimension of this European asylum regime, or in other words, the involvement of third countries -both countries of

origin/transit and Candidate Countries- in the European policies and practices in the fields of asylum and migration. Establishment of partnership with countries of origin and transit in the asylum/migration area and incentives behind this 'partnership association' will be examined within this context. A special emphasis will be given to the Tampere European Council which shifted the focus to the 'partnership with third countries' on asylum and immigration issues. Community mechanisms to affect third countries like the development aid provided to the countries of origin or bi-party Readmission Agreements signed with countries of transit, and especially the enlargement of the a*cquis communautaire* to the Candidate Countries for the aim of membership to the EU and assistance programs for the transference of the *acquis* into the national systems of the Candidate Countries will be also analyzed, in addition to a case study about Turkey.

The fifth or the main chapter of this thesis study will focus on the increasing export value of the asylum *acquis* for the EU and its Associates. This section of the thesis work will be reflected mainly from a critical perspective through which the relevant critics in the literature regarding the issue and many others will be analyzed. This chapter of the work will be reflected from a two-tiered approach, based on the negative implications regarding the establishment of a European refugee regime and its extension beyond Europe; and the advantages of establishing a Common European Asylum Policy and its enlargement to the Candidate States. While doing that, non-arrival, diversion and deterrence policies of the EU States will be studied in detail. The introduction of visa lists, carrier sanctions, liaison officers, international zones, 'safe third-country' and 'manifestly unfounded' concepts, Readmission Agreements, asylum processing centers outside the EU, accelerated/inadmissibility procedures, restrictive interpretation of the 'Refugee' definition, introduction of subsidiary protection mechanisms and other deterrent measures, and their effects on third countries will be analyzed. The general humanitarian concerns regarding the foundation of a common asylum system at the minimum common denominator and

with restrictive measures; and the problematic essence of this cooperation between the Union and third countries, deriving from the legitimacy problem of the EU's failed approach in the development of this Common Asylum System will be addressed. The second part of the chapter will mainly focus on the benefits of the *communitarization* of the European asylum policies and its transference to the outsiders, which will also be reflected in the conclusion chapter of this thesis work.

The last section of the work will be a concluding one, which will be based on a normative approach, making recommendations on how a fair and comprehensive mechanism in Europe on asylum, covering also third countries, should be established. The chapter will try to answer whether the establishment of the Common Asylum Policy will lead to the harmonization of the most restrictive standards or to the creation of a more coherent, coordinated and effective approach about the asylum problem. During this concluding chapter it will be brought forward that a comprehensive and protection-oriented Common Asylum System, which is based on optimum protection standards and on a fair burden sharing idea between the Member States and the third countries is beneficial for both the EU Member and Candidate States, and for the refugees, themselves.

CHAPTER II

HISTORICAL OVERVIEW OF THE REFUGEE PROTECTION WITHIN EUROPE

2.1. The First World War and the Interwar Period: The establishment of a refugee regime, although *ad-hoc* and nation-based, occurs first in Europe...

Refugees and the institution of asylum have been with us since the beginning of mankind. Throughout the human history, people have fled to escape wars, oppression, hunger and natural catastrophes. However, the history of refugee law and of organized international efforts to assist refugee is comparatively short. Only in our time, have refugees become a concern of governments and a problem in the relations between States. Before twentieth century, no legal definition of the refugee concept existed, and entry into States during certain historical periods was totally free. The real change came with World War I, when European States restricted the admission of foreigners for security reasons. Restrictive laws continued to be kept in force after World War I due to the problem of high unemployment. In this framework, it became difficult for refugees to find safe havens and to support themselves. No governmental or international assistance was available, and many depended on

private charity for their survival.[8] As the protection needs of these refugees increased day by day, Europe noticed that private charity and individual assistance were not enough to find solutions for the urgent refugee situation created by the war.[9] The chaotic environment in the aftermath of the First World War, the collapse of the Russian imperial regime in 1917, the disintegration of the Austrian and Ottoman Empires and the ensuing civil war, uprooted millions across Europe and Western Asia. Europe itself was to become the "centre of migrations"[10] with the refugees, produced almost by the rearrangement of European borders, going in all directions and pouring into Western Europe.[11] With an estimated total of 9.5 million in 1926, the refugee crisis of the post- World War I years reached a magnitude unprecedented in European experience.[12] Against this background, it was seen that the scale of the problem required a common humanitarian response and international efforts. The creation of the League of Nations after the war gave birth to the notion of an 'international community' and also to the recognition that the States collectively had the responsibility to provide refugees with protection and to seek solutions to their problems. Between World War I and World War II, political and legal cooperation between European States developed largely, also with respect to refugee law, within the framework of the League of Nations and related bodies.[13]

The first concrete step of the European States towards the refugee problem emerged as the creation of an international agency for refugee aid under the auspices of the League of Nations, the 'High Commissioner for Refugees', in 1921 which was led by Fridtjof Nansen, the creator of Nansen passports for refugees. This step indicated that the refugee problem for the first time had become an international political issue of

[8] Ruthström–Ruin, C., Beyond Europe: The Globalization of Refugee Aid, 1993, p.15
[9] ibid.
[10] Kushner, T. and Knox, K., Refugees in An Age of Genocide: Global, National and Local Perspectives during the Twentieth Century, 2001, p. 9
[11] Smyser, W.R., Refugees: Extended Exile, 1987, p. 5
[12] Zolberg, Aristide R.; Suhrke, A.; Aguayo, S., Escape from Violence: Conflict and the Refugee Crisis in the Developing World, 1989, p.18-20
[13] European Consultation on Refugees and Exiles, Asylum in Europe: An Introduction, 1993, p.55

governmental concern. The creation of the agency was intended as a temporary/ *ad-hoc* measure which was going to be dissolved as soon as the specific refugees had been resettled or had returned to their home countries.[14] The League established no generalized definition of the 'refugee' concept; instead certain listed national groups, for instance Russians, Armenians, and Assyrians were declared eligible for assistance. When Nansen's Commission expired in 1929, it was followed by the creation of the International Nansen Office for Refugees, established with the specification that it, too, was temporary and was to cease its functions no later than December 31, 1938. The Nansen Office could not finish its work by 1938 as expected and the work of the Office of the High Commissioner for Refugees under League of Nations continued into the 1930s. With the disruption caused by the global depression and the advent of the Fascist regimes, persons began fleeing in large numbers from Germany and Italy during the early 1930s. Refugees from the Spanish Civil War, Jewish refugees from Nazi persecution in Germany and Austrians fleeing from the Anschluss were all brought within Office's mandate. When refugee flow began from the Nazi-Germany in 1930s, a similar technique was used and the Assembly of the League decided in October 1933 to point another 'High Commissioner for refugees coming out of Germany'. The activities of the Office only terminated with those of the League of Nations when the League collapsed in 1938.

As another significant step, by October 1933, the first convention on refugees was adopted to cope with new refugee groups created by the deepening European refugee crisis. For the first time, an agreement guaranteed an international status for refugees. It granted them 'enjoyment of civil rights' and many other specific benefits. Although the agreement was ratified by only eight States and therefore had very limited application, it proved to be a vital step towards "giving refugees a defined

[14] Ruthström–Ruin, C., Beyond Europe: The Globalization of Refugee Aid, 1993, p.16

and accepted identity under international law".[15] Furthermore, after the 1938 Evian Conference, which resulted in a failure, the Intergovernmental Committee on Refugees which was headed from 1939 onward by the High Commissioner himself was established. Although all these mentioned "steps were still tentative, they were towards the formation of more permanent international institutions for dealing with refugees".[16]

The approach during the interwar era emerged as granting collective refugee status to groups of people on the basis of their national origin, rather than to recognize refugees individually on the basis of their personal motives for flight.[17] The League approached refugee problems on a group basis -identifying nationalities that could be at risk if returned to their country of origin. During the period after the First World War until the following war, international cooperation was undertaken as an *ad-hoc*, short-term response to the postwar environment.[18] This whole rudimentary and *ad-hoc* structure of international refugee legislation was swept away by the outbreak of the war in 1939. However, although the interwar period was characterized by uncertainty, confusion and hesitation about refugees and their needs and rights, that period brought significant steps in the process towards acceptance and protection of refugees, too: During this period the increasing understanding that refugees' status was legitimate, created by events beyond their control, started to spread. Moreover; there was an increasing understanding that there should be no forced repatriation to an area where the refugee would suffer persecution; that most urgent physical needs of new arrivals should be met, and a common or at least coordinated policy is essential to for the concerns about refugees.[19] We can say that the period, which

[15] Smyser, W.R., Refugees: Extended Exile, 1987, p. 6-7

[16] Zolberg, Aristide R.; Suhrke, A.; Aguayo, S., Escape from Violence: Conflict and the Refugee Crisis in the Developing World, 1989, p.18-20

[17] Ruthström–Ruin, C., Beyond Europe: The Globalization of Refugee Aid, 1993, p.16

[18] Copeland, Emily Ann, The Creation and Evolution of the Refugee and Economic Migration Regimes: Testing Alternative Frameworks, 1997, p.23

[19] Smyser, W.R., Refugees: Extended Exile, 1987, p.7

started in the aftermath of the First World War and continued until the following World War, is significant since it pawed way to a more universal protection regime under the pressure of subsequent events.

2.2. Second World War and Its Aftermath: '*Ad-hoc* and nation-based' interwar refugee regime is swept away with a more systematized approach and refugees coming from Europe are welcomed by Western Europe against the Soviet Union's policies…

As Symser mentioned in his book 'Refugees: Extended Exile', the flows of refugees after World War I and between the wars were as nothing compared to the enormous flood of people sweeping across Europe after World War II. During the war itself, an estimated 27 million persons were displaced.[20] At the end of the war, Europe faced a considerable humanitarian challenge. While the continent struggled to rebuild its devastated infrastructure and economy caused by two World Wars, over 40 million displaced people needed to be repatriated or resettled. In addition, in 1956, some 200,000 people fled following the Soviet crush of the Hungarian uprising, and in 1968 a smaller number left Czechoslovakia after the Soviet suppression of the 'Prague spring'.[21]

Against this background, new measures were undertaken on the international level to deal with the new refugee flows which were of overwhelming proportions. Refugees were a priority item on the agenda of the newly formed United Nations. The eighth General Assembly Resolution recognized that problems of refugees are an international concern that requires a collective approach. The Resolution identified the need for a new international body to deal with refugee problems. In November 1943, even before the establishment of UN, an agency under allied military

[20] ibid., p.8

[21] UNHCR, The State of the World's Refugees, Fifty Years of Humanitarian Action, 2000, p.26-29

command, United Nations Relief and Rehabilitation Agency (UNRRA) took charge of people in areas under allied control that had been displaced within Europe as a result of the war. The UNRRA was not specifically a refugee organization, but rather had a broad mandate to assist with reconstruction in war devastated areas. UNRRA did not establish any definition of the 'refugee' concept, and its eligibility policy was quite chaotic. However the development of the refugee definition was taken one step further during World War II by another organization, the Intergovernmental Committee on Refugees (IGCR), which had been established in 1938 in order to deal with refugees from Germany and Austria. In 1943, it was decided that:

> All persons, wherever they may be, who, as a result of events in Europe, have had to leave or may have to leave their countries of residence because of the danger to their lives or liberties on account of their race, religion or political beliefs from now on were eligible under the organization's mandate.[22]

This definition created a more general definition for the term 'refugee' and it became a precedent for the following international protection of and assistance to refugees. However, UNRRA and IGCR were to be dissolved in 1947 and many people were left in camps in Europe, still in need of international relief. Moreover, new refugees were beginning to arrive in Western Europe from Communist-dominated countries. In order to deal with this situation, at the end of 1946, a new organization was created within the UN framework: the International Refugee Organization (IRO). However during this period, the international efforts to solve the refugee problem had become affected by the East-West conflict. As a repercussion of it, Soviet bloc countries did not join the IRO and the Organization thereby became totally dominated by the Western powers. IRO continued the development away from the previously dominating group determinations of refugee status, like IGCR did. In other words, IRO was a major institutional innovation, "shifting away from the collective approach that had marked previous international efforts towards a more

[22] Ruthström–Ruin, C., Beyond Europe: The Globalization of Refugee Aid, 1993, p.16

individual one that was inherently more appropriate to a universalistic orientation".[23] And by focusing on general causes of flight, it also continued the movement away from the earlier *ad-hoc* eligibility criteria based on national origin. Nevertheless, despite the ambition to create a more general definition, IRO exclusively focused on Europe, and only cared for a minority of the world's estimated fifteen million unsettled refugees in the late 1940s.[24] During this period, Eastern European refugees from communist regimes were welcomed in Western Europe in keeping with anti-communist foreign policy and security concerns.[25] Despite the optimistic predictions and the hard work of the IRO, hundreds of thousands of refugees remained in Europe when IRO's operations were closed down in 1951. It was in this situation the United Nations Office of the High Commissioner for Refugees (UNHCR) began its work in December 1949 as the successor to the IRO. UNHCR was mainly designed to provide legal protection to refugees still remaining in camps in Europe as a result of the World War II, and to refugees who had fled after the war from Communist-dominated countries in Eastern Europe. The Office's Statute was finally adopted in December 1950 and it was decided that UNHCR, as an independent agency under the authority of the General Assembly, was a temporary organization with a three-year mandate period. Its 'refugee' definition, which was a development of the previous IRO definition, was also broader than the one which had been suggested by the USA. The UNHCR's domain was somewhat more comprehensive than the IRO's, extending to all displaced Europeans not repatriated or permanently resettled; however on the other side it remained exclusively concerned with Europe like IRO.[26] And among the tasks of the organization were, contrary to the American proposals, not only legal protection but also promotion of permanent solutions to refugee

[23] Zolberg, Aristide R.; Suhrke, A.; Aguayo, S., Escape from Violence: Conflict and the Refugee Crisis in the Developing World, 1989, p.22-23

[24] ibid., p.17

[25] Kushner, T. and Knox, K., Refugees in An Age of Genocide: Global, National and Local Perspectives during the Twentieth Century, 2001, p. 11

[26] Zolberg, Aristide R.; Suhrke, A.; Aguayo, S., Escape from Violence: Conflict and the Refugee Crisis in the Developing World, 1989, p.23

problems by means of voluntary repatriation or local integration in countries of asylum. UNHCR was also granted the right to take part in other activities than those enumerated in the Statute, if the General Assembly should so decide. The Statute also stipulated that its work must be of non-political, humanitarian and social character.[27] Although the Office was established with a three-year mandate at the beginning, its mandate has been renewed by the U.N. General Assembly each five years since the first three-year mandate expired.

In addition to all these constructive developments, also pressure for a universal definition of a 'refugee' gathered momentum after the Second World War, and as a consequence more precise criteria emerged. This is evident first in the Constitution of the International Refugee Organization (IRO), then in the Statute of the Office of the UNHCR, and finally in the provision of the 1951 Convention relating to the Status of Refugees, which emphasized the *causes of flight*.[28] The 1951 Convention, which was primarily drawn up in response to the mass displacement in Europe at the end of the Second World War, was the critical event in the institutionalization of the post-World War II regime. The total number of Europeans displaced during the six years of the War, 1939 to 1945, was around thirty million. At the same time, additional refugees were being generated by post-liberation conflicts, such as the civil war in Greece between communist partisans and the returning royal government; and clashes among countries of Eastern and Southern Europe.[29] The 1951 Convention was intended to clear up refugee problems after the War. For this reason, it was limited by a date line and only applied to persons fleeing persecution as a result of events occurring before 1951. States were also given the option of limiting its application to events occurring in Europe. While the Convention provided the international legal framework for the protection of these refugees,

[27] Ruthström–Ruin, C., Beyond Europe: The Globalization of Refugee Aid, 1993, p.18-20

[28] Goodwin-Gill, Guy S., The Refugee in International Law, 1996, p.6

[29] Zolberg, Aristide R.; Suhrke, A.; Aguayo, S., Escape from Violence: Conflict and the Refugee Crisis in the Developing World, 1989, p.21

asylum in Europe -and in fact in the West in general- also had an ideological indication. It reflected a broad political commitment to take in refugees from communist countries.[30] On the other hand; the Convention managed to contain the most widely accepted 'refugee' definition even today, despite its ideological tinge. Since 1951, many States in fact have adopted the refugee definition as the criterion for the grant of asylum, and as the sole criterion for the grant of the specific, limited but fundamental protection of '*non-refoulement*'[31] principle.[32] We can say that during the post World War II period, the Statute of UNHCR and the 1951 Convention emerged as the institutionalized elements of a more universalistic regime.

2.3. From 1950s to Late 1970s: The mandate is expanded beyond Europe to the Third World, and with the 1967 Protocol, a regional European refugee regime turns into a global one…

The economic recovery in Europe during the 1950s, after the two world wars and the establishment of border controls in a divided Europe, which culminated in the formation of the Berlin Wall in August 1961, caused a decrease in refugee flows during this period when compared with the post-Second World War environment. From mid-1950s until the following era, since the number of persons seeking asylum in Europe was relatively low, the governments' attitudes towards refugees were generally compassionate and focused on integration and deepening of the rights and

[30] UNHCR, The State of the World's Refugees, Fifty Years of Humanitarian Action, 2000, p. 16-19

[31] '*Non-refoulement'* principle, which has become a norm of customary law, means avoidance of sending a person to the place where (s)he will face persecution. Article 33 of the 1951 Geneva Convention, which prohibits *refoulement*, is the basic safeguard for the protection of refugees. However, as a customary norm it is also binding universally on all States irrespective of their assent to the Geneva Convention. Furthermore, its application was extended to persons who present themselves at the frontier of the receiving country (and hence have not yet entered its territory) with the 1967 Declaration on Territorial Asylum (Art. 3 I), which became widely implemented by Western European States (cited in Weis P., Human Rights and Refugees, 1971).

[32] Goodwin-Gill, Guy S., The Refugee in International Law, 1996, p.191

privileges accorded to refugees, contrary to the 1980's restrictive measures which will be brought up in the following section of this chapter.[33]

Despite these comparatively low numbers in asylum applications during the period, Europe also faced a remarkable number of refugee flows which had a noteworthy effect on the European and international refugee regime. The Cold War environment -until the erection of the 'Iron Curtain'- and the emergence of new States in 1950s as the result of the decolonization process in Third World caused several displaced people during the period. The refugee regime during the Cold War firstly began with the flow of Hungarian refugees in 1956. The Hungarian crisis became the first development which required the expansion of the refugee regime set by the 1951 Convention. The General Assembly asked the High Commissioner to organize an emergency assistance after the crisis which did not take place within the Convention's '1951' dateline. Many countries extended the protection of the 1951 Convention to new refugees after UNHCR's Executive Committee designated the Hungarians as refugees whose plight was related to events occurring before January 1951. In the latter part of the 1950s, UNHCR had to confront a new challenge: refugee situations in the developing world, in which the refugees were in great need but were not considered to fall within UNHCR's statutory mandate because they were not escaping 'the events occurred in Europe'. In 1957, the two examples of this kind presented themselves: One was in Tunisia where the UNHCR assistance was requested for Algerians who had crossed the border into Tunisia due to the war in their homeland; and the other situation of this type was in Hong Kong, where refugees from mainland China were stranded. The dilemma was resolved in 1957 through a General Assembly Resolution which permitted the High Commissioner to use his good offices, as an *ad-hoc* and practical mechanism. This approach was of considerable significance, since it was the first expression of the idea that the

[33] Copeland, Emily Ann, The Creation and Evolution of the Refugee and Economic Migration Regimes: Testing Alternative Frameworks, 1997, p.470

General Assembly could permit UNHCR to take action beyond its statutory mandate through the concept of 'good offices'.[34] Assistance to specific groups was also authorized in the years that followed. In 1959, General Assembly recommended that High Commissioner continue his efforts on behalf of Algerian refugees in Morocco and Tunisia, pending their returns to their homes. Also these attempts included refugees from other continents which began arriving in Europe in large numbers during the 1970s, like the ones fleeing from Latin America as result of the military coups in Chile and Uruguay in 1973, and then in Argentina in 1976. Moreover, in 1975, in a short Resolution, the General Assembly approved continued humanitarian assistance to Indo-Chinese displaced persons, with the same approach.

Before this period, refugees were perceived as primarily a European problem. Organized relief to refugees was an exclusively European phenomenon during the first half of twentieth century; and even the present United Nations system of international refugee protection and assistance, which was shaped in the Cold War context in the early post-war period, was initially focused on Europe. But the system came under mounting pressure as demands for relief to refugees in developing countries increased with the namely massive flows of people escaping wars of national independence or civil wars. That marked the "beginning of a reorientation of the international system of refugee aid towards a global rather than Eurocentric approach".[35] Against this background, the regime became able to adapt itself to new conditions arising from the independence struggles in the former colonies; and as an indication of it, the 1951 Convention was modified in 1967 by the New York Protocol which retained the definition of a refugee, but removed the shortcoming of the 1951 Convention which was the '1951' dateline -time limit- and the optional geographical limitation regarding 'the events occurred in Europe'. The Protocol provided the expansion from a regional to a global refugee regime, through updating

[34] Ruthström–Ruin, C., Beyond Europe: The Globalization of Refugee Aid, 1993, p.223
[35] ibid., p.13

the international legal framework for refugee protection. With Copeland's words "this protocol had the effect of running a regional European refugee regime into a global one".[36] Only a number of States -such as Turkey- that had previously exercised the geographic limitation continued to retain it.

Besides the new legal arrangements like 1967 Protocol, UNHCR's development also showed the pattern of expansion during this period: UNHCR's mandate was prolonged; its activities expanded in a geographical sense from Europe to the developing world; its resources grew larger which permitted UNHCR to get increasingly involved in the organization of material assistance; and the eligibility criteria expanded through the use of good offices concept for UNHCR purposes. Certain refugee crises, such as the Hungarian and Algerian ones, served as "triggers of new steps in this expansion process".[37] On the other side, besides these developments no other significant institutional or legal changes specifically concerning refugees occurred on the global level between 1967 and 1980s. In fact a ten-year effort to draft a convention which would have set forth a 'right to asylum' failed during the UN Conference on Territorial Asylum in 1977.[38]

2.4. 1980s: The sudden increase in the asylum applications are not welcomed this time…

By 1980s, increasing numbers of people from all over the world were fleeing directly to Europe in unexpected movements. Unprompted arrivals of asylum seekers had been rising since the early 1970s, and in the mid-1980s they began to cause serious concern. This increase was related with the number of internal conflicts and serious human rights violations in the developing world. It was also because of the changes

[36] Copeland, Emily Ann, The Creation and Evolution of the Refugee and Economic Migration Regimes: Testing Alternative Frameworks, 1997, p.24
[37] Ruthström–Ruin, C., Beyond Europe: The Globalization of Refugee Aid, 1993, p.24
[38] Copeland, Emily Ann, The Creation and Evolution of the Refugee and Economic Migration Regimes: Testing Alternative Frameworks, 1997, p.24

in immigration policy during the economic depression which followed the sudden increase in oil prices in the 1970s. Moreover, many European countries, which do not need migrant workers anymore, ceased to encourage labor migration. As a result, at least some migrants who are not clearly refugees turned to use the asylum channel for their migration purposes. The continuing escape of Eastern Europeans from communist-dominated countries, improved communications, easier access to transport and growing numbers of people seeking better economic and social opportunities world-wide were other important factors.[39] Regarding the composition of these flows, in the early 1980s a sizable number of Eastern Europeans (from Romania, Poland and Hungary), who fled from Communist-dominated countries, were among the applicants but the increase of non-European applicants was higher and by mid-decade had reversed the ratio completely. In 1985, there were fewer applicants from all of Eastern Europe than from Iran and Sri Lanka alone. The new spontaneous influx from the Middle East, Southwest Asia, and Africa, which increased from 13,000 in 1972 to an estimated 442,350 in 1990[40], was threatening to transform the social composition of Western Europe's refugee population and affecting the process of European unification which gained momentum in the end of 1980s.[41]

This international refugee crisis atmosphere that appeared in the early 1980s was the sign of the 'security versus protection' debate and the restrictive measures that were going to appear in the following decade. The totally unexpected crisis situation in Afghanistan, Indochina and the Horn of Africa, as well as the escalating war in Central America resulted in massive refugee flows into neighboring countries; and as a result, Europe was confronted with flows of 'Third World' nationals arriving uninvited and without papers, and sometimes even clandestinely with the help of

[39] UNHCR, The State of the World's Refugees, Fifty Years of Humanitarian Action, 2000, p. 185-209
[40] Copeland, Emily Ann, The Creation and Evolution of the Refugee and Economic Migration Regimes: Testing Alternative Frameworks, 1997, p. 471
[41] Zolberg, Aristide R.; Suhrke, A.; Aguayo, S., Escape from Violence: Conflict and the Refugee Crisis in the Developing World, 1989, p.200

smugglers. These new, non-European asylum seekers infrequently fitted the Cold War patterns. During this period, Tamil asylum seekers from Sri Lanka were among the first groups to arrive individually in large numbers, and they raised particular problems for European States during the 1980s. They included people fleeing for a variety of reasons, including persecution and the effects of a civil war. Their arrival for the first time created severe debate about States' obligations towards people who travel half-way around the world to seek asylum, when they might have found an alternative shelter closer to their home. Many European governments suspected that the primary incentive of these asylum seekers was economic rather than the *fear of persecution*. Besides these European suspects about the abuse of the asylum mechanism, the case-by-case determination of refugee status required by European asylum procedures, and the need to provide at least minimal social assistance to the asylum seekers increased the administrative and financial burdens for the European States. According to one estimate, the total cost of administering asylum procedures and providing social welfare benefits to refugee claimants in 13 of the major industrialized States rose from around US$ 500 million in 1983 to around US$ 7 billion in 1990. Against this background most European governments started to impose visa requirements on these outsiders –firstly on Sri Lankan nationals.[42]

2.5. 1990s: Flows of refugees enlarge with the torn 'Iron Curtain' and lead to the era of restrictive and deterrent measures against asylum seekers…

During 1990s, increase in the immigration of people to Western Europe has continued. Especially the influx of people from Eastern Europe has grown significantly since the collapse of the Berlin Wall in 1989, when frontier barriers were largely removed. The collapse of the Eastern bloc has led to the ethnic reunion, mostly notably in Germany but also in Greece and Finland, while many ethnic

[42] UNHCR, The State of the World's Refugees, Fifty Years of Humanitarian Action, 2000, p. 275-283

Russians started to return from the former republics of the Soviet Union.[43] In 1990 around 1.3 million people left the former Soviet bloc.[44] The high per-capita income in Western European States and the murky expectations of Eastern Europeans with respect to their countries' domestic-economic situation have motivated them to leave their home for a more prosperous future. In addition, the spreading of the ethnic and religious conflicts after the collapse of the ideological blocks that were uniting nations together, has been another factor that often exiled them. As a result of the increasing pressure that has been caused by increased birth rates, political instability, and adverse economic conditions in these countries and in others out of the European continent, the inflow of migrants, especially into the Southern States of the EU has grown noticeably.[45] Asylum applications continued to increase also with the decreasing demand of the Western governments for cheap labor from other countries, as these people tried to use asylum channel when the immigration policies of Western Europe changed after 1970s. The low transportation costs in recent decades and the flow of information through media that makes available copious information about living standards and employment prospects in different parts of the world are other factors which motivated and facilitated the flows of asylum seekers and immigrants into Western Europe during this period.[46]

The increased asylum applications and migration flows because of the above-mentioned reasons, and especially due to the fall of the Berlin Wall in November 1989, put the international refugee protection system in Western Europe under even more serious pressure than had been the case during the 1980s. Indeed, aggregate asylum applications to Western European countries have increased nearly five-fold

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[43] MacEwen, M., Tackling Racism in Europe: An Examination of Anti-Discrimination Law in Practice, 1995, p. 68

[44] Copeland, Emily Ann, The Creation and Evolution of the Refugee and Economic Migration Regimes: Testing Alternative Frameworks, 1997, p.515-518

[45] Siebert, Horst (ed.), Migration: A Challenge for Europe, 1994, preface

[46] Eichengreen, B., 'Thinking about Migration: Notes on European Migration Pressures at the Dawn of the Next Millennium', in Siebert, Horst (ed.), Migration: A Challenge for Europe, 1994, p. 3

since 1981.[47] During 1990s, there were increasing concerns about uncontrollable floods of these people pouring into Western Europe. The disordered mass departure from Albania to Italy during the 1990s -particularly in 1991 and 1997- and the mass arrival of refugees from the former Yugoslavia in 1992 to Western Europe, made European governments to notice that they were not invulnerable anymore from forced population movements originating in their immediate neighborhood. When asylum applications in Western Europe peaked at nearly 700,000 in 1992, these receiving States understood that they were not prepared for the economic and political costs of such large numbers of people. As a result, the existing absorption capacity and resources were quickly overwhelmed. Against this background, a new defensiveness appeared in the asylum policies of the Western European countries against these flows which exceeded politically and economically tolerable levels.[48] Starting in the 1980s and continuing to the present, governments of industrialized European countries, which are anxious to protect their borders from unwanted immigration, and suspicious of the motivations of many of those seeking asylum, have introduced domestic legislation and practical reforms aimed at accelerating asylum procedures, reducing the costs occurred due to the care and maintenance of asylum seekers, improving border controls, and actually imposing barriers to access like the introduction of the visa requirements, levying sanctions on airline companies which transport 'fraudulent' asylum seekers, stricter applications of the requirements for refugee status, limiting the right of appeal or facilitating asylum seekers' return to countries through which they passed.[49] London Resolutions (that will be examined in the third chapter of this thesis study), which were approved in December 1992 by the ministers of the European Community responsible for immigration, also provided for some of the examples of these restrictive steps. It was also in this context that European governments decided to deal with the large-scale influx of asylum seekers

[47] Copeland, Emily Ann, The Creation and Evolution of the Refugee and Economic Migration Regimes: Testing Alternative Frameworks, 1997, p.515-518
[48] Loescher, Gill, Beyond Charity: International Cooperation and Global Refugee Crisis, 1993; p.166
[49] ibid., p. 543-544

from the former Yugoslavia -which has generated more than 1.3 million internally displaced people- by establishing temporary protection regimes. With this application, the idea of affording protection on the basis of nationality alone returned in the 1990s, when many European countries gave so-called 'temporary protection' to Bosnians.

These restrictive and deterrent measures also made a counter-effect as channels for legal entrance began to close down. As a response, asylum seekers, along with other migrants, turned increasingly to smugglers and traffickers to reach Western Europe with illegal means. Many used false documents or destroyed their papers on their way. This, in turn, underpinned public skepticism about the real motives of asylum seekers. At the same time, certain political parties and some of the media often appeared to be more concerned with playing to racist and xenophobic, anti-immigrant sentiments in an effort to win votes or boost sales. In 1988, when the European Omnibus Survey asked a representative group of 795 EC nationals to rank problems in order of importance, most countries placed migration/immigration in last place. However; in 1991, immigration was the second most frequently cited problem in France after unemployment; and in Germany, by December 1990, asylum seekers/immigrants had risen to the fourth most important issue cited by West Germans and then climbed to the number one position in October 1991 with around 70 percent of those surveyed, citing it.[50] In this context, refugees moving to the wealthier industrialized nations started to be viewed as a threat to economic and political stability and a force to be excluded. Alleged differences in culture and traditions have also made refugees a focus of suspicion and growing hostility, adding to their trivial status and treatment.[51] These events coincided with a critical phase in the ongoing process of European unification -with the removal of internal borders-

[50] Copeland, Emily Ann, The Creation and Evolution of the Refugee and Economic Migration Regimes: Testing Alternative Frameworks, 1997, p.530-531

[51] Kushner, T. and Knox, K., Refugees in an Age of Genocide: Global, National and Local Perspectives during the Twentieth Century, 2001, p. 11

targeted for January 1, 1993.[52] Against this background, and with the increasing abuse of the asylum system by the alleged refugees, recognition rates in all European States started to fall down: Italy's recognition rate (56 percent), which was the highest of the Western European countries in 1989, fell to 4.7 percent in 1991; similarly, the UK's recognition rate went from 31 percent in 1989 to 11 percent in 1991.[53]

During this period, important positive developments also occurred like the fact that Former Soviet Europe which until 1989 had boycotted the UNHCR and the international legal arrangements because of the Cold War atmosphere, have become supporters of the regime, as aligning with the 1951 Convention and its Protocol. Moreover, half a century after the 1951 Convention, Europe, where the institution of asylum was established, started to face some of its greatest challenges; and these continuing criticisms against the restrictive policies of the Western European governments, and the protection need of the genuine refugees ushered in a new international environment where European States came to a position to cooperate much more on an intergovernmental level, with the aim of dealing with the problem of huge asylum and migration flows and of providing a balance between today's 'security versus protection' dilemma.

[52] Copeland, Emily Ann, The Creation and Evolution of the Refugee and Economic Migration Regimes: Testing Alternative Frameworks, 1997, p.510
[53] ibid., p.533

CHAPTER III

CORNERSTONES TOWARDS ESTABLISHING A COMMON EUROPEAN ASYLUM POLICY

The developments towards establishing a Common Asylum Policy in Europe can be examined from a historical perspective in three stages: pre-Maastricht period, Maastricht period and Amsterdam era. This chapter of the thesis work, which will cover also the recent developments like the Constitutional Treaty and Hague Program, will illustrate how the attempts for the Common Asylum Policy have been shaped in time with new developments in Europe.

3.1. Pre Maastricht Period

The pre-Maastricht period (1952-1993) refers to the early stages of European integration and co-operation in the field of 'Justice and Home Affairs'.[54] It is a period where asylum harmonization and Common Asylum Policy development did not enter into the dialogue between the Member States, yet. This era is characterized by the desire to achieve a common market. That is why no direct actions were taken in the

[54] Hereafter will be referred as JHA.

field of asylum until very late in the period (namely until Dublin Convention); and the circumlocutory actions that were taken were only developed outside the framework of the European Community.

The first main development, which led to the alertness on asylum matters in the future, is the foundation of the European Economic Community (EEC) with the ***Rome Treaty*** that addressed for the first time the freedom of movement of persons through its guarantee of the four economic freedoms. Justice and Home Affairs which was considered by Member States at that time as a question of national sovereignty remained outside the EC dialogue and framework since European integration was considered as the development of free market and implementation of the four economic freedoms. However, this is not to say that JHA issues were not of importance to the then 6 Member States. It was felt that the freedom of movement of persons issue would remain limited to certain categories of workers and would not apply to third countries residing in the Member States since internal borders would remain.

This changed on June 28-29, 1985 when the Milan European Council agreed on the ***Commission's White Paper on "Completing the Internal Market"***, which we can call as the second main development of the era. Specific reference was made to the need for a proposal on measures regarding asylum and the status of refugees in the Annex of the White Paper which eventually raised asylum related questions within the context of the freedom of movement of persons within the EEC. The White Paper led to a process, which resulted in the drafting and ratification of the ***Single European Act.*** The purpose of the Single European Act (Article 8A) was the elimination of the remaining barriers to the single market within the deadline of 31 December 1992. Since asylum applications in the EC Member States increased during the pre-Maastricht period, the Member States got concerned regarding their abilities to handle such an influx 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 affect the movement of asylum seekers within the Community.

During this era, asylum matters did not fall within the competencies of the Community institutions. Therefore institutional co-operation may be characterized as *ad-hoc* and taking place outside the formalized procedures provided for in the Treaty Establishing the European Communities (TEEC). In other words "the cooperation …was outside of the formal Community framework and without the involvement of its supranational organs".[55] One of these *ad-hoc* attempts outside of the EC framework was the creation of the ***TREVI Groups,*** which was associated with today's Justice and Home Affairs issues. In 1986, the British Government initiated a further step regarding JHA co-operation through the establishment of the *ad-hoc* group on immigration. An ***"ad-hoc group on asylum"*** was also created, composed of six sub-groups which met regarding admission, expulsion, visas, false documents, asylum, and external borders.

During this period, the role of the European Parliament and Commission, with few exceptions, was limited to one of active observer, being unable to influence policy development through the adoption of legislation. However it was the Commission, which instigated much of the *ad-hoc* cooperation by the various Member States regarding JHA issues. This period was marked by intergovernmental discussions on Member States' asylum policies and practices and the search for a coherent approach to problems such as the growing number of unfounded or repetitive claims for asylum.

As another important development of the era the ***Schengen Accord (1985) and the Implementing Agreement (1990)*** on the removal of common borders were signed by

[55] Lavenex, S., Europeanization of Refugee Policies: Between Human Rights and Internal Security, 2001, p. 85

selected Member States acting outside of the EC framework, as a result of the Single European Act. A working group was established to study the implications of the abolition of frontier controls at the internal borders with special regard for effects on the free movement of persons, on establishing external border controls, a common visa policy, an information system, police cooperation and on asylum policies as regards the determination of responsibility. 'Schengen *acquis'* today consists of the original Schengen Agreement of 14 June 1985, Schengen Implementing Act of 19 June 1990, Accession Protocols as well as Decisions and Declarations taken by the Schengen Committee, which were incorporated later by TEU Amsterdam into the Community framework (TEU Article VI and TEC Article IV). Opt-ins into the Schengen *Acquis* is also offered by TEU Amsterdam for those States who were not signatories to the Schengen Accord and related instruments, namely Denmark, Ireland and the UK.

While the discussions for Schengen continued, the Ministers responsible for migration came together on 28 April 1987 in Brussels and agreed upon certain measures regarding the responsibility of carriers transporting refugees, on the basis of the findings of the *ad-hoc* group on immigration. This included the actions to curb the activities of operators organizing trafficking in refugees and for coordinating the processing of asylum requests. In Copenhagen, on 9 December 1987, the Ministers of Interior made a first step toward an agreement on rules for determining State responsibility for examining an asylum request. Progress continued and in June 1989, at the Madrid European Council, it was stressed, based upon the discussions surrounding the 1985 White Paper and internal market expectations outlined in the 1987 Single European Act, that the laying down of rules determining the State competent to examine an asylum request was an essential measure to complete the internal market. In Strasbourg, on 8 and 9 December 1989, the European Council met, *inter alias*, to discuss the framework for tackling asylum shopping and the problems regarding asylum in orbit. On the basis of the ***Palma Document***, which

was adopted in 1989 Madrid European Council Meeting, a conclusion was adopted, which laid the foundation of the Convention determining the State responsible for examining an asylum application, in other words the Dublin Convention.

The ***Dublin Convention (15 July 1990)*** was a major step in the long-term political dialogue that marked the pre-Maastricht period in Justice and Home Affairs matters. It was an international convention concluded between the 12 Member States belonging to the EC at the time of its ratification in 1990. It came into effect on 1 September 1997 for all EC Member States except for Austria and Sweden (1 October 1997) and for Finland (1 January 1998). The Dublin provisions have replaced the asylum chapter of the 1985 Schengen Agreement. Since the EC Treaty did not provide a legal basis for its adoption, it was signed outside of the EC framework. However later, the Amsterdam Treaty; Article 63/ 1.A provided for the incorporation of the Schengen *acquis* including the content of the Dublin Convention into Community policy. All new Member States therefore have to ratify this Convention as part of the *acquis communautaire.* The Dublin Convention's aim, as its name suggests, was to set up a common criteria to determine the Member State, which is responsible for examining an asylum request. It was signed to ensure that asylum requests will be examined by at least one of the Member States; thereby avoiding situations of asylum seekers in 'orbit'. The Commission on 13 June 2001 has issued a working paper evaluating the Dublin Convention (SEC 2001 756) as well as on 26 July 2001 a proposal for a corresponding Regulation (COM 2001 447) that is called ***Dublin II.*** [56]

Following the successful discussions which led to the Dublin Convention, the European Council met on 10-11 December, in Brussels to discuss plans and establish a program of action. A proposal was drafted by the Dutch presidency, which

[56] Marinho,C. (ed.), The Dublin Convention on Asylum: Its Essence, Implementation and Prospects, 2000, p.7-29

provided the framework for the harmonization calendar. The result of these discussions was the ***1991 Work Program on Asylum and Immigration Policies*** (also known as the WGI 930 'Maastricht Program' or Plan of Action), which was to be carried out before the end of 1993. The WGI 930 Work Program set out the asylum agenda for the years to come. It focused on topics like measures relating to the application of the Dublin Convention, harmonization of substantive asylum law, harmonization of expulsion policy, asylum procedures and return policies, conditions for receiving asylum applicants, admission policies, cooperation on border controls, removal of the causes of migratory movements, support for the accommodation of refugees in their countries of origin…etc. It is clear how effective the WGI 930 Work Program was in influencing asylum policy development during the pre-Maastricht period. Legislation and policy development during the pre-Maastricht and Maastricht periods used the elements and calendar set out by this program. The Program also called for the establishment of the clearing houses which later, in Lisbon in June 1992, led to the establishment of the Center for Information, Reflection and Exchange on Asylum ***(CIREA),*** a clearing house for information on third countries. The inter-State consultation within CIREA was seen as a method to help to the facilitation of coordination and harmonization of asylum issues and policies between Member States. The ministers at the 1992 Lisbon Meeting also adopted the guidelines for implementation of the Dublin Convention. They established the Center for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration ***(CIREFI)*** in line with Article 14 of the Dublin Convention. CIREA and CIREFI are one of the goals of the 1991 Work Program that were achieved. Maastricht formally absorbed both centers into its framework.

A further product of intergovernmental cooperation outside the EC framework during the era was the ***London Resolutions of 1992*** containing guidelines for handling manifestly unfounded claims and applications from applicants who passed through a safe third-country or who are from a safe country of origin. These

Resolutions were concluded by the Ministers responsible for immigration in response to a marked increase in asylum applications within Europe. They are not binding; but they did represent an attempt through intergovernmental co-operation, to adhere to the WGI Action Plan, which mentioned explicitly the need for the development of admission criteria.

Besides all these developments, on 12 March 1987 the European Parliament passed a comprehensive Resolution on asylum. The purpose of the Resolution was to influence the Commission regarding the drafting of a proposal for a future Directive relating to asylum on the competition of the internal market. A proposal for a Council Directive to approximate national rules on the grant of asylum and refugee status was made, but the Directive was never adopted. Due to the fact that asylum issues were not under the competence of the EEC at that time, the legislative action by the EP was not possible.

During this era, asylum policy development was by in large directed by the WGI-930 Work Program. Although most of the discussions took place among Member States' ministers in an intergovernmental level, actions by the Commission and the Parliament should not be completely discounted as both institutions contributed to the content of this plan. Behind the cooperative regulations of the era (Schengen and Dublin Conventions, Palma Document…etc.) lies "a perception of the refugee problem as a zero-sum game in a border free Europe".[57] General cause of the 'problem' leading to cooperation was seen as the abolition of the border controls, and more specifically with regard to refugees, the increase of bogus asylum seekers in the Member States. Progress was slow in the field due in part to Member States' unwillingness to harmonize their asylum and immigration policies and giving up sovereignty in certain related areas. Absence of a clear operational framework and

[57] Lavenex, S., Europeanization of Refugee Policies: Between Human Rights and Internal Security, 2001, p. 99

legal basis, informal nature of cooperation in the asylum field, uncertainty relating to the full realization of the 1985 White Paper and SEA, inexperience of the decision makers involved in the process, lack of knowledge of each other's asylum regimes, varying degrees to which States were willing to adopt common measures were also other factors behind the slow speed of the development in the field. States approached developments in the asylum field with caution and they mostly focused on common measures to protect their borders. The WGI 930 work plan can be seen as a rational document in this regard as it set out to identify those areas where cooperation would be needed to prepare Member States for free movement of persons.

3.2. Maastricht Period

The entry into force of the Treaty of Maastricht in November 1993 created the 'EU' and introduced a ***three-pillar structure***[58] which operates under a single institutional framework. The most important effect of the introduction of the 'third pillar' into the EU structure was the formalization of the links between the intergovernmental actors and the supranational institutions of the EU.[59]

The three existing European Communities (EC, ECSC and Euratom) were brought together under the ***first pillar.*** Under this framework, the Union's institutions have supranational powers, i.e., they can pass in certain cases by majority vote, binding, directly applicable Community law that has primacy over national law in the form of Directives, Regulations, Decisions and also adopt non-binding instruments, such as Recommendations and Opinions. The European Commission has the exclusive right

[58] Guild, E. and Niessen, J., Developing Immigration and Asylum Policies of the European Union: Adopted Conventions, Resolutions, Recommendations, Decisions and Conclusions, 1996, p. 47-53
[59] Lavenex, S., Europeanization of Refugee Policies: Between Human Rights and Internal Security, 2001, p. 108

of initiative, while the EU Council, alone or jointly with the European Parliament, adopts legislation.

The ***second pillar*** concern intergovernmental cooperation in the fields of Common Foreign and Security Policy, which foresees formalized intergovernmental co-operation in these areas. It means the Member States, acting unanimously within the framework of the Council, could adopt Joint Actions and Common Positions which are binding on the Member States, however which have no effect on EU citizens (or in other words which are not supranational). In this framework, the Court of Justice has no jurisdiction and the powers of the European Commission and Parliament are limited just to the right to be informed.

The pillar which is most related with this thesis work is the ***third pillar*** which covers Justice and Home Affairs issues like asylum and immigration policies, customs cooperation, judicial cooperation in civil and criminal matters, police cooperation/combating terrorism etc. The Member States placed asylum, along with other Justice and Home Affairs issues in a new title: Title VI, Article K, entitled 'Provisions on Co-operation in the Field of Justice and Home Affairs'. Title VI, Article K.1 states that for the purposes of achieving the objectives of the Union…Member States shall consider the areas like "asylum policy, rules governing the crossing of external borders by persons, immigration policy including policies related to nationals of third countries in the following areas like entry and movement, family reunion, access to employment…" as matters of *'common interest'*. While this did not provide for supranational decision-making, it allowed for *'formalized intergovernmental co-operation'* within the framework of the Community institutions. It means that the Member States, acting unanimously within the framework of the Council (specifically JHA Council), are initiating and adopting the legislation (Joint Positions and actions as well as Conventions) which are binding on the Member States, however which have no effect on EU citizens (or in other words

which are not supranational). In this framework, again the Court of Justice has no jurisdiction over legislation adopted under Title VI, unless otherwise is explicitly specified in an instrument. The powers of the European Commission and Parliament are limited like in the second pillar. However the Commission may initiate the legislation through JHA Task Force, a unit in the Commission's Secretariat (as it did with its proposals for Joint Actions on temporary protection in 1997 and on burden sharing in 1998) and it can influence policy through the issuance of Communications; and the Parliament, besides having a right to be informed and consulted on issues related to Title VI, can also issue Resolutions and Reports (like the 1994 Lambrias Report on common refugee policy, 1995 Report on immigration and asylum policies, 1997 report on temporary protection …etc.) to stimulate discussion or provide guidance. However besides all these powers, the Commission and Parliament played a back-seat role regarding formal asylum policy development during the Maastricht period. Asylum issues to a large extent remained in the domain of the Member States acting through the JHA Council and K.4 Committee which was established as a political coordinating committee consisting of senior officials from the Member States to support the JHA Council.

During this era, an influential Communication on Immigration and Asylum Policies, the ***Flynn Paper***, was released on 23 February 1994. The European Commission, in response to the harmonization process, to the future enlargement of the EU as well as the rising number of asylum seekers and other immigrants, issued the Flynn Paper which outlined the current status of harmonization with regard to the WGI 930 Work Program as well as a plan of action which aimed to guide future development. Flynn Paper was drafted to influence the Intergovernmental Conference that was making preparations for a review of Maastricht Treaty. It is notable for its main theme of common policy development in the fields of asylum and migration among the Member States.

Besides these developments, during this era the Member States worked towards the creation of a fingerprint identification system (EURODAC) for asylum seekers within the Member States. The purpose was to facilitate the determination of the Member State responsible for handling the application and thereby enhance the application of the Dublin Convention. A draft ***EURODAC Convention*** was agreed upon by the Council during the Austrian presidency during the 2nd half of 1998. 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. A draft ***EURODAC Protocol*** was submitted under the German Presidency (1st half of 1999), which extended the scope of EURODAC to include other third-country nationals. The Convention and Protocol never entered into force until a Council Regulation on EURODAC was adopted on 11 December 2000 under the Amsterdam era that will be examined later.

Another development during the Maastricht period was the adoption of a Decision in 1997 by the Council to monitor the implementation of asylum instruments, in particular the Dublin Convention. Besides that, a ***Joint Position*** was adopted in 1996 ***regarding the harmonized application of the refugee definition of the 1951 Geneva Convention.*** The Joint Position stressed the importance of the Member States' role in guaranteeing protection for those who are in need in accordance with the Geneva Convention. This could have represented a milestone in the harmonization process as Member States agreed for the first time on the necessity of a single approach to the definition of a refugee as found in the 1951 Convention. However it could not, since the Joint Position lacked binding force.

In the field of procedural harmonization, the JHA Council adopted a ***Resolution on Minimum Guarantees for Asylum Procedures***, in 1995**,** with the persistent pressure from the UNHCR and other humanitarian agencies**.** This Resolution as well as the 1997 Resolution on measures to protect minors in the European Union made

reference to the specific needs of unaccompanied minors during the asylum procedure. The guarantees cover the rights of asylum seekers during the examination, appeal and review procedure of their application.

During this era, in 1997, the Commission submitted a ***Proposal for a Council Act establishing the Convention on rules for the admission of third-country nationals to the Member States***. Moreover, in 1994 and 1995, the JHA Council drafted ***model Readmission Agreements*** to support return efforts of rejected asylum seekers from individual Member States to third countries.

Also common standards for temporary protection and rules for burden sharing in cases of mass influx of refugees tried to be established during the Maastricht era. In 1995, with the recent Bosnian crisis in mind, the Council adopted a ***Resolution on burden sharing*** with regard to the reception and temporary abode of displaced persons and adopted Conclusions on an emergency procedure for burden sharing. Another attempt was made in 1997 by the Commission, which proposed a Joint Action on temporary protection; but the proposal was rejected. The Commission also submitted a draft Joint Action concerning burden sharing in 1998, but Member States were not ready to adopt such legislation at that time.

With the Maastricht Treaty, JHA area was finally recognized by the EU Member States as an issue needed to be handled with closer and much more formalized cooperation. During this era, it was decided that intergovernmental co-operation in refugee issues will not be anymore *ad-hoc*, but it will take place within the framework provided for by the institutional structures of TEU Maastricht. Even the possibility for *communitarization* of asylum policies (that is the adoption of asylum legislation by the Community institutions according to the procedures set out in TEC) was provided for under Title VI, Article K.9 and also written into the Declaration on Asylum, based on the 1991 Work Program (WGI 930 Action Plan).

This provision was known as the *'paserelle clause'*. Yet the application of the provision was thought too cumbersome in addition to being infringement on Member State sovereignty and therefore was never used up to Amsterdam Treaty, which will be examined later.

During this era, EU Member States sought to maintain their sovereignty over JHA issues and limited the role of the Community institutions. Despite the initial phase of strong activism, the pace of cooperation calmed down and Member States showed reluctance towards formalization and harmonization of temporary protection issue and the idea of burden sharing, and mainly towards accepting any possible constraints on their national sovereignty. As a result, European refugee policies so far have developed on the lowest common denominator, blurring the distinction between refugees and illegal immigrants and establishing a system of negative redistribution among Member States and the neighboring Eastern and Southern European States.[60]

As we can see, the formalized intergovernmental cooperation foreseen in the TEU Maastricht provided only for the adoption of non-binding instruments -except the Dublin Convention which was adopted outside the EU framework in the pre-Maastricht era. These non-binding instruments represented more of a collection of Member State practice rather than a concerted attempt to harmonize procedural and substantive asylum policies. It was an obstacle that the status of these instruments was unclear and they sometimes lacked focus. During this era, the European Commission made use of its rights of initiative on several occasions. Nevertheless, the Member States, acting through the JHA Council, dominated the development of legislation. Although some progress was made, the Commission, the Parliament and international organizations were disappointed at the rate of asylum harmonization

[60]ibid., p. 110-111

during the Maastricht era. A binding Common Asylum Policy was not the intention of the EU Member States during this era. The Intergovernmental Conference that began in 1996, came together to review the substantial progress achieved as a result of TEU Maastricht and decided to alter the mechanisms by which asylum policy could be harmonized between Member States.

3.3. Amsterdam Era

Close co-operation between Member State authorities in the context of the Schengen Accord, the Dublin Convention and the formalization of intergovernmental cooperation in the JHA Council and in its organs during the Maastricht era brought forward many of the similarities and inconsistencies between Member States and a greater awareness of the varied approaches to asylum policy. The increasing number of unfounded applications, 'asylum shopping' cases and the problems of illegal trafficking created clear horizontal concerns, affecting each Member State. The rights of asylum seekers, refugees and migrants were perceived as not being met, which created another level of political pressure on Member States' asylum practitioners and ministers. Development in migratory and refugee patterns and internal and external criticism of the asylum harmonization process during the Maastricht era prompted Member States to undertake the necessary substantial changes to their asylum policies and seriously consider common solutions to asylum problems experienced at domestic level. These considerations helped moving from the largely unfocused 'intergovernmental co-operation' approach of the Maastricht era to a systematic and '*communitarized* approach' of the Amsterdam era with the aim of creating a binding EU asylum policy with a value of its own in the framework of an 'Area of Freedom, Security and Justice'.[61]

[61] Hereafter will be referred as AFSJ.

As mentioned before, on 29 March 1996, three years after the entry into force of TEU Maastricht, an Intergovernmental Conference was convened in Turin to assess the strengths and weaknesses of TEU Maastricht. The pace of legislative developments in specific fields (like asylum policy harmonization, the *communitarization* of asylum policy, the powers of the Parliament and Commission, decision-making procedures in the Council) was identified among other issues that needed to be improved. This implied the necessity of amendments to the EU Treaty (Maastricht). On 16 and 17 June 1997, the European Council met in Amsterdam to finalize the above-mentioned Intergovernmental Conference. The result of the Amsterdam European Council was a revised Treaty on European Union, the ***Amsterdam Treaty (TEU Amsterdam*** that was signed on 2 October 1997 and entered into force on 1 May 1999.

Among other goals, TEU Amsterdam aimed to accelerate the EU asylum harmonization process and give a new dimension to the harmonization attempts that started for the first time under the Maastricht era. To this effect, JHA policy that was regulated by the Maastricht Treaty was realigned. The majority of the provisions related to JHA (asylum, immigration, external borders control and judicial co-operation in civil matters) in TEU Maastricht in Title VI, Article K, were regulated in Title IV of TEU Amsterdam. TEU Amsterdam in many ways represents a radical departure in the field of asylum. With the transfer of asylum and immigration matters to the Community's first pillar, the Amsterdam Treaty symbolizes the departure from earlier intergovernmental cooperation and assigns greater powers to supranational institutions of the Union in these fields.[62] Previous co-operation between the Member States during the Maastricht era focused primarily on the creation of non-binding guidelines and minimum standards. The new Title IV of TEU on "visas, asylum, immigration and other policies related to the free movement of persons" called for

[62] Lavenex, S., Europeanization of Refugee Policies: Between Human Rights and Internal Security, 2001, p. 4

the elaboration of several elements of the Area of Freedom, Security and Justice including a common asylum and migration policy, which will be binding on the Member States and will be adopted by the Candidate Countries during the pre-accession process. Article 63 under Title IV of TEU, set out the ***'eight building blocks of asylum policy development'*** which can be listed as the criteria and mechanisms for determining which Member State is responsible for considering an asylum application (Art. 63. 1a), minimum standards on the reception of asylum seekers in Member States (Art. 63. 1b), minimum standards with respect to the qualification of nationals of third countries as refugees (Art. 63.1c), minimum standards on procedures in Member States for granting or withdrawing refugee status (Art. 63.1d), minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin (Art. 63.2a), minimum standards for persons who otherwise need international protection (Art. 63.2a), promoting balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons (Art. 63.2b), conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those of family re-union (Art. 63.3a), and the measures within the area of illegal immigration and illegal residence, including repatriation of illegal residents. The 'eight building blocks' approach sought to fill the *acquis* on asylum with the missing substantial, institutional and procedural elements. Once adopted as Regulations, Directives or Decisions by the JHA Council, these building blocks, which form the basis of the legislative developments under the Amsterdam era, started to replace the existing body of non-binding instruments of the Maastricht period. They were also reinforced in 1998 in the Vienna Action Plan, in 1999 by the European Summit in Tampere and in 2000 by the AFSJ Scoreboard, which will be examined later.

In an effort to eliminate the democratic deficit that was created in the field of asylum policy development, Amsterdam aligned asylum and migration legislation and policy

development more closely with the Community approach. Nevertheless, although asylum matters started to be a part of the 'Community law', special rules began to apply to the decision-making procedures and judicial control due to the gradual transformation of the intergovernmental cooperation into a Community area (which is called *'paserelle clause'*). According to the Article 67 of TEU Amsterdam, during the transition period, for a period of five years (1999-2004), the Member States will have the right to initiate legislation with the Commission. Draft Regulations, Directives and Decisions will be submitted to the JHA Council for unanimous decision-making rather than qualified majority voting. The European Parliament's rights will be limited to only being consulted on Proposals. The European Court of Justice will have generally 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 validity to the European Court of Justice during pending procedures; or one of the Member States, the European Commission or the Council request such a ruling. The Court then will be able to issue a preliminary ruling. Following this period, the 'Community approach' should be adopted by the JHA Council by acting unanimously. This means an exclusive right of initiative of the European Commission. The European Parliament and the Council will decide together in the framework of the co-decision procedure on the adoption of an instrument. The Council will decide not by unanimity but by qualified majority. The European Court of Justice will have jurisdiction over asylum matters after these five years.

TEU Amsterdam also introduced a ***Protocol on Asylum concerning nationals of Member States of the EU with regard to their recognition as refugees***. Owing to the stated 'level of protection of fundamental rights and freedoms', it *de facto* designated the EU as a safe, non-refugee producing region. This has been argued by some, including UNHCR, to be in violation of the spirit of the 1951 Refugee Convention. Belgium issued a Declaration annexed to TEU Amsterdam interpreting this Protocol;

and stated that it will continue carrying out its own individual examinations of asylum requests made by nationals of other EU Member States.

In spite of all these developments, while TEU Amsterdam did provide the objectives to be achieved, it did not provide corresponding priorities and time limits. On 4 December 1998, at its Summit in Vienna, the JHA Council adopted an ambitious document under the Austrian Presidency to develop and implement the eight AFSJ building blocks including those related to the creation of a Common Asylum Policy: the ***"Vienna Action Plan"***. The Vienna Action Plan, officially titled 'Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam establishing an Area of Freedom, Security and Justice' provided further political direction and a timeframe for the adoption of the measures provided in the TEU Amsterdam, Title IV. It set out the deadlines to adopt specific binding instruments on asylum under the headings 'common measures to be adopted as Directives within two years' (until 1 May 2001), 'common measures to be adopted as soon as possible', and 'common measures to be adopted as binding Directives within five years' (until 1 May 2004). The Vienna Action Plan is a joint document of the Council and the Commission which marks the first time that the Member States and the Commission jointly agreed upon a timeframe for implementation and a set of priorities that would require an intense and high level of cooperation on a number of political and working levels.

In keeping with the time frame suggested by the Vienna Action Plan, in March 1999 the Commission unveiled its ***Working Document on Common Asylum Procedures (CWD-Asylum)*** under the German Presidency. The CWD-Asylum relates to the procedural element of the asylum agenda and is a prelude to a future legislative instrument. The CWD-Asylum was hailed as the first comprehensive review by an EU institution of the needs and difficulties of reaching a Common Asylum Policy. The CWD-Asylum also outlined the necessary pre-procedural and eligibility

procedure elements of a common asylum system. It made reference to an EU asylum system fully in line with the spirit of the 1951 Convention and consultation with UNHCR.

Another milestone in the asylum harmonization process during the Amsterdam era was reached during the Finnish Presidency at the ***Tampere Summit.*** In Tampere, on 15th and 16th of October 1999, the European Council held a special meeting to discuss the possibilities and ramifications of the AFSJ including the building of a future common asylum and immigration policy. In the area of asylum and migration, four pillars were identified which are partnership with countries of origin, a common European asylum system, fair treatment of third-country nationals and 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 going beyond minimum levels of harmonization and aiming at a common asylum procedure and a uniform refugee status valid throughout the Union. Regarding a common European asylum system, the Tampere Conclusions showed a protection-oriented tendency and emphasized the full and inclusive application of the 1951 Refugee Convention, the absolute respect of the right to seek asylum as well as the need to guarantee access to territory and to the asylum procedure. Regarding migration, the Summit called for a vigorous integration policy aiming at guaranteeing rights and obligations for legally resident third-country nationals. The Council also called for a comprehensive approach to migration, addressing human rights and development issues in countries of origin and transit, based on strengthened partnerships. Furthermore the Summit situated the development of the common asylum and migration policy within the broader framework of the management of migration, based on capacity to combat and prevent irregular migration, integrated border management and the development of readmission and return policy. Finally the Tampere Summit called on the Commission to develop an

implementation tool that would review the progress in implementing the political and legislative agenda towards the realization of the AFSJ set out in TEU Amsterdam and the Vienna Action Plan. This so-called ***Scoreboard*** was introduced by the Commission for the first time in March 2000 and since then, has been updated bi-annually.

As a result of the above-mentioned developments (Vienna Action Plan, Tampere Conclusions…etc.) which provided political direction and a timeframe for the adoption of the specific binding instruments on asylum, Member States agreed on several issues regarding the 'eight building blocks' of the Amsterdam era; and as a result of this momentum, various Community legislation on asylum started to be adopted. In November 2000, the Commission issued a ***Communication 'towards a common asylum procedure and uniform status' valid throughout the Union***. This document is very significant since it presents a strategic and forward-looking approach to the future common asylum system beyond the minimum standards prescribed by the Amsterdam Treaty. The Commission proposed, *inter alias*, the establishment of a single procedure in each of the Member States to determine all protection needs. It also suggested a more effective burden sharing and a common resettlement scheme, on the basis of the enhanced cooperation with countries of origin and first asylum. However, up until April/May 2004 progress had been slow. Despite political declarations relating to the pressing need for 'solidarity' and 'responsibility sharing', theory was very slowly translated into practice as EU Presidencies failed to engineer the necessary consensus required to build a common policy. The Amsterdam Treaty was providing for all measures introduced in this area to be adopted within five years of the entry into force of the Treaty i.e. by 1 May 2004. This was an ambitious target, one that was barely met. During these five years, *Council Decision 2000/596/EC of 28 September 2000 establishing a European Refugee Fund; Council Regulation 2725/2000 of 11 December 2000 concerning the establishment of EURODAC; Council Regulation 343/2003/EC of 18 February 2003*

establishing the criteria and mechanisms for determining which Member State is responsible for examining an asylum application lodged in one of the Member States by a third-country national (Dublin II); Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof; Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers; Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification; Council Directive 2004/83/EC on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection which was adopted by the Justice and Home Affairs Council on 29 April 2004*; Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term resident; Council Regulation 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals* and some other measures within the area of illegal immigration and illegal residence were adopted before the time limit: 1 May 2004. However the Proposal for the *Council Directive on minimum standards on procedures in Member States for granting and withdrawing of refugee status* could not meet this deadline although Member States had come to a political agreement on most of the proposed legislation. Proposals for *Council Directive on the conditions of entry and residence of third-country nationals; and Directive relating to the conditions in which third-country national shall have the freedom to travel in the territory of the Member States* have been other proposals that could not be adopted during this timeframe. However, these improvements, although not fully successful, managed to fill in the *acquis* on asylum with the missing substantial, institutional and procedural elements.[63]

[63] For further information please see http://europa.eu.int/scadplus for Community instruments that were adopted in the fields of asylum and immigration.

Another development of the era was the ***revision of the Nice Treaty***. Amsterdam Treaty did not address certain institutional gaps, which however needed to be tackled in the view of EU enlargement. These concerned mainly the composition of the Commission, the decision-making process in the Council and the powers of the EP. Therefore it was decided to organize a new Intergovernmental Conference which should review these 'leftovers' and come forward with conclusions by December 2000. This was realized at the Nice European Council where another Treaty revision was approved touching on a limited number of institutional reform matters. Regarding asylum, Nice modified relevant provisions of the Amsterdam Treaty by introducing qualified majority voting in the Council and the co-decision procedure of the Council with the EP.

Also 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. The Charter, which makes the fundamental rights of the EU citizens and third-country nationals visible, had been drafted for the first time after a decision by Cologne European Council in June 1999. While Chapter II, Article 18 of the Charter guarantees the absolute right to asylum; 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". The Charter is legally non-binding, yet it presents a solid basis for action by the Council and the Commission and for interpretation by the European Court of Justice. Ever since its proclamation, proposals have been made for its incorporation into the EU Treaty. The Convention on the Future of Europe (which was decided by the Laeken European Council to be convened with the objective of drafting a new Constitutional Treaty for the EU) subsequently heeded this call when preparing a new Constitutional Treaty.

As another development of the era, in 2001, the Council under the Belgium Presidency in Laeken undertook an evaluation of the progress achieved in the field of JHA, as requested by the Tampere Summit. The ***Laeken Summit*** reaffirmed the EU's commitment to the policy guidelines and objectives defined at the Tampere Summit, and the need for new impetus and guidelines to, *inter alias*, establish the common asylum system as a matter of priority respecting the agreed time lines. The Summit established a progress report and set deadlines for reviewing and adopting a number of important instruments, including the draft legislative instruments in asylum. It also called on the Commission to submit amended legislative proposals on minimum standards for asylum procedures and on family re-unification. However, as a negative point, the Summit did not comment on the level of harmonization to be achieved. Generally speaking, the Laeken Conclusions concentrated on developing means for combating illegal migration and trans-national organized crime rather than on asylum and legal matters on admission.

Conclusions of the ***Seville Summit*** in June 2002 marked another benchmark towards establishing the AFSJ. The Summit called for speeding up the implementation of the Tampere Conclusions, and the need to give continued concern for the migration issue during future presidencies by striking a fair balance between asylum, admission and integration policies on the one hand, and combating illegal immigration and human trafficking on the other. Seville Conclusions can be listed in four groups as follows: combating illegal immigration, integrated management of external borders, integrating migration issues into the relations with third countries and speeding up the asylum and migration agenda. With regard to the last aim, 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 Re-unification Directive by June 2003; and the Asylum Procedures Directive by the end of 2003.

As another key step of the era, the ***European Refugee Fund (ERF)*** was launched in September 2000 to support the existing programs and new initiatives in Member States in the areas of reception of asylum seekers, integration of recognized refugees and others in need of protection and voluntary repatriation. Open to national, regional and local authorities, international organizations, practitioners, and NGOs, ERF funds are annually distributed by the European Commission's JHA Directorate General to the Member States based *inter alias*, on the number of recognized refugees and applications received over an average period of three years.

Besides these developments, ***ARGO Program*** was launched in 2002 to primarily support administrative cooperation in the fields of external borders, visas, asylum and immigration. The Program replaced a similar ***Odysseus Program*** which was in place since 1998. ARGO's main objectives are to promote co-operation between national administrations responsible for implementing Community rules taking into account of the Community dimension in their actions, to ensure uniform application of the relevant Community law and to improve the overall efficiency of national administrations in their tasks in the relevant fields. JHA Directorate General of the Commission is in charge of managing ARGO funds.

During the era, the Commission also issued a ***Communication on 15 July 2004*** outlining the Commission's vision of how the EU should continue to improve the asylum system after the end of the five-year period or first stage of the legislative program on asylum. The Commission, according to this Communication, urged a ***single procedure for determination of asylum applications*** which means that the consideration of a request for protection -either under the Geneva Convention protection status or under the subsidiary protection scheme- should be conducted together at a 'one-stop-shop' or in a single procedure to improve the speed and efficiency of the asylum process. The European Parliament started to discuss the Proposal. One of the rapporteurs of the EP, Jean Lambert (Greens), has generally

welcomed the Communication and did not foresee that this would adversely affect the status of refugees under the Geneva Convention. However, the Report made some proposals –such as the establishment of systems to monitor the outcomes of those returned after a failed claim, and requests that any unfavorable decisions are duly reasoned and communicated to the failed applicant in their own language.

Another key development during this era is the signature of the ***Treaty Establishing a Constitution for Europe.***[64] As mentioned before, The Convention on the Future of Europe (which was decided to be convened in the European Council Meeting in Laeken, Belgium, on 14 and 15 December 2001) had the objective of drafting a Constitutional Treaty for the EU. The Constitutional Treaty was adopted by consensus by the above-mentioned European Convention; signed in Rome by the heads of States on 29 October 2004 and published in the EU Official Gazette on 16 December 2004. However it still needs to be ratified by the national parliaments of each Member State before it enters into force. The Treaty is a very significant development since it brings many institutional and procedural changes in many areas and gives a legal personality to the EU. With its entry into force, there will be only one European Union replacing the present 'European Communities' and the 'European Union'; 'third pillar' concept will be removed since the three 'pillars' will be merged (even though special procedures in the fields of foreign policy, security and defense will be maintained); and the EU and EC Treaties, as well as all the Treaties amending and supplementing them, will be replaced by the "Treaty Establishing a Constitution for Europe". Another important development that is brought with this Treaty is the integration of the Charter of Fundamental Rights into the Treaty and the clear acknowledgement of the Union's values and objectives in this text. As mentioned before, the Charter of Fundamental Rights was just a declaration of fundamental rights made by EU leaders in December 2000, which

[64] Please see the "Companion Guide to the EU Constitutional Treaty" of the EU Committee of the Law Society, dated October 2004 and visit http://europa.eu.int/futurum for further practical information on the Treaty.

contained many rights similar to those set out in the ECHR. Until Constitutional Treaty, the Charter has had no binding effect; but this will change as a result of the ratification of the Constitutional Treaty. With its integration into the Treaty, the right to asylum also took place in the Constitution for the first time as a binding statement. While Article No. II-78 of the Treaty states that the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Constitution, the Article II-79 says that no one maybe removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to death penalty, torture or other inhuman or degrading treatment or punishment.

Besides these provisions about the right to asylum, the Constitution significantly updates provisions in the field of Justice and Home Affairs, in order to facilitate and improve the establishment of the AFSJ. It is Chapter IV of the Treaty that specifically focuses on the 'Area of Freedom, Security and Justice'. The Section on "Border Checks, Asylum and Immigration" under this Chapter (Section No. 2) sets out a list of actions in this area that the EU will take. Under Article III-266, Paragraph 1, the Constitutional Treaty provides for the development of a common policy on asylum, subsidiary protection and temporary protection at an EU level that offers appropriate status to any third-country national requiring international protection and which is in accordance with the Geneva Convention and other international treaties. The Treaty emphasizes that the compliance with the principle of non-*refoulement* should be ensured regarding these people; and the Common Asylum Policy should be governed by principles of solidarity and fair sharing of responsibility between Member States. The same Article, but Paragraph 2 of the Treaty states that European laws shall lay down measures for a common European asylum system comprising (a) a uniform status of asylum for nationals of third countries valid throughout the Union; (b) a uniform status of subsidiary protection

for nationals of third countries who, without obtaining European asylum, are in need of international protection; (c) a common system of temporary protection for displaced persons in the event of a massive inflow; (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status; (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection; and (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection. Partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection is also mentioned as the last of these measures. The assurance of efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and enhanced measures to combat illegal immigration and trafficking in human beings are also other parts of the Treaty (Article III-267).

It can be stated that with the entry into force of the Constitutional Treaty, the 'Community method' will apply to all Justice and Home Affairs areas, since the Treaty discards the current system of 'pillars'. Moreover, they will fall to a large extent within the scope of qualified majority voting; or in other words, among the AFSJ fields, asylum-immigration issues will not be subject to unanimity voting anymore. Regarding asylum and immigration, with the entry into force of the Treaty, the European Commission will have the sole right of initiative and be able to make proposals for legislation, and the European Parliament will share the decision-making power with the Council (which will decide on qualified majority voting) under today's co-decision procedure or future's 'ordinary legislative procedure'. The competence of the Court of Justice will be broadened, particularly in the AFSJ. It will have full jurisdiction in the area of Justice and Home Affairs (JHA), which includes asylum and immigration policy. In addition to all these developments,

today's 'Directives and Regulations' will be called as 'Laws and Framework Laws', where necessary, to approximate laws.[65]

The Hague Program, which is reflecting the ambitions in the EU Constitutional Treaty, should be also examined as another cornerstone of the era regarding the development of the AFSJ. The Hague Program is a five-year (multi-annual) framework program for closer co-operation in the fields of Justice and Home Affairs at the EU level from 2005 to 2010. It is Phase II of the Justice and Home Affairs agenda which began in an EU Summit in October 1999 in Tampere; or in other words it is the continuation of the first five-year program (1999-2004 Tampere Program) in Justice and Home Affairs. Since Tampere Program came to an end in 2004, Dutch Presidency has produced a new draft program for 'Freedom, Security and Justice' for the years 2005-2010, the so-called 'Hague Program'. During the European Council held on 4-5 November 2004, EU heads of State approved the Program. In their final declaration, EU leaders affirmed that the second phase of the development of a common policy in the field of asylum, migration and borders should be based on solidarity and fair sharing of responsibility including its financial implications and closer practical co-operation between Member States. The Program is a series of political and policy statements designed to set out the mandate for further action in the area of Justice and Home Affairs policy; and is essentially the political signal from the Member States to the European Commission (DG Justice and Home Affairs) as to what action they should take, which proposals are a priority measure and where the limitations/boundaries of competence should be. The Program builds on the measures already outlined in the Tampere Program -proposing timetables, deadlines and additional measures as well as focusing on new areas and new initiatives. It states that "comprehensive and coordinated progress" has been

[65] The Law Societies of the UK, Joint Brussels Office, EU Legislation on Asylum and Immigration, December 2004, p. 6-7

made and that the development of an Area of Freedom, Security and Justice is a top EU priority given that it is "a central concern of the peoples of the States brought together in the Union". The program urges Member States to establish a common asylum procedure (with the Procedural Directive) and to implement the first-stage Directives relating to common standards for granting and withdrawing refugee status and common definitions of refugee/ subsidiary protection as soon as possible. The program, which aims setting up a common immigration and asylum policy for the 25 EU Member States, defines the measures to be implemented in the Area of Freedom, Security and Justice for the years 2005-2010 and foresees the Commission to present an Action Plan in 2005, containing a timetable for the adoption and implementation of the Hague program. Accordingly, the European Council will review progress on the Hague Program in the second half of 2006. As included in this program, EU leaders have agreed to decision-making by qualified majority and to the co-decision procedure by April 2005 in the fields of asylum, immigration and border control issues, like they did in the Constitutional Treaty which was not ratified yet. However according to the Program, legal immigration will still remain subject to unanimity voting. In the field of asylum, immigration and border control, the Hague Program contains the following key measures: developing a common European asylum system by 2010 with a common asylum procedure and a uniform status for those who are granted asylum or protection; defining measures for foreigners to legally work in the EU in accordance with the labor market requirements; establishing a European framework to guarantee the successful integration of migrants into host societies; reinforcing partnerships with third countries to improve their asylum systems; tackling illegal immigration and implementing resettlement programs; establishing a policy to expel and return illegal immigrants to their countries of origin; establishing a fund for the management of external borders by the end of 2006; ensuring that the Schengen Information System (SIS II) - a database of people who have been issued with arrest warrants and of stolen objects - is operational in 2007; establishing common visa rules (common application centers, introduction of

biometrics in the visa information system). There is also emphasis in the program on legal migration measures and integration programs in addition to measures to fight illegal immigration. The Hague Program also introduced a new concept called 'asylum camps' and focused on a feasibility study for processing asylum applications outside the EU territory. "Externalization" of the EU asylum policy that is seen as "a pretext of co-operation with countries of origin"[66] by many NGOs will be examined in much more depth at the following chapters of this thesis study.

From the above-mentioned developments, we can see that while Maastricht brought the Justice and Home Affairs issues for the first time under the EU framework (but without binding instruments), the Amsterdam launched this field as an area of 'Community concern' and introduced binding Community instruments in the fields of asylum and migration, adopted by the Council of Ministers of the Union. However up to today, the binding Directives and Regulations that were adopted in this field according to the Tampere Program were just based on the 'common minimum denominators' which were found among the practices and policies of different Member States. That's why although minimum standards were accepted by EU Member and Candidate States through these binding instruments, different asylum systems of each Member State prevailed, or in other words only minimum harmonization was maintained to give room to maneuver for Member States. That's why during the first five-year period of the Amsterdam era, Member States mostly used Directives, which need to be transposed into the national systems, rather than Regulations which are directly applicable. Reluctance to give up sovereignty and the slow decision-making process in the area has been the characteristics of the EU asylum and migration cooperation. However, the Member States, which mainly focused on the protection of their borders at the beginning (especially during the Maastricht era), recognized the danger of creating a 'Fortress Europe' in the aftermath of the Kosovo refugee crisis; and at the European Council in Tampere,

[66] Toner, H., From Tampere Agenda to the Hague Program, 2004, p.1-16

they called for a common European asylum system that should be also firmly rooted in a shared commitment to human rights. For the second phase of the Amsterdam period (namely after 1 May 2004) easier decision-making processes (like the majority voting procedure and the enlargement of the powers of the EC, EP and the ECJ) have been introduced. The balance between the protection of the external borders and of the human rights tried to be established first in Tampere and continued also in Hague. The tendency which is towards the establishment of a Common Asylum Policy –or in other words, a single asylum system- and the movement from minimum to total harmonization in these fields are getting stronger; and the minimum harmonization in asylum is assumed to change with the ratification of the Constitutional Treaty which foresees a "Common Asylum Policy" among all Member States. On the other side, whether the EU countries have managed to establish this balance between their security concerns and human rights obligations will be analyzed in the 5th chapter of this thesis work.

CHAPTER IV

DEVELOPMENT OF THE EXTERNAL DIMENSION OF THE EU ASYLUM REGIME:

Attachment of Third Countries and Candidate States To the Formulation of the Common Asylum Policy

The second and third chapters of this thesis study focused on the chronological overview of the refugee protection in the European continent and the historical milestones towards establishing a Common Asylum Policy within the European Union. This chapter, however, will be an introduction to the 'external dimension' of the EU asylum regime, in other words, a prologue regarding the involvement of third countries (countries of origin/transit and Candidate Countries) in the EU's common policy in the fields of asylum and migration.

Prior to the entry into force of TEU Amsterdam, radical increase in the numbers of asylum applications and illegal migrants, had the effect on EU Member States by the end of the century to reflect seriously on how strengthened partnerships with countries of origin and transit could contribute to the reduction of the pressures on the asylum systems of EU States and provide a better management of migration flows.[67] Besides the involvement of these countries of origin and transit in the asylum

[67] Van der Klaauw, J., 'Building Partnerships with Countries of Origin and Transit', in Marinho C. (ed.), Asylum, Immigration and Schengen Post- Amsterdam: A First Assessment; 2001, p. 24

and migration strategy of the EU, the third countries, which have applied for EU membership, were also influenced significantly from EU's strategy in the fields of asylum and migration since most of these Applicant Countries were countries of transit and sometimes of origin; and most importantly they were 'obligatorily' attached to the common asylum and migration policy developments in the EU. In the first part of this chapter, you will find when and how the idea of 'partnership with countries of origin and transit' emerged within the EU asylum and migration strategy, what were the incentives for these third countries and Member States to establish such a partnership, and with what kind of tools this 'neighborhood association' was formulated. The relevant Summits and documents that were stressing this partnership in the fields of asylum and migration, and the instruments to provide it (Readmission Agreements, safe host country application, voluntary return programs, attempts for protection in the region…etc.) will be studied. The second part of the chapter will try to examine briefly the elements in the expansion of a Common European Asylum Policy beyond Europe through the 'candidacy process'. Turkey, also as an example of a Candidate State, which is receiving technical and financial assistance from the EU to adopt and implement the EU *acquis* in the fields of asylum and migration, will be examined as a case study. Accession criteria in this 'membership association' and the integration of the Justice and Home Affairs -specifically asylum issues- into the enlargement process, and the EU financial assistance programs for the transference of the *acquis* into the national systems of the Candidate Countries will be briefly described. However, not this chapter, but the following (5^{th}) chapter of this thesis study will try to give you the answer about the concerns that the third countries may have and the benefits that they may face because of the enlargement of the European asylum policy and practice; and whether the expansion of these asylum policies/practices to third countries, especially to the Candidate Countries beyond Europe, is a positive development for the international refugee protection regime or not.

4.1. INVOLVEMENT OF COUNTRIES OF ORIGIN AND TRANSIT IN THE EU'S ASYLUM AND MIGRATION STRATEGY:

Partnership (Neighborhood) Association

The idea of partnership between the European destination countries and countries of origin/ transit is a new element of the European asylum and migration policy development. The widespread anxiety over immigration which developed during 1990s after the collapse of the Eastern Bloc, the decline in control over immigration flows and the general climate of insecurity in Europe following the end of the Cold War, pushed Member States to look for other solutions and drew their attention to all aspects of the issue, when traditional measures for immigration control, such as border protection and visa regimes, suddenly appeared insufficient to cope with the perceived crisis ahead. 'Action to address root causes' soon became a central phrase in the European political vocabulary and third countries (existing or potential migrant-transit or migrant-sending countries) became involved in the EU strategy especially as partners in migration control. This concern was echoed in the EC's ***'Declaration on the Principles Governing External Aspects of Migration Policy'*** which was issued at the Edinburgh European Council in 1992. The Council called for a policy to promote preservation of peace, full respect for human rights, the creation of democratic societies and adequate social conditions, and a liberal trade policy that should improve economic conditions in the countries of emigration.[68] In 1994, the European Commission issued a ***Communication on Immigration and Asylum***, which called for a comprehensive policy perspective focusing on the need for closer cooperation with countries of origin to address migration pressures and to control

[68] Collinson, S., Europe and International Migration; 1993, p. 61

immigration in order to keep it within manageable structures.[69] Although the Communication of the Commission in 1994 initially did not trigger too much debate among Member States, the following developments led the EU Member States to focus on strengthened partnerships with countries of origin and transit. The worrisome trends like the high costs for the asylum systems in the Member States; increasingly complex flows of migrants and refugees and the real or perceived abuse of these systems by increasing numbers of illegal immigrants and asylum seekers; the rise in trafficking in human beings, particularly through regions neighboring the EU; and the increasing difficulties in returning the rejected asylum seekers and illegal migrants prompted Member States into a discussion as to how these challenges could be confronted within a coherent strategy. A first attempt regarding the subject was made by the British Presidency in early 1998 when an EU Action Plan on the influx of migrants from Iraq and the neighboring region was launched. However, the Plan was criticized for its one-sided focus on repressive control measures and for disregarding the mixed motives for movement from Iraq.

With a distinctive improvement, *Amsterdam Treaty* formally brought the possibility of developing external dimension of the EU policy in Justice and Home Affairs and gave Member States the right to conclude agreements with third countries regarding economic migration and family reunion, and to take into consideration foreign policy concerns with regard to asylum, visas and immigration when safeguarding of internal security is threatened. With entry into force of the Amsterdam Treaty, the EU institutions have embarked on a five-year legislative program to develop the main elements of a Common Asylum Policy as provided for under Title IV.[70] The Conclusions of the *Tampere European Council of October 1999* were meant to give political impetus and strategic direction to the implementation of this legislative agenda. Tampere also marked a new stage as committing itself to integrating asylum

[69] European Commission, Communication from the Commission to the Council and European Parliament on Asylum and Immigration Policies; Brussels, COM (94) 23 Final of 23.02.1994

[70] ibid., p. 21

concerns into the 'external dimension' of the EU policy and establishing 'partnership with countries of origin and transit' for the development of a Common Asylum Policy.[71] In paragraph no. 11 of the Tampere Conclusions, it was stated that the European Union needs a comprehensive approach to migration, addressing political, human rights and development issues in countries and regions of origin and transit. It was also recommended that partnership with third countries concerned would also be a key element for the success of such a policy, with a view to promoting co-development. The Tampere European Council, also focused on the management of migration flows and on the need for more efficient control of these flows "at all their stages", in close cooperation with countries of origin and transit.[72] Under paragraph no. 26, the Council called for assistance to countries of origin and transit to be developed in order to promote voluntary return as well as to help the authorities of those countries to strengthen their ability to control their borders and to cope with their readmission obligations towards the Union and the Member States. It also emphasized the need to contain refugees in their region of origin by addressing the causes of flight and by providing aid locally. In this context, the European Council in Tampere agreed to make migration (including asylum) a horizontal, 'cross-pillar' issue in the EU external relations, and to incorporate standard readmission clauses in all association and cooperation agreements concluded by the Community with third countries. This new emphasis was also reflected in the Conclusions of all subsequent European Councils as an integral part of both JHA and the EU external relations.

Moreover, the European Council in Tampere has given a further mandate to the ***High Level Working Group (HLWG) on Asylum and Migration***, which was set up within the General Affairs Council in December 1998 with the aim of establishing a common, integrated and cross-pillar approach targeted at the situation in the most

[71] Presidency Conclusions, Tampere European Council; 15-16 October 1999, Paragraph No: 11-12
[72] ibid., Paragraph No: 22

important countries of origin of asylum seekers and migrants. The tasks of the HLWG were developing operational strategies for irregular migration; addressing refugee and migration movements from selected main source countries; drawing up a number of Action Plans comprising of joint analysis of migratory flows from or through selected countries of origin and transit of asylum seekers and irregular migrants; preparing proposals to address the causes of these flows; enhancing reception capacities in the region; promoting human right actions; fostering political dialogue and exploring possibilities for readmission and return to the country or region of origin. The conclusion of an EC Readmission Agreement with the countries in question, and also other measures in the field of diplomacy, trade relations, humanitarian assistance, development cooperation, as well as border control mechanisms, information campaigns and exit monitoring in the countries of origin and support for host countries in the conflict region were elements of the HLWG's 'action plans' which targeted at the situation in the most important countries of origin of asylum seekers and migrants. Countries such Afghanistan, Albania and the neighboring regions (i.e. Kosovo), Iraq, Morocco, Somalia and Sri Lanka were the first target countries of HLWG. Moreover, the HLWG has been tasked to explore measures aimed at favoring voluntary return to these countries. The activities of the HLWG represent the first attempt by the EU to develop a comprehensive partnership strategy towards the countries of origin and/or transit to manage migration. Following the Tampere Summit, the HLWG, which produced Action Plans for various migrant and refugee-producing regions of the world, was given a further mandate to continue strategy development with regard to selected countries of origin. In 2003, the HLWG mandate was modified and expanded in order to allow for a more flexible approach and a better geographical balance in its action, including the possibilities for regional approaches, an increased emphasis on analyzing 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.

After Amsterdam and Tampere Summits, which called for the development of the external dimension of the JHA policies for the purpose of strengthening the Union's internal order and security, the EU has increasingly included this dimension in its political agenda. Since then, the external dimension has become the most dynamic aspect of cooperation in asylum and immigration matters. In 1999, merging a number of distinct budget lines, the ***European Initiative for Democracy and Human Rights (EIDHR)*** was launched to assist the reinforcement of pluralist democracy, rule of law and respect for human rights in many third countries in Southeast and Eastern Europe, and the Mediterranean Basin. The ***Feira European Council*** in June 2000, devoted a more detailed discussion to the issue on the basis of a Presidency Report, while the ***Laeken Summit*** in December 2001 confirmed the priority put on JHA matters within the EU external relations. In June 2000, the European Parliament adopted a Resolution on asylum procedures, in which it recognizes the need to promote conflict prevention, peacekeeping, and respect for human rights to attack root causes of migration from the country of origin. In subsequent General Affairs Council meetings, the EU has kept emphasizing the need for cooperation with third countries in managing migration flows. The ***European Council in Seville,*** in June 2002, called for speeding up the implementation of Tampere Conclusions, and the need to give continued attention to combating illegal migration, integrated management of external borders and integrating migration issues in relations with third countries during future Presidencies. The Summit underlined the need for a comprehensive and balanced approach to tackle root causes of illegal immigration, which, in order to be more effective, should make more extensive use of development assistance, trade relations and conflict prevention measures in close cooperation with countries of origin and transit. The Council also stressed that any future cooperation or association agreement with a third-country must include a clause on joint management of migratory flows and on compulsory readmission of irregular residents, including rejected asylum seekers. In the year 2002, the EU adopted three separate, but inter-related Action Plans on combating illegal migration,

on repatriation and return and on border management. These plans, as well as a very central recent development in the field of asylum and migration, ***the Hague Program***, highlighted the need for cooperation with countries of origin and transit. The Hague Program of November 2004, which was examined in detail in the third chapter of this thesis study, attributed so much meaning to the partnership with third countries under the framework of asylum and migration strategy of the EU, and stated that:

> EU policy should aim at assisting third countries, in full partnership, using existing Community funds where appropriate, in their efforts to improve their capacity for migration management and refugee protection, prevent and combat illegal immigration, inform on legal channels for migration, resolve refugee situations by providing better access to durable solutions, build border-control capacity, enhance document security and tackle the problem of return.[73]

The European Council in Hague also called upon the Council and the Commission to continue the process of fully integrating migration in the EU's existing and future relations with third countries and invited the Commission to complete the integration of migration into the Country and Regional Strategy Papers for all relevant third countries by the spring of 2005.

4.1.1. Incentives behind Establishing Cooperation Links between the EU and Third Countries:

According to the Scoreboard in 2002, the Commission's budgetary authority has committed 10 million Euros entered in the 2001 budget and 12.5 million Euros allocated for 2002, for cooperation with third countries of origin and transit, specifically for migration management (including institution and capacity building in migration and asylum in the regions of origin, information campaigns in countries of

[73] For further information, please see the Hague Program in Presidency Conclusions, Brussels, 4-5 November 2004, Paragraph No. 1.6. (external dimension of asylum and migration)

origin and transit about the possibilities of legal migration and penalization of illegal travel and residence, support for voluntary return and implementation of Readmission Agreements, and material and technical support for border management).[74] This number increased when the budget allocated for the 'management of migratory flows' was also used for the same purpose. Of course there are various incentives for the EU, to use this amount of money under the framework of 'partnership with third countries', and also for these third countries who accept the EU's readmission, return and border control policies.

For establishing and developing a comprehensive partnership with countries of origin/ transit and for a true dialogue between equal partners, the principal interests of all countries involved in this cooperation should be addressed; and common areas of interest should be set out in order to build effective forms of cooperation among these third countries and the EU. As Sandra Lavanex and Emek Uçarer state in their article:

> The transfer and diffusion of EU policies in one specific area can be initiated and facilitated by third-country governments, too, who -for one reason or another -choose to alter their domestic policies. Alternatively, diffusion can also be actively promoted by the EU and its Member States when the export of common policies (or parts of them) is seen as a means to resolve common problems at home. Innovators may attempt to devise complex combinations of 'carrots' and 'sticks' to entice others to participate in this endeavor, thereby expanding the circle of participating countries and, arguably, enhancing the effectiveness of a particular policy.[75]

EU's interests to establish such cooperation links and diffuse EU policies in the fields of asylum and migration can be recapitulated as protecting its borders and providing its internal and external security. As already mentioned above, with

[74] For further information, please see the Communication from the Commission on the Biannual Update of the Scoreboard to Review Progress on the Creation of AFSJ in the EU; Brussels, COM (2002) 738 Final of 16.12.2002, p. 1-2

[75] Lavanex, S. and Uçarer, E., 'The External Dimension of Europeanization: The Case of Immigration Policies' in Cooperation and Conflict: Journal of the Nordic International Studies Association; 2004

HLWG, the EU started to focus on establishing political and economical dialogue with these third countries. The underlying premise on the EU side, for such an approach was the belief that political dialogue, as well as trade and aid links, with countries of origin and countries of transit would more effectively address root causes of population movements and prevent the flow of refugees to the European borders -and as a result reduce asylum applications in Europe. Such partnerships could also strengthen countries in the region that need assistance in coping with large influxes of refugees and create conditions favorable to the return of migrants and refugees to their countries of origin. As Johannes Van der Klaauw stated in his article 'Building Partnerships with Third Countries', such partnerships could help to control onward secondary movements to the EU and create conditions contributing to the return of migrants and refugees to their country of origin.[76] On the other side, the interests of the countries of origin/transit can be listed primarily as political stability and economic development, or well-being of their nationals who reside in the EU Member States or who want to reach there.[77] In 'partnership association', the third countries are usually offered 'carrots', or in other words, rewards: The cooperation on asylum and immigration matters is usually linked to the realization of economic and political goals of third countries, which are in the search for something that can be offered in return for the unpopular cooperation in JHA.[78] Sometimes, strong efforts to adopt asylum and migration policies to fit the EU standards can be observed like in the case of Eastern European Countries, who are hoping for EU membership.[79] However, the 'sticks' mechanism is not used towards these third countries as widely as it is used towards Associate Countries. There is a 'conditionality' which is basically a strategy of reinforcement by reward; in other

[76] Van der Klaauw, J., 'Building Partnerships with Countries of Origin and Transit', in Marinho C. (ed.), Asylum, Immigration and Schengen Post- Amsterdam: A First Assessment; 2001, p. 23

[77] For further information, please see the European Commission's proposal: 'Establishing a program for financial and technical assistance to third countries in the area of migration and asylum', COM (2003) 355 final of 11.6.2003

[78] ibid.

[79] Angenendt, S. (ed.), Asylum and Migration Policies in the European Union; 1999, p.39

words, "the EU pays the reward if the target government complies with the conditions and withholds the reward if it fails to comply".[80] The future prospect of sometimes membership, financial and technical aid, and the conclusion of a cooperation or association agreement may constitute such rewards, too.

While the overall goal, from the Western side, may be summarized as control and prevention; from the Eastern side, it is access to Western Europe, international assistance or membership to the EU. Interests of the EU and of the third countries create the basis for bargaining, and as a result, third countries in the East and South agree on assisting the EU in controlling irregular migration and asylum flows through stricter border controls and Readmission Agreements, in exchange for better access of their own populations to the West.[81] Carl Levy describes these countries as countries of buffer zone which has been a line of defense to control and limit the inflow of asylum seekers into the European Union. Buffer zone nations are financially assisted to process and return unfounded asylum applicants to their homelands.[82] These countries' geographical proximity as well as their importance as a major region of origin and transit for migrants has prompted the EU to develop a more explicit migration dimension to its foreign policy towards these countries. As part of this partnership effort, Poland signed the first multilateral Readmission Agreement with the Schengen States on 29 March 1991 for people who stayed in the Schengen area for more than three months without the required residence permit. The signing of the agreement was a *quid pro quo* on the part of Poland in return for the ending of the visa requirement by the Schengen States for short stays of Polish nationals. This, in a way, meant that Western European States were going to turn a blind eye to Polish people who stayed in Europe more than their visa period, in

[80] Schimmelfennig, F. and Sedelmeier, U., 'Governance by Conditionality: The Europeanization of Central and Eastern Europe' in Journal of European Public Policy; 2004, p.663
[81] Copeland, E. A., The Creation and Evolution of the Refugee and Economic Migration Regimes: Testing Alternative Frameworks; May 1996, p.556
[82] Levy, C., 'European Asylum and Refugee Policy after the Treaty of Amsterdam: the birth of a new regime', in Bloch, A. and Levy, C. (eds.), Refugees, Citizenship and Social Policy in Europe;1999,p. 18

return of the stricter border controls by Poland and also readmission of third nationals. With the signing of this agreement, which went into effect on 1 May 1991, Poland undertook to take in all the people who illegally entered into the Schengen area through Polish territory. With this agreement, "Poland performed the role of federal border police oriented toward the West".[83] Moreover, with the signing of a bilateral return agreement between Poland and Germany on 7 May 1993, Poland committed itself to take back 10.000 refugees who secretly crossed the Polish-German border. As a consideration in return, the Polish government received 120 million DM to be used specifically for the purpose of building up a system for refugees, setting up deportation prisons, and to seal off the West Polish border.[84] Western Europe has offered Central and Eastern Europe economic assistance, vocational training, exchange programs and visa-free travel in exchange for the help to control irregular migration and asylum flows from countries of farther East and South. Of course, the EU is paying the costs of readmission and assistance to refugees and giving overall economic assistance for this cooperation.[85] However, in contrast to the comprehensive 'Europeanization' strategy pursued towards Candidate Countries (which will be examined in the second part of this chapter), cooperation between the EU and neighboring countries is still occasional, sector-based, and inspired by short-term interests on both sides.[86] In other words, the *'wider Europe'* initiative, which was launched in March 2003, may be interpreted as one possible instrument to increase the leverage of EU conditionality by raising the costs of non-adaptation in 'matters of shared interest'.[87]

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[83] Evens Foundation (ed.), 'Refugee and Asylum Policy Influenced by Europeanization' in Europe's New Racism: Causes, Manifestations and Solutions; 2002, p.110

[84] ibid., p.111

[85] Copeland, E. A., The Creation and Evolution of the Refugee and Economic Migration Regimes: Testing Alternative Frameworks; May 1996, p.569

[86] Pastore, F., 'Aenea's Route: Euro-Mediterranean Relations and International Migration', in Lavenex S. and Uçarer E. (eds.), Migration and the Externalities of European Integration; 2002, p.105-123

[87] European Commission, Communication on Wider Europe -Neighborhood: A New Framework for Relations with our Eastern and Southern Neighbors; Brussels, COM(2003) 104 final of 11.3.2003, p.3

Especially the neighboring countries to the Union, as countries of transit or sometimes of origin, have been affected from the process of the externalization of the European asylum and migration policies since the Union wanted to solve its intensive migration flow problem as containing these refugees at these third countries, preventing them from entering into the EU territories or sending them back to their countries of origin or countries of transit through readmission and voluntary return policies. 'Neighborhood association' has been developed among the EU and these neighboring countries that were not given the perspective of EU membership, that is the Southern Mediterranean countries (in accordance with the EU definition: Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, the Palestine Territories, Syria, and Tunisia), and the Eastern neighbors (Belarus, Moldova, Russia, and Ukraine).[88] Barcelona Conference of 1995 launched institutionalized cooperation with the Mediterranean countries, which focused on the more limited aspects of readmission and exit-border controls and aimed at deterring and stopping undocumented migration and human smuggling. The new generation of Association Agreements, which give the issue of irregular migration first priority in the social field (see Art. 69 and 71 of the respective Agreements), were concluded with Tunisia in 1998 and Morocco in 2000. However, the failure to agree on the conclusion of Readmission Agreements showed the limits of a one-sided approach dictated by only the interests of the Union.[89] Recognizing the failure of the previous uneven approach, the ***Feira European Council*** in June 2000, called for a more 'balanced partnership' which places greater emphasis on the third countries' interests by opening new channels for foreign investment and ensuring the rights of lawful migrants of Maghreb origin in the EU.[90] A similar development may also be seen in relation to

[88] ibid.

[89] Mrabet, E. A., 'Readmission Agreements: The Case of Morocco', in European Journal of Migration and Law, 2003: 5(4), p. 379–85; and Schieffer, M., 'Community Readmission Agreements with Third Countries – Objectives, Substance and Current State of Negotiations', in European Journal of Migration and Law; 2003: 5(4), p.343–57

[90] Pastore, F., 'Aenea's Route: Euro-Mediterranean Relations and International Migration', in Lavenex S. and Uçarer E. (eds.), Migration and the Externalities of European Integration; 2002, p.117

the EU's new Eastern neighbors. While the Partnership and Cooperation Agreements with Russia, Ukraine, and Moldova define the general framework for cooperation, the priority of JHA is reflected in the Common Strategies towards Russia and Ukraine of 1999 and corresponding Action Plans.[91] Like this partnership, the EU and the ACP (African, Caribbean and Pacific) countries have engaged in a new type of partnership laid down with the Cotonou Agreement of June 2000. As with the second generation of Association Agreements mentioned above, the Cotonou Agreement exceeds in significant ways the previous treaties and includes far-reaching rules on readmission and the fight against irregular migration.[92] The sensitivity of these rules is reflected in the controversial negotiations on the Agreement, where the ACP countries have successfully opposed the EU's intention to include an obligation to readmit not only own nationals staying irregularly in a Member State, but also third-country nationals.[93] In the backdrop of the above-mentioned developments, we can say that the partnership association has been shaped during the negotiations between the EU Member States and third countries on their specific and dissimilar interests.

4.1.2. Partnership Tools (Readmission Agreements, Safe Third Country Concept…etc.):

The early 1990s witnessed a variety of military interventions, such as in Liberia, Iraq, Former Yugoslavia and Somalia, by the international community and regional groups that attempted to alter conditions in the countries of origin, which gave rise to

[91] For further information, please see the Common Strategy of European Council of 4 June 1999 on Russia, Official Journal of the European Communities (OJ), 24. 6. 1999 L 157/1 (1999/414/CFSP); the Common Strategy of the European Council of 11 December 1999 on Ukraine, OJ 23. 12. 1999 L 331/1 (1999/877/CFSP); the EU Action Plan on Common Action for the Russian Federation on Combating Organized Crime published in OJ 2000/C106/5 of 13.4.2000 and EU Action Plan on JHA in Ukraine of 10 December 2001, published in OJ 2003/C 77/01 of 29.3.2003.

[92] Lavenex, S., 'EU's Trade Policy and Immigration Control', in Lavenex S. and Uçarer E. (eds.), Migration and the Externalities of European Integration; 2002, p.169

[93] ibid.

refugee flows. These recent attempts to resolve or at least contain the refugee problem through the 'humanitarian intervention' of armed forces and international organizations may represent a significant development for the refugee regime and indicate a distinct shift in orientation in the search for solutions.[94] However, the prevention of refugee flows through intervention has two facets: intervention as solution and intervention as control. ***'Intervention as solution'***, which is the most preferable, is a longstanding way aiming at addressing the root causes, which force people to flee. Strengthening democratic institutions in those regions; assisting these States economically; promoting development, institutional capacity building, transfer of knowledge and best practices as a means of reducing the 'push factors' are some of the ways of 'prevention as solution'. Under the framework of prevention as solution, Member States find other ways like encouraging return (i.e. paying a premium to those who will return their country, offering these individuals assistance to set up small businesses in their home country, granting subsidies for professional training there), too.[95] Johannes van der Klauuw finds the ultimate goal of such a strategy as promoting stability, safety and security by remedying a variety of factors causing displacement and by preventing the re-emergence of conditions provoking further flows.[96] However, the above-mentioned strategy's principal disadvantage lies in its high cost and the need for the industrialized world explicitly to address the structural nature of poverty and "exploitation within the capitalist system itself".[97] According to D. Papademetriou, a sustained effort to attack root causes requires enormous amounts of physical and political capital, as well as there is unusual clarity of purpose and unequaled policy and political coordination within and among governments. According to the scholar, this kind of policy would require "political

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[94] Copeland, E. A., The Creation and Evolution of the Refugee and Economic Migration Regimes: Testing Alternative Frameworks; May 1996, p.506-507

[95] Eichengreen, B., 'Thinking about Migration: European Migration Pressures at the Dawn of Next Millennium', in Siebert H. (ed.), Migration: A Challenge For Europe, 1993, p.11

[96] Van der Klaauw, J., 'Building Partnerships with Countries of Origin and Transit', in Marinho C. (ed.), Asylum, Immigration and Schengen Post- Amsterdam: A First Assessment; 2001, p. 26

[97] Baldwin-Edwards, M. and Schain, M. (eds.), Politics of Immigration in Western Europe; 1994, p.8

courage" on the part of Member States since the effects would only be noticeable in the long-run.[98] On the other side, ***'intervention as control'*** is reflecting the security concern of governments to regulate the chaotic migration movements and to maintain or perhaps reassert control over their territorial borders; or in other words to limit or prevent access to the EU territories. This type of prevention, which covers short-term measures, like concluding Readmission Agreements, sending these people to 'safe host countries' or 'safe countries of origin', developing intensified cooperation in border control and struggle against human trafficking, also includes subsidizing refugee camps close to the countries or regions of origin.

According to the informal paper of the HLWG issued at the European Conference on Migration, Panel No. 3, called "Partnership with Counties of Origin", there are various tools, which the partnership with countries of origin and transit should focus: Bilateral agreements with countries of origin and transit in the field of migration management; information campaigns; voluntary return programs; assistance to third countries which cope with irregular migration to and through their territories (including assistance to set up an adequate asylum system in transit countries); Readmission Agreements; closer cooperation with international organizations in the case of 'problem countries', where no partnership can be established due to the lack of a recognized government…etc.[99] Another way of cooperation with countries of origin is the promotion of collaboration with police and judicial authorities in the countries of origin, considering that it is an important instrument of control of the migratory phenomena. Equally, collaboration with social services and associations in these countries is another way, since it may facilitate the return of third-country nationals to their countries of origin.[100] Alternatively, posting of Immigration Liaison

[98] Papademetriou, D.G., Coming Together or Pulling Apart: The European Union's Struggle with Immigration and Asylum; 1996, p.34

[99] Informal paper of the High Level working Group on the European Conference on Migration, Panel No.3: Partnership with Counties of Origin, Brussels, 3 October 2001, SN 4107/01, p. 3-4

[100] Giuffre, A. (ed.), Expulsion and Detention of Aliens in the European Union Countries; 2001, p. 600

Officers[101] or immigration control staff to the airports or embassies in the countries of origin and transit to carry out externalized immigration control is another tool for this partnership, which aims protecting the EU borders. The motive behind establishing such a partnership with these countries in JHA issues is generally, as mentioned above, to ensure the internal and external security of the EU by decreasing the numbers of migrants targeting the EU and by sending illegally-residing migrants, including sometimes refugees, back to third countries and countries of origin. Greek-Italian-Albanian cooperation of 10 October 2000, which focused on setting up a centre in Albania to combat all types of trafficking, can be given as an example to this type of cooperation between the two EU Member States and a third-country. Through this kind of cooperation frameworks, the Member States showed that they do not only want stronger border controls and accompanying measures in the external borders of the Union, but also on the non-EU borders of the neighboring States.

In connection with Member States' strategy to protect their external borders, new concepts like *'safe third-country', 'safe host country'* or *'first country of asylum'* were developed.[102] On 30 November 1992, the EC Ministers responsible of immigration adopted a ***'Resolution Concerning Host Third Countries'*** that was intended to establish objective criteria for applying the host third-country principle. According to safe third-country concept, if there is a clear evidence of asylum seeker's admissibility to a third host country which is safe -in other words, which can afford protection for the asylum seeker- the application for refugee status may not be examined by the EU Member State and the asylum applicant may be sent to that country where he passed through before approaching the EU Member State or where

[101] For further information, please see the Council Regulation 377/2004 on the creation of an immigration liaison officers' network, Official Journal of the European Communities L 064, 02.03.2004.

[102] For further information, please see London Resolutions of 1992 on a Harmonized Approach to Questions Concerning Host Third Countries (WGI 1283), which explain the concepts of "safe third-country" and "safe country of origin".

he was already granted protection. The Resolution on Host Third Countries, though it does not have a binding force, indicates that an EU Member State is responsible of examining an asylum claim only if the applicant has not crossed through a third State -including transit- or when no other safe State exists to which the person may be sent. A host country is one, which has ratified the 1951 Geneva Convention and where the applicant will not be exposed to torture or inhuman or degrading treatment. However, allocation to third countries under safe third-country concept will only work if a number of preconditions are fulfilled. The identity and the travel route of the protection seeker have to be established, and the third-country must be willing to take over the protection seeker and his/her case. Establishing the travel route is mandatory for identifying a relevant third-country to which the applicant can be sent back. However, most of the asylum seekers destroy evidence of their flight route and passports not to be sent back, like happened in Germany in 1994, which had accepted 127.210 people to enter the asylum procedure, but which could send only 1.5 percent of these asylum seekers to safe third countries due to lack of documentation.[103] Due to the above-mentioned needs, States have devised methods for information exchange (like storage and exchange of fingerprints) for the workability of the safe third-country concept. To ensure the willingness of the third countries to take over illegal aliens and protection seekers, international agreements (in other words, Readmission Agreements), which were already mentioned above, were concluded. These agreements were a method to prevent illegal immigration and to send back illegally-residing aliens including sometimes asylum seekers. However, since the adoption of the Resolution on 'Safe Host Countries', there has been considerable disagreement on the criteria for establishing whether a country should in fact be considered a host third-country, in particular in cases of mere transit. The ***EU Directive on Asylum Procedures***, which was not adopted yet because of the considerable disagreement on 'safe third-country' and 'safe country of origin'

[103] Kumin, J. (Reprehensive of UNHCR in the Federal Republic of Germany), Asylum in Europe: Sharing or Shifting the Burden?, 1995, at http://www.refugees.org/world/articles/europe, p. 3

concepts, is also reflecting how Member States' perceptions are different from each other. Varying interpretations of what constitutes safety, and differing understandings of which State along an asylum seeker's route is responsible for examining his/her asylum claim, make harmonization on these issues more necessary than ever before.[104]

In the case of voluntary repatriation to the country of origin, States are, as a common rule, obliged to readmit their own nationals according to the international legal instruments. However, although countries of origin have these international legal obligations to take back their own nationals, compliance with such an obligation is in some cases difficult to secure. Bilateral and multilateral cooperation agreements with countries of origin on economic, trade and development aid issues can provide the framework for mutually beneficial cooperation in return of the aliens to their 'country of origin'.[105] On the other side, the return to a 'country of transit' is being justified by the fact that this country, in case of an existing international agreement to that effect, engages its responsibility towards the European country of final destination since it did not prevent the illegal entry of this person into the territory of the latter. The above-mentioned 'existing international agreement' is usually a *Readmission Agreement,* which stipulate the procedures for return and readmission of illegal migrants, including sometimes refugees. Readmission Agreements, which were formulated at an amazing pace,[106] are tools to facilitate the return of persons staying irregularly in the territory of one State, to their country of origin or, in specific cases, to a country of transit. Signing Readmission Agreements is a crucial step and a necessity for the effective implementation of 'safe third-country' rule and

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[104] ibid., p. 2

[105] UNHCR Report, Reaching a Balance Between Migration Control and Refugee Protection in the EU: A UNHCR Perspective; Geneva, September 2000, p. 27

[106] The number of Readmission Agreements involving European States is large, but difficult to specify, as many agreements remain unpublished or are published with a considerable delay. It is thought that, since the late 1980s, some 220 bilateral Readmission Agreements have been concluded worldwide (IGCARMP, IGC Report on Readmission Agreements, 1999, Geneva).

of the London Resolutions on 'Host Third Countries'. Where Readmission Agreements do provide for the return of third-country nationals, they generally contain strict procedures and time limits for this and require proof that the person in fact traveled through or stayed in the State concerned. In order to control entry, almost all EU States have signed Readmission Agreements, binding the contracting parties to readmit their own national or third-country national who sneaked into the EU in an illegal way. While some agreements exclusively covered illegally-residing nationals of these neighboring State parties, others were applicable to nationals of third countries as well, as part of the agreement between the transit State and the European destination country. However, different from Dublin and Schengen Conventions, Readmission Agreements did not contain any obligation on the readmitting State to examine the asylum seeker's request. On 30 November 1994, the Council drew up a ***Recommendation concerning a specimen bilateral Readmission Agreement between a Member State of the European Union and a third-country,*** covering the readmission of both nationals and third-country nationals. This was a model agreement designed to be used flexibly by Member States when negotiating agreements with third countries. A year later, the specimen agreement was followed by ***Council Recommendation on Guiding Principles for Drawing up Readmission Protocols***. In 1996, the Council took further steps to disseminate readmission obligations covering both nationals and third-country nationals by adopting the ***Council Conclusions of 4 March 1996 concerning readmission clauses to be inserted in future mixed agreements***. Following this instrument, when mixed agreements between the Member States of the EU and third countries are negotiated in the future, it shall be considered whether to include an option to future Readmission Agreements. By virtue of such a clause, the contracting third State would be obliged to conclude a bilateral agreement on the readmission of third-country nationals with Member States that request so. According to Gregor Noll, this is the first tangible expression of the Council's wish to exploit the accumulated bargaining power of the (then) 'Fifteen' to facilitate the conclusion of Readmission

Agreements with third countries.[107] Compared with earlier Readmission Agreements signed between Western European States in 1960s, which applied to asylum seekers only if their cases had already been definitely rejected in the asylum procedure, these new treaties of 1990s have been increasingly used as a legal basis for the return of asylum seekers before their status has been determined, on the grounds of the safe third-country rule. While previous agreements were not seen as being very efficient because of the high levels of proof required in order to readmit a person, these newer agreements are characterized by their aim of facilitating readmission through a downgrading of the standards of evidence required, the use of vague formulations, and through the imposition of very long time limits during which the returning State can require readmission. Since the expediency of Readmission Agreements on the side of returning EU States increased, this tool became much more popular in time. Moreover, the ***Amsterdam Treaty*** conferred powers on the Community in the field of readmission.[108] Furthermore, under the issue of management of migration flows, the ***European Council at Tampere*** invited the Council to conclude Readmission Agreements or to include standard clauses in other agreements between the European Community and relevant third countries or groups of countries.[109] In September 2000, EU Member States, because of the transfer of the competence in asylum and migration issues to the Community following the entry into force of the Amsterdam Treaty, agreed to mandate the Commission to conclude Readmission Agreements. In November 2002, the European Community adopted its first Readmission Agreement with Hong Kong.

As Gudrun Hentges states in his article 'Refugee and Asylum Policy Influenced by Europeanization', "a *cordon sanitaire*, a new 'in between Europe' had the task of

[107] Noll, G., Negotiating Asylum: The EU *Acquis*, Extraterritorial Protection and the Common Market of Deflection; 2000, p. 206
[108] Lavenex, S., Europeanization of Refugee Policies: Between Human Rights and Internal Security; 2001, p. 113-115
[109] For further information, please see the Tampere Conclusions, paragraph no. 27

intercepting the expected masses of refugees".[110] In the interest of stemming the immigration from the Eastern Europe, the EC had to promote and support measures and other types of initiatives like Readmission Agreements or safe third-country applications. The concept of 'concentric circles' was built up further in the course of 1990s: Agreements to take back illegal aliens were concluded with more States and the cooperation between the border authorities of the EU States and of the States bordering the EU were intensified.[111] Besides the implementation of safe third-country rule and signing of Readmission Agreements, another partnership tool, which is called *'voluntary return programs'*, was developed -though it was not used as frequent as Readmission Agreements. Relevant with this tool, EC Ministers responsible for immigration adopted the ***Conclusions of 30 November 1992 on countries in which there is no risk of persecution***. According to these Conclusions, the safe country of origin is one, which has not generated refugees, or the circumstances in the past that had warranted the application of the 1951 Geneva Convention no longer exist. In addition, the safe countries of origin, should respect human rights, operate with democratic institutions, and should be stable, where Member States are obliged to confirm all these. To be able to understand if an asylum application is manifestly unfounded or not, the situation in countries of origin started to be analyzed in a much more systematic way since then. In June 1992, the EC Immigration Ministers in Lisbon added an institutional layer to their cooperation by establishing the ***Centre for Information, Discussion and Exchange on Asylum (CIREA)***, which was tasked with the collection of information on the situation in countries of origin. Part of the common policy on asylum and immigration started to involve negotiations with the countries of origin, which are safe, on voluntary repatriation.[112] Since disputes on nationality of the asylum seeker, delays in issuing

[110] Evens Foundation (ed.), 'Refugee and Asylum Policy Influenced by Europeanization' in Europe's New Racism: Causes, Manifestations and Solutions; 2002, p.110

[111] ibid.

[112] Clotilde M. (ed.), Asylum, Immigration and Schengen Post- Amsterdam: A First Assessment; 2001, p.2

travel documents or denial of readmission by countries of origin inhibited efficient return of rejected asylum seekers, bilateral Readmission Agreements were also negotiated with countries of origin to render return more effective by ensuring these States' cooperation. With regard to securing the cooperation of countries of origin, a ***Recommendation was issued on 22 December 1995 for concerted action and cooperation in carrying out expulsion measures***. However, with regard to voluntary return policies, not much progress has been made in introducing a Community assistance program to that effect. *The HLWG* has mentioned the need for studying the possibility of voluntary return, where the conclusion of Readmission Agreements cannot be signed. The ***Communication of the Commission on a Community Immigration Policy on 22 November 2000*** also emphasized that higher priority has to be accorded to the development of voluntary return policies to the countries of origin.

Partnership with third countries (countries of origin/ transit) started to be mentioned much more in time with new tools: According to the ***Action Plan on the Implementation of the Amsterdam Treaty***, the establishment of a coherent EU policy on readmission and return should be achieved namely in two years. Furthermore, the Action Plan confirmed that, within a five-year period, "the possibilities for the removal of persons who have been refused the right to stay through improved EU coordination, implementation of readmission clauses and development of European official (embassy) reports on the situation in countries of origin" should be improved. As a recent central development, the ***Hague Program*** also called for common integrated country/region-specific return programs; the establishment of a ***European Return Fund*** by 2007; the timely conclusion of Community Readmission Agreements; and the prompt appointment by the Commission of a Special Representative for a common readmission policy. The Hague Program also introduced a new concept called ***'asylum camps'*** and focused on a study for the feasibility of processing asylum applications outside the EU

territory -essentially 'externalizing' the EU asylum policy under the name of 'co-operation with countries/regions of origin'. Back, in the beginning of 2000, the UK Home Secretary, Jack Straw, has suggested that a list of 'safe' and 'unsafe' countries be drawn up and that particular problem areas should have offices in order to process asylum applications in the third-country, rather than waiting until the applicant has made it to a European State. In theory, they thought that it could make it easier for those who have a legitimate asylum claim, but who cannot reach a safe country due to poverty or lack of opportunity; but in practice, it could be yet another way to stem the tide of asylum seekers, whether they are genuine or *bona fide*. The notion of "internalizing refugees",[113] which means keeping these people within their area of origin, was also used during the war in Bosnia Herzegovina; and *'safe havens'* were created under the supervision of the UN; however as tragically demonstrated in Srebrenica in 1995, these safe havens appeared to be not safe as assumed. This subject will be examined in much more detail in the following chapter of this thesis study.

[113] Joly, D., Kelly, L. and Nettleton, C. (eds.), Refugees in Europe: Hostile New Agenda; 1997, p.28

4.2. INVOLVEMENT OF CANDIDATE COUNTRIES IN THE EU'S ASYLUM AND MIGRATION STRATEGY:

Membership Association

European Union has expanded its membership several times since its inception. The ***Treaty on European Union*** (Article 49) stipulates that any European State, which respects the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, may apply to become a member of the Union. To these countries, which applied for Membership, the EU transfers its policy and practice in different areas under pre-accession process. Moreover, since most of these Candidate Countries are also countries of transit and sometimes of origin for illegal migrants and asylum seekers, partnership association strategy, which was examined in the first part of this chapter, is also pursued towards them.

Sandra Lavanex and Emek Uçarer[114] classify the policy transfer as obligated/coerced or voluntary transfer. According to them, obligated transfer operates vertically and often results in a top-down and binding process on those countries adapting to the EU's external policy. This obligated adaptation need not necessarily be under pressure and contrary to the interests of the country undertaking such an attempt. However, it occurs at the insistence of the EU, which acts as a policy entrepreneur. The policy transfer to Candidate Countries is an obligated one, without which the country cannot be an EU Member. Membership in the EU has been made conditional on adoption of the *acquis* also in the area of asylum and migration. The adoption of the formal and informal elements of the EU asylum and migration *acquis* was prescribed as a condition for membership: Adjustment is not only expected, but also

[114] Lavenex, S. and Uçarer, E. (eds.), Migration and the Externalities of European Integration; 2002, p.417-443

compulsory. In contrast to the several EU Member States which were able to negotiate opt-outs from common cooperation in asylum and immigration matters (e.g. the UK and Denmark), the Candidate Countries have no choice; but they have to accept the *acquis* in full under the accession partnerships. With this kind of policy transfer present in the accession conditionality and the obligation to implement the EU *acquis* in full, the enlargement preparations may be referred to as a specific form of 'Europeanization' of non-EU Member States. While in the case of Mediterranean, Eastern European and ACP countries that do not have any membership prospect, institutional ties are weaker and the EU enjoys less influence, for third countries that have a membership prospect the situation is different. These countries, who have a rapid transformation from countries of emigration into countries of transit and destination, have accepted to follow largely the terms in JHA set by their Western neighbors. The conditionality for membership gives the Union significant leverage in transferring to the Applicant Countries its principles, norms and rules, as well as in shaping their institutional and administrative structures.[115]

4.2.1. Accession Criteria and Integration of JHA Issues in the Enlargement Process:

For the pre-accession strategy, issues of asylum, migration and border control are very fundamental for the EU and Member States. EU is very concerned about illegal immigration from the East and is putting considerable pressure on Candidate Countries to set up efficient asylum systems, and more importantly to them, strict border controls, since the Union considers Candidate Countries to be a 'buffer zone'

[115] Grabbe, H., 'Stabilizing the East While Keeping Out the Easterners: Internal and External Security Logics in Conflict', in Lavenex, S. and Uçarer,E. (eds.), Migration and the Externalities of European Integration; 2002, p. 93

between them and the countries of farther East.[116] Moreover, the EU knows that in the medium to long-term, when complete freedom of movement of persons is achieved within the enlarged EU, current Member States will have to rely fully on the new Member States to control entries into the EU at the Eastern border -which is a problematic location regarding the route of asylum seekers and illegal migrants. That is why the Applicant Countries are also required to accept in full the *Schengen acquis* and further measures building upon it.[117] It appears very clearly that measures aimed at migration control are perceived by the EU to be an essential condition for the EU membership. For Candidate States, 'EU Accession' is the main stimulus for rebuilding the system of border control.[118] This was also reflected in the ***European Council at Tampere***, which called for closer cooperation and mutual technical assistance between the border control services of the EU States and for the rapid inclusion of the Applicant States in this cooperation. Following the Balkan crisis in the first half of 1990s, there was an increasing awareness that non-economically related issues such as Justice and Home Affairs also needed to be included in the accession negotiations in order to ensure the internal security of the enlarged EU.[119] Regarding enlargement questions, the ***JHA Council in 1997*** convened the so-called ***"Chevenement Group"*** (Group Enlargement) to assess the state of implementation of the *acquis* on asylum in the Candidate Countries. The ***Vienna Action Plan of 1998*** also made reference to the "important link" between the AFSJ and the enlargement process and the "special significance" that Justice and Home Affairs matters will have on applications for the EU membership. The fact that it was mentioned in the ***Seville Council Meeting*** in June 2002, that the lack of adequate cooperation of third countries with the EU regarding illegal migration would hamper the establishment of closer relations between these countries and the Union, also

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[116] Phuong, C., 'Enlarging Fortress Europe: EU Accession, Asylum and Immigration in Candidate Countries', in International and Comparative Law Quarterly; vol. 52, July 2003, p. 641, 645

[117] Presidency Conclusions, Tampere European Council; 15-16 October 1999, Paragraph No: 24-25

[118] ibid., p. 659

[119] Phuong, C., 'Enlarging Fortress Europe: EU Accession, Asylum and Immigration in Candidate Countries', in International and Comparative Law Quarterly; vol. 52, July 2003, p. 644

shows how important the co-operation on immigration and asylum issues are deemed for the Union.

The criteria adopted by the *1993 European Council Meeting in Copenhagen* constitute the basis for the accession process. The EU Candidate States, who have to meet these criteria (establishment of the rule of law, democratic institutions and a functioning free market economy…etc.), would also have to take over the elements of the EU *acquis* on asylum and implement all instruments belonging to it since 'keeping up with the obligations of membership' is also one of the preconditions for accession. For the Applicant Countries, accession depends on the ability of these States to adjust these '*acquis communautaire*' (the body of EU law, which includes instruments on asylum and immigration and commitments to human rights) into their national systems. Before 1989, Candidate Countries did not have any immigration or asylum laws or policies for the simple reason that there was no immigration to regulate.[120] Since these States will become more attractive -as countries of destination- with the EU Accession, the Union finds adoption of the *acquis* (against illegal migration and for building efficient asylum systems in Candidate States) as a pre-requisite for the EU membership.

The EU *acquis* on asylum is the growing set of binding and non-binding instruments that guide Member States' actions in the field of asylum. Even the non-binding *acquis* becomes *de facto* binding for the Applicant States through its conditional linkage to the future Union membership. This non-binding *acquis* includes also the hitherto unpublished Decisions by the Schengen Executive Committee and thus exceeds the level of implementation existing in the Member States.[121] Although the

[120] Grabbe, H., 'The Sharp Edges of Europe: Extending Schengen Eastwards', in International Affairs; 2000, p. 528 (cited in Phuong, C., 'Enlarging Fortress Europe: EU Accession, Asylum and Immigration in Candidate Countries', in International and Comparative Law Quarterly; vol. 52, July 2003, p. 644)

[121] Phuong, C., 'Enlarging Fortress Europe: EU Accession, Asylum and Immigration in Candidate Countries', in International and Comparative Law Quarterly; vol. 52, July 2003, p. 644

Schengen *acquis* must be complied in full by the Candidate Countries by the time of accession, it is well-known that some Member States still do not comply with it.[122] Another contradiction is the fact that Candidate States will not be fully part of Schengen when they become EU Member States even though they are under pressure to comply fully with the these *acquis*. Under the framework of the pre-accession strategy, Candidate States also have to develop full-fledged asylum systems in accordance with the EU standards. Since many of these counties were producing asylum seekers themselves not long ago, their transition towards countries capable of receiving asylum seekers and integrating them into the society is of course a challenging issue. Moreover, Applicant Countries will not be allowed to negotiate flexibility clauses with regard to Title IV, TEU; but they are bound to have adopted the complete *acquis* reached in this area at the time of joining the Union.[123] While involving in the *acquis* is *a la carte* for Member States, it is obligatory for Candidate States. To support this development, the first comprehensive list of the elements making up the *acquis* in Justice and Home Affairs, was published by the Commission in the first half of 1998 during the UK Presidency. This list also included the European Convention on Human Rights and the 1951 Geneva Convention with its 1967 New York Protocol as fundamental elements. In line with pre-accession strategy, the developing EU *acquis* on asylum has to be gradually adopted and implemented by the Candidate States, although these States cannot formally influence the law and policy making in this area. Furthermore, Candidate Countries must also,

> …bring their institutions, management systems and administrative arrangements up to Union standards with a view to implementing effectively the *acquis,* and in particular adopt and implement measures with respect to external border controls, asylum and immigration, and measures to prevent and combat organized crime...[124]

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[122] ibid., p. 647

[123] Lavenex, S., Europeanization of Refugee Policies: Between Human Rights and Internal Security; 2001, p. 135-136

[124] EU Initial Position for the Opening of Negotiations with the first six Candidate Countries, Document 6473/3/98 REV 3 JAI 7 ELARG 51, 25 May 1998

In December 1995, the *Madrid European Council* called on Candidate Countries not only to transpose the *acquis* into their national legislation but also to make sure that it is effectively implemented through appropriate administrative and judicial structures, as a prerequisite for the mutual trust required for the EU membership. The Council also called the Commission to provide an assessment on the Candidates' applications for membership. In June 1997 the Commission presented its *'Agenda 2000 for a stronger and wider EU'*, including a reinforced pre-accession strategy composed of several new instruments for each country. As part of the Agenda 2000, the Commission issued for the first time an *'opinion'* on the state of progress made by Candidate Countries in meeting the Copenhagen Criteria. A chapter on JHA, including an assessment of asylum and migration sectors, was included although not particularly critical at this stage. The Commission's 'opinion' has become thereafter (starting with 1998) an *'Annual Progress/ Regular Report'* which identifies the areas where progress is still needed before the EU membership and where the level of adoption and implementation of the *acquis* is scrutinized. On 12-13 December 1997, the Luxembourg European Council endorsed the *'Accession Partnership'* as a new instrument intended to be the key feature of the enhanced pre-accession strategy towards Candidate Countries. Moreover, the *Luxembourg European Council* has assigned the European Commission the task of compiling so-called Regular Reports analyzing the progress made in the capacity of each Candidate Country to implement the *acquis*. Following the Luxembourg European Council, which introduced the *'enhanced pre-accession strategy'*, the Council concluded for the first time in 1998 an Accession Partnership (AP) to help the Candidate Countries from Central Europe and Baltic region during the pre-accession preparations.[125] Accession Partnership may be regarded as a kind of road map given to the Candidate Countries by the EU, which identifies priorities for adoption of the *acquis* in the short and medium-term and highlights the main tools and financial resources available to reach these

[125] Accession Partnership documents for Cyprus and Malta were concluded in 2000 and for Turkey in March 2001.

priorities. As complementary to the 'Accession Partnership', each Candidate Country has been invited to adopt a *'National Program for the Adoption of the Acquis',* setting timeframes for achieving the priorities as set up in the AP and presenting the country strategy for integration to the EU. In both of these documents, asylum matters received in early years little consideration as opposed to border security and management, migration control and organized crime. To complement the more technical approach of the Commission, the Council, with a Joint Action[126] as of 1999, has also taken part in the exercise of assessing the Candidate Countries' progress in preparing themselves for the EU membership and has set up a mechanism for collective evaluation of the implementation of the JHA *acquis* by the Candidate Countries *(Council's Collective Evaluation Group).* Besides that, the European Parliament has become increasingly involved in the dialogue with the Candidate Countries. For the adoption of the *acquis,* the EU institutions and single Member States have embarked on large-scale monitoring exercises, training programs and resource transfers eastwards.

In 1997-1998, the EU institutions and the Member States had already started promoting JHA matters in the accession dialogue with Candidate States although emphasis was usually put on border control and migration management rather than on admission and protection measures. *Acquis* as regards the 'cooperation in the field of Justice and Home Affairs', which is listed in Chapter 24[127] and which should be transposed into the national systems of each Candidate Country, should be negotiated between the Member States and each Candidate State after the *negotiations for membership* start. For each country, accession is only possible once negotiations

[126] Council of the European Union, Joint Action of 29 June 1998 adopted on the basis of Article K.3 of the TEU, establishing a mechanism for collective evaluation of the enactment, application and effective implementation by the applicant countries of the *acquis* of the European Union in the field of Justice and Home Affairs, Official Journal of European Communities; (1998) L 191, p. 8-9

[127] The EU *acquis* was divided into twenty-eight chapters: on each chapter, a common negotiating position is adopted by the Council and then put forward to each individual Candidate Country during bilateral intergovernmental conferences.

have been concluded on all chapters of the EU *acquis*, and the draft Accession Treaty is approved by the Council with the assent of the Parliament and ratified by all current Member States and the Candidate Country concerned. In 2001, the JHA chapter of the EU *acquis* was opened for all Candidate States except for Turkey and Romania. Negotiations with some of the Candidate Countries (Hungary, Cyprus, Slovenia, Czech Republic and Estonia) on Chapter 24 were successfully closed by the end of 2001. Under this chapter, no transition period is required as all criteria are supposed to be met and the level of preparedness should be high enough to ensure an effective implementation of all the JHA *acquis* right upon accession.

The asylum and migration *acquis* has acquired a full and legitimate status in the negotiation process with Candidate Countries. The next step for the EU would be to assist Candidate Countries in developing integration assistance mechanisms for recognized refugees and creating more favorable reception conditions for asylum seekers. Otherwise, higher standards in Western Europe will continue constituting a pull factor and resulting in secondary movements to Europe.

4.2.2. EU Financial Assistance Programs for the Transposition of the *Acquis* into the National Systems of the Candidate Countries:

EU-led programs are used to strengthen the ability of the Candidate Countries in maintaining migration flows through border controls and visa policies and developing effective protection regimes on the basis of standards of the current Member States. For this aim, the EU is providing financial and technical assistance[128]

[128] For further information, please see the Regulation by the European Parliament and the Council, No. 491/2004 of 10 March 2004 on a program for financial and technical aid to third countries in the area of migration and asylum (Aeneas), OJ L 080, 18.03, 2004

primarily through 'PHARE', 'TACIS' and 'Pre-Accession Financial Assistance' programs, and helping the Applicant States to establish the required institutions and to train personnel via these instruments that are developed in structured dialogue meetings. The main instrument for the EU to grant assistance to Candidate States is the ***PHARE Program*** managed by DG Enlargement of the European Commission. The export of the asylum and migration *acquis* to the Applicant Countries from the Central and Eastern Europe has been largely channeled through the EU-funded PHARE (Poland, Hungary Assistance for the Reconstruction of the Economy) Horizontal Program, which was established in 1989, and of which aim is to explain the content of the *acquis* to the Candidates, to support the reforms taking place in the Central European States and to identify gaps in their protection systems. This program has provided for extensive training and dissemination activities on the asylum *acquis*. For Cyprus, Malta and Turkey specific assistance programs were introduced. At the Essen European Summit in 1994, when a pre-accession strategy for Candidate Countries was formally launched, it was decided that PHARE, which was originally economic in nature, would also focus on administrative and legislative support, including JHA. The PHARE assistance program has turned into an accession-driven instrument, helping Candidate States to meet the Union's requirements for membership. As part of the PHARE Program, a Twinning mechanism was put in place in 1998 with the view of assisting Candidate States to develop modern and efficient administrations as necessary to implement the *acquis* in a specific area, which also includes asylum and migration fields. Under this scheme, experts from Member States have been recruited in Candidate Countries for a period of 1-2 year(s) to provide technical assistance to the authorities in these States for adopting and implementing the *acquis*. From 1997 to 2001, ten PHARE National Programs in the fields of asylum and migration (which aimed at the alignment of the asylum/migration legislation of these Candidate States with the EU *acquis* by providing equipment, software and advisory support; setting up documentation centers for countries of origin; strengthening the capacity of the

responsible refugee agencies' staff; and rehabilitating the reception centers) were approved by the Commission. However, the number of the National PHARE allocations for asylum-related projects have always remained low. From 1997 until 2000, Candidate Countries have received about 11 million Euros of PHARE assistance for projects related to asylum, migration and visa policy, while the total of PHARE funding for all JHA projects in 10 Candidate Countries was over 370 million Euros.[129]

In 1999, ***PHARE Horizontal Program on Asylum (PHA)*****,** which ran until 2000 between 10 Central European and Baltic Countries, seven EU Member States, UNHCR, relevant NGOs and the EU Commission, was launched to provide technical and financial support on asylum to the Candidate Countries from the Central Europe and Baltic region. PHA was a development project that reviewed the state of implementation of the elements of the EU *acquis* on asylum in Candidate Countries and aimed at identifying the needs and priorities of each Applicant Country for setting fair and efficient asylum systems in line with the EU standards. On this basis, each Applicant Country drew, together with the EU experts and UNHCR, a *National Action Plan* indicating how they intend to fill these gaps. In 2001, a complementary project, a migration PHARE Program, was launched to review the implementation of the *acquis* on external borders, migration and documentation issues in the same Associate Countries, and ran until 2003. Another Program, called ***'Access'*****,** was launched in 1999 as a support initiative for NGOs operating in the Central and Eastern European Countries. In line with the priorities laid down in the Accession Partnership documents for these countries, Access was designed to provide financial support for the implementation of the *acquis*. Besides Access, the ***CARDS Program*** started to incorporate gradually the assistance instruments, which were successfully tested during the pre-accession strategy for the Central European States, to the Western Balkan countries. On the other hand, Eastern Europe started to benefit from

[129] For further information, please see the webpage of DG Enlargement.

the EU assistance through the ***TACIS Program*** which has been modeled over time after the accession-driven PHARE Program. Even with the countries of Mediterranean basin, which were not candidates for the EU membership, the EU has started a dialogue and developed its first assistance programs in migration management. The ***Odysseus Program*** which was in place since 1998 and the ***ARGO Program,*** which was launched in 2002 to support administrative cooperation in the fields of external borders, visas, asylum and immigration, also supported practitioners training and exchange of staff in the EU Member States and Candidate Countries.

We can conclude that besides the EU's insistence on adoption of the EU measures as a condition for membership and the yearly monitoring reports that push Candidate Countries for progress towards the adoption of the *acquis,* the 'success' of the 'conditionality approach' is further supported by the use of short-term financial incentives in the EU Financial Programs, which have been examined in the section above.

4.2.3. Turkey as a Case Study:

With the last developments on 17 December 2004, the ***European Council in Copenhagen*** decided, on the basis of a report and recommendation from the Commission, to open accession negotiations with Turkey in the end of 2005. Turkey lodged its application for the EU membership in 1987; however, in 1989, the Commission adopted its opinion reflecting a negative answer due to the political and economical situation existent in Turkey; the relations between Turkey and Greece; and also the situation in Cyprus. In December 1997, the ***European Council in Luxembourg***, confirmed at the highest level Turkey's eligibility for accession to the EU and decided to draw up a strategy to prepare Turkey for accession. In 1999, the

European Council in Helsinki welcomed the "recent positive developments in Turkey, as well as Turkey's intention to continue its reform towards complying with the Copenhagen criteria" and declared Turkey as a Candidate Country to join the EU on the basis of the same criteria as applied to the other Candidates. At its meeting in Luxembourg in December 1997, the European Council had decided that the Accession Partnership would be the key feature of the enhanced pre-accession strategy, mobilizing all forms of assistance to the Candidate Countries within a single framework. In Helsinki, the European Council decided that an Accession Partnership (which shall contain priorities on which accession preparations must concentrate in the light of the political and economic criteria and the obligations of a Candidate State) and also a National Program for the Adoption of the *Acquis*, will be drawn up on the basis of the previous Conclusions of the European Council. With this manner, the EU targets its assistance towards the specific needs of each Candidate as to provide support for overcoming particular problems during the pre-accession. In full compliance with this approach -although financial assistance was totally or partly blocked since 1980- the Commission proposed on *26 July 2000* a Regulation for the establishment of a single framework for coordinating all sources of the EU financial assistance to Turkey for pre-accession. This ***Framework Regulation for Turkey*** is modeled on the Regulation for the 10 Central and Eastern European Candidate Countries[130] and also on the analysis in the Regular Report of 2000 regarding the progress made by Turkey towards membership. On *8th of March 2001,* the EU has adopted the ***Accession Partnership for Turkey,*** which defined the principles, priorities, intermediate objectives and conditions decided by the Council. The purpose of the Accession Partnership is defined as to:

> set out in a single framework the priority areas for further work identified in the Commission's 2000 Regular Report on the progress made by Turkey towards membership of the European Union, the

[130] Council Regulation (EC) No 622/98 (OJL 85), 20.3.1998, p.1

> financial means available to help Turkey implement these priorities and the conditions which will apply to that assistance.[131]

AP also states that it is expected that Turkey, based on this Accession Partnership, adopts a National Program for the Adoption of the *Acquis* before the end of the year.

The intensification of the EU's relations with Turkey and the growing emphasis put on the external action in the development of common asylum and immigration policies have led to intensifying cooperation between Turkey and the EU, in this area, too. As analyzed by Kemal Kirişçi, adaptation to the EU *acquis* in asylum and immigration has become an integral part in the special Accession Partnership preparing Turkey for eventual membership in the Union.[132] This 'membership association' with Turkey has encouraged adoption of the *acquis* in the areas of asylum policy, irregular migration, and visa policy, which is leading to a comprehensive overhaul of Turkey's traditional approach in these fields. In the Justice and Home Affairs Section, the Accession Partnership defined developing information and awareness programs on the legislation and practices in the European Union in the field of Justice and Home Affairs; enhancing the fight against organized crime and ensuring enforcement of the new Customs Code and its implementing provisions as short-term priorities. The medium-term priorities for Turkey were listed as developing training programs on Community law and on the implementation of the JHA *acquis*; starting alignment of visa legislation and practice with those of the EU;[133] adopting and implementing the EU *acquis* and practices on migration (admission, readmission, expulsion) so as to prevent illegal migration; continuing to

[131] For further information, please see the Council Decision of 8 March 2001 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with the Republic of Turkey (2001/235/EC)

[132] Kirisci, K., 'Immigration and Asylum Issues in EU-Turkish Relations: Assessing EU's Impact on Turkish Policy and Practice', in Lavenex S. and Uçarer, E. (eds.), Migration and the Externalities of European Integration; 2002, p.125–142

[133] Candidate Countries have to adopt EU's strict visa policy, which requires nationals of a long list of countries to apply for a visa in order to gain entry to the EU. Most Candidate Countries had to change the visa-free regimes with their Eastern and Southern neighbors, with whom they have often maintained close political and economic relations.

strengthen border management and preparing for full implementation of the Schengen Convention; lifting the geographical limitation to the 1951 Geneva Convention in the field of asylum and developing accommodation facilities and social support for refugees. The inclusion of obligations concerning asylum and immigration in the Accession Partnership document of the General Affairs Council, of December 2000, has already led to first instance of adaptation, reflected, for example, in the decision to lift the geographical limitation existent in the Turkish asylum system, in the tougher stance towards irregular migration, and the reconsideration of the formerly relatively liberal visa policy.[134] The Accession Partnership, which was revised by the Union in *May 2003*, defined negotiating for a Readmission Agreement with Turkey and increasing the public administration's capacity for an effective border management regarding the prevention of illegal migration as short-term priorities. The medium-term priorities included the statement that the harmonization process in the field of asylum should start with the lifting of the geographical limitation; the system for reviewing and deciding asylum cases should be strengthened; and accommodation units and social support should be provided for asylum seekers and refugees.

On the basis of the Accession Partnership document, on *24 March 2001* Turkey has adopted its first ***'National Program for the Adoption of the Acquis'***[135] which set out a timetable regarding the reform that will take place in accordance with the short and mid-term priorities, which were set out by the Union in the Justice and Home Affairs Section of the Accession Partnership. The National Program set out the priorities, which should be realized in 2001 and within medium-term. Regarding asylum, it was

[134] Kirisci, K., 'Immigration and Asylum Issues in EU-Turkish Relations: Assessing EU's Impact on Turkish Policy and Practice', in Lavenex S. and Uçarer, E. (eds.), Migration and the Externalities of European Integration; 2002, p.136-138

[135] For Turkish and English versions of the National Programs on the Adoption of the *Acquis*, please see www.deltur.cec.eu.int or www.abgs.gov.tr.

stated in the National Program that Turkey would consider about the lifting of the geographical limitation after it makes necessary changes for legislation and infrastructure, and also after the EU shows necessary sensitivity to burden sharing, and of course depending on the fact that this will not create a mass influx situation into Turkey from the East. Turkey also stated that present accommodation and social support mechanism, especially after taking into account the situation of the vulnerable groups, will be developed with the help of UNHCR, IOM and relevant NGOs. Turkey has revised this National Program after the EU has revised the Accession Partnership in 2003. In its revised National Program, in Article 24.1, Turkey mentioned about the work on the ***Draft Asylum Law*** which was supposed to come into force in 2005, and the Task Force which was established in June 2002 to draft the ***Strategy Papers*** *on Asylum, Migration and External Borders;* and affirmed that Turkey will lift geographical limitation after discussing this issue in detail during the accession negotiations. With the timetable attached to the Program, Turkey referred to the establishment of a central expert body for Refugee Status Determination in 2004-2005. The establishment of return centers and of civilian and professional border guards' organization in 2004-2005 was mentioned in Article 24.2. Turkey stated in Article 24.3 that the EU's negative visa list was mostly adopted and Turkey should start transit visa implementation in 2005. In Article 24.4, it was stated that Turkey signed Readmission Agreements with Syria and Greece in 2001 and with Kyrgyzstan in 2003. Return centers for foreigners was also mentioned in the same article of the National Program.

As it was mentioned before, for Cyprus, Malta and Turkey specific assistance programs were introduced. For the first time, in 1996 General Affairs Council adopted a Regulation on ***MEDA Program*** for twelve Mediterranean countries including Turkey. In 1997, 'Agenda 2000' which considers that the EU should continue to support Turkey's efforts to resolve its problems and to forge closer links with the EU, was adopted by the Commission. However, Turkey started to benefit

from pre-accession strategy especially after Helsinki, to stimulate its reforms. In accordance with the cooperation framework concluded in late 2000 by UNHCR and the Turkish Ministry of Interior, training activities on strengthening asylum procedures with the Government were funded from the EU's High Level Working Group on Migration and Asylum. On *26 February 2001,* the Council adopted a Regulation, which provides for the coordination of the EC pre-accession financial assistance to Turkey. In *June 2001,* the Council has decided to authorize the EC to negotiate with Turkey a Framework Agreement, which will simplify legal procedures to permit Turkey's participation in Community's financial programs. *In the same year, in December,* the Council adopted a *Regulation on pre-accession financial assistance to Turkey*, which states that the assistance has to focus on the priorities identified in the AP, one of which is Justice and Home Affairs area. The assistance to Turkey may be categorized under two headings: *'Support in Institution Building'* (to implement the EU *acquis* and practice) and *'Investment Support'* for necessary infrastructure to comply with the *acquis*. Turkey is still benefiting from several funds under ***Leonardo da Vinci, Youth, Socrates and the Twinning*** (which is a part of the Pre-Accession Financial Assistance Program and an instrument for Institution Building). Under these Twinning Projects, Pre-accession Advisors/Resident Twinning Advisors from the EU Member States, who are seconded to work in Turkey for a period of 1-2 years, are providing their technical expertise to the Turkish authorities in the fields like asylum, migration, visas and border management. The strategy includes technical and administrative assistance for the exchange of information on legislation and practices, the drafting of legislation, enhancing the efficiency of the institutions, the training of staff, and increasing the security of travel documents and detection of false documents. In the fields of asylum-migration and integrated border management two different twinning projects were launched in Turkey, for the first time in 2004. Twinning projects on visa policy/ practice and human trafficking were planned to start under 2005 programming.

In the field of asylum, Turkey has a distinct position when compared with the EU Member States: Although Turkey signed the 1951 Geneva Convention regarding the Status of Refugees, and its 1967 New York Protocol, it chose to exercise the option to limit 1951 Geneva Convention's application to persons who became refugees as a result of the events occurring in Europe (Geneva Convention, Art. 1 B (I)). As a result of this geographical limitation, Turkey is granting refugee status to people coming only from Europe, and giving a 'temporary status' to the 'asylum seekers' who are non-European (until UNHCR, BO Ankara resettles them to third countries) according to the Article 3 of the Regulation, dated 30 November 1994. On the other side, this 'limitation' option is not in contradiction with international law since it is offered by the Convention, itself. Furthermore, its application does not mean a denial of fundamental protection to non-European refugees. The principle of *non-refoulement*, which lies at the root of the 1951 Convention, whereby a refugee shall not be returned to a country where he or she faces persecution, is part of the customary international law and of other international instruments, notably European Convention on Human Rights, of which Turkey is a signatory without geographic distinctions. Turkey's national Regulation of 1994 on the treatment of refugees and asylum seekers recognizes the obligation to protect non-Europeans as well as European refugees from *non-refoulement*. However, since there are a few asylum applications from Europe that Turkey has to deal with and the resettlement of non-Europeans to third safe countries are made by UNHCR and IOM, Turkey did not very necessarily develop a long-term asylum, immigration and integration policy, and adopt an asylum act up to now. After the given importance to asylum and migration issues in the Accession Partnership document, it is understandable that Turkey started to commit itself to upgrading its asylum system and adopt necessary legal texts, especially as a repercussion of its application for the EU membership. However, this does not mean that the attempts to upgrade asylum system and capacity in Turkey were only the consequence of the EU accession process since the training activities between Turkey and UNHCR to increase the Turkish capacity in

the field of asylum, started already in 1997 even before Helsinki Summit, which gave candidacy status to Turkey. Under this partnership, the Turkish government agreed on a ***Cooperation Framework between the UNHCR and the Ministry of Interior (MOI),*** with the aim of creating a permanent training program within the MOI on asylum; and establishing corps of specialized 'Refugee Status Determination' staff and interpreters, and a country of origin information system -all targeting building institutional and technical capacity in the field of asylum, especially which will be a necessity for Turkey to lift the geographical limitation.

On *8th of March 2004*, Turkey started to implement a one-year Twinning Project which was called ***'Support for the Development of an Action Plan to Implement Turkey's Asylum and Migration Strategy'.*** The overall objective of the project during the implementation, of which Denmark posted a pre-accession advisor in Turkey, was to align Turkey's asylum and migration legislation and practice with the corresponding elements in the EU *acquis* and to provide an overall strategy in the area of asylum and migration. In order to reach this overall objective, activities like dissemination of the relevant EU *acquis* to Turkish officials, and designing and submission of proposals for capacity building projects for future in the fields of asylum and migration were delivered. During the Project, which was carried out by a Consortium between the Foreigners, Borders and Asylum Department within the Turkish Ministry of Interior's General Directorate of Security, Danish Immigration Service and UK Immigration and Nationality Directorate, Turkey's first ***National Action Plan (NAP) in the fields of asylum and migration,*** was formulated and then disseminated to Turkish officials. The National Action Plan on Asylum and Migration, which is a comprehensive document, is based on an extensive analysis of the present legal and institutional set up in Turkey, on the reforms already undertaken during Turkey's candidacy to the EU, and the actions that should be taken in the coming years. It is a more detailed planning instrument for future capacity building in Turkey in the fields of asylum and migration and, hence, for EC

pre-accession funding - than the 2001 and 2003 National Programs for the Adoption of the *Acquis* and the asylum and migration strategy papers adopted by the Turkish Ministry of Interior in 2003.

In addition to the above-mentioned developments, Turkey has concluded *bilateral Readmission Agreements* with individual EU Member States, such as Sweden and Netherlands, on a common model to permit the transit through Turkey for rejected Iraqi asylum seekers who volunteer to be repatriated to Northern Iraq. Turkey also signed Readmission Agreements with Syria and Greece in 2001 and Kyrgyzstan in 2003, and concluded another agreement with Romania in January 2004. In March 2004, Turkey agreed to open negotiations with the EU concerning a Readmission Agreement which will be signed with the Union. In view of UNHCR, Turkey cannot be considered as a safe third-country for the return and readmission of the unscreened asylum seekers; and any Readmission Agreement that will be negotiated should therefore specifically exclude asylum seekers, or contain explicit safeguards that the readmitting party allows asylum seekers to have access to the asylum procedure.[136] Besides the developments in readmission, Turkey has also continued alignment with the *EU Negative Visa List* and introduced visa requirement for citizens of Azerbaijan in November 2003. Moreover, it has already started to draw up a *National Action Plan on integrated border management* and still continues working towards creating non-military professional corps of border guards. In March 2004, Turkey signed a *Cooperation Protocol* with Bulgaria concerning border management to protect both countries' territorial waters. Negotiations have continued concerning the conclusion of a *Joint Action Program on illegal migration* between the Union and Turkey, which increased the measures against smuggling of illegal migrants. Moreover, Turkey signed a *Cooperation Agreement* with EUROPOL in May 2004 that will enhance cooperation in fighting against organized crime. The *installation of*

[136] Report by Johannes van der Klaauw (Regional Office of UNHCR in Brussels), CIREA Meeting on Turkey, Brussels, 28 September 2001

'Automatic Fingerprint Information System' has been completed in 47 provinces, and comprehensive improvement of infrastructure at border gates still continues. A new *Road Transportation Law and a Road Transportation Regulation* were adopted, providing for carrier sanctions. The authorities have initiated a number of legal and administrative reforms in conformity with the EU *acquis* and standards.[137] All these measures were taken as part of the intensified and active cooperation with the EU on JHA issues. In the Communication of the EU Commission to the Council and European Parliament on 6 October 2004, concerning the *'Recommendation of the European Commission on Turkey's Progress towards Accession'*, the EU has stated that managing migration and asylum would all be facilitated through closer cooperation both before and after accession since Turkey's borders will be the external borders of the EU; and the conclusion of a Readmission Agreement which will be signed between the Union and Turkey, would help to address these problems in the pre-accession period. The Commission repeated that Turkey should lift the geographical limitation and take the responsibility of also non-European asylum seekers as setting up a system to deal with all asylum applications. The Union, which aims to protect its borders and ensure its internal security with these cooperation frameworks (that will distract asylum seekers from the EU borders), exposed its motive and intention in the text attached to the Regular Progress Report of 2004, which stated "the accession of Turkey, would thus be likely to reduce the number of asylum applications dealt with by the current EU Member States".[138]

Turkey, as a country of origin and transit, is getting prepared for the future, to be a receiving country and to establish a full-fledged asylum system with the ownership of refugee status determination by its own capacity. The work to move the asylum

[137] Please see the JHA Chapter of the Regular Report of the EC on Turkey's Progress towards Accession; 6 October 2004, at www.abgs.gov.tr.

[138] Commission Document called 'Issues Arising from Turkey's Membership Perspective', p.42, attached to the 2004 Regular Report on Turkey's progress towards accession; Brussels, 6.10.2004, COM(2004) 656 final

issues under the competence of an expert body, which will be out of police; and to establish reception, accommodation and return centers is ongoing.[139] Turkey has already intensified the work on its first ***Asylum and Foreigners Acts***, which will incorporate the EU standards; and also on an ***Internal Directive on handling of the asylum applications***, which will be a bridge between the current 1994 Regulation and the future Asylum Act. The Internal Directive on the handling of asylum applications, which was found "protection-oriented and incorporating minimum standards of the new *acquis* on asylum procedures", by the EU Commission in its Regular Report on 6 October 2004, is planned to be a guidebook for the police forces in the provinces to decide on asylum applications, at the first hand, until an expert body is established. Lifting of the ten-day time limit for asylum applications, which is planned to be included in the Internal Directive and the future Asylum Act, was already signaled in Turkey's first NAP on asylum and migration that, *inter alias*, referred to the accelerated procedures in addition to the subsidiary protection and temporary protection schemes. Moreover, ***the work to revise the 1994 Regulation*** is continuing to lift the ten-day time limit for asylum applications. Since 1998, the Union is monitoring Turkey with its Regular Reports for progress, regarding the improvements in Turkey towards accession. As the EU tries to surround itself with a safety zone, Turkey will be one of the countries where the migration and refugee flows will be blocked or transferred, after Turkey establishes strong border controls and a working asylum system. It is clear that Turkey will need sustainable financial assistance in order to modify its policy to keep with the EU standards. Turkey's adaptation may best be characterized as motivated by the conditionality linked to the prospect of eventual membership in the EU. However, two factors are likely to limit the impact of conditionality and the calculation of the costs of non-adaptation: the uncertain time-frame within which adaptation will be rewarded, and the questionable

[139] For further information, please see the National Action Plan on Asylum and Migration of 2005 at www.unhcr.org.tr

credibility of an unclear promise for membership.[140] Without meeting Turkey's and other third countries' interests, the EU's attempts for 'burden sharing' between the EU and 'the external world' can only turn out to be 'burden shaping' as the EU's role in protecting refugees would be shifting to the further East.

[140] Lavanex, S. and Uçarer, E., 'The External Dimension of Europeanization: The Case of Immigration Policies' in Cooperation and Conflict: Journal of the Nordic International Studies Association; 2004, p. 432

4.3. CONCLUSION

This chapter of the thesis work aimed to explain how the countries of origin/ transit and the Candidate Countries for the EU membership found themselves attached to the EU attempts to formulate a common asylum and migration policy. The chapter tried to reflect the period especially after the establishment of HLWG and following the Tampere European Council, aiming at illustrating the development of 'partnership' with countries of origin/transit in the forms of Readmission Agreements, and safe third-country application. It was explained that Candidate Countries had to establish these association links in a much bigger motive and interest, and were bound to adopt the EU measures also in the fields of asylum and migration due to their obligation to do so.

After the Tampere Summit, a humanitarian organization working in the field of asylum and migration, *'Medecins Sans Frontieres Belgium'*, welcomed particularly the establishment of the HLWG as a very positive evolution in their report prepared in the light of the Tampere Summit; and supported taking the root causes into account when developing a migration policy. However, they also stated:

> The final objectives of the efforts to intensify cooperation with countries of origin have been 'how to keep asylum seekers and migration out of EU?' and 'how to combat illegal trafficking?'. Such an approach is geared towards 'border control' and is inspired by exclusively Eurocentric interests. Unfortunately, this has little to do with a real root-cause approach. A real root-cause approach aims to

> reduce the need to migrate…without preventing people from entering the EU when they really need to.[141]

The HLWG was also criticized by this NGO which stated that although the establishment of it was welcomed, it was disappointing to see that the Action Plans that the HLWG prepared were written from a border control oriented perspective, not really to deal with the causes of flight. It was also mentioned it is remarkable that major attention is paid to the possibilities of concluding Readmission Agreements with countries in the region, rather than implementing the human rights related measures of the various Action Plans. Furthermore, UNHCR stated that they perceived the tasks of HLWG as a positive step in that it represents a comprehensive approach to refugee policy addressing root causes of refugee movements and strengthening reception and protection conditions in the countries concerned and providing assistance for voluntary return where suitable. However, they also criticized the approach where it no longer recognizes the shared responsibility between countries of origin, transit and destination; but turns into a deterrence policy with the aim of directing refugee movements away from the EU Member States. Many human rights organizations told that implementing the measures in the realm of foreign policy, including human rights measures, was quite slow in comparison to the repressive measures adopted by Justice and Interior ministers of the EU. These organizations criticized the approach of HLWG as saying that human and financial resources have been put into projects for the return of illegal migrants and rejected asylum seekers, rather than programs aimed at strengthening capacities in the region for the protection of refugees.[142] The European Parliament did not also find the bilateral Readmission Agreements as "a realistic solution of the phenomenon of

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[141] Please see the 'Note on Asylum and Migration' prepared by Medecins Sans Frontieres Belgium in the light of the Tampere Summit on 15 and 16 October 1999 in the UNHCR Trainers' Tool Box on EU Matters: Tampere Conclusions and Relevant Commentaries; 1999, p. 53-58

[142] Van der Klaauw, J., 'Building Partnerships with Countries of Origin and Transit', in Marinho C. (ed.), Asylum, Immigration and Schengen Post- Amsterdam: A First Assessment; 2001, p.41

illegal migration" and rejected any automatic link between development cooperation and readmission.[143]

Although many scholars, international organizations and NGOs criticized the Readmission Agreements, the attempts of the HLWG, and also the safe third-country concept, this chapter of the thesis work did not focus on these critics since the 5th chapter will mainly examine, from a critical approach, the export value of the EU asylum policies and measures for the third countries, especially for the Candidate States.

[143] Watson, G., 'EU Asylum and Immigration Policies: The Point of View of the European Parliament' in Clotilde, M. (ed.), Asylum, Immigration and Schengen Post- Amsterdam: A First Assessment; 2001, p. 50

CHAPTER V

ASYLUM HARMONIZATION PROCESS AND ITS IMPACTS WITHIN THE CONTEXT OF THE EU ENLARGEMENT

As Raymond Hall, Director of UNHCR's Europe Bureau states, the creation of a Common Asylum System and its extension to third countries should be given further importance since "the ramifications of the EU harmonization process will be felt far beyond the current borders of the European Union".[144] The developing EU asylum and immigration *acquis* have increasing implications for other destination countries, as well as the countries from which asylum seekers originate or through which they travel on their way to the countries of the EU. According to Brubaker, international migration becomes a matter of international interdependence, where "a person cannot be expelled from one territory without being expelled into another; cannot be denied entry into one territory without having to remain in another".[145] Changes in the asylum and immigration policy of one country have repercussions for other countries since a more permissive policy may lead to a reduction of immigration flows in neighboring countries, while a more restrictive policy may increase the number of

[144] UNHCR News, "EU's Harmonized Treatment of Asylum Seekers Welcomed", 26 April 2002

[145] Brubaker, R., 'Citizenship and Nationhood in France and Germany', 1992, p.26, cited in Lavenex S. and Uçarer E. (eds.), Migration and the Externalities of European Integration; 2004, p.425

migrants seeking entry in other countries.[146] The EU's importance as a major destination for voluntary and forced migrants imply that common policies aiming at the management of inflows will necessarily have implications for other countries, especially for the ones who have a membership prospect since they are under pressure to change their asylum and immigration laws and policies according to the EU requirements. Candidate Countries in the Eastern and Southern borders of the Union are very significant "in terms of controlling the main European migratory channel between a disintegrating East and an integrating West".[147] Moreover, because of their geographical location, today's Candidate, tomorrow's new Member States will be responsible for policing the new Eastern borders of the EU and receiving asylum seekers traveling from further East.[148]

While the previous chapter was an introduction to the emergence of the 'external dimension' of the EU asylum and migration policies, or in other words, a prologue regarding the involvement of third countries (countries of origin/transit and Candidate Countries) in the EU's policy in the above-mentioned fields; this chapter will focus on the ramifications of the extension of these policies beyond Europe, mainly to the Candidate States. The external effects of the EU policies occur in a more diverse manner and include both positive and negative implications. For that reason, the formulation of the asylum *acquis* within the EU, and its extension beyond the Union cannot be criticized only from a negative perspective, since the transference of the EU's asylum instruments during the enlargement process will have both positive and negative ramifications, or benefits and shortcomings for the future EU Member States and the international protection regime. Due to these

[146] Lavanex, S. and Uçarer, E., 'The External Dimension of Europeanization: The Case of Immigration Policies' in Cooperation and Conflict: Journal of the Nordic International Studies Association; 2004, p.425

[147] Phuong, C., 'Enlarging Fortress Europe: EU Accession, Asylum and Immigration in Candidate Countries', in International and Comparative Law Quarterly; vol. 52, July 2003, p. 653

[148] ibid., p. 641-642

considerations, fifth chapter of this thesis work will be divided into two sections under two main headings, which will first focus on the negative implications regarding the establishment of a European refugee regime and its transference beyond Europe; and then the benefits that originate from the establishment of a Common Asylum Policy and its extension to the Candidate Countries.

5.1. NEGATIVE IMPLICATIONS REGARDING THE ESTABLISHMENT OF A EUROPEAN REFUGEE REGIME AND ITS EXTENSION BEYOND EUROPE

Since Amsterdam, Member States have been still trying to establish a Common European Asylum Policy, which will be composed of legally binding texts for all Member States and Associate Countries. During the first phase of harmonization on asylum, between 1999 and 2004, most of the 'pre-supposed' *acquis* on asylum, like the Directives on reception facilities, family reunification, temporary protection and burden sharing, qualification and asylum procedures were adopted –though only political agreement was reached on the last of these instruments. When compared with the security-oriented and non-binding texts on asylum and migration of early 1990s (like the London Resolutions of 1992 containing guidelines for handling manifestly unfounded claims and applications from asylum seekers who passed through a safe third-country or who are from a safe country of origin); the newly adopted *acquis,* which are binding on Member States, are safeguarding the rights of refugees much more due to the reactions came from UNHCR, the Commission and the Parliament of the Union, and various international organizations and NGOs in the area to the restrictive measures of 1990s. After the Tampere Summit Conclusions, which contained strong focus on the need for common asylum and immigration policies to offer guarantees to those who seek protection, the newly adopted *acquis* followed a protection-oriented approach; however there are still many critical points since restrictive and deterrent practices of the individual Member States prevailed in some areas, especially in the field of migration control, due to the unanimity voting principle. In this subchapter, mainly the negative ramifications as regards the Candidate Countries' alignment with the asylum and migration standards will be emphasized by reflecting the general humanitarian concerns about the foundation of

a European asylum and migration system which was shaped with the restrictive and deterrent practices of early 90s. The extension of a less flexible asylum system in Europe which has been established with lowest common denominators will of course have negative impacts on Candidate Countries f these countries become satisfied with the minimum standards and do not bring much more liberal norms to their asylum and immigration systems. The risks are obvious: "The accession process may also degenerate to burden-shifting eastwards and the export of protection standards could replicate the EU failings or remain a dead letter".[149] The endemic problems in the asylum practices of the EU countries may be exported to Candidate Countries. The asylum *acquis* that jeopardize protection standards for refugees in the current EU States may be transferred to the future EU States. In other words, the fault-lines, which leave significant gaps in the guarantees of protection in the advanced legal systems of the West, may become more problematic when they are exposed to the newly democratized States in the East.[150] Candidate Countries, which were originally adopting relatively generous policies towards asylum seekers because they had not realized the impact of the future EU accession and also thought that the influx of asylum seekers was only going to be temporary, may copy the restrictive practices of the EU when they face with the inflow of asylum seekers that were diverted by the EU into their territories. As Guild and Niessen state, the consequence of moving the protection burden to less developed States, is the reduction in the level of protection for asylum seekers, as the resources available in third countries will inevitably be more limited compared to the resources in the EU Member States.[151] Moreover, according to them, there is a risk of undermining the concerted efforts of the Union and other international bodies to enshrine human rights protection in third States,

[149] Noll, G., Negotiating Asylum: The EU *Acquis*, Extraterritorial Protection and the Common Market of Deflection; 2000, p.153
[150] Byrne, R.; Noll, G.; Vedsted-Hansen, J. (eds.), New Asylum Countries: Migration Control and Refugee Protection in an Enlarged European Union; 2002, p.376
[151] Guild, E. and Niessen, J., The Developing Immigration and Asylum Policies of the European Union: Adopted Conventions, Resolutions, Recommendations, Decisions and Conclusions; 1996, p.122

since the Associate States with less wealth, administrative and legal resources will have disbelief of the efforts of the EU which is unwilling to protect its own asylum seekers. During this sub-chapter, the problematic essence of this cooperation between the Union and third countries, deriving from the unequal distribution of responsibility between the Member States and Candidate Countries in the development of a Common Asylum System, will also be examined as another negative point. While constituting the relevant section, the Union's non-binding acts of 1990s and the individual State practices in the area will be taken into consideration much more than the concrete and binding last developments towards the formulation of the Common Asylum Policy (like the Qualification and Procedural Directives) since restrictive European policies and practices in the field of asylum and migration developed much earlier than the first phase of asylum harmonization which started in 1999.

5.1.1. Enlargement of Restrictive Policies/Practices to Third Countries:

Many critics think that the right to seek and enjoy asylum from persecution -a core principle of human rights protection and the very foundation of international refugee law- is under serious threat in Europe since 1990s.[152] Many States in the EU now feel that the large amounts of money that the industrialized countries are spending for asylum seekers could be better spent to keep the refugees in their region.[153] The problems of financial and administrative burden as parallel to the increasing numbers of asylum applications; the blurring of asylum and migrant categories, combined with increased xenophobia and anti-immigrant reactions within Europe; and the

[152] Mariner, J. (at Human Rights Watch), "50 Years On-What Future for Refugee Protection?" at www.hrw.org/campaigns/refugees

[153] The cost of one asylum seeker for Danish authorities is 123.000 Danish Kronas or 16.600 Euro on a yearly basis (also available at Danish Immigration Service's web page at www.udlst.dk.

newly perceived threats -terrorism, international crime, drug trafficking and illegal migration that grew in importance- have stimulated restrictive tendencies in the Union countries and have resulted in a number of national measures for control on the access into the territories of the EU Member States. Especially early 1980s marked the "globalization of a hitherto primarily European asylum problem".[154] Member States shared similar security concerns, particularly over the uncontrolled movement of criminals, terrorists and drugs that might accompany the creation of a border-free area.[155] Fears as regards the flood of unwanted foreigners entering into their territories have led to a 'siege mentality' in many Western European States.[156] As Edminster from U.S. Committee for Refugees put out:

> The failure to meet the challenges posed by the arrival of larger numbers of asylum seekers in Europe has unleashed an unseemly competition in which individual European States have each sought to trump the other with increasingly restrictive policies.[157]

Due to this fear, many European countries, even the most liberal EC States with practices of being open to asylum seekers, like Germany, the Netherlands and Denmark,[158] brought changes to their aliens' legislations in 1980s: It was in *Germany,* where the State had the most liberal laws governing asylum; and where, as a result of this liberal policy, the highest numbers of asylum applications of Europe were lodged each year. The Paragraph 16 of the Constitution *(Grundgesetz)* written for the New Federal Republic in 1949 was in a generous way providing for the

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[154] Lavenex, S., Europeanization of Refugee Policies: Between Human Rights and Internal Security; 2001, p.27

[155] Papademetriou, D.G., Coming Together or Pulling Apart: The European Union's Struggle with Immigration and Asylum; 1996, p. 40

[156] U.S. Committee for Refugees, At Fortress Europe's Moat: The Safe Third-country Concept; July 1997, p. 7

[157] ibid., p. 9

[158] All three EC States at that time had legislations which required, to a certain degree, that asylum seekers are given shelter and a right to due consideration. (Bolten, 1992, cited in Manners, Ian, 'Negotiation of an Asylum Policy for the EC', in Substance and Symbolism: An Anatomy of Cooperation in the New Europe; 2000, p. 117)

protection and sustenance for any politically persecuted person reaching Germany's borders and claiming asylum. Asylum in Germany had become a means for many immigrants until 1982 to enter Germany without having to deal with visa and immigration restrictions. However, in 1982, Germany made a reform that led to the adoption of the Procedural Asylum Law *(Asylverfahrensgesetz)* which replaced the procedural regulations of the Foreigners Act. The new Regulations were designed to make staying in Germany more unattractive for asylum seekers, and thus, were aimed at reducing rising application numbers. This reform was an attempt to limit the right of entry into the territory in the cases of 'manifestly unfounded' asylum applications and to decrease the number of instances regarding the appeal right. The most significant changes have been made especially after 1993, when the inflows from Eastern Europe increased dramatically. In July 1993, Germany amended its Constitution to "do away with the unqualified right of asylum in Germany".[159] At that point, as Angenendt states, the constitutional guarantee of asylum for political refugees became much more restricted.[160] Since then, asylum seekers have had to provide more proof of their 'claimed persecution' if they came from so-called secure countries of origin. These restrictive policies also paved the way for new policies to restrict admission and facilitate expulsion or transfer of asylum seekers particularly to the transit countries. Germany introduced a 'safe third-country' Regulation, which allows the government to send asylum seekers back to any safe third-country, through which they had traveled before entering into Germany.[161] The deportation of asylum seekers was also made easier. The restrictive measures continued in 1997 and 1998: Further changes for asylum and migration policy (like the worsening of conditions for the care and accommodation of asylum seekers) were made to reduce the burden that migration places upon public funding.[162] Also immigration controls have become more restrictive in *Netherlands* since 1994. Measures like 'safe third-

[159] Collinson, S., Europe and International Migration; 1993, p. 23
[160] Angenendt, S. (ed.), Asylum and Migration Policies in the European Union; 1999, p.40
[161] ibid., p.40
[162] ibid., p.41

country' and 'secure countries of origin' were incorporated into the asylum laws to decrease the number of asylum seekers. Much more priority started to be given to the inspection of travel documents for so-called high-risk flights which have the greatest likelihood for carrying potential asylum seekers. Some airline companies have even begun to collect the travel documents of potential asylum seekers before the flight, in order to prevent them to destruct their documents, or in other words to remove the evidence for their country of origin and their travel route. Moreover, to deter further aliens from coming to the country, Netherlands adopted the 1995 Aliens Employment Act, which limited the employment of aliens.[163] In *Denmark,* based on the increase in the number of asylum applications from 4300 in 1984 to 9300 in 1996,[164] restrictive measures have been taken since the beginning of 1990s to tighten border controls and speed up asylum procedures. The Aliens Act of 1993 was amended several times and more restrictive immigration rules, like the third-country Regulation, were introduced. In 1992, the measures were undertaken leading to more restriction in the area of family reunification and to sanctions for asylum seekers, who do not cooperate with the Immigration Service. The Danish authorities could even compel immigrants to take a DNA test if they want to reunite in Denmark with their family members.[165] In 1994, the concept of 'safe countries of origin' was integrated to the Danish asylum legislation and in May 2001 wider detention possibilities were introduced. Following the general elections of November 2001, the new Conservative/Liberal government announced its intention to take measures in order to reduce the number of foreigners coming to Denmark and brought more restrictive amendments to the Aliens Act *'Udlaendingeloven'*, which proved to be successful since the number of asylum seekers and recognized refugees reduced drastically since 2002.[166] Elsewhere in Western Europe, rising numbers of asylum

[163] ibid., p.42

[164] For further information, please see www.udlst.dk

[165] Angenendt, S. (ed.), Asylum and Migration Policies in the European Union; 1999, p.44

[166] Schlenzka, N., Politics of Asylum and Refugee Protection in Denmark; 2002, p.14

claims,[167] coupled with a reduction in the proportion of applicants accepted as refugees, have established the justification for even more restrictive asylum policies.[168] Strict procedures were introduced immediately in order to "deal with the pressure of asylum seekers already inside Europe and to dissuade those outside".[169] As Watson argues, immigrants were seen as "easy scapegoats for the woes of the world"[170] and "refugees and asylum seekers were increasingly portrayed as people who are problem rather than as being the people who have problem".[171] Since September 2001, with the attempts of fighting global terrorism which was on the rise, these tendencies have been exacerbated and population movements started to be seen not only as threatening cultural formation and identity in Western European countries, but also, in some cases, endangering national security.[172] As an old French Interior Minister, Charles Pasqua, stated "democracy stopped where the States' reason started"[173] and as Stuart Mill wrote in 1861, security became "the most vital of all interests".[174] Most of the Western governments have started to undertake ever-stricter measures to cut the number of asylum seekers arriving on their territory and applying for asylum, and went towards creating a 'Fortress Europe' with several

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[167] In 1977, the number of asylum seekers arriving in Western Europe was estimated at 30.000. In 1987, their number had risen to 186.000 and in 1993 to 543.000. (For further information, see ECRE, Asylum in Europe: Review of Refugee and Asylum Laws and Procedures in Selected European Countries; vol. II, 1994, p.6)

[168] Black, R., 'Refugees and Asylum Seekers in Western Europe: New Challenges', in Black, R. and Robinson, V. (eds.), Geography and Refugees, Patterns and Processes of Change; 1993, p.87

[169] Manners, Ian, 'Negotiation of an Asylum Policy for the EC', in Substance and Symbolism: An Anatomy of Cooperation in the New Europe; 2000, p. 114

[170] Watson, G., 'EU Asylum and Immigration Policies: The Point of View of the European Parliament', in Clotilde M. (ed.), Asylum, Immigration and Schengen Post- Amsterdam: A First Assessment, p.49

[171] Joly, D., 'Who's Protection? European Harmonization on Asylum Policy', The Cambridge Survey of World Migration; 1995, p.498

[172] Lavanex in her article 'Europeanization of Refugee Policies: Between Human Rights and Internal Security', at page no. 13, notes that from a realist perspective, uncontrolled immigration not only undermines a State's sovereign authority over its own territory, but it also threatens its social, economic and political fabric.

[173] Joly, D., Kelly, L. and Nettleton, C. (eds.), Refugees in Europe: Hostile New Agenda; 1997, p. 18

[174] Mill, J. S., Utilitarianism, On Liberty, Considerations on Representative Government; 1992, p. 56 (cited in Gibney, M., Security and the Ethics of Asylum after September 11, Centre for Legal Research and Policy Studies, 24 May 2002, p.1

restrictive measures like strict visa policies and strong border controls, carrier sanctions, safe third-country applications, Readmission Agreements, narrow application of appeal rights in manifestly unfounded claims, constricted definition of the 1951 Convention relating to the Status of Refugees and the creation of regional protection areas. As Joly states, European governments have become concerned with the increase and unpredictability of asylum seekers' arrivals and the 'loss of control' over their borders, which then caused the chain extension of these restrictive measures and tendencies in all European countries.[175]

With the introduction of restrictive measures -especially after the wave of asylum immigration at the beginning of 1990s- while visa requirements have become more stringent, asylum procedures have been made faster and more difficult in all European countries.[176] The number of asylum applications began to reduce across Europe as Member States started to make it harder to claim asylum: When compared to the increase in the estimated flow from 387.025 in 1990 to 672.383 in 1992, the number of applications started to decrease since 1993 due to this restrictive tendency. In 1996, the estimated flows into the Community were only 226.806.[177] The decrease in the number of asylum applications continued until today in most of the Member States, although not at the same speed of 1990s. September 11 and Madrid attacks also caused the world to seem less secure and a "much more uncertain place".[178] This 'changed world' also provided the rationale for new measures of exclusion and control of refugees. Applications for asylum in the EU (excluding Italy) fell by 14% in the second quarter of 2004 when compared to the first quarter of the same year.[179] The total number of persons applying for asylum in Denmark was 4593 in 2003

[175] Joly, D., Kelly, L. and Nettleton, C. (eds.), Refugees in Europe: Hostile New Agenda; 1997, p. 18

[176] Angenendt, S. (ed.), Asylum and Migration Policies in the European Union; 1999, p. 19

[177] Source: Eurostat (2000)

[178] Gibney, M., Security and the Ethics of Asylum after September 11, Centre for Legal Research and Policy Studies, 24 May 2002, p.5

[179] U.K. Home Office, Asylum Statistics, 2nd Quarter (April-June); 2004, p.2 (also available at http://www.ind.homeoffice.gov.uk)

compared to 6068 in 2002 and 12.512 in 2001. Thus, the figure continued to decrease in 2003 and in 2004 it came to a third of the level of 2001. According to the Home Office statistics, applications for asylum in UK fell by 41% in 2003 to 49,405.[180] The total number of persons lodging an asylum application was only 7.920 in the second quarter of 2004 while it was 20.090 in the same quarter of 2002. Even in only three months the decrease in the applications was striking: The number of asylum applications reduced by 11% from 8.940 in the first quarter of 2004 to 7920 in the second quarter of the same year.[181] The reason behind this fall was the progress in the implementation of the EURODAC fingerprint system, the use of 'safe third-country' lists and new border control measures out of UK which prevented illegal aliens to enter into the UK territories (e.g. external control via liaison officers, cooperation with other countries for external control like patrolling services in France and Belgium …etc.), or measures like the use of accelerated procedures which deterred bogus asylum seekers who saw that during the examination of their case they will not anymore be able to stay in Britain as long as before, and the increasing hardship in getting a visa for entry into the UK. As UK Home Office also put out overtly in its Strategic Plan of 2004, through new laws, Britain "simplified the asylum appeals system, provided for the certification of clearly unfounded cases and ended automatic support for asylum applicants who fail to claim at the earliest opportunity"[182] which also had effect on the decrease in the number of applications for asylum. In addition to the decrease in the number of asylum applications all over Europe, the recognition rates started to fall down, which also deterred asylum seekers to come to Europe and lodge their claims. The recognition rate in Denmark stood at 22% in 2003, compared to 28% in 2002 and 53% in 2001.[183] In UK, overall an

[180] Heath, T., Jeffries, R., and Purcell, J., Home Office Statistical Bulletin: Asylum Statistics of United Kingdom, 2003, 2nd Edition; 24 August 2004, p.1 (also available at http://www.homeoffice.gov.uk/rds)

[181] U.K. Home Office, Asylum Statistics, 2nd Quarter (April-June); 2004, p.2 (also available at http://www.ind.homeoffice.gov.uk)

[182] U.K. Home Office, Home Office Strategic Plan: Confident Communities in a Secure Britain; August 2004, p. 21

[183] Danish Immigration Service, Statistical Overview, 2003, p.2 (also available at www.udlst.dk)

estimated 5% of the applications in 2003 resulted in grants of asylum.[184] This number decreased much more in 2004: 3% of asylum applicants was granted asylum in the second quarter of 2004, when compared with 4% in the first quarter of the same year. 89 % of initial decisions were refusals[185] or in other words, the number of cases recognized as refugees and granted asylum was only 3,865 in 2003 while it was 8,270 in 2002 and 11,450 in 2001.[186]

As a result of the restrictive measures adopted by the Member States -which diverted certain flows of refugees to other destinations or deterred certain refugees from seeking asylum- while admissions to refugee status in Europe declined immensely in recent years, the number of the asylum applicants climbed up contrarily in neighboring countries and Associate States. Starting from 1994, the number of asylum seekers fell in nine major European countries including Germany, which faced a sharp decline by more than 60 percent.[187] With the applications like 'safe third-country rule' and Readmission Agreements, under the name of *'burden sharing'*, the EU started to shift the responsibility of its asylum seekers to the less developed countries, who are less equipped and competent to afford such care and maintenance for refugee protection as already burdened with the large majority of refugees from neighboring countries. In 2002, General Secretary of European Council on Refugees and Exiles (ECRE), Peer Baneke, has criticized these divertive measures stating that action taken by the UK to implement immigration checks at Prague airport may have slightly reduced the actual number of asylum applications

[184] Heath, T., Jeffries, R., and Purcell, J., Home Office Statistical Bulletin: Asylum Statistics United Kingdom 2003, 2nd Edition; 24 August 2004, p.1 (also available at http://www.homeoffice.gov.uk/rds)
[185] U.K. Home Office, Asylum Statistics, 2nd Quarter (April-June); 2004, p.3 (also available at http://www.ind.homeoffice.gov.uk)
[186] Heath, T., Jeffries, R., and Purcell, J., Home Office Statistical Bulletin: Asylum Statistics United Kingdom 2003, 2nd Edition; 24 August 2004, p.33 (also available at http://www.homeoffice.gov.uk/rds)
[187] Santel, B., 'European Union and Asylum Seekers: The Harmonization of Asylum and Visa Policies', in Thranhardt, D. (ed.), Europe- A New Immigration Continent, Policies and Politics in Comparative Perspective; 1996, p.130

made by Czech nationals in that country by 270 (from 1200 in 2000 to 930 in 2001); but it may also have led to other countries receiving greater numbers of Czech applicants than in previous years.[188]

Another important impasse regarding the development of a restrictive asylum and immigration regime within Europe is the fact that the third countries have already started to realize they will become the new front line States outside an 'EU Fortress'. Due to these considerations, the neighboring States have also started to implement restrictive policies and increased their efforts to ensure that they would not become the new front-line and get all the asylum seekers that the EU is deterring.[189] They started to adopt the same strategy as Schengen States in order to ensure that asylum seekers cannot stay in these countries. For example, like many other Candidate States, Poland, which did not want to be the final destination for asylum seekers, has also negotiated and signed bilateral Readmission Agreements with its own neighbors such as Bulgaria, Estonia, Romania, Ukraine and Armenia. Accelerated procedures have been introduced in all Candidate Countries' asylum systems to deal with manifestly unfounded applications, and "other EU concepts such as safe third-country and safe country of origin whose conformity with international refugee protection standards may be in doubt"[190] have been incorporated to Candidate States' practice, which all shows how quickly the restrictive EU practices and policies have been transferred to third countries. As Joly states:

> If Europe labels refugees as burdensome, adopts measures to effectively prevent asylum seekers from reaching European borders and refuses to

[188] Baneke, Peer (General Secretary of ECRE), "Asylum Developments in Europe", Speech given at the ECRE Biannual Meeting in Seville, 9 June 2002

[189] Copeland, E.A.; Creation and Evolution of the Refugee and Economic Migration Regimes: Testing Alternative Frameworks, A Thesis Submitted to the Fletcher School of Law And Diplomacy in partial fulfillment of the Requirements for the Degree of Doctor of Philosophy, May 1996, p. 506-507

[190] Phuong, C., 'Enlarging Fortress Europe: EU Accession, Asylum and Immigration in Candidate Countries', in International and Comparative Law Quarterly, vol. 52, July 2003, p. 650-651

> grant asylum to those who manage to make a legitimate claim, then it is likely that the other regions of the world may soon follow suit.[191]

Candidate Countries, which have applied for the EU membership, have obligatorily accepted these restrictive policies, like visa regime; and showed strong efforts to adopt the EU asylum and migration standards with the prospect of getting the EU membership. The defects and shortcomings of the *acquis* already started to be exported to Candidate States by means of pre-accession strategy. Most of the time, the Candidates adopted the EU standards without questioning the validity and conformity of these standards with international standards.[192] As criticized in an article at Economist dated 4 August 1990, "East Europeans can be forgiven for feeling that they have demolished their Iron Curtain only to see the ramparts of a 'Fortress Europe' rising up on the other side".[193] There is always a fear that the extension of these European policies and practices to the Associate Countries with the pre-accession strategy, and to the third countries with bilateral agreements may result in the creation of a 'bigger' Fortress Europe in the future. The transference of these restrictive measures to today's Associate Countries and tomorrow's Member States is also enlarging the Union's stand towards asylum and immigration issues.

After reflecting the above-mentioned concerns as regards the extension of restrictive European measures to third countries, especially to Candidate States, let's now examine these restrictive policies and practices of the EU States and other Western Countries, under mainly three sub-titles: non-arrival, diversion and deterrence policies.

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[191] Joly, D., Kelly, L. and Nettleton, C. (eds.), Refugees in Europe: Hostile New Agenda; 1997, p. 37

[192] Phuong, C., 'Enlarging Fortress Europe: EU Accession, Asylum and Immigration in Candidate Countries', in International and Comparative Law Quarterly; vol. 52, July 2003, p. 655

[193] "Compromise: Building the New Wall", in Economist, 4 August 1990, p.12

a. Non- Arrival (Non-Admission) Policies:

Non-arrival policies aim at preventing, interrupting or stopping improperly documented aliens, including potential asylum seekers, from ever reaching Europe. Imposition of visa obligations, bringing sanctions for carriers which transport illegal travelers, implementing strong border checks, carrying out pre-screening measures at the borders of third countries through recruiting Liaison Officers in countries of transit and origin which generate refugees, physical interception or interdiction of vessels before reaching the EU territory, or creation of international zones[194] in the airports to avoid obligations towards refugees…can be listed as examples of measures preventing physical access.

'Visa policy' is a traditional and legitimate instrument used by States for years to control the entry of the aliens into their territory. Until the Schengen visa list, European governments adopted individual visa policies, which were aimed to restrict the influx of unwanted foreigners. Visa restrictions were imposed on nationals of the former Yugoslavia by many individual European countries, as refugees who started to seek asylum with the reason of 'ethnic cleansing' from this region increased in number. This individual application changed with the Schengen Agreement that aimed at establishing a 'harmonized' visa regime including a 'common list'[195] of States whose nationals will be required to apply for visas prior to entry into the European Union. Visa requirements have been strengthened by the legislation providing for fines on airlines or other carriers. The Schengen Agreement[196] and Dublin Convention ensure that ***'carrier sanctions'*** will be introduced in all EU

[194] As described in ECRE's document called 'Asylum in Europe: Review of refugee and asylum laws and procedures in selected European countries', page no. 9, the international or 'restricted' zone is obviously "part of the national territory of the State concerned, but the fiction has been established and is being maintained that it is somehow *extra muros*. The asylum seeker is physically in the territory but has no legal right to be there".

[195] Member States can themselves also determine visa requirements for nationals of countries which are not on the common list.

[196] Schengen Implementation Act, Article 26 (Para. 2)

States.[197] Some States felt that the Chicago Convention on International Civil Aviation, which makes airline companies responsible for the transportation of passengers without valid papers, was insufficient. As a result, legislative provisions for sanctions[198] against carriers (airlines, shipping, railway and coach companies) transporting improperly documented passengers were put in force virtually in all Member States of the EU.[199] The UK, Denmark and West Germany were among the first which incorporated carrier sanctions into their legislations as a means of preventing entry of foreigners without valid travel documents.[200] Denmark with the amendment of its Aliens Act in October 1988, Germany since 1986 and United Kingdom with its Carriers Liability Act in May 1987 started to impose heavy fines on companies carrying undocumented passengers, including asylum seekers.[201] Particularly in Denmark, the practice of carrier sanctions has become an acceptable measure for the control of asylum seekers and was somewhat extended by the creation of *'international zones'*[202] within the Dublin system.[203] In this way, pressure was put on carriers to check passengers before departure to see that all travel documents are in order. As Cruz put out:

> Finding themselves burdened with an increase of asylum applications, considering a substantial quantity of those asylum applications to be

[197] Joly, D., Kelly, L. and Nettleton, C. (eds.), Refugees in Europe: Hostile New Agenda; 1997, p. 26

[198] Please see the 1944 Chicago Convention on Airline Aviation, Article No. 13, which requires the airline passenger to comply with the entry formalities of the country of destination, but which does not impose a legal duty on the airline operator to enforce such compliance by the passenger.

[199] The level of coordination among Member States as regards the imposition of sanctions on carriers is low. Some States like Finland, Spain and Sweden do not have laws on carrier sanctions, but demand only that carriers take responsibility of repatriation of the aliens in question. (see EP Working Paper, Asylum in the EU Member States; 2000, p.15)

[200] Manners, Ian, 'Negotiation of an Asylum Policy for the EC', in Substance and Symbolism: An Anatomy of Cooperation in the New Europe; 2000, p. 118

[201] Joly, D., Kelly, L. and Nettleton, C. (eds.), Refugees in Europe: Hostile New Agenda; 1997, p. 19

[202] Article 7 (2) of the Dublin Convention states that transit zones through airports shall be considered 'international zones' which are not regarded as being home territory and thus claims for asylum cannot be made in them.

[203] Manners, Ian, 'Negotiation of an Asylum Policy for the EC', in Substance and Symbolism: An Anatomy of Cooperation in the New Europe; 2000, p. 119

> fraudulent….Member States…have resorted to introducing stricter legislation on carrier liability to stop the problem before it reaches the Community itself.[204]

In addition, many States have posted their own airline ***'Liaison Officers'*** at major international airports both in countries of departure and transit with the task of prevention of improperly documented passengers. This has been complemented with financial and technical assistance to the countries of departure and transit to enable them to detect fraudulent documentation, or with hardening of entry measures like increasing requirements asked from an alien such as return ticket and sufficient money for covering the stay to enter to the EU. Although most of the EU States have introduced a number of the above-mentioned measures, UK's application regarding non-arrival of foreigners is striking: As stated in 'Home Office Strategic Plan: 2004-2008', through a greatly expanded network of UK's Airline Liaison Officers all over the world, with the use of new detection technology for border controls, and as a result of the movement of security and immigration controls out of UK (mainly to the French coast), many of those without a right to come to the UK have been turned away before they reach UK shores. The same document clearly states that UK will continue to strengthen controls at every point in the system: travel documents will increasingly be checked before travelers even reach the UK and they will move more controls to ports in France, Belgium and elsewhere.[205]

The migration control measures are designed to prevent, interrupt or stop outside a State's national territory the movement of persons without the required documentation for entry into that State, which has the competence to control and regulate the movement of persons across their borders. The EC Visa Regulation and the visa list attached to the Schengen Common Consular Instructions oblige States to

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[204] Cruz, A., Shifting Responsibility- Carriers' Liability in the EU Member States and North America; 1995, p.27

[205] Home Office, Confident Communities in a Secure Britain: Home Office Strategic Plan, 2004-08; 2004, p.21 (also available at www.homeoffice.gov.uk)

introduce visa requirements vis-à-vis certain third countries. However, while such interception policies and practices are aimed principally at combating irregular migration, they also pose alarming barriers for asylum seekers to have access to an authority where they could seek protection.[206] For instance, although some Eastern European countries are still refugee producing countries, the imposition of strict visa requirements on the nationals of these States would in effect contribute to denying persecuted individuals to have access to protection. Asylum seeker, who lacks a visa, is usually not allowed entrance to the concerned State and the determination procedure takes place while the applicant is held in a waiting zone at the border or in an airport; or much worse, the person without valid visa is directly turned away at the border without having been able to actually lodge his/her claim for asylum. Measures like visa requirements for aliens coming from specific source countries, imposing sanctions on carriers carrying undocumented aliens, establishing international zones…etc. make the lodging of asylum claims much more difficult. With non-arrival actions, access of unwanted aliens, including asylum seekers, to host countries and to the asylum procedure is being made increasingly difficult, and the right to asylum is turning out to be "a contestable concept".[207] While the EU is providing considerable assistance and training to reinforce border control on the Eastern borders of the Candidate Countries, a new curtain is being put in place in the further East.[208] Nevertheless, as also Hathaway states, "while the principle of territorial sovereignty implies the right of States to refuse foreigners' entry into their territory, the concept of refugees constitutes an exception to this prerogative of States".[209] Besides their competence to control their borders, States also have obligations that arise from generally accepted principles of international law and

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[206] UNHCR Report, Reaching a Balance Between Migration Control and Refugee Protection in the EU: A UNHCR Perspective; Geneva, September 2000, p. 8

[207] Manners, Ian, 'Negotiation of an Asylum Policy for the EC', in Substance and Symbolism: An Anatomy of Cooperation in the New Europe; 2000, p. 116

[208] Phuong, C., 'Enlarging Fortress Europe: EU Accession, Asylum and Immigration in Candidate Countries', in International and Comparative Law Quarterly; vol. 52, July 2003, p. 648-649

[209] Hathaway, J.C., The Law of Refugee Status; 1991, p. 231

applicable international agreements. Access to the territory and to the asylum procedures are at risk of being undermined if stringent control measures are put in place without adopting sufficient guarantees addressing the situation of persons seeking protection.[210] In her article 'Europeanization of Refugee Policies: Between Human Rights and Internal Security', Lavanex states that as people seeking the protection of another State, refugees are a transnational phenomenon which conflicts with the territorial organization of States.[211] However, the wide-ranging measures for immigration control introduced up to now by the European States have served to seriously undermine the foundations of the refugee protection regime since they are blunt instruments, which frequently do not distinguish between refugees and ordinary migrants.[212] As United Nations' ex High Commissioner for Refugees, Sadako Ogata, stated in 1993 "at the heart of the European asylum crisis is the difficulty of separating those who have a valid claim to international protection and those who can be returned to their own countries as irregular migrants".[213] Visa policy is a legitimate instrument for controlling immigration, but when it is directed against asylum seekers, it in obvious contradiction with the principle of asylum and the relevant instruments of international law.[214] According to EC Visa Regulation and the visa list, the States can contain exemption clauses, allowing States to deviate from common visa requirements.[215] However, the application of a protection seeker for visa exemption even takes time and may result in the exposure of the person in need of protection to the risk of persecution. The entry visas required from the refugee producing countries' nationals (who usually have serious difficulties in applying for

[210] Van der Klaauw, J., 'Towards a Common Asylum Procedure', in Guild, E. and Harlow, C. (eds.), Implementing Amsterdam: Immigration and Asylum Rights in the EC Law; 2001, p.193

[211] Lavenex, S., Europeanization of Refugee Policies: Between Human Rights and Internal Security; 2001, p.10

[212] UNHCR Report, Reaching a Balance Between Migration Control and Refugee Protection in the EU: A UNHCR Perspective; Geneva, September 2000, p.7

[213] Manners, Ian, 'Negotiation of an Asylum Policy for the EC', in Substance and Symbolism: An Anatomy of Cooperation in the New Europe; 2000, p. 116

[214] ECRE, Asylum in Europe: Review of refugee and asylum laws and procedures in selected European countries; vol. II, 1994, p. 8

[215] Please see Article 4(1) of the EC Visa Regulation and Article 15 of SC.

a passport and visa due to the fear of persecution), the non-arrival mechanisms like imposing sanctions on carriers transporting undocumented aliens, controlling measures by Liaison Officers or interception of vessels which carry undocumented aliens before reaching the territorial waters …all prevent potential asylum seekers to reach Europe and inhibit their entry and access to asylum procedures, which, in reality, violates the right to seek asylum, and in a way the principle of *non-refoulement*. When denying entry of a foreigner who has protection needs, the contracting States to the ECHR, violate Article 3 of the Convention, if the denial of entry results directly in the exposure of an individual to the violation of his rights under the ECHR.

These non-arrival practices exist in the national legislations of many European States, like Germany. According to the German asylum legislation, if a person expresses his/her wish to seek asylum at the German border -while not possessing the necessary entry documents[216] or when found in the vicinity (i.e. within approximately 30 kilometers) of the border immediately before or after illegal entry-[217] the border authorities decide whether or not the applicant is granted leave (permission) to enter into the German territory. According to the 1951 Geneva Convention and 1967 Protocol, there are core rights for refugees that should be safeguarded, like ensuring admission to safety, protection against *refoulement* (including non-rejection of asylum seekers at the frontier), no punishment for illegal entry, and access to fair and efficient procedures for the determination of refugee status. However, the EU countries sometimes prohibit illegal entry and punish the asylum seekers who lack passports, by not issuing their asylum applications. Although lacking proper and adequate documentation on the part of asylum seekers complicates the asylum process and the task of determining refugee status, still these problems cannot in themselves justify 'refusal to admit' or 'summary exclusion from asylum

[216] For further information, please see the Sections 13(3) and 18(1) of the Asylum Procedural Act of the Federal Republic of Germany.
[217] ibid., Section No. 18(3)

proceedings' since asylum seekers most of the time can reach a safe country only by using illegal means. The fact that the applicant has arrived in an irregular manner is not a reason to declare the application inadmissible. An application for asylum may be declared inadmissible only if it can be proven that the applicant has already found protection in another country, or if a safe third-country can be identified which accepts responsibility for the examination of the claim fully.[218] When it comes to the question of protection from persecution, there is no rational basis for distinguishing between a person fleeing persecution with a document and without a document.[219] This is also inconsistent with Article 31 of the 1951 Convention, which accepts that there is a valid justification for a refugee's illegal entry or presence in an asylum country. According to Paragraph 2 of Article 31, States must likewise not apply restrictions other than those necessary on the movements of refugees.[220] As long as the refugee travels directly from his/her county of origin and reports to the authorities in the country of destination without delay, the illegality of the transport should not be a bar to the access to the asylum procedure. However, with high sanctions imposed on carriers, transportation of protection seekers without documents causes high risk and therefore becomes bad business for carrier companies.[221] In their Recommendation No.1163, dated 1991, the Parliamentary Assembly of the Council of Europe also agreed that airlines sanctions undermine the basic principles of refugee protection and the right of refugees to claim asylum, while placing a considerable legal, administrative and financial burden upon carriers and moving the responsibility away from the immigration officers to the hands of airline staff, who do not have the proper education or experience to separate out refugees from illegal immigrants. Private companies are given *de facto* competence to accept and

[218] Van der Klaauw, J., 'Towards a Common Asylum Procedure', in Guild, E. and Harlow, C. (eds.), Implementing Amsterdam: Immigration and Asylum Rights in the EC Law; 2001, p.177

[219] For further information, please see the EXCOM Conclusion No. 15 of 1979, which states that an application cannot be considered as inadmissible since the applicant could not submit the asylum request within a specified time limit or in compliance with other formal requirements.

[220] EP Working Paper, Asylum in the EU Member States; 2000, p.15

[221] Noll, G., Negotiating Asylum: The EU *Acquis*, Extraterritorial Protection and the Common Market of Deflection; 2000, p.178

administrate asylum seekers' claims.[222] However, airlines and other carrier personnel are not authorized by international law to either make asylum determination on behalf of States or to assume immigration control responsibilities. They are not immigration officials and should not be used "as a first line of defense against asylum seekers who would generally find it difficult to gain entry visas"[223] during their flight from persecution. A Swedish newspaper put out the development of non-arrival policies in the EU States and its extension to Associate States in a very concise manner as stating that:

> The EU governments are looking at a phantom picture of an overpopulated Europe…The EU Member States are with growing desperation trying to mend the fences around *'Schengenland'*. Refugee boats in the Mediterranean are being hunted by the military police. The entrances to the Channel tunnel are being enclosed with barbed wires so that no one will be able to go for that perilous walk… States in the East get support so they will be able meet EU border control standards.[224]

Considering that most asylum seekers reach Western Europe either by boat or by land from the Southern and the Eastern neighbors, this rule puts a considerable burden on the countries possessing an external border with the Union.[225] As a result of the bilateral agreements between these countries and the Union, the countries beyond Europe are also implementing stricter border controls. The fact that these third countries do not want to be the target of flows of people when the EU door is closed, also results in these third States to adopt strong border control measures and visa obligations. As Phuong puts out, restrictive migration policies in the EU, which have already led Central and Eastern European countries to become countries of

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[222] Levy, C., 'European Asylum and Refugee Policy after the Treaty of Amsterdam: the birth of a new regime' in Bloch, A. and Levy, C.(eds.), Refugees, Citizenship and Social Policy in Europe; 1999, p.45

[223] Manners, Ian, 'Negotiation of an Asylum Policy for the EC', in Substance and Symbolism: An Anatomy of Cooperation in the New Europe; 2000, p.119

[224] Dagens Nyheter News, "Europe Haunted by Fear of Ghosts-Immigrants", 26 June 2003

[225] Lavenex, S., Europeanization of Refugee Policies: Human Rights and Internal; 2001, p. 99-116

destination, leads these neighboring States to adopt stricter measures, too.[226] For Candidate Countries, due to the pre-accession process, stricter border controls and migration management even becomes an obligation for membership since these countries will have the duty to guard the external borders of the Union, when they become the EU Members.[227] Therefore, the improvement of border controls and the adoption of the EU visa list are seen as essential conditions for accession of the Candidate States, which is the main stimulus for rebuilding the system of border control in the Eastern neighbors of the EU.[228] The Commission's each yearly-produced country report focuses on this need to improve border control in the Candidate States, as the main EU demand in JHA and a priority area for the EU aid. The demand for stricter border controls on the future Eastern borders gives us the signal of an enlarged 'impenetrable Europe'. As in the case of Poland,[229] the accession to the EU is getting linked with the prerequisite of fulfilling the Schengen criteria, and it is demanded on the part of the EU that these Associate Countries have to introduce visa obligations for the neighboring States in their further East.[230] The Union establishes a buffer zone (between the Union and the countries of further East), which is a line of defense to control and limit the inflow of asylum seekers into the Union; and financially assists these buffer zone nations to regulate flows between the European Union and the East, and to return illegal aliens including asylum seekers.[231] The neighboring countries to the EU, which are being urged to form a buffer against the hordes from the East, are strengthening their border management

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[226] Phuong, C., 'Enlarging Fortress Europe: EU Accession, Asylum and Immigration in Candidate Countries', in International and Comparative Law Quarterly; vol. 52, July 2003, p. 646

[227] Noll, G., Negotiating Asylum: The EU *Acquis*, Extraterritorial Protection and the Common Market of Deflection; 2000, p.154

[228] Phuong, C., 'Enlarging Fortress Europe: EU Accession, Asylum and Immigration in Candidate Countries', in International and Comparative Law Quarterly; vol. 52, July 2003, p. 659

[229] It should be noted that Polish government in 1993 and 1994 received more than 120 million DM from Germany in an effort to strengthen the controls at the Eastern Polish borders as well as to train the Polish Border Police.

[230] Collinson, S., Europe and International Migration; 1993, p. 23

[231] Levy, C., 'European Asylum and Refugee Policy after the Treaty of Amsterdam: the birth of a new regime', in Bloch, A. and Levy, C. (eds.), Refugees, Citizenship and Social Policy in Europe; 1999, p.17-18

mechanisms and introducing visa requirements for the nationals of their neighbors in the further East and South. Asylum seekers traveling from or through States sharing borders with the EU are increasingly faced with a *'cordon sanitaire'* erected along the outer limits of the Union.[232] All these non-arrival measures in a way spread to the other third countries by a chain reaction and affect the international refugee protection regime in an unconstructive way. Non-arrival policies adopted by today's Candidate Countries are preventing and stopping improperly documented aliens, including potential asylum seekers from ever reaching Europe although it is clear that States cannot discharge themselves of their responsibilities like the rule of *non-refoulement* by moving border control away from their own frontiers or by invoking the provisions of their internal laws.[233]

b. Diversion (Deflection) Policies:

Diversion policies are designed to shift the responsibility to other States for those asylum seekers who manage to arrive at the borders of the EU. This kind of measures usually results in the refusal of the concerned State to consider the substance of the asylum application and in the removal of the applicant from the territory.[234] Introduction of 'safe third-country' or 'safe first country of asylum' concepts, signing Readmission Agreements with third countries for the return of illegally-residing aliens, and attempts to set up regional protection centers can be given as the examples of the diversion measures. Sadly, many of the measures introduced by Western European and other industrialized States since the beginning of 1980s have had the effect of diverting the refugee problem elsewhere, often to those States that

[232] Overbeek, H., 'Towards a New International Migration Regime: Globalization, Migration and the Internalization of the State', in Miles, R. and Thranhardt D. (eds.), Migration and European Integration: The Dynamics of Inclusion and Exclusion; 1995, p.15-36

[233] UNHCR Report, Reaching a Balance Between Migration Control and Refugee Protection in the EU: UNHCR Perspective; Geneva, September 2000, p. 11

[234] ECRE, Asylum in Europe: Review of refugee and asylum laws and procedures in selected European countries; vol. II, 1994, p.27

are least able to guarantee effective protection. Notions such as 'safe third-country' and 'safe first country of asylum' have become, in the views of many observers, evasive strategies by States seeking to avoid their international responsibilities towards refugees without actually committing direct breaches of their treaty obligations.[235] As Loescher states, the effect of these policies has been the transfer of the refugee problem from one country to another and the increase of the 'refugees in orbit', those unwanted asylum seekers "who are bounced back and forth between countries like shuttlecocks".[236] Reallocation along the concept of 'safe third-country' has worsened the unequal distribution of protection seekers in Europe, and thus the mechanism of deflection has started to affect not only single asylum seekers, but also the protection responsibilities in single Member States.[237]

'Safe third-country concept'[238] was set out formally with the London Resolution of 30 November and 1 December 1992 on "a Harmonized Approach to Questions Concerning Host Third Countries" as mentioned before. The Resolution on safe third countries contains provisions on how the Member States should use the principles of safe (host) third-country, including certain safeguards. In Article 2, the Resolution, which provides for the removal of asylum claimants who had passed through a 'host third-country', defines host third countries as countries of transit or potential destination where the applicant's life and freedom are not threatened in the meaning of Article 33 of the 1951 Refugee Convention; where (s)he will not be faced with torture or inhuman or degrading treatment, where (s)he can be afforded effective

[235] UNHCR Report, Reaching a Balance Between Migration Control and Refugee Protection in the EU: A UNHCR Perspective; Geneva, September 2000, p. 20

[236] Loescher, G., 'The European Community and Refugees', in International Affairs; No. 4, 1989, p. 617-636

[237] Noll, G., Negotiating Asylum: The EU *Acquis*, Extraterritorial Protection and the Common Market of Deflection; 2000, p.317

[238] Denmark was among the first countries to introduce the safe third-country concept in its domestic legislation in 1986 –the so-called Danish Clause. The idea underlying the Danish Clause proliferated quickly and found its way into the Dublin and Schengen Conventions, albeit in a more sophisticated form.

protection against *refoulement* to a fourth country; and where (s)he has already been granted protection or has had the opportunity to seek protection there or where there is clear evidence regarding the admissibility of the person to the third-country. However, there are problems resulting from wide variations among European States in the application of the 'safe third-country' concept and admissibility rules. For example, in Denmark 'coming from a safe third-country' is a ground for inadmissibility at the border, and is a ground for exclusion in the territory after examination in substance. In France, while it is a ground for inadmissibility at the border, in territory the application is examined but mostly in an accelerated procedure. In Greece, this kind of applications is considered as manifestly unfounded and examined in accelerated procedure. In Italy, application is declared inadmissible at the border, like in Germany. But in Germany, in-country applicants have a possibility to appeal against a negative decision, while in UK accelerated appeal procedure is used for this kind of cases.[239] Moreover, the States that deal with safe third-country cases at the border have different ways of doing so: In Germany an applicant can be rejected by the border authority without the application being sent to the asylum determination body in the country and the effects of appeal is very limited as it is not suspensive; whereas in the UK, all applications must be sent to the Asylum Division of the Home Office, and appeal can have suspensive effect under certain circumstances. In Denmark, an appeal against refused admissibility on safe third-country grounds is not possible at all.[240] There are also differences among States regarding the determination of the safe third-country: While Belgium does not use the safe third-country notion to deny the access of people to the determination procedure (if the applicant has spent less than 3 months in the supposed safe third-country), other Member States like Austria, France, Denmark, Finland, Germany and the UK might use the principle in cases of mere transit through a safe third-country. Besides these discrepancies between the Member States' practices, most of the time

[239] EP Working Paper, Asylum in the EU Member States; 2000, p.19-20
[240] ibid., p.21

the above-mentioned safeguards are not, in practice, taken into consideration by the EU Member States, although they officially adhere to these provisions. For example, when the Central and Eastern European States acceded to the Council of Europe, the EU Member States took the opportunity to declare them as 'safe third countries' despite their unsatisfactory asylum legislation.[241] In February 1996, German authorities had returned 12 Iranians to Austria on safe third-country grounds. Although Germany reminded Austria that these people had asked for asylum in Germany, Austrian authorities arranged the deportation of the group to Ukraine despite Ukraine's not having signed the 1951 Geneva Convention.[242] In addition to the above-mentioned vagueness in the application of the 'safe third-country' concept, the formal identification of a host third-country in the Resolution precedes the substantive examination of the asylum application; or in other words, the Resolution expressly states that 'the determination of whether there exists a safe third-country to where the asylum seeker shall be sent' precludes a substantial examination of the asylum claim. Therefore each case is not necessarily examined on its merits.[243] The Resolution is criticized since without a substantial examination of the applicant's claim, the removal of a protection seeker to a State out of the EU (where he/she can be sent back to another State or to his country of origin without enjoying effective protection against *refoulement*) would contravene the 1951 Refugee Convention.[244] On the other side, as Van der Klauuw puts out "a country may be a 'safe' asylum country for applicants of a certain origin, and yet 'unsafe' for those originating from another country or representing a different social or ethnic group".[245] Furthermore,

[241] Phuong, C., 'Enlarging Fortress Europe: EU Accession, Asylum and Immigration in Candidate Countries', in International and Comparative Law Quarterly; vol. 52, July 2003, p. 645

[242] U.S. Committee for Refugees, At Fortress Europe's Moat: The Safe Third-country Concept; July 1997, p. 13

[243] European Parliament Working Paper, Asylum in the EU Member States; 2000, p.6

[244] Standing Committee of Experts in International Immigration, Refugee and Criminal Law, Commentary on the Draft Conclusions of the European ministers responsible for Immigration Affairs meeting in London on 20.11.1992; (1993, Forum, Utrecht), p.16

[245] Van der Klaauw, J., 'Towards a Common Asylum Procedure', in Guild, E. and Harlow, C. (eds.), Implementing Amsterdam: Immigration and Asylum Rights in the EC Law; 2001, p.186-187

Article 1(b) and (d) of the Resolution sets out the relationship between the application of the concept of the host third-country and the procedures of the Dublin Convention. According to it, a Member State may make a decision to return an asylum seeker to a host third-country before it makes a decision to return the applicant to another Member State under the Dublin Convention,[246] which is clearly the signal of a mechanism to shift the burden to third countries.[247] Only if the asylum applicant cannot in practice be sent to a host third-country, shall the provisions of the Dublin Convention apply according to 1(d) of the Resolution. In other words, the safe third-country principle precludes determination of responsibility in accordance with the Dublin Convention. With these provisions, Member States can remove a person to a country outside the EU on safe third-country grounds before applying the Dublin Convention, including the humanitarian clauses on family reunification (Article 4). We can also understand that in these conditions Dublin Convention does not guarantee that an application for asylum will be processed by one of the Member States (which was the main goal of the Convention). Guild states that the purpose of the 'third safe country' rule is:

> to reduce the administrative burden of determining asylum applications and the attendant costs of caring for asylum applications during the process by moving applicants as quickly as possible from the territory of the Union to some other third States.[248]

The safe third-country rule applies to all asylum seekers regardless of their qualification as refugees. The need for protection is no longer therefore the crucial

[246] Article 3(5) of the Dublin Convention provides that any Member State retains the right pursuant to its national laws, to send an applicant for asylum to a third State outside the Union, which can be held responsible for a substantive consideration of the application, subject to compliance with the UN Convention.

[247] At least five Member States (Austria, Germany, Denmark, the Netherlands and the United Kingdom) apply safe third-county rule before transferring an applicant under the terms of Dublin Convention. (EP Working Paper, Asylum in the EU Member States, 2000, p.27)

[248] Guild, E. and Niessen, J., Developing Immigration and Asylum Policies of the European Union: Adopted Conventions, Resolutions, Recommendations, Decisions and Conclusions; 1996, p.121

criteria, but it is rather the geographical itinerary of the flight.[249] However, as also stated in the preamble of the Dublin Convention, it is important to guarantee that an individual's application for asylum is substantively examined by the responsible State, so that 'refugee in orbit' situations do not occur. It is necessary that Member States ensure the consent of the other country to readmit the asylum seeker, to consider the merits of the claim and to provide effective protection as long as required. This objective, therefore, should also be pursued by Member States when considering return to third countries outside the EU. Safe third-country rule should be only applied after it is guaranteed that the concerned third State will let the asylum seeker to lodge his/her application; it has signed and fully implements the provisions of the 1951 Convention and its Protocol relating to the Status of Refugees; it has fair and full asylum determination procedures; and it is able to provide for the asylum seeker's basic subsistence needs and to offer durable solutions for the refugee.[250] However, in practice, most of these safeguards are not taken into consideration by Member States. For example, in Germany, according to the Constitution, a country where application of 1951 Convention and ECHR is assured, can be considered as a safe third-country. In accordance with the concept of 'normative establishment of certainty' the safe third-country must also have accepted the individual complaints procedure under Article 25 of the ECHR. The procedures in the safe third-country must also include a formalized examination by the authorities to ensure that the principle of *non-refoulement* is adhered to. However, actual access to asylum procedures is not essential.[251] This is problematic, since a refugee, by being sent to a third-county, can be deprived of his rights under the 1951 Geneva Convention although he is protected from *refoulement*. Moreover, some Member States use so-called safe third-country lists, on the basis of which the applicant is excluded from

[249] Lavenex, S., Europeanization of Refugee Policies: Between Human Rights and Internal Security; 2001, p.114

[250] U.S. Committee for Refugees, At Fortress Europe's Moat: The Safe Third-Country Concept; July 1997, p. 33

[251] EP Working Paper, Asylum in the EU Member States; 2000, p.27

the procedure without any effective possibility to rebut this presumption of safety. Although the country, from which the asylum seeker is coming, is considered as a safe third-country, Member States are expected to offer the applicant at least an opportunity to refute[252] 'the presumption of safety of the third-country' and to appeal against the awaiting removal, which will have suspensive effect. It should be noted that there are positive developments regarding this subject in the proposed Procedural Directive which has not been officially adopted yet.[253]

As parallel to the development of the concepts like 'safe third-country' or 'host third country', the Schengen group under Germany's leadership has taken measures to deal with readmission possibilities and signed a Protocol of Readmission with Poland and other neighboring States in March 1991. Under the ***'Readmission Agreement'*** signed between Germany and Poland, it has become almost impossible to be granted asylum in Germany if the applicants have traveled via Poland. If we take into consideration the fact that the overwhelming majority of asylum seekers in Germany enter through the German-Polish border, we can say that Poland has thus become a *de facto* member of the Dublin system before the EU accession, as it started to receive asylum seekers who have traveled to the EU via Poland (but contradictorily it

[252] In May 1996, German Constitutional Court took a decision on safe third-country practices and acknowledged that all EU countries are considered safe by definition. The court also confirmed the safety of all neighboring countries (Poland, Czech Republic, Austria and Switzerland, and found that the presumption of safety need not be individually 'refutable'. Also the Court did not consider it necessary to ensure that the asylum seeker would have access to a formal asylum procedure in the third-country, as long as (s)he is protected from *refoulement.*

[253] In the Inter-institutional File 2000/0238 (CNS) of the Council of the EU, dated 30 April 2004 (8771/04) on "Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status", it is stated in page 44 that the Recital: "The designation of a third-country as a safe country of origin for the purposes of this Directive cannot establish an absolute guarantee of safety for nationals of that country….For this reason, it is important that, where an applicant shows that there are serious reasons to consider the country not to be safe in his/her particular circumstances, the designation of the country as safe can no longer be considered relevant for him/her." will be added to the Preamble. However it should be noted that the Procedural Directive is just in the proposal stage and has not been adopted as a binding instrument yet.

was not allowed to transfer asylum seekers to the EU).[254] After the Readmission Agreement signed between Germany and Poland, the framework for Readmission Agreements was drawn up by the Council on 30 November 1994, with a Recommendation 'concerning a specimen bilateral Readmission Agreement between a Member State and a third-country'. Readmission Agreements which have been signed by the EU States with countries of origin and sometimes of transit are necessary for the implementation of the safe third-country notion, since without a legal framework, it is difficult to guarantee the admission of these aliens to third countries and sometimes to their countries of origin. Readmission Agreements were originally designed to facilitate the return of the illegally-residing aliens to their countries of origin and sometimes of transit. However, among these illegal migrants there are also asylum seekers rejected on the basis of the 'safe third-country' ground or because their claim has been determined to be manifestly unfounded. Readmission Agreements, which apply to both asylum seekers and illegal immigrants indiscriminately, do not consider the special situation relating to refugees. In practice, this instrument can be seen as a direct extension of the redistribution system for handling asylum claims within the EU Member States to all potentially 'safe' countries outside the Union.[255] However, it has been observed with justified concern that texts of Readmission Agreements -even the model Readmission Agreement drawn up by the EU- failed to specify guaranteed access to status determination procedures, and to restate the obligation of *non-refoulement*.[256] Since Readmission Agreements, different from Dublin and Schengen Conventions, do not usually contain any obligation on the readmitting country to examine the asylum seeker's request, the problem of chain deportation of persons with valid claims for protection

[254] Phuong, C., 'Enlarging Fortress Europe: EU Accession, Asylum and Immigration in Candidate Countries', in International and Comparative Law Quarterly; vol. 52, July 2003, p. 654

[255] Lavenex, S., Europeanization of Refugee Policies: Between Human Rights and Internal Security; 2001, p. 113

[256] Landgren, K, 'Deflecting International Protection by Treaty: Bilateral and Multilateral Accords on Extradition, Readmission and the Inadmissibility of Asylum Requests', 1999, cited in Noll, G., Negotiating Asylum: The EU *Acquis*, Extraterritorial Protection and the Common Market of Deflection; 2000, p.209

may arise. The asylum seeker, whose claim is rejected because of the 'safe third-country' rule, may be sent back to the readmitting transit country and then to his county of origin, which, in an indirect way, is a breach of the *non-refoulement* principle. With readmission measures, the risk of chain *refoulement,* sometimes all the way to the country of origin, is systematically aggravated, and cases of actual *refoulement* occur: In a 1995 study, ECRE compiled 16 cases of chain *refoulement* which took place in 1994.[257] It is worrying that a number of Readmission Agreements were signed with countries which were not even party to the 1951 Geneva Convention and ECHR.[258] Moreover, the lack of communication between the requesting and the requested State might put the legal certainty of asylum seekers at stake and result in an asylum applicant being in orbit for months while (s)he is bounced from one country to another[259] in accordance with readmission arrangements or being kept in detention without being able to find a State willing to examine his/her claim. Furthermore, the conclusion of Readmission Agreements by the neighboring countries and Associate States with countries in their further East and South, increase the concerns regarding the enlargement of the 'Fortress Europe'. The biggest threat is the conclusion of a Readmission Agreement with a country out of the EU, which is still producing refugees. While the EU is sending asylum seekers to safe third countries out of the EU, it is also prioritizing to engage in bilateral cooperation with these countries to reinforce their protection capacities. However the Associate States do not have sufficient resources to offer the same level of support to the countries by their Eastern borders. Due to all these considerations, Readmission

[257] ECRE, Safe Third Countries, Myth and Realities; London, 1995, Appendix B

[258] For instance, Poland signed Readmission Agreements with Latvia and Estonia in 1993 although these countries became party to the 1951 Convention only in 1997.

[259] In January 1996, four Syrian asylum seekers flew from Damascus to Bratislava via Prague. Since the group hoped to seek asylum in Germany, they asked the help of smugglers to plan their onward travel. Instead of taking them to Germany, smugglers abandoned the Syrians on the Czech side of the Czech-Slovak border. Czech border guards caught the group and returned them to Slovakia. Although the group asked for asylum in Slovakia, Slovak authorities kept them in jail and then returned them by plane to Prague. However the Czech authorities returned them again to Bratislava. The Slovak authorities expelled them one more time to Prague, where the Czech police finally consented to receiving their asylum application. (example taken from U.S. Committee for Refugees, At Fortress Europe's Moat: The Safe Third-country Concept; July 1997, p. 16-17)

Agreements signed with countries out of the EU, should include reference to the 1951 Convention and to the ECHR, and also guarantee that asylum seekers will not be removed by these States to other third countries, and will have access to the asylum procedure. In addition to all these concerns, it should be remembered that although *non-refoulement* principle is respected by the host third-country and protection seeker gets access to the asylum procedure, allocation to a safe third-country outside the EU, may result in great protection losses due to a more limited protection offer and restrictive recognition practice in these countries -where also the protection offered is largely limited to the Convention refugee category (different from the Western European countries offering various forms of subsidiary protection in their domestic law).

Another attempt by the Union to divert asylum seekers to countries out of the EU, is the ***'regionalizing or localizing the asylum problem'*** and the planning for the setting up *'Regional Processing Centers'* in specific countries out of the Union. 'Regionalizing' of asylum or 'containment' means locating the asylum seekers in a country close to their country of origin, like the settlement of Afghan refugees in Pakistan and Iran; while *'localizing'* or *'internalization'* has a meaning of keeping these people at a safe part of the country of origin, like decided in the Action Plan of HLWG: Sri Lankan refugees within presumed safe areas in Sri Lanka. In 1993, European Union governments were the first to suggest the creation of safe areas or 'havens' in Bosnia and Herzegovina. They agreed that protection and assistance "should wherever possible be provided in the region of origin" and that "displaced persons should be helped to remain in safe areas situated as close as possible to their homes".[260] The massacres which later took place, when Bosnian Serb forces overran the 'safe areas' of Srebrenica and Zepa in 1995, showed just how precarious this approach can be.[261] Albeit 'regionalized' and 'localized' asylum may have some

[260] UNHCR, State of World Refugees: 50 years of Humanitarian Assistance; 2000, p.17

[261] ibid, p. 18

positive implications since the return is easier, it is also seen as a way of burden shifting to the countries out of the EU which do not have enough capacity and resources, and which already get uneven and disproportionate numbers of people seeking protection. As Levy states "the concept of safe areas may have been the functional equivalent of *refoulement* because these safe areas were used to prevent displaced persons from seeking protection".[262] It is natural that a refugee, believing that his flight is only a temporary necessity, wishes to find sanctuary in a country geographically close to his own, and where, if possible cultural and linguistic affinities that facilitate a positive and welcome reception exist.[263] However, no matter how attractive the idea of regionalized asylum may appear to some States, there is evidently a straightforward question of human dignity and integrity that needs to be taken into account, as well as the need for an equitable global system of refugee protection.[264] Another attempt, which was proposed by Britain first, is the establishment of *'Regional Protection Areas'* near source countries or *'Transit Processing Centers'* on transit routes in selected countries of the certain regions (in Eastern Europe, Africa, Middle East) to serve as an initial place for identifying protection needs of asylum seekers originating from that region. Such a system should ensure initial time-limited protection in the processing country (about 6 months), followed by voluntary repatriation or where this becomes impossible, a long-term protection and asylum through resettlement to another State. However, as a researcher at Statewatch expresses, "resettlement will not be a right".[265] Under these conditions, any asylum seeker who 'manages' to come into the EU from those regions would be referred to one of the regional centers to have his asylum claim processed. After it is found that he is a refugee, he may be sent to one of the

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[262] Levy, C., 'Asylum seekers, refugees and the future of citizenship in the European Union', in Bloch, A. and Levy, C. (eds.), Refugees, Citizenship and Social Policy in Europe; 1999, p. 217

[263] UNHCR Report, Reaching a Balance Between Migration Control and Refugee Protection in the EU: A UNHCR Perspective; Geneva, September 2000, p. 21

[264] ibid.

[265] Hayes, B. (Researcher at Statewatch), "Fortress Europe: 'Safe' Havens for Refugees and Asylum Seekers", at http:// bond.org.uk

European States for resettlement. A Home Office spokesman has said that Britain, with *'zones of protection'*, wants to give refugees a safe haven close to their home before they flee their region entirely.[266] However, this is just a proposal and the Union did not start to implement a trial project regarding the issue yet. Denmark, Austria, the Netherlands and Ireland have backed this plan, while the British and Danish proposal to set up closed camps has been met by strong resistance both from Sweden and Germany. Opponents called it an effort by Britain to shift its responsibilities for refugees into poor, faraway nations. Writing in Guardian, Raekha Prasad, commented that these attempts will create ghettoes by the world's most peaceful and richest countries in some of the world's poorest and most unstable regions and "sending more people back to poor nations will only add to the burden on developing countries, which already cope with 72% of the world's refugees".[267] Although, the EU will have to give sufficient financial and technical assistance to be made available to those counties providing the initial reception and processing the asylum applications, these kinds of measures are still diverting the asylum seekers to other countries, far from the EU; and aiming at shifting the responsibility for refugee protection from the Member States towards the source of flight or to countries bordering an enlarged European Union. As also Van der Klauuw puts out in his article, called 'Building Partnerships', it should not be forgotten that support for enhancing protection capacities in the region must be seen as a complement to, and not a replacement of Member States' continued obligations to examine the asylum applications of those who seek protection on the EU territory.[268] Moreover, improving the reception conditions in regions of origin or transit cannot be limited to the establishment of processing centers, but should also include a number of other

[266] Associated Press News, "British Plan for Distant Asylum Centers Angers Refugees' Advocates", 21 June 2003

[267] Hayes, B. (Researcher at Statewatch), "Fortress Europe: 'Safe' Havens for Refugees and Asylum Seekers", at http:// bond.org.uk

[268] Van der Klaauw, J., 'Building Partnerships with Countries of Origin and Transit', in Clotilde M. (ed.), Asylum, Immigration and Schengen Post- Amsterdam: A First Assessment; 2001, p. 31

actions that will help to develop a functioning asylum and migration system in the region.

All these attempts of the EU Member States to release themselves from their obligations under the Geneva Convention by shifting the burden of their asylum seekers to third countries -which is called 'burden shifting' or 'burden concentration'- are criticized by various international organizations and NGOs. As Amnesty International is concerned, despite the expressed commitment of the EU to the observance of international refugee and human rights law, the asylum regime that may be established at the EU level may in practice result in a serious undermining of the internationally agreed regime for the protection of refugees. ECRE also affirms that this transfer of responsibility for refugee status determination to the third countries at the borders of Europe or in the region of origin, could risk being incompatible with the fundamental right to seek and enjoy asylum enshrined in Article 14(1) of the Universal Declaration of Human Rights of 1948; and Article 18 of the EU's Charter of Fundamental Rights of 2000. ECRE calls on Member States to carefully consider the conclusion of Readmission Agreements with transit countries of refugees and not to use these agreements as mechanisms of responsibility shifting to third countries that may already be struggling to cope with large numbers of refugees on their territories.[269] The diversion policies, like burden concentration in these countries, under safe third-country arrangements and Readmission Agreements, will raise the number of protection seekers in neighboring countries and also will lead these countries to adopt restrictive policies which will at the end result in the shift of their recognition rates downward, as happened in Hungary, Czech Republic and Poland: From 1996 to 1997, the aggregate number of asylum applications in these countries, which were Associate States at that time, rose by 35 percent to some 10.000 cases. After 1997, the number of asylum applicants in

[269] UNHCR Report, Reaching a Balance Between Migration Control and Refugee Protection in the EU: A UNHCR Perspective; Geneva, September 2000, p. 25

the above-mentioned Associate States, which share land borders with the EU Member States, increased much more. As a result of Readmission Agreements signed with the EU countries, as well as an increase in direct arrivals, the numbers of asylum seekers in Poland continued to increase in each year since 1996 and reached to 4590 in 2000.[270] However, despite the increase in the number of asylum applications, the recognition rates in all three countries in 1998 were markedly lower than the average of all EU States. Poland, for example, recognized 1.9 percent of all applications as Convention refugees, which must be compared to the European average of 9.7 percent. The corresponding numbers were 2.8 percent for the Czech Republic and 7.8 percent for Hungary.[271] This shows that when faced with large inflows, Associate States reacted by retaliating against protection seekers as avoiding the introduction of subsidiary protection categories and maintaining restrictive recognition practices; and they in a way contributed to the enlargement of the restrictive policies and practices within the European Union and of the 'Fortress Europe'.

c) Deterrence Policies:

Deterrence policies aim to discourage people who have arrived or want to arrive to the EU territory, with measures such as denial or restricting means regarding subsistence allowances and/or medical services, restrictions on family reunification[272]

[270] For further information please see UNHCR, Global Refugee Trends; Geneva, May 2001 at http://www.unhcr.ch

[271] Noll, G., Negotiating Asylum: The EU *Acquis*, Extraterritorial Protection and the Common Market of Deflection; 2000, p.326-327

[272] Denmark is a good example among other EU States, which applies stringent rules on family reunification. The amendments to the Aliens Act in 2002 and 2003 in the area of asylum and immigration brought stricter and additional conditions for family reunification. As an example, both spouses should be over 24 years old to apply for reunion. The total number of persons applying for family reunification in Denmark continued to decrease in 2003 –from 15.370 in 2001 to 11.250 in 2002 and to 6520 in 2003. The recognition rate also decreased from 8151 in 2002 to 4791 in 2003. (Also available at Danish Immigration Service's web page: www.udlst.dk).

even after granting refugee status, limitations on employment, welfare benefits[273] or on freedom of movement through compulsory housing schemes, and abusive detention[274] of asylum seekers…etc. As Joly argues, enhancing the rights of beneficiaries would make the stay of refugees more permanent and diminish both the capacity and the willingness of States to provide such protection.[275] That's why most of the States are curtailing the rights provided to refugees to discourage their stay and as a result to deter them from coming to the territory of the EU. As overtly set out in UK's 'Strategic Plan', one of the commitments of the Home Office for 2004-2008 is to make illegal immigration less attractive.[276] The restrictive application of the 1951 Geneva Convention, in particular defining away certain categories of refugee claimants (e.g. victims of persecution caused by non-State agents, victims of gender-related or localized persecution) from the scope of refugee definition; and introduction of manifestly unfounded claims, accelerated or inadmissibility procedures/less appeal rights and subordinate protection mechanisms (such as subsidiary and temporary protection status as substitute to the refugee protection status) can be listed as some of the other examples of measures to deter asylum seekers from coming to Member States' territories and seeking asylum.

At the second half of 1990s, some Western European States -such as Germany and France- have excluded individuals fleeing from non-State agents of persecution or

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[273] With Section 55 of the Nationality, Immigration and Asylum Act of 2002 (which came into force on 8 January 2003), UK restricted the availability of National Asylum Support Service's (NASS) support to those who did not seek asylum as soon as reasonably practicable (in 3 days). (Home Office's Asylum Statistics: 2nd Quarter 2004)

[274] According to EXCOM Conclusions: No. 44, detention is considered permissible on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status is based; to deal with cases where asylum seekers destroyed their travel and/or identity documents; or to protect national security or public order. However, right to judicial or administrative review of the decision to detain, humane conditions of detention; no unjustified or unduly prolonged detention; access to legal counsel and legal aid, access to a UNHCR representative and to NGOs, are required conditions.

[275] Joly, D., Kelly, L. and Nettleton, C. (eds.), Refugees in Europe: Hostile New Agenda; 1997, p. 29

[276] U.K. Home Office, Home Office Strategic Plan: Confident Communities in a Secure Britain; August 2004, p. 22-23

situations of State breakdown, from refugee protection. Some governments have rejected asylum claims of women who were fleeing persecution by private actors, such as family members, even though the abuse amounts to persecution and protection is not available in their own country. Other EU States have excluded individuals who have fled situations of generalized violence and civil war, such as in Sri Lanka or Colombia. Largely because of Germany's ***'narrow interpretation of the refugee definition'*** given in the Article I A (2) of the 1951 Geneva Convention which referred to the grounds for admission, and France's desire to limit its obligations *vis-à-vis* Algerians fleeing their country, the European Union governments came together to discuss the refugee definition and adopted a Joint Position in March 1996 on the harmonized application of the definition of the term 'refugee'. The Joint Position was a binding instrument[277] which called for Member States to consider its guidelines for the application of criteria for recognition and admission as a refugee; and which gave the generally agreed upon definition of *'persecution'* within the meaning of Article 1A of the 1951 Refugee Convention as the Convention does not define this term. The Joint Position also gave examples on the origins and grounds of persecution that the Member States should bear in mind when examining an application for asylum. However, it did not, in an explicit manner, accept non-State actors as agents of persecution, although it established some criteria concerning persecution by third parties: In Article 5.2 of the Position, it was stated that persecution has to be 'encouraged' or 'permitted' by the State authorities, to consider the acts of non-State actors as persecution.[278] However, it was also put out that in the case that the official State authorities are 'unable' to prevent persecution, each case should be examined individually in the light of the judicial practice in the examining Member State. So it failed bringing common rules regarding the persecution by non-State actors in case the State authorities are unable

[277] However, the Joint Position was adopted within the limits of the Constitutional powers of the Governments of the Member States, and does not bind the legislative authorities or affect the decisions of judicial authorities of the Member States.

[278] European Parliament Working Paper, Asylum in the EU Member States; 2000, p.13

to provide protection. As the conflicts in Afghanistan, Former Yugoslavia and Somalia have shown, to a large extent violations were carried out by non-State agents. This approach caused the continuation of different practices in each Member State and prevented many asylum seekers from getting refugee status and therefore discouraged many others to come to the EU and seek asylum. However, the restrictive approach of 1990s is about to change with the Qualification Directive of 29 April 2004, which should be transposed into the national systems of each Member State (except the ones who have an opt-out for JHA issues) before 10 October 2006. With the new EU Directive, the Union showed that it recognizes also non-State actors as agents of persecution. In paragraph number 6 of the Directive, which is binding on all Member States (except the ones who kept opt-outs), it is stated that actors of persecution or serious harm include: (a) the State; (b) parties or organizations controlling the State or a substantial part of the territory of the State; (c) non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organizations, are unable or unwilling to provide protection against persecution or serious harm. Article number 9 of the Directive also explains the acts of persecution and as an innovation defines the acts of gender-specific or child-specific nature in paragraph number (f), as one of these acts. The Directive does not refuse gender based persecution as some EU States did before: In Article number 10, paragraph number (d), under the reasons for persecution, it is put out that:

> A particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article.

Another deterrent measure, which discourages future asylum seekers to lodge their claim in the territories of the EU Member States, is the introduction of the notions like ***'safe countries of origin'***, ***'manifestly unfounded claims'*** and the ***'accelerated***

procedures', which may limit some significant safeguards in the asylum procedure, if applied in a restrictive manner. Conclusions of 30 November 1992 on 'Countries in which there is generally no serious risk of persecution' provides basic elements to determine whether a country is safe which would render an application for asylum 'manifestly unfounded' and accelerate the examination procedure. Although these basic elements include the observance of human rights by the country of origin, the existence of democratic institutions and stability in the country, and a low number of previous asylum seekers or recognition rates for the applicants from the concerned country; the existence of all these basic elements does not always mean that the country concerned is safe for everybody. The Conclusion provides some safeguards to prevent a miscalculation, such as the one mentioned above. Article no. 1 of the Conclusions defines a *'safe country of origin'* as:

> …a country which can be clearly shown, in an objective and verifiable way, normally not to generate refugees or where it can be clearly shown, in an objective and verifiable way, that circumstances which might have justified recourse to the 1951 Geneva Convention have ceased to exist.

Moreover, Article no.3 prescribes that an assessment of a country as 'safe' should not lead to the automatic refusal of nationals from that country; but the application shall be handled on an individual basis, although an accelerated procedure may be used if the Member State in question wishes so. In other words, applicants should have the possibility to present facts that might substitute the general assumption of safety.[279] Another risk, which is posed by some Member States' practices, is refusing admissibility at the borders of the Union because of the 'safe country of origin' principle. As Van der Klauuw puts out in his article 'Towards a Common Asylum Procedure', the use of the notion cannot be the privilege of governments by listing countries as safe, which may result in the exclusion of all citizens of a specific

[279] Working Paper, Asylum in the EU Member States; 2000, p.19

country from the asylum process and consequently in a *de facto* reservation to Article 1A (2) of the 1951 Geneva Convention.[280] The blanket exclusion of whole groups of people merely on the basis of their countries of origin carries a high risk of *refoulement* and contradicts with the international protection standards.[281] Preparing rigid 'lists of safe countries',[282] which are not updated regularly, and rejecting the applications of asylum seekers coming from these countries, without a full interview, is a breach of international protection norms. Asylum claims, which are supposed to be manifestly unfounded because of the 'safe country of origin' concept, should be given opportunity for full examination (complete personal interview by a fully qualified official) like in the normal procedure; so the basic safeguard against a flawed decision can be ensured.[283] Rules applied in order to quickly screen out asylum applications undeserving of a full determination procedure should be kept to the smallest amount and should not be applicable to fundamental principles, such as access to procedures and the right to a fair hearing of the claim.[284]

Another document that focuses on manifestly unfounded claims is the Resolution on 'Manifestly Unfounded Applications for Asylum', which was adopted by the Ministers for Immigration in London on 30 November and 1 December 1992. The Resolution should be seen against the backdrop of a considerable increase in the

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[280] Van der Klaauw, J., 'Towards a Common Asylum Procedure', in Guild, E. and Harlow, C. (eds.), Implementing Amsterdam: Immigration and Asylum Rights in the EC Law; 2001, p.182

[281] Mariner, J. (at Human Rights Watch), "50 Years On-What Future for Refugee Protection?" at www.hrw.org/campaigns/refugees

[282] Countries like Denmark, Germany, Netherlands and United Kingdom are using lists of safe countries. Except Netherlands, all of them consider safe third-country cases as manifestly unfounded and examine them in an accelerated procedure. Luxembourg and Netherlands call these kinds of claims as manifestly unfounded and declare them inadmissible. Countries like Belgium and Ireland do not make use of the safe country of origin principle. (EP Working Paper, Asylum in the EU Member States, 2000, p.18-19)

[283] For further information, please see the EXCOM Conclusion No. 8 of 1977 and No. 30 of 1983 which put out the procedural guarantees for processing manifestly unfounded applications in accelerated procedures.

[284] Van der Klaauw, J., 'Towards a Common Asylum Procedure', in Guild, E. and Harlow, C. (eds.), Implementing Amsterdam: Immigration and Asylum Rights in the EC Law; 2001, p.192

number of asylum applications which are considered to be unfounded or abusive or otherwise not deserving of an in-depth examination, and of the resulting pressure of these applications on the asylum systems of the Member States. The Resolution is therefore an attempt to standardize Member States' definition and application of the *'manifestly unfounded'* concept and the use of *'accelerated or simplified procedures'* to deal with such cases. It also establishes that Member States can use *'inadmissibility procedures'* where applications may be quickly rejected on objective grounds, before it is admitted to the asylum procedure. In adopting the Resolution, Member States expressed the aim of adapting their national laws to incorporate the principles of it as soon as possible (at the latest 1 January 1995).[285] However, most of the States in the EU have continued their own practice regarding the use of accelerated procedures for manifestly unfounded claims, since these Resolutions set only minimum standards and are not binding for the Community (because they were adopted before the EU harmonization on asylum that only started after 1999). As a result, variations in State practices and legislations regarding the issue have continued: While Austria, Denmark, Greece and Sweden have used accelerated procedures for manifestly unfounded applications, including safe country of origin and safe third-country cases; Belgium and Luxembourg have not used accelerated procedures for the so-called manifestly unfounded claims. In countries like Greece, France, Italy and Portugal all border applications have gone through an accelerated procedure, while Ireland has used accelerated procedures only for appeals of manifestly unfounded cases. UK, different from the practice in Ireland, has used accelerated appeal procedure for both manifestly unfounded claims and safe country of origin/safe third-country applications.[286] With this Resolution, under Articles no. 6-11, 'manifestly unfounded application' was defined as a claim where there is clearly no substance to the applicant's claim to fear of persecution in his/her own country (Article 6); and/or where the claim is based on deliberate deception or abuse

[285] They furthermore commit themselves to reviewing the operation of accelerated procedures from time to time, and examining whether any additional measures are necessary.

[286] EP Working Paper, Asylum in the EU Member States; 2000, p.17

of asylum procedures (Article 9).[287] Moreover, Article no. 10 of the Resolution stated that deliberate deception and abuse of asylum procedures *in themselves* cannot outweigh a well-founded fear of persecution (since refugees are forced to flee persecution sometimes with falsified documents). However, experience has shown that Member States resort rather quickly to declaring a claim 'manifestly unfounded' in case of such indications. In practice, most of the States follow contrary practices and apply manifestly unfounded procedures to a wide range of situations such as those where the application is lacking in credibility by being inconsistent and contradictory, where the notion of internal flight alternative can be applied, where the application is based on forged or counterfeit documents, or has been rejected in another country…etc. The Resolution leaves it to the decision of Member States to include manifestly unfounded asylum applications within an accelerated procedure. Such procedures need not include full examination at each level and Member States can expedite the appeal stage.[288] According to the Article no. 3, more simplified appeal and review procedures than those generally available may be used in order to reduce the time required for the completion of the asylum procedure for manifestly unfounded cases. In accordance with this provision, in the United Kingdom, asylum seekers whose claims are found 'clearly (manifestly) unfounded' do not have a right to 'in-country appeal' since 7 November 2002; or in other words the application for review or appeal does not have a suspensive effect on the removal of person from the country. It is also again the Resolution which clearly stated that "the applicant should be given the opportunity for a personal interview with a qualified official, empowered under national law before any final decision is taken", although the

[287] The Resolution, by defining categories of manifestly unfounded claims, broadens the possible scope of the application of the notion compared to the guidelines provided in UNHCR Executive Committee, Con. No. 30.

[288] In UK, the time required for fast track cases (between the asylum application and removal, including any appeal) is one month. (see Home Office Strategic Plan: Confident Communities in a Secure Britain; August 2004, p. 22)

manifestly unfounded claims may be included in the accelerated procedure.[289] However, in reality, in a number of European countries, the procedure may be conducted at the border and the summary rejection of so-called 'manifestly unfounded' claims can take place: Time constraints and restricted access to lawyers may lead to an increased risk of asylum seekers with legitimate claims being returned under the 'manifestly unfounded' procedure at the border.[290] The Council Resolution of 20 June 1995[291] on 'Minimum Guarantees for Asylum Procedures', also reflects the attempts of the EU States to make their perilous practices legitimate. According to the Council Resolution, there are special provisions (which limit the application of the guarantees applicable in the normal procedure by allowing for exceptions and derogations) for processing manifestly unfounded asylum applications and for applications that are made at the border. The minimum guarantees do not necessarily provide complete protection from *refoulement* in all cases: an appeal is not always granted, such as in manifestly unfounded cases or in safe third-country cases (Paragraph number 19); even then, there is not always suspensive effect for the appeal (Paragraph numbers 21 and 25). In conformity with this Council Resolution, in Denmark,[292] which also implements 'manifestly unfounded' rule, the asylum applicants, whose claims are so-called manifestly unfounded, are not be able to use their right for effective remedy against the negative decision, because the negative decision is not examined by an independent court, but only reviewed by the Refugee Council, which is just a non-governmental organization. Appeal can only be made if the Refugee Council disagrees with the decision of the Danish Immigration Service. These protection seekers, without getting effective remedy, are usually deported

[289] For further information, please see the 1992 Resolution on Manifestly Unfounded Applications for Asylum, Article No. 4.

[290] ECRE, Asylum in Europe: Review of refugee and asylum laws and procedures in selected European countries; vol. II, 1994, p.26

[291] Official Journal, No. C 274, 19.09.1996, p.13.

[292] In Denmark, the applications of asylum seekers from countries like Albania, Ghana, Moldova, Macedonia, Nigeria, Romania, Senegal, Tanzania, Czech Republic, Western Europe and the Northern Countries are examined in the manifestly unfounded procedure, according to the records of 1 April 2004.

from the country and nobody is getting sure that they will not face persecution in the future. Speeding up asylum procedures by making more effective use of admissibility/accelerated procedures for 'clearly unfounded applications' is a justifiable argument for Member States which are using lots of money and personnel for dealing with bogus asylum claims. If basic procedural safeguards (like a complete and substantive examination of the claim, or in other words, the possibility to rebut the presumption that the claim is manifestly unfounded, and also the possibility for a suspensive appeal against the negative decision) are provided, the speeding up the procedure can be useful since it is a practical solution, especially to prevent bogus asylum seekers to exploit the asylum system in the EU States. However we should not forget that the speeding up the procedure without essential safeguards might have also some negative and disastrous implications when the applicant, in a short time-period, is deported from the country, with an erroneous decision and without a complete review of this decision. In a number of cases, careful examination of the claim may reveal a well-founded fear of persecution, that's why the concept of the manifestly unfounded application should not be used in an unreserved manner.[293] As Watson puts out "there needs to be a method of wedding out the bogus from the genuine asylum seeker, but what one country sees as a clearly unfounded application could be interpreted in a different way elsewhere".[294] The grave consequence of a 'flawed determination for the applicant' brings the need for appropriate legal and procedural safeguards, which are necessary to prevent an erroneous decision and its potentially catastrophic consequences for the asylum seeker.[295]

[293] Van der Klaauw, J., 'Towards a Common Asylum Procedure', in Guild, E. and Harlow, C. (eds.), Implementing Amsterdam: Immigration and Asylum Rights in the EC Law; 2001, p.180

[294] Watson, G., 'EU Asylum and Immigration Policies: The Point of View of the European Parliament' in Clotilde, M. (ed.), Asylum, Immigration and Schengen Post- Amsterdam: A First Assessment; 2001, p.52

[295] ECRE, Asylum in Europe: Review of refugee and asylum laws and procedures in selected European countries; vol. II, 1994, p.26

Apart from the 'manifestly unfounded' applications, the Resolution on 'Manifestly Unfounded Applications for Asylum' suggests further cases that could give rise to the application of *'accelerated procedures'*, which are not necessarily considered as 'manifestly unfounded'. This might be the situation if an applicant has transited a so-called 'host third-country'[296] or without prejudice to the substance of the claim, where a case falls manifestly within the situation mentioned in Article 1(F) of the 1951 Refugee Convention, or the applicant constitutes threat to the national security.[297] In addition, the Resolution suggests that Member States may consider applying an accelerated procedure if the fear of persecution is "clearly limited to a specific geographical area where effective protection is readily available for the individual in another part of his own country" (internal flight alternative).[298] The Resolution further leaves it to the Member States to include the applications of persons originating from countries in which there is generally no serious risk of persecution (safe country of origin), under the scope of an accelerated procedure.[299] This thesis work also supports the idea of Van der Klauww stating that application by asylum seekers from certain counties of origin can be handled in 'accelerated procedures', however the applicant should be given the opportunity to disprove the presumption that the claim is manifestly unfounded (or in other words, the concerned country is not safe for him or her).[300] Accelerated procedures for claims which are obviously without foundation, have generally proven useful in reducing the waiting period for the applicants and in helping to discourage asylum seekers who are abusing the protection systems of the Member States. However, the potentially severe consequences of wrongly-processing of an application through the accelerated procedures, emphasizes the need for specifically-stated procedural safeguards for

[296] Resolution on 'Manifestly Unfounded Applications for Asylum', Part 1 (b)

[297] ibid., Part 11

[298] ibid., Part 7

[299] ibid., Part 8

[300] Van der Klaauw, J., 'Towards a Common Asylum Procedure', in Guild, E. and Harlow, C. (eds.), Implementing Amsterdam: Immigration and Asylum Rights in the EC Law; 2001, p.181

asylum claimants, as well as for clearly defined categories of manifestly unfounded claims and accelerated procedures. The current definition is perhaps too broad as individuals genuinely in need of international protection might be caught within its provisions without the fault of their own. As such, the definition of manifestly unfounded claims and accelerated procedures provided in the Resolution may have to be reconsidered as regards its key elements and scope of application. Otherwise, the wide and unclear scope of 'manifestly unfounded application' and 'accelerated procedures' will continue to be copied by the third countries, which usually fail to provide necessary safeguards; and this will lead to detrimental consequences in refugee protection.

Introduction of subordinate protection mechanisms such as 'subsidiary' and 'temporary' protection schemes can be listed as other examples of measures to deter asylum seekers: As substitute to the refugee status, the rights provided under subsidiary protection scheme are secondary and the duration of temporary protection status is shorter when compared to the refugee protection status.[301] Much more widely use of secondary protection schemes in the EU countries than the granting of refugee status, has also a discouraging effect on asylum seekers to lodge their claim in the EU States.

Until the 1990s, it was generally assumed that when individuals were recognized as refugees in Europe, they would be able to remain in their country of asylum indefinitely. However, during the conflict in the former Yugoslavia a new approach to asylum was introduced, whereby States offered *'temporary protection'*[302] to people

[301] For more information, please see the Council Directive 2004/83/EC on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection (Qualification Directive).

[302] For further information please see the Council Resolution on Burden Sharing with Regard to the Admission and Residence of Displaced Persons on a Temporary Basis of 25 September 1995 (Official Journal No. L 63, 13.03.1996, p. 10); Council Decision on an Alert and Emergency Procedure for Burden Sharing with Regard to the Admission and Residence of Displaced Persons on a Temporary Basis of 4 March 1996 (Official Journal No. L 63, 13.03.1996, p. 10.); and Council Directive

fleeing the conflict -meaning that these people would be expected to return once the conflict is over. Temporary protection is an emergency response to an overwhelming situation, where there are evident protection needs and where there is little or no possibility of determining such needs on an individual basis in the short-term. Although it ensures immediate access to safety and the protection of basic human rights, including protection from *refoulement*, in countries directly affected by a large-scale influx; on the other side, it gives only a time-limited protection (although most of the beneficiaries of temporary protection scheme are refugees who would get the right to stay without a time limit, if they were put through the Refugee Status Determination procedure). The main differences between temporary protection and traditional protection provisions are the absence of a right on the part of the refugee to have his claim considered, the absence of an independent institution in charge of examining the asylum claim and of legal remedies against negative decisions, and the provisional nature of the residence permit together with the discretionary power of the executive to end the protection status as soon as it is deemed to be appropriate.[303] With the introduction of temporary protection scheme, stay of the protection seeker becomes more uncertain and short-term. In its Preamble, Article number 13 of the Council Directive of 20 July 2001 on 'minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof' states that "...in order to deal with a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, the protection offered should be of limited duration". The Directive also puts out that "the duration of temporary protection shall be one year".[304] Temporary protection grants protection, but for a limited time-period and

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2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection (Temporary Protection Directive).

[303] Lavenex, S., Europeanization of Refugee Policies: Between Human Rights and Internal Security; 2001, p. 120

[304] For further information, please see the Council Directive on Temporary Protection, Article No. 4.

with return as the only solution envisaged.[305] In addition to this time-limited protection, UNHCR and NGOS are concerned that temporary protection may in practice entail the withholding of refugee status and exclusion from an integration program. These organizations warn that temporary protection scheme should not be used as a means to preclude genuine refugees, who would fall under the scope of the 1951 Geneva Convention, from full refugee status.[306] According to Joly, Kelly and Nettleton, "there is a risk of setting a precedent creating second-class refugees, which would also lower protection standards"[307] and a trend toward the establishment of a secondary protection regime.

Besides the development of *'temporary protection'* concept, mainly due to their obligations under ECHR,[308] the EU States incorporated a new term called *'subsidiary protection'* into their protection systems and used this mechanism more widely in time, which also caused concerns regarding the possibility of the replacement of the refugee protection status with this subordinate protection scheme. With the Qualification Directive, the rules about the subsidiary protection mechanism were finally laid down, which will bind the whole Community except the ones who had opt-outs in JHA matters. As defined in the above-mentioned binding instrument, person eligible for subsidiary protection means:

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[305] Joly, D., Kelly, L. and Nettleton, C. (eds.), Refugees in Europe: Hostile New Agenda; 1997, p. 29

[306] In Kosovo crisis most EU Member States granted renewable temporary residence permits of three months. While in some countries, such as France, this scheme did not preclude Kosovo Albanians from applying for full refugee status; access to formal asylum procedures was excluded in other countries, such as Germany. (Van Selm, J., Kosovo's Refugees in the EU, 2000, cited in Lavenex, S., Europeanization of Refugee Policies: Between Human Rights and Internal Security; 2001, p. 121)

[307] Joly, D., Kelly, L. and Nettleton, C. (eds.), Refugees in Europe: Hostile New Agenda; 1997, p. 28

[308] Although the applicant does not deserve the refugee status in accordance with 1951 Geneva Convention relating to the Status of Refugees, still the States that signed the European Convention on Human Rights, has the obligation not to send a foreigner to a country where he will face torture, inhuman or degrading treatment. Due to these considerations, EU States have introduced a new status called 'subsidiary protection' for aliens who cannot be sent back to their country of origin under ECHR.

> A third-country national or a stateless person, who does not qualify as a refugee, but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm...and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.[309]

Although the subsidiary protection scheme ensures the protection of people at risk against *non-refoulement*, the rights provided under this mechanism are secondary when compared to the refugee protection status: As set out in the recent Qualification Directive, which determines the rules about the subsidiary protection scheme, Member States shall issue to beneficiaries of refugee status a residence permit which must be valid for at least three years, while the residence permit issued to beneficiaries of subsidiary protection status must be valid for at least one year.[310] According to the Article no. 23 of the Directive, Member States shall ensure that family members of the beneficiary of refugee or subsidiary protection status are entitled to claim the benefits referred, however, in so far as the family members of beneficiaries of subsidiary protection status are concerned, Member States may define the conditions applicable to such benefits.[311] The Directive also states that "Member States shall authorize beneficiaries of subsidiary protection status to engage in employed or self-employed activities…immediately after the subsidiary protection status has been granted." However, for subsidiary protection beneficiaries, it also calls that the situation of the labor market in the Member States may be taken into account, including for possible prioritization of access to employment for a 'limited period of time' to be determined in accordance with national law; while this does not apply to refugees.[312] Furthermore, while the same Article (Article no. 26 (4)) states that Member States shall ensure that activities such as employment-related

[309] The Qualification Directive, Article No. 2(e).
[310] ibid., Article No. 24(1) and (2).
[311] Ibid., Article No. 23(1) and (2)
[312] ibid., Article No. 26

education opportunities for adults, vocational training and practical workplace experience are offered to beneficiaries of refugee status under equivalent conditions as nationals; for beneficiaries of subsidiary protection, it is offered under conditions to be decided by the Member States. Moreover, the Directive brings dissimilar rights in the fields of social welfare, health care and access to integration facilities for refugees and beneficiaries of subsidiary status: Article no. 28 and 29, Paragraph no. 2 state that by exception to the general rule laid down, Member States may limit social assistance and health care granted to beneficiaries of subsidiary protection status to core benefits. In Article no. 33, although it is stated that Member States shall make provision for integration programs in order to facilitate the integration of refugees into society, in paragraph no. 2, the Council states that beneficiaries of subsidiary protection status shall be granted access to integration programs "where it is considered appropriate by Member States". Despite these discrepancies in some of the rights provided to refugees and subsidiary protection beneficiaries, it is important that the Member States finally agreed, with the Qualification Directive, on the definition of subsidiary protection, and agreed on bringing rights to people who are not falling within the scope of 1951 Convention. Before this Directive was adopted, there was not a binding text which set out the rules on qualification as people who will benefit from any *'complementary form of protection'*.[313] The rights afforded to persons under subsidiary protection have varied among the Member States: While family reunification has been possible in Denmark, Finland and Sweden, it has been limited in the Netherlands and Spain, could have been granted after a delay in countries like France, Belgium, Ireland and the UK, and has not been granted at all in Austria, Germany, Luxembourg and Portugal. While the right to work has been granted in Denmark, Finland, Ireland, the Netherlands, Portugal, Sweden and the UK, it has been limited in Austria, Belgium, France, Germany and Spain, and has not been granted at all in Luxembourg. Italy has not been offering any form of subsidiary

[313] Before the Qualification Directive was adopted, EP had issued a Resolution on the "harmonization of forms of protection complementing refugee status in the EU" (A4-0450/98) and expressed concern over the lack of harmonization with regard to complimentary protection within the Union.

protection.[314] With the recent Qualification Directive, which is one of the significant steps of the first phase of harmonization on asylum, arbitrary implementations regarding the basic rights provided under complementary protection schemes are aimed to be brought in conformity in all EU Member States. However, it should be noted that the 'subsidiary' protection mechanism is an additional and complementary protection scheme, which provides protection to people who are not within the scope of refugee definition; it is not the substitute of a wider refugee status.

5.1.2. A Less Flexible and a More Exclusionary Asylum System Within the Union and its Associates:

Many of the host communities consider the arrival of refugees and immigrants from distant lands as an unwelcome disruption to their normal lives, or as a threat to their national identity and culture. Yet others regard them as competitors for jobs or social welfare support systems. This environment is usually a fertile ground for racism, xenophobia and related intolerance to develop, especially when bogus asylum seekers misuse the protection system. It can be easily aggravated by an irresponsive media or public debates that politicize asylum and criminalize migration.[315] In addition, some political parties strongly oppose to growing immigration, like it happened with Jean-Marie Le Pen's *Front National* in France, the *Lega Nord* in Italy, or the *Republicaner* in Germany, which has gained electoral success in Europe and resulted in the governments overtly or covertly getting tough on immigrants and asylum seekers.[316] Moreover, these restrictive immigration policies have forced

[314] EP Working Paper, Asylum in the EU Member States; 2000, p.26

[315] UNHCR Report, Reaching a Balance Between Migration Control and Refugee Protection in the EU: A UNHCR Perspective; Geneva, September 2000, p. 25

[316] Stöss, R., 'Politics against Democracy: Right Wing Extremism in West Germany', quoted in Thranhardt, D. (ed.), Europe- A new Immigration Continent, Policies and Politics in Comparative Perspective; 1996, p.118

asylum seekers and migrants to make use of illegal and clandestine means to enter European countries, thus, in the eyes of public, politicians and media, equated asylum seekers and migrants with criminals. The tendency to regard asylum seekers not as victims fleeing from persecution, but as a threat to political and socio-economic stability of European States, has grown in time.[317] Many Member States of the EU had seen an increase in far-right anti-immigrant extremist activities in response to the perceived fear of the rise in numbers of asylum seekers and immigrants. As noted by the European Monitoring Center on Racism and Xenophobia:

> Every day, racism and xenophobia rear their heads in the Member States of the Union. Every day racism causes the death of many people…Hate-driven groups inflict wounds and confusion. Discrimination even penetrates to the wheels of governments.[318]

As a repercussion of the initiatives of bogus asylum seekers which misuse the protection system and damage the 'refugee' image, and of the above-mentioned racist movements which has "produced another momentum to restrict asylum",[319] European governments have thought that they need to formulate a coordinated but less flexible system of protection. Developments like the restrictive measures described above; the Dublin Convention, which aimed to reduce the 'asylum shopping' phenomenon; and the Protocol to Amsterdam (Spanish Protocol), which prevent European nationals to seek asylum, created a 'Fortress Europe' while the recognition rates decreased continuously.

With the 'Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European

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[317] Santel, B., 'European Union and Asylum Seekers: The Harmonization of Asylum and Visa Policies' in Thranhardt, D. (ed.), Europe- A new Immigration Continent, Policies and Politics in Comparative Perspective; 1996, p.119

[318] European Monitoring Centre on Racism and Xenophobia, Annual Report on Activities: Giving Europe a Soul; 1998

[319] Joly, D., Kelly, L. and Nettleton, C. (eds.), Refugees in Europe: Hostile New Agenda; 1997, p. 22

Communities' *(Dublin Convention),* a standardized protection system which is more coordinated but 'less flexible' (due to the limited choice of the asylum seeker to submit his/her claim to a single EU State) has been established within Europe: The Convention was concluded in Dublin on 15 June 1990 between the (then) twelve Member States of the EC to prevent asylum shopping phenomenon. The rational behind the Convention was the idea that asylum shopping would not make much sense anymore, if all European States offered roughly the same procedural and material standards to asylum seekers. According to the Convention, the application shall be examined by a 'single' Member State, but necessarily not by the one in which the application was filed. The Convention sets up common criteria to determine the single Member State responsible for examining an asylum request based on a list of criteria.[320] That is why it is a positive development as establishing a concrete structure of responsibility amongst signatory States. However, based on the perception of refugee issue as a zero-sum game, the responsibility provisions contained in the Dublin Convention sets up a system of negative redistribution for the handling of asylum claims. Responsibility for handling an asylum claim is placed on the State which first enables the entry of the asylum seeker into the common territory. Considering that most asylum seekers reach Western Europe from the South and East, this rule puts an extensive burden on the countries possessing an external border of the Union; thereby modifies traditional refugee flows, which tend to find their final destination in the main Western European States.[321] Due to this pressure, the 'first countries of entrance' are taking much more restrictive measures to prevent the allocation of large numbers of asylum seekers in their countries, under the Dublin mechanism. Moreover, since a substantial part of transfers between the

[320] Primarily, the application shall be examined in the Member States where the applicant has family members who have been granted refugee status. If no such family members exist, the application shall be examined in the Member State where the applicant has a valid residence permit or visa. If no such permit or visa exists, 'the first Member State of entry' shall be responsible for the examination. Acc. to Article 3(5) of the Convention, any Member State can send an asylum seeker to a safe third-country before applying any rules in the Convention.

[321] Lavenex, S., Europeanization of Refugee Policies: Between Human Rights and Internal Security; 2001, p.99

EU countries under the Dublin measures do not take place immediately, and some of them are not even accepted at all, the asylum seekers are sometimes faced with difficult living conditions until a country takes the responsibility of them. Furthermore, although the stated aim of the Convention is that the responsible Member State has to conduct the full examination procedure to its conclusion, due to the application of the safe third-country notion it is possible that the substance of an asylum seeker's claim will not be examined by one of the Member States and will be sent to a third-country which may not even examine the case. Dublin Convention sets up a less pliable and a more exclusionary system since asylum seekers cannot go to more than one EU State to seek asylum. While this is on the one hand constructive since it prevents bogus asylum seekers to misuse the international protection regime and inhibits the abuse of resources; on the other hand, it may have detrimental consequences since an asylum seeker, whose claim is rejected by an EU Member State, will not be able to seek asylum in another EU country, of which protection regime is maybe much more liberal. In these conditions, an asylum seeker has more chance of being protected, within an EU, where asylum and aliens legislation varies considerably. Of course, the most favorite thing is an EU which is composed of 25 Member States which provide the same level of protection at the same quality, so that the asylum seekers will not need to travel from one Member State to another to seek asylum. However, there is an obvious reality: despite the many similarities in the immigration-related challenges confronting the EU Member States and in their political strategies for addressing them, and the attempts for harmonization, still astonishing differences remain in asylum systems of each Member State.[322] Poor representation of the applicant because of a deficient asylum procedure in a specific Member State or improper application of material asylum law in one Member State can normally lead a protection seeker to flee to another Member State; or an asylum seeker can apply for asylum for the second time in another Member State because of a subsequent change in circumstances. The harmony of European protection systems

[322] Angenendt, S. (ed.), Asylum and Migration Policies in the European Union; 1999, p.4

(especially when based on restrictive policies) will maybe prevent a real refugee, to be recognized as so. Furthermore, the asylum seeker, who was making multiple applications in different EU States before, will not be anymore able to retain the advantage of delaying removal to the country of origin, where he may face persecution. As European Parliament puts out, for the Dublin Convention to be effective, first of all a high level of harmonization of the asylum procedures within the EU is necessary.[323] Full harmonization of procedural and material asylum law and an effective common protection system all over the Union can make the 'asylum shopping' argument redundant. However, as Noll argues:

> Instead of intensifying the harmonization of protection systems, whose divergence was the very cause of secondary movements, States stipulated the fictive equality of these systems, and allocated protection seekers under a mechanical rule, which was based on the concept of safe third countries.[324]

Since new Member States must also accede to the Dublin Convention (which is binding and is therefore considered part of the *acquis* on asylum, although not strictly a Community instrument[325]), this non-flexible protection regime will enlarge eastwards. UNHCR and many scholars in the area also agree with States that asylum seekers should in principle submit their asylum claim in only one country. However this, of course, should be in case of the presence of a country, which has fair and effective procedures for the determination of refugee status that comply with established international standards and which has the means to guarantee asylum seekers' safety and basic human treatment as long as needed. Once it is accepted that measures should be taken to limit the so-called asylum-shopping phenomenon, there must be at least one country in the world willing and able to provide protection. This

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[323] EP Working Paper, Asylum in the EU Member States; 2000, p.27

[324] Noll, G., Negotiating Asylum: The EU *Acquis*, Extraterritorial Protection and the Common Market of Deflection; 2000, p.183

[325] It entered into force on 1 September 1997 for 12 Member States, for Austria and Sweden on 1 October 1997, and for Finland on 1 January 1998.

may be best achieved by defining universal rules on the proper distribution of responsibilities for receiving asylum seekers. Unilateral measures by European States such as the safe third-country policy or the search for regionalized asylum are not a satisfactory solution. Indeed they raise the worrying prospect that asylum will no longer be a global regime and will, instead, be confined to the world of poor nations and regions neighboring refugee producing countries.[326] Additionally, another problematic repercussion of this non-flexible system is the fact that there are only limited choices left for Member States and Candidate Countries that fear overburdening, as equitable burden sharing is systematically blocked by the Dublin Convention and other safe third-country arrangements: The choices are either to block the access of protection seekers to their territory, or minimize protection obligations by curtailing the level of rights enjoyed during and after procedure, by adopting restrictive interpretations of existing protection categories and avoiding introduction of additional protection categories…etc.[327]

Additionally, with the enlargement process, the sole binding *acquis* on procedures, *'Protocol to the Treaty of Amsterdam on asylum for nationals of the EU Member States'* (Protocol No. 29 of the consolidated text), which prevents the EU nationals to seek asylum within the EU, will be extended to cover further countries at the point that they accede to the Union. The Protocol expressly denies the qualification of citizens of the EU Member States as refugees and would, thus, if strictly implemented, "create a *de facto* geographical limitation as regards the scope of the Geneva Convention"[328] and undermine the universal nature of the Convention and its Protocol. As a result, potential refugees from the EU Member States may be deprived from their fundamental right to seek and enjoy asylum laid down in Article 14 of the

[326] UNHCR Report, Reaching a Balance Between Migration Control and Refugee Protection in the EU: A UNHCR Perspective; Geneva, September 2000, p. 20

[327] Noll, G., Negotiating Asylum: The EU *Acquis*, Extraterritorial Protection and the Common Market of Deflection; 2000, p. 348

[328] Lavenex, S., Europeanization of Refugee Policies: Between Human Rights and Internal Security; 2001, p.134

Universal Declaration of Human Rights. This Protocol represents a serious threat to international principles of refugee protection and violates the purpose of some of the basic provisions of the 1951 Refugee Convention, too, like the principle that each case for asylum must be judged by the receiving country on its own merits. With the Protocol, the EU Member States, with their standardized rules, prevent asylum seekers originating from one of the EU countries to seek asylum in another EU Member State since there is an assumption that the EU already constitutes a common area of security and justice; and Member States are already considered as safe countries because of the level of protection of rights and freedoms. According to the Protocol,[329] such an application should normally be declared inadmissible by the receiving Member State (although the Protocol allows for exceptions, *inter alias,* where a Member State decides unilaterally to declare the application 'admissible' on the presumption that it is manifestly unfounded and therefore can be decided in a fast-track procedure).[330] The devil is in the possibility that this non-flexible and exclusionary system may be also copied by the Associate Countries and, thus, may pose a big threat to the basic protection norms, as enlarging an inaccessible 'Fortress Europe'. Moreover, acting as a political dam-breaker, it may lead other regions of the world to adopt similar exclusionary measures, too.[331]

[329] Since access to asylum procedure should not be denied on nationality grounds (e.g. by using the concept of safe country of origin), Belgium adopted a Declaration to the Protocol stating its intention to continue carrying out an individual examination of any asylum request made by a national of another Member State. (Declaration No. 5)

[330] For further information please see the Protocol on Asylum for Nationals of Member States of the European Union, annexed by the ToA to the EC Treaty, sole Art. (d).

[331] Noll, G., Negotiating Asylum: The EU *Acquis*, Extraterritorial Protection and the Common Market of Deflection; 2000, p.232

5.1.3. A Protection System based on 'Lowest Common Denominators':

Since 1999, the formation of a 'Common Asylum System' at the EU level is materialized after complicated negotiations between the governments of each Member State on several sensitive topics, due to the difficulty for Member States to come to an agreement on security-driven issues, like asylum and migration. Therefore, the outcome is usually based on minimum common denominators of each State's policies and practices in the fields of asylum and migration. A common system, composed of 'minimum protection standards', which diminishes the EU protection expectations, also poses a threat as regards the Candidate Countries, since these countries, lacking usually legislations on asylum, are ready to copy the lowest common standards into their new acts during the pre-accession process. These are of course only minimum standards to protect refugees, and as already set out in the Union's binding Directives, there is a fact that each Member State and Candidate Country can go beyond these rules and adopt more favorable standards. In many cases, however, it is the standard of the lowest common denominator, which prevails and results in diminished rather than enhanced protection for refugees in the Candidate Countries.

In addition to these problems, with post-enlargement, the necessity of unanimity voting[332] on legally binding measures related to asylum and immigration, may put even greater downward pressure on the EU legislation and cause a system based on more minimum standards, since the Union will be composed of more Member States. As with many complex legal matters, the devil, it seems is in detail. A common asylum and immigration policy has to avoid the trap of "legislating down to the

[332] Constitutional Treaty foresees majority voting in asylum matters; however it is still pending ratification of Member States.

lowest acceptable level".[333] Since the shortcomings of the *acquis* and the instruments carrying those defects are being exported to Candidate Countries, the EU should try to agree on common denominators, which will not diminish refugee protection in the Union and in its Associates.

5.1.4. Imbalance between the Member States and Associates in the Application of the *Acquis* and as regards Burden Sharing:

Although Tampere Summit Conclusions contained strong language on the need for common asylum and immigration policies to offer guarantees to those who seek protection in the EU (paragraph no. 3), they did not offer an explicit commitment on the role of the EU Member States. Moreover, the mandate of the HLWG remained silent on measures aimed at strengthening the institution of asylum in the States of the EU.[334] However, the Associate Countries were expected to adopt the EU measures as soon as possible. This unfair expectation combined with inequitable 'burden sharing' or, as more correctly-said, the deliberate burden shifting to the third States, has created a disbelief environment for third countries about the essence of their cooperation with the Union, and its nature that was expected to be fair.

There is a high degree of 'misfit' between the domestic situation and legal-administrative arrangement of the Associate Countries and the policies developed in the EU. In so far as the adoption of the formal and informal elements of the EU asylum and migration *acquis* was prescribed as a condition for membership,

[333] Lavenex, S., Europeanization of Refugee Policies: Between Human Rights and Internal Security; 2001, p. 52
[334] Van der Klaauw, J., 'Building Partnerships with Countries of Origin and Transit', in Clotilde M. (ed.), Asylum, Immigration and Schengen Post- Amsterdam: A First Assessment; 2001, p. 27

adaptation is not only expected, but also compulsory.[335] In contrast to several EU Member States, which, in the absence of domestic political will, were able to negotiate opt-outs from common cooperation in asylum and immigration matters (e.g. the UK and Denmark), the Candidate Countries have no choice for a cooperation *a la carte*; but they have to accept the *acquis* in full under the accession partnerships although the exact content of the asylum provisions is being defined by the Member States. While proposed Directives or Regulations are adopted by the EU Member States, the Candidate States can only speculate as to what their final content will be.[336] Given their rapid transformation from countries of emigration into countries of transit and destination for forced and economic migrants, and the extent of political and economic reforms involved in the transformation process, legislation on asylum and immigration follow largely the terms set by their Western neighbors and is largely promoted by the activities of neighboring EU Member States and the European Commission.[337] According to Heather Grabbe, the dynamics of this policy transfer amounts to an instance of Europeanization where "the conditionality for membership gives the Union significant leverage in transferring to the Applicant Countries its principles, norms and rules, as well as in shaping their institutional and administrative structures".[338]

Nevertheless, the dilemma lies in the 'double standards' applied on the *communitarization* of these norms and policies. Several provisions of the Amsterdam Treaty highlight a lack of solidarity of the current Member States vis-à-vis future members: Firstly, Candidate Countries will not be allowed to negotiate flexibility

[335] Lavanex, S. and Uçarer, E., 'The External Dimension of Europeanization: The Case of Immigration Policies' in Cooperation and Conflict: Journal of the Nordic International Studies Association; 2004, p. 430

[336] Phuong, C., 'Enlarging Fortress Europe: EU Accession, Asylum and Immigration in Candidate Countries', in International and Comparative Law Quarterly; vol. 52, July 2003, p. 651

[337] Wallace, C., 'The New Migration Space as a Buffer Zone?' in C. Wallace and D. Stola (eds.), Patterns of Migration in Central Europe; 2001, p. 72–84

[338] Grabbe, H., 'Stabilizing the East While Keeping Out the Easterners: Internal and External Security Logics in Conflict', in Lavenex, S. and Uçarer, E. (eds.), Migration and Externalities of European Integration; 2002, p. 93

clauses with regard to Title IV of TEC, but are bound to have adopted the complete *acquis* reached in this area at the time of joining the Union. This means Malta and Cyprus don't have the right to maintain their border checks on the grounds that they are islands, like UK and Ireland did. Secondly, Applicant States will have to adopt the totality of legally binding and non-binding *acquis* including unpublished Decisions by the Schengen Executive Committee. Even though the Candidate States are under pressure to comply fully with the Schengen *acquis*, they will not be fully part of Schengen when they become EU States since free movement of persons will not be allowed in the years following accession.[339] It is clear that Candidate Countries have to comply with the obligations arising from Schengen before benefiting from the advantages in terms of abolition of internal border controls. As Grabbe stated "tougher border controls must first be applied on the Eastern borders of the Candidate Countries, and only then will concessions be made on their Western borders".[340] Thirdly, while Schengen and Dublin Conventions are binding on the EU States which have ratified them, other harmonization activities of 1990s have taken place outside a binding framework in a far from transparent inter-governmental process. Even so, agreement among European Union countries could only be reached at the level of the lowest common denominator. Indeed, there has been considerable variation among Member States in their implementation of supposedly harmonized policies on asylum. That's why, for Candidate States, there is an uncertainty as to what norms must be implemented since European asylum law has only emerged in the last few years and is not yet very elaborate.[341] Moreover, despite this minimum harmonization among the EU Member States, Candidate Countries are expected to align their system with the *acquis* that is even non-binding for the EU States. Although the Member States implementing differing applications of the EU

[339] Phuong, C., 'Enlarging Fortress Europe: EU Accession, Asylum and Immigration in Candidate Countries', in International and Comparative Law Quarterly; vol. 52, July 2003, p. 648

[340] Grabbe cited in Phuong, C., 'Enlarging Fortress Europe: EU Accession, Asylum and Immigration in Candidate Countries', in International and Comparative Law Quarterly; vol. 52, July 2003, p. 648.

[341] Phuong, C., 'Enlarging Fortress Europe: EU Accession, Asylum and Immigration in Candidate Countries', in International and Comparative Law Quarterly; vol. 52, July 2003, p. 651

measures, have a number of problems regarding creating a Common Asylum Policy for the Union, and many of the non-binding measures which are part of the *acquis* have not been implemented within the existing EU Member States yet, these unbinding *acquis communautaire* for the Union itself, becomes with the pre-accession process in a way binding for the Associate States, who are aware that the failure of harmonizing their national policies with the Union's *acquis* will be detrimental for their accession to the Union. As Lavanex state:

> This may constitute a significant hurdle for…Applicant Countries; they must within a short period of time, develop and implement policies which EU Member States have taken years to shape and in some cases are still having problems with them.[342]

Fourthly, the vagueness and differing applications of the EU measures also creates problems among Associate States regarding the legitimacy of a Common Asylum Policy. According to Gregor Noll, two aspects of the accession process are striking: The first is the hardening of the asylum, of a soft law area in the accession process; the second is the "selling of an outdated product to the cousins in the East". He states that while the present Member States are far from having implemented the asylum *acquis* themselves, they demand strict compliance of the non-members and this is something of a paradox that the rules of the club apply first and foremost to outsiders.[343] Since an outdated product is sold to the outsiders, Candidate Countries are amending their asylum and immigration legislation almost on a yearly basis in order to catch the recent developments.[344] However legislative changes on a frequent

[342] Lavenex, S., Europeanization of Refugee Policies: Between Human Rights and Internal Security; 2001, p.136

[343] Noll, G., Negotiating Asylum: The EU *Acquis*, Extraterritorial Protection and the Common Market of Deflection; 2000, p. 156

[344] In drafting and amending 1997 Aliens Act, Polish authorities took into account most of the EU asylum standards contained in soft law instruments, as they believe that these instruments will be shortly adopted as legally binding and thought that Poland cannot amend its legislation each time a new Directive or Regulation is adopted by the EU.

basis, on the other side, "create serious challenges to the stability and certainty of the law in Candidate Countries".[345]

[345] Phuong, C., 'Enlarging Fortress Europe: EU Accession, Asylum and Immigration in Candidate Countries', in International and Comparative Law Quarterly; vol. 52, July 2003, p. 652

5.2. BENEFITS OF ESTABLISHING A COMMON EUROPEAN REFUGEE REGIME AND ITS ENLARGEMENT BEYOND EUROPE

For Member States, the advantages of the enlargement of the EU Common Asylum Policy are obvious: "At best enlargement may imply a form of burden sharing for Member States, and lead to an expeditious improvement of extraterritorial protection available in Candidate States",[346] which will decrease the burden of individual European States, in the future. With harmonization, the burden of the asylum seekers will fall more evenly on the shoulders of the EU and its future Member States rather than on one Member State, like it happened for Germany in the beginning of 1990s.[347] In September 1992, Klaus Kinkel, referring to his country' disproportionate asylum burden, complained that Germany could not do 'everything alone'.[348] As Noll states:

> Where a collective of States shares the task of protection, high costs will be avoided, while existing resources will be fully exploited. There are two beneficiaries to such arrangements: Host States and protection seekers: First, States engaging in burden sharing cut their total costs. Second, the number of protection seekers finding haven is larger than it would be in the absence of burden sharing arrangements.[349]

Although the 'burden sharing' idea can be found in the Final Act of the 1951 Geneva Convention and in various texts of the Community, it came into widespread usage, just like temporary protection, during the Yugoslavian crisis. Sharing of the burden

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[346] Noll, G., Negotiating Asylum: The EU *Acquis,* Extraterritorial Protection and the Common Market of Deflection; 2000, p. 153

[347] Manners, Ian, 'Negotiation of an Asylum Policy for the EC', in Substance and Symbolism: An Anatomy of Cooperation in the New Europe; 2000, p.97

[348] Collinson, S., Europe and International Migration; 1993, p. 145

[349] Noll, G., Negotiating Asylum: The EU *Acquis,* Extraterritorial Protection and the Common Market of Deflection; 2000, p.266

meant either the sharing of the physical protection of displaced persons and the associated financial costs, or spreading of either the physical and economic burden throughout the Union.[350] Having taken 350,000 Bosnians in the early 1990s, the German government pushed hard for some kind of burden-sharing arrangement. In 1995, the European Union adopted a non-binding Resolution on burden sharing with regard to the admission and residence of displaced persons on a temporary basis. The mass outflow of refugees from Bosnia and Herzegovina in the mid-1990s and from Kosovo in the late 1990s showed that the issue of 'burden sharing' would have been a prominent issue in Europe, throughout the decade. Through burden sharing within the EU, Germany's share of Western Europe's asylum applications declined from 63 percent at the beginning of the 1990s to 23 percent in 1999. However, with the enlargement of the European asylum and migration policies eastwards, the EU Member States will be also able to divert this burden to today's third countries or tomorrow's Member States -which are already taking many asylum seekers via safe third-country arrangements and Readmission Agreements.

For current Member States, 'burden sharing' can be seen as one of the positive impacts of harmonization on asylum and migration. However, the EU asylum system has an export value for Candidate Countries, too; and as contrary to the first part of this chapter, this value is not always negative from the perspective of Candidate Countries. The enlargement of the European Union results in the shift of the Union's external borders and also in the protection of these borders by today's Candidate States. However, enlargement is not solely about enlarging borders, but also about the extension of protection capacities to the Candidate Countries. Alignment of countries (that do not have an effective asylum system) with international standards; standardized common rules that will prevent governments to take arbitrary decisions about asylum seekers; or membership prospect for these third countries can be given

[350] Levy, C., 'Asylum seekers, refugees and the future of citizenship in the European Union', in Bloch, A. and Levy, C. (eds.), Refugees, Citizenship and Social Policy in Europe; 1999, p. 216-217

as examples of the positive impacts of the development of a Common Asylum Policy within the Union and its Associates:

5.2.1. Alignment with International Standards:

Enlargement has provided an opportunity for Candidate States to establish comprehensive asylum systems and protection standards with assistance and funding provided by the EU. Before pre-accession process, which pushed Candidate States to adopt measures regarding asylum and migration, Candidate Countries did not have any immigration or asylum laws/policies, or only had very primitive admission systems for the simple reason that there was no immigration to regulate.[351] Although Poland became party to the 1951 Convention and its Protocol in September 1991, there were no specific asylum procedures in place in the country before the EU pre-accession process.[352] The asylum systems initially set up in Candidate Countries did raise problems in terms of refugee protection since "these countries had no tradition of asylum and/or lacked a human rights culture".[353] As Lavanex and Uçarer state:

> In the absence of a comparable legislative and administrative framework for both forced and economic migrants, the orientation towards EU requirements may, on the one hand, offer a welcome vehicle for adaptation by opportune conditionality where the controversial and time-consuming search for domestic solutions can be avoided.[354]

[351] Grabbe, H., 'The Sharp Edges of Europe. Extending Schengen Eastwards', 2000, p. 528, cited in Phuong, C., 'Enlarging Fortress Europe: EU Accession, Asylum and Immigration in Candidate Countries', in International and Comparative Law Quarterly; vol. 52, July 2003, p. 644

[352] The 1997 Aliens Act constitutes the first attempt to regulate comprehensively the situation of asylum seekers and refugees in Poland.

[353] Phuong, C., 'Enlarging Fortress Europe: EU Accession, Asylum and Immigration in Candidate Countries', in International and Comparative Law Quarterly; vol. 52, July 2003, p. 649

[354] Lavanex, S. and Uçarer, E., 'The External Dimension of Europeanization: The Case of Immigration Policies' in Cooperation and Conflict: Journal of the Nordic International Studies Association; 2004, p. 437

In addition, the EU legislation is seen usually to be compatible with international legal standards. Thereby, it is helping the Associate Countries in their move towards liberal juridical and democratic regimes, and in fulfilling the gaps in their protection systems. Adoption of the UN Refugee Convention and its necessary implementing machinery in Candidate States is submitted as a pre-accession requirement for membership, since the protection of human rights is at the foundation of the political criteria for the accession process (as set forth by the Copenhagen Presidency). As a similar element, the preambles of the relevant *acquis,* which are the building blocks of the European refugee protection regime, rest upon the principles of refugee and human rights protection taking place in the 1951 Refugee Convention and the European Convention on Human Rights and Fundamental Freedoms.[355] Since the start of the accession process, many of the newly created refugee determination systems in the Candidate States embraced an array of fundamental procedural safeguards that are also integral to the *acquis.*[356] As Candidate Countries are going through the transition from countries of transit where asylum seekers did not stop to lodge their applications, to countries of destination, they know that they have to focus on establishing asylum procedures and reception facilities which are in conformity with international standards.[357] It is a fact that the *acquis* has, to varying degrees, resulted in the advance of protection in the Eastern countries which in the recent past maintained only limited capacity to guarantee protection for asylum seekers in line with international standards. For example, Chapter 5 of the 1997 Aliens Act of Poland, which deals with refugee status determination, has introduced satisfactory procedural standards which include, *inter alias*, the right for asylum seekers to be informed in a language they understand (Article 33), the right to a personal interview (Article 40) and the right to contact with UNHCR (Article 49). Decisions on asylum applications that were taken by the Ministry of Internal Affairs

[355] Byrne, R.; Noll, G.; Vedsted-Hansen, J. (eds.), New Asylum Countries: Migration Control and Refugee Protection in an Enlarged European Union; 2002, p. 10
[356] ibid., 374
[357] Phuong, C., 'Enlarging Fortress Europe: EU Accession, Asylum and Immigration in Candidate Countries', in International and Comparative Law Quarterly; vol. 52, July 2003, p. 651

before has been transferred to a specific expertise body in 2001 and a Refugee Board was established to examine asylum appeals, which are all positive developments.[358] Similarly, Turkey, which is right now at the stage of preparing its first Asylum Act as parallel to the EU requirements, gave the signal of its protection-oriented approach on asylum in its first 'National Action Plan for the Adoption of the EU *acquis* on Asylum and Migration'[359] (NAP): In Section 4.1, the Plan stated that in order to increase the capacity, institutional set-up will be realized to establish a specialized unit (expertise body) in the fields of asylum and migration. This is a big improvement for a country, where the administrative body for asylum decisions is still the National Police. There are also other very positive provisions in the Action Plan, especially in Section 4.6, which describes the future asylum procedures. The paragraphs under this heading state, *inter alias,* that:

> Multilingual brochures on the rights and responsibilities of asylum seekers, and on the application procedures should be prepared…Aliens reaching the Turkish border shall be allowed to seek asylum…Being late in making the application should not prevent asylum seekers to exercise their rights to asylum…Persons having no IDs or documents should be allowed to access the full asylum procedure and should not be punished because of failure to provide their IDs or documents… Each applicant should be allowed the right to be interviewed in order to explain the reasons for seeking asylum…A group comprising of qualified and expert interpreters should be convened and the required financial resources should be allocated for this purpose…Notification of the applicant with the grounds for the negative decision should include both factual and legal grounds of refusal.[360]

All these provisions are signaling an asylum procedure with high protection standards, far from the restrictive measures of the EU Member States in 1990s. Although the NAP also refers to the concept of 'accelerated procedure', on the other

[358] ibid., p. 654

[359]Turkish National Action Plan for the Adoption of the EU *Acquis* on Asylum and Migration came into force on 25.03.2005 (For further information pls. see www.unhcr.org.tr)

[360] ibid., Section No. 4.6

side it is stated in Section 4.6.1 that "applications channeled to the accelerated procedure should be examined and decided upon in a short time with priority while the legal guarantees are safeguarded". As another development, the Plan, for the first time brings the complementary forms of protection to Turkish protection system, as stating in Section 4.6.8 that procedures related to the 'Subsidiary Protection', 'Tolerated Aliens' and 'Residence Permits based on Humanitarian Grounds' shall be established in the draft bills on asylum and/or aliens. Furthermore, Section 4.9.1 of the NAP announces that an integration policy and system should be established for asylum seekers, which is again a very positive and encouraging development for a country, which lacks right now a full-fledged reception and an official integration system for refugees.

The process of harmonizing asylum policies within the Union and its enlargement beyond the Union is ongoing. UNHCR also endorse these efforts where they have been aimed at making asylum systems fairer, more efficient and more predictable, not only for the benefit of governments, but also for refugees and asylum seekers themselves. It is true that attempts of the Associate Countries to harmonize their asylum policies and practice with the EU *acquis* cause improving refugee protection standards in the these developing countries, in the short-run, which is a by-product of the EU enlargement process. The investment in and monitoring of refugee protection standards in the East by the EU States, of course, aims the transfer of asylum seekers back to the Candidate Countries through which they have transited. It is not difficult to understand that it is in the interest of Member States to improve asylum systems in Candidate Countries since the EU will have less difficulty in justifying the return of asylum seekers to these Candidate States because they will benefit from an equivalent level of protection in the future.[361] However, this does not change the fact that these attempts strengthen human rights protection in the future Member States.

[361] Phuong, C., 'Enlarging Fortress Europe: EU Accession, Asylum and Immigration in Candidate Countries', in International and Comparative Law Quarterly; vol. 52, July 2003, p. 650

Although the motivation of the EU can be criticized, the EU pressure to implement changes in the asylum systems of Candidate Counties has brought some positive consequences: Asylum procedures have been adopted or improved, specialized administrative structures have been set up to deal with asylum seekers and refugees, and support groups have been created.[362] Enlargement process, *de facto*, exported protective norms to Candidate Countries. It is factual that in the short-run extending the EU standards to Associate States through financial and technical assistance will have an overall positive impact on the protection of refugees in these countries, which lack comprehensive and full-fledged protection systems right now. ECRE and UNHCR also support the increased attention devoted to improving refugee protection standards in the Associated States through financial and technical assistance and training programs provided by the Union.[363]

5.2.2. Standardizations -Tools against Arbitrariness:

The harmonization process on asylum and migration and its enlargement eastwards is not always negative, since it would bring asylum and migration policy within the framework of a comprehensive and coherent approach.[364] The disorderly migration movements can only be avoided through harmonizing policies and practices on asylum and migration.[365]

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[362] ibid.

[363] For Hungarian case, see Copeland, E.A., The Creation and Evolution of the Refugee and Economic Migration Regimes: Testing Alternative Frameworks, a Thesis submitted to the Fletcher School of Law and Diplomacy in partial fulfillment of the Requirements for the Degree of Doctor of Philosophy; May 1996, p. 557

[364] Van der Klaauw, J., 'The Challenges of the European Harmonization Process' in Muus, P. (ed.), Exclusion and Inclusion of Refugees in Contemporary Europe; 1997, p.27

[365] Manners, Ian, 'Negotiation of an Asylum Policy for the EC', in Substance and Symbolism: An Anatomy of Cooperation in the New Europe; 2000, p. 114

The harmonization on asylum issues and its extension to third countries has an additional positive impact, too, since harmonized rules prevent Member States' governments to take arbitrary decisions on refugee status determination and on provision of socio-economic rights to refugees. It is, ultimately, the individual State, which decides whether or not to grant asylum, and decisions cannot be detached from the political considerations that a particular government holds paramount.[366] Rates of recognition as refugees vary with regard to a combination of different factors like the country of reception, the country of the origin of asylum seekers, and the policies of the government currently in power. The nature of the government can fundamentally influence policies for specific groups of asylum seekers.[367] However, common rules on reception, temporary protection, burden sharing, qualification and asylum procedures will prevent Member States to behave arbitrarily at least on minimum protection standards.

The Candidate Countries, which are required to adopt the EU *acquis* on asylum and migration in full, will also have to provide for the minimum protection standards in their legislations. With harmonization, protection for refugees will be coordinated within the framework of a coherent and uniform (standardized) approach instead of being dependent on the arbitrary decisions of particular governments in power or on the reactions of some of the media and public against the increased number of aliens in these countries.

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[366] Joly, D., Kelly, L. and Nettleton, C. (eds.), Refugees in Europe: Hostile New Agenda; 1997, p. 18

[367] For instance, in the UK the then Conservative government did not accept Chilean refugees in the aftermath of the 1973 coup; however, between 1974 and 1979 the succeeding Labor government admitted 3000 Chileans in an organized program, which in turn was terminated six months after the re-election of the Conservatives in 1979.

5.2.3. Prospects for the EU Membership:

As Gregor Noll states, the accession process is about being integrated and not necessarily about integrating the 'other'.[368] In other words, the main goal and overriding national policy objective of each of the Associate Countries is to gain membership. The criteria adopted by the 1993 Copenhagen European Council constitute the basis for the accession process. Membership to the Union requires that the Candidate Country respects human rights, including the rights of refugees. On the other side, 'the ability to take on the obligations of membership'[369] is one of the other pre-conditions for accession, which also includes the obligation to protect the EU's external borders. The Candidate Countries will have to transpose the EU *acquis* on both asylum and border control into their national laws and policies, and implement all instruments belonging to these legislation. As with the extensive range of areas that require reform for States to qualify for admission, the criteria established by the *acquis* for the emerging asylum and border control systems set the benchmarks that these governments are striving to meet.[370] To be a member, the Candidate Countries both need to establish an effective asylum system to provide international protection to refugees and also to take measures regarding border control. While on the one side, the alignment of Candidate States with these EU standards will lead these States to set up a balance between a working, efficient and fair protection system and an integrated border management; on the other side, this will lead these States, at the end, to be a part of a privileged 'club', which they are longing to be a member for years.

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[368] Noll, G., Negotiating Asylum: The EU *Acquis,* Extraterritorial Protection and the Common Market of Deflection; 2000, p. 154

[369] For further information, please see the Conclusions of the Copenhagen Summit; June 1993, Points no. 1.1- 4.1

[370] Byrne, R.; Noll, G.; Vedsted-Hansen, J. (eds.), New Asylum Countries: Migration Control and Refugee Protection in an Enlarged European Union; 2002, p. 381

5.3. CONCLUSION

During the fifth and the main chapter of this thesis work, a number of concerns regarding the extension of the European asylum policies and practices beyond the Union, specifically to the Candidate States, were exemplified. Since each Member State has been affected from the intergovernmental cooperation on asylum of 1990s and shaped their asylum policies with the era's restrictive instruments (the non-binding *acquis*), the chapter mostly covered the restrictive policies and practices of the EU States on asylum and migration, and the impacts of these individual policies and non-binding *acquis* on Candidate Countries. However, while doing that, references to the most recent binding legislations of the first phase of harmonization on asylum, like the Directives on Qualification and Asylum Procedures, were also provided. The chapter also aimed to give the hint as regards the future of the European protection regime with the establishment of a 'Common European Asylum Policy' which will be binding on all EU Member States and Candidate Countries in the future. Both the negative implications of the extension of the European asylum policies/practices to third countries and the benefits that the Candidate States will experience with the alignment process were examined.

As Lavanex and Uçarer state, 'Europe', or more precisely the EU, fulfils an important role as "carrier of ideas, and, given its history and the ideals of integration, also acts as a model or normative template for peoples and countries beyond European territory".[371] It is true that in the short-run, extending the EU standards to Associate States through financial and technical assistance will have an overall positive impact on the protection of refugees in these countries, which lack comprehensive and full-fledged protection systems right now. Yet the risks are

[371] Lavanex, S. and Uçarer, E., 'The External Dimension of Europeanization: The Case of Immigration Policies' in Cooperation and Conflict: Journal of the Nordic International Studies Association; 2004, p. 437

equally obvious. As also argued by Noll "the accession process may also degenerate to burden shifting eastwards and the export of protection standards could replicate EU failings or remain a dead letter".[372] There are also flaws in the current policies and practices of the Member States where the EU standards fall short of international standards and contradict with the basic provisions of 1951 Convention, namely with the principle of *non- refoulement*. However, it should be noted that these standards are not the discoveries of the 'harmonization on asylum' which has only started after 1999. The binding Directives, which provided at least for the minimum protection standards, have brought necessary safeguards against most of these concerns and harmonized the individual Member States' dissimilar and arbitrary practices in many areas. Up to now, the Directives that were adopted during the first phase of harmonization on asylum provided a protection-oriented approach when compared to the restrictive State policies and practices of mid-90s. However, the main binding *acquis* on asylum procedures is still pending approval which will shape the future of the EU's Common Asylum Policy.

It is very significant that the EU is engaged in the historic and complex task of forging a single common European asylum system that will apply to the current 25 Member States and its Associates. This process presents the EU with a unique opportunity to establish a principled and forward-looking Common Asylum Policy, which is consistent and coherent in itself and which is based on high levels of protection. However; as Söderbergh from UNHCR puts out, "much depends on whether the long-term common good will prevail over short-term national self-interest and domestic politics".

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[372] Noll, G. Negotiating Asylum: The EU *Acquis*, Extraterritorial Protection and the Common Market of Deflection; 2000, p.153

CHAPTER VI

CONCLUSION:

Enlargement of Restrictions or Protection?

During the preceding chapter (the 5th chapter) of this thesis work, several concerns regarding the extension of the European asylum policies/practices beyond the Union, specifically to the Candidate Countries, were reflected. The chapter mostly covered the restrictive measures taken by the EU States in 90s on asylum and migration, and the impact of these individual policies and non-binding *acquis* on Associates. However, it was also given reference to the binding legislations of the 'first phase of harmonization on asylum'[373] like the Directives on Qualification and Asylum Procedures; and to the future of the European protection regime with the establishment of a 'Common European Asylum Policy' which will be binding on all EU Member States and Candidates. The 5th chapter, from an impartial standpoint, tried to examine both the negative implications of the extension of the European asylum policies/practices to third countries, and the benefits that the Candidate States will experience with the alignment process. After reflecting all these concerns in an explicit way, this concluding chapter will ask the question if a 'Common Asylum Policy' will mean the enlargement of restrictions rather than the enlargement of

[373] The first phase of the harmonization on asylum covers the period between 1999 and 2004. The binding *acquis* adopted during this era should be incorporated into the national systems of each Member State by a specific deadline mentioned in each Directive. The second phase has already started by 2004. While the first phase of harmonization on asylum (1999-2004) aims at the adoption of a binding set of common minimum standards on asylum, the second phase (2005- 2010) should result in a common asylum procedure, a uniform status for asylum and subsidiary protection valid throughout the Union, as well as a common resettlement scheme.

protection; or if it will be beneficial both for the Member/Candidate States and the refugees themselves. Another question is whether the 'harmonization on asylum' will lead to the harmonization of the most restrictive standards or to the creation of a more coherent, coordinated and effective approach about the asylum problem.

At the Luxembourg European Council meeting on 28-29 June 1991, Chancellor Kohl surprised everyone by proposing to have common Community policies on asylum, immigration, visas and anti-criminal activities. In the aftermath of this Summit, the Community Members attempted to reach a final compromise on asylum policy which would be acceptable by all Member States. In December 1991, European Council in Maastricht, after a long bargaining taking place between the German and British governments, decided to include asylum and migration matters in the third pillar of the Community. This was the first formal inclusion of asylum issues as part of the European agenda. As Manners also put out, the reason behind this decision is a simple political fact that most States felt they had something to "gain from the payoff structure by cooperating".[374] With the perceived consequences of the opening of the Eastern Bloc and the German pressure, the EU States agreed on the cooperation on asylum and migration after seeing that national policies could not provide an adequate response to the increasing asylum problem. However under pillar structure, there was still no basis for binding laws to be enacted that would oblige Member States to adopt identical practices. It was for the first time in 1999 that asylum became an EU competence under Article 63 TEU, which envisages the adoption of legally-binding instruments in a number of areas by April 2004. With Amsterdam, cooperation on asylum and immigration affairs has moved from *ad-hoc* cooperation outside the EC institutions to the first pillar of the Union; and *'the first phase of harmonization on asylum'* has been launched. The legal framework of harmonization on asylum, which was established with Amsterdam Treaty and Tampere Conclusions

[374] Manners, I., 'Negotiation of an Asylum Policy for the EC', in Substance and Symbolism: An Anatomy of Cooperation in the New Europe; 2000, p.121

of October 1999, paved the way towards truly common binding European laws on asylum.

Before 1999 (the start of the 'first phase of harmonization on asylum'), the EU developments in the fields of asylum and immigration already demonstrated "the prioritization of security concerns over humanitarian concerns and followed a strong logic of inclusion/exclusion as illustrated by strict border controls".[375] In the mid 1980s, asylum issue started to be perceived as a threat to the national stability and internal security due to the increasing numbers of foreigners who used the asylum channel to enter into the EU territory when the foreign labor recruitment was officially halted in mid 70s. Because of the overburdening of asylum systems in the principal receiving countries and of the widespread perception regarding the abuse of the asylum procedures by asylum seekers, the management of migration flows became a priority and Western countries have increasingly tightened their provisions as regards the admission of foreigners. Nevertheless, while harmonization on border control issues has been effectively addressed, little attention has been paid to other very significant components of the immigration policy: the criteria that determine which refugees and migrants are permitted to enter each Member State, and the reception and integration of these people. As practice in Member States has proven, the protection of the asylum seekers' rights has been ignored during this era. As Lavanex put out in a very concise manner, with regard to asylum and immigration:

> The mandate of the intergovernmental groups during this era was restricted to the elaboration of common high standards of control at the external borders, tight entry conditions for third-country nationals, the fight against illegal immigration, and with regard to asylum, the fight against bogus applications.[376]

[375] Phuong, C., 'Enlarging Fortress Europe: EU Accession, Asylum and Immigration in Candidate Countries', in International and Comparative Law Quarterly; vol. 52, July 2003, p. 662
[376] Lavenex, S., Europeanization of Refugee Policies: Between Human Rights and Internal Security; 2001, p. 90

The prospect of "abolition of internal border controls and the perception that the resulting consequences might undermine the cross-country movements in and into the Union"[377] pushed Member States to cooperate in border control measures instead of protection issues. In the asylum field, as also reflected during the fifth chapter of this thesis work, the non-binding procedural instruments adopted during this era by the (then) twelve EC ministers for Immigration in London in 1992 have "contributed to the increasingly restrictive application of procedural asylum law in the EU Member States".[378] Following the London Resolutions, most of the Western European governments applied the concept of 'safe third-country' and concluded Readmission Agreements with countries out of the EU. However, differences in the application of asylum procedures continued to exist among Member States, since these soft law instruments allowed Member States to formulate their practices and legislations in diverse and multiple ways. On the other hand, while these documents are non-binding, still they have been important due to the fact that even the non-binding *acquis* has an export value for Candidate States. As Lavanex stated, during this era "the restrictive trend placed the Europeanization of refugee policies between two conflicting paradigms: The commitment to international human rights instruments on the one hand; and the pre-occupation with the safeguarding of internal security on the other".[379] The measures adopted during early 90s originated from the lowest common denominators, which were usually restrictive and security-oriented. During this era, a number of EU soft law instruments, most of which have been characterized by significant departures from general protection principles, were adopted.[380] Furthermore, the status of adopted instruments was unclear under

[377] ibid., p. 93
[378] Van der Klaauw, J., 'Towards a Common Asylum Procedure', in Guild, E. and Harlow, C. (eds.), Implementing Amsterdam: Immigration and Asylum Rights in the EC Law; 2001, p.177
[379] Lavenex, S., Europeanization of Refugee Policies: Between Human Rights and Internal Security; 2001, p. 3
[380] Van der Klaauw, J., 'Towards a Common Asylum Procedure', in Guild, E. and Harlow, C. (eds.), Implementing Amsterdam: Immigration and Asylum Rights in the EC Law; 2001, p.193

international law.[381] The fifth chapter mainly focused on these restrictive non-binding *acquis,* and their influence on the policies/practices of the EU Member States and third countries.

However, with Amsterdam a new era has been launched: The most important innovation of the Amsterdam Treaty is its emphasis on the relationship between the Union and the people, and its observance to human rights. In the Final Act of the Treaty, a new title on "Fundamental Rights and non-Discrimination" was introduced and adherence to the ECHR was underlined. The Treaty introduced the possibility of sanctions against any Member State who is seen as violating principles like liberty, democracy, respect for human rights and fundamental freedoms and the rule of law (Art. 7 II EU), while empowering the Council to take measures regarding non-discrimination (Art. 13 EC).[382] There is also a declaration attached to the Final Act of the Amsterdam Treaty, which is putting consultations with UNHCR on a much more formal footing. This normative turn in the EU's fundamental principles has gained much meaning with the Charter of Fundamental Rights, which also included the right to asylum (Art. 18).[383] With Amsterdam, "almost fifteen years after the beginning of intergovernmental cooperation, the establishment of a common European asylum system has become a priority of the European Union politics".[384] Since the signing of the Treaty, which defines common asylum and refugee policies as central elements in the development of an Area of Freedom, Security and Justice (Title IV EC), there has been widespread agreement that, in the interest of European integration, "a common asylum and migration policy that goes beyond harmonized border controls" should be developed.[385] Member States realized that they need close cooperation and a

[381] Guild, E. and Niessen, J., The Developing Immigration and Asylum Policies of the European Union: Adopted Conventions, Resolutions, Recommendations, Decisions and Conclusions; 1996, p.62

[382] Lavenex, S., Europeanization of Refugee Policies: Between Human Rights and Internal Security; 2001, p.132

[383] ibid., p. 13-133

[384] ibid., p. 74

[385] Angenendt, S. (ed.), Asylum and Migration Policies in the European Union; 1999, p.2-3

common legal framework in their search for common approaches to shared problems. They saw that solutions for their asylum and migration management problems need to be found at the European level. The response of individual States to the mass influx from Former Yugoslavia has also shown that a global approach is indispensable.[386] In the aftermath of Kosovo crisis, the EU Heads of States recognized the danger of an emerging 'Fortress Europe' and, after meeting at the European Council in Tampere, in 1999, they called for a common European system that should be firmly rooted in a "shared commitment to ....human rights" and be based on the "full and inclusive application of the Geneva Convention".[387] While the main purpose of the cooperation during early 90s was to establish common restrictions on the intake of asylum seekers, after Tampere a more protectionist approach on asylum has been launched with the intervention of UNHCR and relevant NGOs in the area. The restrictive measures of early 90s met with domestic opposition in the EU States by the NGOs, largely because they ignored constitutional requirements and international legal obligations as well as humanitarian concerns.[388] The European Parliament (EP) and the European Commission (EC) also took a significant role regarding the changing of this restrictive tendency.[389] As Joly, Kelly and Nettleton stated, the greater measure of openness and consultation with the Commission and the Parliament followed from the Treaty on the EU.[390] After the Treaty, the Commission started to share initiative with Member States and

[386] Watson, G., 'EU Asylum and Immigration Policies: The Point of View of the European Parliament' in Clotilde, M. (ed.), Asylum, Immigration and Schengen Post- Amsterdam: A First Assessment; 2001, p.51

[387] Lavenex, S., Europeanization of Refugee Policies: Between Human Rights and Internal Security; 2001, p.106

[388] Baldwin-Edwards and Schain, cited in Manners, I., 'Negotiation of an Asylum Policy for the EC', in Substance and Symbolism: An Anatomy of Cooperation in the New Europe; 2000, p.120

[389] Article K.3 of the Maastricht Treaty grants the Commission the right of co-initiative on asylum and immigration matters and sets up an extensive consultation and collaboration procedure for Community decision-making. The EP should be regularly informed and consulted on principal aspects. In addition to granting the Commission the right to initiate policy, Article K.3 states that the Council may elect to grant the European Court of Justice the jurisdiction to interpret and arbitrate disputes arising from Community policies. (in Papademetriou, D.G., Coming Together or Pulling Apart: The European Union's Struggle with Immigration and Asylum; 1996, p. 60-61)

[390] Joly, D.; Kelly, L.; Nettleton, C. (eds.), Refugees in Europe: The Hostile New Agenda; 1997, p.26

Parliament started to influence somehow the decisions. The EP attempted to take democratic control of the issue through its Committee on Civil Liberties and Internal Affairs, which is very concerned about the anti-immigrant and anti-refugee approach of the Council and Member States.[391] In 1998, the Parliament had issued a Resolution on the 'harmonization of forms of protection complementing refugee status in the EU' (A4-0450/98) and expressed its concern over the lack of harmonization with regard to complimentary protection within the Union. The Resolution recognized that for the asylum determination regime to be fair and efficient within the Community, harmonization is needed both concerning the definition of the refugee and alternative forms of protection.[392] Moreover, in a Working Document published on 24 November 1999, the European Parliament has criticized the restrictive immigration control measures and instruments which tackle the causes of migration as being inconsistent; and stated that these instruments are putting the emphasis on Readmission Agreements and securing protection away from the EU's borders.[393] As Lavanex put out:

> The European Parliament soon took a very critical stance towards the undemocratic and restrictive character of intergovernmental cooperation and advocated a more liberal and generous attitude towards asylum seekers and refugees. This approach has been maintained through subsequent parliamentary Resolutions and Reports.[394]

Additionally, with the anti-foreigner stance which started to spread out in Europe, the European Commission also moved very close to the liberal or humanitarian frame of the European Parliament with a Communication on 'Immigration and Asylum Policies' in 1994. The Communication proposed long-term solutions such as cooperation with countries of origin in order to fight against the causes of forced

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[391] Weber cited in Manners, Ian, 'Negotiation of an Asylum Policy for the EC', in Substance and Symbolism: An Anatomy of Cooperation in the New Europe; 2000, p.111

[392] EP Working Paper, Asylum in the EU Member States; 2000, p.27

[393] Lavenex, S., Europeanization of Refugee Policies: Between Human Rights and Internal Security; 2001, p. 125-126

[394] ibid., p.123

migration and to promote better integration of legally resident aliens in Member States. It emphasized the need to observe the fundamental principles of the Geneva Convention and underlined the need both to harmonize substantive refugee law and to agree on certain procedural guarantees in applying the Dublin Convention and the London Resolution in order to respect the norm of *non-refoulement* and the rule of law.[395] As Papademetriou put out, the February 1994[396] Communication may be characterized as "the Commission's bid to regain its place as the moral and visionary voice of Europe".[397] The Commission in its Communication stated that:

> Immigration has been a positive process which has brought economic and broader cultural benefits both to the host countries and the immigrants themselves. Some have called for a complete halt to immigration: this is neither feasible nor desirable. What is necessary is proper management of immigration policy. The Community has always been a multicultural and multi-ethnic entity whose diversity enriches the Community itself and benefits all its citizens....[398]

Moreover, in its March 1999 Working Document, the Commission put forward some very striking and attention-grabbing proposals, such as the abolition of the concept of the 'safe country of origin', the adoption of additional safeguards required for the implementation of the 'safe third-country' concept, a restricted application of the definition of 'manifestly unfounded claims', the reintroduction of the suspensive effect of the appeal in all cases where a negative decision on substance has been taken, and consideration of the introduction of a single asylum procedure in each Member State.[399]

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[395] ibid., p.124

[396] The root causes approach to immigration was the subject of several subsequent meetings since 1994 (e.g. informal meeting in Thessalonica, in May 1994, where ministers of interior discussed possible cooperation on the issue).

[397] Papademetriou, D.G., Coming Together or Pulling Apart: The European Union's Struggle with Immigration and Asylum; 1996, p.85

[398] ibid.

[399] Van der Klaauw, J., 'Towards a Common Asylum Procedure', in Guild, E. and Harlow, C. (eds.), Implementing Amsterdam: Immigration and Asylum Rights in the EC Law; 2001, p. 171-172

As a result of all these constructive attempts, while the asylum system in early 90s developed only on lowest common denominators (since Member States were only occupied with securing their borders from foreigners and were reluctant in accepting any possible constraints on their national sovereignty), the *'selective harmonization'* of 90s has recently turned to a more *'substantive harmonization'* with the adoption of the binding *acquis* on asylum. During the first phase of harmonization (1999-2004), Council Decision of 28 September 2000 establishing a European Refugee Fund; Council Regulation of 11 December 2000 concerning the establishment of EURODAC; Council Regulation of 18 February 2003 establishing the criteria and mechanisms for determining which Member State is responsible for examining an asylum application lodged in one of the Member States by a third-country national (Dublin II); Council Directive of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof; Council Directive of 27 January 2003 which lays down minimum standards for the reception of asylum seekers; Council Directive of 22 September 2003 on the right to family reunification; Council Directive of 29 April 2004 on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection, were adopted before the time limit: 1 May 2004. However the proposal for the Council Directive on minimum standards on procedures in Member States for granting and withdrawing of refugee status could not meet this deadline although Member States had come to political agreement on most of the proposed legislation. These improvements, although not fully complete, managed to fill the *acquis* on asylum with the missing substantial, institutional and procedural elements.[400] As a very encouraging development, the new *acquis* took the Geneva Convention as the legal basis for asylum policy. A quota system for sharing

[400] For further information please see http://europa.eu.int/scadplus for Community instruments that were adopted in the fields of asylum and immigration.

the load more evenly over all Member States (taking into account each Member State's population and facilities) was introduced; the common minimum standards governing the entry conditions and reception facilities for asylum applicants and the minimum standards for the qualification of protection seekers as refugees or as people who will benefit from subsidiary protection were established. In a short time, legally binding instruments which "ensure uniform application and interpretation of common policies and judicial and procedural safeguards to protect third-country nationals"[401] were adopted. The binding *acquis* like the Directive on reception facilities, temporary protection, qualification and asylum procedures introduced basic safeguards for the admission, reception and integration of refugees. Qualification Directive went even beyond existing obligations under international law and set up the rules for subsidiary protection scheme, which is not existent in any international instrument. Moreover, the Directive provided basic safeguards as creating a clear obligation for *non-refoulement.* The EU *acquis,* for the first time, acknowledged the situations of persecution inflicted by non-States actors; provided for a harmonized interpretation of the notion of 'persecution' (although 'persecution' was not defined in the 1951 Geneva Convention); defined a very contestable concept, 'social group' as a ground for persecution and included 'gender-related persecution' under the scope of the definition of 'refugee', with this Directive. Another Directive which is on asylum procedures, although not officially adopted yet, has provided for basic procedural safeguards for asylum applicants including persons with special needs; and introduced very positive provisions like the applicant's right of access to the asylum procedure, right to personal interview, right to remain in the territory of the asylum country until a final decision has been taken, right to appeal to a court or to a review body in case of a negative decision. The obligation of observing the *non-refoulement* principle; protecting personal data and undertaking an impartial and objective examination of the application by a fully qualified authority; the need to

[401] Van der Klaauw, J., 'Towards a Common Asylum Procedure', in Guild, E. and Harlow, C. (eds.), Implementing Amsterdam: Immigration and Asylum Rights in the EC Law; 2001, p.156

communicate decisions to the applicant in writing and in a language (s)he understands, to provide detailed reasons for rejection and to provide the asylum seeker with access to legal counsel and where necessary interpreters; the right to contact a legal adviser, the UNHCR and its implementing NGO partners; the right of access to the procedure without a time limit; and guarantees against the arbitrary detention of the asylum seeker…etc. are also other positive developments provided in the Directive.

Of course the binding *acquis* adopted up to now, also contain a number of weak points, which should be remedied by a continual reform process: Minimum protection standards can go higher with the interference of the European Parliament, UNHCR and relevant NGOs; absorption problems of third countries can be monitored and a more realistic and fair burden sharing mechanism can be set up between the Union and third countries; and tolerance and understanding of foreigners can be spread out throughout the Union and its Associates. More effective democratic control of the European Parliament -which does not still have the power to stop a Council Decision- and judicial control of the European Court of Justice, can be guaranteed.[402] Moreover, in handling migration flows, States cannot neglect or no longer neglect the crucial dimension of cooperation and dialogue with source countries: A comprehensive strategy based on true partnership, fair and reciprocal standards should be developed; and effective instruments and sufficient human and financial resources should be used to address effectively the root causes of migration and flight.[403] The tendency in Europe is to prevent asylum seekers and illegal immigrants from entering into the EU territory since sending them back from the Union is conflicting with the obligations of the EU States under the ECHR. That is why most of the EU States introduce non-arrival measures (like carrier sanctions,

[402] With regard to the EP, consultation procedure applies with Amsterdam (that is without having the power to alter or stop a Council Decision).
[403] Van der Klaauw, J., 'Building Partnerships with Countries of Origin and Transit', in Clotilde M. (ed.), Asylum, Immigration and Schengen Post- Amsterdam: A First Assessment; 2001, p.46

stringent visa lists and liaison officers abroad), and shift their 'protection burden' to other third countries. The EU should not forget that establishing cooperation links with third countries cannot be the substitute of the EU's obligations to protect a refugee under international law. Besides the above-mentioned concerns, there are also Directive-specific deficiencies which should be remedied with precedence: Although the EP in its June 2000 Resolution[404] takes the view that an asylum seeker cannot be expelled until his/her right to appeal has been exhausted, the Directive on Asylum Procedures, although not formally adopted yet, does not contain any explicit right for all the asylum seekers to remain in the asylum country during the appeal process.[405] In other words, Article number 38 of the Directive does not guarantee that appeals will have suspensive effect in all cases. Therefore, the suspensive appeal right should be provided in the relevant *acquis,* and adequate safeguards against the risky implementation of 'super safe countries' and 'safe countries of origin' should be introduced.[406] Any person, who seeks asylum, though coming through a 'super safe country', should have the right to rebut the presumption of safety. Since "in some EU countries between 30 and 60 percent of refugees were only recognized after an appeal"[407] nobody should be sent to a third-country or his country of origin before the results of their appeal are known. Moreover, the proposed Directive on Asylum Procedures includes rules that allow unaccompanied children over the age of 16 to be denied adult representation in the asylum procedure, which is again another highly controversial practice that is currently only contained in one or two Member States' national legislation, but that can be inserted in the legislation of all 25 EU States, if

[404] Watson, G., 'EU Asylum and Immigration Policies: The Point of View of the European Parliament' in Clotilde, M. (ed.), Asylum, Immigration and Schengen Post- Amsterdam: A First Assessment; 2001, p.51

[405] For further information, please see the 'Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status', Brussels, 30 April 2004, Inter-institutional File: 2000/0238 (CNS), 8771/04, Article no. 38

[406] UNHCR News, "UNHCR Regrets Missed Opportunity to Adopt High EU Asylum Standards", 30 April 2004

[407] ibid.

the Directive is adopted like that.[408] Furthermore, the same Directive does not guarantee interpretation services at all phases of the asylum procedure and during all interviews including those conducted by the border officials. According to the Directive, there are exceptions for procedural safeguards as regards the border applications and manifestly unfounded claims. As another worrying example, Article number 3(2) of the Family Reunification Directive[409] exempts the scope of the Directive from persons authorized to remain on the basis of subsidiary form of protection and persons under temporary protection. Moreover Article number 4(5) of the above-mentioned Directive allows Member States to require refugees and their spouses to be of a minimum age and maximum 21 years old before the spouse can join them. Article number 4(1) also permits Member States to require that any minor above the age of 12 passes an integration test before reunification. Article numbers 4(1) and (6) of the Directive also contain provisions allowing Member States to simply not grant the right to family reunification to children over the age of 15, which is the breach of Article 1 of the UNCRC (UN Convention for the Rights of the Child), which defines a 'child' as every human being below the age of 18 years old. The above-mentioned controversial provisions of the Directive should be changed, as special attention should be paid to the situation of refugees and more favorable standards should therefore be laid down according to the Paragraph no. 2 and 8 of the Preamble of the Directive on Family Reunification. Moreover, another Directive which is on qualification, gives an extensive definition of internal flight alternative; and Article 9A of the Directive states that protection from persecution may be provided by international organizations or *de facto* authorities, although it is known that State-like authorities are not and cannot be parties to international human rights

[408] For further information please see the 'Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status', Brussels, 30 April 2004, Inter-institutional File: 2000/0238 (CNS), 8771/04, Article no. 15 (3)

[409] The legality of the Directive on Family Reunification was challenged before the European Court of Justice by the European Parliament. On 16 December 2003, the EP brought an action for annulment before the Court, since members of the EP think that the text as agreed by the Council undermines the right to family life under the ECHR.

instruments and therefore cannot be held accountable for non-compliance with international human rights obligations.[410] Since international organizations cannot always guarantee protection as proven in the massacre of Srebrenica, this shortfall of the Qualification Directive should also be remedied.

However, some deficiencies in the products of the 'first stage of harmonization on asylum' do not mean that establishment of the 'Common Asylum Policy' (CAP) is a worthless target which will bring a more restrictive asylum system in Europe. It should be taken into consideration that it is not the 'Common Asylum Policy' idea which introduced these restrictive measures to Europe and extended them to third countries; it was individual[411] Member States which reacted to the misuse of their asylum systems and to the sudden increase in the number of asylum applications. Moreover, we cannot exactly say that harmonization of asylum policies shifted the standards downward in each Member State; but maybe we can say that Member States, which wanted to introduce restrictive measures against increasing numbers of asylum seekers, used the "harmonization" as a pretext to bring restrictive reforms to their aliens' legislations. Since late 80s, restrictive measures were already existent in the laws and practices of most of the EU Member States, even before the idea of CAP. Denmark is not a party to the CAP because of the 'Danish reservation'[412] on Justice and Home Affairs, but still it has restrictive policies on asylum and immigration. CAP brings standardizations and at least minimum protection standards; and these minimum standards help for the improvement of some of the

[410] Amnesty International, EU Office, Critical Assessment of the Fall of the Tampere Agenda, Training of Refugee Coordinators in Ankara; 19-20 June 2004, p.7

[411] On the other side, there are also positive individual Sate practices. For example in Austria's 1997 Asylum Act, Article 39(3), it is stated that "Applications filed at the time of the border control by asylum seekers arriving via an airport may not be dismissed as being manifestly unfounded or rejected by reason of existing protection in a safe third-country except with the consent of the United Nations High Commissioner for Refugees".

[412] Accordingly, the instruments adopted at EU level in the field of asylum and immigration do not apply in Denmark, with some limited exceptions, such as the visa policy. The Danish government has requested that Denmark -despite its reservation- participates in some EU measures like the Dublin/EURODAC system. Such a participation requires the negotiation and ratification of parallel (intergovernmental) agreements between Denmark and the other Member States of the EU.

restrictive practices in specific Member States. For example, while some individual Member States were rejecting the non-State agents as actors of persecution, with the Qualification Directive, which explicitly includes victims of persecution by entities other than State authorities, all Member States will have to abide by this rule after the incorporation of the Directive into their domestic legislations. With a Common Asylum Policy, the establishment of the status for subsidiary form of protection for persons falling outside of the 1951 Geneva Convention will be provided in Ireland and Belgium, which did not have any subsidiary protection mechanism up to now; temporary protection regime will be established in Belgium; Germany and Spain will have to recognize non-State actors of persecution; Spain will have to accept gender-specific forms of persecution and ensure that material reception conditions are available to applicants as soon as they make an asylum application; The UK and Hungary will allow asylum seekers (who have been in asylum procedure for one year and have not received a first-instance decision) access to labor market; Greece will improve general reception conditions; and France will ensure the right of asylum seekers to social benefits during the whole asylum procedure.[413]

As reflected above, the process of establishment of a common asylum system within the EU and its Associates, should be welcomed since a common asylum system based on main protection standards will be beneficial not only for Member States and Associates, but also for refugees, themselves. This thesis study also supports the establishment of a Common Asylum System because of higher standardizations it will introduce, when compared to today's restrictive State implementations. A common procedural framework for the full and fair determination of all protection needs, based on a comprehensive set of protection standards; and a Common Asylum Policy, which will continue to be shaped with the intervention of the European Parliament, UNHCR and relevant NGOs, will make Member States to incorporate

[413] ECRE, 'Broken Promises-Forgotten Principles', An ECRE Evaluation of the Development of EU Minimum Standards for Refugee Protection: Tampere 1999 - Brussels 2004; 2004, p. 24

basic protection safeguards into their restrictive asylum systems. A common system, which is based on hard law instruments[414] of the *acquis* (like the 1951 Geneva Convention and the European Convention on Human Rights and Fundamental Freedoms) will provide alignment with international standards; and at least will transpose minimum protection standards into the legislations of Member States and Associates, who are justifying their restrictive practices with reasons like threat to security, public demand or specific geographical location of their countries. On the other side, although pre-determined standards for protection represent minimum common denominators of protection, they cannot be deemed restrictive since nothing inhibits States from agreeing on more generous standards.[415] Member States are free to keep more generous legislation, but once the Directives are incorporated into their national systems, they will not be able to go below this threshold. As Noll put out, a fixed normative framework will prevent the EU States from remaining completely passive; and regulating protection beforehand will be better than negotiating it *ad-hoc*.[416] Besides its benefits for protection seekers, a common asylum system, will set the rules for mechanisms -like accelerated procedures, manifestly unfounded claims- to prevent the 'asylum shopping' phenomena and to lessen the burden of Member States with measures promoting a balance of efforts between Member States in receiving such persons. Up until now, the interpretation and application of the 1951 UN Refugee Convention have differed across the EU. As a result, asylum seekers and refugees have received unequal treatment depending on in which country they were in when they made their asylum claim. This has contributed to an uneven distribution of asylum seekers as some go to countries where they feel they have a

[414] As regards State obligations, hard law instruments of the *acquis*, like the 1951 Geneva Convention, are always superior to the soft law instruments like London Resolutions of 1992.

[415] For instance, Article 3 of the Qualification Directive, Article 4 of the Directive laying down minimum standards for the reception of asylum seekers, Article 4 of the Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status...and many others, state that "Member States may introduce or retain more favorable standards".

[416] Noll, G., Negotiating Asylum: The EU *Acquis*, Extraterritorial Protection and the Common Market of Deflection; 2000, p.267

better chance of being recognized and well-treated. This has increased the uneven burden in some specific EU States. With full harmonization of asylum policies and practices and with a sufficiently well-designed CAP, while this uneven burden sharing will be avoided, the rights of *bona fide* protection seekers will be safeguarded. More refugees will find havens with a fair burden sharing and fewer refugees will be rejected due to the image the bogus asylum seekers built. Or in other words, with full harmonization of procedural and material asylum law and with an effective common protection system all over the Union, while real protection seekers will benefit from the effective international protection, bogus asylum seekers will not be able to misuse the over-burdened asylum systems of Member States, which introduce restrictive policies due to this misuse, usually. As we have seen during the previous chapter, the last decade has shown an erosion of protection standards by frequent use of accelerated procedures and adoption of a wide range of elements defining manifestly unfounded or clearly abusive claims, and by several measures to screen out asylum applications at the admissibility stage.[417] A combination of the extensive use of the concepts such as 'safe third-country' and 'safe county of origin' and the accelerated border procedures without procedural safeguards, have undoubtedly hampered effective opportunity for asylum seekers to have access to the determination procedures. On the other side, practices of Member States regarding all these concepts have been diversified. Accordingly, an asylum seeker's possibility to actually enter a procedure, where his/her case will be examined on its merits, has again depended on which Member State (s)he approaches.[418] It is well-known that the Member States need to streamline and shorten the often lengthy and cumbersome asylum proceedings; however it should be done as fully respecting the basic procedural rights and safeguards.[419] Since abstract criteria in law as regards the

[417] Van der Klaauw, J., 'Towards a Common Asylum Procedure', in Guild, E. and Harlow, C. (eds.), Implementing Amsterdam: Immigration and Asylum Rights in the EC Law; 2001, p.193

[418] EP Working Paper, Asylum in the EU Member States; 2000, p.29

[419] Van der Klaauw, J., 'Towards a Common Asylum Procedure', in Guild, E. and Harlow, C. (eds.), Implementing Amsterdam: Immigration and Asylum Rights in the EC Law; 2001, p.193

'accelerated procedures', 'safe country applications' or 'regularly updated list of countries' result in divergences in the assessment of the safety of third States, and hence, in the treatment of applications; there is, therefore, an urgent need to harmonize the criteria and procedures for the application of these notions and to bring basic safeguards.[420] With a Common Asylum Policy, Member States and Associates will not be able use precarious concepts such as 'safe third-country' or 'accelerated/admissibility procedures' in an arbitrary and uncontrolled way. A much fairer and more efficient and predictable system will be set up. The discrepancies between Member States' practices regarding the application of manifestly unfounded claims, accelerated procedures, admissibility procedures, 'safe third-country' and 'safe county of origin' concepts will be eliminated with detailed set of safeguards. A Common Asylum System, which will put out the rules and main safeguards, will prevent arbitrariness regarding these shaky individual State implementations.

The UN High Commission for Refugees also supports that the development of a Common European Asylum Policy offers a great opportunity to establish asylum standards and procedures that will be applied by 2004 across all 25 EU Member States. As Söderbergh from UNHCR stated, the important first phase of asylum harmonization, which has been completed by 2004, resulted in a comprehensive set of common standards and high level of protection for refugees throughout the Union.[421] UNHCR supports the establishment of the CAP because of several reasons: First of all, they think that a common asylum system, where refugee protection standards are applied in a uniform manner in as many countries as possible, is in the interest of all parties involved. UNHCR thinks that harmonization is also meant to raise standards in certain countries and to bring them into conformity with the agreed harmonized standards (minimum standards). Furthermore, the EU's harmonized texts actually contain higher standards concerning some issues than certain universal

[420] ibid., p.183

[421] Carl Söderbergh, UNHCR RO Stockholm, Overview of EU Asylum Policies; 17 December 1997

refugee law instruments, including the Conclusions adopted by the UNHCR Executive Committee (e.g. 'subsidiary protection' concept).[422] The opposite is also true on a few points which are below universal refugee law standards; however, these areas, which cause worries for the international community, can be also remedied with the intervention of humanitarian organizations, European Parliament and relevant NGOs. UNHCR supports the harmonization of asylum laws; however, it also associates it with two requirements: The first requirement is that the harmonization respects international refugee norms and principles. The second is that the harmonization does not lead to a general lowering of existing refugee protection standards, even if those lower standards are in conformity with the international minimum standards. This would be the case, for example, if the harmonization results in countries with higher standards lowering them to the level of the lowest common denominator. Moreover some States maintaining higher standards may feel obliged to change their policies and just move to the minimum standards since they do not want to be attractive for asylum seekers.[423]

Despite these concerns, full harmonization on asylum and the extension of this common system to Associates, are also deemed positive for Candidate Countries (CCs) because of a range of reasons: *First of all*, CCs represent new countries of asylum with fledgling asylum systems. Harmonization and the EU funds attributed to CCs help these countries, which usually do not have the capacity to deal with asylum flows, to build institutions and capacities necessary for coping with this phenomenon (e.g. creating structures and operational systems required for refugees and developing the skills of the staff of those structures so as to allow them to deal effectively with these issues). Harmonization process, indirectly, brings these countries self-sufficiency: Up to now, the adoption of national legislation and

[422] Petersen, M., 'Recent Developments in Central Europe and the Baltic States in the Asylum Field: View from UNHCR and the Strategies of the High Commissioner for Enhancing the Asylum Systems of the Region', in Byrne, R.; Noll, G.; Vedsted-Hansen, J. (eds.), New Asylum Countries: Migration Control and Refugee Protection in an Enlarged European Union; 2002, p. 360-361
[423] ibid., p.361

by-laws relating to asylum and establishment of administrative structures to deal with refugee-related issues have been accelerated with harmonization process. The gaps have been identified by the EU, funds have been reallocated to fill these gaps and short-term experts have been sent. As Van der Klauuw states, a broadly comprehensive system is always preferable to a mechanism, whereby administrative authorities without specialist knowledge and competence in asylum matters would provide protection on an *ad-hoc*, discretionary basis.[424] *Secondly,* harmonization obliged these Candidate States to accede to the relevant international refugee instruments such as the 1951 Geneva Convention. PHARE Democracy Program (or in other words, the European Initiative for Democracy and Human Rights) provided funds for Candidate Countries in many areas to fulfill their international obligations. As Petersen put out, for these Associate Countries "bringing their asylum systems into conformity with the EU *acquis* on asylum means ensuring compliance with the international refugee law standards on which the *acquis* is based".[425] *Thirdly,* with accession process, Candidate Countries have been obliged to reach at least the standards of the EU *acquis.* As also UNHCR supports, the EU *acquis* covers all the elements that a comprehensive asylum system needs to include.[426] Moreover, it is not in conflict with the hard law instruments like the 1951 Geneva Convention and European Convention on Human Rights and Fundamental Freedoms since these texts are also part of the *acquis*. The restrictive soft law instruments (Resolutions, Recommendations and Communications) should be interpreted in conformity with these hard law texts. Even if the conflict between them cannot be eliminated through interpretation, it is clear that the hard law text will eventually have to prevail over the

[424] Van der Klaauw, J., 'Towards a Common Asylum Procedure', in Guild, E. and Harlow, C. (eds.), Implementing Amsterdam: Immigration and Asylum Rights in the EC Law; 2001, p.191

[425] Petersen, M., 'Recent Developments in Central Europe and the Baltic States in the Asylum Field: View from UNHCR and the Strategies of the High Commissioner for Enhancing the Asylum Systems of the Region', in Byrne, R.; Noll, G.; Vedsted-Hansen, J. (eds.), New Asylum Countries: Migration Control and Refugee Protection in an Enlarged European Union; 2002, p.362

[426] ibid.

soft law instrument.[427] *Moreover,* a Common Asylum System, which has binding and clear rules, is in the interest of the Candidate Countries which are obliged to align their asylum systems with all instruments of the *acquis* -including the non-binding ones. Since usually an outdated product is sold to the outsiders, Candidate Countries are amending their asylum and immigration legislation almost on a yearly basis in order to catch the recent developments within the EU.[428] The vagueness and different applications of the EU measures create problems for Associate States. With a common asylum system which has clear rules and which gives clear responsibilities, Candidate States will get rid of incorporating irrelevant *acquis* into their national systems, which are already instable.

It is a fact that the EU accession process leads the Associate Countries to establish a working asylum system, expertise institutions responsible for Refugee Status Determination, reception and integration mechanisms for refugees, which are all deemed as very encouraging developments. The harmonization, at least puts out the minimum protection standards, so that none of the Member States and Candidate Countries can go below this threshold. However, it is also true that most of the Candidate States adopt these EU standards without questioning the validity and conformity of these standards with international protection norms. The common asylum system, which will put out definitions and common standards and bring mechanisms to distinguish between *bona fide* refugees and illegal migrants, and which will establish a functioning burden sharing mechanism, is of course a very constructive improvement. However there is a risk of legislating down and of the enlargement of the restrictive measures to the further East. Given that the main building blocks of the common policy have to be adopted unanimously, there is an

[427] ibid., p.363

[428] In drafting and amending 1997 Aliens Act, Polish authorities took into account most of the EU asylum standards contained in soft law instruments, as they believe that these instruments will be shortly adopted as legally binding and Poland cannot amend its legislation each time a new Directive or Regulation is adopted by the EU.

obvious danger that the compromises that will have to be made will lead to the dilution of protection standards, with the result that the most restrictive policies of individual EU States will become the norm for the entire common system. As Lavanex state, without the participation of actors representing the values of the international protection regime -such as the UNHCR and relevant NGOs- and without the full involvement of supranational institutions -like the Commission and the Parliament- Member States may tend to pursue a restrictive approach which weakens the humanitarian core of refugee policies and which inhibits cooperation.[429] That's why UNHCR, European Parliament and relevant NGOs should continue working with all parties involved in the development of the new policy in order to bring about the adoption of the highest possible protection standards in Europe for refugees. International organizations such as UNHCR, the International Committee of the Red Cross and the International Organization for Migration can act "as a catalyst for establishing dialogue between States confronted with an exodus of their citizens and their international obligations".[430]

In the Constitutional Treaty, it is stated that since the unanimity voting rule will be removed for asylum-related issues, it will be much easier to decide in this field, so single Member States will not be able to block the harmonization process. As van der Klauuw also agrees, the minimum standards can turn out to be maximum standards if the unanimity voting rule changes to qualified voting principle and Member States stop preserving the particularities of their own asylum systems.[431] Moreover with the Constitutional Treaty, after the co-decision procedure is launched, attempts for CAP will be reviewed much more easily by the EP; and the jurisdiction of the European Court of Justice in the areas of asylum and immigration will be normalized, which

[429] Lavenex, S., Europeanization of Refugee Policies: Between Human Rights and Internal Security; 2001, p.205

[430] Van der Klaauw, J., 'Building Partnerships with Countries of Origin and Transit', in Clotilde M. (ed.), Asylum, Immigration and Schengen Post- Amsterdam: A First Assessment; 2001, p.26-27

[431] Van der Klaauw, J., 'Towards a Common Asylum Procedure', in Guild, E. and Harlow, C. (eds.), Implementing Amsterdam: Immigration and Asylum Rights in the EC Law; 2001, p.192-193

are again very positive steps. However, after the referenda in France and Holland, it seems that the Constitutional Treaty which foresees, *inter alias,* a CAP will not be realized due to the lack of ratification by each of the 25 Member States. On the other hand, this does not mean that CAP idea has already died. The idea for CAP has been launched before the Constitutional Treaty and some parts of it have already been realized during the first phase of harmonization; and the second phase is still ongoing. Moreover, the gradual introduction of the majority rule for the European Council was already planned before the Constitutional Treaty, with the Amsterdam Treaty; and it has started to be implemented after the first phase of harmonization has been completed. On 1st of May 2004, with the start of the second phase of harmonization on asylum, some aspects of the asylum area have automatically moved from unanimity and consultation, and others remained in the realm of the unanimous decision of the Council. In addition, effects of the immigration, which is not a temporary phenomenon, will be always on more than one State and will require common action, irrespective of the frustration about the ratification of the Constitutional Treaty. As Lavanex states:

> Refugees are a classic example of international interdependence: Their production by one State automatically impacts upon other States. At the same time, the denial of protection by one potential host country directly shifts the responsibility to provide shelter to another.[432]

As Kant put out, with the rise of interdependence "the peoples of the earth have....entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in one part of the world is felt everywhere".[433] With Ruthström's words "few parts of our planet are unaffected by refugee flows,

[432] Lavenex, S., Europeanization of Refugee Policies: Between Human Rights and Internal Security; 2001, p.10

[433] Kant, 'The Perpetual Peace', cited in Lavenex, S., Europeanization of Refugee Policies: Between Human Rights and Internal Security; 2001, p.14

the refugee problem is truly global".[434] The interdependence of the Member States regarding social, economic and political fields necessitates a common approach to immigration, asylum and integration matters, although the Constitutional Treaty loses its popularity.[435] Furthermore, asylum is not a zero-sum game. That's why common solutions have to be developed to erase the negative effects of it, instead of introducing only restrictive measures each day. Border closures, push backs, forced round-ups of refugees, arbitrary detention and confinement in closed camps in order to address security or other restrictive measures is not the solution. As Transatlantic Learning Community put out, "today's reality of migration patterns and the evolution of migration relationships have been characterized as the rivulets of a river delta en route to the ocean, created out of a previously narrow channel, no longer stoppable by the erection of dams".[436] Closing the front door to immigrants and asylum seekers will lead them to find illegal solutions to enter from the back door. Although the Constitutional Treaty fails to be ratified, Member States have to develop a Common Asylum Policy, which differentiates between *bona fide* protection seekers and bogus applicants and which is based on high protection standards for real refugees. However, as Van der Klauuw puts out, States are facing a dual challenge right now: to uphold basic human rights and the institution of asylum and humanitarian traditions; and to safeguard their legitimate interests to control immigration and preserve the integrity of legal channels.[437] Of course much will depend on whether the long-term common good would prevail over the short-term national self-interest and domestic politics. The establishment of a common European refugee regime poses a challenge of redistribution among the Member States and raises the problem of coordination between national interests and collective goals. The challenge is to find a reasonable balance between the States' legitimate interests and those of

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[434] Ruthström, C., Beyond Europe: The Globalization of Refugee Aid; 1993, p.13

[435] Guild, E. and Niessen, J., The Developing Immigration and Asylum Policies of the European Union: Adopted Conventions, Resolutions, Recommendations, Decisions and Conclusions; 1996, p.61

[436] Transatlantic Learning Community, Migration in the New Millennium; 2000, p.34

[437] Van der Klaauw, J., 'Building Partnerships with Countries of Origin and Transit', in Clotilde M. (ed.), Asylum, Immigration and Schengen Post- Amsterdam: A First Assessment; 2001, p.43-46

refugees.[438] As Guild states, the development of asylum and migration policies will depend on the success of measures to ensure Member States' interests: "When the safety of the State is perceived to be at stake, respect for human rights and democratic decision-making process come under pressure".[439] Establishing common policies in the fields of asylum and immigration -which are related with sovereignty and security concerns- has never been so easy for the EU that has faced the dilemma between the keeping up with their human rights obligations about refugees and preservation of their national security.[440] That is why, there is a clear need, first of all to manage or regulate the migratory movements of bogus asylum seekers in order to protect the rights and interests of both real protection seekers and sovereign States. However, this does not mean, either, that any foreigner that seeks asylum should be prevented access when not having an entry document. Strong border controls are today's needs; however, any asylum seeker who wants to lodge a claim cannot be prevented to do so. In other words, immigration control policies should never deny the right of an asylum seeker to seek asylum from persecution.[441] Stringent control measures can be put in place, but it should be done only after adopting sufficient guarantees, addressing the situation of persons seeking asylum.

The world possesses a common responsibility for the protection of the rights of refugees. Moral principles should precede political considerations, as also mentioned in Kant's 'Perpetual Peace'. As it is argued by Baneke:

> The policies of blocking legal access are not working. One cannot build a Berlin wall around Europe and refuse access for those who desperately need it. They will dig their tunnels, land on European shores

[438] Lavenex, S., Europeanization of Refugee Policies: Between Human Rights and Internal Security; 2001, p.18

[439] Guild, E. and Niessen, J., The Developing Immigration and Asylum Policies of the European Union: Adopted Conventions, Resolutions, Recommendations, Decisions and Conclusions; 1996, p.60

[440] Tippkamper, S., 'AB'de Göç, İltica ve Mülteciler Alanında Oluşturulan Politikalar', Avrupa ve Türkiye'de Sığınma Hakkı ve Mülteciler, Uluslararası Sempozyum Notları; 2002, p.60

[441] Joly, D.; Kelly, L. ; Nettleton, C. (eds.), Refugees in Europe: Hostile New Agenda; 1997, p.37-38

> in the flimsiest of boats. Many will suffer serious harm or die in their desperate efforts to reach the EU in illegal ways, because they are forced to rely on criminals to reach just safety.[442]

Deriving from these arguments, *first of all,* we can say that cooperation with third countries on asylum and immigration issues should not only be based on inflexible border control measures; but should also include development of protection capacities and eliminating root causes of population movements. As Collinson state:

> Action to address the root causes soon became a central phrase in the European political vocabulary as traditional forms of immigration control such as border controls and visa regimes, suddenly appeared insufficient to cope with the perceived crisis ahead.[443]

This partnership should not be aimed at only better management of migration flows from countries of origin and transit to the EU, but it should also promote the political and socio-economic conditions in source countries, and create a mutual benefit system for the EU, partners and of course for refugees.[444] Besides the border controls on which Nation States have sovereign rights, training and every type of assistance (relating to fair and efficient asylum procedures and establishment of optimum protection standards) should be provided to the Associate States for the harmonization of their policies and their practices with the relevant EU *acquis*. Furthermore, as the poorest States carry the heaviest load; European policies to shift the responsibility even more onto these countries' shoulders will result in the destabilizing of such countries, with the possible consequence of future conflicts, poverty and even more refugees. That's why the EU should seriously commit itself to establish effective protection standards in the regions of origin and improve the

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[442] Baneke, Peer (General Secretary of ECRE), "The Case for Access", Speech given at the ECRE Biannual Meeting in Seville; 7 June 2002

[443] Collinson, S., Europe and International Migration; 1993, p.60

[444] Van der Klaauw, Johannes, 'Building Partnerships with Countries of Origin and Transit', in Clotilde Marinho (ed.), Asylum, Immigration and Schengen Post- Amsterdam: A First Assessment; 2001, p. 27

situations in such countries. For this purpose, all elements of foreign, development, human rights and trade policy, like expert technical assistance, generous financial aid, fair trade measures, reconciliation, civic education, tolerance and confidence building measures, strengthening the rule of law, promoting respect for human rights and minority rights, legal and judicial capacity building, effective political pressure…should be used.[445] The consequence should be that regional governments feel that responsibility is shared and that they choose to protect, support and integrate refugees. As a result of this cooperation, refugees would also be able and want to stay in those regions. Simply stated, development interventions should aim at poverty reduction and institution building rather than supporting activities only seeking to block the population flows into Europe.

Secondly, the EU *acquis* which do not, on some points, contain adequate standards and safeguards concerning refugee protection should be exported to third countries only after making essential reforms to prevent the extension of bad practices to the Associate Countries. Accession process should not only confirm and consolidate this bad practice. The Associate Countries should seek to enter reservations on the points described above in order that the EU enlargement does not simply mean the enlargement of 'Fortress Europe'. The Associate Countries should be also made aware of these failings, in particular where they amount to violations of international refugee law, so that they are not imported into newly developing systems.

Thirdly, where the current EU *acquis* provides no guidance on common standards, best practice and the standards of human rights law should be implemented by the Associate Countries. Where issues are currently under negotiation within the EU, the position of the Associated States should be fully taken into account in order to create regional systems that are sustainable and equitable in an enlarged European Union.

[445] ibid., p.23

As the fourth point, the EU should not pass its responsibility for processing the applications of its asylum claimants and these people's return completely to the 'regions of origin'. As it is obvious, until the countries of the region become safe and durable destinations for asylum, many refugees will continue to transit through these regions into the EU territory, with illegal means. The EU has to accept that without establishing the necessary infrastructure and practice in these developing countries, sending refugees from the EU territories to the neighboring countries cannot be a solution both for the refugees and the third countries, and also in the long-run for the Union, itself, which will be invaded with frustrated asylum seekers, applying to illegal means to be able to reach a firmer 'Fortress Europe'.

As the High Commissioner stated in 1994 in a speech called 'Refugees: A Comprehensive European Strategy', "it was in Europe that the institution of refugee protection was born, it is in Europe today that the adequacy of that system is being tested most".[446] Therefore the EU has a big opportunity to shape the asylum regime for Europe and for third countries. Set of comprehensive, highly-structured and detailed guidelines for asylum procedures mark an important step forward towards the standardization of European asylum procedures. A European asylum regime, that is uneven and untidy and that lacks transparency and clarity is not also beneficial for refugees. The *ad-hoc* and sometimes secret intergovernmental cooperation should immediately turn into a CAP which is fair and comprehensive; so that the restrictive practices of individual Member States can be avoided through basic protection standards since Member States will have to abide by these binding rules. As Guild and Niessen put out, policy discussions and decisions on the protection of refugees and their integration can only profit from open and frank discussions at all levels.[447]

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[446] Van der Klaauw, J., 'The Challenges of the European Harmonization Process' in Muus, P. (ed.), Exclusion and Inclusion of Refugees in Contemporary Europe; 1997, p.27

[447] Guild, E. and Niessen, J., The Developing Immigration and Asylum Policies of the European Union: Adopted Conventions, Resolutions, Recommendations, Decisions and Conclusions; 1996, p.62

Therefore, a Common Asylum Policy is welcome, essential and indispensable; but on the other side, root causes should be addressed and a fair burden sharing mechanism should be established rather than shifting the burden eastwards.[448] The strengthening of integration policies for legal aliens should be also provided since it will improve the image of the refugee and the immigrant in the public eye, thus opening doors to greater understanding and tolerance. As the Director of UNHCR's Europe Bureau, Raymond Hall puts out:

> A well-harmonized asylum system based on a common interest rather than one State's individual domestic concerns would be of enormous benefit both for the EU and for refugees. A well organized, streamlined system would alleviate the pressures caused by asylum seekers moving from State to State in search of better treatment.[449]

However, Hall also argues that the ramifications of the EU harmonization process will be felt far beyond the current borders of the European Union; that's why the resulting common policy should be of high quality, as it will set an example for outsiders. Although, the first products of the harmonization are very significant, they set only minimum procedural norms. Progress has been done, but much still remains to be done, too. Now the focus is on establishing the details of such a difficult and highly politicized issue and on setting higher standards as Member States started to begin to transpose the EU legislation into their national laws. The increasing role of the Parliament and the European Court of Justice allows hope for an improvement in the minimum (basic) standards, as these institutions can act as a controlling machinery. However, strong commitment of Member States to work by consensus and to adopt common standards -which are in accordance with international refugee law- is also necessary. As Amnesty International put out, "much of the future developments will depend on Member States' political willingness to break the

[448] ibid., p. 60-61
[449] UNHCR News, "EU's Harmonized Treatment of Asylum Seekers Welcomed", 26 April 2002

current deadlock" and to seize the opportunity to build "a Common Asylum Policy that is ambitious, coherent and protection-centered".[450]

[450] Amnesty International, EU Office, Critical Assessment of the Fall of the Tampere Agenda, Training of Refugee Coordinators in Ankara; 19-20 June 2004, p.12

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RELATED INTERNET WEB SITES

http://www.refintl.org

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APPENDIX

INTERNATIONAL INSTRUMENTS PROTECTING REFUGEES AND THE EU ACQUIS ON ASYLUM AND MIGRATION

a- International Instruments Protecting Refugees:

- 1948 Universal Declaration on Human Rights
- 1950 European Convention on Human Rights and Fundamental Freedoms
- UNHCR Statute
- 1951 Geneva Convention relating to the Status of Refugees
- 1967 New York Protocol relating to the Status of Refugees
- 1957 European Convention on Extradition
- 1954 Convention Related to the Status of Stateless Persons
- 1961 Convention on the Reduction of Statelessness

b- The EU Documents:

- 1985 Schengen Agreement and 1990 Schengen Convention
- 1990 Dublin Convention
- 1992 Maastricht Treaty on European Union, Title VI (JHA)
- 1996 Amsterdam Treaty
- 1998 Vienna Action Plan
- 1999, Conclusions of the Tampere European Council

- 2000, Conclusions of the Nice European Council and the European Charter of Fundamental Rights
- 2001, Conclusions of the Laeken European Council
- 2002, Conclusions of the Seville European Council
- Other Related Binding and Non-Binding *Acquis* on Asylum and Migration[451]

Asylum:

- Council Regulation (EC) No 343/2003 of 18 February 2003 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 (Dublin II)
- Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 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, O.J. L 222, 05.09.2003, p. 3
- Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention
- Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention, O.J. L062, 05.03.2003, p. 1
- Resolution on a harmonized approach to questions concerning host third countries 30 November and 1 December 1992

[451] The list of the *acquis* was taken from the Covenant of the EU Twinning Project on Asylum and Migration in Turkey.

- Council Declaration regarding safe 3rd countries. 28 November 2002 15067/02 Asile 76
- Conclusions on countries in which there is generally no serious risk of persecution, 30 November and 1 December 1992
- Resolution on manifestly unfounded applications for asylum, 30 November and 1 December 1992
- Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures, O.J. C 274, 19.09.1996, p. 13
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- 2000/596/EC: Council Decision of 28 September 2000 establishing a European Refugee Fund
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- Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers

- Council Directive 2004/83/EC on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection O.J. L 304/12 p. 12
- Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (ASILE 33 30.04.04)

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- Regulation by the European Parliament and the Council no. 491/2004 of 10 March 2004 on a program for financial and technical aid to third countries in the area of migration and asylum (Aeneas) OJ L 080 18.03.2004 p. 1
- Council Resolution of 20 June 1994 on limitation on admission of third-country nationals to the territory of the Member States for employment, O.J. C 274, 19.09.1996, p. 3
- Council Recommendation of 22 December 1995 on harmonizing means of combating illegal immigration and illegal employment and improving the relevant means of control, O.J. C 5, 10.01.1996, p. 1
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- Council Resolution of 4 December 1997 on measures to be adopted on the combating of marriages of convenience : OJ N° C 328 of 16 December 1997;
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- Council Recommendation of 24 July 1995 on the guiding principles to be followed in drawing up protocols on the implementation of Readmission Agreements: OJ N° C 274 of 19 September 1996, page 25;
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- Council Regulation 377/2004 on the creation of an immigration liaison officers network OJ L 064 02.03.2004 p. 1)
- Council Directive 2003/81/EC of 29 April 2004 on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities OJ L 261 06.08.2004 p. 19
- Council Decision 2004/573/EC OJ 29.04.04 on the organization of joint flights for removals, from the territory of two or more Member States, of third-country nationals who are the subjects of individual removal orders OJ L 261 06.08.04 p. 28

- Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data *(OJ L 261 06.08.2004 p. 24)*
- Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities COM/2001/0386 final - CNS 2001/0154 (reference is made to the above mentioned Council Resolution of 20 June 1994 on limitation on admission of third-country nationals to the territory of the Member States for employment, O.J. C 274, 19.09.1996, p. 3)
- Proposal for a Council Directive relating to the conditions in which third-country nationals shall have the freedom to travel in the territory of the Member States for periods not exceeding three months, introducing a specific travel authorization and determining the conditions of entry and movement for periods not exceeding six months COM/2001/0388 final - CNS 2001/0155
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