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The evolution of the European regulation of asylum: from Geneva to Amsterdam.

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The Evolution of the European Regulation of Asylum: from Geneva to Amsterdam

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"It would be a disgrace for you, for all
Of Athens, to let refugees - and those
Your cousins too - to be dragged off."[1]

Introduction

Western Europe has a long and not unsophisticated tradition of offering protection or refuge to those tortured or persecuted in other lands. However, asylum, though historically founded in humanitarian principles, is imbued with political and economic considerations which can fundamentally affect the possibility of receiving refuge.[2] The post-World War II chaos, destruction and massive displacement prompted a response that resulted in legal mechanisms and procedures being established to introduce an effective means of overriding, or at least tempering, the influence of economic and political factors as countries accepted onto their territories the millions of victims of Europe's tragedies. These legal mechanisms, a combination of the declaration of the right to *seek* asylum,[3] accompanied by definitions and procedures of the 1951 Convention Relating to the Status of Refugees ('Geneva Convention') (with 1967 Protocol)[4] constitute the basis of the law regulating asylum on an international level. They have been incorporated into the domestic law of many contracting states and serve to govern the remedies and entitlements of those who seek asylum.[5] These international legal instruments are of fundamental importance to individuals who claim asylum throughout the world. It is the provisions of the Geneva Convention that generally govern the law in this area[6] and determine *who* may be considered entitled to

[1] *The Heracleidae*, cited in R. Gorman, 'Poets, Playwrights and the Politics of Exile and Asylum in Ancient Greece and Rome', (1994) 16 *International Journal of Refugee Law*, at p. 414.

[2] Gorman recounts how the political consequences of accepting an asylum seeker and issues such as the wealth of the supplicant all fed into the policy in ancient Greece. There is marked similarity with asylum in modern Europe, as the case of Al Massari (*Mohammed Al-Massari v. Immigration Officer and Secretary of State for the Home Department*, 5 March 1996) in the UK demonstrated.

[3] Article 14, Universal Declaration on Human Rights: 'Everyone has the right to seek and to enjoy any other country's asylum'.

[4] Geneva Convention, Article 1A (2): 'the term refugee shall apply to any person who […] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a 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 […]'.

[5] Not many states adopt a higher standard of protection or wider definitions than those provided in these conventions. However, see P. Barcroft, 'Immigration and Asylum Law in the Republic of Ireland', (1995) 7 *International Journal of Refugee Law* 84.

[6] See further G. Goodwin-Gill, *The Refugee in International Law* (Clarendon Press, 1996); E. Ferris, *Beyond Borders, Refugees, Migrants and Human Rights in the Post-Cold War Era* (WCC Publications, 1993).

make a claim, the basis upon which such a claim may be made and additional rights such as that of the 'non-refoulement' (the prohibition of expulsion or return).[7] This internationally accepted mediation of the granting of refuge or protection to non-nationals is, however, in a state of widely acknowledged uncertainty; the temporal and territorial origins of the law have been gradually exposed as inadequate for the changed circumstances of the end of the twentieth century. The weaknesses are well documented;[8] they include the restricted definition of refugee, the limited grounds upon which persecution may be based that take no account of inhumane situations that may have non-political origins, the confined and individualistic premise of the Geneva Convention and the gender bias.[9] These inherent flaws and increasing inappropriateness of the legal instruments of protection are accompanied by the radically altered conditions under which refuge or protection may now be needed; from identifiable, individual victims of war to mass, group displacement resulting from famine or disease, for example. Finally, although over-hyped for political reasons in many refugee receiving countries, there has, in the last ten to fifteen years, been a marked increase in the number of people attempting to resort to the mechanisms of asylum in order to be allowed to live outside their own country.[10] There is a resulting acknowledgement of a 'new realism' and a rethinking of the basis of asylum that permeates both academic analysis as well as political practice and policies.[11] This re-conceptualisation of the basis upon which states ought to or are prepared to accept obligations to receive onto their territory a persecuted non-national is much influenced by the global post-Cold War political climate, with the imperatives of the recent past that generously guaranteed asylum for many in the West now gone and replaced largely by domestically determined factors. Asylum, however, is inherently an international issue and at this level it is in a state of ideological and political flux. This is reflected in the extent to which individual states, signatories of the legally binding Conventions, have increasingly adopted laws that restrict the procedural and substantive rights of asylum seekers.

This then is the background against which a previously low-key policy issue has become one of the major political and constitutional issues affecting the future of the European Union. Asylum and migration (particularly illegal migration) have come to occupy a centre stage position, along with other matters considered as vital for the future of the EU (such as enlargement and EMU). EU-level asylum policy is today

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[7] Article 33 of the Geneva Convention states: '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.

[8] See, among others, J. Dacyl, 'Europe Needs a New Protection System for Non-Convention Refugees', (1995) 7 *International Journal of Refugee Law* 578; T. Einarsen, 'Mass Flight: the Case for International Asylum', (1995) 7 *International Journal of Refugee Law* 551; G. Goodwin-Gill, 'Asylum: the Law and Politics of Change', (1995) 7 *International Journal of Refugee Law* 1, and 'Who to Protect, How…, and the Future?' (1997) 9 *International Journal of Refugee Law* 1; A. Shacknove, 'From Asylum to Containment', (1993) 5 *International Journal of Refugee Law* 516.

[9] See, among others, J. Bhabha, 'Legal Problems of Women Refugees', (1993) 4 *Women: A Cultural Review*; T. Spijkerboer, *Women and Refugee Status: beyond the public/private distinction* (1994).

[10] UN High Commissioner for Refugees (UNHCR), *The State of the World's Refugees* (1995), at p. 20.

[11] See Goodwin-Gill (1995), note 8 above, and C.J. Harvey, 'Restructuring Asylum: recent trends in United Kingdom Asylum Law and Policy', (1997) 9 *International Journal of Refugee Law* 60.

accepted as a matter of prime importance at the highest level of negotiations for Treaty reform of the Union[12], whereas it was previously confined to the little-publicised domain of Member States' administrative practice. It may be surprising, at a superficial level, that the essentially economic EC should concern itself with asylum matters. The EU, of course, can no longer be simplistically considered an economic entity; asylum and migration issues serve to bring sharply into focus several of the most vital and conflicting interests influencing the future direction of the Union. These include the role of state sovereignty and the claims on the right to maintain border control in the face of increasing EC/EU competencies, domestic economic stability, issues of culture, identity and race, and questions on who should belong in the Union.[13] This, if asylum at international level is in a state of flux, this is mirrored in an intense and concrete manner in regional policy in the EU. The Union Member States are bound to abide by the standards of international law, but - both individually (in domestic law changes in the area) and collectively as the EU - they have been responsible for the initiation of many of the most restrictive and exclusionary changes in the law of asylum in recent years. The Union is setting an identifiable trend in the curtailment of the scope and content of the concept of *its* ancient tradition of granting asylum; "In short, Europe has been a leader in devising control and jurisdictional constraints, and a failure in solutions".[14]

This paper examines, firstly, the emergence of "new asylum" in Europe, a "region [that] seems deliberately to have denied itself the capacity to deal with the population displacements of today".[15] New policy (safe countries of origin), new laws (re-admission treaties), even a new language (the concept of "manifestly unfounded" claims, for example) now govern the management of asylum in Western Europe. In less than 50 years, widespread endorsement of asylum has ceded to a political imperative to curtail its exercise, with the developments under the Maastricht Treaty (Treaty on European Union) representing a major contribution to this restrictive climate. This transition has been dominated by individual states' agendas and restrictive preferences.

The Road to Maastricht

That there would be mention of immigration and asylum in an EC/EU founding Treaty would have been unthinkable even a few years before Maastricht.[16] However, the pillar structure proved to be the ideal vehicle for the formalisation of pre-existing practices without much of a concession towards the trappings of communitarianism. To a certain extent, some positive signs can be observed in the Maastricht

[12] See the outcome in the Treaty of Amsterdam.
[13] See further Dacyl, note 8 above.
[14] Goodwin-Gill (1995), note 8 above, p. 16.
[15] *Ibid.*
[16] Cases 281, 283-5, 287/85, *Germany and Others v. Commission* [1987] ECR 3203, in which Member State resistance to Commission ascription of competence in this field was demonstrated in a challenge before the Court of Justice.

developments, in that they represent a level of maturity in law and policy-making in this area. But so many of the features of the so-called *ad hoc* phase in Member State co-operation on asylum and related issues that preceded the TEU continue to permeate even after Maastricht that this is questionable. Migration issues and a state's powers of controlling them represent the core of national sovereignty. From that point of view, it is difficult to see why such issues could have been allowed by the Member States to enter the European Union (EU) domain at all. However, the logic of the internal market to a certain extent dictated this development and the way in which it has been carried out represents an awkward concession to Member State preferences. The Member States were willing to bring their activities in this area within the Union structure for the sake of increased efficiency and control, but without compromising their sovereignty in any respect.

This compromise has inevitable consequences for those persons affected by policy-making in this area. Immigration, asylum and related policies were, under TEU, effectively being formulated at Union level without parliamentary input. Policy-making in other areas at EC/EU level is generally safeguarded by the full use of the institutional framework. In the case of immigration and asylum this does not function in the usual manner, as the third pillar and its output are outside the jurisdiction of the European Court of Justice (ECJ). Therefore, people affected fell into a juridical and institutional gap, affected by measures adopted in a process untouched by parliamentary or representative sanction to any extent. The developing "law" in this area infringes and has the potential to infringe many areas traditionally closely watched by civil liberties lawyers. Yet, ironically or perhaps intentionally, because the lawmakers removed their meetings to the European level, they escape censure and involvement at a national level, and have excluded EC/EU level judicial control; a clever exercise in anti-democratic tactics that deepens considerably the so-called democratic deficit and makes a mockery of the very laudable principles declared in the TEU itself: democracy; respect for human rights; and the rule of law.

Given the often-repeated litany about Europe being "swamped" or "flooded" with immigrants/refugees, it is clearly established that, of the 18 million refugees in the world, Western Europe provides asylum to only 5% of them. Whence, therefore, the invective that has characterised European-level discussions of the "refugee problem" during recent years? It was fuelled mainly by an increase in the numbers seeking asylum in EU states between 1989 and 1991/2, principally from Eastern Europe and the states of former Yugoslavia. These real increases served to justify the changes in asylum laws in several EU states[17] and to foster an attitude that lent support to the restrictive activities of the Ad Hoc Group. It is ironic that the first real refugee

[17] On Germany in particular, see C. Wisskirchen, 'Germany: Assault on the Constitutional Right to Asylum', Parts 1 and 2, (1994) 8 *Immigration and Nationality Law and Practice*, 136. For a brief but succinct account of changes throughout Europe since 1988, see the Council of Europe Parliamentary Assembly Report on the Right of Asylum (Rapporteur M. Franck), March 1994, Doc. 7052.

crisis faced by Western Europe since the enactment of the 1951 Geneva Convention should have been met with seemingly panic-driven, fragmentary short-term action and anti-refugee measures.

Despite increases, the actual numbers are far from being of the enormity faced by countries of the South (such as Bangladesh or Zaire) and, in fact, have begun to decrease since 1992/3, at the time of the JHA enactments.[18] The restrictions imposed in the EU have knock-on effects for those countries that share its land borders.[19] Many of the nationals of such states would have been welcomed as refugees prior to 1989 by virtue of their communist governments, underlining the flexible nature of the politics of asylum and the intimate connection between world politics and economics, and the position of the asylum-seeker.[20]

While it is undoubtedly the case that it is "[…] the reality that, from now on, asylum and immigration policy will be determined at European level […]"[21], this has been a gradual development over recent years only. Immigration and asylum control were traditionally strictly protected by the Member States from any interference by the Community, being matters of national sovereignty. However, since the mid-1980s, there was a concerted attempt by the Member States to ensure more effective control by co-ordinating law and practices. There had been vague attempts since the mid-1970s to establish a Community *and* Member State programme, but this ended dramatically when five Member States brought an action in the European Court of Justice to annul a Commission Decision that purported to deal with aspects of migration policy.[22] The establishment of a single market and the abolition of internal frontiers meant that it was obvious to those Member States most interested in controlling entry into their territory that, unless the same level of control was exercised by all the Member States, less strict policies in one state would have inevitable consequences

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[18] COM (94) 23, note 9 above, Annex 1, Table 5, p. 12, where it can be seen that the number of asylum seekers in five Member States decreased in 1992, and in nine states in 1993; for example: the UK, 1991 - 57,700, 1993 - 22,350; France, 1991 - 47,380, 1992 - 27,000. Germany, however, though witnessing a decrease between 1992 and 1993, continued to attract the largest numbers of asylum seekers: 1992 - 438,191, 1993 - 322,599.

[19] The Council of Europe has expressed concern that the policies of some of its Member States (namely the 15 EU states) will affect the position in some of the other states: Council of Europe Parliamentary Assembly Recommendation 1236 (1994), on the Right of Asylum.

[20] See G. Gilbert, 'Tackling the Causes of Refugee Flows', in S. Spencer (ed.), *Strangers and Citizens* (1994, IPPR), at p. 18. The position in Europe can be compared with that in the USA, where, in 1965, the law was changed to provide that "[…] the refugee needed to have fled from a Communist or Communist-dominated country [… thus re]defining a refugee as someone fleeing Communism'; M. O'Connor Hurley, 'The Asylum Process: Past, Present and Future', (1992) 26 *New England Law Review* 995, at p. 1007. She further examines the dichotomy arising when an asylum seeker alleges persecution in a state that is supported by the potential asylum-granting state; 'In reference to Salvadorian claims, the complicating factor seems to be that the United States financially supports a military operation that engages in documented human rights violations. Rendering asylum to those fleeing from El Salvador would be an admission by the United States that it backs a government that violates the human rights of its citizens. Once again, ideology is allowed to play into the asylum system' (at p. 1022).

[21] C.A. Groenendijk, 'The Competence of the EC Court of Justice with respect to Inter-Governmental Treaties on Immigration and Asylum', (1992) 4 *International Journal of Refugee Law* 531, at p. 533.

[22] Cases 281/85, 283-285/85 and 287/85, *Re the Immigration of Non-Community Workers: Germany and others v. Commission* [1987] ECR 3203. See Advocate General Mancini's Opinion there for a brief history of the attempt at joint collaboration, and also G. Callovi, 'Regulation of Immigration in 1993: Pieces of the European Community Jig-Saw Puzzle', (1992) 26 *International Migration Review* 353.

for the others. Thus, rather than a desire motivated by positive communitarian principles, it was a nationally-inspired protectionism that led to European-level co-operation between the Member States.

A process of inter-governmental Member State co-operation began in 1986 under the UK presidency of the Council of Ministers. This developed to take the form of regular meetings of civil servants and their ministers, and became known as the Ad hoc Immigration Group.[23] Between 1986 and November 1993 (when the TEU entered into force), this forum, which operated outside the framework of the EC, was responsible for initiating several important developments in immigration and asylum policy. These included the Dublin Convention (1990)[24] and resolutions on aspects of asylum control and on family reunification. The work of the Ad hoc Group was criticised for the secrecy that surrounded their meetings and negotiations, as well as the exclusion of the European Parliament and the European Court of Justice from the process, and the uncertain legal status surrounding many of the documents that issued from the Group. During the same period of time, there were other developments on immigration and asylum control at both national and European level: restrictive changes in the asylum and immigration laws in many EC states as well as the entry into force of the Schengen Agreements.[25]

Primary immigration having been gradually effectively terminated in most of the Member States, the activities of the Ad Hoc phase carefully targeted the two remaining avenues for entry into the Community states: family unification and asylum. It appears to have been of little concern that there are international and national human rights guarantees that affect these areas. It is worthwhile recalling that all of these developments were carried out in relative secrecy with, in many instances, policies activated that might not have escaped attention had they been formulated at national level. The status of the measures was never clear (public international law, *travaux préparatoires*?), but in general the methodology employed involved incorporation of developments at Ad Hoc level being implemented by means of national legislation, a process not dissimilar to the incorporation of EC Directives. In terms of family unification, the initiative included waiting periods and conditions of sufficient funds being available.[26]

Administrative structures ensured the continued development of policies; there were five well-established sub-groups that involved civil servants meeting regularly to formulate policy. Ministers met twice a year and

[23] The name may have derived from the connection with the Ad Hoc Committee of Experts on the legal aspects of territorial asylum, refugees and stateless persons (CAHAR), established in 1977 under the aegis of the Council of Europe; there was a significantly less "ad hoc" aspect to the EC body, meeting as it did forty to fifty times a year (see Council of Europe Information Document, *Existing For a for Inter-Governmental Co-operation on Asylum, Refugee and Migration Problems in the European Region*, Strasbourg, October 1993).

[24] The Convention determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities, 1990 (see (1991) 30 *International Legal Materials* 425).

[25] Convention Applying the Schengen Agreement of 14 June 1985 (between some but not all of the Member States of the EEC) on the gradual abolition of checks at their common borders (see (1991) 30 *International Legal Materials* 147).

[26] Resolution on the harmonisation of national policies on family reunification, Ad Hoc Group on Immigration, Copenhagen, 1 June 1993.

the results were presented to the European Council. Already, there can be observed a development of the hybrid character of policy-making in asylum and immigration matters with allegedly inter-governmental processes being closely connected with the EC institutional machinery via the European Council. These blurred distinctions - between EC matters proper, and Member State co-operation and policy co-ordination - evidence most clearly one dimension of the democratic deficit engendered by European integration.

The developments in the area of asylum can perhaps be regarded as the most significant of the Ad Hoc phase, with the emergence of the Dublin Convention and also several resolutions on substantive aspects of asylum. Many of these developments were supported by a perceived mass increase in the numbers of persons seeking asylum in Member States at the end of the 1980s. There were several reasons, some short-term, for this increase; and the figures did in fact decrease within one to two years in most Member States.[27] But the demand for restricting this one remaining avenue of entry remained and the policies continued to be implemented. The resolutions witnessed the development of the concepts of "manifestly unfounded" asylum applications, "safe host/third countries" and a conclusion on countries in which there is generally no series risk of persecution (to be determined by the receiving state).[28] Many of these innovations were "incorporated" into national laws and there were widespread restrictive changes in asylum laws throughout the EC.[29] It is certainly arguable that some - if not all - of these innovations were contrary not only to the spirit but the letter of the 1951 Geneva Convention on the Protection of Refugees. These developments also have to be seen in the light of the very small numbers of people who seek asylum in the states of the EC; as mentioned earlier, only about 5% of the world total of refugees are to be found in Europe with the majority of the 18-20 million being supported by countries that can hardly afford them.[30]

The procedural changes in asylum were couched in humanitarian terms, yet can be seen only as attempts to blatantly restrict the number of people "abusing" asylum. The Dublin Convention (which has yet to enter into force)[31] has as its professed aims to avail each applicant of the opportunity of one application in the states of the EC, in order to avoid "refugees in orbit".[32] In practice, this means that there will be a real harmonisation of restrictive procedures in the area of asylum, with only one application per applicant. Thus the EC territory is to be treated as unitary for the purposes of asylum. The system will have to be backed up with extensive computerised information on applicants, thus further infringing their civil liberties. In reality,

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[27] EC Commission (1994). EC total, 1991: 447,000; 1993: 420,000. Almost all individual countries except Germany experienced decreases in this period; for example, UK from 57,000 to 22,000, and Italy from 28,000 to 1,000.

[28] For a full discussion, see E. Guild, 'Towards a European Asylum Law: Developments in the European Community', (1993) 7 *Immigration and Nationality Law and Practice* 88.

[29] See for example Wisskirchen, note 17 above.

[30] UNHCR, *The State of the World's Refugees* (1995).

[31] For text of Convention, see *Bulletin of the EC*, No. 6, 1990, p. 155.

[32] See further, A. Achermann and M. Gattiker, 'Safe Third Countries: European Developments', (1995) 7 *International Journal of Refugee Law* 19.

the orbit syndrome will not work, with states constantly returning applicants to another state if they spend even a short period of time there. Furthermore, a network of re-admission agreements with non-EC third states developed, in order to facilitate the removal of asylum seekers outside of EC territory if they had passed through a neighbouring "safe" state.[33]

The Council of Europe, through its Parliamentary Assembly, has produced a series of recommendations on asylum.[34] In the Report[35] that preceded Recommendation 1236, the need for a pan-European approach to asylum was highlighted[36] and an increased role for the Council of Europe institutions (including the European Court of Human Rights) proposed. Amongst the most important of the recommendations endorse by the Parliamentary Assembly are: (a) the establishment of a European Refugee Commission; (b) the European Court of Human Rights to act as the single supreme jurisdiction on asylum matters in Europe; and (c) a right of asylum to be included in the ECHR.

The Council of Europe, which has had working parties on asylum for many years, has expressed concern at the extent to which restrictive asylum policies by some of *its* member states (i.e. EU Member States) are "bound to increase the burden of protection and assistance for refugees and asylum seekers disproportionately for member states in the Council of Europe"[37], recalling that this will increase friction between Council of Europe states: "the right of asylum is a pan-European problem that requires a pan-European solution."

The Treaty on European Union

These *ad hoc* activities became more formalised with the provision of a Treaty framework for this co-operation under Title VI of the TEU (the "third pillar" of the TEU), which provides that the Member States of the EU shall regard as matters of common interest, *inter alia*, asylum policy (Article K.1(1)) and immigration policy, and policy regarding nationals of third countries, including family reunion (Article K.1(3)(b)). However, even though the discussions in this area take place at formal Justice and Home Affairs Council meetings, activity under Title VI was still inter-governmental in character, the European Parliament has only limited input (Article K.6) and the ECJ, expressly excluded by Article L, had a possibility only of limited jurisdiction in

[33] For example, the Schengen-Poland Agreement of May 1991.
[34] Recommendation 1236 (1994) on the Right of Asylum.
[35] Council of Europe, *Parliamentary Report on the Rights of Asylum*, Doc. 7052 (March 1994).
[36] The rules on "safe countries" in particular are "bound to increase the burden of protection and assistance for refugees and asylum seekers disproportionately for member states of the Council of Europe which are not members of the European Union": Council of Europe Report, note 35 above, at p. 17.
[37] Council of Europe Parliamentary Assembly Recommendation 1236, p. 2, note 20 above.

the future.[38] The European Commission, which had a limited right of initiation under Title VI, initially actively demonstrated interest in influencing and being involved in the formulation of immigration and asylum policy.[39]

Under the third pillar, there are obvious wilful connections made between immigration and asylum, and drugs, terrorism and police matters, perpetuating the disingenuous myth that all asylum seekers/migrants are illegal and threatening. Substantively, the changes introduced by Title VI mirrored to a large extent the previous ad hoc practices extending to the lack of openness on matters in this area. The lack of openness in this area was of particular concern. Unlike the EC pillar, where all decisions are published, a unanimous decision is required as to publication in relation to Title VI measures. The European Parliament has an extremely limited input, only being informed on a regular basis, consulted on the principal aspects of activity and asking questions of the Council (Article K.6). The role of the ECJ is even more limited, being effectively excluded from adjudicating on Title VI under the provisions of Article L TEU. However, there are two "escape clauses" - Article K.3(2)(c) and Article K.9 - that in principle provided, under restrictive conditions, for potential ECJ jurisdiction.

The measures that could emanate from the Article K processes are stated to be joint positions, joint actions and conventions, and - as under the Ad Hoc phase - their status and nature are questionable. The administrative structure reproduces the Ad Hoc phase developments with a certain duplication of the functions. Article K.8 provides for budgetary considerations with the possibility of the Community budget being used.

The European Commission's analysis of the effectiveness of Title VI TEU was critical in its evaluation of the work carried out under this heading.[40] The Report, without admitting to the difficulties regarding status etc. that are inherent in Title VI, suggested that it represents a "significant innovation" that has been "inserted into the unique framework of the Union". It classifies the common position, common action and conventions as new legal instruments, implying that they are within the Community/Union sphere to some extent. Whatever their status, these instruments have been little used by the Council since 1993, which has resorted mainly to recommendations, resolutions and conclusions. The Commission believes that it is the nature and suitability of the legal instruments that affect future action in this area. Questions about the exact status and

[38] There was much criticism of these aspects of the third pillar of the EU, and also discussion of the confusion concerning competencies between the EC and the Title VI activities. See, in particular, P.-C. Müller-Graff, 'The Legal Basis of the Third Pillar and its Position in the Framework of the Union Treaty', (1994) 31 *Common Market Law Review* 493; and also K. Hailbronner, 'Visa Regulations and Third Country Nationals in EC Law', (1994) 31 *Common Market Law Review* 969.

[39] COM (93) 684 (10 December 1993), Communication from the Commission to the Council and the European Parliament on the crossing of external frontiers of the Member states and the determination of the third countries whose nationals require visas; COM (94) 23 (23 February 1994), Communication from the Commission to the Council and the European Parliament on immigration and asylum policies.

[40] See the Commission Report for the Reflection Group, May 1995, pp. 47-49.

effect of the measures (whether binding or not), the need for unanimity, and finally no means of interpretation or control of execution of measures above all affect the nature of measures that emerge from this process. Although in principle all Member States (and the Commission in certain areas) have a right of initiative on policy in this area, this possibility has hardly been exercised and it is the Presidency's agenda that still dominates. The Commission also draws attention to the fact that the need to consult the European Parliament is not obligatory and several Presidencies have failed to do so. Finally, attention is drawn to the working methods in this field, involving a duplication of functions and an overabundance of committees, which has arisen from the fact that the previous intergovernmental structures were simply slotted into the more traditional Community approach. Mention is made of the budgeting in this area, which the Commission says has been contributed to directly by the Member States, because it has not been possible to reach unanimity on whether to resort to the Community budget.[41] The Commission is eloquent on the subject of the division of competencies between Title VI and the Community pillar, recalling firstly the wording of Article K.1, which creates confusion. This has resulted in the "enactment" of the Common Action on the free movement of non-EC national schoolchildren, which is an area the Commission asserts to be within the Community domain. Further complications arise in the case of visa policy; the establishment of a list of countries whose nationals require visas is within Community competence, but the conditions of its exercise is a Title VI matter. Article K.9 might represent a solution to some of these confusions, but it cannot be brought into play without unanimity and national constitutional revision is necessary. Annex 15, which contains a list of measures adopted in this area, highlights the principal means of communication of such measures - press releases (which again is a practice well-established during the Ad Hoc phase).

Since the entry into force of the TEU, the work of the Justice and Home Affairs Council together with the Co-ordinating Committee (provided for in Article K.4) have continued the work programmes begun in the Ad Hoc phase.

The provisions of the Resolutions that emanated from that process contained several concrete proposals, which would gradually allow for harmonisation of asylum policy in the EU. These include: (a) implementation of the Dublin Convention; (b) a resolution on manifestly unfounded applications for asylum; (c) a resolution on host third countries; and (d) conclusions on countries in which there is generally no serious risk of persecution.[42]

[41] Perhaps it has been the fear amongst some Member States that, should the Community budget be used, it would somehow involve Community interference in the shape of the Court of Justice. One wonders how many meetings in how many for a (at national taxpayers' expense) were spent in trying to reach unanimity on this issue.

[42] For a thorough discussion of the Ad Hoc activities, see Guild, note 28 above.

Questions arise concerning the enforcement and interpretation of measures enacted under Title VI; "the framework established by Title VI creates confusing overlap of powers in respect of administration, limited democratic control and no judicial mechanism to ensure uniformity".[43] Given the lack of jurisdiction on the part of the Court of Justice under JHA,[44] the possibility of international law and human rights standards feeding into the third pillar was limited. Title VI does potentially allow for the breaching of several international human rights instruments, including the Geneva Convention, the ECHR and the UN Convention on the Rights of the Child, amongst others. The vulnerable people affected by such breaches find themselves effectively without any real recourse to judicial remedies. In creating the administrative mountain that is Article K, the Member States have colluded to produce a situation whereby they are facilitating human rights breaches and ensuring that there are few means of redress. This does not say very much for European integration forty years after the Geneva Convention was drafted.

The Future: The Implications of Amsterdam

As mentioned in the Introduction, the third pillar of the TEU did not represent a final stage in the modernising of European approaches to asylum. JHA produced a flawed and ineffective system for the operation of asylum at EU level, and concerns about its deficiencies - whether motivated by a desire to ensure effective restrictive control of asylum, or by the need to take account of many of the humanitarian-based concerns about asylum under Title VI - found their way to the top of the agenda, establishing the negotiating framework for the revision of the Maastricht Treaty. Many of the preparatory contributions and documents highlighted the aspects of Title VI that they considered merited redrafting, with - generally speaking - the main argument centred on the issue of incorporation or not under the first pillar.[45] The final version of the Treaty as revised by the Treaty of Amsterdam introduces major changes in relation to asylum.[46] The essence of these alterations is that, once the Treaty has been ratified and enters into force, instead of being consigned to the nether regions of intergovernmental co-operation under JHA, it enters the heart of law and policy-making of the EC proper, being subject to the mechanisms of the first pillar and all that entails. The most important implication for this relocation of asylum (and immigration) is the potential exposure to ECJ

[43] Written evidence submitted to the European Communities Committee (Sub-Committee C), submission by JUSTICE, HL Paper 35 (HMSO); Select Committee on the European Communities (Community Policy on Migration) (7 August 1992). See also C.A. Groenendijk, note 21 above, at p. 533: "The Committees provided for in the Dublin Convention and in Chapter K of the Maastricht Treaty, are charged with rule-making, executive tasks and dispute settlement. Only an international court which can make binding decisions is able to offer the badly needed counterbalance to the omnipotence of these committees."

[44] Article K.3(2)(c) and Article K.9 both provide for the possibility that the Court of Justice may have jurisdiction over some Title VI matters, despite what is said in Article L.

[45] See *inter alia* the Commission Report for the Reflection Group, May 1995, and the Reflection Group's Report, December 1995 (SN 520/95).

[46] See P. Craig and G. de Búrca, *EC Law* (2nd edition, 1998, Oxford University Press), Chapter 15; and N. Walker, (1998) 47 *International and Comparative Law Quarterly*, p. 231.

censure and enforcement mechanisms, followed by increased European Parliamentary input. The passing of the third pillar phase will therefore have tremendous practical significance in rendering the whole process less democratically challenged. Nor can the symbolic and allied political significance of incorporation in the EC pillar be underestimated. It represents a formal reshaping of the face of European integration, an evolution from taxes and tariffs to persecution and human rights issues.

The Treaty creates a new Title within the EC Treaty, headed *Free Movement of Persons, Asylum and Immigration*. All matters concerning border controls, visas and asylum determinations will be covered by this one Title, rather than being scattered throughout various Treaties. On the face of it, therefore, considerable consolidation in this area, the objective being the progressive establishment of "an area of freedom, security and justice" (Article A of the Draft). The timescale envisaged is five years, during which decision-making will be by unanimity with limited EP involvement. This means that there will be slow progress only from the current prevailing third pillar approach, with little dramatic development likely for some time. It is envisaged that the Treaty will not enter into force until at least mid-1999. A period of six or seven years will therefore provide for the transition from third pillar to EC processes proper. But, although radical change will not occur, the significance of moving from the secretive, non-democratic Ad Hoc phase described above to the full incorporation in the EC Treaty in a decade cannot be overestimated.[47]

Reception of the changes in asylum and immigration under the Amsterdam Treaty has been positive. The extent to which asylum, arguably one of the most ancient of internationally-exercised rights, is undergoing a period of inevitable rethinking was highlighted at the outset of this paper. The developments in the EU between 1986 and 1997 represented a major contribution to the effective curtailing of asylum availability. It is unlikely that the Amsterdam changes will influence in any significant way the perception and political appreciation of asylum at an international level, where the need for constructive modernising is greatest. However, they represent a marked advance in the European Union's acknowledgement that granting refuge to victims of persecution or to those forced into inhumane and degrading situations is an important part of its very heritage and which merits, at the very least, democratic control.

[47] A Protocol (Protocol Y) limits the involvement of the UK under this new Title.