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I. INTRODUCTION

The original starting point of this paper was my acting as an "expert" in a number of EU- and UNHCR-sponsored asylum and refugee protection programmes in the then EU candidate countries between 2000 and 2004. I was struck by the fact that there were elaborate EU projects for the provision of technical and financial assistance and the transfer of know-how on asylum law and practical arrangements for refugee reception and protection in the countries of Central and Eastern Europe, while many then EU member states also appeared to struggle with a lack of resources, training and quality control mechanisms in their respective asylum systems – yet seemingly without much support or remedial efforts by the EU.

What is more, at least from the outset, the approach towards those outside the EU seemed much more harmonized than the diverging and often contradictory standards and practices applied within the EU. To me, something felt quite wrong with being one of the thousands of people paid by the EU to convey "common" high-quality standards to third countries that – at least in my perception – even within the EU had largely not yet been established.

I was therefore curious to see whether my personal observations were purely subjective or whether they at least partially reflected the "reality" of EU asylum and enlargement policy development. More specifically, in order to be better able to understand the greater context of what I had experienced I wanted to take a closer look at how a common EU asylum policy had evolved as well as whether and how the two parallel processes of EU asylum policy harmonization and EU enlargement overlapped.

As a consequence, this thesis is aimed at achieving a better understanding of the dynamic of the European integration process, and the EU asylum policy harmonization process through 2004, in particular. EU enlargement to Central and Eastern Europe until 2004 forms the backdrop against which this process is

analyzed. Questions of legitimacy, including the oft-stated lack of popular influence on decision-making, insufficient democratic oversight and power struggles between the EU Commission and member states, are only touched upon where relevant to the above focus.

For practical and conceptual reasons, the central aspects of my analysis are the major political decisions taken by EU member states and the main financial instruments developed by EU institutions with the aim of harmonizing asylum policy and practice within the EU and in the EU candidate countries. This approach is practical because – in contrast to information on informal processes – documentation on these aspects is readily publicly available. And conceptually, it appears perfectly suited to help me assess whether my observations as an "EU expert" were merely subjective, as these kinds of decisions and instruments were crucial elements of the integration process in other EU policy areas as well and as they certainly constitute an "objective" political reality.

The first aspect includes first and foremost the outcome of intergovernmental conferences (such as EU Council summits) that decisively shaped the evolution of the legal framework for a harmonized EU asylum policy (such as EU Treaties, Directives and Regulations) and major political decisions advancing EU enlargement (such as EU Accession Agreements). The second aspect relates to the practical and financial measures administered or monitored by EU institutions in order to promote a common set of standards and rules for refugee protection within the EU and in the candidate countries (such as EU Programmes).

Returning to my above-mentioned discomfort with my acting as an "EU expert" and conveying standards to third countries that apparently were not even applied yet within the EU, it seems obvious that one of the main reasons for a more unified and forceful approach to asylum policy harmonization in the EU candidate countries compared to the existing EU member states was the fact that the former had much to gain politically and economically from abiding by common asylum standards, while the latter had not much to fear in terms of sanctions for non-

compliance with these standards. For instance, Angenendt noted in 1999 that *"Especially strong efforts to adapt asylum and migration policies to fit EU standards could be observed in the Eastern European countries, who are hoping for EU membership in the near future."*¹

Yet, even if we acknowledge and accept the different approaches regarding asylum policy harmonization in the member states and the candidate countries as a given, that still does not answer the question underlying my discomfort, i.e. if the EU had indeed tried to establish "not yet existing" EU standards in the candidate countries. Likewise, it does not explain how and when such standards were developed in the first place and how inter-related the parallel standard-setting processes regarding EU member states and candidate countries were.

Before addressing these issues, however, it is necessary to provide some contextual information on two factors, which I deem central to understanding the EU asylum policy harmonization process. The first relates to trends in the number of persons seeking protection worldwide, and in the EU, in particular, while the second concerns international and regional legal frameworks for refugee protection. Both factors guide, set the stage and limit the EU's ability to design its own asylum regime.

I.1 Basic research questions

This paper first and foremost deals with the two processes of EU asylum policy harmonization and EU enlargement to Central and Eastern Europe through 2004, with a primary focus on the first process and special attention given to asylum-related aspects in the latter process. More specifically, it will trace the central stages of these processes, including the outcomes of the grand intergovernmental conferences, and present the main policy, legal and financial instruments developed by the EU until 2004 to achieve a common asylum policy and promote common asylum standards within the EU and in the 2004 accession countries.

¹ Angenendt 1999, p.39; see also Phuong, p.406

In addition, it will attempt to determine whether indeed – as I seemed to have observed when acting as an EU expert – EU assistance in the asylum field had been provided in the candidate countries before this happened in the then EU member states and whether the standards promoted in the candidate countries had already been established within the EU.

I.2 Theoretical assumptions

At the beginning, I intended to devote an entire chapter to summarizing theoretical considerations concerning my research topic. As writing progressed, I realized, however, that this would have further expanded the already comprehensive scope of my thesis and detracted attention from my primary research focus. Therefore, I ultimately decided to settle for briefly presenting here the theoretical assumptions that shaped my understanding of the EU asylum policy harmonization process.

Theories on European integration abound, as do reviews and anthologies of them. For instance, in 1994, Michelmann/Soldatos made an attempt to synthesize different approaches to analyzing European integration, including those by political scientists, sociologists, legal scholars, economists and historians.² One of the more recent and most comprehensive German-language endeavours to systematically present the wide range of scientific approaches analyzing the phenomenon, "Theorien europäischer Integration", edited by Hans-Jürgen Bieling and Maria Lerch in late 2004, comprises no less than 15 contributions on individual European integration theories, including on federalism, neo-functionalism, intergovernmentalism, Marxist political economy, supranationalism, liberal intergovernmentalism, neo-Gramscianism, multi-level governance, actor-centered institutionalism, historical institutionalism, Europeanization of national politics, social constructivism, feminist perspectives, sociological perspectives and integration through law. The editors even apologize that, for lack of space, no separate chapter was devoted to an additional number of relevant theories, such

² Michelmann/Soldatos 1994, p. 7-8

as communicative interactionism, comparative political system analysis and fusion thesis.³

Bieling/Lerch suggest that, for a long time, integration theories concentrated on the "process" dimension, trying to explain how and under which conditions economic, societal and political cooperation and integration may advance. In contrast, the focus of recent research on Europe has shifted to the "condition" dimension, analyzing the EU as a community and political system, without, however, ignoring the ongoing integration dynamic and related transformation process. Furthermore, Bieling/Lerch highlight that there is no consensus in political science on how to categorize the European Community and the European Union: as an international organization, a regime, a system "sui generis", a federation etc. They attribute these differences to the divergent theoretical positions and disciplines but also to the constantly changing and evolving "nature of the beast".⁴ Given the focus of this thesis on harmonization in one specific policy area, theoretical considerations regarding the "condition" dimension of the "moving target" EU⁵ were of less relevance to me than those addressing the "process" dimension.

The first theory to be mentioned in this context is neofunctionalism, as developed by E. B. Haas, Leon Lindberg and Amitai Etzioni in the 1950s and 1960s. Neofunctionalism is based on the assumption that increasing economic interdependency between states will reduce their ability to pursue equally efficient and autonomous economic policies and that the resulting – technical and rather apolitical – economic integration, which aims at maintaining efficient economic policy-making by giving up nation-state autonomy, will gradually accelerate and increasingly *spill over* into the political sphere and from economic policy into other policy areas. Ultimately, depending on the political will of the member states, this may result a gradual pooling of state sovereignty at supranational level and even the creation of strong central institutions which further advance the integration

³ Bieling/Lerch 2006, p. 31-33; for other overviews see e.g. Loth/Wessels 2001, Michelmann/Soldatos 1994 Plümper 2003, Rosamond 2000

⁴ Bieling/Lerch 2006, p.14

⁵ Große Hüttemann/Knodt 2006, p.233

process. These solutions do not require the complete agreement of states, but rather a general convergence of similar interests around the goals of the original common undertaking.⁶ Neofunctionalism quite well describes a central aspect of the EU asylum policy harmonization dynamic, i.e. the spill-over from the establishment of the Internal Market and the formulation of its four principles (free movement of goods, services, capital and persons) to enhanced asylum and migration-related cooperation. However, it does not sufficiently explain the persistence and sometimes even increase of conflicts of interest between EC/EU member states concerning a range of policy areas, including asylum and migration.

In order to address these shortcomings, Stanley Hoffmann, Robert Keohane and Andrew Moravcsik elaborated a theory, which reiterated the central role of nation-states, thus termed "intergovernmentalism". In contrast to assuming that national sovereignty will be gradually transferred more or less automatically to a supranational entity or level, this approach stresses the significance of "intergovernmental bargains" and the convergence of interests among the leading states of the Community as a precondition of integration, while the role of the European Commission and transnational interest groups is seen as negligible. In other words, by helping European states to better fulfill their functions, European integration reproduces nation-state sovereignty, albeit in a different form. Moreover, integration is more likely in "low policy" areas, i.e. economic and social policy, while "high policy" areas, i.e. foreign and defence policy, will retain their primarily intergovernmental character. In the 1990s, both notions – the centrality of nation-state interests and the strict distinction between "high" and "low" policy areas – were modified, in order to allow for the recognition of economic interdependencies as well as of the active role of supranational institutions in the integration process.⁷ These concepts were amended by Andrew Moravcsik's liberal intergovernmentalism, which e.g. conceives the state as a consequence of

⁶ Bieling/Lerch 2006, p.25-26; Linskeseder 2010, p.12-16, 23-29, 109-110; Michelmann/Soldatos 1994, p.9; Mutimer 1994, p.26-33; Plümper 2003, p.11-12; Wolf 2006, p.65-90

⁷ Bieling 2006, p.91-116; Linskeseder 2010, p.16-23, 106-109; Michelmann/Soldatos 1994, p.10; Mutimer 1994, p. 36-42; Nölke 2006, p.160 Plümper 2003, p.12

specific societal power relations rather than a unitary actor. Nonetheless, it retains the emphasis of the pre-eminent role of member states' preferences for the European integration process, questioning the existence of autonomous European institutions as such. It also assumes that the states with the greatest interest in supranational coordination are forced to give in to the demands of states not dependent on a given agreement, thus often leading to the common lowest denominator. In order to avoid such an outcome, however, a coalition of states may well put pressure on a potential "veto" state to comply with their considerations or link cooperation in different policy areas and adopt so-called "package-deals".⁸ Whereas intergovernmentalism and liberal intergovernmentalism account for the significant influence of individual member states on designing and delaying agreements in the field of asylum policy, they underestimate the role of supranational institutions, especially the European Commission, which has played a vital role in preparing the grand intergovernmental conferences as well as conducting and monitoring EU financial and technical assistance to member states and candidate countries. Likewise, they neglect the activities of the UNHCR and refugee NGOs.

At least partially, this omission is underlined by a post-neofunctionalist concept devised by Alec Stone Sweet and Wayne Sandholtz, supranationalism, which suggests that the respective state of integration of the Union does not simply reflect member states' preferences but that integration rather creates its own dynamic through the logic of its inherent institutionalization process. Stone Sweet and Sandholtz also demonstrate that, per definition, the big government conferences follow intergovernmental patterns and that an exclusive focus on their outcomes is inadequate. Even during the "empty chair" crisis of the 1960s and the Eurosclerosis of the 1970s there was substantial integration progress in some areas, although that did not lead to breakthrough in intergovernmental negotiations. Later government conferences only codified the integration advances made earlier.⁹ Yet, as Ann P. Branch and Jakob C. Øhrgaard observe, instead of

⁸ Linskeseder 2010, p.16-23, 106-109; Steinhilber 2006, p.177-184; Linskeseder 2010, p.16-23, 106-109

⁹ Linskeseder 2010, p.29-32; Nölke 2006, p.159-161

adequately addressing the empirical complexity of political processes at European level, where different actors interact with each other in different contexts, supranationalism falls into the same trap as intergovernmentalism, i.e. it privileges certain actors over others. Besides, it has a bias towards certain – supranational – policy areas (the Single European Market in the broadest sense) at the expense of sectors that are still government-dominated or at least initially do not feature noteworthy transnational interactions.¹⁰

An alternative theory, put forward by Gary Marks, Liesbet Hooghe and Kermit Blanks, describes the EU as a "multi-level governance" (MLG)¹¹, i.e. *"a system of continuous negotiation among nested governments at several territorial tiers – supranational, national, regional, and local – as the result of a broad process of institutional creation and decision reallocation that has pulled some previously centralized functions of the state up to the supranational level and down to the local/regional level."*¹² Similar to (post-)neofunctionalist approaches, it thus challenges the presumed primacy of the state and emphasizes the role of other, economic, societal and supranational actors, including the European Commission, the European Parliament and the European Court of Justice. Moreover, it postulates that least common denominator solutions are limited to a few areas where the unanimity principle still applies, while an increasing number of legislative measures is adopted by majority, which may result in "painful" defeats of big member states.¹³ The MLG approach is very appealing as it accounts for the complex dynamics of the large variety of actors who are typically involved in shaping asylum policy and practice and acknowledges the Commission as a driving force in strengthening cooperation and influencing the direction of integration in a given policy area.

In light of the above, there seems to be no single theory on European integration that applies to all aspects of the EU asylum policy harmonization process. Rather,

¹⁰ Nölke 2006, p.164-166

¹¹ Große Hüttemann/Knodt 2006, p.226

¹² Marks 1993, p.392

¹³ Große Hüttemann/Knodt 2006, p.225-247; Linskeseder 2010, p.36-39, 130, 133-134

I believe, it is elements drawn from a number of theories that adequately explain its dynamic and direction. These include (post-)neofunctionalism, which explains the spill-over from economic integration to asylum and migration policy and the perpetuation of the integration process; (liberal) intergovernmentalism, as it emphasizes the significance of states in a policy area so closely linked to questions of nation-state sovereignty and identity; and the multi-level governance approach which allows for appreciating the vital role of supranational and other non-state actors and addresses the increasing predominance of majority-based decision-making at EU level.¹⁴

In short, my point of departure is the perception of the EU as a political community and a political system in its own right and the assumption that the evolution of a common EU asylum policy was all but a linear process. Rather, it initially happened as a by-product of economic integration, was later driven by the member states to safeguard their national interests, yet was also significantly shaped by other actors such as the Commission, the UNHCR and NGOs.

I.3 Methodology

In order to ensure a maximum of intersubjectivity, I will attempt to be as transparent as possible regarding the central aspects of my research. More specifically, in the previous passages, I have laid out my motivation for choosing the research subject and the theoretical assumptions, principal understanding and observations underlying my writing of this thesis. Furthermore, in this sub-chapter, I provide an overview of my considerations for the selection of the research method I used and the sources I consulted.¹⁵

Given that my focus is on description and "hermeneutically" understanding rather than on developing or testing theories and that I began my research with only limited knowledge of the overall processes I sought to examine, I have chosen a

¹⁴ also Linskeseder 2010, p.39-41

¹⁵ Burnham et al. 2008, p.3; Krumm/Noetzel/Westle 2009, p.108-109; Krumm 2009, p.301; Burnham et al. 2008, p.3; Sommer 1995, p.368

qualitative approach to address my basic research questions. Such an approach seemed to be most expedient because it exhibits greater openness concerning my research subject than a quantitative analysis and did not require me to formulate exact starting hypotheses to be tested. In addition, it allowed me to deal with and integrate into my thesis central aspects of EU asylum policy harmonization I had not thought of or was only vaguely aware of when starting my research, while also allowing me to discard aspects I had originally considered to be of interest if it turned out that they were not sufficiently relevant to answering my basic research questions and would have exceeded the scope of the study I envisioned.¹⁶

A further argument for my choice of methodology is that qualitative methods are particularly well-suited for case studies because they help to achieve an ideographic understanding of the research subject by giving due attention to the respective case in its totality, including its peculiarities, complexity and contextuality.¹⁷ While this is especially true for my first research question (evolution of a common EU asylum policy in the context of the 2004 EU enlargement), it also applies to my second question (concurrence of asylum policy-related EU programmes in the candidate countries and the member states). More specifically, with regard to the latter, I wanted to take a closer look at and provide an overview of EU financial instruments aimed at promoting "common" asylum standards rather than merely testing the hypotheses that such assistance was provided in the candidate countries before this happened in the then EU member states and that the standards promoted in the candidate countries had not yet been established within the EU.

Out of the numerous qualitative methods available, I opted for a document analysis of the texts that were the most relevant to addressing my basic research questions.¹⁸ In view of my assumption that member states, supranational actors and the UNHCR played a central part in the evolution of a common EU asylum

¹⁶ Alemann/Tönnemann 1995, p.50-64; Burnham et al. 2008, p.40; Krumm/Noetzel/Westle 2009, p.97-98, 100-101; Krumm 2009, p.297; Stykow et al. 2009, p.160-167

¹⁷ Alemann/Tönnemann 1995, p.56-61; Burnham et al. 2008, p.231-247; Krumm/Noetzel/Westle 2009, p.99; Krumm 2009, p.311; Stykow et al. 2009, p.160-167

policy, the primary texts I consulted were intergovernmental agreements, secondary legislative acts, official documents, background information and statements published by the European Union (EU) and the United Nations High Commissioner for Refugees (UNHCR) as well as international and regional legal instruments. The EU was an essential source of information for obvious reasons, as its policies and legal documents lie at the heart of this analysis. The UNHCR, the primary intergovernmental agency tasked with refugee protection and authoritatively interpreting the central international legal instrument for refugee protection, the Geneva Refugee Convention, provides an inexhaustible wealth of statistical and analytical information as well as political and legal guidance on issues relating to asylum policy and refugee protection. Finally, as mentioned further above, international and regional refugee law represents a set of obligations that limits and shapes the EU's ability to design its own asylum regime.

The academic literature I consulted was not the main basis and focus of my research. Rather, I used it as a tool to help me identify relevant EU and UNHCR documents that I had not been aware of, in addition to the ones I had already accessed, as well as to help me interpret my findings and put them in perspective. NGO publications and media reports are only referred to when necessary to fill information gaps, highlight specific developments or stress a point.

In view of the wealth of publicly accessible, written information, as well as given the difficulty of identifying and getting in touch with a balanced set of experts and decision makers, I have refrained from seeking and conducting "elite" or "expert" interviews.¹⁹ Likewise, simulating a limited "project budget", thus reflecting the often prevailing financial realities of social and political scientific research projects, I have restricted my use of information solely to sources accessible without extra cost in public libraries and on the Internet. In addition to the obvious practical advantages of this approach, it will also facilitate the reproduction of the results of my research.

¹⁸ Reh 1995, p.201-260; Burnham et al. 2008, p.187-195, 208-212; Krumm et al. 2009, p.325-334

¹⁹ Burnham et al. 2008, p.231-247; Schmid 1995, p.293-326

Moreover, while an effort was made to consult a mix of online and hard-copy sources, it was impossible to avoid a significant imbalance in the use of such sources in relation to primary and secondary texts. More specifically, almost all international and regional legal instruments and EU and UNHCR documents cited in this thesis were available online, while the bulk of the remaining texts were accessed in hard-copy. The information gathered online was exclusively accessed from sources whose authenticity and reliability was without doubt, including the EU, UNHCR, academic research journals and the BBC.²⁰ In order to ensure utmost transparency and future access to the cited online texts, I have endeavoured to be as precise as possible regarding document titles, reference numbers and navigation tree references. What is more, in the days before finalizing this thesis, I have tested and updated all Internet links listed in the bibliography in order to ensure that the vast majority of online sources I used are still available as of January 2012. Unfortunately, due to changes to the EU web portal EUROPA, presumably mainly as a consequence of the restructuring of the EU and the EU Commission, in particular in the wake of the Lisbon Treaty, some of the background information cited in this thesis is no longer accessible. In these few instances, I have provided dates of last access for each piece of information.

I.4 Central definitions

"Asylum policy" has been a buzzword for many years. However, in public discourse, asylum policy has often been confused with migration policy, and associated with varying categories of people, including refugees, asylum-seekers and migrants, without a clear understanding of the differences between these groups. It was therefore necessary to develop a working definition of "asylum policy" and, in particular, to clarify which persons I consider being the subjects of that policy.

Forced Migration Online (FMO), a comprehensive website project coordinated by a team of researchers based at the Refugee Studies Centre in Oxford,

²⁰ Burnham et al. 2008, p.213-215

distinguishes three types of forced migration, including conflict-induced displacement, development-induced displacement and disaster-induced displacement, and seven types of forced migrants, ranging from refugees, asylum-seekers and internally displaced persons to developmental displacees and environmental and disaster displacees as well as smuggled people and trafficked people.²¹ This concept is based on *"the definition of 'forced migration' promoted by the International Association for the Study of Forced Migration (IASFM), which describes it as 'a general term that refers to the movements of refugees and internally displaced people (those displaced by conflicts) as well as people displaced by natural or environmental disasters, chemical or nuclear disasters, famine, or development projects.'"*²²

The UN organization tasked with refugee protection (United Nations High Commissioner for Refugees (UNHCR)), on the other hand, quite simply sets migrants *"who choose to move in order to improve the future prospects of themselves and their families"* apart from refugees who *"have to move if they are to save their lives or preserve their freedom."*²³

As these two examples show, the term "migrants" is quite ambiguous as it may be understood narrowly as meaning persons who voluntarily move to a country other than that of their usual residence – e.g. in juxtaposition to "refugees" – yet may also encompass all groups of persons leaving their home countries for an extended period of time, be it voluntarily or involuntarily.

In contrast, while *"the term 'refugee' has a long history of usage to describe certain groups in broad and non-specific terms"* there is also a legal definition of a refugee, as enshrined in the 1951 UN Convention Relating to the Status of Refugees. Article 1 of the Refugee Convention defines a refugee as a person residing outside his/her country of nationality, who is unable or unwilling to return because of a "well-founded fear" of persecution for reasons of race, religion,

²¹ Forced Migration Online: What is Forced Migration?

²² Forced Migration Online: What is Forced Migration?

nationality, membership of a particular social group, or political opinion. According to FMO, *"those recognized as refugees are better off than other forced migrants, as they have a clear legal status and are afforded the protection of the United Nations High Commissioner for Refugees (UNHCR)."*²⁴

Asylum-seekers, on the other hand, are people who have moved across international borders in search of protection under the 1951 Refugee Convention, but whose claim for refugee status has not yet been determined,²⁵ or in UNHCR's words: *"an asylum-seeker is someone who says he or she is a refugee, but whose claim has not yet been definitively evaluated."*²⁶

It has to be noted, however, as Castles/Loughna rightly point out, that increasing restrictions on the entry of asylum-seekers to potential countries of asylum have caused some of them to enter illegally, thus blurring the distinction between asylum-seekers and undocumented migrants and leading to the notion of the "asylum-migration nexus".²⁷ Similarly, Gibney/Hansen suggest that the concepts "asylum" and "immigration", which had clearly been distinct in times of the Cold War when *"'protection' meant protection from Communism, and the terms 'refugee' and 'defector' were synonymous"*, have merged in the 1980s and 1990s, a fusion which was most complete in Europe.²⁸

Contrary to asylum-seekers and refugees, "internally displaced persons" (IDPs), who are sometimes also referred to as "internal refugees", are identified by the Representative of the UN Secretary-General on Internally Displaced Persons, Francis Deng, as *"persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who*

²³ UNHCR: Who We Help: Refugees

²⁴ Forced Migration Online: What is Forced Migration?

²⁵ *ibid.* (FMO)

²⁶ UNHCR: Who We Help: Asylum-Seekers

²⁷ Castles/Loughna 2005, p.39-40

²⁸ Gibney/Hansen 2005, p.70

have not crossed an internationally recognized State border".²⁹ FMO points out that while being in similar need of protection and assistance as refugees, IDPs do not have the same legal and institutional support as those who have managed to cross an international border. For instance, there is no specifically-mandated international body to provide assistance to IDPs, and although they are guaranteed certain basic rights under international humanitarian law (the Geneva Conventions), ensuring that these rights are secured is often the responsibility of authorities which were responsible for their displacement in the first place, or ones that are unable or unwilling to do so.³⁰

For the purposes of this paper, I understand asylum policy as those political processes, mechanisms, decisions and agreements that govern the lives of refugees and asylum-seekers under the 1951 Geneva Refugee Convention. As a consequence, I will not specifically deal with policies relating to "regular" or economic migrants, disaster and environmental displacees, or victims of trafficking and IDPs.

I.5 Outline

This substantive part of this paper begins with contextual considerations that are essential to understanding the EU asylum policy harmonization process. It provides a short account of past and current trends regarding the movement and distribution of refugees and asylum-seekers, briefly touching upon changed perceptions and reception policies in the host countries. The second part of the starting chapter gives a cursory overview of relevant international and regional refugee law, in particular as applicable to the EU and its member states.

The next chapter deals with the development of a common EU asylum policy through 2004, from the first tentative steps in the 1960s and 1970s, to the Single European Act and the Schengen Agreement, to the Maastricht Treaty, the creation

²⁹ UN Commission on Human Rights: Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39, Addendum, Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2, 11 February 1998, Annex para. 2

of an "Area of freedom, security and justice" through the Amsterdam Treaty and the adoption of the first asylum directives. In addition to tracking the formal political, institutional and legal arrangements that were put in place to advance EU asylum law harmonization, the chapter also examines the main financial instruments developed to advance the harmonization process, including the European Refugee Fund, Odysseus and ARGO.

The focus of the fourth chapter is on the 2004 EU enlargement. It describes the enlargement process to Central and Eastern Europe since 1989, especially highlighting asylum policy-related aspects. Furthermore, the chapter presents the EU's main financial instruments to promote asylum policy-related harmonization and provide relevant pre-accession assistance to the candidate countries in Central and Eastern Europe, including Phare and EU Budget line B7-667 as well as Odysseus and ARGO.

The last chapter will summarize the key findings, proposing a four-generation model for describing EU asylum policy harmonization until 2004 and epitomizing the main stages of EU enlargement to Central and Eastern Europe until 2004. In addition, it will address the question whether EU assistance in the asylum field had been provided in the candidate countries before this happened in the then EU member states and whether the standards promoted in the candidate countries had already been established within the EU. Finally, on the basis of the findings presented in this paper, it will also propose areas for related future research.

³⁰ FMO: What is Forced Migration?

II. Framework conditions of a common EU asylum policy

EU asylum policy, like any other EU policy, did not evolve in a vacuum and cannot be fully understood by exclusively looking at internal aspects of the EU and its member states. In fact, asylum policy is very much shaped by external factors which guide and limit the ability of the EU to design its own policy. These include armed conflicts, peace agreements, democratization processes and other related political developments that generate, increase or reduce refugee movements; the perceived decline or resurgence of the supremacy of the nation-state in international politics; supranational, sub-regional, regional and global economic and political integration processes; and the evolution of an international legal framework for human rights and refugee protection.

It would be far beyond the scope of this paper to extensively deal with all the above factors. However, I consider it necessary to elaborate on two factors without which even a basic understanding of EU asylum policy harmonization would be impossible. The first aspect relates to trends in the movement of refugees and asylum-seekers to the EU, which have received much attention by media and national electorates, and have often been used by politicians to back up their calls for changes to the existing asylum regimes, including at EU level. The second aspect relates to international and regional norms on refugee protection which oblige EU member states to ensure that their policies and practices do not contravene these rules.

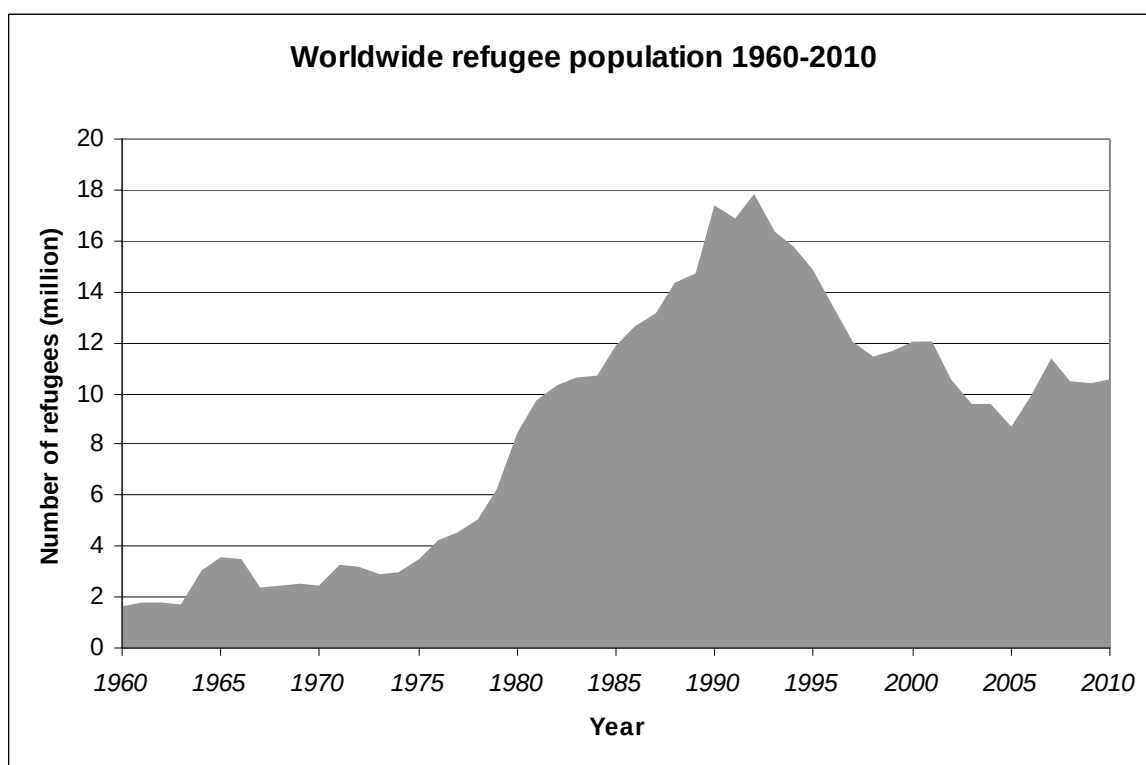
II.1 Asylum trends

II.1.1 Refugee flows

The UNHCR reports that, in 2010, 43.7 million people were displaced worldwide, including 15.4 million refugees (10.55 million under UNHCR's care and 4.82 million registered with the UN Relief and Works Agency for Palestine Refugees (UNRWA)), 27.5 million internally displaced persons (IDPs) and nearly 850,000

asylum-seekers.³¹ In addition, the UNHCR estimates that the worldwide number of refugees falling under its mandate has increased more than sixfold from 1.6 million in 1960 to 10.5 million in 2010.³²

This development has not been linear, however. While in the 1960s, the refugee population remained relatively stable at some 2 to 4 million, there was a steady increase after the mid-1970s, with a dramatic surge in the late 1980s and early 1990s and an unprecedented peak of 17.8 million refugees in 1992. Refugee numbers then dropped again significantly and have hovered between 9 and 12 million in 1997-2010.³³ (see chart below)



Source: UNHCR: Total Refugee population by country of asylum, 1960-2010 & Total Refugee population by origin, 1960-2010

³¹ UNHCR News Stories: World Refugee Day: UNHCR report finds 80 per cent of world's refugees in developing countries, 20 June 2011

³² "In UNHCR statistics, refugees include individuals recognized under the 1951 Convention relating to the Status of Refugees; its 1967 Protocol; the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa; those recognized in accordance with the UNHCR Statute; individuals granted complementary forms of protection; or, those enjoying 'temporary protection'." in: UNHCR: Total Refugee population by country of asylum, 1960-2010 & Total Refugee population by origin, 1960-2010; see also Castles/Loughna 2005, p.42

³³ Ibid.

II.1.2 Asylum applications

Before going into detail, I would like to note that the UNHCR statistical data I consulted during my research was not always consistent. For instance, there are discrepancies in the number of asylum applications in the EU-15 listed in a UNHCR study of November 2001 and a statistical overview of February 2004. At times these differences are quite substantial, e.g. the figures given for 1993 are 549,696 and 516,400, respectively. These differences also exist in other UNHCR publications, such as the mentioned 2004 overview and a March 2006 report, which e.g. put the number of applications for 2002 at 376,830 and 393,450, respectively.³⁴ While this is likely due to changes in the methodology and typology of the recording procedures, it also means that exact comparisons of asylum statistics are next to impossible and that there is no way for me to ensure that the data I present below are entirely accurate. Nonetheless, with the above qualification, I will use UNHCR statistics on asylum applications to highlight historical trends, focusing on aggregate figures to minimize statistical variances and preferably citing the most current information available on a given time period in order to ensure best-possible comparability with data on newer periods.

For the 1960s and 1970s, only scarce statistical information is available on applications for international protection. According to a 2001 UNHCR study documenting asylum flows in the previous decades, 141,586 people applied for asylum in 4 industrialized countries³⁵ in 1960-1969, 72,831 in 10 countries³⁶ in 1970-1974 and 233,671 in 13 countries³⁷ in 1975-1979.³⁸ In the 1980s and 1990s, the UNHCR found that the asylum regime had undergone significant changes. More specifically, while 2.3 million asylum applications had been submitted in 1980-1989 in 37, mostly industrialized, countries in Europe, North America and

³⁴ see UNHCR: Asylum Applications in Industrialized Countries: 1980-1999 (Nov 2001), 15 November 2001, p. 169-170; UNHCR: Asylum levels and trends: Europe and non-European industrialized countries 2003, 24 February 2004, p.9; UNHCR: Asylum levels and trends in industrialized countries 2005, 16 March 2006, p.9

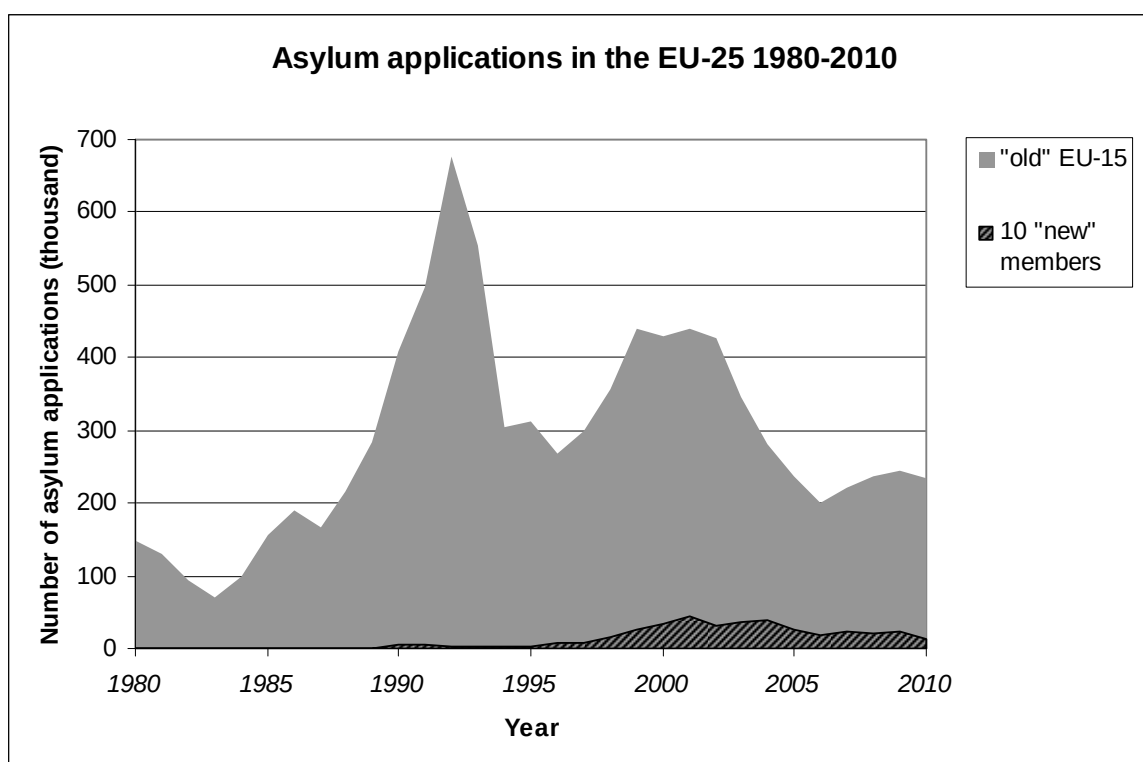
³⁵ Austria, Germany, Italy, Switzerland

³⁶ Austria, Belgium, Denmark, France, Germany, Italy, Portugal, Switzerland, Turkey and the USA

³⁷ Austria, Belgium, Denmark, France, Germany, Greece, Italy, the Netherlands, Portugal, Switzerland, Turkey, the UK and the USA

³⁸ UNHCR: Asylum Applications in Industrialized Countries: 1980-1999, 15 November 2001, p. 169-170

Asia and Oceania³⁹, the number of applications lodged in 1990-1999 reached 6.1 million, an almost three-fold increase compared to the previous decade. In 1992, a historical high of 856,000 applications in the 37 countries was recorded.⁴⁰ Almost twenty years later, in 2010, a mere 358,800 asylum applications were submitted in 44 industrialized countries, which is some 42 percent lower than the decade's peak in 2001, when almost 620,000 asylum applications had been made.⁴¹



Source: UNHCR: Asylum Applications in Industrialized Countries: 1980-1999; Asylum levels and trends in industrialized countries 2004, 2005, 2010⁴²

³⁹ The 37 countries included in the study are: The 15 countries that were EU member states in 2001 (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and the United Kingdom), then Candidate countries for EU-membership (Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovak Republic, Slovenia and Turkey), Australia, Canada, Iceland, Japan, Liechtenstein, New Zealand, Norway, Switzerland and the United States

⁴⁰ UNHCR: Asylum Applications in Industrialized Countries: 1980-1999 (Nov 2001), 15 November 2001, p. vii-x, p.89

⁴¹ "The 44 industrialized countries included in this report are: The 27 European Union countries as well as Albania, Australia, Bosnia and Herzegovina, Canada, Croatia, Iceland, Japan, the Republic of Korea, Liechtenstein, Montenegro, New Zealand, Norway, Serbia, Switzerland, Turkey, the United States and the former Yugoslav Republic of Macedonia." in: UNHCR News Stories: Asylum-seeker numbers nearly halved in last decade, says UNHCR, 28 March 2011; UNHCR Press Releases: Asylum figures fall in 2010 to almost half their 2001 levels, 28 March 2011

⁴² see also Menz 2009, p.vi, who presents a very similar graph based on Eurostat figures; Castles/Loughna 2005, p.42, 63- 65; Gibney/Hansen 2005, p.71-73

Concerning the EU, several sets of UNHCR statistics reveal that in the EU-15 more than 1.5 million asylum applications were submitted in 1980-1989, some 4 million in 1990-1999 and almost 2.8 million in 2000-2009.⁴³ As the above graph shows, a sharp rise in the number of asylum-seekers in the 1980s and early 1990s, in line with the growth of the refugee population worldwide, was followed by a rapid decline. In 1999, Angenendt also highlighted this development on the basis of OECD and SOPEMI reports, pointing to enormous decreases in most of the then 15 EU member states until 1996, e.g. -96% in Italy (since 1991) and more than -70% in Portugal, Germany, Austria, Finland and Spain (since 1993, 1992, 1991, 1992, and 1993, respectively). For the seven years up until 1999, he observed a general decrease of asylum applications lodged in the EU, which he mainly attributed to the member states' more restrictive asylum policies in the 1990s, more stringent visa requirements and faster and more difficult asylum procedures as well as to the (temporary) stabilisation in the former Yugoslavia.⁴⁴ Castles/Loughna attribute the decline in the mid- and late 1990s mainly to changes in refugee law in Germany and Sweden, yet also point to the complex relationship between push, pull and intermediary factors to explain forced migration to the EU.⁴⁵

The number of asylum applications in the EU-15 rose again to between 340,000 and 414,000 annually in 1998-2002, leading to considerable concern and calls by Western leaders for greater burden-sharing between countries of asylum.⁴⁶ From 2003, applications continued to decrease until 2006, when only some 180,000 asylum applications were lodged in the EU-15 – the lowest number since 1988 –

⁴³ UNHCR: Asylum Applications in Industrialized Countries: 1980-1999, 15 November 2001, p.145, 155; UNHCR Statistics: Asylum levels and trends in industrialized countries 2004, 1 March 2005, p.8; UNHCR: Asylum levels and trends in industrialized countries 2005, 16 March 2006, p.9; UNHCR: Asylum Levels and Trends in Industrialized Countries 2010, 28 March 2011, p.15; see also Castles/Loughna 2005, p.42, 63- 65; Gibney/Hansen 2005, p.71-73; Muus 1997, p.5

⁴⁴ Angenendt 1999, p.19-20; see also Brübach 1997, p.38; Castles/Loughna 2005, p.42, 64; Muus 1997, p.5

⁴⁵ Castles/Loughna 2005, p.42

⁴⁶ UNHCR: Asylum Applications in Industrialized Countries: 1980-1999, 15 November 2001, p.145; UNHCR Statistics: Asylum levels and trends in industrialized countries 2004, 1 March 2005, p.8; Castles/Loughna 2005, p.42, 63- 65; Gibney/Hansen 2005, p.71-73

and 201,000 in the EU-27.⁴⁷ According to the latest available annual statistics, in 2010, all 27 current EU member states still received just over 243,000 asylum applications or about 29 percent of the worldwide total of 845,800.⁴⁸

The figures for the "new" member states are marginal in comparison to the "old" EU-15. Of course, as the UNHCR points out, *"most countries in Eastern and Central Europe were not destination countries in the 1980s but rather [a] source of asylum-seekers. This situation, however, changed during the 1990s with countries in this region developing asylum regimes and some of them emerging as important asylum-seeker receiving countries, in a few cases even exceeding traditional asylum countries. [...] For instance, during the time period 1999-2000, Hungary received more asylum claims than Ireland or Spain, and during 2001, the Czech Republic recorded more asylum applicants than Australia, Ireland, Italy, Norway or Spain."*⁴⁹ Phuong emphasizes that the Central and Eastern European (CEE) countries, which had been countries of origin of refugees during the Cold War, first became transit countries in the mid-1990s and ultimately countries of destination of asylum-seekers following the disintegration of the Soviet Union and restrictive migration policies in the EU.⁵⁰ Still, only slightly more than 80,000 asylum applications were lodged in the ten 2004 enlargement countries⁵¹ in the 1990s and about 300,000 in the successive decade.⁵²

Interestingly, whereas the number of asylum-seekers in the 19 countries located in Western Europe declined by 36% between 2001 and 2004, the 10 new EU member states experienced a slight increase in asylum applications (4%) from 2003 to 2004. For some, including Cyprus, Malta, Poland and the Slovak Republic,

⁴⁷ UNHCR Statistics: Asylum levels and trends in industrialized countries 2004, 1 March 2005, p.8; UNHCR: Asylum Levels and Trends in Industrialized Countries 2010, 28 March 2011, p.15;

⁴⁸ UNHCR Press Releases: UNHCR marks 60th anniversary of Refugee Convention, 28 July 2011; UNHCR Global Trends 2010. 60 years and still counting, 20 June 2011, p. 3 (incl. footnote 3)

⁴⁹ UNHCR: Asylum levels and trends in industrialized countries 2005, 16 March 2006, p.3

⁵⁰ Phuong 2005, p.390-391

⁵¹ Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia

⁵² UNHCR: Asylum Applications in Industrialized Countries: 1980-1999, 15 November 2001, p.156; UNHCR Statistics: Asylum levels and trends in industrialized countries 2004, 1 March 2005, p.8; UNHCR: Asylum levels and trends in industrialized countries 2005, 16 March 2006, p.9; UNHCR: Asylum Levels and Trends in Industrialized Countries 2010, 28 March 2011, p.15

the number of asylum-seekers in 2004 was even the highest on record⁵³, which may at least partially be due to their accession to the EU and their consequently increased attraction for asylum applicants.

An argument often used by governments calling for greater EU-internal burden-sharing is the uneven sharing of asylum responsibilities. Indeed, considerable differences not only exist between the "old" and "new" members but also between individual member states across the EU-25. For instance, in 2000-2004, the UK (393,830), Germany (324,150) and France (279,190) were the leading reception countries in absolute numbers. In contrast, Cyprus (22.1/1,000), Austria (17.9/1,000) and Sweden (14.3/1,000) were the countries that received the largest share of asylum applications per capita in that period, more than three times the EU average of 4.2 asylum-seekers per 1,000 inhabitants, which led the UNHCR to conclude that the sharing of asylum responsibilities within the EU compared to national population size was *"far from equitable"*.⁵⁴

II.1.3 International burden-sharing and changing attitudes towards refugees

In 1992, Rudge explained that, in the thirty years after the creation of the UNHCR in 1950, the vast majority of asylum-seekers in Western Europe had been from the Soviet bloc but also noted that asylum-seekers increasingly came from outside Europe.⁵⁵ Leuthardt points out that while the term "refugee" still had a positive connotation at the time of the creation of the Schengen group in 1985, some eight years later, the mood had changed considerably and, for instance, a statement by British researcher Myles Robertson that illegal migration was a crime found widespread acceptance.⁵⁶ Moreover, Brübach stated in 1997 that, since the downfall of the Communist regimes in Central and Eastern Europe, there had been a growing tendency of European states and their populations to view the reception of refugees not as a demonstration of ideological superiority and an

⁵³ UNHCR Statistics: Asylum levels and trends in industrialized countries 2004, 1 March 2005, p. 3-4

⁵⁴ UNHCR Statistics: Asylum levels and trends in industrialized countries 2004, 1 March 2005, p. 5

⁵⁵ Rudge 1992, p.93-94, 100-101; see also Castles/Loughna 2005, p.40-41

⁵⁶ Leuthardt 1994, p.119

international obligation but as an economic burden and a threat to national identity. These fears were aggravated by the apparent loss of control over migration flows to Western Europe since the late 1970s.⁵⁷ Hathaway, likewise in 1997, suggested that *"because the assimilation of European refugees was perceived as relatively straightforward, they helped to meet acute labour shortages and their reception reinforced the ideological objectives of the capitalist world, the governments of industrialized states implemented generous admission policies. The reasons that induced this openness have, however, largely withered away, with refugees mostly coming from the poorer countries of the South and being seen as a challenge to the cultural cohesion of many developed states as well as an irritant to political and economic relations with the state of origin."*⁵⁸ The latter trend is underscored by UNHCR statistics of 2002, according to which developing countries produced 86 percent of the world's refugees between 1992 and 2001.⁵⁹

According to Rudge, in the early 1990s, the number of asylum seekers had reached "a level unknown" since the displacements of World War II. He describes the treatment of refugees and asylum-seekers as *"problematic, involving great stresses on the national determination procedures, a rising risk of summary rejection at borders and of refoulement, disorder in intergovernmental relations, and a growing pressure to develop and harmonize restrictive and deterrent legislation to 'control' the situation."*⁶⁰ In the same year, Loescher observed that the 1980s and 1990s had *"rudely shaken the industrialized countries out of their old notions. [...] Most of these new arrivals do not fit the image of refugees for whom most Westerners have had ready sympathy in the past. [...] Refugees are seen by many in the West as a threat to their way of life. The unexpected arrival in the West of large numbers of people with a variety of claims to asylum has severely jolted existing practices and has overtaxed the procedural systems for handling refugee determinations."*⁶¹

⁵⁷ Brübach 1997, p.38

⁵⁸ Hathaway 1997, p.xix-xx

⁵⁹ UNHCR Press Releases: Developing countries host most refugees, according to new statistical yearbook from UNHCR, 8 November 2002

⁶⁰ Rudge 1992, p.94, 102

⁶¹ Loescher 1992, p.2; see also Gibney/Hansen 2005, p.70-71; Rudge 1992, p.94

Furthermore, Gibney/Hansen suggest that following deterrent policy measures adopted since the mid-1980s, with the EU member states having *"gone furthest in coordinating their policies in order to restrict access to asylum"*, all Western states had embraced the prevention of the arrival of asylum-seekers as their chief policy goal, in order *"to avoid incurring responsibilities under the 1951 Refugee Convention (and other domestic and international legal instruments), and by doing so escape the expenses of asylum processing and the possibility of political backlashes"*.⁶² Numerous other observers agree with the assessment that the receiving states in Europe reacted to the increased numbers of refugees in the 1980s and 1990s by implementing restrictive measures.⁶³ Gibney/Hansen observe that these policies have made access to asylum for refugees more difficult and have undermined their rights and harmed their interests.⁶⁴

However, perceptions in European countries of the burden they had and continue to face do not correspond with the actual share of refugees they have been receiving. For instance, Rudge concluded concerning the early 1990s that *"the crisis is not one that affects so much the affluent and relatively peaceful European world but rather one that adds to the intense strains upon the poorer and less secure states."*⁶⁵ While noting that Western Europe was *"the destination of most asylum-seekers going to industrialized countries"* in 1990-2001, Castles/Loughna also underline that, in general, *"only a small proportion of refugees and asylum seekers actually come to the highly developed countries"*.⁶⁶ In 1997, Hathaway stated that Africa alone *"shelters more than double the number of refugees protected in all of Europe, North America and Oceania combined and in very poor countries like Armenia, Guinea, Jordan and Lebanon the ratio of refugee population to total population is 1:10. Yet no burden sharing mechanism exists to*

⁶² Gibney/Hansen 2005, p.70-71, 75-76

⁶³ Benedikt 2002, p.89-94; Betz 2002, p.205-207; Castles/Loughna 2005, p.39-41; Muus 1997, p.1-8; Lavenex 1999, p.1-2; Leuthardt 1994; Linskeseder 2010, p.7, 58-59; Löhr 2010, p.9-10; Menz 2009, p.3; Richmond 1994, p. XV; Van der Klaauw 1997, p.19-21

⁶⁴ Gibney/Hansen 2005, p.86-87

⁶⁵ Rudge 1992, p.98

⁶⁶ Castles/Loughna 2005, p.42, 63; for their analysis of asylum migration to industrialized countries in 1990-2001 see p.43-52

*offset the contributions of these reception states of the South, leading them to increasingly turn away from traditions of hospitality towards refugees, and to the outright denial of access to refugees and the coercion of refugees to return to their states of origin."*⁶⁷

In a similar vein, the UNHCR emphasized in 2002 that *"while rich countries voice increasing concern over the numbers of asylum seekers arriving on their borders, it is mainly poor nations that provide asylum to the world's refugees – 72 percent over the past 10 years", a fact which "underscores the responsibility of industrialized states to share in international refugee protection"*.⁶⁸ In 2002, Pakistan, Tanzania and the DR Congo were the top refugee-receiving countries, with the EU's "most burdened" member state, Germany, trailing far behind in 37th place and the entire EU-15 accommodating only 1.9 million or 15% of the world's asylum-seekers and refugees.⁶⁹

The UNHCR Global Trends 2010 report, published in June 2011, reaffirms these findings, revealing the *"deep imbalance in international support for the world's forcibly displaced, with a full four-fifths of the world's refugees being hosted by developing countries – and at a time of rising anti-refugee sentiment in many industrialized ones."*⁷⁰ Antonio Gutierrez, the UN High Commissioner for Refugees lamented: *"What we're seeing is worrying unfairness in the international protection paradigm. Fears about supposed floods of refugees in industrialized countries are being vastly overblown or mistakenly conflated with issues of migration. Meanwhile it's poorer countries that are left having to pick up the burden."*⁷¹ Moreover, the UNHCR finds that *"Contrary to common belief, the available statistical evidence demonstrates that most refugees prefer to remain in their region of origin, rather than seeking refuge elsewhere. By the end of 2010, three*

⁶⁷ Hathaway 1997, p.xxi-xxii

⁶⁸ UNHCR Press Releases: Developing countries host most refugees, according to new statistical yearbook from UNHCR, 8 November 2002

⁶⁹ Nuscheler 2004, p.56-57; see also Castles/Loughna 2005, p.42-52

⁷⁰ UNHCR News Stories: World Refugee Day: UNHCR report finds 80 per cent of world's refugees in developing countries, 20 June 2011

⁷¹ UNHCR Global Trends 2010. 60 years and still counting, 20 June 2011, p. 6

*quarters of the world's refugees were residing in a country neighbouring their own", while Europe hosted only 15% of the world's refugees, equalling some 1.6 million people.*⁷²

⁷² UNHCR Global Trends 2010. 60 years and still counting, 20 June 2011, p. 11

II.2 International and regional legal frameworks for refugee protection

According to Sir Guy Goodwin-Gill, one of the leading scholars in international refugee law, the proclamation of the Universal Declaration of Human Rights of 1948 and its Article 14 (1), which acknowledges the right of everyone *"to seek and to enjoy in other countries asylum from persecution"*⁷³, alongside the signing of the Geneva Refugee Convention of 1951 and the creation of the Office of the United Nations High Commissioner for Refugees in 1950, are the foundations of today's refugee and asylum regime.⁷⁴

By providing a universal definition of the term "refugee" (Art. 1 A(2)) and introducing the "non-refoulement" principle (Art. 33 (1)), the 1951 Convention relating to the Status of Refugees (GRC)⁷⁵, as amended by the New York Protocol of 1967⁷⁶, which lifted the geographic and temporal limitations of the Convention, still serves as the principal tool to protect refugees worldwide:

"For the purposes of the present Convention, the term 'refugee' shall apply to any person who: [...]"

Art. 1 A(2) [...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. [...]"

Art. 33 (1) No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."⁷⁷

⁷³ Universal Declaration of Human Rights. Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948

⁷⁴ Goodwin-Gill 2002, p. 24; see also Nuscheler 2004, p.187

⁷⁵ UN Convention Relating to the Status of Refugees. Adopted on 25 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons

⁷⁶ UN Protocol Relating to the Status of Refugees. Adopted by UN General Assembly Resolution 2198 (XXI) on 16 December 1966 and signed by the President of the General Assembly and by the Secretary-General on 31 January 1967

⁷⁷ UN Convention Relating to the Status of Refugees 1951; Nuscheler 2004, p.187

In 1992, Rudge noted that *"the right of asylum itself has become established as a norm of civilized international behavior in Europe and many millions of persecuted and marginalized people have benefited from it."*⁷⁸ On the other hand, e.g. Nuscheler and Vedsted-Hansen point out that despite the progress that the GRC 1951 represented in the development of international refugee law, its narrow definition which focuses on the persecution of individuals for specific reasons excludes too many *de facto* refugees and that contemporary refugee situations required new forms of protection.⁷⁹ The 1969 Organization for African Unity (OAU) Convention governing Specific Aspects of the Refugee Problem in Africa and the 1984 Cartagena Declaration on Refugees consequently broaden the concept of the refugee enshrined in the GRC 1951 and its 1967 Protocol, owing to a perceived need *"to complement the 1951 Convention, as modified by the 1967 Protocol, in order to provide adequate responses to new dimensions of mass displacements of persons in need of international protection and assistance."*⁸⁰

More specifically, the OAU Convention governing Specific Aspects of the Refugee Problem in Africa of 1969 extends the scope of the refugee protection to victims of war and civil war:

*"Art. 1 (2) For the purposes of this Convention, The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."*⁸¹

⁷⁸ Rudge, Philip: The Asylum Dilemma – Crisis in the Modern World: A European Perspective. in: Loescher, Gil (ed.): Refugees and the asylum dilemma in the West, Pennsylvania State University Press, University Park, Pa 1992, p.93

⁷⁹ Nuscheler 2004, p.195, 199; see also Vedsted-Hansen 1997, p.31-37

⁸⁰ UNHCR Executive Committee: Persons covered by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and by the Cartagena Declaration on Refugees (Submitted by the African Group and the Latin American Group), EC/1992/SCP/CRP.6, 6 April 1992, Introduction para. 2. (for original full texts see Organization of African Unity: Convention Governing the Specific Aspects of Refugee Problems in Africa: Adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session, 10 September 1969; Cartagena Declaration on Refugees: Adopted at a colloquium entitled "Coloquio Sobre la Protección Internacional de los Refugiados en América Central, México y Panamá: Problemas Jurídicos y Humanitarios" held at Cartagena, Colombia from 19 – 22, November 1984

⁸¹ Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention) 1969; Nuscheler 2004, p.195

In addition, it provides that *"the Contracting State of Asylum shall determine whether an applicant is a refugee"* (Art. 1 (6)) but does not specify criteria for the refugee status determination process.⁸²

The Cartagena Declaration on Refugees of 1984 takes over the extended refugee definition of the OAU Convention (Conclusion 3), reiterates the importance of the non-refoulement principle as laid out in Art. 33 (1) GRC 1951 (Conclusion 5) and proposes

Conclusion 1. *"To promote within the countries of the region the adoption of national laws and regulations facilitating the application of the Convention and the Protocol and, if necessary, establishing internal procedures and mechanisms for the protection of refugees. In addition, to ensure that the national laws and regulations adopted reflect the principles and criteria of the Convention and the Protocol, thus fostering the necessary process of systematic harmonization of national legislation on refugees."*⁸³ [...]

Conclusion 8. *"To ensure that the countries of the region establish a minimum standard of treatment for refugees, on the basis of the provisions of the 1951 Convention and 1967 Protocol and of the American Convention on Human Rights, taking into consideration the conclusions of the UNHCR Executive Committee, particularly No. 22 on the Protection of Asylum Seekers in Situations of Large-Scale Influx."*⁸⁴

The *Declaration on the Protection of Refugees and Displaced Persons in the Arab World* of 1992 (Cairo Declaration) expresses hope that *"Arab States which have not yet acceded to the 1951 Convention and the 1967 Protocol relating to the status of refugees will do so"* (Art. 4). It determines that *"in situations which may not be covered by the 1951 Convention"* or other relevant instruments, *"refugees, asylum seekers and displaced persons shall nevertheless be protected by: (a) the humanitarian principles of asylum in Islamic law and Arab values, (b) the basic human rights rules, established by international and regional organisations, (c) other relevant principles or international law."* (Art. 5) The Declaration also

⁸² Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention) 1969

⁸³ Cartagena Declaration 1984

"recommends that [...] Arab States adopt a broad concept of 'refugee' and 'displaced person' as well as a minimum standard for their treatment" (Art. 6).⁸⁵

In addition to the above-mentioned special treaties, international legal protection for refugees has been reiterated and complemented at international level through the UN Declaration on Territorial Asylum⁸⁶ in 1967 and the UN Convention against Torture (CAT)⁸⁷ in 1984, as well as through a number of instruments at European level⁸⁸, including the European Convention on Human Rights (ECHR)⁸⁹ in 1950 and the Council of Europe Declaration on Territorial Asylum⁹⁰ in 1977, which all reaffirm the "non-refoulement" principle. In the past decades, in application of that principle, many people seeking international protection, including by submitting asylum applications, who did not qualify for refugee status but could not return to their countries of origin, have received a form of "subsidiary" protection or status.⁹¹ However, as Gibney/Hansen forcefully argue, many recent Western practices, including the general movement of border controls outwards and the practice of interdiction, *"come close to corroding fundamental refugee norms, notably the principle of non-refoulement"*, constituting *"an attempt by Western states to escape 1951 Convention responsibilities at the expense of other states"*.⁹²

All industrialized countries have signed the GRC 1951, the 1967 Protocol and CAT and integrated their provisions into their national asylum legislation.⁹³ As of 1 April 2011, the total number of States Parties to both the Geneva Refugee Convention and Protocol was 144, with Madagascar and Saint Kitts and Nevis having only

⁸⁴ Cartagena Declaration 1984

⁸⁵ Declaration on the Protection of Refugees and Displaced Persons in the Arab World. Conclusion of the Fourth Seminar of Arab Experts on Asylum and Refugee Law, Cairo, 19 November 1992

⁸⁶ Declaration on Territorial Asylum. Adopted by General Assembly resolution 2312 (XXII) of 14 December 1967; Nuscheler 2004, p.196-197

⁸⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984. Entry into force 26 June 1987, in accordance with article 27 (1)

⁸⁸ for details see Fungueiriño-Lorenzo 2002, p.58-60

⁸⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950. As amended by Protocol No. 11, with Protocol Nos. 1, 4, 6, 7, 12 and 13, February 2003

⁹⁰ Council of Europe: Committee of Ministers: Declaration on territorial asylum, 18 November 1977 (only paper copy available)

⁹¹ see also Schieffer 1998, p.109-115, 124, 149; Nuscheler 2004, p.194

⁹² Gibney/Hansen 2005, p.87

signed the 1951 Convention and Cape Verde, the USA and Venezuela having only acceded to the 1967 Protocol.⁹⁴ Moreover, all EU member states have signed the ECHR and some have even included the right to asylum in their national constitutions, like France, Germany, Greece, Italy, Portugal and Spain.⁹⁵ However, as Goodwin-Gill pointed out in 1997, the ECHR does not directly address the right of an asylum-seeker to a fair asylum procedure and related procedural guarantees or substantive protection against return to a country where he/she would be at risk of persecution other than torture and ill-treatment. In other words, the European human rights system *"fails badly, because, like tolerance, asylum and refuge are not protected rights; neither is family reunion, entry, or non-deportation. A claim to protection under the Convention must therefore be pursued indirectly [...]"*⁹⁶

Like the ECHR, neither the GRC 1951 and the Protocol of 1967 nor the OAU Convention contain any detailed provisions concerning the refugee status determination process. More specifically, while the GRC provides an authoritative definition of the term "refugee" (Art. 1 A(2)) and introduces the "non-refoulement" principle (Art. 33 (1)) it merely lays out general obligations of the signatories, which mainly focus on the reception and general treatment of refugees as well as the issuing of travel documents in the countries of reception rather than on asylum procedural issues, such as the non-discrimination principle in applying the Convention (Art. 3) and the right to free access to courts for refugees (Art. 16).⁹⁷ Nuscheler also emphasizes that the imprecise wording of Art. 1 A gives the signatories of the GRC 1951 and its 1967 Protocol wide discretion in its interpretation.⁹⁸ Likewise, the Declarations of Cartagena (Conclusion 8) and Cairo (Art. 6) recommend establishing a minimum standard for the treatment of refugees, *"guided by the provisions of the United Nations instruments relating to*

⁹³ Castles/Loughna 2005, p.40; Weiss, p.10

⁹⁴ UNHCR: States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, as of 1 April 2011

⁹⁵ Weiss, p.10

⁹⁶ Goodwin-Gill 1997, p.13-14; see also Linskeseder 2010, p.110-111

⁹⁷ UN Convention Relating to the Status of Refugees 1951; Linskeseder 2010, p.110-111; Nuscheler 2004, p.187

⁹⁸ Nuscheler 2004, p.188

*human rights and refugees as well as relevant regional instruments*⁹⁹, but do not further elaborate on concrete measures or procedures to achieve these standards.

As a consequence, the countries receiving asylum-seekers have for a long time been trying to individually establish criteria and procedural standards for the implementation of the GRC 1951 and its 1967 Protocol through their national asylum legislation and related national administrative provisions. Moreover, until recently, the major effort to unify criteria for asylum procedures was undertaken by UNHCR in 1979 through its *Handbook on Procedures and Criteria for Determining Refugee Status* (re-edited in 1992), which was "meant for the guidance of government officials concerned with the determination of refugee status in the various Contracting States [of the GRC 1951 and the 1967 Protocol]".¹⁰⁰ Besides providing a brief overview of the genesis of the GRC 1951 and UNHCR, the Handbook discusses in depth various problems relating to the interpretation of the definitions of "refugee" in these two instruments and attempts to show how these definitions may be applied in concrete cases as well as to focus attention on various procedural problems arising with regard to the determination of refugee status.¹⁰¹ Yet, like all political and legal processes, the development of common standards for the refugee status determination (RSD) procedure is a dynamic and ongoing process, which has also been fundamentally shaped by the asylum legislation and court rulings in the recipient countries.

As indicated above, starting in the 1950s, the Council of Europe was the first regional structure to set legal standards relating to asylum at European level. However, it gradually lost ground to the European Community and later the European Union, where cooperation on asylum matters was increasingly concentrated.¹⁰² Overall, the most persistent and politically most significant endeavour to set common standards for refugee protection and harmonize asylum

⁹⁹ Declaration on the Protection of Refugees and Displaced Persons in the Arab World, Cairo, 19 November 1992

¹⁰⁰ UNHCR: *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1, Reedited, Geneva, January 1992, UNHCR 1979, Foreword, para. VII

¹⁰¹ *ibid.*, para. 220

policy and practice at sub-regional level was undertaken by the EU member states and EU institutions. The next chapter will assess how these standards evolved.

¹⁰² Fungueiriño-Lorenzo 2002, p.60

III. The evolution of a common EU Asylum Policy

III.1 Background

The UNHCR describes *"the practice of granting asylum to people fleeing persecution in foreign lands"* as *"one of the earliest hallmarks of civilization."*¹⁰³ However, observers typically do not link a common EC (and EU) asylum policy to the civilized mindset and noble intentions of European policy-makers, but rather point out that it was mainly an application of the four principles of the Internal Market (free movement of goods, services, capital and persons). More specifically, in order to compensate for the removal of existing obstacles to EU-wide integration, such as tariffs and border controls, a unified approach vis-à-vis non-EU citizens at the EU's external borders was needed.¹⁰⁴

As a consequence of the original orientation of the European Community towards economic integration and the creation of a peace zone in Europe, migration policy at first only played a rudimentary role. Moreover, it initially only concerned questions of freedom of movement and of the rights of citizens within the EC, but not migration from abroad, which for a long time remained within exclusive nation-state competence. Hanisch refers to the Paris summit of 1974, where the harmonization of legal provisions concerning foreigners and the abolition of border controls were discussed for the very first time, as a milestone in that direction.¹⁰⁵

Fungueiriño-Lorenzo also states that until the 1970s, cooperation on visa, asylum and immigration matters played merely a subordinate role at European level. Furthermore, during the so-called "first generation" of cooperation in the mentioned policy areas, i.e. from the 1970s until the 1992 Maastricht Treaty, the European Community still did not have many relevant legislative competencies. Related cooperation primarily took place on an inter-governmental level, e.g.

¹⁰³ UNHCR: Who We Help: Refugees

¹⁰⁴ see Van der Klaauw 1997, p.20; Weidenfeld/Wessels 2002, p.74; Hanisch 2003, p.46

¹⁰⁵ Hanisch, Nina: Auf dem Weg zu einer gemeinsamen Einwanderungs- und Integrationspolitik für Europa. Migration im Spannungsfeld von nationalen Handlungsmustern und europäischem Einigungsprozess anhand der Entwicklung in Frankreich, Deutschland und Großbritannien. Master Thesis, Wien 2003, p.46-47

through TREVI (Terrorisme, Extrémisme et Violence Internationale) and the Ad Hoc Group Immigration, and resulted either in non-binding agreements or arrangements based on international law. Meetings were generally held in camera and the agreements reached only rarely made public, thus forestalling public scrutiny, including by the European Parliament, UNHCR and the Council of Europe.¹⁰⁶

In the same vein, Brübach states that activities by the Council to harmonize asylum law before Maastricht were few, limited in scope and not legally binding. For instance, a Declaration of 25 March 1964 (Official Journal 1964, No. 78/1225) postulated that recognized Convention refugees should receive preferential treatment regarding entry into other member states of the European Economic Community for work-related purposes. Likewise, Council Regulation 1408/71 (Official Journal 1971, No. L 149/2) only codified the application of social security systems to refugees in so far as they were already workers resident in one of the member states.¹⁰⁷

In the 1980s, the asylum policy harmonization process slowly gathered speed. The European Parliament repeatedly took the initiative, in particular in the late 1980s, and adopted a report on the state of asylum law in the European community in 1986 – the so-called Vetter report (EP Doc A 2-227/86) – as well as a number of asylum policy-related resolutions. These include the Resolution on questions of asylum law of 12 March 1987 (Official register 1987, No. C 99/167), the Resolution on the asylum policy in some member states which contravenes international human rights law of 18 June 1987 (Official register 1987, No. C 190/105), the Resolution on the Schengen agreement as well as the Convention on asylum law and refugee status prepared by the ad-hoc working group on 'immigration' of 1 June 1990 (Official register 1990, No. C 175/170) and the Resolution on the free

¹⁰⁶ EUROPA: Summaries of EU legislation: Institutional affairs: Building Europe through the treaties: The Amsterdam treaty: a comprehensive guide: The gradual establishment of an area of freedom, security and justice; Fungueiriño-Lorenzo 2002, p.4-5; for details on TREVI and the ad-hoc Group Immigration see p.8-10 and p.16-18, respectively; see also Leuthardt 1994, p.112-115; Linskeseder 2010, p.9,58, 91; Schieffer 1998, p. 21, 65

¹⁰⁷ Brübach 1997, p.19-20

movement of persons and security in the European Community of 13 September 1991 (Official register 1991, No. C 267/197). Interestingly, the March 1987 resolution demanded speedy and thorough asylum procedures in accordance with the GRC 1951 and relevant CoE and UN standards as well as an independent judicial review of decisions, a suspensive effect of appeals, the prohibition of extraditions for the duration of the procedure and access to the labour market and social security after a maximum of six months. The resolution also foresaw a burden-sharing mechanism. Nonetheless, to a large part, these findings and resolutions were never put into practice.¹⁰⁸

The European Commission again, as part of its efforts to finalize the internal market, sought to establish harmonized rules for non-EU citizens. In its White Paper "Completing the Internal Market" of 1985¹⁰⁹, which contained some 280 recommendations, the Commission set out to propose measures on asylum law and the state of refugees until 1988 and take relevant decisions until 1990. However, while many recommendations were taken up a year later in the Single European Act, a number of proposals, including two draft directives, remained internal working papers and were never made public. Moreover, the debate centered mainly about determining which country was responsible for examining an asylum application, the harmonization of accelerated procedures and the freedom of movement of asylum applicants. Overall, the Commission proposals were far from aiming at a general harmonization of asylum law and the design of the asylum procedures as such was to firmly remain in the remit of the member states.¹¹⁰

According to Weidenfeld/Wessels, the beginning of intensified harmonization efforts regarding European asylum, immigration and visa policy was marked by two events in 1985: the publication of the EU Commission's White Paper on the

¹⁰⁸ Brübach 1997, p.20; Linskeseder 2010, p.59-60

¹⁰⁹ European Commission: Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28-29 June 1985), COM(85) 310, June 1985

¹¹⁰ Brübach 1997, p.21; Fungueiriño-Lorenzo 2002, p.12, 19-20; Schieffer 1998, p. 66-67; Hanisch 2003, p.47

Internal Market and the adoption of the Schengen Agreement.¹¹¹ More generally, as Menz put it, *"Asylum and Migration Policy (AMP) at the EU level has been slow in the coming, yet all serious scholarship concurs on the remarkable giant leap forward since the mid-1980s"*.¹¹²

Nonetheless, national interests and different legal and administrative traditions in the member states initially continued to obstruct the above harmonization efforts of the European Commission and the European Parliament. In addition, an ECJ judgment of July 1987¹¹³ which, upon applications lodged by Denmark, France, Germany, the Netherlands and the UK seeking the annulment of Commission Decision 8 5/3 81/EEC of 8 July 1985 setting up a prior communication and consultation procedure on migration policies in relation to non-member countries, upheld the competence of the member states vis-à-vis the Commission concerning national legislation on foreigners. Therefore, before the entry into force of the Maastricht treaty in 1993, no initiative by a Community body aimed at the harmonization of asylum and migration policy led to a legally binding outcome.¹¹⁴

III.2 Inter-governmental agreements relating to asylum

III.2.1 Single European Act

After a lengthy political process and on the basis of the Solemn Declaration of Stuttgart of 19 June 1983, the EP draft Treaty establishing the European Union of 14 February 1984, the Fontainebleau European Council of 25 and 26 June 1984 and the Commission's White Paper on the Internal Market of 1985, the Single European Act (SEA), was signed by the 12 EC member states on 17 and 28 February 1986 and entered into force on 1 July 1987. It was the first major revision of the 1957 Treaty of Rome, i.e. the Treaty establishing the European Economic Community (EEC), and foresaw the creation of an Internal Market until 31

¹¹¹ Weidenfeld/Wessels 2002, p. 74

¹¹² Menz 2009, p.6

¹¹³ European Court of Justice: Federal Republic of Germany and others v Commission of the European Communities. Joined cases 281, 283, 284, 285 and 287/85. Judgment of the Court of 9 July 1987

¹¹⁴ Brübach 1997, p.22; Fungueiriño-Lorenzo 2002, p.12-14; Nuscheler 2004, p.177; Schieffer 1998, p. 22

December 1992. It also strengthened cooperation of the Council with the European Parliament and enhanced qualified majority voting instead of unanimity in the Council, albeit excluding measures concerning, inter alia, the free movement of persons. Art. 14 SEA introduced a new Art. 8a EEC which for the first time defines the free movement of persons as one of the four constitutive elements of the Single Market.¹¹⁵

Interestingly, in this context, Böhner emphasizes the central role of fundamental rights for the legitimacy of the Community's legal order and asserts that if the Community did not respect fundamental rights and infringe upon individual freedoms this would undermine the protection of these rights on nation-state level. She observed that at the time there was no consistent use of the term "fundamental rights", either in the member states or in the Community, but rather a multiplicity of concepts ranging from fundamental freedoms to rule of law, democracy and human rights. Gradually, European Court of Justice rulings integrated fundamental rights into Community law and some related progress was also made on the political level. For instance, in 1977, the European Parliament, the European Commission and the EU Council of Ministers signed a joint declaration vowing to respect fundamental rights, as defined by the European Court of Justice. However, it was the SEA, which through its preamble for the first time introduced fundamental rights into primary Community law, explicitly referring to the constitutions and laws of the member states, the European Convention on Human Rights (ECHR) and the European Social Charta.¹¹⁶

Likewise, Brübach stresses the importance of the SEA and points out a related political declaration of 29 June 1987, in which the governments of the then EC member states agree that: *"In order to promote the free movement of persons, the member states shall co-operate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of*

¹¹⁵ EUROPA: Summaries of EU legislation: Institutional affairs: Building Europe through the treaties: The Single European Act; Hanisch 2003, p.47; Linskeseder 2010, p.59; Scheucher 2010, p.55

¹¹⁶ Böhner 1998, p. 75-79, 95-96, 260

nationals of third countries."¹¹⁷ However, Brübach also mentions the general declaration of the governmental conference on Articles 13 to 19 SEA of 29 June 1987, which clarifies that: *"Nothing in these provisions shall affect the right of member states to take such measures as they consider necessary for the purpose of controlling immigration from third countries [...]."*¹¹⁸

III.2.2 Schengen Agreement and Convention

Already a year earlier, on the basis of the 1984 Saarbrücken Agreement between France and Germany¹¹⁹, the inter-governmental Schengen Agreement was signed by France, Germany, Belgium, Luxembourg and the Netherlands on 14 June 1985 and was later amended by the Convention implementing the Schengen Agreement of 19 June 1990.¹²⁰ Although plans for a European passport union had already existed since the 1970s, the then new members (Denmark, Greece, Ireland and the UK) were adverse to the free movement of persons within the borders of the Community. Thus, the two Schengen treaties had to be developed outside the EC framework – on the basis of first bilateral and then limited multilateral negotiations – by the countries most willing to integrate this policy area.¹²¹ Issues of national sovereignty, internal security and fears of being flooded by immigrants from the East after the collapse of the Communist regimes in Central and Eastern Europe prevented the swift implementation of the Schengen provisions, which was delayed until 1995.¹²² By the time the Schengen Convention came into effect in March 1995, other EU Member States (Italy 1990, Portugal and Spain 1991, Greece 1992) had signed the agreements as well.¹²³

¹¹⁷ Single European Act, Final Act, Political Declaration by the Governments of the Member States on the Free Movement of Persons, Official Journal L 169, 29 June 1987

¹¹⁸ Single European Act, Final Act, General Declaration on Articles 13 to 19 of the Single European Act, Official Journal L 169, 29 June 1987; Brübach 1997, p.104; see also Fungueiriño-Lorenzo 2002, p.12-14; Schieffer 1998, p. 65-66, 89-93

¹¹⁹ Scheucher 2010, p.54

¹²⁰ Brübach 1997, p.22-27; Fungueiriño-Lorenzo 2002, p.14-15, 20-21; Leuthardt 1994, p.115; Linskeseder 2010, p.59-60; Nuscheler 2004, p.178; Weidenfeld/Wessels 2002, p.74

¹²¹ Costello 2006, p.293-296; Leuthardt 1994, p.115; Plümper 2003, p.72-73

¹²² Hanisch 2003, p.48; Linskeseder 2010, p.59

¹²³ Leuthardt 1994, p.116-117; Scheucher 2010, p.55

The Schengen Agreement abolished checks at internal borders of the signatory states and created a single external frontier, supposedly with the goal of allowing individual EC citizens to personally experience Europe through the liberalization of cross-border movements of persons.¹²⁴ According to the EU Commission's website *"this freedom of movement without being submitted to checks at internal borders was accompanied by so-called compensatory measures. These measures involve setting a common visa regime, improving coordination between the police, customs and the judiciary and taking additional steps to combat problems such as terrorism and organised crime. [...] A complex information system known as the Schengen information system (SIS) was set up to exchange data on certain categories of people and lost or stolen goods."*¹²⁵

In addition, Chapter 7 (Art. 28-38) under Title II of the Schengen Convention lays out details concerning the "Responsibility [of the signatories] for Processing Applications for Asylum", focusing on procedural, rather than substantive, matters. Art. 28 specifically reaffirms the obligations of the Contracting Parties under the GRC 1951 and its 1967 Protocol as well as their commitment to cooperation with the UNHCR in their implementation.¹²⁶ The Schengen treaties were, inter alia, complemented by Council Regulation (EC) No 539/2001 of 15 March 2001, listing the third countries for which a visa requirement or exemption existed. The list has been updated several times since. Interestingly, the Regulation affirms the applicability of the list to stateless persons and recognised refugees from a third country, but nonetheless allows member states to introduce a visa requirement for these persons even if its nationals are in principle exempt from the visa requirement (Preamble para. 7, Art. 1 (19)).¹²⁷

¹²⁴ Scheucher 2010, p.54; Nuscheler 2004, p.178

¹²⁵ EUROPA: European Commission: Justice and Home Affairs: Schengen Convention EUROPA: European Commission: Abolition of internal borders and creation of a single EU external frontier; see also Brübach 1997, p.22-27; Fungueiriño-Lorenzo 2002, p.21-23; Linskeseder 2010, p.61

¹²⁶ Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, Official Journal L 239, 22 September 2000; Fungueiriño-Lorenzo 2002, p.22; Schieffer 1998, p.94; Nuscheler 2004, p.178

Brübach regards the Schengen cooperation as a model for common asylum and immigration policy development in two areas: it highlighted the potential risks of cross-border cooperation yet through its own success also managed to induce cooperation in areas outside those covered by Schengen.¹²⁸ Scheucher, too, points to the Schengen Agreement as a kind of pilot project in terms of the communitarisation of the areas of justice and home affairs.¹²⁹ However, while Fungueiriño-Lorenzo describes the Schengen cooperation as a role model, as it realized the principle of freedom of movement without compromising public security,¹³⁰ Costello emphasizes the restrictive nature of the policies and practices adopted.¹³¹

In addition, Brübach und Schieffer criticize that the Schengen process largely sidestepped judicial and parliamentary control on Community and member-state level. They also underline that the Schengen process took a long time before yielding tangible results, which at the time did not bode well for other forms of intergovernmental cooperation. According to Brübach, another drawback was that the member states themselves were responsible for the implementation of the Schengen regulations, which could even be suspended by individual signatories for reasons of national security.¹³² Fungueiriño-Lorenzo also negatively comments on the Schengen *acquis* being outside the jurisdiction of any supranational court and, while allowing a multitude of interventions by the authorities, not providing for corresponding legal safeguards for individuals.¹³³

After March 1995, the EU member states Austria (April 1995), Denmark, Finland and Sweden (December 1996) as well as the associated countries Iceland and

¹²⁷ Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement

¹²⁸ Brübach 1997, p.166

¹²⁹ Scheucher 2010, p.55

¹³⁰ Fungueiriño-Lorenzo 2002, p.23

¹³¹ Costello 2006, p.289-291

¹³² Brübach 1997, p.165-168; Fungueiriño-Lorenzo 2002, p.128-132; Schieffer 1998, p.95-96

¹³³ Fungueiriño-Lorenzo 2002, p.23-24

Norway (March 2001) joined the Schengen Area.¹³⁴ Interestingly, the five Nordic countries had had a passport union since 1954 under which nationals from any of the countries had free movement between them. According to a BBC report of April 2001, their Schengen accession was seen as "highly controversial" within the region and *"with anti-EU organisations in particular sounding the warning drum that illegal immigrants would overrun the relatively homogenous countries of the north."* However, spot checks carried out by local police on vehicles and persons crossing land borders during the week following the new agreement turned up the same number of illegal immigrants as when border posts had been functioning.¹³⁵

Although the Schengen Agreement and Convention were originally not part of the EU acquis, the Schengen Convention proscribes in its Article 134 that *"The provisions of this Convention shall apply only insofar as they are compatible with Community law."*¹³⁶ Moreover, a protocol attached to the Treaty of Amsterdam of 1999 incorporated the Schengen acquis, as defined by the EU Council, into the EU legal and institutional framework.¹³⁷ In December 2004, an additional protocol required that *"For the purposes of the negotiations for the admission of new Member States into the European Union, the Schengen acquis and further measures adopted by the institutions within its scope shall be regarded as an acquis which must be accepted in full by all States candidates for admission."*¹³⁸

In December 2007, nine additional countries, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia, who had all acceded to the EU in 2004, joined the Schengen Area.¹³⁹ In December 2008, non-

¹³⁴ EUROPA: European Commission: Justice and Home Affairs: Schengen Convention EUROPA: European Commission: Abolition of internal borders and creation of a single EU external frontier; Scheucher 2010, p.55

¹³⁵ BBC News 1 April 2001; Fungueiriño-Lorenzo 2002, p.21

¹³⁶ Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, Official Journal L 239, 22 September 2000

¹³⁷ Council Decision 1999/435/EC of 20 May 1999, Official Journal L 176, 10 July 1999; The Schengen Acquis as referred to in Article 1(2) of Council Decision 1999/435/EC of 20 May 1999, Official Journal, 22 September 2000; Fungueiriño-Lorenzo 2002, p.132-133, 156-157; Linskeseder 2010, p.60

¹³⁸ Protocol on the Schengen Acquis Integrated into the Framework of the European Union, Official Journal C 310/348, 16 December 2004

¹³⁹ BBC News 21 December 2007

EU country Switzerland followed suit.¹⁴⁰ As of October 2011, with the exception of Bulgaria, Cyprus, Ireland, Romania and the United Kingdom, most EU member states were part of the Schengen Area. Liechtenstein was expected to join by the end of the year as the fourth non-EU member and EU member states Bulgaria and Romania were likewise in the process of joining the Schengen Area.¹⁴¹ Ireland and the United Kingdom still only participate in those aspects of the Schengen Agreement that entail cooperation between police forces and the judiciary. Furthermore, although Denmark has signed the Schengen Agreement, it can choose within the EU framework whether or not to apply any new decision taken under the Agreement, on the basis of the Protocol on the Position of Denmark regarding non-adoption of measures under Title IV of the EC Treaty, annexed to the Treaty on European Union and to the Treaty establishing the European Community through the Treaty of Amsterdam.¹⁴²

Since its inception, the Schengen acquis has been complemented by the adoption of numerous international agreements, EU secondary legislative acts, technical programmes, institutional measures, Communications, Notifications, Reports and Studies, including regarding the establishment of FRONTEX, the Schengen Information System (SIS I and II) and the Visa Information System (VIS). As of December 2011, quite a number of additional legislative proposals on Schengen issues such as the temporary reintroduction of border controls, the processing of visa applications, the list of travel documents entitling to cross external borders and management of large-scale IT systems in the area of freedom, security and justice were still pending.¹⁴³

¹⁴⁰ BBC News 12 December 2008

¹⁴¹ EUROPA: European Commission: Home Affairs: Policies: Borders & Visas: Schengen; Linskeseder 2010, p.60

¹⁴² Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts: Protocol on the position of Denmark, Official Journal C 340, 10 November 1997; Costello 2006, p.295-296; Fungueiriño-Lorenzo 2002, p.162; Linskeseder 2010, p.60; Schieffer 1998, p.97-98

¹⁴³ EUROPA: European Commission: Home Affairs: Documentation centre: Borders & Visas: Border crossing; EUROPA: European Commission: Home Affairs: Documentation centre: Borders & Visas: Large-scale IT systems; EUROPA: European Commission: Home Affairs: Documentation centre: Borders & Visas: Schengen; EUROPA: European Commission: Home Affairs: Documentation centre: Borders & Visas: Visa policy; Brouwer 2006, p.137-149; Costello 2006, p.291

III.2.3 Dublin Convention (Dublin I)

The Schengen provisions were complemented by the Dublin Convention and its implementation provisions, which determined *"the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities"*. The Convention was signed by 11 EU member states on 15 June 1990 and by Denmark on 13 June 1991. However, its ratification and entry into force was delayed until September 1997, mainly due to tensions between Spain and the UK over the territorial status of Gibraltar.¹⁴⁴ In Austria and Sweden the Convention entered into force in October 1997, in Finland in January 1998. In addition to the EU member states, Iceland and Norway acceded to the Dublin Convention in 2001. At the time, it was the only agreement in the area of asylum and immigration that all EU member states were part of.¹⁴⁵

The agreement was the most significant outcome of the work of the Ad Hoc Group Immigration. It sought to address two potential problems: 1) no member state feels responsible for processing a given asylum application, since each asylum case adds to the state's existing budgetary constraints ("refugees in orbit"), and 2) a third-country national submits asylum applications in two or more member states, because he/she wants to increase his/her chances of obtaining refugee status ("asylum shopping"). Therefore, as defined in its preamble, the main purpose of the Convention was to ensure that asylum seekers cannot lodge several (successive) asylum claims in the EU whilst guaranteeing that any application for asylum lodged within the European Union will be processed by one of the member states. One of its central provisions (Art. 7) determined that, in principle, *"the responsibility for examining an application for asylum shall be incumbent upon the*

¹⁴⁴ Fungueiriño-Lorenzo 2002, p.27; Hanisch 2003, p.48; Linskeseder 2010, p.62; Weidenfeld/Wessels 2002, p. 74

¹⁴⁵ Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (97/C 254/01), 19 August 1997; for details on the implementation provisions and the agreement with Iceland and Norway see EUROPA: European Commission: Justice and Home Affairs: Asylum: Attributing responsibility for examining an asylum application in the European Union, 2) EU legislation, main proposals and Community acts; Fungueiriño-Lorenzo 2002, p.27; Brübach 1997, p.29-31

*Member State responsible for controlling the entry of the alien into the territory of the Member States [...].*¹⁴⁶

It is important to note that the Dublin Convention was the first international legal instrument that defined the terms "application for asylum" and "applicant for asylum" (Art. 1). However, as its main focus was to facilitate the creation of the Internal Market, it did not contain a general definition of "asylum" or an obligation by member states to grant asylum.¹⁴⁷

Apart from its actual scope, the entry into force of the Dublin Convention also had significant repercussions for the general EU asylum policy harmonization process. More specifically, with only one member state responsible for examining asylum claims and such decisions being valid throughout the Union, there was an increased need to harmonize asylum procedures, as otherwise member states with more favourable procedures could attract more asylum-seekers while deficiencies could lead to differing decisions in similar cases¹⁴⁸, which could result in protection gaps.

Fungueiriño-Lorenzo contends that the Convention did not solve the problem of "refugees in orbit" at all, since the member states retained the right *"to send an applicant for asylum to a third State"* (Art. 3 lit. 5). Likewise, it did not prevent "asylum shopping", stipulating that the member states have the right to examine asylum applications *"even if such examination is not its responsibility under the criteria defined in this Convention"* (Art. 3 lit 5).¹⁴⁹ Overall, the Dublin I Convention is typical of the first generation of asylum policy-related cooperation, as asylum was mainly understood as a matter of internal security, decisions were taken behind closed doors, cooperation primarily took place outside the EC framework,

¹⁴⁶ Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (97/C 254/01), 19 August 1997; Brübach 1997, p.29-31; Fungueiriño-Lorenzo 2002, p.28-29; Leuthardt 1994, p.120-124; Scheucher 2010, p.57-58

¹⁴⁷ Fungueiriño-Lorenzo 2002, p.28; Scheucher 2010, p.58

¹⁴⁸ Rudge 1992, p.104-105; Van der Klaauw 1997, p.23

¹⁴⁹ Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (97/C 254/01), 19 August 1997; Fungueiriño-Lorenzo 2002, p.33-34

no overarching structures were created and the solutions that were developed only addressed isolated problems.¹⁵⁰

The Danish Refugee Council observed in its 2001 study on the practical implementation of the Dublin Convention: *"Since September 1997, the implementation of the Convention has proved to be a difficult process. Member States generally agree that the 'Dublin system' does not function as expected: the procedures are lengthy, the criteria unclear and difficult to implement and, moreover, the results are not significant since only a few asylum seekers are ultimately transferred. At the same time, some of the concerns expressed by refugee assisting lawyers and NGOs across Europe have materialised: longer (pre-procedural) period of uncertainty; incitement to destroy identity and travel documents; separation of family members; incitement to choose illegality rather than transfer to a country which is not seen as a reasonable option due to lack of harmonisation of material law and practice in the European Union, etc."*¹⁵¹

Due to the shortcomings of the Dublin I system, the Convention is no longer in force and was replaced in February 2003 by 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, also dubbed Dublin II.¹⁵²

III.2.4 Maastricht Treaty

As indicated above, initiated by the EU Commission's White Paper on the Internal Market in 1985, the EU Member States started to gradually cooperate on the rights of third country nationals to entry, movement and residence in the European Community. The foundation of the European Union through the Maastricht Treaty of 7 February 1992 (operational on 1 November 1993) was a huge step forward in

¹⁵⁰ Fungueiriño-Lorenzo 2002, p.36

¹⁵¹ Danish Refugee Council 2001, Preface; for earlier criticism see also Leuthardt 1994, p.121-122

¹⁵² 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

intensifying this cooperation.¹⁵³ According to Fungueiriño-Lorenzo, it marked the beginning of the "second generation" of asylum policy cooperation in the EU.¹⁵⁴

The new Union rested on three pillars: the Treaties founding the European Coal and Steel Community (ECSC), the European Economic Community (EEC) and the European Atomic Energy Community (Euratom) formed the supranational first pillar (called "European Community"), while the Common Foreign and Security Policy (CFSP) and cooperation in Justice and Home Affairs (JHA) made up the intergovernmental second and third pillars.¹⁵⁵ This meant that for the first time, justice and home affairs was brought into the ambit of the European Union. More specifically, in its Title VI (Art. K – K.9), the EU Treaty set out common rules for asylum and immigration policy and for non-EU citizens crossing the EU's external frontiers.¹⁵⁶ Only visa policy was integrated into the first pillar, under Art. 100c.¹⁵⁷

According to Schieffer, in practice, the member states developed distinct interpretations of "asylum policy" and "immigration policy", which were only enumeratively listed in Art. K.1 (1) and (3), respectively. Asylum policy would include policy measures related to third country nationals who were applying for asylum in EU member states, claiming persecution on the grounds laid out in the GRC 1951. In contrast, immigration policy would relate to all non-humanitarian stays, which either had the purpose of obtaining work or which exceeded a length of three months.¹⁵⁸ Interestingly, there was no comprehensive concept for refugee protection, but rather a restriction of asylum policy to Convention refugees, while excluding *de facto* refugees, i.e. people seeking protection on humanitarian grounds other than those listed in the GRC, including civil war situations. In other words, although all member states had practices in place for providing (temporary)

¹⁵³ Treaty on European Union, Official Journal C 191, 29 July 1992

¹⁵⁴ Fungueiriño-Lorenzo 2002, p.4, 37

¹⁵⁵ Brübach 1997, p.47; Fungueiriño-Lorenzo 2002, p.37; Linskeseder 2010, p.64; Schieffer 1998, p.19-20, 153

¹⁵⁶ EUROPA: European Commission: Justice and Home Affairs: The Charter of Fundamental Rights: The EU and Fundamental rights – The wider context; see also Brübach 1997, p.50-51; Nuscheler 2004, p.179

¹⁵⁷ Hanisch 2003, p.48

¹⁵⁸ Schieffer 1998, p. 70-71, 147

humanitarian protection, they were reluctant to introduce such a regime at European level.¹⁵⁹

Whereas the European Council, i.e. the institutionalized meetings of the heads of state and government, de facto remained the most important forum for JHA decisions, the Council of the European Union was formally established as the highest JHA decision-making body of the third-pillar framework. TREVI and the Ad Hoc Group Immigration were succeeded by the so-called JHA Council – made up of the interior and justice ministers of the member states – with its three steering groups (including Steering Group I "Asylum and Immigration"), which met in different configurations depending on the subjects under discussion. A Coordinating Committee ("Article K.4 Committee") consisting of senior officials was set up under Article K.4 of the Treaty on European Union to do the preparatory work for Council deliberations on justice and home affairs. The Commission and Parliament were to be kept informed about the Council's initiatives, but rather played rudimentary roles. Likewise, the oversight competencies of the European Court of Justice were quite limited.¹⁶⁰

Under the new framework, only the European Community (first pillar) had the status of an international legal personality whereas, e.g. in the area of intergovernmental cooperation under Title VI (third pillar), the European Union – as the roof of the three-pillar structure – could not assume directly applicable, legally binding supranational or international obligations, including accession to the ECHR. Furthermore, within the EU, and in contrast to legislation under the first pillar, cooperation in justice and home affairs, including joint positions, joint measures and agreements, did not constitute Community law as such and thus did not create legal obligations beyond the sphere of the member states.¹⁶¹ This was further reinforced by the codification of the subsidiarity principle in Art. B (2) EU

¹⁵⁹ Schieffer 1998, p.103-107, 149

¹⁶⁰ Brübach 1997, p.69-79, 137; Fungueiriño-Lorenzo 2002, p.38-41, 48-53; Leuthardt 1994, p.17, 125, 136-137; Schieffer 1998, p.72-77, 147-148

¹⁶¹ Brübach 1997, p.48-49; Hanisch 2003, p.49; Linskeseder 2010, p.64; Schieffer 1998, p.80, 98-102, 160-166, 171-175, 184-185

Treaty and of the supremacy of measures taken by individual member states in Art. K.3 (2) lit. b EU Treaty.¹⁶²

As a consequence, neither Art. F (2) EU Treaty, which established respect for fundamental rights as guaranteed by the ECHR as general principles of Community law, nor Art. K.2 (1) EU treaty, which stipulated that JHA cooperation should comply with the ECHR and the GRC, had immediate legal effect. However, they were understood as political guidelines that emphasized the already existing international legal obligations of the then EU member states, which were all signatories to the ECHR and the GRC.¹⁶³

Brübach contends that the Dublin Convention, although finalized before the adoption of the EU Treaty and thus outside the Title VI framework, can already be categorized as a third-pillar matter. In contrast, Fungueiriño-Lorenzo emphasizes that the Dublin Convention was never formally integrated into the third pillar. Both authors, however, agree that since all major JHA acts at the time took the form of international conventions that had to be agreed unanimously by EU governments and then formally ratified by each of the EU's national parliaments and the working structure was quite complicated (in the third pillar it comprised five levels (working groups, steering groups, the K.4 Committee, COREPER and the Council of the European Union) as opposed to only three levels in the first pillar), lawmaking on these issues remained slow and cumbersome. Therefore, even though the right to initiative had been extended to the member states and the Commission they hardly ever made use of it and only a handful of new acts were passed in the six years after Maastricht.¹⁶⁴

Interestingly, a few months after the adoption of the Maastricht Treaty, the immigration ministers of the EC member states, meeting in London on 30 November and 1 December 1992, agreed on resolutions and conclusions, whose

¹⁶² Brübach 1997, p.52-53; Schieffer 1998, p.68-70, 176-178, 185; Nuscheler 2004, p.179

¹⁶³ Brübach 1997, p.60-61; Schieffer 1998, p.98-99, 148-149

underlying concepts shaped EU asylum policy, and were thus hotly debated, in the years to come. These included, inter alia, accelerated procedures for manifestly unfounded asylum applications and readmission agreements, as well as lists of safe third countries and of safe countries of origin. Although not legally binding, some member states implemented parts of the agreements. The European Parliament lambasted the decisions formally and substantively, in particular the resolution on manifestly unfounded applications, arguing that it disregarded human rights standards regarding the right to appeal and to a minimum level of protection.¹⁶⁵

In addition, Van der Klaauw mentions resolutions and recommendations by the EU member states on the expulsion of persons, including rejected asylum-seekers, that were adopted in London in 1992, in Copenhagen in 1993 and Brussels in 1995 as well as a specimen readmission agreement adopted in November 1994, which did not include important safeguards.¹⁶⁶

Apart from a number of non-binding and less consequential communications and decisions between 1993 and 1995¹⁶⁷, there were two noteworthy developments. The first was the adoption by the JHA Council of a Council Resolution on Minimum Guarantees for Asylum Procedures on 21 June 1995, which van der Klaauw in 1997 described as the *"first effort at harmonising the positive elements of asylum law"*. On the negative side, he observed that the Resolution appeared to codify existing differences in the member states rather than to establish a common standard, allowed member states opt-outs and over time could even lead to a lowering of national standards.¹⁶⁸ Follow-up work included a Commission draft of

¹⁶⁴ EUROPA: European Commission: Justice and Home Affairs: The Charter of Fundamental Rights: The EU and Fundamental rights – The wider context; Brübach 1997, p.54-55, 80-82; Fungueiriño-Lorenzo 2002, p.48-53, 200; Schieffer 1998, p.79; Hanisch 2003, p.49; Nuscheler 2004, p.179

¹⁶⁵ EUROPA: Summaries of legislation: Other: Criteria for rejecting unfounded applications for asylum; Brübach 1997, p.145-147, 152-165; Fungueiriño-Lorenzo 2002, p.42-43; Schieffer 1998, p.82-85; Van der Klaauw 1997, p.21

¹⁶⁶ EUROPA: Summaries of EU legislation: Other: Readmission agreements; Van der Klaauw 1997, p.25-26

¹⁶⁷ for details see Fungueiriño-Lorenzo 2002, p.43-46; Schieffer 1998, p.86-88, 125-127, 130-132, 149-150

¹⁶⁸ Van der Klaauw 1997, p.23

September 2000 for what became later known as the Procedures Directive.¹⁶⁹ The second development concerned a joint EU Council position on Art. 1 of the GRC refugee definition on 4 March 1996¹⁷⁰, which excluded civil wars and general violence as well as prosecution for conscientious objection and desertion as grounds for granting refugee status. The UNHCR heavily criticized the joint position and its restrictive approach regarding persecution by non-state actors, in particular, arguing that it would leave many refugees without protection. Since this item had only been included on the insistence of a minority – France, Germany, Italy and Sweden – the UNHCR feared that other member states would follow suit and lower their protection standards as well.¹⁷¹

On 14 October 1996, the JHA Council set its priorities for the period 1996 to 1998, which included the harmonization of national asylum procedures. In the months until May 1997, several recommendations, decisions and joint measures followed, covering matters such as the monitoring of existing Council instruments concerning illegal immigration, readmission, the unlawful employment of third country nationals and cooperation in the implementation of expulsion orders, a uniform format for residence permits for third-country nationals and the exchange of information concerning assistance for the voluntary repatriation of third-country nationals.¹⁷²

Overall, however, the record of JHA-related cooperation in the five years after the adoption of the Maastricht Treaty is less than impressive. For instance, according to Van der Klaauw, an EU Council Report of 6 April 2005 on the Operation of the Treaty on European Union acknowledged that the application of Title VI had been inadequate and that *"extremely limited use has been made of the new instruments*

¹⁶⁹ EUROPA: Summaries of EU legislation: Justice, freedom and security: Free movement of persons, asylum and immigration: Minimum guarantees for asylum procedures; Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures

¹⁷⁰ Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term 'refugee' in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees, Official Journal L 63, 13 March 1996; see also Brübach 1997, p.152-165, 197; Schieffer 1998, p.88; Nuscheler 2004, p.179

¹⁷¹ Brübach 1997, p.144-145; Van der Klaauw 1997, p.24-25

¹⁷² Fungueiriño-Lorenzo 2002, p.47; Schieffer 1998, p.132

*provided under this Title".*¹⁷³ Likewise, Schieffer states that from the entry into force of the EU treaty in November 1993 until early 1997, only nineteen joint measures, seven agreements and two joint positions were adopted within the third-pillar framework.¹⁷⁴

III.2.5 Amsterdam Treaty and Tampere European Council

The Amsterdam Treaty¹⁷⁵ was signed by the EU Foreign Ministers on 3 October 1997 and entered into force on 1 May 1999. It was the outcome of the revision process of the Maastricht Treaty foreseen in its Art. 2, which had resulted in key reflection documents in 1995 (including the April 2005 Council report mentioned above) and culminated in the Inter-Governmental Conference 1996 ("Maastricht II") that started in March 1996 in Turin and was concluded in October 1997 in Amsterdam.¹⁷⁶ While the EU Commission describes it as *"a breakthrough in the area of Justice and Home Affairs at EU level"*¹⁷⁷ and e.g. Nuscheler refers to it as a "milestone" and "important step"¹⁷⁸, some observers regard it as generally rather disappointing and including few innovations.¹⁷⁹

Fungueiriño-Lorenzo refers to the Treaty as at the same time representing a disappointment and a success. On the one hand, the Amsterdam Treaty only amended and complemented the Maastricht provisions instead of completely replacing them, as had only originally been envisaged, and it did not undertake any of the reforms necessary for the next round of EU enlargement. On the other hand, it brought about important changes in Justice and Home Affairs and served to overcome the main deficits of the second-generation asylum policy cooperation, i.e. intergovernmental decision-making, lack of democracy and non-binding

¹⁷³ Van der Klaauw 1997, p.22

¹⁷⁴ Schieffer 1998, p.81, 147

¹⁷⁵ Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts: Consolidated Version of the Treaty Establishing the European Community (97/C 340/03), Official Journal C 340, 10 November 1997

¹⁷⁶ EUROPA: European Commission: Public Opinion: Archives: Standard Eurobarometer: Eb44: Eurobarometer 44 – Chapter 3: 3. The 1996 Intergovernmental Conference; Scheucher 2010, p.61

¹⁷⁷ EUROPA: European Commission: Justice and Home Affairs: The Charter of Fundamental Rights: The EU and Fundamental rights – The wider context

¹⁷⁸ Nuscheler 2004, p.176, 180

agreements. Thus, although a number of JHA-related anomalies remained, including the ongoing limitation of European Court of Justice jurisdiction and the retention of the unanimity principle, the Amsterdam Treaty marks the beginning of what Fungueiriño-Lorenzo labels the "third generation" of cooperation in this policy area.¹⁸⁰

In particular, it finally moved several key JHA matters, including asylum and immigration policy, from Title VI EU treaty to Title IV EC Treaty, i.e. from the third to the first pillar, and thus into the EU's normal lawmaking structures. This meant that in contrast to being limited to intergovernmental instruments such as conventions, joint positions, common actions, decisions and framework decisions, the Council could now adopt instruments listed in Art. 249 EC Treaty, i.e. regulations, directives, decisions, recommendations and opinions.¹⁸¹

Furthermore, while most JHA-related acts passed as a result of third-pillar cooperation or intergovernmental bargaining outside the EU framework, including the Dublin Convention, did not become Community law, the Amsterdam Treaty incorporated the intergovernmental Schengen Agreement into the EU acquis.¹⁸² Deirdre Curtin criticizes that the incorporation of the Schengen acquis by virtue of a special protocol to the Amsterdam Treaty aggravated the "opaqueness of related decision-making" and that the decisions implementing it into the EU legal order were *"full of ambiguities concerning the delimitation of the acquis and the associated legal basis exercise."*¹⁸³ On a more general level, the Council was now obliged to hear the European Parliament on proposed new measures and the European Court of Justice obtained jurisdiction for matters relating to freedom of movement, as long as they did not touch upon internal security and public order concerns of the member states. In addition, after a period of five years the

¹⁷⁹ see e.g. Linskeseder 2010, p.66; Topan 2001, p.88

¹⁸⁰ Fungueiriño-Lorenzo 2002, p.57, 60-64; see also Linskeseder 2010, p.66; Nuscheler 2004, p.180; Schieffer 1998, p.223-225

¹⁸¹ EUROPA: Summaries of EU Legislation: Glossary: Community legal instruments; Hanisch 2003, p.50; Linskeseder 2010, p.66; Nuscheler 2004, p.180

¹⁸² EUROPA: European Commission: Justice and Home Affairs: The Charter of Fundamental Rights: The EU and Fundamental rights – The wider context; Fungueiriño-Lorenzo 2002, p.57, 99-100, 105, 120-125; Hanisch 2003, p.50; Schieffer 1998, p.223-225

European Commission was to assume the exclusive right of initiative, which under the Maastricht Treaty had still been shared with the member states. After the same period, the Council was also to decide whether the EP would receive the right to co-decision-making and whether the majority rule could also be applied to decision-making on asylum issues.¹⁸⁴

The Amsterdam Treaty also stipulated (Art. 63) that within five years the EU Council should adopt

"(1) measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties, within the following areas:

(a) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States,

(b) minimum standards on the reception of asylum seekers in Member States,

(c) minimum standards with respect to the qualification of nationals of third countries as refugees,

(d) minimum standards on procedures in Member States for granting or withdrawing refugee status;

(2) measures on refugees and displaced persons within the following areas:

(a) minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection,

(b) promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons;

(3) measures on immigration policy within the following areas:

(a) conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion,

(b) illegal immigration and illegal residence, including repatriation of illegal residents;

¹⁸³ Curtin 2002, p.39

¹⁸⁴ EUROPA: European Commission: Justice and Home Affairs: The Charter of Fundamental Rights: The EU and Fundamental rights – The wider context; Costello 2006, p.294-295; Fungueiriño-Lorenzo 2002, p.57, 99-100, 105, 120-125; Nuscheler 2004, p.180; Schieffer 1998, p.223-225

*(4) measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States.*¹⁸⁵

Furthermore, Art. 64 (2) provides that

*"In the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries and without prejudice to paragraph 1, the Council may, acting by qualified majority on a proposal from the Commission, adopt provisional measures of a duration not exceeding six months for the benefit of the Member States concerned."*¹⁸⁶

Implementing the objectives of the Amsterdam Treaty was a huge undertaking. Therefore, following a call for such an instrument at the Cardiff European Council in June 1998 and based on an initial contribution by the Commission of 14 July 1998, on 3 December 1998, *"an Action Plan was adopted by the EU Council and submitted to the Vienna European Council a few days later"* which was intended to "give substance" to the concepts of freedom, security and justice *"by defining the priority objectives for the next five years and setting out a timetable of measures necessary for achieving the area of freedom, security and justice envisaged by the Treaty of Amsterdam."*¹⁸⁷ Besides these "priority objectives", the Vienna Action Plan listed detailed measures to be taken in the short and long term, i.e. within the next two and five years, respectively.¹⁸⁸

The first element of the Action Plan, the creation of an area of freedom, concerned freedom of movement, in line with the Schengen acquis, as well as the protection

¹⁸⁵ Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts: Consolidated Version of the Treaty Establishing the European Community (97/C 340/03), Official Journal C 340, 10 November 1997; see also Brübach 1997, p.221; Linskeseder 2010, p.66-67

¹⁸⁶ Treaty of Amsterdam, 10 November 1997; see also Fungueiriño-Lorenzo 2002, p.105

¹⁸⁷ EUROPA: Summaries of EU legislation: Other: Council and Commission Action Plan of 3 December 1998 on how best to implement the provisions of the Treaty of Amsterdam on the creation of an area of freedom, security and justice, Official Journal C 19 of 23 January 1999; Fungueiriño-Lorenzo 2002, p.100-101; Hanisch 2003, p.50; Nuscheler 2004, p.180

¹⁸⁸ *ibid.*

of fundamental rights and combating of discrimination, including the protection of the rights of third-country nationals legally residing in the EU. The second objective, an area of security, aimed at combating crime, in particular terrorism, human trafficking, crimes against children, drug and arms trafficking, corruption and fraud. Thirdly, area of justice meant equal access to justice by EU citizens and enhanced judicial cooperation between member states. All three goals were seen as inter-dependent and influencing each other.¹⁸⁹ However, already at the time there seems to have been an understanding that the areas of security and justice took precedence over the area of freedom, or as the Vienna Action Plan so succinctly puts it: *"The full benefits of any area of freedom will never be enjoyed unless they are exercised in an area where people can feel safe and secure."*¹⁹⁰

Benedikt points to two flaws in the grand concept of an "area of freedom, security and justice", which had thus been named in analogy to the principles of the French Revolution. For one, he highlights the obvious discrepancy between its claim to universality and its geographic and legal limits in practice. He also notes that while in the Vienna Action Plan immigration and asylum policy are part of the chapter "area of freedom" they are later increasingly discussed in the context of security issues.¹⁹¹

Nonetheless, the Vienna Action Plan made significant commitments concerning the future EU asylum policy. It asserted that different considerations would have to apply to immigration policy on the one hand and asylum policy on the other. It admitted that the instruments adopted until then had often suffered from two weaknesses: the fact that they were frequently based on "soft law", such as resolutions or recommendations, which had no legally binding effect, and that they did not have adequate monitoring arrangements. And it urged that particular priority be given to combating illegal immigration, while ensuring the integration and rights of those third country nationals legally present in the Union as well as

¹⁸⁹ *ibid.*; see also Gusy/Schewe 2004, p.343-344

¹⁹⁰ European Commission: Towards an area of freedom, security and justice. COM(1998) 459, adopted 14 July 1998 (Bulletin EU 7/8-1998); see also Boeles 2002, p.1-12

¹⁹¹ Benedikt 2002, p.78; see also Linskeseder 2010, p.92-93

protection for those in need of it even if they did not fully meet the criteria of the GRC.¹⁹²

Apart from the Action Plan, the expansion of the small task force for justice and home affairs – which had been established when the Maastricht treaty had been signed – into a full directorate-general in October 1999 was another important step towards implementing the JHA provisions of the Amsterdam Treaty. The Commission also appointed a Commissioner solely responsible for this area, Antonio Vitorino.¹⁹³

Moreover, at a special European Council meeting "on the Creation of an Area of Freedom, Security and Justice in the European Union", held on 15 and 16 October 1999 in Tampere, EU governments pledged to adopt a series of new initiatives on asylum, fighting crime, and cooperation between courts and police forces.¹⁹⁴ In advance of the summit, the Commission and the Parliament had sought rather liberal asylum regulations than the member states' representatives, who, however, ultimately prevailed.¹⁹⁵

More specifically, the heads of state or government of the EU member states stressed the need for a "Common European Asylum and Migration Policy", reiterated the objectives and timetable set in the Amsterdam Treaty and the Vienna Action Plan and emphasized the importance of consulting UNHCR and other international organizations. In particular, they reaffirmed the importance of the right to seek asylum and their earlier agreement to work towards establishing a Common European Asylum System (CEAS), *"based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement"* (Art. 13). In the short

¹⁹² Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on the creation of an area of freedom, security and justice, Text adopted by the Justice and Home Affairs Council of 3 December 1998, Official Journal C 19 of 23 January 1999, para.8

¹⁹³ EUROPA: European Commission: About us: Introducing: DG JLS – European Commission: Justice, Freedom and Security from a European Commission perspective

¹⁹⁴ EUROPA: European Commission: Justice and Home Affairs: The Charter of Fundamental Rights: The EU and Fundamental rights – The wider context; Hanisch 2003, p.50

¹⁹⁵ Linskeseder 2010, p.69

term, such a system would have to *"include a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status"* as well as measures on subsidiary forms of protection (Art. 14).¹⁹⁶

In the longer term, this was aimed at establishing a common asylum procedure and an EU-wide uniform status for those granted asylum (Art.15). In addition, the European Council urged the Council to reach an agreement on temporary protection and burden-sharing between member states, consider financial reserves for situations of mass influx of refugees (Art. 16) and promptly finalize the planned system for the identification of asylum seekers (Eurodac) (Art. 17).¹⁹⁷

Following up on the Amsterdam Treaty, the Vienna Action Plan and the Tampere European Council, on 27 March 2000, the EU Council approved a scoreboard¹⁹⁸ with the stated objective of setting out, *"in a single table, the measures needed to create an area of freedom, security and justice and review the progress made in implementing them"*. Besides areas such as a genuine European area of justice, the Union-wide fight against crime, cooperation against drugs, citizenship of the Union and stronger external action, the scoreboard also covers a common EU asylum and migration policy (partnership with countries of origin, common European asylum system, fair treatment of third-country nationals, management of migration flows) and issues related to internal and external borders and visa policy, implementation of Art. 62 TEC and converting the Schengen acquis.¹⁹⁹

¹⁹⁶ Council of the European Union: Presidency Conclusions of the Tampere European Council (15 and 16 October 1999); see also Linskeseder 2010, p.68

¹⁹⁷ Council of the European Union: Presidency Conclusions of the Tampere European Council (15 and 16 October 1999)

¹⁹⁸ Communication from the Commission to the Council and the European Parliament: Scoreboard to review progress on the creation of an area of "Freedom, security and justice" in the European Union, COM(2000) 167, final – Not published in the Official Journal, 24 March 2000

¹⁹⁹ EUROPA: Summaries of EU legislation: Other: Scoreboard

Fungueiriño-Lorenzo highlights two aspects that were central to providing a frame for EU asylum policy development in the years to come: The notion that asylum and migration were "separate but closely related issues" and the affirmation that the envisaged EU asylum system should be based on the full and inclusive application of the Geneva Refugee Convention.²⁰⁰

According to Bendel, in the late 1990s there was much optimism and Council, Commission and the European Parliament alike regarded immigration increasingly as a chance rather than merely a threat.²⁰¹ In contrast, Benedikt contends that the view that migration policy in Europe became more restrictive in the 1990s is widely shared in scientific literature. He points to the possibility of a dynamics where frequently quite tough negotiations lead to a "down harmonization" which can be imposed by more restrictive member states on less restrictive ones much more easily than the other way round. Although the Amsterdam Treaty shifted vital competences from the third to the first pillar, the individual member states retained an essential role. Nonetheless, Benedikt argues that the above tendency cannot be solely attributed to the communitarisation process and suggests to consider the influence of altered environmental or external factors as well.²⁰² Nuscheler also observes that EU asylum and migration policy "harmonization" in the 1990s in difficult matters often represented the least common denominator, which primarily consisted of the closing of the common external borders.²⁰³

III.2.6 Nice Treaty

The Nice European Council on 7-9 December 2000 noted *"progress on all aspects of the policy established at Tampere"*, asked to settle *"the last remaining problems concerning the texts aimed at combating the traffic in human beings and illegal immigration"* and called on the Council to begin discussing *"two Commission communications on immigration policy and a common asylum procedure [...] at an*

²⁰⁰ Fungueiriño-Lorenzo 2002, p.61-62

²⁰¹ Bendel 2006, p.124

²⁰² Benedikt 2002, p.71, 74

²⁰³ Nuscheler 2004, p.177

early date".²⁰⁴ The Intergovernmental Conference which also took place during the Council meeting agreed on a draft Treaty of Nice that was finally signed on 26 February 2001 and ratified on 1 February 2003. It extended co-decision-making by the European Parliament under Art. 251 EC Treaty to measures under Art. 63 (1) and (2) lit. a as well as under Art. 65. Art. 251 EC Treaty specifies that for the adoption of an act, the EU Commission has to submit a proposal to the EU Council and the European Parliament. The Council obtains the opinion, including proposals for amendments, of the EP and decides by qualified majority. The EP may approve or reject the decision or once again propose amendments to the Council and to the Commission, which have to deliver an opinion on those amendments.²⁰⁵

However, as an exception to the majority rule laid out in Art. 251 EC Treaty, Council decisions under Art. 63 (1) and (2) lit. a EC Treaty still needed to be taken unanimously. This resulted mainly from two factors: The countries receiving the largest number of refugees had a strong interest that no decisions on the status and protection measures for refugees could be taken without their consent and, more generally, the member states sought to avoid a more direct influence of the European Parliament in substantive asylum policy-making. For similar reasons, co-decision-making on judicial cooperation in civil matters under Art. 65 EC Treaty excluded family law and did not solve the problems arising from the limited jurisdiction of national courts and the fact that the UK, Ireland and Denmark retained special positions concerning judicial cooperation under Title IV EC Treaty.²⁰⁶

The main achievements of the Treaty of Nice were that it extended qualified majority voting in the European Council and removed national vetoes from thirty-nine areas, strengthened the role of the EP and the President of the Commission

²⁰⁴ Presidency conclusions of the Nice European Council (7, 8 and 9 December 2000)

²⁰⁵ Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts (2001/C 80/01), 10 March 2001; EUROPA: Consolidated Version of the Treaty Establishing the European Community, Official Journal C 325 of 24 December 2002; Fungueiriño-Lorenzo 2002, p.104; Linskeseder 2010, p.69-70

and ultimately paved the way to the institutional reforms needed for further EU enlargement.²⁰⁷

III.2.7 European Council summits 2001-2004

The Laeken European Council on 14-15 December 2001 concluded that despite some achievements in relation to a "true" common asylum and immigration policy *"such as the European Refugee Fund, the Eurodac Regulation and the Directive on temporary protection, progress has been slower and less substantial than expected"* and that a new approach was therefore needed (para. 38). It determined that such a policy would need to balance *"protection of refugees, the legitimate aspiration to a better life and the reception capacities of the Union and its Member States"* and should comprise, inter alia, readmission agreements, an action plan on illegal immigration, a European information system on asylum, migration and countries of origin, the implementation of Eurodac and the establishment of common standards on procedures for asylum, reception and family reunification, including accelerated procedures (paras. 39-40). The Commission was asked to submit, *"by 30 April 2002 at the latest, amended proposals concerning asylum procedures, family reunification and the 'Dublin II' Regulation. In addition, the Council is asked to expedite its proceedings on other drafts concerning reception standards, the definition of the term 'refugee' and forms of subsidiary protection"* (para. 41).²⁰⁸

The Seville European Council on 21-22 June 2002 expressed the Council's determination to speed up the implementation of the Tampere programme and reiterated the need to develop a common EU policy on *"the separate, but closely related, issues of asylum and immigration"* (para. 26). It also stated that joint migration management measures had to *"strike a fair balance between, on the one hand, a policy for the integration of lawfully resident immigrants and an asylum*

²⁰⁶ EUROPA: Consolidated Version of the Treaty Establishing the European Community, Official Journal C 325 of 24 December 2002; Fungueiriño-Lorenzo 2002, p.104, 126

²⁰⁷ Civitas: Treaty of Nice, Last updated: 27 July 2011; see also: EUROPA: Summaries of EU Legislation: Glossary: Treaty of Nice

²⁰⁸ Presidency conclusions of the Laeken European Council (14 and 15 December 2001), SN 300/1/01 REV 1

policy complying with international conventions, principally the 1951 Geneva Convention, and, on the other, resolute action to combat illegal immigration and trafficking in human beings" (para. 28). Refugees should be afforded *"swift, effective protection, while making arrangements to prevent abuse of the system and ensuring that those whose asylum applications have been rejected are returned to their countries of origin more quickly"* (para. 29). Finally, the Council urged the adoption of the Dublin II Regulation by December 2002, the Qualification and Family Reunification Directives by June 2003, and the Asylum Procedures Directive by the end of 2003 and held out the prospect of a Commission report on the effectiveness of Community funding for the repatriation of immigrants and rejected asylum seekers, the management of external borders and asylum and migration projects in third countries in October 2002 (paras. 37-38).²⁰⁹

The Thessaloniki European Council on 19-20 June 2003 repeated the Seville commitment to speed up EU asylum and migration policy development, giving top political priority to migration, including the prompt conclusion of readmission agreements with key third countries of origin, combatting illegal migration, exploring legal migration channels under specific terms of reference and the smooth integration of legal migrants (paras. 8-9, 24). Concerning asylum, it again called for the adoption of outstanding basic legislation, such as the Qualification and Procedures Directives, before the end of 2003, and reaffirmed the importance of more efficient procedures to quickly identify all persons in need of protection and to accelerate the processing of non-international protection-related asylum applications (paras. 24-25, 27). In addition, the Council invited the Commission to *"examine ways and means to enhance the protection capacity of regions of origin"* and present a report on its findings before June 2004, noting *"that a number of Member States plan to explore ways of providing better protection for the refugees in their region of origin, in conjunction with the UNHCR"* (para. 26).²¹⁰

²⁰⁹ Council of the European Union: Presidency conclusions of the Seville European Council (21 and 22 June 2002), 13463/02, 24 October 2002

²¹⁰ Council of the European Union: Presidency conclusions of the Thessaloniki European Council (19 and 20 June 2003), 11638/03, 1 October 2003; Linskeseder 2010, p.70

The Brussels European Council on 16-17 October 2003 again highlighted the importance of combating illegal immigration, readmission agreements, a common return policy and the VIS and SIS II, and called *"upon the JHA Council to complete its work urgently on proposals for the asylum qualification and procedures directives, in order to comply with the deadline already set by the Seville and Thessaloniki European Councils for the end of 2003, to enable the Union to tackle asylum abuse and inefficiency while fully respecting the Geneva Convention and its humanitarian traditions"* (p.10-11).²¹¹ The Brussels European Council on 12-13 December 2003 was even more insistent and, while welcoming *"the significant progress achieved in the negotiations on the adoption of the two Council Directives on asylum qualification and procedures"*, it criticized *"the persisting political obstacles that have been delaying the conclusion of these negotiations"* and invited *"the JHA Council to complete its work as soon as possible to ensure that the first phase of the establishment of a European Asylum system is fully implemented within the deadline set in Tampere"* (para. 23).²¹² Finally, the Brussels European Council on 17-18 June 2004 was quite satisfied with the progress made under the Tampere programme, including the adoption of the Asylum Qualifications Directive and the political agreement on the Asylum Procedures Directive. Furthermore the Council expressed its belief *"that the time has now come to launch the next phase of the process"* and therefore invited *"the Council and the Commission to prepare proposals for a new programme for the coming years to be considered by the European Council before the end of 2004"* (paras. 6-11).²¹³

With the adoption of the multi-annual Hague Programme, five years after Tampere, by the Brussels European Council on 4-5 November 2004 marked the next stage in the establishment of an "area of freedom, security and justice". It set a new tone, insisting that *"The security of the European Union and its Member*

²¹¹ Council of the European Union: Presidency conclusions of the Brussels European Council (16 and 17 October 2003), 15188/03, 25 November 2003

²¹² Council of the European Union: Presidency conclusions of the Brussels European Council (12 and 13 December 2003), 5381/04, 5 February 2004

²¹³ Council of the European Union: Presidency conclusions of the Brussels European Council (17 and 18 June 2004), 10679/2/04 REV 2, 19 July 2004

States has acquired a new urgency, especially in the light of the terrorist attacks in the United States on 11 September 2001 and in Madrid on 11 March 2004" and that "The citizens of Europe rightly expect the European Union, while guaranteeing respect for fundamental freedoms and rights, to take a more effective, joint approach to cross-border problems such as illegal migration and trafficking in and smuggling of human beings, as well as to terrorism and organised crime" (para. 14). The new programme covered, inter alia, asylum and migration, border management, integration, the fight against terrorism and organised crime, justice and police cooperation, and civil law (para. 16). The Commission was invited to present an Action Plan with concrete proposals and a timetable in 2005 and produce an annual implementation report ("scoreboard"). on the basis of information provided by the member states (para. 17). The Council also emphasized the financial implications of the new agenda and announced a review of programme by November 2006 (para. 20).²¹⁴

²¹⁴ Council of the European Union: Presidency conclusions of the Brussels European Council (4 and 5 November 2004), 14292/1/04 REV 1, 8 December 2004; Liinskeseder 2010, p.74-75

III.3 Supranational EU legal instruments on asylum

The previous chapter focused on intergovernmental agreements originally adopted outside the EU framework, such as the Schengen Agreement, as well as "primary" EU legislation, i.e. EU treaties, which form the basis for "secondary" EU legislation, including regulations, directives and decisions.²¹⁵ Seven pieces of secondary EU legislation relating to asylum were adopted in the first five years after the Tampere summit: The Decision to establish a European Refugee Fund in September 2000²¹⁶, a Regulation concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention in December 2000, a Directive on temporary protection in the event of a mass influx in July 2001²¹⁷, a Directive laying down minimum standards for the reception of asylum seekers in January 2003²¹⁸, a Regulation determining the Member State responsible for examining an asylum application in February 2003²¹⁹, a Directive on the right to family reunification in September 2003, and a Directive laying down minimum standards for the qualification and status of non-EU nationals and stateless persons as refugees or as persons who otherwise need international protection in April 2004.²²⁰

III.3.1 Council Decision establishing a European Refugee Fund

The first European Refugee Fund (ERF)²²¹ was established through an EU Council Decision of 28 September 2000 (2000/596/EC)²²² for the period of 1 January 2000 to 31 December 2004 and amended by two Commission Decisions of March

²¹⁵ EUROPA: About the EU: Basic information: Decision-making in the European Union

²¹⁶ Council Decision of 28 September 2000 establishing a European Refugee Fund (2000/596/EC)

²¹⁷ 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

²¹⁸ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers

²¹⁹ 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

²²⁰ EUROPA: European Commission: Home Affairs: Policies: Asylum – Building a common area of protection and solidarity

²²¹ EUROPA: European Commission: Justice and Home Affairs: Freedom, security and justice: European Refugee Fund — European Commission: European Refugee Fund — to help the EU Member States receive refugees and displaced persons

(2001/275/EC) and December (2002/307/EC) 2001 regarding the eligibility, implementation and management of ERF co-financed actions.²²³ The Decision was the first political outcome of the implementation of Art. 63 of the Amsterdam Treaty.²²⁴ It is noteworthy that Denmark is the only EU Member State that did not participate in the ERF²²⁵, due to the Protocol on the Position of Denmark regarding non-adoption of measures under Title IV of the EC Treaty, annexed to the Treaty on the European Union and to the Treaty establishing the European Community through the Treaty of Amsterdam.²²⁶

Decision 2000/596/EC reiterated that a common asylum policy was a constituent part of the EU's objective of gradually creating an area of freedom, security and justice, and created the ERF with the understanding that implementation *"of such a policy should be based on solidarity between Member States and requires the existence of mechanisms intended to promote a balance in the efforts made by Member States in receiving and bearing the consequences of receiving refugees and displaced persons."* (Preamble, paras. 1-2)²²⁷ Thus, the ERF was an instrument of financial burden-sharing, albeit "a fairly paltry one", which had been much easier to achieve than the sharing of actual refugees between states.²²⁸

The ERF was intended to support the granting of appropriate reception conditions by member states, including fair and effective asylum procedures, promote the social and economic integration of refugees and support relevant measures in the

²²² Council Decision of 28 September 2000 establishing a European Refugee Fund (2000/596/EC)

²²³ Commission Decision of 20 March 2001 laying down detailed rules for the implementation of Council Decision 2000/596/EC as regards the eligibility of expenditure and reports on implementation in the context of actions co-financed by the European Refugee Fund (*notified under document number C(2001) 736*) (2001/275/EC); Commission Decision of 18 December 2001 laying down detailed rules for the implementation of Council Decision 2000/596/EC as regards management and control systems and procedures for making financial corrections in the context of actions co-financed by the European Refugee Fund (*notified under document number C(2001) 4372*) (2002/307/EC)

²²⁴ Linskeseder 2010, p.67

²²⁵ EUROPA: European Commission: Justice and Home Affairs: Freedom, security and justice: European Refugee Fund — European Commission: European Refugee Fund — to help the EU Member States receive refugees and displaced persons

²²⁶ Eur-Lex Home: Treaties: Consolidated versions: Selected instruments taken from the Treaties: 3. Protocols: Protocol on the position of Denmark

²²⁷ Council Decision of 28 September 2000 establishing a European Refugee Fund (2000/596/EC); see also: EUROPA: European Commission: Justice and Home Affairs: Freedom, security and justice: European Refugee Fund — European Commission: European Refugee Fund — to help the EU Member States receive refugees and displaced persons

field of education and vocational training, provide practical support to refugees and displaced persons wanting to return home, and finance pilot initiatives ("innovatory action") and best-practice exchanges between Member States (Preamble, paras. 3-8).²²⁹ In addition, in line with the Tampere European Council conclusions, "*a financial reserve should be established for the implementation of emergency measures to provide temporary protection in the event of a mass influx of refugees*", the use of which required a unanimous decision of the EU Council (Preamble, para. 10; Art. 6 (1)).²³⁰

The ERF's main target groups were third-country nationals and stateless persons enjoying or applying for GRC refugee status, other forms of international protection or temporary protection in a member state.²³¹

III.3.2 Eurodac Regulation

In order to "effectively apply" the Dublin Convention, the EU Council found it necessary "*to establish the identity of applicants for asylum and of persons apprehended in connection with the unlawful crossing of the external borders of the Community*" and desirable "*to allow each Member State to check whether an alien found illegally present on its territory has applied for asylum in another Member State*".²³² The first agreement on the establishment of such a system had already been adopted in 1991 and related expert meetings were held throughout the 1990s.²³³ In October 1999, the Tampere European Council urged the JHA Council to promptly finalize the planned system for the identification of asylum

²²⁸ Gibney/Hansen 2005, p.80

²²⁹ Council Decision of 28 September 2000 establishing a European Refugee Fund (2000/596/EC); see also: EUROPA: European Commission: Justice and Home Affairs: Freedom, security and justice: European Refugee Fund — European Commission: European Refugee Fund — to help the EU Member States receive refugees and displaced persons

²³⁰ *ibid.*

²³¹ *ibid.*

²³² 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, Preamble, para. 3; Brouwer 2006, p.145

²³³ EUROPA: Summaries of legislation: Justice, freedom and security: Free Movement of Persons, asylum and immigration: "Eurodac" system; EUROPA: Home Affairs: Policies: Asylum: Identification of applicants (Eurodac); Answer of 15 January 1998 to Written Question E-2418/97 by Laura De Esteban Martin (PPE) to the Council of 18 July 1997, Official Journal C 134, Volume 41, 30 April 1998, Notice No 98/C 134/09

seekers.²³⁴ While "Eurodac" originally stood for "European system for the comparison of the dactyloscopic records of asylum seekers", the system's scope was ultimately extended to include not only asylum seekers but also illegal immigrants. Interestingly, unlike comparable pieces of EU legislation, *"a regulation was preferred to a directive in view of the need to apply strictly defined and harmonised rules in all the Member States"*.²³⁵

Council Regulations (EC) No 2725/2000²³⁶ and (EC) No 407/2002²³⁷ establishing and implementing the "Eurodac" system were passed on 11 December 2000 and 28 February 2002, respectively. As of December 2011, Eurodac is applied by all countries that are party to the Dublin Regulation, i.e. all EU member states as well as Iceland, Norway and Switzerland.²³⁸

Technically speaking, Eurodac consists of a Central Unit at the EU Commission with a central computer database for comparing the fingerprints of certain groups of third-country nationals above the age of 13 as well as an electronic data transmission system between member states and the database. Data on asylum-seekers are kept for a maximum of ten years or erased earlier once the individual concerned obtains the citizenship of a member state, while data relating to foreign nationals irregularly crossing an external EU border may be kept for two years but have to be immediately erased if the person in question obtains EU citizenship, receives a residence permit or has left EU territory.²³⁹

On the basis of its evaluation of the Dublin System in June 2007²⁴⁰, the

²³⁴ European Council: Presidency Conclusions: Tampere European Council, 15 and 16 October 1999, Art. 17

²³⁵ EUROPA: Summaries of legislation: Justice, freedom and security: Free Movement of Persons, asylum and immigration: "Eurodac" system; EUROPA: Home Affairs: Policies: Asylum: Identification of applicants (Eurodac)

²³⁶ *ibid.*

²³⁷ 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

²³⁸ EUROPA: Summaries of legislation: Justice, freedom and security: Free Movement of Persons, asylum and immigration: "Eurodac" system; EUROPA: Home Affairs: Policies: Asylum: Identification of applicants (Eurodac)

²³⁹ *ibid.*; Brouwer 2006, p.145-146; Linskeseder 2010, p.63

²⁴⁰ European Commission: Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system, COM(2007) 299 final, 6 June 2007

Commission concluded in its Policy Plan on Asylum of June 2008 that the scope of both the Dublin and the Eurodac Regulations should be extended to include subsidiary protection, data on recognized refugees should be made available and searchable by national asylum authorities to avoid repeat applications by recognized refugees, rules and deadlines for transmission and deletion of data should be clarified to improve efficiency and more information should be introduced into the system to better determine the member state responsible for processing a given asylum claim. In addition, the Commission wanted to examine the possible use of Eurodac for law enforcement purposes.²⁴¹

In December 2008, the Commission presented a proposal for amending the Eurodac Regulation²⁴². Taking *"into account the resolution of the European Parliament and the results of negotiations in the Council"*²⁴³, the Commission adopted an amended proposal on 10 September 2009²⁴⁴ and another, further revised draft in October 2010.²⁴⁵

III.3.3 Temporary Protection Directive

Temporary protection is not new, but its spread and the development of a related legal infrastructure in the EU in the 1990s was a novel trend. It was increasingly applied as the connection between refugee status and permanent residence

²⁴¹ European Commission: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: Policy Plan on Asylum: An integrated approach to protection across the EU, COM(2008) 360 final, 17 June 2008, p.7-8

²⁴² European Commission: Proposal for a Regulation of the European Parliament and of the Council concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EC) No [...] [establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person] (Recast version), COM(2008) 825 final, 3 December 2008

²⁴³ European Commission: Report from the Commission to the European Parliament and the Council. Annual report to the European Parliament and the Council on the activities of the EURODAC Central Unit in 2009, COM(2010)415 final, 2 August 2010

²⁴⁴ European Commission: Amended proposal for a Regulation of the European Parliament and of the Council concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EC) No [...] [establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person] (Recast version), COM(2009) 342 final, 10 September 2009

²⁴⁵ European Commission: Amended proposal for a Regulation of the European Parliament and of the Council concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EC) No [...] [establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person] (Recast version), COM(2010) 555 final, 11 October 2010

became looser, although e.g. Canada and the USA were more reluctant to use it than European countries.²⁴⁶

Over the years, most member states had established exceptional temporary protection schemes, especially in the context of a number of armed conflicts in the 1990s which generated large refugee flows to the EU, including the war in Bosnia 1992-1995 and the events of spring 1999 in Kosovo. These crises, however, also revealed significant variations in the rights and benefits granted by the Member States to persons enjoying temporary protection.²⁴⁷ The EU member states increasingly undertook efforts to address the issue and harmonize their related positions and policies, including in the conclusions relating to persons displaced by the conflict in the former Yugoslavia adopted by the Ministers responsible for immigration at their meetings in London on 30 November and 1 December 1992 and Copenhagen on 1 and 2 June 1993, the Council Resolution on burden-sharing with regard to the admission and residence of displaced persons on a temporary basis of 25 September 1995, Decision 96/198/JHA 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. Yet the most significant commitment by the EU Council to establish minimum standards on temporary protection and promote burden-sharing was made in the Amsterdam Treaty (Art. 63 (2) lit. a and b) of October 1997, with its five-year deadline for such an effort. This was subsequently reaffirmed in the Vienna Action Plan of December 1998, the Council conclusions on displaced persons from Kosovo of 27 May 1999 and the Tampere European Council conclusions of October 1999.²⁴⁸

In May 2000, the Commission presented a proposal²⁴⁹ which was finally adopted

²⁴⁶ Gibney/Hansen 2005, p.81

²⁴⁷ EUROPA: Summaries of EU legislation: Other: Temporary protection in the event of a mass influx of displaced persons

²⁴⁸ 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, Preamble, paras. 3-7

²⁴⁹ European Commission: Proposal for a Council Directive 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, COM(2000) 303 final, 24 May 2000

as "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". The Directive is applicable in all EU member states, except Denmark and Ireland.²⁵⁰

The Directive is aimed at supporting a common European asylum system and the full and inclusive application of the Geneva Convention and explicitly provides that it should not replace protection granted on the basis of regular asylum procedures.²⁵¹ It lays out minimum standards for temporary protection (duration and implementation, member states' obligations towards persons enjoying temporary protection, access to the asylum procedure, return and measures after temporary protection) as well as solidarity mechanisms which are triggered automatically in the event of a massive influx of displaced persons and determines the duration and implementation of temporary protection. More specifically, member states are obliged to issue residence permits, provide visas free of charge or at minimum cost and reduce formalities to a minimum as well as to ensure access to employment, vocational training, accommodation, necessary assistance (social welfare, means of subsistence, medical care) and the national education system. In addition, the Directive guarantees persons enjoying temporary protection the right to submit an asylum application at any time, underlines the right to family reunification and gives special consideration to the rights of unaccompanied minors. The directive also determines that Member States facilitate the voluntary return of persons enjoying temporary protection or whose temporary protection has ended, while taking into consideration any compelling reasons which make return impossible.²⁵²

A mass influx of displaced persons as well as the extension or the end of temporary protection are established by a Council decision, adopted by qualified majority on a proposal from the Commission, which will examine any request by a

²⁵⁰ Council Directive 2001/55/EC, Preamble, paras. 25-26

²⁵¹ Council Directive 2001/55/EC, Preamble, paras. 1, 10; Art. 3 (1)

Member State to that end. The duration of temporary protection, set by the Directive at one year and possibly extended for a maximum period of one additional year, may also end automatically either when the maximum two-year period expires or when the situation in the country of origin is such as to permit the long-term, safe and dignified return of the displaced persons. In order to finance the measures provided for in the Directive, Member States may apply for funding through the European Refugee Fund.²⁵³ *"However, the provisions within this Directive, based on solidarity between EU States, have not been triggered so far."*²⁵⁴

III.3.4 Reception Conditions Directive

Already in 1991, the Dutch EU presidency thematized the reception policies in the member states regarding refugees, asylum-seekers and people in need of temporary protection, a discussion that was revived by the Spanish presidency in 1995.²⁵⁵

These efforts were reiterated in the Amsterdam Treaty (Art. 63 (1) lit. b), the Vienna Action Plan and the Tampere European Council conclusions (points 13 and 14), which called for common minimum reception conditions of asylum seekers in the EU. Subsequently, a draft directive was prepared by the Commission in May 2001 and initial political agreement between member states was reached in April 2002 after substantial amendments to the original text had been made. Following continued resistance by Germany concerning access of asylum seekers to the labour market negotiations on the proposal were reopened a few months later and concluded on 28 November 2002, after further changes to Article 16 and the introduction of a right for member states to refuse reception conditions to asylum seekers who fail to claim asylum as soon as "reasonably practicable". Council Directive 2003/9/EC laying down minimum standards for the

²⁵² Council Directive 2001/55/EC

²⁵³ Council Directive 2001/55/EC, Art. 4-7, 20-22, 24

²⁵⁴ EUROPA: European Commission: Home Affairs: Policies: Asylum: Temporary protection

²⁵⁵ Van der Klaauw 1997, p.26

reception of asylum seekers was finally adopted on 27 January 2003 and required the EU member states to implement its provisions through necessary domestic legislation by 6 February 2005 (Art. 26 (1)). This deadline applied to all then EU member states, except Denmark and Ireland, as well as *"to the ten accession countries joining the EU in May 2004, as they are required to accept the 'EU acquis' in whichever form it is at the time of joining"*.²⁵⁶ An important rationale for the directive was the assumption that by ensuring *"appropriate and comparable reception conditions throughout the Union"* asylum-seekers would be discouraged from *"moving from one EU State to another in the hope of receiving more generous treatment"*.²⁵⁷

The Directive relates to asylum-seekers, with the presumption that all applications for international protection are applications for asylum unless the applicant explicitly requests another form of protection. It includes all third country nationals and stateless persons who have requested asylum at the border or on the territory of member states as well as their family members, but not those who have submitted their asylum applications to the representations of member states abroad.²⁵⁸

In order to achieve the stated objectives of the directive, i.e. to ensure asylum-seekers a dignified standard of living and to afford them comparable living conditions in all member states (Preamble, para. 7), the member states must guarantee certain material reception conditions, in particular accommodation, food and clothing, family unity, medical and psychological care as well as access to the education system and language courses for minor children. Moreover, special attention and special care must be given to pregnant women, minors, the mentally ill, disabled people, elderly people and victims of discrimination or exploitation as

²⁵⁶ European Council on Refugees and Exiles (ECRE): Information Note on the Council Directive 2003/9/EC of 27 January 2003 Laying down Minimum Standards for the Reception of Asylum Seekers, 1 June 2003, p.1; Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers; EUROPA: Summaries of legislation: Justice, Freedom and Security: Free movement of persons, asylum and immigration: Minimum standards on the reception of applicants for asylum in Member States

²⁵⁷ EUROPA: Summaries of legislation: Justice, Freedom and Security: Free movement of persons, asylum and immigration: Minimum standards on the reception of applicants for asylum in Member States

²⁵⁸ *ibid.*

well as victims of rape and other forms of violence and, in particular, children who have been victims of abuse, exploitation and torture.²⁵⁹

The applicants must be informed of their rights and obligations and the benefits they may claim and must be issued a document certifying their status as applicants for asylum. The Directive also foresees that member states allow asylum-seekers freedom of movement within their territory, however, with certain restrictions possible for specific reasons (e.g. freedom of movement only for part of the country in order to facilitate the swift processing of applications) and even detention permissible in order to check the identity of asylum-seekers. Access to the labour market and vocational training must be granted at the latest six months after an asylum application was lodged, but may still be limited e.g. concerning the amount of time and the kind of work asylum-seekers may do and the required skills and qualifications. Reception conditions, with the exception of emergency medical care, can be reduced or withdrawn for various reasons, based exclusively on the individual behaviour of the person in question who can appeal against the decision.²⁶⁰

The Reception Conditions Directive also contains technical and political provisions to ensure implementation of the above objectives, including the requirement for each member state to appoint a national contact point and to take appropriate measures to promote harmonious relationships between local communities and nearby accommodation centres with a view to preventing acts of racism and discrimination against asylum-seekers, the requirement for organisations to have adequate human resources and for staff working with asylum-seekers to receive special training and adhere to the duty of confidentiality.²⁶¹

Nuscheler notes that while the Directive to a great extent implemented the precepts of the Tampere European Council conclusions and related EP

²⁵⁹ *ibid.*; see also Nuscheler 2004, p.181

²⁶⁰ *ibid.*

²⁶¹ EUROPA: Activities of the European Union: Summaries of legislation: Justice and Home Affairs: Free Movement of Persons: Minimum standards on the reception of applicants for asylum in Member States

resolutions, harmonization efforts failed regarding the definition of family members, access to the labour market and vocational training as well as restrictions of the freedom of movement of asylum-seekers.²⁶²

On the basis of Art. 25, which obliged the Commission to report to the European Parliament and the Council on the application of the Directive by 6 August 2006, propose any necessary amendments and continue reporting at least every five years²⁶³, an evaluation report was issued in November 2007.²⁶⁴ Similar to the Commission's Green Paper of June 2007, which had already concluded that *"the wide margin of discretion left to Member States by several key provisions of this Directive results in negating the desired harmonisation effect"*, especially regarding an adequate level of material reception conditions, access to the labour market and health care as well as regarding the applicability of the Directive to detention centres²⁶⁵, the Commission's report found that *"the wide discretion allowed by the Directive in a number of areas undermined the objective of creating a level playing field in the area of reception conditions."*²⁶⁶

To address those deficiencies, the Commission presented a proposal amending Directive 2003/9/EC in December 2008²⁶⁷ and a modified proposal for the Directive in June 2011²⁶⁸, which is being discussed within the European Parliament and the Council. The main objectives of the proposal include extending the Directive's scope to include applicants for subsidiary protection, limiting the time restrictions for access to the labour market, guaranteeing an adequate level of material

²⁶² Nuscheler 2004, p.181

²⁶³ Council Directive 2003/9/EC; EUROPA: Activities of the European Union: Summaries of legislation: Justice and Home Affairs: Free Movement of Persons: Minimum standards on the reception of applicants for asylum in Member States

²⁶⁴ European Commission: Report from the Commission to the Council and to the European Parliament on the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, COM(2007) 745 final, 26 November 2007

²⁶⁵ European Commission: Green Paper on the future Common European Asylum System, COM(2007) 301 final, 6 June 2007

²⁶⁶ EUROPA: Activities of the European Union: Summaries of legislation: Justice and Home Affairs: Free Movement of Persons: Minimum standards on the reception of applicants for asylum in Member States

²⁶⁷ European Commission: Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast), COM(2008) 815 final, 3 December 2008

²⁶⁸ European Commission: Amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (Recast), COM(2011) 320 final, 1 June 2011

reception conditions, ensuring that detention is used only in exceptional cases and under certain procedural guarantees and ensuring the immediate identification of special needs and provision of the necessary support.²⁶⁹

III.3.5 Dublin Regulation (Dublin II)

Article 63 (1) lit. a of the 1997 Amsterdam Treaty required the Council *"to adopt an instrument of Community law laying down criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States. This instrument will replace the Dublin Convention."*²⁷⁰

There had been no intention to simply integrate the provisions of the Dublin Convention (Dublin I, see above), which had been signed outside the EC framework in 1990, into Community law. Rather, the Council, *"Before drafting any new measures [...] felt that the operation of the Convention should be evaluated, a task which the Commission agreed to take on."*²⁷¹

The Convention had given some cause for discontent in the few years since entering into force in 1997. For instance, in January 2001, the UNHCR highlighted the findings of a Commission working paper of March 2000 *"Revisiting the Dublin Convention"*²⁷² which *"acknowledges that the Dublin Convention has not operated as well in practice as its authors hoped it would, and submits that it is sensible to use the opportunity provided by the Treaty of Amsterdam not only to take stock of practical experience of implementing the Dublin Convention to date, but also to reflect again on the principles on which the Convention is based, in the light of the*

²⁶⁹ EUROPA: Activities of the European Union: Summaries of legislation: Justice and Home Affairs: Free Movement of Persons: Minimum standards on the reception of applicants for asylum in Member States

²⁷⁰ European Commission: Commission Staff Working Paper: Evaluation of the Dublin Convention, SEC(2001)756, 13 June 2001

²⁷¹ *ibid.*

²⁷² European Commission: Working paper "Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States", SEC (2000) 522 final, 21 March 2000

objectives established by the Treaty in the field of asylum."²⁷³ On the basis of its critical assessment of how the Dublin Convention was implemented, the UNHCR strongly recommended that two principles should be affirmed in any newly adopted instrument replacing the Convention: primary responsibility to process an asylum claim of the member state where an application was lodged and transfer to another member state only if the applicant has meaningful links with the member state concerned. Finally, the UNHCR reiterated that the *"disparity of national standards [...] challenges many of the assumptions on which the Dublin Convention is implicitly based"* and that *"the credibility of any mechanism for transfer of responsibility is contingent upon the existence of harmonised standards in several other substantive and procedural areas of asylum."*²⁷⁴ As foreseen in the Vienna Action Plan, a Commission paper evaluating the Convention was issued in June 2001 which also points to flaws concerning scope, definitions, wording of the provisions and gaps in the Convention.²⁷⁵ In the preamble to its Proposal for a Council Regulation of July 2001, the Commission states that *"The drafting of this proposal for a Regulation was preceded by a wide-ranging debate"* and that working paper SEC (2000) 522 *"has given rise to written contributions on the part of various interested organisations, including the HCR, ILPA/MPG, Amnesty International, the Conference of Churches on migrants in Europe and the European Council on Refugees and Exiles (ECRE)."*²⁷⁶

On the basis of the Proposal, the Dublin Convention was finally replaced in February 2003 by Council Regulation (EC) No 343/2003²⁷⁷ (Dublin II), which was complemented in September 2003 by Commission Regulation (EC) No 1560/2003

²⁷³ UNHCR: Revisiting the Dublin Convention. Some reflections by UNHCR in response to the Commission staff working paper, January 2001

²⁷⁴ *ibid.*

²⁷⁵ European Commission: Commission Staff Working Paper: Evaluation of the Dublin Convention, SEC(2001)756, 13 June 2001

²⁷⁶ European Commission: Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, COM(2001) 447 final, 26 July 2001, p. 2

²⁷⁷ 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

laying down detailed rules for its application.²⁷⁸ As with the Dublin Convention, due to Denmark's opt-out of Title IV EC Treaty, which includes the communitarization of asylum and immigration policy and law, a separate agreement had to be signed with the country to allow it to become a state party to the Dublin II Regulation.²⁷⁹ Today, all EU member states as well as Norway, Iceland, Switzerland and Liechtenstein apply the Regulation.²⁸⁰

The underlying objective of the Regulation was the same as that of the Convention, i.e. to establish clear rules for which member state was responsible for processing a given asylum claim and, in particular to avoid "refugees in orbit" (no member state accepts responsibility) and "asylum-shopping" (multiple applications by the same person in different member states).²⁸¹ However, as indicated above, it also sought to address a number of deficiencies of its predecessor and explicitly aimed to:

- *"close the loopholes and correct the inaccuracies detected in the Dublin Convention;*
- *adapt the system to the new realities resulting from the progress made as regards the establishment of an area without internal borders, in particular by drawing the consequences of the entry into force of Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement;*

²⁷⁸ 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

²⁷⁹ Council Decision No 2006/188/EC of 21 February 2006 on the conclusion of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions 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 and Council Regulation (EC) No 2725/2000 concerning the establishment of Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention

²⁸⁰ EUROPA: European Commission: Home Affairs: Policies: Asylum: Examination of applications (Dublin); Linskeseder 2010, p.70-72

²⁸¹ *ibid.*

- *the Member State responsible to be determined as quickly as possible, partly by laying down a reasonable timetable for the various phases of proceedings and partly by providing clarifications on the standard of proof required to establish the responsibility of a Member State;*
- *increase the system's efficiency by granting the Member States a more realistic period in which to implement decisions on transfers of asylum seekers and by providing an appropriate framework for special implementing arrangements between Member States which jointly have to process a large number of cases involving the determination of the Member State responsible."*²⁸²

In order to achieve these goals, the Dublin II Regulation specifies that the member state responsible for examining an asylum application is the one where the asylum-seeker concerned has a family member legally present, the one which issued a residence document or a visa with the latest expiry date, the one into which he/she entered irregularly or irregularly stayed for a period of at least five months, the one where he/she is not subject to a visa requirement or the one where the international transit area of an airport was located, if an application had been submitted there. *"If no EU State can be designated as responsible for examining the asylum application on the basis of these criteria, responsibility falls to the first EU State with which the asylum application was lodged."*²⁸³

Yet a Commission report (technical assessment)²⁸⁴ and the Commission's Green Paper on the future of the Common European Asylum System (policy evaluation)²⁸⁵ of June 2007 showed that Dublin II still suffered from a number of deficiencies, *"particularly in terms of practical application and effectiveness"*.²⁸⁶ More specifically, in its Policy Plan on Asylum of June 2008, the Commission

²⁸² European Commission: COM(2001) 447 final, p.3

²⁸³ EUROPA: European Commission: Home Affairs: Policies: Asylum: Examination of applications (Dublin)

²⁸⁴ European Commission: Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system, COM(2007) 299 final, 6 June 2007

²⁸⁵ European Commission: Green Paper on the future Common European Asylum System, COM(2007) 301 final, 6 June 2007

concluded that *"the objectives of the system [...] have, to a large extent, been achieved"* and *"the higher common standards of protection resulting from the completion of the CEAS will eliminate most of the concerns regarding the operation of the current system"*. However, *"in order to address the shortcomings identified in the evaluation report"*, the scope of *"both the Dublin and the Eurodac Regulations"* should *"be extended to include subsidiary protection"*. Furthermore, *"better compliance and uniform application"* by the member states should be ensured in particular regarding *"the provisions on the humanitarian and sovereignty clause and those relating to family unity"* and amendments should be introduced *"to enhance the efficiency of the system (notably as regards deadlines)".*²⁸⁷

As a consequence, the Commission elaborated a proposal amending the Dublin Regulation in December 2008²⁸⁸, which aimed at increasing the efficiency of the Dublin system and ensuring higher standards of protection as well as addressing situations of a mass influx of refugees.²⁸⁹ Nonetheless, in its comments of March 2009 on the revamped Eurodac and Dublin II proposals, the UNHCR "voiced significant concerns" regarding the Dublin II system's impact on the legal rights and personal welfare as well as the uneven distribution of asylum claims in the EU and noted an urgent "need to fill protection gaps".²⁹⁰

III.3.6 Family Reunification Directive

On its website, the European Commission describes family reunification as *"one of the main reasons for immigration to the EU"* and consequently also deals with the issue under the chapter immigration policy. However, it also mentions the Family

²⁸⁶ EUROPA: European Commission: Home Affairs: Policies: Asylum: Examination of applications (Dublin)

²⁸⁷ European Commission: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: Policy Plan on Asylum: An integrated approach to protection across the EU, COM(2008) 360 final, 17 June 2008, p.7-8

²⁸⁸ European Commission: Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast), COM(2008) 820 final, 3 December 2008

²⁸⁹ EUROPA: European Commission: Home Affairs: Policies: Asylum: Examination of applications (Dublin)

²⁹⁰ UNHCR comments, 18 March 2009, p.1, 25

Reunification Directive²⁹¹ *"which also applies to refugees"* as one of the legal instruments constituting the first phase of the Common European Asylum System (CEAS).²⁹²

On the basis of Article 63 (3) lit. a of the 1997 Amsterdam Treaty, the October 1999 Tampere European Council and the December 2001 Laeken European Council, Council Directive 2003/86/EC on the right to family reunification was adopted on 22 September 2003.²⁹³ The Commission noted that *"At the moment, this right is recognised only by international legal instruments, in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. At national level the situation is very patchy. Family reunification protects the family and makes it easier to integrate nationals of non-member countries in the Member States. It should thus be a recognised right throughout the Union."*²⁹⁴

The Directive foresees that third-country nationals with a residence permit valid for at least one year and a genuine option of long-term residence can apply for family reunification with their spouses and unmarried minor children, including adopted children. The member states may adopt provisions allowing for family reunification of first-degree ascendants in the direct line, unmarried children above the age of majority and unmarried partners. The directive does neither apply to asylum-seekers and persons under temporary protection nor to the family members of Union citizens.²⁹⁵

The right to family reunification is dependent on e.g. respect for public order and public security and may be further restricted through the imposition of conditions such as adequate accommodation, sufficient resources and health insurance. *"However, as made clear by the European Court of Justice (Case C-540/03), EU*

²⁹¹ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification

²⁹² EUROPA: European Commission: Home Affairs: Policies: Immigration: Family reunification

²⁹³ Council Directive 2003/86/EC, Preamble, para. 3

²⁹⁴ EUROPA: Summaries of EU legislation: Justice, freedom and security: Free movement of persons, asylum and immigration: Family reunification

²⁹⁵ *ibid.*

States must apply the Directive's rules in a manner consistent with the protection of fundamental rights, notably regarding family life and the principle of the best interests of the child."²⁹⁶

III.3.7 Qualification Directive

As set out in the Amsterdam Treaty (Art. 63 (1) lit. c, (2) lit. a and (3) lit. a) and the Tampere European Council conclusions (Art. 14), on 29 April 2004, the Council adopted Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.²⁹⁷ *"(6) The main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States. (7) The approximation of rules on the recognition and content of refugee and subsidiary protection status should help to limit the secondary movements of applicants for asylum between Member States, where such movement is purely caused by differences in legal frameworks."*²⁹⁸

The Directive obliges the member states to grant international protection not only to those who fully meet the criteria of Art. 1 A Geneva Refugee Convention but also to those who do not qualify for refugee status, yet cannot return to their country of origin due to a real risk of suffering serious harm (death penalty or execution, torture or inhuman or degrading treatment, serious individual threat to the life or person as result of indiscriminate violence). Applications for protection must be carried out on an individual basis and take into account facts relating to the country of origin, documentation or statements from the applicant and the individual circumstances of the applicant. Even if a well-founded fear of

²⁹⁶ *ibid.*

²⁹⁷ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, published 30 September 2004

²⁹⁸ Council Directive 2004/83/EC, Preamble, paras. 6-7

persecution or real risk of serious harm has been established the member states may still determine that there is no need for international protection if an "internal protection" existed in another part of the country of origin and the applicant can reasonably be expected to stay there. Those granted international protection enjoy certain rights and benefits, including residence permits, travel documents and freedom of movement within the country, access to employment, education, social welfare, health care and integration programmes), although these may differ depending on the protection status awarded.²⁹⁹ For instance, according to Art. 24, a residence permit issued to beneficiaries of refugee status must be valid for at least three years, while the minimum validity for beneficiaries of subsidiary protection is only one year.³⁰⁰

²⁹⁹ EUROPA: European Commission: Home Affairs: Policies: Asylum: Refugee status

³⁰⁰ Council Directive 2004/83/EC, Art. 24

III.4 Asylum-policy related EU programmes in Member States

III.4.1 European Refugee Fund

Precursors – the Joint Actions of 1997-1999

The late 1990s saw the beginning of financial cooperation on asylum matters, with the Commission initiating small-scale burden-sharing pilot projects and programmes and making efforts to create a budget line to help member states carry the cost of the reception of refugees. The first asylum-related programmes targeting the member states were set up in the form of two Joint Actions of 22 July 1997 "concerning the financing of specific projects" – one "in favour of asylum-seekers and refugees" (97/478/JHA)³⁰¹ with the aim of improving admission facilities and the other "in favour of displaced persons who have found temporary protection in the Member States and asylum-seekers" (97/477/JHA)³⁰² with the aim of facilitating their voluntary repatriation – which were both renewed in the following year (through Joint Actions 98/304/JHA and 98/305/JHA of 27 April 1998).³⁰³ The programmes were still limited in time (one year), scope (temporary protection and repatriation) and funding (€23.75 million in 1997 and €26.75 million in 1998) and the projects to be funded as well as the beneficiaries were only vaguely defined. Nevertheless, while their practical impact was negligible they were an important testing ground for asylum-related financial burden-sharing at EU level.³⁰⁴

Joint Action 99/290/JHA of 26 April 1999, which unified the 1997 and 1998 Joint Actions, was a further step towards the adoption of minimum standards for the reception of asylum applicants in the Member States, as provided for in the

³⁰¹ Joint Action of 22 July 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning the financing of specific projects in favour of asylum-seekers and refugees (97/478/JHA)

³⁰² Joint Action of 22 July 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning the financing of specific projects in favour of displaced persons who have found temporary protection in the Member States and asylum-seekers (97/477/JHA)

³⁰³ Joint Action of 27 April 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning the financing of specific projects in favour of displaced persons who have found temporary protection in the Member States and asylum-seekers (98/304/JHA); Joint Action of 27 April 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning the financing of specific projects in favour of asylum-seekers and refugees (98/305/JHA)

³⁰⁴ Gadermaier 2006, p.45

Amsterdam Treaty, and a precursor of the European Refugee Fund. It remained in force only from 26 April until 31 December 1999 and, similarly to its predecessors, aimed primarily at improving reception conditions and access to asylum procedures, on the one hand, and measures to facilitate voluntary repatriation and reintegration of the persons concerned, on the other. Specific provisions allowed for the provision of emergency assistance to those Member States which received refugees from Kosovo.³⁰⁵

Criteria for the selection of projects included the needs in the member states, cost effectiveness, the innovative nature of the project and its complementarity with other Community or national measures. In total, €15 million were made available for measures to provide practical support in relation to the reception and voluntary repatriation of refugees, displaced persons and asylum applicants, and €14.3 million were earmarked for financial aid to Kosovo refugees in the territory of the European Union. In all projects, EU finance was limited to 80% of the cost of the project. According to the EU website, monitoring and financial control were the responsibility of the Commission, assisted by a committee which it chaired, consisting of one representative from each member state, and the Court of Auditors.³⁰⁶

Interestingly, Gadermaier points out that in contrast to its predecessors, which saw most of their funds distributed by the Commission, the 1999 Joint Action strengthened the Council's control by requiring approval of funding by the mentioned committee of member states' representatives and the Commission retained sole responsibility only for emergency measures for refugees from Kosovo with a budget of €1 million. She further states that these funding principles were *"already quite similar to the basics of the European Refugee Fund"* and that *"their existence brought about the necessary infrastructure for the creation of a*

³⁰⁵ EUROPA: Activities of the European Union: Summaries of legislation: Justice and Home Affairs: Free Movement of Persons: Reception and voluntary repatriation of refugees, displaced persons and asylum applicants (1999); Gadermaier 2006, p.46

³⁰⁶ EUROPA: Activities of the European Union: Summaries of legislation: Justice and Home Affairs: Free Movement of Persons: Reception and voluntary repatriation of refugees, displaced persons and asylum applicants (1999)

European Refugee Fund", adding that "it is remarkable that the development of the financial Burden-sharing and Temporary Protection happened remotely [sic!] from the political debate on Burden-sharing and Temporary Protection, namely as a silent budget line under the surveillance of the Commission." ³⁰⁷

The European Refugee Fund 2000-2004 (ERF I)

As mentioned above, the (first) European Refugee Fund (ERF) was established through EU Council Decision 2000/596/EC³⁰⁸ in September 2000 for the period of 1 January 2000 to 31 December 2004 and later amended by two Commission Decisions of March and December 2001 regarding the eligibility, implementation and management of ERF co-financed actions.³⁰⁹ With the exception of Denmark, all EU member states participated in the ERF. Overall, €216 million were earmarked for implementing the ERF Decision.³¹⁰ The CEE candidate countries were only covered once they had acceded to the EU countries, i.e. for the first time in 2004.³¹¹

The groups targeted by the ERF included third-country nationals or stateless persons with refugee status according to the GRC, persons enjoying another form of international protection granted by a member state in accordance with its national legislation or practice, persons who had applied for one of the above forms of protection as well as persons benefiting from temporary protection

³⁰⁷ Gadermaier 2006, p.46

³⁰⁸ Council Decision of 28 September 2000 establishing a European Refugee Fund (2000/596/EC)

³⁰⁹ Commission Decision of 20 March 2001 laying down detailed rules for the implementation of Council Decision 2000/596/EC as regards the eligibility of expenditure and reports on implementation in the context of actions co-financed by the European Refugee Fund (*notified under document number C(2001) 736*) (2001/275/EC); Commission Decision of 18 December 2001 laying down detailed rules for the implementation of Council Decision 2000/596/EC as regards management and control systems and procedures for making financial corrections in the context of actions co-financed by the European Refugee Fund (*notified under document number C(2001) 4372*) (2002/307/EC)

³¹⁰ Council Decision of 28 September 2000 establishing a European Refugee Fund (2000/596/EC); EUROPA: European Commission: Justice and Home Affairs: Freedom, security and justice: European Refugee Fund — European Commission: European Refugee Fund — to help the EU Member States receive refugees and displaced persons

³¹¹ European Commission: Proposal for a Council Decision establishing the European Refugee Fund for the period 2005-2010 (presented by the Commission), SEC(2004) 161, COM(2004) 102 final, 12 February 2004, p.5

arrangements and persons whose right to temporary protection was being examined in a member state.³¹²

Measures eligible for ERF financial support included activities by Member States ("national ERF") relating to conditions for reception and access to asylum procedures (accommodation, material aid, health care, social and legal assistance); integration of persons whose stay in the Member State was of a lasting and/or stable nature (social assistance for housing, means of subsistence and health care, support for adjustment to the host society); repatriation, provided that the persons concerned had not acquired a new nationality and had not left the territory of the Member State (information and advice about voluntary return programmes, the situation in the country of origin, general or vocational training, help in resettlement).³¹³

In addition to the nationally distributed ERF funds, 5% of the Fund's available resources were used to finance innovative projects or activities of interest to the Community as a whole ("community action"), including studies, exchanges of experience and steps to promote cooperation at Community level, as well as assessment of the implementation of measures and technical assistance. All applications to the Commission had to be submitted by two or more member states and could be funded with up to 100% of the planned project budget.

By unanimous decision of the EU Council of Ministers, the European Refugee Fund could also be used to finance emergency measures, in order to help one or more or all Member States in the event of a sudden mass influx of refugees or displaced persons, or if it was necessary to evacuate them from a third country.³¹⁴

The member states were responsible for implementing actions supported by the ERF and were obliged to appoint a public administration authority, which,

³¹² EUROPA: European Commission: Justice and Home Affairs: Freedom, security and justice: European Refugee Fund — European Commission: European Refugee Fund — to help the EU Member States receive refugees and displaced persons

³¹³ *ibid.*

however, could delegate its responsibility to another public administration or a non-governmental organization. On an annual basis, member states sent a request for co-financing for the coming year to the Commission. Member States had sole responsibility for the selection of individual projects and for the financial management and administration of projects supported by the Fund, with due respect for Community policies and criteria for eligibility.³¹⁵

Following a public call for proposals for exclusively non-profit projects, a wide range of actors, including public authorities, education or research institutions, the social partners, international organizations or non-governmental organizations, operating individually or in partnerships, could submit applications for funding. The responsible authority then selected projects on the basis of a number of criteria, including the situation in the member state, cost-effectiveness in relation to the number of persons covered by the project, the expertise and financial contribution of the applying organization and the extent to which the project complemented other EU-funded actions.³¹⁶

A mid-term evaluation of the ERF I was conducted from January to November 2003 (which included a survey of all Member States national authorities as well as all projects supported between 2000 and 2002), a review conference was organized in Brussels on 30-31 October 2003 and an extended impact assessment was finalized by the Commission in February 2004.³¹⁷ Over 350 government and NGO representatives from 15 member states and 10 accession countries attended the Brussels Conference, discussing *"new developments and needs in the three fields of intervention of the European Refugee Fund (reception, integration and return), and 'horizontal' themes (development of best practices, the added value of transnationality, definition and expression of solidarity in the area*

³¹⁴ *ibid.*

³¹⁵ *ibid.*

³¹⁶ *ibid.*

³¹⁷ European Commission: Proposal for a Council Decision establishing the European Refugee Fund for the period 2005-2010 (presented by the Commission), SEC(2004) 161, COM(2004) 102 final, 12 February 2004, p.2

of asylum policy)".³¹⁸ The findings of these processes included that the ERF "should receive substantially increased financial resources in order to have a substantially greater impact on structures, processes and policies, in particular given the increased need to transpose and adopt new EC legislation in the field of asylum" as well as that multi-annual programming periods and a simplified and proportionate management and control system should be established.³¹⁹

In addition, in the light of "calls for a bigger role for the Commission, particularly in terms of planning and the pooling of information, and the entry into force of more detailed financial rules on how tasks of public authority may be delegated to institutions or outside bodies (Financial Regulation and implementing rules), the option chosen for the second phase of the Fund is a system of 'shared' management with management tasks being delegated to the Member States, which will designate — for the management of action under the Fund — national public-sector bodies or bodies governed by private law".³²⁰ On the basis of the above considerations, the Commission presented a proposal for the extension of the ERF in February 2004.³²¹

Successors of the European Refugee Fund after 2004 (ERF II and III)

On the basis of this proposal, the ERF was extended in December 2004 for the period 2005 to 2010 "to ensure continued solidarity between Member States in the light of recently adopted Community legislation in the field of asylum, taking account of the experience acquired when implementing the first phase of the Fund for the period 2000 to 2004."³²² However, in 2007, the Council decided to replace the existing ERF with a new one for the period 2008-2013, "in the light of the establishment of the European Fund for the integration of legally-resident third-country nationals, the European Fund for the return of illegally-resident third-

³¹⁸ European Commission: Commission Staff Working Paper: Proposal for a Council Decision establishing the European Refugee Fund for the period 2005-2010, Extended Assessment {COM(2004)102 final}, SEC(2004) 161, 12 February 2004, p.16

³¹⁹ *Ibid.*

³²⁰ European Commission, SEC(2004) 161, COM(2004) 102 final, 12 February 2004, p.39-40

³²¹ *Ibid.*

country nationals and the External Borders Fund for the period 2007 to 2013, as part of the General programme 'Solidarity and Management of Migration Flows', in particular with a view to setting out common management, control and evaluation arrangements."³²³

III.4.2 Odysseus and ARGO

Odysseus

On 28 October 1996, through Joint Action 96/637/JHA, the Council initiated the "Sherlock" programme of training, exchanges and cooperation on identity documents.³²⁴ On 19 March 1998, the Council adopted a new Joint Action (98/244/JHA) introducing the Odysseus programme³²⁵, which substantially broadened the scope of the Sherlock programme for the years 1998 to 2002 and took over the projects already under way.³²⁶ The general objective of the Odysseus programme was now *"to extend and strengthen existing cooperation [between member states, M.S.] in the matter of asylum, immigration, the crossing of external borders and the security of identity documents, and cooperation in these same areas with States applying for accession, by means of multiannual programming."*³²⁷

In order to meet the above objective, the programme supported activities ranging from training measures (practical training courses, including basic and top-level specialist training as well as training for instructors), to exchange measures (exchanges between the member states of officials or other staff responsible for

³²² Council Decision of 2 December 2004 establishing the European Refugee Fund for the period 2005-2010 (2004/904/EC)

³²³ Decision No 573/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows' and repealing Council Decision 2004/904/EC

³²⁴ Joint Action of 28 October 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union introducing a programme of training, exchanges and cooperation in the field of identity documents ('Sherlock') (96/637/JHA)

³²⁵ Joint Action of 19 March 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, introducing a programme of training, exchanges and cooperation in the field of asylum, immigration and crossing of external borders (Odysseus-programme) (98/244/JHA)

³²⁶ EUROPA: Summaries of EU legislation: Other: Odysseus Programme; EUROPA: European Commission: Justice and Home Affairs: ODYSSEUS programme of training, exchanges and cooperation

³²⁷ Joint Action of 19 March 1998 (98/244/JHA), Art.1 (3)

the matters to which the programme related) as well as studies and research (including the design, production and dissemination of teaching materials).³²⁸

Measures in the field of asylum were required to focus primarily on two areas. The first concerned the coordinated application of the Dublin Convention of 15 June 1990, which included the coordinated application of procedures, time limits, evidence, and other practical problems of applying the Convention as well as the application of other legal instruments relating to asylum. The second area comprised close cooperation between competent national administrations and bodies, relating to first instance (standard or accelerated) and appeal procedures for examining asylum requests, country of origin documentation systems, reception conditions of asylum-seekers, alternatives to refugee status, including temporary protection, cooperation between the various bodies involved (asylum request scrutiny departments, welfare departments, border control services, etc.) and the role of the UNHCR, other international organisations and NGOs, as well as the treatment of rejected asylum-seekers.³²⁹

The Commission was responsible for managing and monitoring the programme and for drawing up an annual programme comprising a breakdown of the available funds and a list of priorities, which was published in the EU Official Journal (OJ). It was assisted by the programme Management Committee, consisting of representatives of the 15 Member States and chaired by a representative of the Commission, which provided its opinion on the Commission's drafts of the annual programme and subsequently selected projects from all the applications for funding submitted before 31 March. Eligible projects had to be of "demonstrable interest to the Union" and involve at least two Member States, yet could also involve candidate countries and other third countries. Financing covered a maximum of 60% of total project costs, with an increase to 80% in exceptional cases. Activities under the programme, which was also subjected to an external evaluation, were carried out by public and private institutions as well as NGOs,

³²⁸ EUROPA: Summaries of EU legislation: Other: Odysseus Programme; EUROPA: European Commission: Justice and Home Affairs: ODYSSEUS programme of training, exchanges and cooperation

research institutes, universities and training bodies, while overall responsibility for the implementation of the projects lay with the EU Commission.³³⁰

In 1998 and 1999, the Odysseus programme was granted an annual budget of roughly €3 million. The whole programme was allocated a total of €12 million 1998-2002, which, however, had already been exhausted in 2001. Therefore, the programme was ended and, upon a proposal by the Commission that was later adopted by the Council, replaced by the ARGO programme which included most areas previously covered by Odysseus (see below).³³¹

ARGO

In a Decision of 13 June 2002 (2002/463/EC)³³², the EU Council adopted an action programme for administrative cooperation in the fields of external borders, visas, asylum and immigration for the period of 1 January 2002 to 31 December 2006 (ARGO). In these four areas, it was intended to support the promotion of cooperation between national administrations responsible for implementing Community rules, promotion of the uniform application of Community law, encouragement of transparency of actions and improvement of the overall efficiency of national administrations. Activities eligible for funding included training, staff exchange, actions promoting the computerised handling of files and electronic data exchange, the setting up of common operative centres and of teams composed of staff drawn from two or more member states as well as studies, conferences and seminars and member states activities in third

³²⁹ Joint Action of 19 March 1998 (98/244/JHA), Art.7

³³⁰ Joint Action of 19 March 1998 (98/244/JHA), Art.11-18; EUROPA: Summaries of EU legislation: Other: Odysseus Programme; EUROPA: European Commission: Justice and Home Affairs: ODYSSEUS programme of training, exchanges and cooperation

³³¹ EUROPA: Summaries of EU legislation: Other: Odysseus Programme; EUROPA: European Commission: Justice and Home Affairs: ODYSSEUS programme of training, exchanges and cooperation

³³² Council Decision of 13 June 2002 adopting an action programme for administrative cooperation in the fields of external borders, visas, asylum and immigration (ARGO programme) (2002/463/EC)

countries.³³³ The Decision establishing ARGO applied to 13 EU member states, including the United Kingdom, yet did not apply to Denmark and Ireland.³³⁴

Activities in the area of asylum were required to promote the establishment of the common European asylum system by developing a common asylum procedure and a uniform status for those granted asylum; to facilitate the determination of the member state responsible for examining an asylum application; to support the approximation of rules on the recognition and content of refugee status and subsidiary forms of protection; to reinforce the efficiency and fairness of asylum procedure and to increase convergence in asylum decisions; and to develop resettlement and entry facilities, and legal means for admission on humanitarian grounds.³³⁵

Like Odysseus, co-financing of an action by the ARGO programme covered up to 60 % (and up to 80 % in exceptional circumstances) of the cost of eligible projects, which were proposed by the national agencies of one member state and had to involve either at least two other member states or another member state and a candidate country or a third country. The European Commission, in partnership with the member states and assisted by "the ARGO Committee", a body composed of representatives of the member states, was responsible for the management and implementation of the ARGO action programme, including the preparation of an annual work programme as well as the evaluation and selection of the actions proposed. Furthermore, it was foreseen that the Commission could propose its own actions which were to be indicated in the annual work programme. In contrast to Odysseus, implementation of the ARGO programme was not monitored and evaluated externally, but by the Commission and the Member States. To that end, the Commission was required to submit a report each year to

³³³ EUROPA: European Commission: Justice and Home Affairs: Freedom, security and justice: ARGO — European Commission: ARGO — asylum, visas, immigration and external borders; EUROPA: European Commission: Justice and Home Affairs: ARGO Programme

³³⁴ Council Decision 2002/463/EC of 13 June 2002, Preamble, paras. 11-13

³³⁵ Council Decision 2002/463/EC of 13 June 2002, Art. 6

the European Parliament and the Council, with its first report due by 31 December 2003 and its final report due by 31 December 2007.³³⁶

Originally, a total of €25 million was reserved for activities under the programme. However, following a call by the Thessaloniki European Council on 19 and 20 June 2003, the ARGO programme was amended in December 2004, *"in order to address, during the period 2004-2006, the most pressing structural needs [...] in the management of external borders"* and allocated funds for 2004 were *"substantially increased"* by the budgetary authority.³³⁷

³³⁶ Council Decision 2002/463/EC of 13 June 2002, Art. 11-14; EUROPA: Summaries of EU legislation: Other: ARGO; EUROPA: European Commission: Justice and Home Affairs: Freedom, security and justice: ARGO — European Commission: ARGO — asylum, visas, immigration and external borders; EUROPA: European Commission: Justice and Home Affairs: ARGO Programme

³³⁷ Council Decision of 13 December 2004 amending Decision 2002/463/EC adopting an action programme for administrative cooperation in the fields of external borders, visas, asylum and immigration (ARGO programme) (2004/867/EC), Preamble paras. 3-4; EUROPA: Summaries of EU legislation: Other: ARGO

IV. The 2004 EU Enlargement

IV.1 Background

The EU originated in the six-member European Coal and Steel Community (ECSC) of 1951, including Belgium, West Germany, Luxembourg, France, Italy and the Netherlands. The ECSC was supplemented in 1957 through the Treaties of Rome, which created the European Atomic Energy Community (EURATOM) and the European Economic Community (EEC). Some years after the institutions of the three European communities had merged in 1967, Denmark, Ireland and the United Kingdom joined in 1973, followed by Greece in 1981, Spain and Portugal in 1986 and Austria, Finland and Sweden in 1995.³³⁸

Even before the latest accession of new member states in 1995, however, another highly significant enlargement process had already been initiated. In a White Paper of March 2001, Ireland's Department of Foreign Affairs attempted to assess the background and prospects of the process, which would fundamentally change the European Union with its then 15 existing Member States, covering a land area of over 3.2 million sq km and hosting a population of over 370 million people. The paper suggested that this latest enlargement process, including the countries of Central and Eastern Europe (CEE), could see the European Union growing to 28 Member States with an area of approximately 5 million sq km and an overall population of up to 550 million citizens.³³⁹

This process had its origins in the dramatic changes in the international political system in 1989 and 1990 – collapse of the vast majority of the world's socialist regimes, dissolution of the Warsaw Pact, dissolution of the Council for Mutual Economic Assistance (COMECON), implosion of the Soviet Union, accession of the former GDR to the Federal Republic of Germany. According to Woyke, at the time, the countries of Central and Eastern Europe (CEE) found themselves in a political, economic and societal vacuum, with most past networks having ceased

³³⁸ EUROPA: The European Union at a glance: The history of the European Union

to exist. It was unclear how these countries would develop nationally but also which role they would play internationally. Very quickly, the elites of the CEE countries showed great interest in EU and NATO accession. Although these initiatives were deferred at first, it soon became clear that the CEE countries maintained their eagerness for EU and NATO accession and that the Western European countries would have to face up to their demands. Given the significant impact an unstable development in CEE could have had, leading to high consequential costs in form of increased insecurity, refugee movements and need for crisis management, the EU, while maintaining a degree of control over the transformation process, had to recognize the CEE countries as partners, not as solicitants.³⁴⁰

In a similar vein, Achten suggests that, given the existing economic and political vacuum, EU accession of the "reform countries" in Central and Eastern Europe represented a guarantee for economic development and reinsurance against a backlash to old structures and reemerging nationalist tendencies. However, at the time, the EU had not sufficiently fulfilled its role as a stabilizing force for the "young democracies" of Central and Eastern Europe by supporting the transformation process and integrating them into the mostly Western-oriented alliances and organizations. Until 1996, the EU had contributed financially by founding the European Bank for Reconstruction and Development (EBRD) or "Osteuropabank" (through loans) and via the PHARE programme (through grants) and by selectively including the "reform countries" in association agreements for trade facilitation and the gradual establishment of free trade zones. However, Achten cites criticism that protectionism dictated most of these agreements, which did not even come close to opening the EU markets to the "reform countries", and that their main goal was to appease the population of the Central and Eastern European countries.³⁴¹

³³⁹ Ireland Department of Foreign Affairs 2001, p.15

³⁴⁰ Woyke 2002, p.10-12; see also Rudge 1992, p.109

³⁴¹ Achten, Peter: Die Osterweiterung der Europäischen Union. Beitritts- und Erweiterungshindernisse im Spiegel ökonomischer Kritik. 1996, p. 2-6

Rammer and Schieffer point out that, at the time of the regime change in CEE in the early 1990s, the EU was entirely occupied with itself, i.e. with the development of common interior, foreign and security policies, the Schengen agreement and the introduction of a common currency. At first, CEE did not fit in the agenda and the EU applied a strategy of promises and deferment. Moreover, the EU mostly negotiated bilaterally, in order to prevent a common representation of the interests and thus a stronger standing of the CEE countries. Initially, the focus was mainly on opening the CEE markets for EU products while protecting the EU from cheap CEE imports. This was complemented by the adoption of the Copenhagen criteria of July 1993 which implicitly set a pro-Western orientation – in particular concerning the economic policies of EU candidate countries – as a precondition for accession. The EU actively supported sympathetic governments, e.g. through the PHARE programme, which in turn were much more susceptible to EU demands and put up less resistance in the negotiations.³⁴²

Rammer lists a number of reasons why the CEE countries pursued EU accession, despite the unequal starting position and the high economic and social costs. First, there were hardly any alternatives for political and economic integration, be it a stronger CEE-USA alliance or a Višegrad-type coalition of states. Second, EU accession would have considerable advantages for CEE officials and politicians, by strengthening the position of pro-Western political parties and opening career opportunities in the EU bureaucracy. Third, CEE economic elites would have access to Western markets and see the post-Communist ownership structure legitimized, no matter how they had acquired their new properties. Lastly, there was no unified resistance by those that would have to pay the highest cost for accession – farmers, elderly and sick people, the population of peripheral regions. This was partly due to a perceived lack of political alternatives to accession but also the hope that it would not be as bad as they feared, that they would get an EU passport and thus have the free choice of their place of residence in the EU, that

³⁴² Rammer 2003, p.8; Schieffer 1998, p. 46

accession would strengthen the international standing of the new nation-states and that they would benefit from direct financial aid by the EU.³⁴³

According to Rammer, all EU enlargement steps before 2004 were primarily intended to strengthen the Western European political and economic block. Likewise, the projects of the creation of a single market (1992), the "Northern" enlargement (1995) and the currency union (1999) were geared towards increasing the economic power and improving conditions for investments and accumulation of capital in Western Europe. The only major change was that after the breakdown of the Soviet Union the thrust of these efforts was directed away from the East to the global competition vis-à-vis North America and East Asia.³⁴⁴

The 2004 enlargement was markedly different. Besides Cyprus and Malta, eight countries joined the EU which had been shaped by a socialist economic and political system for more than four decades. Six of the new EU members had only recently been founded as independent states: Estonia, Latvia, Lithuania and Slovenia in 1991, the Czech and Slovak Republics in 1993. Their officials often lacked the experience of their EU counterparts, which gave the accession negotiations a one-sided character and meant that the Central and Eastern European governments accepted most EU requirements without much resistance. Interestingly, while the eight new EU member states added a population of 75 million or nearly 20% to the EU and increased its territory by 22.5%, their economic weight was quite marginal in comparison – their combined GDP of 327 billion Euro being smaller than that of the Netherlands and merely equalling 3.9% of the GDP of the EU-15. In terms of its economic significance, the previous enlargement through Austria, Finland and Sweden in 1995 was almost twice as large, expanding the EU market by 7.5 %.

³⁴³ Rammer 2003, p.9-10

³⁴⁴ Rammer 2003, p.2

IV.2 Intergovernmental process

IV.2.1 Association Agreements

In summer 1989, the heads of state and government of the G7 decided to support the democratization and modernization process in Poland and Hungary by providing economic assistance through the PHARE (Poland Hungary Aid for the Reconstruction of the Economy) programme, coordinated by the EC Commission. The programme, which was later extended to the other candidate countries as well as other subject matters, was the most important pre-accession instrument for CEE countries in the early 1990s.³⁴⁵

At EC level, a special meeting of the European Council was convened in Dublin on 28 April 1990 to discuss the unification of Germany and the developments at the time in the rest of Central and Eastern Europe. At that Council it was decided to begin a debate on Association Agreements (later to be called "Europe Agreements") with the emerging democracies of Central and Eastern Europe, and that, in addition to economic issues, these Agreements should include an institutional framework for political dialogue.³⁴⁶ In December 1991, the Maastricht European Council agreed that any European State whose system of government was founded on the principle of democracy might apply to become a member of the European Union.³⁴⁷

In addition, a number of high-level political meetings with representatives from Eastern and Western Europe were held between 1991 and 1993 to discuss measures to combat illegal migration and the return and readmission of rejected asylum-seekers. These included the Vienna ministerial conference on issues of East-West migration of 24-25 January 1991, organized by the Council of Europe at the Initiative of the Austrian Ministry of the Interior; the Rome ministerial conference of April 1991; the Berlin ministerial conference on questions of illegal

³⁴⁵ Woyke 2002, p.12

³⁴⁶ Ireland Department of Foreign Affairs 2001, p.15; see also Schieffer 1998, p. 43

³⁴⁷ Ireland Department of Foreign Affairs 2001, p.15; Phuong 2005, p.391-392

immigration from and through Central and Eastern Europe of 30-31 October 1991, organized by the Vienna Club and the German Ministry of the Interior; the Berlin follow-up conference in Budapest of 15-16 February 1993, organized by the German group at the initiative of the German and Hungarian Ministries of the Interior; and the Athens ministerial conference of 18-19 November 1993 under the aegis of the Council of Europe.³⁴⁸

In this context, Phuong notes that, in the early 1990s, the EU member states negotiated a series of agreements to ensure the return of asylum-seekers and to effectively "transfer the 'asylum burden'" to the CEE countries, which had been declared safe third countries after their accession to the CoE, with some of them even being considered to be safe countries of origin.³⁴⁹ For instance, by 1992, Germany had concluded such readmission agreements with Poland (on behalf of the Schengen group), Bulgaria, Hungary and Romania and had declared Czechoslovakia and Poland to be safe third countries.³⁵⁰ According to Phuong, Poland in turn also signed readmission agreements with countries such as Armenia, Belarus, Russia and Vietnam, apparently without sufficient guarantees against *refoulement*.³⁵¹

Following up on Maastricht, the Copenhagen European Council in June 1993 formally determined that the Associated Countries could become members of the European Union and that the future relationship with those countries would rest on that basis. More specifically, the summit formulated political, economic and legal conditions for accession, the so-called "Copenhagen criteria", including a) institutional stability as a safeguard for a democratic and rule-of-law based political order, the protection of human rights and the rights of minorities; b) a functional market economy and the capability to withstand the competitive pressure and market forces within the EU; and c) the adoption of the EU *acquis communautaire*. In addition to these strict criteria, a fourth condition was formulated, that was

³⁴⁸ Leuthardt 1994, p.58-59, 110-111; Phuong 2005, p.397

³⁴⁹ Phuong 2005, p.393-395

³⁵⁰ Leuthardt 1994, p.68-75

³⁵¹ Phuong 2005, p.403-405

directed at the EU itself and required the union to conduct a reform to prepare itself for accession, thus allowing the EU to always maintain control over the enlargement process by making accession dependent on EU internal organizational reform.³⁵²

For the purposes of this paper, it is important to note that whereas the *"initial accession criteria did not refer explicitly to Justice and Home Affairs (JHA) issues, partly because the EU was only just getting involved in this area when enlargement was envisaged"*,³⁵³ ultimately, the EU acquis to be adopted by third countries before accession also included the growing body of asylum-related EU legislation. Menz cites the obligation of newly acceding countries to implement the entire acquis in the migration and asylum field as an example of top-down Europeanization, as they had not been involved in the elaboration of these regulations.³⁵⁴

At the time of the 1993 Copenhagen summit, negotiations on Europe Agreements had been concluded with four CEE countries, while negotiations with others were well advanced.³⁵⁵ By 1996, Europe Agreements, which, in principle, were association agreements albeit on a higher level, and were intended to create free trade zones as well as to intensify economic, financial and cultural cooperation, and in particular assistance with the transition to market economy, had either been signed with or were in force in all ten CEE countries.³⁵⁶

IV.2.2 Pre-Accession strategy

For a long time, the member states were reluctant to give specific accession dates. This led the candidate countries to increasingly demand a more specific pre-accession strategy,³⁵⁷ which was developed for the first time at the EU Council

³⁵² Woyke 2002, p. 10-12; Ireland Department of Foreign Affairs 2001, p. 15-16; Schieffer 1998, p. 43, 46

³⁵³ Phuong 2005, p.391

³⁵⁴ Menz 2009, p.19

³⁵⁵ Ireland Department of Foreign Affairs 2001, p.15

³⁵⁶ Woyke 2002, p. 12

³⁵⁷ Phuong 2005, p.391

summit in Essen in December 1994. Its three main elements were the implementation of the Europe Agreements, financial assistance through the Phare Programme and a "structured dialogue" between member states and candidate countries to discuss issues of common interest.³⁵⁸

Concerning the direction of that strategy, as already indicated, the initial primary concern of the EU had been to maintain stability and bridge the economic gap between the member states and the CEE countries. This changed in the wake of the Balkans crisis in the early 1990s, when awareness increased that JHA issues should be included in the accession negotiations, particularly as the candidate countries, which had not had any immigration or asylum laws before 1989, were bound to become more attractive as countries of destination once they had acceded to the EU. In other words, the underlying objectives of asylum-related EU assistance were the improvement of asylum systems in the CEE countries in order to justify returns of asylum-seekers and the adoption of deterrence measures to limit their attraction for asylum-seekers.³⁵⁹

Yet, although the Copenhagen European Council had formulated certain requirements already a year before the adoption of the mentioned pre-accession strategy, the process of defining accession criteria after 1993 remained *"somewhat progressive and piecemeal"*.³⁶⁰ In particular, there was still uncertainty regarding *"the exact content of the EU asylum provisions"* and *"as to what norms must be implemented"* by the candidate countries, because, for a long time, European asylum law had been *"mainly composed of non-binding agreements adopted in the first half of the 1990s"*.³⁶¹ According to Anagnost and Phuong, this soft law was nevertheless presented to the candidate countries as binding and requiring implementation by them.³⁶²

³⁵⁸ EUROPA: European Commission: Enlargement: Financial assistance: Pre-accession strategy – Pre-Accession Instruments; Woyke 2002, p. 12

³⁵⁹ Phuong 2005, p.393-396

³⁶⁰ Phuong 2005, p.391

³⁶¹ Phuong 2005, p.396

³⁶² Anagnost 2000, p.386; Phuong 2005, p.396

The Phare Programme, which played an important part in the EU's overall pre-accession strategy, began to support JHA-related activities in 1996, with the launch of a horizontal programme on combating organized and trans-national crime, judicial cooperation, immigration as well as asylum policies and procedures.³⁶³ In March 1997, Phare was restructured and given an exclusive pre-accession focus. Furthermore, in July 1997, the EU Commission presented the Agenda 2000, which laid out a strategy for preparation of the EU for the upcoming enlargement, focusing on the implementation of the Europe Agreements and the provision of pre-accession assistance through the revised Phare programme and newly to be created instruments for agricultural reform (SAPARD) and regional development (IPSA), which were effectively launched in 1999. Out of a total budget of Ecu 274 bn for the period 2000-2006, Ecu 74 bn were reserved for pre-accession programmes.³⁶⁴

In addition to its central role in the EU asylum policy harmonization process, Woyke also highlights the significance of the Amsterdam Treaty for EU enlargement. He notes that instead of simply becoming part of a political entity called "Europe", the Amsterdam Treaty now obliged newly acceding countries to fulfil a set of shared and predetermined values.³⁶⁵ More specifically, it established that the EU should respect human rights and fundamental freedoms (Art 6 TEU) and required the candidate countries to respect these principles in order to be able to join the Union (Art. 49 TEU):

"Art. 6 of the Treaty on European Union

- 1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles that are common to the Member States.*
- 2. The Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law. [...]*

³⁶³ EUROPA: European Commission: The Phare Programme – Annual Report 1996, COM (98) 178 final, 24 March 1998, p.14; Phuong 2005, p.394

³⁶⁴ EUROPA: European Commission: Enlargement: How does it work?: Financial assistance: Phare; Phuong 2005, p.392; Woyke 2002, p.12, 17

³⁶⁵ Woyke 2002, p. 9-10

Art. 49 of the Treaty on European Union

*Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members.*³⁶⁶

However, even after the adoption of the first binding asylum-related instruments in application of the Amsterdam Treaty, other legislative proposals remained under negotiation, thus leaving it up to the candidate countries to speculate on and try to anticipate their final content and adopt the most restrictive standards in order to demonstrate their ability to stem the influx of asylum-seekers. Moreover, the ongoing passage of new EU instruments meant that candidate countries had to frequently amend their asylum legislation, thus seriously challenging the principle of legal certainty.³⁶⁷

The Commission proposed to hold negotiations first with those countries that were expected to fulfill all criteria for EU membership in the medium run, while negotiations with the other countries should take place at a later stage. The European Council in Luxembourg in December 1997 confirmed these proposals, thus paving the way for accession negotiations (launched in March 1998) with Cyprus, the Czech Republic, Estonia, Hungary, Poland and Slovenia (the "Luxembourg candidates").³⁶⁸ Moreover, on the basis of the European Commission's Agenda 2000, it decided on an enhanced pre-accession strategy for all ten CEE candidate countries, with Accession Partnerships as a new instrument. The reinforced pre-accession strategy had two main objectives: *"First, to bring together the different forms of support provided by the Union within a single framework, the Accession Partnerships, and to work together with the applicants, within this framework, on the basis of a clearly defined programme to prepare for membership, involving commitments by the applicants to particular priorities and to a calendar for carrying them out. Secondly, to familiarise the applicants with Union*

³⁶⁶ EUROPA: European Commission: Justice and Home Affairs: The Charter of Fundamental Rights: The EU and Fundamental rights – The wider context

³⁶⁷ Anagnost 2000, p.386; Phuong 2005, p.396

³⁶⁸ EUROPA: European Commission: Enlargement: Financial assistance: Pre-accession strategy – Pre-Accession Instruments; Woyke 2002, p.17

*policies and procedures through the possibility of their participation in Community programmes.*³⁶⁹ The Luxembourg Council also introduced a specific strategy for Cyprus, which included participation in Community programmes, participation in targeted projects and use of TAIEX assistance, and asked the Commission to elaborate a strategy to prepare Turkey for accession. Following Malta's reactivation of its application for membership in October 1998, a specific pre-accession strategy was developed for Malta as well.³⁷⁰

The Helsinki European Council in December 1999 decided to extend accession negotiations (launched in February 2000) to include all candidate countries except Turkey, i.e. Bulgaria, Latvia, Lithuania, Malta, Romania and Slovakia (the "Helsinki candidates") and confirmed the principle of "differentiation" within the negotiations, whereby countries proceed at a pace that best suits their individual abilities. Yet it also reiterated that the "Helsinki candidates" would have the opportunity to catch up with the countries already in negotiations (the "Luxembourg candidates").³⁷¹ In addition, the Helsinki European Council committed *"to make every effort to complete the Intergovernmental Conference on institutional reform by December 2000"* in order to put the EU *"in a position to welcome new Member States from the end of 2002 as soon as they have demonstrated their ability to assume the obligations of membership and once the negotiating process has been successfully completed."*³⁷² Furthermore, on the basis of a recommendation by the Commission, it decided to prepare a pre-accession strategy for Turkey, building on the European Strategy, which was further revised by the Laeken European Council in December 2001.³⁷³

In line with the commitments of the Helsinki Council, the EU Commission published a Strategy Paper on Enlargement in November 2000 and introduced a

³⁶⁹ EUROPA: Press Room: Press Releases: EU enlargement and the Accession Partnerships, MEMO/98/21, 27 March 1998

³⁷⁰ EUROPA: European Commission: Enlargement: Financial assistance: Pre-accession strategy – Pre-Accession Instruments; Woyke 2002, p.17

³⁷¹ Ireland Department of Foreign Affairs 2001, p.16; Phuong 2005, p.392

³⁷² Ireland Department of Foreign Affairs 2001, p.17

³⁷³ EUROPA: European Commission: Enlargement: Financial assistance: Pre-accession strategy – Pre-Accession Instruments

"Road Map" for the negotiations in the immediate years ahead, which set down what types of transition arrangements might be possible and what types were excluded. The Road Map also included a timetable of "chapters" to be substantially progressed with the more advanced countries by mid-2002, with individual annual reports on each of the candidate countries as instruments to monitor the progress of accession preparations.³⁷⁴

According to the EU Commission, the Treaty of Nice of December 2000 *"opened the way to the institutional reform needed for the EU enlargement with the accession of countries from eastern and southern Europe. Some of its provisions were amended by the Treaty of Accession of the ten new Member States, which was signed in Athens in April 2003, and the Treaty of Luxembourg on the accession of Romania and Bulgaria, signed in April 2005."*³⁷⁵ The Nice European Council endorsed the Helsinki objectives and the November 2000 Commission Strategy and announced a progress assessment of the actual implementation of the strategy in June 2001 in Göteborg.³⁷⁶

Woyke highlights that the Copenhagen criteria had already foreseen that a reform of the EU institutions had to precede any further enlargement, an undertaking which failed at the EU summit in Amsterdam but was finally accomplished at the EU summit in Nice. He sees the main significance of the Treaty of Nice in the considerable modifications of the decision-making regulations and the weighting of votes in the Council of Ministers, resulting in a relative underrepresentation of the large member states which is further exacerbated by the accession of many small CEE countries. In addition, as the large member states were to waive their right to a second commissioner, in 2005, the size of EU Commission was to be reduced according to the principle "one country, one commissioner". The third centrepiece of reform was an agreement on the future constitution of the European Parliament, with an envisaged total of 732 members.³⁷⁷

³⁷⁴ Ireland Department of Foreign Affairs 2001, p.17

³⁷⁵ EUROPA: Summaries of EU Legislation: Glossary: Treaty of Nice

³⁷⁶ Ireland Department of Foreign Affairs 2001, p.17

³⁷⁷ Woyke 2002, p.20-23

IV.2.3 Accession process

Between 1994 and 1996, all Central and Eastern European countries submitted formal applications for membership of the Union, with Hungary and Poland piloting the process in 1994, Romania, Slovakia, Latvia, Estonia, Lithuania and Bulgaria following suit in 1995, and the Czech Republic and Slovenia finally applying in 1996. At the time, five other countries had already submitted applications for membership, including Turkey in 1987, Cyprus and Malta in 1990, and Norway and Switzerland in 1992.³⁷⁸ Morocco's application of 1987 had been rejected on grounds that it was not a European country.³⁷⁹ Switzerland again, while having concluded with the EC (and later the EU) a Free Trade Agreement in 1972, the agreement on insurance in 1989, bilateral agreements in 1999, Bilateral II in 2004 and more than 100 additional technical agreements, has taken no further steps towards EU accession following a negative vote in a domestic referendum about joining the European Economic Area in 1992.³⁸⁰ Likewise, in a referendum in 1994, Norway voted against joining the Union. In contrast, Malta had not pursued its application for membership from 1996, but then revived its accession efforts in 1998.³⁸¹

As noted in the previous chapter, accession negotiations were begun in March 1998 with the six countries deemed by the Commission to be ready at that time, i.e. Cyprus, the Czech Republic, Estonia, Hungary, Poland and Slovenia (the "Luxembourg candidates") and extended in February 2000 to an additional six countries, including Bulgaria, Latvia, Lithuania, Malta, Romania and Slovakia. Turkey, although accorded the status of a candidate country, was not included in the negotiations as it was still considered to be far from fulfilling democratic and human rights standards.³⁸²

In order to facilitate the accession process and to be able to monitor progress of

³⁷⁸ Ireland Department of Foreign Affairs 2001, p.16; Phuong 2005, p.391; Schieffer 1998, p. 46

³⁷⁹ Woyke 2002, p.9

³⁸⁰ EUROPA: EEAS: Switzerland

³⁸¹ Ireland Department of Foreign Affairs 2001, p.16

³⁸² Ireland Department of Foreign Affairs 2001, p.16-17; Phuong 2005, p.392; Woyke 2002, p.17

the candidate countries in fulfilling the Copenhagen criteria, the EU acquis was divided into 31 chapters. In 1998, the Commission started to publish annual "screening reports" (later called "progress reports") on advances made in these policy areas, with progress in the asylum field being assessed in chapter 24. This strategy was reinforced by the Commission's 2000 Strategy Paper on Enlargement and the "Road Map" for the accession negotiations.³⁸³

The progress reports for the years 1999-2001 already reflected a very positive assessment of the fulfilment of the political accession criteria and designated all candidate countries, with the exception of Bulgaria, Romania and Turkey, as stable democracies with a functioning market economy. For instance, until October 2001, 23 of 31 chapters had been agreed upon with Cyprus, 22 with Hungary, 21 with Slovenia, 19 with Poland, the Czech Republic, Slovakia and Estonia, 18 with Lithuania, and 16 with Malta and Latvia. However, at the time, the most contentious policy areas, such as Justice and Home Affairs as well as Agriculture and Taxes, still had to be negotiated.³⁸⁴

Finally, a Treaty of Accession was signed in Athens on 16 April 2003 with eight Central and Eastern European countries (the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia) and two Mediterranean countries (Cyprus and Malta),³⁸⁵ entering into force on 1 May 2004. It is noteworthy that JHA matters featured very prominently in the Act of Accession annexed to the Accession Treaty, which sets out the "conditions for admission" of the accession countries. More specifically, Art. 3 lays out in detail obligations relating to the Schengen acquis and requires the new member states to *"undertake in respect of those conventions or instruments in the field of justice and home affairs which are inseparable from the attainment of the objectives of the EU Treaty: — to accede to*

³⁸³ Anagnost 2000, p.380-400; Ireland Department of Foreign Affairs 2001, p.17; Phuong 2005, p.392; Woyke 2002, p.12

³⁸⁴ Woyke 2002, p.17-18

³⁸⁵ EUROPA: The European Union at a glance: The history of the European Union; EUROPA: European Commission: Enlargement: The policy: Countries on the road to EU membership; Documents concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, Official Journal L 236 , 23 September 2003

*those which, by the date of accession, have been opened for signature by the present Member States, and to those which have been drawn up by the Council in accordance with Title VI of the EU Treaty and recommended to the Member States for adoption".*³⁸⁶

Two additional CEE countries, Bulgaria and Romania, joined the EU in January 2007. As of December 2011, Croatia, Iceland, Montenegro, the Former Yugoslav Republic of Macedonia and Turkey are candidate countries and Albania, Bosnia and Herzegovina, Serbia and Kosovo are potential candidates for EU membership.³⁸⁷

³⁸⁶ Treaty of Accession 2003: Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, Official Journal L 236 , 23 September 2003; Act of Accession 2003: Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, Official Journal L 236 , 23 September 2003

³⁸⁷ EUROPA: The European Union at a glance: The history of the European Union; EUROPA: European Commission: Enlargement: The policy: Countries on the road to EU membership

IV.3 Asylum policy-related EU programmes in accession countries

For the purposes of this paper, it is important to note that the to be adopted by third countries before accession, of course, also included the growing body of asylum-related EU legislation.

In her 1999 overview of the EU programmes existing at the time, Kaschitz distinguished between structural funds for the development of economic structures in disadvantaged regions within the EU, action programmes for the strengthening of intra-European cooperation, and third-country programmes to support structural change in the Central and Eastern European (CEE) countries, the Commonwealth of Independent States (CIS), the non-EU members of the Mediterranean region and the African-Caribbean-Pacific (ACP) countries. All programmes had in common that the EU only covered 30 to 50% – or 75% in exceptional cases – of project costs, that projects had to be innovative and contribute to sustainable development of a given sector, and that the selection of eligible projects for funding was based on public calls for tenders or calls for proposals.³⁸⁸

As already mentioned, one of the third-country programmes, Phare, underwent a reorientation in 1997 towards pre-accession and several new pre-accession instruments were created since the mid-1990s. According to Woyke, out of a total budget of Ecu 274 billion for the period 2000-2006, Ecu 74 billion were reserved for pre-accession programmes³⁸⁹, which included Phare, ISPA and SAPARD for the CEE candidate countries, CARDS for the Western Balkans (2001-2006) as well as the MEDA Programme (1996-2001) for the Mediterranean countries including Cyprus and Malta and a special pre-accession assistance instrument (2002-2006) for Turkey.³⁹⁰ Cooperation with third countries in migration and asylum-related matters were covered mainly by Phare (Central European and

³⁸⁸ Kaschnitz 1999, p. 6-7

³⁸⁹ Woyke 2002, p.17

³⁹⁰ EUROPA: European Commission: Enlargement: How does it work?: Financial assistance: Former assistance; EUROPA: European Commission: Enlargement: Financial assistance: Phare: Ch. 1 "What is Phare? – Introduction"; see also Schieffer 1998, p. 45-46

Baltic countries), MEDA (Mediterranean countries) and TACIS (Commonwealth of Independent States).³⁹¹

Further – post-accession – assistance was provided through a "Transition Facility" to the ten countries that joined the EU in 2004 (in 2004-2006) and Bulgaria and Romania (in 2007-2010). All pre-accession programmes mentioned above were eventually phased out and replaced by the new Instrument for pre-accession assistance (IPA) in 2007.³⁹²

IV.3.1 Phare

Phare was initiated by the European Community through Council Regulation (EEC) No 3906/89 of 18 December 1989³⁹³ to support the economic reform process in two Central European countries. The acronym PHARE ("**P**oland and **H**ungary: **A**id for **R**estructuring of the **E**conomies") was kept even as the political and geographic scope of the programme was extended. Until December 2004, the Programme was amended thirteen times.³⁹⁴ Areas that were initially supported by Phare included privatization of state-owned enterprises, reform of the agricultural and social systems, infrastructure, public administration and institutional reforms.³⁹⁵ In 1996, Achten critically noted that the EU had not yet sufficiently supported the transformation process in the CEE "reform countries" and that its efforts were mostly limited to financing the EBRD and the Phare programme and to concluding association agreements.³⁹⁶

In March 1997, in response to the Copenhagen European Council on 21 and 22 June 1993 and in anticipation of the Luxembourg European Council on 12 and 13 December 1997, which invited applications for membership by CEE countries and launched the 2004 enlargement process, respectively, the EU Commission

³⁹¹ Morgades 2010, p.24

³⁹² *ibid.*

³⁹³ Council Regulation (EEC) No 3906/89 of 18 December 1989 on economic aid to certain countries of Central and Eastern Europe

³⁹⁴ *ibid.*

³⁹⁵ Leitner 1999, p. 7

³⁹⁶ Achten 1996, p. 2-6

elaborated "New Phare Orientations for Pre-Accession Assistance".³⁹⁷ In addition, in July 1997, the Commission published its Agenda 2000 with Opinions on the applications for EU membership the ten CEE candidate countries and an interim evaluation of the Phare Programme since 1989, including proposals to improve Phare management and financial performance and to re-focus its efforts on precise objectives and larger projects in order to avoid multiplication and fragmentation of projects.³⁹⁸

On the basis of the above findings and recommendations, Phare was now given an exclusive focus on the pre-accession priorities highlighted in the EU Road Maps and Accession Partnerships, aiming at strengthening public administrations and institutions to function effectively inside the EU, promoting convergence with the EU *acquis* and reduce the need for transition periods, and promoting Economic and Social Cohesion. Following the creation of SAPARD (Special Accession Programme for Agriculture and Rural Development) and ISPA (Instrument for Structural Policies for Pre-Accession), it formed one of the three EU-financed instruments of pre-accession assistance to the ten EU candidate countries in CEE (Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia). Until 2000, three countries of the Western Balkans (Albania, Bosnia and Herzegovina and The Former Yugoslav Republic of Macedonia) were also beneficiaries of Phare. However, as of 2001 the CARDS programme (Community Assistance to Reconstruction, Development and Stability in the Balkans) has provided financial assistance to the Western Balkans, now also covering Croatia and the Federal Republic of Yugoslavia.³⁹⁹

The financial volume of Phare was determined as part of the total annual budget of the EU, amounting to between € 500 million and more than € 1 billion annually in

³⁹⁷ EUROPA: European Commission: New Phare Orientations for Pre-Accession Assistance, COM(97) 112, 19 March 1997

³⁹⁸ EUROPA: European Commission: The Phare Programme – Annual Report 1997, COM (99) 234 final, 18 May 1999, p.3

³⁹⁹ EUROPA: European Commission: Enlargement: Financial assistance: Phare: Ch. 1 "What is Phare? – Introduction"; EUROPA: European Commission: Enlargement: How does it work?: Financial assistance: Phare; see also Schieffer 1998, p. 45-46

the 1990s (totalling € 10.3 billion in 1990-1999).⁴⁰⁰ Of these funds, 30% were earmarked for institution-building programmes to support the establishment of institutions similar to those in the EU and 70% were reserved for projects relating to energy supply and the environment, as well as the development of infrastructure and the health sector.⁴⁰¹ In 2000-2003, the annual Phare budget reached € 1.569⁴⁰², € 1.620, € 1.664⁴⁰³ and € 1.703 billion⁴⁰⁴, respectively.

Phare-sponsored projects primarily focused on those areas where the discrepancy to EU standards was greatest and were delivered through three types of programmes: National Programmes, Cross-Border Cooperation and Multi-Country & Horizontal Programmes.⁴⁰⁵

National Programmes

Most programmes supported by Phare were so-called "national programmes", which were agreed bilaterally with each partner country. For instance, in 1991-1992, 75-80% of Phare funds were used for national programmes.⁴⁰⁶ Likewise, in 1999-2003, national programmes amounted to € 782, € 853, € 1404, € 1415⁴⁰⁷ and € 1223 million⁴⁰⁸, i.e. between some 60 and 85% of the total budget. Phare support within these national programmes has traditionally focused on a number of key priority sectors in which reform and changes have been needed in the move from a centrally planned to a market-oriented system and to meet accession criteria.⁴⁰⁹ Gugerbauer explains that the scope of the national programmes was defined by

⁴⁰⁰ Leitner 1999, p. 6, 8; EUROPA: European Commission: The Phare Programme – Annual Report 1997, COM (99) 234 final, 18 May 1999, p.26

⁴⁰¹ Kaschnitz 1999, p. 12

⁴⁰² EUROPA: European Commission: Enlargement: How does it work?: Financial assistance: Phare: Phare Programme Types; Gugerbauer 2000, p. 231

⁴⁰³ EUROPA: European Commission: Enlargement: Financial assistance: Phare: 3. Phare Programme Types

⁴⁰⁴ EUROPA: European Commission: Enlargement: How does it work?: Financial assistance: Phare: Phare Programme Types

⁴⁰⁵ EUROPA: European Commission: Enlargement: Financial assistance: Phare: 3. Phare Programme Types
EUROPA: European Commission: Enlargement: How does it work?: Financial assistance: Phare: Phare Programme Types; Gugerbauer 2000, p. 230

⁴⁰⁶ EUROPA: European Commission: Third and Fourth Annual Reports from the Commission to the Council and the European Parliament on the implementation of Community assistance to the countries of East and Central Europe (PHARE) in 1992 and 1993, COM (95) 13 final, 20 February 1995

⁴⁰⁷ EUROPA: European Commission: Enlargement: Financial assistance: Phare: 3. Phare Programme Types

⁴⁰⁸ EUROPA: European Commission: Enlargement: How does it work?: Financial assistance: Phare: Phare Programme Types

the so-called "accession partnerships"⁴¹⁰ with the candidate countries, which typically consisted of only one single document and built the framework of Phare. In these agreements, the EU Council determined the principles, priorities, intermediate goals and conditions of the partnerships and for each country defined the priority areas where the candidate country was required to make progress and the way Phare was going to support these efforts.⁴¹¹ Thus, the typical Phare project cycle consisted of an accession partnership to determine the priorities of pre-accession assistance, an annual programme to define necessary projects and funds, the realization of programmes through concrete projects and the selection of projects through calls for proposals.⁴¹²

Interestingly, the offices responsible for planning, calling for proposals and distributing funds, including ministerial agencies and commissions, were not situated with the EU but in the capitals of the beneficiaries, although they worked very closely together with the local EU liaison offices.⁴¹³ These local Programme Co-ordination Units (PCUs) – sometimes also referred to as Programme Management Units⁴¹⁴ – were established for each programme to conduct project selection and definition, project monitoring and supervision and the dissemination of information, and in some cases, PCUs also had responsibility for contracting and payments. Support to the PCUs was provided through special technical assistance contracts. Gradually, the national programme PCUs were phased out (as were the multi-beneficiary programme PCUs) and the role of the Commission and its relations with the government ministries responsible strengthened.⁴¹⁵

⁴⁰⁹ EUROPA: European Commission: Enlargement: Financial assistance: Phare: 3. Phare Programme Types

⁴¹⁰ for details see EUROPA: European Commission: Enlargement: Financial assistance: Pre-accession strategy – Pre-Accession Instruments: Accession Partnerships

⁴¹¹ Gugerbauer 2000, p. 231

⁴¹² Leitner 1999, p.11

⁴¹³ Kaschnitz 1999, p.12

⁴¹⁴ Leitner 1999, p.13

⁴¹⁵ EUROPA: European Commission: Enlargement: Financial assistance: Phare: 3. Phare Programme Types

*Cross-Border Co-operation Programmes*⁴¹⁶

Since 1994, Phare cross-border cooperation (CBC) has served as a tool to finance cooperation between border regions of the Central and Eastern European countries, i.e. the Phare countries, and adjacent regions of the EU member countries. CBC programmes initially focused on regions with development problems or on areas where border conflicts had taken place. They were later complemented by the INTERREG programme, which was financed from the Structural Funds and supported co-operation between border regions in different EU Member States.⁴¹⁷

EU Commission Regulation 2760/98 continued and adapted cross-border assistance on the basis of integrated regional programmes by extending its applicability to include border regions between the candidate countries themselves, preparing a single joint programming document with a multi-annual perspective and establishing specific provisions concerning Joint Small Project Funds to allow for the selection and implementation of small projects at the local level in a certain number of areas.⁴¹⁸

In order to accommodate neighbourhood programmes covering the external borders of the enlarged Union in the period 2004 to 2006, it was first amended by Commission Regulation 1596/2002⁴¹⁹ and more recently by Commission Regulation 1822/2003 of 16 October 2003. The latter Regulation, which entered into force on 1 January 2004 and replaces Article 2(1) of Regulation 2760/98, stipulates that borders eligible for CBC funding include those between (a) Romania and Hungary, Romania and Bulgaria, Romania and Ukraine, Romania and Moldova, Romania and Serbia and Montenegro; as well as (b) Bulgaria and

⁴¹⁶ for details see EUROPA: European Commission: Enlargement: Financial assistance: Phare: List of Multi-Beneficiary Programmes: Cross-Border Cooperation Programmes

⁴¹⁷ Gugerbauer 2000, p. 231; EUROPA: European Commission: Enlargement: Financial assistance: Phare: 3. Phare Programme Types

⁴¹⁸ Commission Regulation (EC) No 2760/98 of 18 December 1998 concerning the implementation of a programme for cross-border cooperation in the framework of the PHARE programme; EUROPA: European Commission: Enlargement: Financial assistance: Phare: 3. Phare Programme Types

⁴¹⁹ Commission Regulation (EC) No 1596/2002 of 6 September 2002 amending Regulation (EC) No 2760/98 concerning the implementation of a programme for cross-border cooperation in the framework of the PHARE programme

Greece, Bulgaria and Romania, Bulgaria and Turkey, Bulgaria and the former Yugoslav Republic of Macedonia, Bulgaria and Serbia and Montenegro.⁴²⁰

The total annual budget allocated to Cross-Border Co-operation Programmes was € 180 million in 1998 and 1999 and € 163 million in 2000, representing a good 10% of the total operational Phare budget. Following the eligibility of borders between candidate countries, and in compliance with the budgetary comment providing that up to one third of the appropriation had to be earmarked for those borders, allocations for borders with the EU were reduced correspondingly.⁴²¹

Most CBC projects related to infrastructural development in the fields of transport and the environment, with the principle of a minimum project size of € 2 million being flexibly applied so that projects for less than € 2 million but a strong cross-border impact were also accepted. On most borders, Small Project Funds continued to operate or were established, using between 10 and 20 per cent of appropriations, allowing regional and local actors to become increasingly involved in the programme.⁴²²

*Multi-beneficiary programmes (Multi-country and horizontal programmes)*⁴²³

Phare assistance was also delivered through multi-beneficiary programmes, i.e. programmes supporting a range of countries, which were initiated at a meeting of national aid coordinators in 1991. These multi-country activities adopted a multi-annual programming perspective after the Essen Summit in 1994. An important feature of the multi-country programmes was their demand-orientation in order to allow the programmes to respond to the direct needs of Phare countries.⁴²⁴ There were two types of programmes: multi-country programmes, which were both

⁴²⁰ Commission Regulation (EC) No 1822/2003 of 16 October 2003 amending Regulation (EC) No 2760/98 concerning the implementation of a programme for cross-border cooperation in the framework of the Phare programme

⁴²¹ EUROPA: European Commission: Enlargement: Financial assistance: Phare: 3. Phare Programme Types

⁴²² EUROPA: European Commission: Enlargement: Financial assistance: Phare: 3. Phare Programme Types
⁴²³ for details see EUROPA: European Commission: Enlargement: Financial assistance: Phare: Phare Programme Types: The Phare Programme – List of Multi-Beneficiary Programmes

⁴²⁴ EUROPA: European Commission: Enlargement: Financial assistance: Phare: 3. Phare Programme Types
Gugerbauer 2000, p. 231

planned and implemented centrally, and horizontal programmes, which were planned centrally but implemented by the candidate countries. Horizontal programmes included projects focusing on nuclear safety and the introduction of an Extended Decentralised Implementation System (EDIS) in the candidate countries⁴²⁵ as well as on justice and home affairs.⁴²⁶

As a consequence of the reorientation of the Phare programme towards pre-accession in 1998 and in accordance with the Phare Guidelines 2000-2006, the focus of multi-country programmes was shifted towards priority pre-accession areas common to the candidate countries, such as environment, justice and home affairs and intellectual property, and more emphasis was placed on the provision of aid through national programmes. This also led to a merger of the non-national programmes, i.e. the multi-country and horizontal programmes, to the so-called multi-beneficiary programmes, which were significantly reduced in number in the late 1990s (down from a temporary high of 25-30 programmes to some 10 programmes). Moreover, it was decided that new multi-beneficiary programmes should only be established in cases where there was a specific justification for a multi-country approach, such as the need for consistency and cost-effective delivery mechanisms across all partner countries. These programmes were to be centrally managed by the Commission in partnership with the beneficiary countries, both at the programming and the implementation stages.⁴²⁷

As was the case with the national programmes, the separate Programme Co-ordination Units (PCUs) that had been established for the implementation of individual multi-beneficiary programmes were gradually phased-out.⁴²⁸

Asylum policy-related support

⁴²⁵ EUROPA: European Commission: Enlargement: Financial assistance: Phare: Phare Programme Types

⁴²⁶ EUROPA: European Commission: The Phare Programme – Annual Report 1998

⁴²⁷ EUROPA: European Commission: Enlargement: Financial assistance: Phare: 3. Phare Programme Types; EUROPA: European Commission: The Enlargement Address Book, September 2000, p.5-6

⁴²⁸ EUROPA: European Commission: Enlargement: Financial assistance: Phare: 3. Phare Programme Types

Phare support for justice and home affairs began in 1996 with the launch of a (multi-beneficiary) horizontal programme which provided ECU 11 million to support activities in combating organized and trans-national crime, judicial cooperation, immigration as well as asylum policies and procedures.⁴²⁹ In 1997, the JHA programme sponsored a ministerial conference on illegal immigration and training activities for police in the candidate countries⁴³⁰ as well as missions to identify JHA projects in Hungary, the Czech Republic and Slovakia⁴³¹. In 1998, it funded additional missions to identify JHA projects in Bulgaria, Estonia, Latvia, Lithuania, Poland, Romania, and Slovenia as well as 25 twinning projects, including three on asylum and immigration, new JHA horizontal projects on the transposition of the acquis in priority JHA areas, including asylum issues, and projects focusing on corruption and economic crime, customs reform and border management.⁴³² Based on the figures for JHA-related Phare funding in 1996 (€11 million)⁴³³ and 1998 (€35 million)⁴³⁴, it can be estimated that some €10-30 million were provided in 1997, amounting to some € 60-80 million in 1996-1998, i.e. not even one percent of the Phare total of €8.89 billion in 1990-1998⁴³⁵. This clearly shows that JHA matters were quite marginal in the Phare programme until 1998.

However, the Commission emphasized that the reorientation of Phare towards pre-accession *"also meant an increased focus on the area of justice and home affairs (JHA) in 1998. The Accession Partnerships accord particular importance to the area of justice and home affairs. Along with finance, agriculture and environment, justice and home affairs was one of the four sectors identified as priorities for support under the new twinning programme."*⁴³⁶

⁴²⁹ EUROPA: European Commission: The Phare Programme – Annual Report 1996, COM (98) 178 final, 24 March 1998, p.14

⁴³⁰ EUROPA: European Commission: The Phare Programme – Annual Report 1997, COM (99) 234 final, 18 May 1999, p.17

⁴³¹ EUROPA: European Commission: The Phare Programme – Annual Report 1998, p.11

⁴³² EUROPA: European Commission: The Phare Programme – Annual Report 1998, p.11-12; Phuong 2005, p.394

⁴³³ EUROPA: European Commission: The Phare Programme – Annual Report 1996, p.14

⁴³⁴ EUROPA: European Commission: The Phare Programme – Annual Report 1997, p.17

⁴³⁵ EUROPA: European Commission: The Phare Programme – Annual Report 1998, p.85

⁴³⁶ EUROPA: European Commission: The Phare Programme – Annual Report 1998, p.11

In the programming years 1998 – 2003, 256 Phare projects in support of the JHA acquis were conducted in the CEE countries, including Bulgaria and Romania, with an allocated Phare budget of €772 million and national co-financing of €570 million. The majority of the projects focused on external border control, Schengen and police cooperation and was provided mainly through investment for equipment and twinning.⁴³⁷ An external evaluation carried out in 2006 found that JHA-related Phare support in the first four or five programming years *"was undertaken without a real strategic vision, based on ad hoc perceptions of immediate needs"* and that *"Strategies came into play as programming tools only in 2002/2003, which was very late in the pre-accession process."*⁴³⁸ Moreover, despite the complexity of the JHA acquis and the candidate countries' difficulties in this area, no differentiated approach was applied regarding alignment or effective implementation, no special guidance was provided and ultimately the candidate countries' total JHA obligations were not adequately addressed.⁴³⁹

IV.3.2 Odysseus and ARGO

Odysseus

As already mentioned, the Odysseus programme of training, exchanges and cooperation in the field of asylum, immigration and crossing of external borders was established for the years 1998 to 2002 through Joint Action 98/244/JHA on 19 March 1998.⁴⁴⁰ It supported training measures, exchange measures as well as studies and research⁴⁴¹, which in the field of asylum focused on the coordinated application of the Dublin Convention of 15 June 1990 and close cooperation between competent national administrations and bodies.⁴⁴²

⁴³⁷ ECOTEC Research and Consulting: From Pre-Accession to Accession – Support to the Justice and Home Affairs Acquis. Thematic Evaluation Report of the European Union Phare Programme, January 2006, p.III, 59

⁴³⁸ ECOTEC 2006, p.I

⁴³⁹ *ibid.*

⁴⁴⁰ Joint Action of 19 March 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, introducing a programme of training, exchanges and cooperation in the field of asylum, immigration and crossing of external borders (Odysseus-programme) (98/244/JHA)

⁴⁴¹ EUROPA: Summaries of EU legislation: Other: Odysseus Programme; EUROPA: European Commission: Justice and Home Affairs: ODYSSEUS programme of training, exchanges and cooperation

⁴⁴² Joint Action of 19 March 1998 (98/244/JHA), Art.7

Interestingly, Odysseus was aimed at extending and strengthening not only existing cooperation between member states but also cooperation with candidate countries (referred to as "applicant countries" and "applicant States"), with the understanding that the extension of the cooperation with the candidate countries represented *"a measure to prepare for their accession"* and would *"help the applicant countries to attain the Union's standards in the fields covered by the programme."*⁴⁴³ Moreover, specific pre-accession subprogrammes were to be set up in the annual programmes, special attention was to be paid to *"transposal into national law and application by civil servants working in these fields"* and cooperation measures were to be targeted on *"improving knowledge of the Union acquis in order to help the applicant States to take the measures needed to enable their services to work in line with Union standards and rules"* and *"exchange of information on the legal and administrative institutional systems of the Member States and the applicant States."*⁴⁴⁴

The Commission was responsible for managing and monitoring the programme, including drawing up the annual programmes, assisted by the programme Management Committee, which consisted of representatives of the 15 Member States and was chaired by a representative of the Commission. Eligible projects had to be of "demonstrable interest to the Union" and involve at least two Member States and – in line with the pre-accession orientation of the programme – could also involve candidate countries, as well as other third countries. The projects, which were funded with a maximum of 60%, and exceptionally up to 80%, of total costs and subjected to an external evaluation, were carried out by a variety of domestic public and private bodies, with overall responsibility for implementation remaining with the EU Commission.⁴⁴⁵ After the funds reserved for the Odysseus

⁴⁴³ Joint Action of 19 March 1998 (98/244/JHA), Preamble, Art.1 (3); EUROPA: Summaries of EU legislation: Other: Odysseus Programme; EUROPA: European Commission: Justice and Home Affairs: ODYSSEUS programme of training, exchanges and cooperation

⁴⁴⁴ Joint Action of 19 March 1998 (98/244/JHA), Art.10

⁴⁴⁵ Joint Action of 19 March 1998 (98/244/JHA), Art.11-18; EUROPA: Summaries of EU legislation: Other: Odysseus Programme; EUROPA: European Commission: Justice and Home Affairs: ODYSSEUS programme of training, exchanges and cooperation

programme – €12 million for the period 1998-2002 – had already been exhausted in 2001, it was replaced by a new programme, called ARGO (see below).⁴⁴⁶

ARGO

The ARGO programme, established by Council Decision 2002/463/EC of 13 June 2002⁴⁴⁷ for the period 2002-2006, was intended to support administrative cooperation in the fields of external borders, visas, asylum and immigration through training activities, research and conferences, staff exchange, operational activities and development of best practices.⁴⁴⁸ Activities in the area of asylum were required to promote the development of a common asylum procedure, uniform rules on the recognition and content of refugee status and subsidiary forms of protection, fair asylum procedures and increased convergence in asylum decisions, as well as the development of resettlement and entry facilities, and legal means for admission on humanitarian grounds.⁴⁴⁹

Like Odysseus, ARGO co-financing covered up to 60 % (and exceptionally 80 %) of eligible projects costs, with the Commission, assisted by "the ARGO Committee", being responsible for management and implementation of the programme, including the preparation of an annual work programme, the selection of project proposals and the submission of annual implementation reports to the European Parliament and the Council.⁴⁵⁰ The ARGO programme was amended in December 2004 to better address border management deficits and the funds for

⁴⁴⁶ EUROPA: Summaries of EU legislation: Other: Odysseus Programme; EUROPA: European Commission: Justice and Home Affairs: ODYSSEUS programme of training, exchanges and cooperation

⁴⁴⁷ Council Decision of 13 June 2002 adopting an action programme for administrative cooperation in the fields of external borders, visas, asylum and immigration (ARGO programme) (2002/463/EC)

⁴⁴⁸ Council Decision 2002/463/EC of 13 June 2002, Art. 8; EUROPA: European Commission: Justice and Home Affairs: Freedom, security and justice: ARGO — EUROPA: European Commission: ARGO — asylum, visas, immigration and external borders; EUROPA: European Commission: Justice and Home Affairs: ARGO Programme

⁴⁴⁹ Council Decision 2002/463/EC of 13 June 2002, Art. 6

⁴⁵⁰ EUROPA: Summaries of EU legislation: Other: ARGO; EUROPA: European Commission: Justice and Home Affairs: Freedom, security and justice: ARGO — EUROPA: European Commission: ARGO — asylum, visas, immigration and external borders; EUROPA: European Commission: Justice and Home Affairs: ARGO Programme

2004 – which were part of its original total budget of €25 million – were *"substantially increased"*.⁴⁵¹

Compared to Odysseus, the role of the candidate countries (now referred to as such) was strengthened. For instance, Odysseus funding required the involvement of two member states, while the involvement of candidate countries was only an optional add-on. In contrast, projects eligible under the ARGO programme were proposed by the national agencies of one member state and had to involve either at least two other member states or *"another Member State and a candidate country, where the aim is to prepare for its accession"*, or another member state and a third country (Art. 10 (1) lit. a). In addition, the criteria for selection by the Commission of project proposals by the national agencies explicitly included *"the European dimension of the proposed action and/or scope for participation by the candidate countries"* (Art. 12 (5) lit. b). The Commission was also given the possibility to *"invite representatives from the candidate countries to information meetings after the ARGO Committee's meetings"* (Art. 13 (5)).⁴⁵²

IV.3.3 Budget line B7-667

Budget line B7-667 was created in 2001 as a direct follow-up of the Tampere European Council conclusions in order to fund asylum and migration-related projects in countries and regions of origin and transit. Its main objectives were combating illegal migration, protection of refugees in third countries, efficient asylum and migration management systems, promoting voluntary sustainable return and strengthening the link between migration and development. In 2001-2003, B7-667 was allocated a total of €57 million and supported 50 projects, which were mostly carried out by international organizations as well as NGOs and national authorities in the member states, up to a maximum of 80% project costs. While it did not directly focus on the countries joining the EU in 2004 and related pre-accession measures, it complemented EU activities in member states as well

⁴⁵¹ Council Decision of 13 December 2004 amending Decision 2002/463/EC adopting an action programme for administrative cooperation in the fields of external borders, visas, asylum and immigration (ARGO programme) (2004/867/EC), Preamble paras. 3-4; EUROPA: Summaries of EU legislation: Other: ARGO

as the 2004 candidate countries by targeting the EU periphery, including potential candidates for EU accession at a later stage. More specifically, B7-667 gave priority to the countries and regions which were the subject of the Action Plans developed by the High Level Working Group on Asylum and Migration and adopted by the Commission, including with which readmission agreements had been negotiated. While the focus was first on Afghanistan, the Maghreb and the Balkans, it later shifted to Sub-Saharan Africa and ultimately to Turkey, Russia and the CIS, Sri Lanka, Iraq, Philippines and Colombia.⁴⁵³

In 2004, the AENEAS programme for financial and technical assistance to third countries in the areas of migration and asylum⁴⁵⁴ succeeded the preparatory actions under budget line B7-667. Originally allocated a budget of €250 million for 2004-2008, it was shortened to three years in 2006, when projects amounting to some €120 million had been financed.⁴⁵⁵ On the basis of Art. 16 of the EU Regulation establishing the Development Co-operation Instrument (DCI), AENEAS was replaced by the thematic programme for cooperation with third countries in the areas of migration and asylum with a budget of around €384 million for the period 2007-2013.⁴⁵⁶

⁴⁵² Council Decision 2002/463/EC of 13 June 2002

⁴⁵³ Centre for Strategy and Evaluation Services: Evaluation of Preparatory Actions B7-667 – Cooperation with Third Countries in the Area of Migration, Final Report, November 2007, p.ii; EUROPA: European Commission: Justice and Home Affairs: Freedom, security and justice: Cooperation with third countries in the area of migration

⁴⁵⁴ Regulation (EC) No 491/2004 of the European Parliament and of the Council of 10 March 2004 establishing a programme for financial and technical assistance to third countries in the areas of migration and asylum (AENEAS)

⁴⁵⁵ EUROPA: European Commission: EuropeAid: Aeneas programme. Programme for financial and technical assistance to third countries in the area of migration and asylum. Overview of projects funded 2004 – 2006, p.2; Centre for Strategy and Evaluation Services 2007, p.14

⁴⁵⁶ EUROPA: European Commission: EuropeAid: How we work: How we finance aid: Dci: Migration and asylum thematic programme

V. Conclusions and Outlook

Two questions lay at the core of my thesis: First, what were the central stages of the EU asylum policy harmonization and enlargement processes until 2004, including the main policy, legal and financial instruments developed by the EU to achieve a common asylum policy and promote common asylum standards? Second, was EU assistance in the asylum field provided in the candidate countries before this happened in the then EU member states and had the standards promoted in the candidate countries indeed not even been established yet within the EU?

This chapter will summarize the main findings of my research concerning the above questions. It describes two background factors that shaped EU asylum policy, i.e. asylum trends and international refugee law, then suggests a four-generation model for describing EU asylum policy harmonization until 2004. Next it provides a three-staged account of the 2004 EU enlargement to Central and Eastern Europe and gives an overview of the EU's most important asylum-related programmes in that period. Finally, it addresses the concurrence of asylum policy-related EU programmes and related standard-setting in the member states and the candidate countries.

V.1 Background

Asylum policy is influenced by a range of external factors which guide and limit the ability of the EU and member state governments to design their own policies. These include trends in the movement and reception of refugees and asylum-seekers in the EU as well as international and regional refugee law as applicable to the EU and its member states.

The number of refugees worldwide has multiplied from 1.6 million in 1960 to 10.5 million in 2010, with significant fluctuations, and a noteworthy peak of 17.8 million

refugees in 1992.⁴⁵⁷ Changes in the overall number of asylum-seekers in industrialized countries, including the EU, more or less reflected the above trends in the number of refugees. For instance, in the EU-15, asylum applications increased sharply from the 1980s until 1992 (to 673,947 applications in 1992), fell rapidly thereafter (to 260,243 in 1996), rose again in 1998-2002 (to 414,444 in 2002) and have stabilized since with slight variations at a level comparable to the late 1980s (between 180,960 and 241,000).⁴⁵⁸

The figures for the "new" member states are marginal in comparison, with a total of some 80,000 asylum applications lodged in the ten 2004 enlargement countries⁴⁵⁹ in the 1990s and about 300,000 in the following decade.⁴⁶⁰ Interestingly, from 2003 to 2004, in contrast to the decrease in asylum applications in Western European countries, the 10 new EU member states experienced a slight increase and some even recorded the highest number of asylum-seekers in their history⁴⁶¹, which may at least partially be due to their accession to the EU and their consequently increased attractiveness for asylum applicants.

Starting in the 1980s and early 1990s, the receiving states in Europe reacted to the fact that asylum-seekers in Western Europe had increasingly come from outside Europe and, in particular, to the sharp rise in the number of asylum applications by implementing restrictive measures.⁴⁶² However, perceptions in European countries of the burden they had and continue to face do not correspond

⁴⁵⁷ UNHCR: Total Refugee population by country of asylum, 1960-2010 & Total Refugee population by origin, 1960-2010; UNHCR News Stories: World Refugee Day: UNHCR report finds 80 per cent of world's refugees in developing countries, 20 June 2011; see also Castles/Loughna 2005, p.42

⁴⁵⁸ UNHCR: Asylum Applications in Industrialized Countries: 1980-1999, 15 November 2001, p.145, 155; UNHCR Statistics: Asylum levels and trends in industrialized countries 2004, 1 March 2005, p.8; UNHCR: Asylum levels and trends in industrialized countries 2005, 16 March 2006, p.9; UNHCR: Asylum Levels and Trends in Industrialized Countries 2010, 28 March 2011, p.15; see also Angenendt 1999, p.19-20; Brübach 1997, p.38; Castles/Loughna 2005, p.42, 63- 65; Gibney/Hansen 2005, p.71-73; Muus 1997, p.5

⁴⁵⁹ Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia

⁴⁶⁰ UNHCR: Asylum Applications in Industrialized Countries: 1980-1999, 15 November 2001, p.156; UNHCR Statistics: Asylum levels and trends in industrialized countries 2004, 1 March 2005, p.8; UNHCR: Asylum levels and trends in industrialized countries 2005, 16 March 2006, p.9; UNHCR: Asylum Levels and Trends in Industrialized Countries 2010, 28 March 2011, p.15

⁴⁶¹ UNHCR Statistics: Asylum levels and trends in industrialized countries 2004, 1 March 2005, p. 3-4

⁴⁶² Benedikt 2002, p.89-94; Betz 2002, p.205-207; Castles/Loughna 2005, p.39-41; Gibney/Hansen 2005, p.70-71, 75-76; Muus 1997, p.1-8; Lavenex 1999, p.1-2; Löhr 2010, p.9-10; Loescher 1992, p.2; Menz 2009, p.3; Richmond 1994, p. XV; Rudge 1992, p.94, 102; Van der Klaauw 1997, p.19-21

with the actual share of refugees and asylum seekers they have been receiving. Since the early 1990s, UNHCR and other observers have kept reiterating that the poorer, less secure countries hosted between 70 and 80% of the total number of refugees and asylum seekers worldwide, while only a small proportion of refugees and asylum seekers came to the affluent, highly developed, industrialized countries.⁴⁶³ For instance, in 2002, the entire EU-15 accommodated only 1.9 million, or 15%, of the world's asylum-seekers and refugees.⁴⁶⁴ In June 2011, the UNHCR still bemoaned the *"deep imbalance in international support for the world's forcibly displaced [...] at a time of rising anti-refugee sentiment in many industrialized [countries]"*.⁴⁶⁵

Contrary to the dynamic of the above developments, the principal instruments of international refugee law have not changed much in the past decades. The 1951 Geneva Refugee Convention (GRC), adopted in the wake of the mass displacements of World War II, was amended only once, by the New York Protocol of 1967⁴⁶⁶, which lifted the geographic and temporal limitations of the Convention. Although the GRC 1951 has been complemented by a number of international and regional legal instruments, including the 1984 UN Convention against Torture, as well as, at European level, the 1950 European Convention on Human Rights and the 1977 Council of Europe Declaration on Territorial Asylum, it still serves as the principal tool for refugee protection. All industrialized countries have signed the GRC 1951, the 1967 Protocol and CAT and integrated their provisions into their national asylum legislation, and all EU member states have signed the ECHR and some have even included the right to asylum in their national constitutions, like France, Germany, Greece, Italy, Portugal and Spain.⁴⁶⁷

⁴⁶³ Castles/Loughna 2005, p.42-52, 63; Hathaway 1997, p.xxi-xxii; Nuscheler 2004, p.56-57; Rudge 1992, p.98; UNHCR Press Releases: Developing countries host most refugees, according to new statistical yearbook from UNHCR, 8 November 2002; UNHCR News Stories: World Refugee Day: UNHCR report finds 80 per cent of world's refugees in developing countries, 20 June 2011

⁴⁶⁴ Nuscheler 2004, p.57

⁴⁶⁵ UNHCR News Stories: World Refugee Day: UNHCR report finds 80 per cent of world's refugees in developing countries, 20 June 2011

⁴⁶⁶ UN Protocol Relating to the Status of Refugees. Adopted by UN General Assembly Resolution 2198 (XXI) on 16 December 1966 and signed by the President of the General Assembly and by the Secretary-General on 31 January 1967

The central elements of the GRC 1951 are the provision of an authoritative definition of the term "refugee" and the introduction of the "non-refoulement" principle, which have provided the legal basis for granting protection to millions of people worldwide. The Convention has a number of flaws, though, such as its narrow definition focusing on the persecution of individuals for specific reasons, which excludes many contemporary *de facto* refugees. On the other hand, the "refugee" definition has been criticized as vague and giving the signatories wide discretion in its interpretation. In addition, the GRC 1951 does not contain any detailed provisions concerning the refugee status determination process. As a consequence, the countries receiving asylum-seekers have for a long time been trying to individually establish related criteria and procedural standards, with the Council of Europe having been the first regional structure to set legal standards relating to asylum at European level.⁴⁶⁸ More recently, however, the most persistent and politically most significant endeavour to set common standards for refugee protection and harmonize asylum policy and practice at (sub-)regional level was undertaken by the EU.

⁴⁶⁷ Castles/Loughna 2005, p.40; Weiss, p.10

⁴⁶⁸ UN Convention Relating to the Status of Refugees 1951; Fungueiriño-Lorenzo 2002, p.60; Linskeseder 2010, p.110-111; Nuscheler 2004, p.184-188, 195, 199; also see Vedsted-Hansen 1997, p.31-37

V.2 Evolution of a common EU asylum policy and the 2004 enlargement

Fungueiriño-Lorenzo postulates that cooperation in the areas of visa, asylum and immigration policy must be viewed in the context of the overall European integration process. Based on what "most authors" agreed on, she identifies three stages of European integration – from the beginnings of the European idea to the Treaties of Rome (middle ages to 1957), the evolution of the European Community (1957-1992) and the post-Maastricht era (since 1992). In a similar vein, she distinguishes several phases or "generations" of visa, asylum and immigration policy cooperation – before Maastricht (1970s-1992), after Maastricht (1992-1997) and after Amsterdam (since 1997). In other words, since the adoption of the Maastricht Treaty the European integration and asylum policy harmonization processes have run more or less parallel.⁴⁶⁹ In contrast, in the context of the adoption of the Amsterdam Treaty, the EU Commission portrayed three different phases in "The gradual establishment of an area of freedom, security and justice": "The beginnings of cooperation (1975-85)", "From the Single Act to the Treaty of Maastricht (1986-92)", and "Institutionalising cooperation in the fields of justice and home affairs: Title VI of the Treaty on European Union (1992-98)".⁴⁷⁰ In 2004, Nuscheler described three slightly different eras: "From Schengen to Dublin to Maastricht", "From Maastricht to Amsterdam" and "From Amsterdam to Tampere to Brussels".⁴⁷¹

While all these classifications have their merits in describing the intensification of asylum-related cooperation in the EU until 2004, with Fungueiriño-Lorenzo's three-generation model certainly being the most comprehensive, they all have their flaws. For instance, Nuscheler neglects developments before the mid-1980s, and the first phase as proposed both by Fungueiriño-Lorenzo and the Commission fail to include the 1960s, which e.g. saw the adoption of a Declaration of 25 March 1964 (78/1225) on preferential treatment of recognized refugees regarding work-

⁴⁶⁹ Fungueiriño-Lorenzo 2002, p.4

⁴⁷⁰ EUROPA: Summaries of EU legislation: Institutional affairs: Building Europe through the treaties: The Amsterdam treaty: a comprehensive guide: The gradual establishment of an area of freedom, security and justice

⁴⁷¹ Nuscheler 2004, p.178-180

related entry into other EEC member states.⁴⁷² Furthermore, whereas the Commission names the adoption of the 1986 SEA as the beginning of the second phase, Nuscheler completely disregards the Commission's White Paper of 1985 and the SEA, and Fungueiriño-Lorenzo's model does not treat the years leading up to the Maastricht Treaty as different from the 1970s and early 1980s and thus fails to adequately reflect the considerable changes in the dynamic of the EU asylum policy harmonization process in the mid-1980s. In contrast, and in line with Weidenfeld/Wessels, I consider the beginning of intensified harmonization efforts regarding European asylum, immigration and visa policy to be marked by the publication of the EU Commission's White Paper on the Internal Market and the adoption of the Schengen Agreement in 1985.⁴⁷³ Hence, I suggest a four-generation model of the EU asylum policy harmonization process until 2004 that is almost identical to the classification developed by Sigona in 2005.⁴⁷⁴ It comprises a first "early beginnings" generation (1960s-1985), a second "post-White Paper and post-Schengen" generation (1985-1992), a third "post-Maastricht" generation (1992-1997) and a fourth "post-Amsterdam" generation (1997-2004). The latter coincides to a large extent with what the EU today refers to as the "first phase" in establishing the Common European Asylum System (CEAS).⁴⁷⁵

V.2.1 First generation (1960s-1985)

According to Fungueiriño-Lorenzo, first-generation cooperation in asylum matters was the result of political integration as an end in itself rather than the reflection of an intention to address factual issues.⁴⁷⁶ As a consequence, it occurred mostly at inter-governmental level in reaction to external stimuli, such as threats to security from international terrorism, or changing internal conditions, such as the establishment of the Internal Market, and was marked by its ad-hoc and largely non-binding nature and its lack of transparency.⁴⁷⁷ Similarly, Hanisch emphasizes

⁴⁷² Brübach 1997, p.19-20

⁴⁷³ Weidenfeld/Wessels 2002, p.74

⁴⁷⁴ see Sigona 2005, p.115-116

⁴⁷⁵ EUROPA: European Commission: Home Affairs: Policies: Asylum: Asylum – Building a common area of protection and solidarity

⁴⁷⁶ Fungueiriño-Lorenzo 2002, p.63

⁴⁷⁷ Fungueiriño-Lorenzo 2002, p.63; Brübach 1997, p.19-20; Schieffer 1998, p. 21, 65

that due to the original orientation of the EC towards economic integration and the creation of a peace zone in Europe, migration policy at first only played a rudimentary role and concerned questions of freedom of movement and of the rights of citizens within the EC, but not migration from abroad.⁴⁷⁸

Brübach highlights the very few instances of asylum-related cooperation in that early period, including the mentioned 1964 Declaration (78/1225) and a 1971 Regulation (1408/71) relating to social security access of Convention refugees.⁴⁷⁹ Hanisch again refers to the Paris summit of 1974, where the harmonization of legal provisions concerning foreigners and the abolition of border controls were discussed for the very first time, as a milestone in that direction.⁴⁸⁰

V.2.2 Second generation (1985-1992)

In the 1980s, asylum policy harmonization slowly gathered speed, initially still as a secondary aspect of economic integration, yet being pursued with more urgency as the number of asylum applications continued to rise. The European Commission published its White Paper "Completing the Internal Market" in 1985⁴⁸¹, which also included recommendations related to asylum law that were largely taken up in the Single European Act (SEA) in 1986. However, neither the Commission's proposals nor the SEA aimed at a general harmonization of asylum law and asylum procedure design, which firmly remained in the remit of the member states.⁴⁸² The European Parliament repeatedly took the initiative and adopted a report on the state of asylum law in the EC in 1986 and a number of asylum policy-related resolutions from 1987 onwards.⁴⁸³

⁴⁷⁸ Hanisch 2003, p.46-47

⁴⁷⁹ Brübach 1997, p.19-20

⁴⁸⁰ Hanisch 2003, p.46-47

⁴⁸¹ EUROPA: European Commission: Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28-29 June 1985), COM(85) 310, June 1985

⁴⁸² Brübach 1997, p.21, 104; Fungueiriño-Lorenzo 2002, p.12-14, 19-20; Schieffer 1998, p. 65-67, 89-93; Hanisch 2003, p.47; Nuscheler 2004, p.178

⁴⁸³ Brübach 1997, p.20

Two important asylum and migration-related treaties – the 1985 Schengen Agreement and the 1990 Schengen Convention abolishing (Schengen-area) internal border checks and introducing compensatory measures, such as a common visa regime, improved police and judiciary cooperation and an information exchange system – had to be adopted outside the EC framework due to opposition from a number of EC members.⁴⁸⁴ Ultimately, political misgivings following the collapse of the Communist regimes in Central and Eastern Europe delayed the implementation of the Schengen provisions until 1995.⁴⁸⁵

The Schengen provisions were complemented by the 1990 Dublin Convention determining the EC member state responsible for processing asylum applications, which also entered into force only after a considerable delay, in September 1997. Neither the Schengen agreements nor the Dublin Convention, however, aimed at the harmonization of material asylum law but rather focused on technical and procedural issues.⁴⁸⁶ In 1992, Rudge found that the Schengen Agreement and the Dublin Convention had been drafted *"largely behind closed doors"* and also cites criticism by NGOs that these treaties might violate the Geneva Refugee Convention and even the right to seek asylum itself. In addition, he highlighted the fact that whereas the jurisprudence on asylum claims differed substantially between member states, under the two treaties they were required to accept each other's decisions, including a negative asylum decision. More generally speaking, he was worried that *"the European states have approached the law-making task regarding refugees and asylum-seekers from an administrative and bureaucratic direction with little regard to the special human rights requirements"* and *"with little democratic scrutiny or parliamentary control"*.⁴⁸⁷ This view was reiterated, among others, by Van der Klaauw in 1997, who pointed to NGO criticism and a possible lack of conformity of policy decisions in Western Europe with international refugee law, and also by Goodwin-Gill, who found that in some contexts *"open democratic*

⁴⁸⁴ Brübach 1997, p.22-27; Weidenfeld/Wessels 2002, p.74; Fungueiriño-Lorenzo 2002, p.14-15, 20-21; Plümper 2003, p.72-73

⁴⁸⁵ Hanisch 2003, p.48

⁴⁸⁶ Weidenfeld/Wessels 2002, p. 74; Fungueiriño-Lorenzo 2002, p.27; Hanisch 2003, p.48; Nuscheler 2004, p.178

⁴⁸⁷ Rudge 1992, p.104-105

processes have been sidelined, and rules and policies have been developed, usually in secret, by non-accountable bureaucratic elites."⁴⁸⁸

Overall, national interests and different legal and administrative traditions in the member states as well as an ECJ judgment of July 1987⁴⁸⁹, which reaffirmed member state competence vis-à-vis the Commission concerning national legislation on foreigners, obstructed all efforts to harmonize asylum and migration policy and ultimately meant that, before the entry into force of the Maastricht Treaty in 1993, no initiative by a Community body led to a legally binding outcome.⁴⁹⁰

V.2.3 Third generation (1992-1997)

The adoption of the Maastricht Treaty in 1992 was the first real step towards a common legal EU regime in the areas of visa, asylum and immigration policy. However, Fungueiriño-Lorenzo observes that cooperation measures taken on the basis and as a consequence of the new EU Treaty were no expression of a liberal or forthright approach to asylum matters but rather represented minimum substantive legal standards. The strong interest of member states in maintaining their national sovereignty resulted in mostly non-binding agreements and the retention of intergovernmental decision-making, with an independent but non-exclusive right of initiative by the Commission, and to the almost total exclusion of the European Parliament and the European Court of Justice. Overall, third-pillar cooperation on the basis of the Maastricht Treaty, including on asylum policy, suffered from a marked lack of efficiency, transparency and democracy.⁴⁹¹

In the same vein, Nuscheler notes that the gradual asylum and migration policy "harmonization" taking place in the EU at the beginning of the 1990s still did not

⁴⁸⁸ Goodwin-Gill 1997, p.11; Van der Klaauw 1997, p.19-20

⁴⁸⁹ European Court of Justice: Federal Republic of Germany and others v Commission of the European Communities. Joined cases 281, 283, 284, 285 and 287/85. Judgment of the Court of 9 July 1987

⁴⁹⁰ Nuscheler 2004, p.177; Brübach 1997, p.22; see also Fungueiriño-Lorenzo 2002, p.12-14; Schieffer 1998, p. 22

⁴⁹¹ Fungueiriño-Lorenzo 2002, p.47-53, 63-64; see also Linskeseder 2010, p.64-65

mean "communitarization" of these policy areas. Rather, it was mainly achieved through intergovernmental agreements and in difficult matters often represented the least common denominator, which primarily consisted of the closing of the common external borders.⁴⁹²

In 1997, Van der Klaauw observed that *"It was only in early 1994 that EU governments started to consider seriously a more positive approach to harmonising essential aspects of procedures and criteria for determining refugee status. Yet a truly common European asylum policy developed within a coherent, consistent and transparent framework and subject to supranational judicial and parliamentary control, as desired by many observers, remains a long-term objective."*⁴⁹³ In the same year, Goodwin-Gill observed critically that the European states still had not been "noticeably successful" in developing a refugee protection approach at the policy level and had refused regional institutions an effective role in refugee and migration matters. Furthermore, in some contexts, *"open democratic processes have been sidelined, and rules and policies have been developed, usually in secret, by non-accountable bureaucratic elites."*⁴⁹⁴

Overall, JHA-related cooperation on the basis of the Maastricht Treaty was less than impressive, with only nineteen joint measures, seven agreements and two joint positions being adopted within the third-pillar framework between the entry into force of the EU treaty in November 1993 and early 1997.⁴⁹⁵

V.2.4 Fourth generation (1997-2004)

The 1997 Amsterdam Treaty served to overcome some of the main deficits of the previous period of asylum policy cooperation, thus marking the beginning of the "fourth generation" of cooperation in this policy area. In particular, it announced the establishment of an "area of freedom, security and justice" and moved key

⁴⁹² Nuscheler 2004, p.177

⁴⁹³ Van der Klaauw 1997, p.22

⁴⁹⁴ Goodwin-Gill 1997, p.11

⁴⁹⁵ Schieffer 1998, p.81, 147; Van der Klaauw 1997, p.22

JHA policy areas, including asylum and immigration policy, from the third (intergovernmental) to the first (Community) pillar and incorporated the non-EU Schengen Agreement into European law. It also strengthened the role of the Commission and extended the JHA-related competencies of the European Parliament and the European Court of Justice.⁴⁹⁶

Assessments of the Amsterdam Treaty vary significantly, from calling it a breakthrough, milestone and important step, to regarding it as generally rather disappointing and including few innovations. Others describe it as being a disappointment and a success at the same time because, on the one hand, it brought about important changes in Justice and Home Affairs and addressed previous shortcomings such as intergovernmental decision-making, lack of democracy and non-binding agreements. On the other hand, it only amended and complemented the Maastricht provisions instead of completely replacing them, as had only originally been envisaged, and it did not undertake any of the reforms necessary for the next round of EU enlargement. Moreover, as the member states were still reluctant to give up too much power in a policy field so closely linked to national sovereignty, a number of structural peculiarities remained, including the ongoing limitation of European Court of Justice jurisdiction and the retention of the unanimity principle.⁴⁹⁷

In addition to the institutional changes mentioned above, the Amsterdam Treaty set up a five-year deadline for establishing minimum standards in a wide range of asylum-related areas, including reception conditions, refugee status determination and temporary protection. The 1998 Vienna Action Plan further defined priority objectives and detailed short and long term measures. The 1999 Tampere European Council reaffirmed the objectives and timetable of the Amsterdam Treaty and the Vienna Action Plan and stressed the need for a "Common European Asylum and Migration Policy", a call which was reiterated at numerous

⁴⁹⁶ Fungueiriño-Lorenzo 2002, p.60-64, 100, 126-127, 203-204

⁴⁹⁷ EUROPA: European Commission: Justice and Home Affairs: The Charter of Fundamental Rights: The EU and Fundamental rights – The wider context; Fungueiriño-Lorenzo 2002, p.57, 60-64, 100, 126-127, 203-204; Linskeseder 2010, p.66; Nuscheler 2004, p.176, 180; Schieffer 1998, p.223-225; Topan 2001, p.88

European Council meetings in the following years. On the basis of these agreements, seven pieces of secondary EU legislation⁴⁹⁸ relating to asylum were adopted in the first five years after the Tampere summit: the Decision to establish a European Refugee Fund in September 2000⁴⁹⁹, a Regulation concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention in December 2000, a Directive on temporary protection in the event of a mass influx in July 2001⁵⁰⁰, a Directive laying down minimum standards for the reception of asylum seekers in January 2003⁵⁰¹, a Regulation determining the Member State responsible for examining an asylum application in February 2003⁵⁰², a Directive on the right to family reunification in September 2003, and a Directive laying down minimum standards for the qualification and status of non-EU nationals and stateless persons as refugees or as persons who otherwise need international protection in April 2004.⁵⁰³

The process of drafting these instruments was, at times, lengthy and cumbersome, owing to *"differences of opinion regarding the scope of the instruments under discussion and Member States' unwillingness to adopt measures which exceed the scope of their national asylum legislation."*⁵⁰⁴ The adoption of the multi-annual Hague Programme, five years after Tampere, by the Brussels European Council on 4-5 November 2004 marked the next stage in the establishment of an "area of freedom, security and justice". Due to the heightened importance of security-related measures since 9/11, it set a new tone, insisting that matters such as illegal migration, human trafficking and the fight against terrorism and organized

⁴⁹⁸ EUROPA: About the EU: Basic information: Decision-making in the European Union

⁴⁹⁹ Council Decision of 28 September 2000 establishing a European Refugee Fund (2000/596/EC)

⁵⁰⁰ 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

⁵⁰¹ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers

⁵⁰² 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

⁵⁰³ EUROPA: European Commission: Home Affairs: Policies: Asylum – Building a common area of protection and solidarity

⁵⁰⁴ Martenson 2003, p.4

crime needed to be addressed more effectively.⁵⁰⁵

V.2.5 EU enlargement

The 2004 EU enlargement process began in 1989, following the collapse of the socialist governments in Central and Eastern Europe. Within only a few years, the EU member states, keen to maintain political stability and support the democratization and modernization process in the CEE countries by means of economic assistance (mainly through the EBRD and Phare), gradually overcame their initial reluctance to consider the accession of these countries to the EU. Already in April 1990, the European Council in Dublin decided to begin a debate on Association Agreements (later called "Europe Agreements") with the "emerging democracies" and in 1991, the Maastricht European Council opened the door for EU membership applications by states whose governments were founded on the principle of democracy. The 1993 Copenhagen European Council formally determined that the Associated Countries could become EU members if they fulfilled a number of preconditions, the so-called "Copenhagen criteria", such as respect for human rights – a requirement that was reiterated in the 1997 Amsterdam Treaty – and the adoption of the EU *acquis communautaire*, including the growing body of asylum-related EU legislation.⁵⁰⁶ In this context, Menz cites the obligation of newly acceding countries to implement the entire *acquis* in the migration and asylum field as an example of top-down Europeanization, as they had not been involved in the elaboration of these regulations.⁵⁰⁷ In addition, in the early 1990s, a number of high-level political meetings were held and readmission agreements negotiated with CEE officials in order to ensure the return of asylum-seekers, thus effectively transferring the "asylum burden" to the CEE countries.⁵⁰⁸

⁵⁰⁵ Council of the European Union: Presidency conclusions of the Brussels European Council (4 and 5 November 2004), 14292/1/04 REV 1, 8 December 2004

⁵⁰⁶ Achten 1996, p. 2-6; Ireland Department of Foreign Affairs 2001, p. 15-16; Schieffer 1998, p. 43, 46; Woyke 2002, p. 9--12

⁵⁰⁷ Menz 2009, p.19

⁵⁰⁸ Leuthardt 1994, p.58-59, 68-75, 110-111; Phuong 2005, p. 393-395, 397, 403-405

Of the countries joining the EU in 2004, Cyprus and Malta submitted formal applications for membership in 1990, while all CEE countries followed suit between 1994 and 1996.⁵⁰⁹ A pre-accession strategy comprising three main elements – Europe Agreements (i.e. upgraded Association Agreements), the Phare Programme and a "structured dialogue" between member states and candidate countries – was developed for the first time at the EU Council summit in Essen in December 1994. By 1996, Europe Agreements had either been signed with or were in force in all ten CEE countries.⁵¹⁰ The awareness that JHA issues should be included in the accession negotiations gradually increased, particularly as the candidate countries were bound to become more attractive as countries of destination once they had acceded to the EU. Nonetheless, for a long time, there was much uncertainty regarding exactly which asylum provisions had to be implemented by the candidates countries.⁵¹¹

The Phare Programme, which had been gradually extended to include all CEE candidate countries and began to support JHA-related activities in 1996, was given an exclusive pre-accession focus in 1997 and complemented in 1999 by the SAPARD and IPSA programmes. It was the main financial pre-accession instrument to CEE and the only one covering asylum projects in CEE.⁵¹² In addition to Phare, Odysseus (1998-2001) and ARGO (2002-2006) financially supported JHA-related activities in the candidate countries.

On the basis of the Commission's Agenda 2000, the 1997 Luxembourg European Council decided on an enhanced pre-accession strategy for all ten CEE candidate countries, with Accession Partnerships as a new instrument. At that summit, the Council also paved the way for accession negotiations with the six countries deemed by the Commission to be ready at that time, i.e. Cyprus, the Czech Republic, Estonia, Hungary, Poland and Slovenia (the "Luxembourg candidates"),

⁵⁰⁹ Ireland Department of Foreign Affairs 2001, p.16; Schieffer 1998, p. 46

⁵¹⁰ EUROPA: European Commission: Enlargement: Financial assistance: Pre-accession strategy – Pre-Accession Instruments; Woyke 2002, p. 12

⁵¹¹ Anagnost 2000, p.386; Phuong 2005, p.391, 393-396

⁵¹² EUROPA: European Commission: Enlargement: How does it work?: Financial assistance: Phare; Woyke 2002, p.12, 17

which were extended after the 1999 Helsinki European Council to include Bulgaria, Latvia, Lithuania, Malta, Romania and Slovakia (the "Helsinki candidates"). In line with the EU Commission's Strategy Paper on Enlargement and the "Road Map" for the accession negotiations, annual progress reports were published by the EU Commission on the progress of the candidate countries in fulfilling the Copenhagen criteria. Progress in the asylum field was assessed in chapter 24 (out of 31 chapters) of the EU's "screening reports" (later called "progress reports").⁵¹³

By 2001, much progress had been made concerning most chapters, while the most contentious policy areas, such as Justice and Home Affairs as well as Agriculture and Taxes, still had to be negotiated.⁵¹⁴ Finally, a Treaty of Accession was signed in Athens on 16 April 2003 with eight Central and Eastern European countries (the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia) and two Mediterranean countries (Cyprus and Malta), entering into force on 1 May 2004. JHA matters featured very prominently in the Act of Accession annexed to the Accession Treaty, with detailed obligations of the new member states relating to the Schengen acquis and recently adopted EU asylum legislation.⁵¹⁵ Financial assistance to the ten 2004 accession countries was gradually phased out until 2006.⁵¹⁶

⁵¹³ EUROPA: Press Room: Press Releases: EU enlargement and the Accession Partnerships, MEMO/98/21, 27 March 1998; EUROPA: European Commission: Enlargement: Financial assistance: Pre-accession strategy – Pre-Accession Instruments; Anagnost 2000, p.380-400; Ireland Department of Foreign Affairs 2001, p.16-17; Woyke 2002, p.12, 17

⁵¹⁴ Woyke 2002, p.17-18

⁵¹⁵ EUROPA: The European Union at a glance: The history of the European Union; EUROPA: European Commission: Enlargement: The policy: Countries on the road to EU membership; Treaty of Accession 2003; Act of Accession 2003

⁵¹⁶ EUROPA: The European Union at a glance: The history of the European Union; EUROPA: European Commission: Enlargement: The policy: Countries on the road to EU membership

V.3 Asylum policy-related EU programmes

V.3.1 Overview

Between 2000 and 2005, I acted as an "expert" in elaborate EU- and UNHCR-sponsored asylum projects in the then EU candidate countries, while seemingly observing substantial deficits and great discrepancies in the asylum systems of many then EU member states. Furthermore, efforts by the EU to address these shortcomings appeared to me inadequate and the EU approaches towards member states and candidate countries contradictory and not well concerted. I even had the impression that EU assistance in the asylum field was provided in the candidate countries before this happened in the then EU member states and that the standards promoted in the candidate countries had not even been established yet within the EU.

As my research has shown, these personal observations to a large extent correspond with the facts. To begin with, while a common EU asylum policy had been a long time in the making, with very few noteworthy legal and political steps taken in the 1970s and 1980s, its evolution accelerated only after the 1992 Maastricht Treaty and in particular in the wake of the 1997 Amsterdam Treaty, the Vienna Action Plan and the 1999 Tampere European Council. The first financial support measures for member states in the asylum field were established through two Joint Actions in July 1997 (funded with €23.75 million)⁵¹⁷, which were extended in 1998⁵¹⁸ (€26.75 million), unified in 1999 (29.3 million)⁵¹⁹ and finally transformed into the European Refugee Fund in 2000 (€216 million for 2000-2004)⁵²⁰. These instruments were complemented by the Odysseus programme in 1998 (€12 million

⁵¹⁷ Joint Actions 97/477/JHA and 97/478/JHA of 22 July 1997; Gadermaier 2006, p.45

⁵¹⁸ Joint Actions 98/304/JHA and 98/305/JHA of 27 April 1998; Gadermaier 2006, p.45

⁵¹⁹ Joint Action 99/290/JHA of 26 April 1999

⁵²⁰ Council Decision 2000/596/EC of 28 September 2000

for 1998-2002⁵²¹) and the ARGO programme in 2002 (€25 million reserved for 2002-2006, and "substantially increased" in 2004)⁵²².

In contrast, the EU enlargement process to Central and Eastern Europe only began with the fall of the CEE socialist regimes in 1989 but then quickly picked up speed. The first EU assistance programmes were launched that same year and continuously extended in terms of scope and financial volume. In 1996, a Phare horizontal programme on Justice and Home Affairs was created in 1996 to support, inter alia, activities related to asylum policies and procedures.⁵²³ The Phare programme was given a pre-accession focus in 1997⁵²⁴, which resulted in a marked increase in support of JHA-related projects from 1998 onwards.⁵²⁵ Whereas Phare funding in 1996-1998 was limited to a few programmes to the value of an estimated €60-80 million, in 1998-2003, 256 JHA-related projects were funded in the CEE countries, including Bulgaria and Romania, with an allocated Phare budget of €772 million.⁵²⁶

V.3.2 Concurrence and standard-setting

On the basis of the above, one can conclude that financial support in the asylum field was introduced for the benefit of the candidate countries (in 1996) *before* it was begun in the EU member states (in 1997).

Moreover, there is evidence that supports my initial assumption that the "common" standards promoted through EU asylum projects in the candidate countries until 2004 had not been established yet within the EU. For instance, in 1992, Rudge emphasized that *"while the processes of harmonization of border controls and*

⁵²¹ Joint Action 98/244/JHA of 19 March 1998; EUROPA: Summaries of EU legislation: Other: Odysseus Programme; EUROPA: European Commission: Justice and Home Affairs: ODYSSEUS programme of training, exchanges and cooperation

⁵²² Council Decision 2002/463/EC of 13 June 2002; Council Decision 2004/867/EC of 13 December 2004; EUROPA: Summaries of EU legislation: Other: ARGO

⁵²³ EUROPA: European Commission: The Phare Programme – Annual Report 1996, p.14

⁵²⁴ EUROPA: European Commission: New Phare Orientations for Pre-Accession Assistance, COM(97) 112, 19 March 1997

⁵²⁵ EUROPA: European Commission: The Phare Programme – Annual Report 1998, p.11

⁵²⁶ ECOTEC Research and Consulting: From Pre-Accession to Accession – Support to the Justice and Home Affairs Acquis. Thematic Evaluation Report of the European Union Phare Programme, January 2006, p.III, 59

access to the territory are now quite advanced, there is no comparable harmonization of the criteria whereby asylum claims are assessed" nor of reception conditions in the European Community.⁵²⁷ In 1997, Van der Klaauw observed that the EU had only begun to harmonise refugee status determination criteria and procedures and that a coherent common EU asylum policy remained a long-term objective⁵²⁸, while Goodwin-Gill admonished that the European states still refused regional institutions an effective role in refugee and migration matters.⁵²⁹

In October 1997, the Amsterdam Treaty (Art. 63) laid down the EU's commitment to establish "minimum standards" in a number of areas, including reception of asylum seekers, qualification of third country nationals as refugees, asylum procedures and temporary protection, which clearly implies that no such standards were in place at the time.⁵³⁰ In a similar vein, the Commission found that when the ERF was created the EU *"did not possess a coherent body of legislation in the field of asylum"*.⁵³¹ In March 2000, it stated that substantive asylum law and asylum procedures had not yet been "approximated" and that recognition rates as well as receptions conditions varied considerably between member states.⁵³² Furthermore, the Laeken European Council in December 2001 bemoaned the slow progress in relation to a "true" common asylum and immigration policy⁵³³ and the Seville and Thessaloniki European Councils in June 2002 and 2003, respectively, asserted the Council's determination to speed up the implementation of the Tampere programme.⁵³⁴ As late as December 2003, the Brussels European Council highlighted "the persisting political obstacles" delaying the conclusion of the

⁵²⁷ Rudge 10992, p.107

⁵²⁸ Van der Klaauw 1997, p.22

⁵²⁹ Goodwin-Gill 1997, p.11

⁵³⁰ Treaty of Amsterdam (97/C 340/03), Official Journal C 340, 10 November 1997

⁵³¹ European Commission: Proposal for a Council Decision establishing the European Refugee Fund for the period 2005-2010 (presented by the Commission), SEC(2004) 161, COM(2004) 102 final, 12 February 2004, p.4

⁵³² European Commission: Working paper "Revisiting the Dublin Convention", SEC (2000) 522 final, 21 March 2000, para. 24

⁵³³ Presidency conclusions of the Laeken European Council (14 and 15 December 2001), SN 300/1/01 REV 1, para. 38

negotiations on the asylum qualification and procedures directives.⁵³⁵ In February 2004, the Commission observed that the use of the ERF's national co-financing had neglected *"the general goal of European convergence on asylum policy"*.⁵³⁶

This inconsistency in asylum matters within the EU was also reflected in its assistance to the CEE candidate countries. For instance, an external evaluation of the Phare programme commissioned by the Commission found that, until 2002/2003, JHA-related Phare support lacked a coherent strategy and failed to adequately address the candidate countries' difficulties and full range of obligations in the JHA area.⁵³⁷ Only in June 2004 was the Council satisfied with the progress achieved and called for the launch of the next phase of the process of building a common area of freedom, security and justice⁵³⁸, which was presented in the form of the Hague Programme in November 2004.⁵³⁹

In other words, Council and Commission documents and other available sources suggest that the bulk of asylum-related assistance to the 2004 enlargement countries lacked consistency and was provided at a time when the EU itself had only just begun the process of establishing common asylum standards in earnest.

⁵³⁴ Council of the European Union: Presidency conclusions of the Seville European Council (21 and 22 June 2002), 13463/02, 24 October 2002, para. 26; Council of the European Union: Presidency conclusions of the Thessaloniki European Council (19 and 20 June 2003), 11638/03, 1 October 2003, para. 8

⁵³⁵ Council of the European Union: Presidency conclusions of the Brussels European Council (12 and 13 December 2003), 5381/04, 5 February 2004, para. 23

⁵³⁶ European Commission: Proposal for a Council Decision establishing the European Refugee Fund for the period 2005-2010 (presented by the Commission), SEC(2004) 161, COM(2004) 102 final, 12 February 2004, p.4

⁵³⁷ ECOTEC 2006, p.I

⁵³⁸ Council of the European Union: Presidency conclusions of the Brussels European Council (17 and 18 June 2004), 10679/2/04 REV 2, 19 July 2004, paras. 7-10

⁵³⁹ Council of the European Union: Presidency conclusions of the Brussels European Council (4 and 5 November 2004), 14292/1/04 REV 1, 8 December 2004, paras. 14-20

V.4 Outlook

My main motivation for choosing the research topic of this thesis was to achieve a better understanding of a political process in which I had participated, albeit in a minor role. As a consequence, the major part of my research was dedicated to issues such as the main phases of EU asylum policy harmonization and EU enlargement to Central and Eastern Europe, which have already been the subject of research by numerous political scientists, legal scholars and other observers. In that respect, this paper did not generate any new findings.

However, it helps fill a gap insofar as it scrutinized for the first time the concurrence of asylum policy-related EU programmes and standard-setting in the member states and the 2004 accession countries, finding a number of contradictions and paradoxes in the EU approach to internally and externally establishing common asylum standards.

It is surprising that the EU was ready to support asylum projects in the candidate countries before it did so in the member states. After all, there is usually much competition between the member states for EU financial assistance and it seems to be against their own interest to start giving away funds to third countries before securing a share for themselves. It is also remarkable that, in the name of the EU, bureaucrats and experts were able to promote asylum standards that had not yet been established in the EU. Especially given the sometimes widely divergent asylum laws and practices in the member states, the frequent trainings and exchanges of officials funded by the EU must have resulted in more, not less, confusion and uncertainty about which standards were to be applied.

These findings could serve as a springboard for related future research. To begin with, the conclusions of this paper could be challenged and reassessed. Yet the underlying research questions could also be refined and deepened. For instance, it would be interesting to study why asylum-related model provisions and practices that were not even shared in the EU were promoted as common EU standards in the candidate countries. Another question worthy of research is how much and in

which areas the established and evolving asylum standards in the candidate countries and the member states differed.

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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

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VII. Appendix

VII.1 Abstract (in English)

This study analyzes the process of EU asylum policy harmonization through 2004 against the backdrop of the EU enlargement process to Central and Eastern Europe. Following a brief overview of international and regional refugee law and trends concerning the number of refugees and asylum-seekers worldwide, it traces the central stages of these processes, including the outcomes of the major intergovernmental conferences, and scrutinizes the main policy, legal and financial instruments developed by the EU until 2004 to achieve a common asylum policy and promote common asylum standards within the EU and in the 2004 accession countries.

It proposes a four-generation model for describing EU asylum policy harmonization until 2004, provides a three-stage account of EU enlargement to Central and Eastern Europe up to 2004 and gives a summary of the EU's most important asylum-related programmes in that period. In addition, it shows that, paradoxically, EU assistance in the asylum field had been provided in the candidate countries before this happened in the then EU member states and that the standards promoted in the candidate countries were all but established within the EU.

The research findings presented in this study were arrived at through a document analysis of EU and UNHCR documents as primary sources, while academic and other texts served as reference and secondary sources. At a theoretical level, this paper is based on the assumption that no single explanatory model but rather only a combination of elements drawn from a number of theories, including (post-) neofunctionalism, liberal intergovernmentalism and the multi-level governance approach, can adequately explain the dynamics and the course of EU asylum policy harmonization.

VII.2 Abstract (in German)

Die vorliegende Diplomarbeit analysiert den Harmonisierungsprozess der EU-Asylpolitik bis 2004 vor dem Hintergrund des EU-Erweiterungsprozesses nach Zentral- und Osteuropa. Nach einem kurzen Überblick über internationales und regionales Flüchtlingsrecht und die Entwicklung der Zahl der Flüchtlinge und AsylwerberInnen weltweit werden die zentralen Stadien dieser beiden Prozesse, einschließlich der Ergebnisse der großen Regierungskonferenzen, nachgezeichnet und die wichtigsten politischen, rechtlichen und finanziellen Instrumente untersucht, die von der EU bis 2004 entwickelt wurden, um eine gemeinsame Asylpolitik zu verwirklichen und gemeinsame Asylstandards innerhalb der EU und in den Beitrittsländern des Jahres 2004 zu fördern.

Dabei werden ein Vier-Generationen-Modell zur Beschreibung der Harmonisierung der EU-Asylpolitik bis 2004 vorgestellt, eine dreistufige Übersicht über die EU-Erweiterung nach Zentral- und Osteuropa bis 2004 präsentiert und die wichtigsten Asylprogramme der EU in diesem Zeitraum zusammenfassend dargestellt. Darüber hinaus wird gezeigt, dass paradoxerweise EU-Förderungen im Asylbereich in den Beitrittsländern bereitgestellt wurden, bevor dies in den damaligen EU-Mitgliedstaaten geschah, und dass die dabei in den Beitrittsländern vermittelten Standards innerhalb der EU noch keineswegs etabliert waren.

Die in dieser Studie präsentierten Forschungsergebnisse basieren auf einer Dokumentenanalyse von EU- und UNHCR-Dokumenten als Primärquellen, während wissenschaftliche Beiträge und andere Texte als weiterführende und Sekundärquellen dienten. Auf der Theorieebene beruht diese Arbeit, die sich nicht im Detail mit Theorien der Europäischen Integration auseinandersetzt, auf der Vorannahme, dass nicht ein einzelnes Erklärungsmodell, sondern nur eine Kombination von Elementen unterschiedlicher Ansätze, einschließlich des (Post-) Neofunktionalismus, des Liberalen Intergouvernementalismus und des Multi-Level-Governance-Ansatzes, Dynamik und Verlauf des Harmonisierungsprozesses der EU-Asylpolitik angemessen abzubilden vermag.

VII.3 Curriculum Vitae

Persönliche Daten

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Bildungsweg

März 2003 – April 2012 Wiederaufnahme des **Diplom-Studiums der Politikwissenschaft, Universität Wien** im März 2012, Abschluss voraussichtlich im April 2012

Oktober 1991 – Jänner 2000 **Studium der Politikwissenschaft mit Fächerkombination Entwicklungspolitik, Universität Wien;**
 Abschluss 1. Studienabschnitt am 12. Jänner 1995

Oktober 1995 – Juni 1996 **Austauschstudium an der University of California, Irvine, USA,**
 ausgezeichneter Studienerfolg (Dean's Honors List)

Juli 1994 Joseph A. Schumpeter **Summer School in Politics and Law, Universität Czernowitz, Ukraine**

Juli – August 1993 **International Summer Programm der Universität Wien (Politik, Wirtschaft und Völkerrecht)** in Strobl am Wolfgangsee, ausgezeichneter Studienerfolg (Diploma)

Oktober 1989 – Juni 1991 **Studium der Rechtswissenschaften, Universität Graz;** Abschluss 1. Studienabschnitt am 1. Februar 1991

Juni 1989 **Matura** am BG Oeversee (neusprachlicher Zweig mit Französisch), Graz

Berufserfahrung

seit Juli 2005 Seit April 2010 **Policy Adviser**, davor Lobbying-Koordinator sowie Länder-, Themen- und Web-Koordinator, **Amnesty International Österreich, Wien**

- **inhaltliche Koordination**
- **Koordination des Web-Auftritts und Aufbereitung von Inhalten** für amnesty.at
- **Lobbying Parlament und Bundesministerien** zu europäischen und internationalen Menschenrechtsthemen
- **Hintergrundrecherchen und inhaltliche Grundlagenarbeit**

April 2000 – Juni 2005 **Researcher/Trainer, Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD)**, bis Dezember 2001 Teil der Österreichischen Forschungsförderung für Entwicklungshilfe (ÖFSE), seit Jänner 2002 beim Österreichischen Roten Kreuz (ÖRK), Generalsekretariat/Abteilung Recht und Migration, Wien

- **Länderrecherche** Naher Osten, Nordafrika, Süd- und Ostasien, Kaukasus
- Länderspezifische Betreuung einer **Online-Datenbank**
- **Regionalkoordination** und Durchführung von **Training & Assessment Missions** in Zentral- und Osteuropa (im Rahmen von UNHCR- und EU-Programmen)
- Koordination und Durchführung von **Schulungen** sowie Entwicklung von Trainingskonzepten

November 1999 – März 2000	Koordinationsassistentz und Berichterstattung für den fünften UNHCR/ACCORD COI Workshop für Asylbehörden aus Zentral- und Osteuropa (Dez. 1999, Bratislava, Slowakei), UNHCR , Wien
Oktober 1996 – Juni 1999	Koordination der Institutsbibliothek des Instituts für Politikwissenschaft, Universität Wien
September – Dezember 1997	Praktikum beim United Nations International Drug Control Programme (UNDCP), Europe and the Middle East Section (EME), Wien
Oktober 1992 – Juni 1995	Tutor der Institutsbibliothek des Instituts für Politikwissenschaft, Universität Wien
Juni 1992	Koordinationsassistentz für das Symposium anlässlich des 100. Jahrestages der Österreichisch-Koreanischen Beziehungen, Wien
März – Juni 1992	Forschungsassistentz für eine Studie zum Vergleich europäischer politischer Systeme in den 1920ern and 30ern, Universität Wien
Oktober 1989 – Juni 1991	Mitarbeit in der StudentInnenvertretung der Fakultät für Rechtswissenschaften, Universität Graz

Kurse/Schulungen

September 2010	Ausbildung zur Sicherheitsvertrauensperson, Wifi Wien
Februar – April 2009	Fernkurs "The UN Human Rights Council" – Human Rights Education Association (HREA), Boston
Juni 2004 – März 2005	Komplexe Moderationssituationen, Professionelle Seminargestaltung mit e-Learning, Rhetorik I – ÖRK-Bildungszentrum, Wien
März – Juli 2003	Offizierskurs für Führungskräfte des ÖRK – ÖRK-Bildungszentrum, Wien
April 2001	A Comprehensive Overview of the 1951 Refugee Convention Refugee Definition – HHC/COLPI, Budapest, Ungarn

Sprachkenntnisse

Deutsch	Muttersprache
Englisch	Ausgezeichnet in Wort und Schrift
Französisch	Grundkenntnisse
Spanisch	Grundkenntnisse