PART THREE: THE DEVELOPMENT OF ASYLUM POLICY IN THE EUROPEAN UNION

I. Introduction

The purpose of this research is to examine the influence of the European integration on the development of asylum policy in the European Union (EU). The central question in this respect is to what extent did regional integration and the creation of new policy making bodies affect the development of asylum policy in the EU. Moreover, what are the impacts of the new measures taken by the EU on asylum seekers?

The basic assumption of this research is that EU regional integration has paved the way for an asylum policy which sets itself apart from the ways other Western nation-states deal with the issue. While establishment of an asylum policy in Western society always involves the difficulty of satisfying the contradictory objectives of adherence to liberal universal asylum standards, on the one hand, and the desire to control immigration into one's country, on the other, the special features of the EU tend to deepen this difficulty. The result has been that EU integration has increased the motivation for the development of a more restrictive asylum policy.

There are number of reasons why the EU has adopted a more restrictive asylum policy . Though the EU model differs from the traditional model of nation-states, the EU, since it must represent the interests of its individual member states, cannot escape similar exclusionary pressures. Like any nation, it must also try to develop a policy that reflects the conflicting goals of promoting the interests of the citizens of its member states while also respecting universal human rights. In fact, it appears that this conflict is even more severe in the case of the EU, due to its unusual position. The EU entails multiple actors (representing the various member states), who both participate in the policymaking while at the same time continue to protect their own national interests. Moreover, it appears that the EU is more vulnerable compared to other Western democracies, as it is still involved with the community building process and consideration of new members. It is attempting to create a strong common identity and to gain legitimacy by demonstrating its

effectiveness in promoting the interests of its citizens. One side effect of this tendency to stress the priority of EU citizens is to take into account their concerns and fears about new migration pressures. Thus, if citizens are concerned about migration, EU policy-makers have to prove their effectiveness in this area. And indeed, in recent years the EU has adopted relatively restrictive measures in the field of asylum.

In the coming chapters the progress leading to the development of asylum policy in the EU will be described. The main documentary sources and other points of reference to illustrate the path the EU (and Member States) have chosen to follow will be examined. There are a number of important road marks along this path. The first was the Schengen Agreement (1985) and the Single European Act (1986), which abolished intra-EC borders and allowed for the free movement of persons. While EU Member States were in favor of these initiatives, they feared losing control of the movement of non-EC nationals as a result of the new fluidity at the national borders and the new migration pressures. The result was a growth of interests in promoting common migration and asylum policy. Yet, while different levels of cooperation were available to deal with the new border situation, at first Member States preferred not to develop a common immigration policy but to adopt a number of measures to pursue their own immediate interests. The next significant step was the signing of the Treaty of Maastricht and the founding of the European Union in 1992. The signing of the Treaty of Maastricht offered a higher degree of cooperation among Member States, though negotiations among EU Member States revealed differences of opinions over the extension of the EU's powers. Certain countries supported the idea of a common immigration policy, while others were of the opinion that intergovernmental cooperation was the best solution to avoid undermining the sovereignty of the national state. Nevertheless, the desire to work together has grown in the course of the years. As Member States attempted to limit the number of migrants/asylum seekers entering EU territory, they realized that this goal could only be fully achieved if other members did not pursue a contradictory policy. The result was a clear shift from purely intergovernmental cooperation to implementation of common policies, highlighted by the creation of a common asylum policy in the 1997 Treaty of Amsterdam. Currently, negotiations are being carried out which are to result in the

promulgation of concrete measures by May 2004.

II. Towards the Creation of a Regional Refugee Policy in Western Europe

One of the more important developments after the Second World War was the creation of the European Economic Community (EEC) in Western Europe. The search for peace and stability in light of the horrors of war induced European states to dismantle many of the conditions necessary for war, with the creation of the European Community for Coal and Steel[237], and to pursue common economic interests with the establishment of the EEC. At first, the EEC consisted of six members including Germany, France, Italy, Belgium, the Netherlands and Luxembourg. In the course of time additional countries such as Denmark, Britain, Ireland (1973), Greece (1981), Spain, Portugal (1986) Sweden, Austria and Finland (1995) joined the Community. Community members initially defined their activities primarily through the lens of economic interests and plans to move towards more intensive political cooperation emerged only in the mid 80s. In many ways this process began as the new political situation in the world, namely, the gradual decline of the Communist Bloc was becoming more evident. As the EC members began to appreciate the opportunities made possible by this new political environment, they were motivated to implement a number of political and economic reforms. To a large extent these steps were not possible during the Cold War, as the EC members preferred not to provoke the USSR[238]. Yet beyond the need of the EC to be flexible and to carefully select the political measures to be taken under the political conditions at the time, a major reason for the relatively modest political cooperation between EC members during the Cold War was related to the particular stage of development that the EEC was in. The

[237] See "Schuman Declaration" of May 9, 1950 calling upon European countries to join the common control on coal and steel. Hans August Lücker & Jean Seitlinger (2000), *Robert Schuman und die Einigung Europas*, Editions Saint-Paul, Luxemburg, pp. 87-91.

[238] For this reason a number of European countries such as Sweden, Finland and Austria were reluctant to join the European Community during the Cold War. As they wished to remain neutral (and maintain good relations with the Soviet Union) during the Cold War, they preferred a membership in the European Free Trade Area (EFTA) rather than in the EC. As Pedersen noted, "the EFTA was seen as a defensive move with no long term political purpose". Moreover, "while the EC was both a Custom Union and a Common Market, EFTA merely aimed at removing internal trade barriers on industrial goods". Thomas Pedersen (1994), *European Union and the EFTA Countries. Enlargement and Integration",* Pinter Publishers, London, pp. 20-21. See also Philippe G. Nell (1990), "EFTA in the 1990s: The Search for a New Identity", *Journal of Common Market Studies*, Vol XXVIII, No. 4, June 1990. Only after the collapse of the Soviet Bloc did they submit their application for EU membership.

EEC was primarily designed to be a new form of diplomacy, restoring the relations between European countries and overcoming their mutual hostility. Members of the European Community did not seek to replace the traditional nation-state, but to create a new alliance which would open the way for economic and political cooperation[239]. The gradual progress towards European unity began in the mid 1980s with the creation of the Single European Act (SEA) and the founding of a European Union in the 1992 Treaty of Maastricht. This increased unity not only offered a higher degree of cooperation among Member States, but also led to the introduction of a new set of rules governing policymaking that significantly differed from other approaches prevalent in the Western world.

1. The Schengen Agreement and the Single European Act: The Logical Consequences of the Free Movement of Persons

Until the mid-1980s there was no significant attempt among EC members to cooperate in the field of migration and coordinate asylum policy towards non-EC nationals. As the European Community in its incipient stage tended to focus primarily on economic rather than political cooperation, migration and asylum policy were considered to be the exclusive concern of the individual Member States. Another reason for the lack of motivation to develop common policy measures was associated with the perception of migrants in Europe. Until the early 1970's the admission of non-EC nationals into EC countries was not recognized as a possible threat to the local citizens. On the contrary, many European countries were encouraging the entrance of migrant workers to compensate for the lack of local labor. Thus, the policy which emerged was one which facilitated the admission of migrant workers from outside the EC[240]. EC legislation such as Regulation 1616/68/EEC, for example, guaranteed entry and residence to families of non-EC migrant workers. Council Regulation 1408/71 specified that there should be no discrimination between EC and non-EC migrants. Finally, based on bilateral agreement between a Community member and non-EC country, non-discriminatory treatment is to

[239] See Article 2, the Treaty of Rome.
[240] The Treaty of Rome provided for the free movement of workers (Articles 48-51 of the EC Treaty – [old numbering] envisaged that by December 1969 EC nationals would be free to work in other EC countries). This freedom however, did not refer to non-EC nationals.

be assured to non-EC nationals working in the EU[241].

The relative liberal attitude towards non-EC nationals gradually begun to change after the early 1970s. With the oil crisis of 1973 and increased numbers of foreign workers, European countries began to adopt a new approach towards non-EC nationals, responding to the growing public demand to halt migration. At the time migrants represented about 6% of the total population[242]. But while EC members gradually introduced restrictive measures at the national level, a policy at the EC level was still not desired[243]. In June 1980, for example, the Council published guidelines for the community labor market emphasizing the need for consultation only with regard to third countries[244]. As Collinson also observed, the limited EC jurisdiction in the area of third country nationals was expressed in the types of agreements concluded between the EC and third countries. The Cooperation Agreement with Tunisia, Morocco and Algeria in 1978 or the Association agreement with Turkey and the Additional Protocol of 1980 were generally limited to non-discrimination clauses, rather than specifying migration or asylum policy of the individual Member States as such[245].

The degree of cooperation between EC members in the area of asylum and migration policy significantly increased as a result of the Schengen Agreement and the Single European Act. As a result of these agreements, the borders between EC members became much more open. Along with these initiatives the new migration pressures and the large

[241] For example, the Association Agreement between the European Community and Morocco stipulates that Moroccan workers in the EC will benefit from non-discriminatory treatment. See also Willy Alexander (1994), "The law applicable to nationals of third countries in the absence of agreements between the Community and their countries", *Actualités du droit*, p. 289.
[242] Between 1969 and 1973 about 570.000 workers from third world countries were admitted every year into the European Community. At the same time, the share of EC workers, in particular Italians, who constituted about half of the foreign labor in the EC in the 1960s, constantly dropped. See W. Mole (1991), *The Economics of European Integration*, Aldershot, Dartmouth, p. 208.
[243] See Giuseppe Callovi (1992), "Regulation of Immigration in 1993: Pieces of the European Community Zig-Saw Puzzle", *International Migration Review*, vol. 26, No. 2, pp. 355-357.
[244] In 1974, the EC adopted an Action Program for Migrant Workers and their Families to provide for the examination of future development. Moreover, the Council of Minister adopted in 1976 a resolution calling for a Community approach to non-EC nationals. But since this resolution was not legally binding, the Council of Ministers did not attempt to transform this document into compulsory legislation. See also Council Resolution of July 16, 1985 on Guidelines for a Community Policy on Migration, *Official Journal*, C 186, 26.7.1985, pp. 0003-0004.
[245] Collinson, *op.cit.,* pp. 122-123.

number of non-EC migrants residing in the EU tended to change the Member States' perception about migration, making it more desirable to cooperate more closely with other EC members.

In June 1985 five Member States, namely Germany, France and the Benelux countries signed the Schengen Agreement allowing for the gradual abolition of controls at their common borders. The agreement was basically a product of a Franco-German initiative aimed at facilitating the movement of trucks crossing their frontiers by removing the checks in their common borders[246]. The result was the abolition of police and customs formalities for people goods and services crossing intra-community frontiers[247]. The Schengen Implementation Convention concluded in 1990, provided for specific measures to implement this agreement.

Not all Member States participated in the scheme to dismantle border control, though the signatory states declared this act to be an expression of an "ever closer union of the peoples of the Member States"[248]. Italy, for example, though favoring the integration process, was not invited to sign either agreement. The major reason for this stems from doubts harbored by the signatory states as to whether Italy would take the necessary measures to effectively implement the agreements. Britain and Denmark, on the other hand – already often described as Euro-skeptic towards the integration process - vigorously opposed these initiatives, expressing concern about the Schengen Agreement. In many ways this reservation seemed to reflect the lack of trust in the Community members. In other words, Britain's and Denmark's view was that border control should fall under the competence of the national government, as other states cannot sufficiently

[246] On July 13, 1984 Germany and France concluded an agreement at Saarbrücken to remove the obstacles to the free movement of transports by abolishing police and customs formalities for people and goods crossing intra-community frontiers.

[247] As Geddes notes, while the Commission was allowed to participate as an observer, Member States concluded the provisions of this agreement alone. Andrew Geddes (2000), *Immigration and European Integration. Towards fortress Europe?,* Manchester University Press, p. 81.

[248] The decision to remove the checks on the common borders was already decided in the European Council in 1974. The Commission suggested to first gradually remove the checks by facilitating the movement of persons crossing the common frontiers and than to abolish them. See Alberto Achermann, Roland Bieber, Astrid Epiney & Ruth Wehner (1995), *Schengen und die Folgen. Der Abbau der Grenzkontrollen in Europa,* Verlag Stämpi + Cie AG, Bern, pp. 22-23.

ensure the common borders. Thus, as a result of British opposition, Ireland, which shares a Common Travel Area with Britain, was prevented from joining the Schengen agreement. Denmark finally decided to join and by 1996 all EU members with the exception of Britain and Ireland were signatories to the Schengen Agreement: Italy (1990), Spain, Portugal (1991), Greece (1992), Austria (1995), Sweden, Denmark and Finland (1996). Moreover, due to the Nordic Passport Union[249] between Denmark, Finland, Sweden, Norway and Iceland, the Schengen Agreement - originally designed to include EU Member States only – was applied also to Norway and Iceland[250]. As "associate members", they were allowed to express their opinion but had no right to vote and to take part in the decision making process[251]. The Schengen Agreement of 1985 and the Implementation Convention of 1990 came into force in 1995.

In contrast to the Schengen Agreement, which was initially an arrangement limited to just a few Member States, the Single European Act (SEA), signed in February 1986, was open to all Community members[252]. It was not, in contrast to the Schengen Agreement, separate from the EEC Treaty but part of the latter. The SEA's purpose was to upgrade and amend the EEC Treaty while creating an internal market by 1992, "in which free movement of good, persons, services and capital was to be insured". While the SEA primarily promotes the idea of "an area without internal frontiers" with the ultimate goal of achieving greater political unity, one of its most important innovations was the transition of focus away from just the free movement of workers and self employed (Article 48 and 52) to the broader category of free movement of persons in general. The

[249] The Nordic Passport Union signed in 1954 provides for the free movement of persons between Denmark, Finland, Sweden, Norway and Iceland.

[250] Lars Bay Larsen (1997), "Schengen, the Third Pillar and Nordic Cooperation" in: Monica den Boer (ed.), *The Implementation of Schengen: first the widening, now the deepening*, European Institute of Public Administration, Maastricht, the Netherlands, p. 18.

[251] See also *Free movement of Persons in the European Union*, Working Paper, European Parliament, September 1998, p. 8.

[252] The European Council meeting in Luxembourg on December 2-3, 1985 to discuss the SEA faced a number of difficulties. Italy, for example, preferred this act to be brought before the national parliament in view of its historical implications, whereas Denmark had already opened it up to public debate by arranging a referendum. Greece for its part had no particular objection to the SEA but nevertheless preferred to make a decision on the basis of how the latter two countries would decide. In the end, nine Member States signed the agreement on February 17, 1986, while Italy, Denmark and Greece signed the act on February 18. For more details about the draft treaty establishing the European Union, see Desmond Dinan (1999), "Ever Closer Union". An introduction to European Integration. The Macmillan Press, London, p. 119.

Treaty of Rome allows only for the free movement of workers, whereas in the framework of the newly created Treaty of Maastricht, Member States pledged to allow citizens from other Member States to enter their territory by opening their national border. Moreover it allows EU nationals to reside in another Member State and take the nationality of a Member State if they wish.

The decision to move forward towards establishment of the European Union ("to make concrete progress towards European unity" Article 1, SEA), and, in particular, the establishment of the free movement of persons, had large ramifications on the desire for cooperation between Member States. While Member States were aware of the advantages that the new European model provided via the Four Freedoms of the Single Market, they were concerned about the implications of this initiative, specifically in light of new migration pressures and the increased vulnerability at the national borders. The result was a growth of interest in promoting common migration and asylum policy[253]. Nonetheless, the formulation of a common policy was not easy, as Member States were wary of having control of their borders given to the EU. Thus, while different levels of cooperation were available to address the immediate problem of trans-border migration, Member States preferred to develop short-term solutions to pursue their immediate interests. Hence, the first measures to be taken were used to counter some of the more threatening results of the Schengen Agreement and the Single European Act, namely, confronting the externalization of borders control and the free movement of persons.

2. Initial Outcomes of the Single Market Initiative: the *ad-hoc* Group on Migration and the Schengen Implementation Agreement

The Commission's White Paper for the Implementation of a Single Market by the Year 1992, of June 1985, stressed that a number of specific measures relating to migration were necessary to establish the Single Market. The Council however, provided only a general statement about how these measures could be realized. In its 1985 Resolution on the Guidelines for a Community Policy on Migration of 1985, for example, the Council

[253] Werner Weidenfeld (1994) (ed.), *Das europäische Einwanderungskonzept. Strategien und Optionen für Europa*, Verlag Bertelsmann Stiftung, Gütersloh, pp. 20-21.

merely declared that, "it is desirable to promote cooperation and consultation between the Member States and the Commission as regards migration policy, including vis-à-vis third countries"[254]. Only in a declaration annexed to the final act of the SEA, in 1986, did Member States for the first time explicitly express their expectations towards cooperation on migration issues[255]. The Schengen Agreement also was explicit, listing the measures, which needed to be taken in the area of migration policy; "the application of this agreement require legislative measures". It made a distinction between short and long-term measures and suggested the improvement of external and internal EC border checks to prevent the movement of terrorists, drug traffickers, criminals and illegal migrants. The Agreement also mentioned the desirability of harmonization of visa policies and close cooperation among members to avoid asylum abuse. One of the suggestions in this respect was that the signatory states should attempt "to approximate their visa policies as soon as possible in order to avoid the adverse consequences in the field of migration and security that may result from easing checks at the common borders" (Article 7).

Under the British EU Presidency the first meeting of the twelve EC immigration ministers was held in London in October of 1986. The ministers emphasized the need to re-examine the repercussions of the free movement of persons, and in particular, how this movement would impact the fight against illegal migration, terrorism and drug trafficking. As a result of this meeting, the ministers also decided to set up an *ad-hoc* group on immigration which was charged to prepare a working program describing specific measures necessary for the achievement of the Internal Market[256]. In the Rhodes

[254] "Much closer consultation and cooperation is required at the Community level in the implementation of national migration policies vis-à-vis third countries". See Council Resolution of July 16, 1985 on Guidelines for a Community Policy on Migration, Official Journal, C 186, 26.7.1985, pp. 0003-0004.

[255] "In order to promote the free movement of persons, the Member States shall cooperate in particular as regards the entry, movement and residence of national of third countries". See the "Political Declaration by the Governments of the Member States on the Free Movement of Persons", annexed to the Final Act of the Single European Act.

[256] As Hentges notes, the name of the group alone implies the nature of its activities: Terrorism, Radicalism, Extremism, Violence International (TREVI). It was established to deal with internal security and reported annually to the meeting of the interior ministers on its activities. See Gudrun Hentges (2002), "Refugee and Asylum Policy Influenced by Europanisation" in Evans Foundation (ed.) *Europe's New Racism? Causes, Manifestations and Solutions*, Berghahn Books, New York, p. 107. See also Tony Bunyan (1997) (ed.), *Key texts on Justice and Home Affairs in the European Union. Vol. 1 (1976-1993). From Trevi to Maastricht*, Statewatch, London, p. 9.

European Council of December 1988, the immigration ministers also established a group of coordinators to oversee the policy allowing the free movement of persons. Like the *ad-hoc* group on migration, the activity of this group was structured on an intergovernmental basis, and thus EC institutions could influence the decision making process. One major achievement of this intergovernmental cooperation was the formulation of the Palma Document adopted at the Madrid European Council in June 1989[257]. This document contains the compensatory measures considered to be essential for the implementation of the free movement of persons, referred to the development of a mechanism for determining which nation is responsible when asylum is requested, specified rules governing external border controls, and described the future European information system.

The signing of the Schengen Implementation Agreement in 1990 represented major progress in specifying how migration and asylum policy was to be implemented. And in fact, most of the objectives presented in its agenda were eventually achieved. The Implementation Agreement aimed at developing a new mechanism to address the priorities and needs of the Member States and suggested a plan to avoid the negative implications of the internal market. The starting point was to guarantee that efficient mechanisms would be used to control the entrance of non-EC nationals into the EC. For this reason, policy-makers readily ignored the differences between legal migrants, asylum seekers and illegal migrants, describing them all as alien, and tended to see them as obstacles to the freedom of movement. This confirms the idea that from the national perspective, the entrance of asylum seekers as well as migrants was viewed as needing control.

Moreover, the measures suggested by the Member States with regard to the abolition of checks at internal borders and free movement of persons show that the signatory states

[257] While several action plans were offered, the document made a distinction between "measures which are essential" and "measures which are desirable". Thus, for example, in the field of asylum essential measures referred to the determination of the State responsible for examining the application of asylum, while desirable measures referred to the possible examination of criteria for granting the right of asylum and refugees status. "The Palma Document" Free Movement of Persons. A Report to the European Council by the Coordinators' Group, Madrid, June 1989. See also Korella, *op.cit.,* pp. 49-50.

were prepared to cooperate and even harmonize their policies on issues which were believed to be central to state sovereignty. The most important policy in this respect concerned the granting of visas to non-EC nationals: "the contracting parties undertake to peruse through common consent the harmonization of their policies on visas" (see Article 9)[258]. The fact that EC members did not reject the idea of cooperation on such issues demonstrated that they were capable of being flexible in policy formulation if they were likely to benefit from the consequences. Another attempt to deal with consequences of the new circumstances related to the treatment of asylum seekers. Thus, for example, Article 30 of the Schengen Implementation Agreement aimed at developing a mechanism that would impose the responsibility of responding to applications of asylum to a single state, "If two or more contracting parties have issued an asylum seeker with a visa of whatever type or a residence permit, the contracting party responsible shall be the one which issue the visa or the residence permit that will expire last". Whereas in the past asylum seekers could apply to all twelve Member States, they could apply now for to only one Member State. This provision was eventually incorporated in the signing of 1990 Dublin Convention, which placed severe restrictions on the ability of asylum seekers to ask for asylum. The 1985 Schengen Agreement did not address this issue, partly because asylum became a major point of discussion in the political agenda of many European countries only with the increase number of asylum seekers into their territory in the early 1990s[259].

An additional area of cooperation between Member States, though of a different nature, was police matters. The contracting parties undertook, "to ensure that their police authorities shall, in compliance with national law and within the scope of their powers, assist each other for the purpose of preventing and detaching criminal offenses" (Article 39). Criminal offenses included murder, rape, kidnapping, trafficking in human beings,

[258] "Visa arrangements relating to third states whose nationals are subject to visa arrangements common to all Contracting Parties at the time of signing this Convention or at a later date may be amended only by common consent of all contracting parties". See Article 9.

[259] As the United Nations High Commissioner for Refugees noted, whereas in the beginning of the 1980s the total number of people seeking asylum in 23 European Countries from Poland to Portugal was 71.000, in 1992 the figure was over 700.000. See Sadako Ogata (1993), "Refugees and Asylum Seekers: A Challenge to European Immigration Policy", *Towards a European Immigration Policy*, The Philip Morris Institute for Public Policy Research, Brussels, October, p.14.

and illicit trafficking in narcotics. Cooperation in police matters was based on the assumption that removal of border controls could adversely affect the quality of security and thus promote criminal activity. One of the inevitable outcomes of cooperation in visa and police activities was the construction of a detailed information system, the so called the "Schengen Information System", to enable the authorities to exchange important information "to maintain public policy and public security" (Article 93).

It was decided to appoint an executive committee for the purpose of implementing the convention" (Article 131), in which every state had a seat and decisions were to be taken unanimously (Article 132). The European Parliament repeatedly criticized the way the committee functioned, claiming that it lacked transparency in the decision making process, "there is no provision for democratic accountability, no role for the European Court of Justice and not even a limited code of access to documents"[260]. Moreover, the meetings of the executive committee were not public unless otherwise decided. The European Parliament also often criticized the measures adopted by the signatory states. It argued that the signatory states were motivated by the wish to limit migration waves. The creation of the Schengen area, it stated, "must not be the excuse for introducing systematic controls in border regions or for hermetically sealing the external borders ('fortress Europe')"[261].

The approach taken at the Schengen Convention suggested that the main concern that came to dominate the policy of EU Member States was how to limit the number of migrants into EC territory and how to provide a feeling of security. Member States gave the impression that they believed that the creation of the Single Market would be accompanied with negative side effects, including increased migration. In this environment, asylum seekers were viewed as a threat, and EU Member States shared the opinion that they needed to provide measures to reduce the number of asylum applications. Under this state of affairs the road to the drafting of the Dublin Convention became inevitable.

[260] See also *Free movement of Persons in the European Union*, Working Paper, European Parliament, September 1998, p. 22.
[261] Ibid., p. 24.

3. The Dublin Convention

The Dublin Convention signed in 1990 and ratified in 1997 was a result of the Single Market initiatives. With the abolishing of internal borders, asylum seekers were no longer considered an exclusive concern of the individual states, but rather of the Community as a whole. Hence, a common approach to asylum had become necessary. One of the Schengen Agreement's guiding principles was that a person applying for asylum in one Member State is not entitled to apply for asylum in another one, if the first application had been rejected. Exceptions could be made when family members of the applicants (wife and minor unmarried child) were already recognized as refugees and were residing in a different Member State than the one where the application was lodged (Article 4) or in cases where the applicant concerned had a valid residence permit or a visa issued by another Member State[262].

While the provisions of the Dublin Convention, emphasizing the importance of a common asylum policy, could be justified as necessary due to the creation of a single market, a harmonized asylum law did not emerge. Rather, the convention simply authorized Member States to examine applications on behalf of all other Member States in accordance with their national law [263]. What has finally emerged is a mutual recognition that the right of asylum seekers to look for shelter elsewhere in the EU should be withheld once the application was rejected by a Member State, this even in the absence of a common asylum policy. In other words, notwithstanding the fact that a differentiation of asylum treatment among EU Member States still prevailed, only one application could be submitted. This point is critical, since the Geneva Convention places no limits on the number of applications for asylum. If the EU wished to "guarantee adequate protection to refugees in accordance with the terms of the Geneva Convention" as stated in the preamble of the Dublin Convention, a more honest approach would have

[262] If the applicant has more than one valid residence and/or visa permit the responsibility will be assumed by the Member States, which granted him the longest period of residency. See Article 5.
[263] Karsten Kloth (2000), "The Dublin Convention on Asylum- An Introduction" in: Marinho Clotilde (ed.) *The Dublin Convention on Asylum. Its Essence, Implementation and Prospects*, European Institute of Public administration, Maastricht, p. 9.

been to first decide on a timetable for achieving a harmonized asylum policy and only then to adopt the above-mentioned measures. The Member States, however, were not ready to follow this reasoning. Instead they favored a coordination of their policies, striving to protect their national interests by limiting the entrance of potential asylum seekers into EU territory and encouraging the notion of unfounded claims for asylum. From the EU perspective the Convention was found to be very efficient in preventing "asylum shopping" by limiting the number of applications. At the same time it also opened the door for a long and bitter debate between Member States about identifying the country most responsible for examining an application.

4. The External Border Convention

As a result of the decision to dissolve existing internal border controls, a first draft of an External Border Convention was submitted a to EU immigration ministers by the 1989 French Presidency. The main objective of this Convention was to "remove the obstacles to the full abolition of internal border controls"[264] while laying down the rules governing the crossing of external borders by non-EC nationals. The Convention defined "external borders" as the land of a Member State not sharing a common border with another Member State, airports and seaports (except those used solely for internal flights) and made special arrangements for controlling these frontiers. It included, for example, regulations to ensure that passengers with a connecting flight will be subject to control at the airport in which they make their departure. Additional measures referred to travel documents and the period of stay in a Member State. It was also decided that the rules governing "short" (less than three months) stays should be distinguished from those governing "long" stays: while the Convention provided the possibility of mutual recognition of short term stays for non-EC nationals, it left to the individual Member States to decide about long term visas.

The Convention also attempted to formulate visa policy towards non-EC nationals. EC Member States were able to make significant progress in this regard. In 1995, the EC

[264] Riccardo Faini (1995), "Migration in the Integrated EU" in: Richard E. Baldwin, Pertti Haaparanta & Jaakko Kiander(eds.), *Expanding Membership of the European Union*, Cambridge University Press, p. 145.

presented a list of countries whose nationals would need a visa when crossing the external border of a member state. This list included poor countries, such as India and Pakistan, which had the greatest potential for dispatching immigrants to the EU[265]. Signing of the Convention, however, was blocked as a result of a dispute between Spain and Britain on the status of Gibraltar[266]. Nonetheless, most of the objectives declared were achieved outside the framework of the Convention. Visa policy, for instance, was subject to Community law after Maastricht. Moreover, once almost all EU member States became members of the Schengen Convention and the Schengen information system (SIS), it was no longer necessary to refer to the External Border Convention as most of its measures were adopted via Schengen[267].

III. The Maastricht and the Justice and Home Affairs Pillar: A Bastion of National Sovereignty

The idea of the internal market was discussed at the 1985 Intergovernmental Conference (IGC). The plan that emerged was to amend the Treaty of Rome to include the Four Freedoms (movement, service, capital and goods) in an area without internal frontiers. The establishment of the Economic Monetary Union (EMU) was considered especially

[265] Philip Alan Butt (1994), "European Union Immigration Policy: Phantom, Fantasy or Fact?" *West European Politics*, vol. 17 No. 2 April 1994, p. 176. See Council Regulation (EC) No 2317/95 of 25 September 1995 determining those third world countries whose nationals must be in possession of visas when crossing the external borders of Member States, *Official Journal of the European Communities*, 1995, L 234/1. In addition to the countries mentioned in the Common List for which a visa was needed, the Commission published another list of countries not included in the Common List but whose nationals nevertheless needed a visa to reside in one or more specific Member States, see Commission Communication of 14 December 1996, *Official Journal of the European Communities,* 1996, C 379/3. In December 1995, the European Parliament appealed against this decision to the European Court of Justice since the Council did not consult the Parliament. The Court of Justice annulled this measure and as a result the Council, on the basis of Article 100c in the Maastricht Treaty, had to consult the Parliament.

[266] Gibralter is considered a British dependent territory under the Utrecht Treaty of 1713. When Britain joined the European Community in 1973, Gibraltar received a special status. Spain, however, refused to accept this and attempted to win back the sovereignty of Gibraltar, though a referendum in 1968 showed that the vast majority of the people of Gibraltar wished to remain under British rule: 12,148 in favor, 44 against. Moreover, in 1997, the government of Gibraltar made it clear that it was not seeking independence but to maintain the political ties to the UK "through a modernized, non-colonial constitution". At the same time it stressed that Gibraltar "wants and seeks good neighborly relations and mutual cooperation with Spain". See statement by the chief Minister of the government of Gibraltar, the Hon Peter Caruana, Brussels, January 29, 1997.

[267] See Klaus-Peter Nanz(1995), "The Schengen Agreement: Preparing the Free Movement of Persons in the European Union", in: Bieber and Monar (eds.), *op.cit.,* pp. 45-46.

important among the Member States. As the latter came to view economic cooperation with considerable interest, they proposed the creation of a single currency zone to eliminate the last barrier to trade. Along with the creation of the EMU, attention was also gradually paid to other policy areas that traditionally had been assumed to be the provenance of individual Member States, such as foreign policy, justice, and home affairs[268]. Although historically the EU exhibited relatively poor performance in the political sphere, external factors in the early 1990s forced the EU to act more effectively.[269]. The end of the Cold War and the emergence of the Yugoslavian crisis prompted Member States to strengthen their will to fulfill the necessary conditions to play a major role in foreign policy and present a more unified political front[270]. In the field of migration it was recognized that new arrangements were necessary to deal with the waves of migration and asylum seekers resulting from the formation of the internal market and the collapse of the Soviet Union.

In order to coordinate the direction of the European Union it was left to the 1991 IGC to make the appropriate measures, eventually leading to the signing of the Maastricht Treaty. During the IGC discussions, Member States divided into two main approaches. Some countries supported the federalist approach, advocating for political integration which was likely to carry supranational characteristics, while other countries were of the opinion that intergovernmentalism was the appropriate form of governance for this stage

[268] As the EC lacked the ability to operate in world politics outside the field of economics, the President of the Commission declared in 1985 that the EC is an "economic giant but political dwarf". For a further analysis of Delor's expectations of the Internal Market see "Das neue Europa" (1992), Carl Hanser Verlag, Munich.

[269] In the Kohl-Mitterrand letter of April 20, 1990 to the Irish Presidency, the German and French leaders supported the idea of a second IGC on political union. "In the light of far-reaching changes in Europe and in view of the completion of the single market and the realization of economic and monetary union, we consider it necessary to accelerate the political construction of the Europe of the twelve With this in mind…the European Council should initiate preparations for an intergovernmental conference on political union. In particular, the objective is to: strengthen the democratic legitimization of the union, - render its institutions more efficient, - ensure unity and coherence of the union's economic, monetary and political action, - define and implement a common foreign and security policy". European Political Cooperation (EPC) began in 1970 but the creation of the internal market and the collapse of the Soviet Union gave a real boost to the development of this common policy.

[270] During the IGC on Political Union and Economic and Monetary Union, EU policy makers were obliged to develop foreign policy mechanisms to meet the challenge of the post-cold war period. Thus, it was expected that the EU would now play a major role in maintaining peace and stability in Europe as well as in the world. See Charlotte Bretherton and John Volger (1999), *The European Union as a Global Actor*, Routledge, London and New York, p. 178.

of development[271]. To some extent these different approaches were expressed in other policy areas, such as asylum. The Maastricht Treaty signed on February 7, 1992 and ratified in November 1993 was based on a compromise between these two notions. The Treaty provided three structural pillars - the first pillar dealing inter-alia with the internal market and competition, external trade, EMU, and the environment, were subject to community law. In contrast, in the second and third pillars, describing Common Foreign Security Policy (CFSP) and Justice and Home Affairs (JHA), respectively, policy-making was clearly proscribed as intergovernmental in character and thus largely decided at the national level.

1. The Road to Maastricht: Preparatory Work before the Conclusion of the Treaty of the European Union (TEU)[272]

At the 1990 IGC in Rome dealing with the EMU and with political union, Member States had to determine what kind of cooperation they would like to develop. While recognizing the need to redefine the Community competence in these specific areas, they also considered "whether and how activities currently conducted in an intergovernmental framework could be brought into the ambit of the Union, such as certain key areas of home affairs and justice, namely immigration, visas, asylum and the fight against drugs and organized crime"[273]. The Luxembourg Presidency suggested four options in January 1991: 1) developing cooperative measures outside the Community framework; 2) introducing a short reference in the Treaty to the principle of cooperation and leaving it to the Council to work it out in detail; 3) defining the exact fields in which to cooperate; 4) achieving full communitarization, i.e. the decision making process will be subject to Community law. As Corbett notes, Member States reacted with mixed feelings. While the Netherlands, Belgium, Italy and Spain were in favor of harmonization, Germany and France preferred option three with the possibility of moving towards a harmonized policy

[271] See Renaud Dehousse (1994), "From Community to Union" in: Renaud Dehousse (ed.), *Europe after Maastricht. An Ever Closer Union,* C.H. Beck, Munich, p. 6.
[272] The Treaty of Maastricht established the European Union. The Treaty of the European Union incorporates the Maastricht Treaty and further amendments. After the ratification of the Amsterdam and Nice Treaties, for example, the TEU included the amendments made in these two Treaties.
[273] See Conclusions of the European Council Meeting held in Rome, December 14-15, 1990.

in the future. The UK, Ireland and Greece choose option two and Denmark "could accept either one or two"[274].

The positions shared by the Member States to a large extent coincided with their ambitions and hopes with regard to the integration process. The Benelux countries, from the early years of the EEC, became great supporters of "a more unified inter-state system". The Second World War experience as Nugent notes, "re-emphasized their vulnerability to hostile and more powerful neighbors and the need to be on good terms with West Germany and France". This could explain why they backed most of the proposals made by France and Germany. Italy and Spain took a similar position but for different reasons; the economic benefits the Community brought to their countries, formerly suffering from high inflation and an unemployment rate[275], made them look favorably on the integration process[276].

Britain[277], Ireland, and Denmark[278], on the other hand, took a minimalist approach to the integration process. They often expressed great concern about their potential loss of

[274] Richard Corbett (1993), *The Treaty of Maastricht*, Longman, Essex, pp. 48-49.
[275] EC membership has proved very beneficial to Italy and in particular to Spain. Thanks to the generous access to the EC structural funds and regional aid plans, the number of Spanish nationals migrating to other European countries, in particular France, declined over the years. Moreover, Spain, which traditionally was an emigrant country become a receiving country due to its membership in the European community. Christopher Preston (1997) *Enlargement & Integration in the European Union*, London, Routledge, pp. 144-145; see also Heinz Werner (1994), "Regional Economic Integration and Migration: The European Case", *The Annals*, vol. 534, July pp. 154-155.
[276] See Neil Nugent (1999), *The Government and Politics of the European Union*, Fourth Edition, Palgrave, London, pp. 24-25.
[277] To a large extent the tense relations between Britain and the EU paralled Margaret Thatcher's views towards the EU. The extremely negative attitude of Thatcher towards the integration process led to harsh criticism in Europe as well as in Britain. Anthony Bevins, for example, declared: "What you have is a position in which Mrs. Thatcher is now out of the mainstream of thinking, not simply of socialist leaders and socialist governments, but even of right-wing governments". Anthony Bevins, *The Independent*, May, 9 1989. See Norbert Himmler (2001), *Zwischen Macht und Mittelmaß. Großbritanniens Außenpolitik und das Ende des Kalten Krieges,* Duncker & Humblot, Berlin pp. 65-73 and 170. See also Stephen George (2001), *An Awkward Partner. Britain in the European Community*, Oxford University Press, New York, p. 15. Britain, for example was the only EC country, which did not accept the Community Charter of the Fundamental Social Rights of Workers of December 9, 1989, which established the main principles on which the European model for labor law should be based. The Charter includes, for example, social protection, freedom of association, health care, vocational training, protection of children and adolescents and the improvement of living and working conditions. The Charter itself is not a legally binding document but it imposes obligations on the signatory states to guarantee, as far as possible, fundamental social rights. It also contains a specific mandate for the Commission to propose an action program to implement the

sovereignty, particularly during the debate over the extension of EU institutional powers[279]. The position of Ireland towards refugee policy at the EU level generally followed the British position, partly due to its economic and political dependence on the latter as well as for the fact that, in any case, the number of refugees applying to Ireland for asylum was small[280]. The consequence was that these latter countries, and in particular Britain, was extremely hostile to any motion that included the increase of power of EC institutions at the expense of the sovereignty of the individual Member States.

France and Germany, the main "engines" of the Community, often took a leading role in the formulation of Community policy. Indeed, most of the proposals made till the 1990s were the result of cooperation between these two countries[281]. With regard to formation of asylum policy they were also very activist. In fact, the decision of a second IGC on political issues leading to the introduction of the third pillar was basically a result of a Franco-German initiative[282]. Moreover, France, and in particular Germany, made

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Charter's aims. European Commission (1994), "Community Social Policy", *Internal Market*, Vol. 6 July 1994-EN pp. 67-87.

[278] In Denmark, the first referendum on the ratification of the Maastricht Treaty was rejected by the general public and thus the European Council had to work out special arrangements for the Danes. See Conclusions of the European Council meeting in Edinburgh, December 11-12, 1991.

[279] The British approach favoring a limited role of the Union reflected its general ambitions and the way it viewed its role in the world. Although Britain sought to become a member of the European Community (in spite of President de Gaulle's opposition), it did not seek to limit itself to cooperation in the European Continent only, but sought to foster its relationship with the Commonwealth and the United States as well. But since it lost its former colonies it gradually realized that a closer cooperation with the EC is necessary. This was clearly demonstrated since 1997 with the election of Tony Blair. David Gowland and Arthur Turner (2000), *Britain and the European Integration 1945-1998. A Documentary History*. Routledge, London, pp. 71-72.

[280] The position of Ireland, as Bill Shipsey notes, was unique among EU Member States. Until 1996 Ireland immigration and refugee policy was subject to the 1935 Alien Act which made no explicit reference either to the term asylum or refugee. However, since the 1980s asylum policy was regulated by the minister of justice, who used the Ten-Point procedures to determine refugee status. The need to adopt specific measures on asylum did not appear to be necessary for the small number of asylum seekers. In 1991, for example, 31 persons applied for asylum in Ireland, and in 1992 and 1993, the number had risen to 39 and 91 respectively. See Bill Shipsey (1997), "Asylum Policy and Title VI of the Treaty on European Union" in Gavin Barrett (ed.), *Justice Cooperation in the European Union*, Institute of European Affairs, Dublin, pp. 174-175.

[281] The European Political Cooperation (EPC) understanding of 1970, for example, was a result of an agreement between France and Germany. The close cooperation between the two also led to the creation of the European Monetary System in 1979 (EMS). See Ben Soetendorf (1999), *Foreign Policy in the European Union*, Longman, London, p. 21.

[282] Thomas Oppermann (1998), 'Du Plan Schuman au Traité D'Amsterdam: La Coopération Franco-Allemande, Moteur de L'Integration Européenne' in *La Coopération Franco-Allemande en Europe À L'Aube du XXIe Siècle*, Presses Universitaires d'Aix-Marseille, pp. 31-39. See also Wichard Woyke (2000),

suggestions encouraging cooperation on asylum. The European Council of 28-29 June 1991, for example, welcomed the German proposal on the issue of migration and asylum and, "noted with interest the practical proposals submitted by the German delegation, which supplemented the work already carried out in this area"[283].

With regard to the nature of the measures to be included in building the justice and home affairs pillar there were a number of options. The Commission prepared several proposals and in particular proposed a Communication to the Council and Parliament on immigration and asylum policies. The 1991 Communication laid down the policy guidelines for Community action with regard to migration and asylum. This plan was based on three main principles: the need to take action to alleviate migration pressure; controlling migration flow and strengthening integration policy. The Commission acknowledged the fact that economic aid to third countries could help to reduce migration to Western Europe. Moreover, it called for harmonization at the national level and recommended intergovernmental procedures concerning the treatment of asylum seekers that would lead to a decrease in migration flow. The Commission was also of the opinion that a common policy towards the deportation of illegal migrants and harmonization of criteria for reuniting families ought to be established. At the same time the Commission stressed the responsibilities of the EU towards migrants within its own borders. Thus, it encouraged Member States to promote integration policy while emphasizing the importance of guaranteeing the protection of migrants and refugees in the EC. It linked the right of free movement of persons within the Community to the need for Members States to ensure that immigrants and especially non-EC nationals become well integrated into their adopted countries. For this reason, the Commission called for joint measures to prevent discrimination against immigrants in a variety of areas and to provide access to employment, housing, health, education and job training[284].

Deutsch-französische Beziehungen seit der Wiedervereinigung, Leske Budrich, Opladen, pp. 41-47.

[283] See the Conclusions of the European Council, Luxembourg, June 28-29, 1991.

[284] See Communication from the European Commission to the Council and the European Parliament on Immigration and Asylum Seekers, Brussels, SEC (91) 1855 final, 23.10.1991, p. 2-12.

In addition to the Commission Communication, the twelve EU ministers of immigration worked out a program establishing the work of the Union for the coming years. They prepared a report on immigration and asylum policy for the European Council, calling for coordination and harmonization of asylum policy. The report demonstrated that the immigration ministers had a clear preference for promoting migration control rather than integration strategy for non-EC nationals. While stressing the restrictive nature of migration policy, they declared that "*the term 'immigration policy' used in this context may be misleading in that no EC Member State currently conducts a policy focused on immigration. It is on the contrary the control of immigration that is involved*"[285]. The result was that the report contained proposals for efficient reduction of the number of immigrants and asylum seekers and identified strategies for achieving this aim through various programs.

In general the ministers noted the main tasks necessary for implementation of migration policy in both the broad and specific senses. The former refers to the elimination of the causes of immigration, as it was realized that even if Member States would succeed in harmonizing their national policies, "results will be limited unless the causes of migratory pressure are also addressed"[286]. Hence, they suggested taking into account the different factors behind migration; "in some countries the main reason behind migration would be the socio-economic situation, whereas in other countries ethnic tensions or demographic factors might be predominant"[287]. Specific policy issues involved actions leading to the harmonization and coordination of European migration policy. These issues were mainly concerned with common procedures and regulations regarding expulsion, illegal immigration and restrictive admission policy. With regard to the position of non-EC nations in the EU, estimated at the time at 8.3 million, no decisions were taken modifying the existing legislation, although the hope was expressed that EU policy makers will,

[285] "Thus EC ministers responsible for immigration must in particular pinpoint those aspects which are related to migration policy in the *strict* sense of the term". See Report "From the Ministers responsible for immigration to the European Council meeting in Maastricht on immigration and asylum policy". Brussels, December 3, 1991 (05.12) (OR.f) SN 4038/91 (WGI 930) in: Elspeth Guild. *(1996), The Developing Immigration and Asylum Policies of the European Union. Adopted conventions, Resolutions, Recommendations, Decisions and Conclusions,* Kluwer Law International, The Hauge, pp. 449-491.
[286] Ibid., p. 465.
[287] Ibid.

"examine which rights third country nationals should be able to enjoy among those enjoyed by Member State nationals". It was noted that this does not mean that admission policy has to be fully harmonized before the situation of third country nationals is improved[288].

The twelve immigration ministers also noted the measures to be taken concerning asylum[289]. They realized that, "the initial results of co-operation between Member States - the Dublin Convention to determine the State responsible for examine applications for asylum and the draft Convention between the Member States on the crossing of their external frontiers by non-EC nationals - in themselves implied that a more through harmonization of policy was needed"[290]. Thus, the ministers agreed that, "harmonization of asylum policy is a logical component of the increasing co-operation amongst the twelve on immigration". As it turned out, harmonization policy did not mean that Member States were planning to change their laws on asylum, rather, it referred to the harmonization of procedures and fundamental policy rules as a mechanism to control (and reduce) the number of asylum seekers[291]. The ministers did not wish to define who is a refugee and who is entitled to have access to refugee status, and only supported the development of measures determining who is not entitled to asylum. It was assumed that Member States did not wish to use this forum to undermine national sovereignty by limiting their ability to decide who is a refugee. Moreover, assuming it would be difficult to find a common definition, they chose to concentrate on exclusion procedures, specifying who is not a refugee. By doing so, they left considerable room for maneuver, satisfying national concerns by allowing considerable independence on this issue. Two different strategies were adopted at this point: defining the concept of "clearly unjustified" application for asylum, defined as those applicants whose "real aim is to migrate for other, mostly economic reasons"[292] and the drawing up of a plan to

[288] While the ministers made a proposal for measures to be taken by the Member States they argued, "this does not mean that admission policy has to be fully harmonized before the situation of third country nationals is improved". Ibid., p. 472.
[289] These steps formed the basis of the proposals submitted by the ministers of immigration to the EU.
[290] Ibid., p. 450
[291] Ibid., p. 476.
[292] It is interesting to note that to justify this position the ministers argued that UNHCR also supported accelerated procedures for "clearly unjustified" applications for asylum. See Guild, *op.cit.,* pp. 480-481.

implement the Dublin Convention. The Member States eventually adopted these proposals in 1992.

2. The Treaty of Maastricht and Justice and Home Affairs Cooperation

The Maastricht Treaty signed on February 7, 1992 mandated that migration and asylum issues be dealt with by the intergovernmental third pillar - Justice and Home Affairs. Under the title "Provisions on cooperation in the fields of justice and home affairs" Article K1 stipulated that in order to achieve the objective of the free movement of persons, Member States should regard the following areas as matters of common interest; asylum and immigration policy; rules governing the crossing of non-EC nationals of external borders of Member States; conditions of entry and change of residence by nationals of third countries on the territory of Member States, including family reunion and access to employment; combating unauthorized immigration; judicial cooperation in civil and criminal matters; customs and police cooperation for the purpose of preventing and combating terrorism; and combating unlawful drug trafficking and other serious forms of international crime.

As the third pillar was based on intergovernmental cooperation, the EU's attempt in integrating its Member States migration, asylum and judicial policies in the Treaty of Maastricht would seem to serve as a possible starting point – both for a new discourse on migration and possible models of cooperation in these fields. This cooperation was also based on the realization that the Member States' aims of limiting the number of migrants/asylum seekers entering their territory implied that increased police cooperation would be needed, as one of the implications of a more restrictive migration policy would be an increase in the number of illegal migrants[293]. Thus, in order to overcome these difficulties a new policy was build around the idea that cooperation would likely lead to achievement of the aims of the EU members. The result was a new integrated approach,

[293] In various documents the problem of illegal migration was recognized. Indeed, soon after the signing of the Treaty of Maastricht a report to the European Council in Edinburgh from the Coordinators Group on the free movement of persons described the potential danger of the integration process on illegal migration. See 1991 Edinburgh European Council.

based on a strong link between migration policy and internal security[294]. This link would be further strengthened in the course of the years and in particular after the Amsterdam Treaty.

The concern about the growing threat to internal security as a result of the increased openness of the borders prompted Member States to work together in this area. In the field of judicial cooperation in criminal matters EU Member States had already achieved much progress before the signing of the Maastricht Treaty. Alderson observed in 1988 that "there is much common ground already concerning the control of international drug trafficking and it might be anticipated that through approximation of laws and police operations anything lost at internal border checks would be regained at external borders and by means of internal police collaboration"[295]. Under the new Treaty in addition Member States were given the opportunity to deepen their cooperation by establishing Europol.

Another important evolution resulting from Maastricht, which helped Member States justify coordination on security measures between national police forces and adopt common measures on immigration, was related to the creation of European Citizenship. Article 8 of the Treaty of the European Union (TEU) explicitly states that, "Citizenship of the Union is hereby established" and thus, "every citizen of the Union shall have the right to move and reside freely within the territory of the Member States"[296]. The establishment of European Citizenship was a significant step towards the development of a more unified Europe. But while allowing easy access of all EC nationals to Member States' territory, this concept resulted in a complex situation with regard to the legal position of non-EC nationals residing in EU territory. European Citizenship did not include non-EC nationals. In addition, as a declaration annexed to the Treaty of Maastricht made clear, decisions on granting citizenship could only be determined by

[294] Werner Weidenfeld (1992), "Die Innere Sicherheit als europäische Politik", *Innere Sicherheit im Europäischen Binnenmarket*, Verlag Bertelsmann Stiftung, Gütersloh, pp. 15-17.
[295] Indeed, Member States had already decided on establishing the Europol organization to improve police cooperation. John Alderson (1988), "Are Border Controls Necessary?" in: Roland Bieber, Renaud Dehousse, John Pinder and Joseph H.H. Weiler (eds.), *1992: One European Market*, Nomos Verlagsgesellschaft, Baden-Baden, p. 307.
[296] See Declaration on Nationality of a Member State, 1992 Treaty of Maastricht.

national and not by EC law: ”the question whether an individual possess the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned”[297]. Thus, non-EC nationals residing in a Member States continued to be subject to the domestic laws of the Member States. Moreover, EC and non-EC nationals were not treated equally. Non-EC nationals were not allowed to work and reside in Member States other than the ones in which they received authorization. But, since there was not to be any border control inside the EC, Alfred Tovias notes that, “immigrants may risk working in a Member State other than the one they are allowed to work in. In particular many legal immigrants in one EC State could be tempted to cross daily into a neighboring country to work”[298]. For this reason Member States realized that they needed to adopt similar positions to combat “unauthorized immigration, residence and work by nationals of third countries on the territory of Member States” (K.1)[299].

Under the third pillar Member States recognized two basic ways in which they can limit migration into their territory. This could be done by imposing conditions of entry and movement by nationals of third countries in the territory of a Member State, and by combating unauthorized immigration, residence and work by nationals of third countries in the territory of Member States. At the same time they abstained from explicitly mentioning the way asylum policy could be conducted, despite the fact that the proposals

[297] Denmark, for example, expressed its concern with regard to EU citizenship by unilaterally declaring that, “citizenship in the Union is a political and legal concept which is entirely different from the concept of citizenship within the meaning of the constitution of the United Kingdom of Denmark and of the Danish legal system. Nothing in the Treaty of the European Union implies or foresees an undertaking to create a citizenship of the Union in the sense of the citizenship of a nation state”. It also argued that, ”citizenship of the Union in no way gives a national of another Member States the right to obtain Danish citizenship or any of the rights, duties, privileges or advantageous that are inherent in Danish citizenship by virtue of Denmark's constitutional, legal and administrative rules”. See Annex 3 of the Unilateral Declarations of Denmark to be associated to the Danish Act of ratification of the Treaty on European Union and of which the 11 other Member States will take cognizance, Edinburgh European Council 11-12 December 1992, Conclusions of the Presidency, *Official Journal of the European Communities (OJ),* C 348, 31.12.1992.

[298] Alfred Tovias (1992), “The Single Market and Labour Mobility”, in: Jozef M. van Brabant (ed.), *Implications of the Single European Act for Non- Member Countries*, United Nations, New York, p. 107.

[299] The European Commission suggested that in the light of the internal market Member States should, “enable third country nationals to move freely around within the Union on the basis of their residence permit which would replace any existing visa requirements”. The Schengen Agreement provides such a right, but this is only applicable to the Schengen countries. Thus, Britain, for example, which is not a member of the Schengen Agreement does not ensure this right. See Communication from the European Commission to the Council and the European Parliament on Immigration and Asylum Seekers Policies, Brussels, COM (94) 23 final, 23.2.1994, p. 34.

made by the ministers of migration in December 1991 specified the decisions required to be adopted. There were good reasons for preferring to avoid declaring clear provisions on asylum. One reason was that Member States did not wish to push for significant progress in an area that has an important impact on national security at this early stage of cooperation among Member States, and they preferred to delay or postpone such decisions to a later stage. Moreover, full harmonization demanded a revision of the national legal system. Finally, when the Maastricht Treaty was signed immigration issues appeared to be more urgent than asylum issues. Indeed, the number of applications for asylum was still relatively small in 1991 compared to the number of applications in 1992 and in subsequent years.

Another possible explanation for the non-inclusion of asylum policy in the Treaty has to do with the human rights aspects of asylum. In contrast to migration policy, which was considered to be a domestic matter (and thus subject to national discretion), and Member States were assumed to take actions in accord with their national interests, policy makers have less flexibility on asylum policy, as they are expected to demonstrate generosity, fulfilling their obligations of international agreements[300]. From this point of view, Member States preferred that policy decisions concerning asylum should be less specific[301]. To summarize, while the Maastricht Treaty drew much more attention than the proposals of the Twelve Ministers in 1991, the signers needed to be more careful in their formulation. In this respect, lack of exact procedures in the field of asylum enabled Member States flexibility to practice their own policies without binding themselves to specific EU criteria[302].

[300] Thus the ability to make restrictions in asylum is harder than in migration issues.
[301] This is especially evident in light of the new role that the EU pledged to play in the field of human rights.
[302] In a Declaration on Asylum annexed to the Treaty of Maastricht, however, (a similar declaration can be found already in the final draft by the Dutch presidency of December 10, 1991) Member States declared that, "the Council will consider as a matter of priority questions concerning Member States' asylum policies with the aim of adopting them by the beginning of 1993, common action to harmonize aspects of them, in light of the work program and timetable contained in the report of asylum drawn up at the request of the European Council meeting in Luxembourg on 28 and 29 June 1991. Moreover, on the basis of this report the Council will consider by the end of 1993 the possibility of applying Article K.9 to such matters". This statement implies that asylum policy will be subject to jurisdiction of the Community institutions rather than intergovernmental cooperation. See Declaration on Asylum, The Treaty of Maastricht.

3. The Decision Making Process of the Third Pillar: The Various Actors and their Chief Responsibilities

Article C of the Treaty on European Union states the foundation of the European Union will bring about, "a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communataire*". Indeed, the single unity, characterized by the four institutions (the Council, Commission, Parliament and the Court of Justice), is what inevitably binds the first and third pillars[303]. In practice, however, there has been a considerable difference in the impact of these two pillars as a consequence of the negotiations among Member States.

While EU institutions have been strengthened by the process of integration, in particular with regard to first pillar issues, the third pillar has been characterized by a weak inter-governmental arrangement, leaving major decision responsibilities to the Member States. The inter-governmental nature of the Justice and Home Affairs (JHA) implied that the role of Community institutions, and in particular, of the Commission and the European Parliament, role was expected to be insignificant. Unlike the first pillar, where Member States believed in increased cooperation, Member States did not strive for a similar form of cooperation under the third pillar. From their point of view intensive involvement of the Community institutions in the third pillar might eventually threaten the interest of the individual states. They thus declined to provide significant authority to EU institutions on most justice and home affairs issues.

3.1. The non-exclusive right of initiative of the European Commission

According to the Treaty of Rome, the European Commission has the exclusive right and obligation to initiate and formulate policy according to the conditions provided in the

[303] As Müller-Graff notes, the term "justice and home" affairs is not really clear and remains very abstract. See Peter-Christian Müller-Graff (1994), "The Legal Bases of the Third Pillar and its Position in the Framework of the Union Treaty" in: Joerg Monar & Roger Morgan (eds.), *The Third Pillar of the European Union. Cooperation in the fields of Justice and Home Affairs*, European University Press, Brussels, pp. 22-25.

Treaty. In reality, the Commission had limited power in the decision-making process until the ratification of the TEU[304]. Thanks to Maastricht the Commission's major activity is the right of initiative, namely to make proposals for legislation to the Council. This is especially evident in the first pillar where the Commission has an exclusive right of initiative[305]. The Council can amend the Commission's proposal but it needs unanimity to do so, which is often difficult to achieve. Another important function of the Commission is negotiating international agreements, especially in the field of trade which is part of the first pillar.

Whereas the Commission played an extremely important role in the initial phase of the legislative process establishing the first pillar this was not the case with regard to the third pillar. Under the third pillar the Commission's ability to act was restricted. It had the right to submit proposals to the Council only in areas of cooperation K1 to 6 only i.e. issues covering asylum policy[306], migration, drugs, and fraud. Moreover, the Commission did not have an exclusive right of initiative in third pillar issues but needed to share it with the Member States. This implied that both the Commission and Member States could initiate proposals (see Article K.3). With relation to matters dealing with judicial cooperation, criminal, custom and police cooperation the Commission has no power to submit proposals. These issues were to be settled by the Member States alone, as Member States were reluctant to lose sovereignty in such highly sensitive issues. Member States felt strongly that they did not wish to push for a progress in an area that might

[304] Janne Haaland Matlary (1998), "Democratic Legitimacy and the Role of the Commission", *Democracy and the European Union*, Springer, Heidelberg, p. 68.
[305] In the absence of proposals from the Commission, the Council is unable to make legislation.
[306] It is worth noting that during the negotiations leading to the conclusion of Treaty of Maastricht, Member States offered various drafts to establish the basis for Member States' cooperation in the field. In the first draft Treaty presented by the 1991 Luxembourg presidency on June 18, 1991, for example, they attempted to squeeze asylum policy into sub article A 1 b, that is, next to issues dealing with "authorized entry, movement and residence on the territory of the Member States by *nationals of third countries* (in particular conditions of access, visa policies, asylum policies)". The Dutch Presidency Draft Treaty of September 24, 1991, however, suggested the creation of a separate provision (i.e. a new sub article) for asylum policy and also offered the "harmonization of the formal and substantive aspects of asylum policy". Yet, a working document of 8 November 1991 demonstrated that Member States preferred not to follow this suggestion to proscribe the nature of their cooperation. Hence they decided not to reveal their plans about the form of cooperation and changed this provision by deleting the reference to the harmonization of asylum policy. See Luxembourg Presidency "Draft Treaty on the Union", June 18, 1991, Dutch Presidency Draft Treaty "Towards European Union", September 24, 1991 and Dutch Presidency Draft Union Treaty, Working Document, November 8, 1991.

compromise important nationalistic concerns, especially those linked with specific history and tradition. Moreover, an attempt to revise and approximate the national legal system could add further complications to the negotiation process. Finally, Member States had already demonstrated that they were capable of working efficiently alone in these areas.

The Commission was also deprived of the opportunity to propose legally binding instruments (used under the first pillar) such as Regulation and Directive. Under the third pillar, Member States created a new set of measures to deal with the issues of migration and asylum, as joint positions and joint actions[307]. The legal status of these measures, however, was not clearly specified in the Maastricht Treaty. Certainly, these instruments were not legally binding[308]. The only legal binding instrument offered by the third pillar was a Convention. This, however, needed to be ratified by the national parliaments, and therefore is not often used. It is thus evident that the third pillar involved measures that were either non-binding or difficult to implement, as they required a ratification of the national parliaments. Thus, the Commission had little effect on the behavior of Member States in this area, and Member States were satisfied that the Commission was not about to limit their ability to decide on their own policies[309].

Despite the limited role of the Commission in the decision-making process on most third pillar issues, it gained important responsibility on visa policy. The Commission could make proposals to the Council with regard to, "the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member State". Moreover the Maastricht Treaty also provided Member States the opportunity to transfer some provisions, namely K.1 (1) to (6), to Community jurisdiction (see Article K.9). Thus the Council could decide which of the decisions are to be taken by a qualified

[307] According to Article K.3, the Commission is granted the right of initiative for the adoption of joint positions, joint actions and conventions which be adopted by the Council by qualified majority. The Commission usually adopted these instruments in Common and Foreign Security Policy (CFSP), though they often have proven to be very vague and weak.
[308] Where O'Keeffe suggests, for example, that joint action do not have legal effects, Monar is of the opinion that the latter is a legal binding instrument. See O'Keeffe, *op.cit.,* p. 914.
[309] Ben Crum (2003), "Legislative-Executive Relations in the EU", *Journal of Common Market Studies*, Vol. 41, No. 3, June, pp. 376-377.

majority. As a result, the Commission had the potential to play a significant role if Member States were to shift these provisions to the First Pillar control.

3.2. The marginal role of the European Parliament (EP)

Although the European Parliament was already established under the Coal and Steel Treaty in 1951, it played a minor role in policymaking until the second half of the 1970s. In these years, as it acquired more power with relation to the budget, it became increasingly more important. This is particular evident with regard to certain aspects of the Community budget such as non-compulsory expenditure (i.e. most of Community matters with the exception of agriculture). The Parliament gradually gained the ability to share with the Council the responsibility to decide on the budget and also gained the power to reject the final draft made by the latter. Further reforms to increase its position occurred in 1979, when the EC Member States decided for the first time to organize direct elections to the European Parliament[310].

The Maastricht Treaty also increased the capacity of the Parliament to act in other areas of the decision-making process[311]. Whereas under the Treaty of Rome the Parliament's main competence was to provide consultation, under the new Treaty, the Parliament became prominent in "cooperation", "co-decision" and "assent" procedures[312]. The assent

[310] The number of seats allocated to each country is in proportion to its size. As a result, large countries such as Germany had a larger representation than small one such as Belgium. See also Andreas Follesdal (1998), "Democracy and the European Union: Challenges" in: Follesdal & Koslowski (eds.), *op.cit.,* p. 5.

[311] Though, as Lewis rightly observed, the Parliament had the ability to significantly influence Community legislation, it "failed in its bid to initiate legislation and to share the veto rights of member governments". See David W. P. Lewis (1993), *The Road to Europe. History, Institutions and Prospects of European Integration*, Peter Lang Publishing, New York, p. 184.

[312] "Consultation" (single reading) means that the Parliament gives its opinion but the Council is not obliged to take it into account and can reject it. Under "cooperation" the Council is obliged to consider the opinion of the Parliament, but it can still reject its proposal during the cooperation procedure (two readings). (If the Council does not agree with the opinion of the Parliament it can ask the Parliament to read the measure again.) If the Council chooses to reject the measure after a second reading of the amendment by the Parliament, the Council needs a unanimous vote to override the Parliament's view. It is only under the "co-decision" procedure, (after three readings) that both the Parliament and Council share equal power. During the third reading both Parliament and Council have the authority to prevent the adoption of a specific proposal. The last important competence of the Parliament is the "assent" procedure which is a binding opinion of the Parliament to which the majority in the Parliament have to agree. Parliament's assent is required for the accession of new members to the EU, the conclusion of certain international agreements, and for all Association agreements with third countries. Helen Wallace and William Wallace (2000)(eds.),

of the Parliament became necessary for the signing of international agreements. It gained the ability to veto Association agreements with third countries,[313] and could prevent the accession of new candidate members to the EU[314].

Despite major developments in the integration process, especially after Maastricht, which made it possible for the Parliament to gain additional power primarily in the area of the first pillar, the Parliament remained weak with respect to issues falling under the jurisdiction of the third pillar. The only procedure that it had available was that of consultation, which was non-binding. Thus Article K.6 stated that, "the Presidency will consult the European Parliament and will take into consideration its opinion". Moreover, the Presidency and the Commission shall, "inform the European Parliament of discussions in the areas" covered by the third pillar. The Parliament could ask questions of the Council, and make recommendations to it, and in addition was to hold each year a debate on the progress made in the implementation of the areas referred to in Title VI.

As Monar observed, availability of information is an important democratic principle, but the Parliament was not in the position to guarantee that the Commission and the Presidency would share with it all relevant information in a timely manner. Moreover, important information such as Communications to the Parliament, "are usually vague and evasive, and it has happened frequently that the Parliament has been left in the dark as regards the precise legal status of texts adopted by the governments or that texts have been forwarded with considerable delays or even not at all"[315]. It is thus evident that the Parliament was not considered to be an important actor in the decision-making process

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Policy-Making in the European Union, fourth edition, Oxford University Press, p. 22.

[313] One prime example is the Partnership Agreement with Russia. The Parliament threatened to delay the ratification process because of the situation in Chechnya. The first time the Parliament used the assent procedure was in 1987, with regard to relations with Turkey. It decided to postpone a consideration of two protocols with Turkey due to the arrest of opposition leaders before the national election. See Richard Corbett and Otto Schmuck (1992), "The New Procedures of the European Community after the Single European Act. Efficiency and Legitimacy in the Light of Experience", in: Christian Engel & Wolfgang Wessels (eds.), *From Luxembourg to Maastricht. Institutional Change in the European Community after the Single European Act,* Europa Union Verlag, Bonn, p. 43.

[314] The Parliament must also give its assent with regard to the enlargement process, as assent is a pre condition for ratification.

[315] See Joerg Monar (1995), "Democratic Control of Justice and Home Affairs: The European Parliament and the National Parliaments" in: Roland Bieber and Joerg Monar (eds.), *Justice and Home Affairs in the European Union. The Development of the Third Pillar*, European University Press, Brussels, p. 247.

with respect to issues pertaining to the third pillar. And, in general, the tendency to increase power of the Parliament through institutional changes in the basic Treaty was not reflected in third pillar matters. To a large extent, Title VI: provisions on cooperation in the fields of justice and home affairs, represented an unwillingness to increase power of the Parliament through institutional change of the basic Treaty. Before and after Maastricht, the Parliament's major function was consultation. It could not compel the Presidency and the Commission to change their stance on any particular issue, but was completely dependent on their willingness to cooperate and to take into consideration its opinion in third pillar matters.

3.3. The limited jurisdiction of the European Court of Justice (ECJ)

The main role of the Court of Justice is to ensure the interpretation and application of Community law. An area of substantive EC law where the Court has important jurisdiction is in the regulation of the Internal Market. Though Member States have, for example, frequently attempted to prevent and hinder the import of goods from other Member States by establishing so- called Non-Tariff barriers (NTBs.), the Court has constantly condemned such protectionist practices[316]. The effect of such judicial condemnation has become much more important since the Treaty of Maastricht entered into force. As a result of the Treaty's new procedures in the case of Member non-compliance with the ruling of the Court, the Commission can ask the Court to impose financial penalties[317].

But while the Maastricht Treaty increased the power of the Court, allowing the latter to impose penalties on Member States which do not follow its rulings, the Court's role with

[316] A famous case in this respect is the Judgment Cassis de Dijon of 1979, in which the Court ruled against the decision of the German authorities with regard to the national standards pertaining to liquor, and upheld the principle that products legally produced and marketed in a Member State (such Cassis de Dijon in France) should have free access to the German Market (i.e. the principle of mutual recognition of food standards). Consequently, Germany had to abandon its own standards and allow the import of liquor legally produced in France. Nugent, *op.cit.,* pp. 262-263.

[317] In 2002, for example, the Commission recommended that financial penalties should be imposed on France due to its refusal to allow the import of British meat into French territory after the BSE crisis. In addition, one possible consequence of non-compliance is that the Commission can prevent future access of Member States to structural funds.

regard to third pillar issues remained non-existent. The policy that finally resulted from the Treaty was that in matters concerning migration the Court was explicitly denied jurisdiction, since these areas were integrated in the inter-governmental pillar of the Maastricht Treaty. Consequently, the Court of Justice was not authorized to make any judgment in migration issues. Member States were requested under the Treaty of Maastricht to consider the possibility of involving the Court of Justice in third pillar issues, authorizing it to make judgment in migration and asylum issues. However, they were not obliged to do so. Only with respect to conventions dealing explicitly with third pillar issues would the Court have jurisdiction[318]. Moreover, should Member States decide to transfer certain areas covering asylum and immigration into the first pillar as set forth in Article 100 of EC Treaty along with Article K.9, the Court would have jurisdiction in these issues since they are subject to Community law.

The very limited role given to the Court of Justice in Justice and Home Affairs led to harsh criticism regarding the nature of the third pillar and on the questionable quality of judicial protection precisely in those areas where such protection is most needed. Some scholars have noted, for example, that while all EU Member States are parties of the European Convention of Human Rights (ECHR) and international treaties with regard to the treatment of refugees, it is not clear what mechanism exists that can assure that Member States abide by these arrangements and how these international treaties are being observed and how they should be interpreted[319]. Although Article K.5 explicitly stipulated that, "matters referred in Article K.1 shall be dealt with in compliance with the European Convention for the Protection of human rights and fundamental freedoms of 4 November 1950 and the Convention relating to the status of refugees of 28 July 1951", the Commission is unable to take action against a Member State that is in breach of these provisions[320]. Thus, if a Member State violates one of the treaty provisions the Commission cannot compel it to comply. Also, the Court of Justice was not given

[318] "Such conventions may stipulate that the Court of Justice shall have jurisdiction to interpret their provisions and to rule on any disputes regarding their application, in accordance with such arrangements as they may lay down" Article K.3.2 (c).
[319] See Nanette Neuwahl (1995), "Judicial Control in Matters of Justice and Home Affairs: What Role for the Court of Justice", in: Bieber and Monar (eds.), *op.cit.,* p. 305.
[320] Ibid., p. 301.

jurisdiction to interpret the Geneva Convention, the major legal document regarding refugee protection.

3.4. The Key Actor: The Council of Ministers

The Council of Ministers is undoubtedly the most important institution in the EU. It enacts legislation and develops policy on the basis of EU Member States' priorities and preferences. Though the European Parliament's opportunities to co-legislate in certain areas have gradually increased, the Council is still the key player in the EU legislative process. This key role is particularly apparent regarding legislation on issues falling under the jurisdiction of the second and third pillars, since the new competence given to the Commission and the Parliament on first pillar issues diminishes the Council's power in this arena.

Besides the General Affairs Council, which is composed of the ministers of foreign affairs of the Member States, the work of the Council is divided into different policy areas. For example, issues relating to education are discussed among ministers for education, whereas agricultural matters are discussed among those ministers responsible for agriculture. Asylum and migration topics are addressed by the ministers of the interior and Justice[321]. Article K.3 in the Justice and Home Affairs pillar describes the Council as the forum where Member States are given the opportunity to, "inform and consult one another within the Council with a view to coordinating their action". Thus, ministers exchange views in the Council and jointly determine policies according to the Member States' preferences and "common interests". The decisions taken by the Council may be based on a proposal made by the Member States as well as the by the Commission in areas referred to in article K.1 (1) to (6). On the other hand, on issues related to articles K.1 (7) to (9) (i.e. judicial and customs cooperation and policing) only Member States

[321] The frequency of meetings depends on the interest and importance that Member States grant to the topic. Ministers of finance and agriculture tend to meet more often than ministers of transportation or environment. See Peterson John and Elizabeth Bomberg (1999), *Decision-Making in the European Union*, Palagrave, New York, pp. 34-35.

can submit proposals for consideration by the Council. Also, the final decision on whether to adopt a proposal is made by the Member States alone[322].

Before the Treaty of the EU, decisions in the Council required a unanimous vote. But as this requirement allowed the legislative process to be easily blocked if one member decide to impose a veto, it was decided already in the SEA[323] to simplify the voting procedures by also allowing various forms of voting such as qualified majority and later, also simple majority. Nonetheless, third pillar issues, to a large extent, are still subject to unanimity rule. This state of affairs indeed led to the portrayal of the third pillar as, "a triumph of the nation States"[324]. As O'Keeffe also points out, "the requirement of unanimity is a severe obstacle to the adoption of measures under the third pillar"[325]. With the unanimity requirement it is often difficult to put forward proposals, resulting in limited progress and ineffectiveness. But while Member States preferred to use this procedure when dealing with migration and asylum issues, fearing that other forms of cooperation might clash with their national interests, they were willing already in Maastricht to compromise with regard to visa policy. It was explicitly stated that, starting January 1, 1996, common visa policy would be adopted by a qualified majority (see Article 100c). In this respect it appears that Member States found it easier to agree on this issue and did not seem to suffer from conflicting views.

Because of the intergovernmental nature of the third pillar it was recognized that Member States needed to coordinate their preferences in a shared forum where they could develop future policy measures. Thus, Article K.4 in Title VI suggested the creation of a coordination committee to, "give opinions for the attention of the Council, either at the

[322] Anke Gimbel (1995), "Innen- und Justizpolitik – die dritte Säule der Europäischen Union", in: Werner Weidenfeld (ed.), *Maastricht in der Analyse*. *Strategien und Optionen für Europa,* Verlag Bertelsmann Stiftung, Gütersloh, pp. 78-79.
[323] The SEA established derogation from the principle of unanimity for Directives and allowed for a qualified majority. A qualified majority vote applies to most of the decisions taken under the first pillar, such as trade policy. Unanimity, however, still applies to Second and Third Pillar issues.
[324] See Roger Morgan (1994), "The Third Pillar: An Introduction", in: Joerg Monar & Roger Morgan (eds.), *The Third Pillar of the European Union. Cooperation in the Fields of justice and Home Affairs*, European University Press, Brussels, p. 16.
[325] David O'Keeffe (1995), "Recasting the Third Pillar", *Common Market Law Review*, 32, p. 898.

Council's request or on its own initiative". The K.4 Committee was also to help prepare the Council for discussions, "in areas refereed in Article K.1 and in the conditions laid down in Article 100d of the treaty establishing the European Community in the areas refereed to in Article 100c of that Treaty". One of the functions of the K.4 Committee was to, "avoid a duplication of work and if necessary to expand certain tasks or relocate them"[326].

As for the specific working methods and the structure of the coordinating committee; a proposal was made in the Report to the European Council of Edinburgh from the Coordinators' Group on Free Movement of Persons on December 3, 1992, where it was recommended that, "in view of the very wide range of subjects covered in Title VI" the work of the Committee would be organized into three main sectors: 1) immigration, asylum, security and law enforcement; 2) police and customs cooperation; and 3) judicial matters[327]. In the Conclusions of the Belgium Presidency of 29 October 1993, the activity of the Committee was further discussed, stressing its importance in preparing the Council's meetings. It was suggested that the K.4 Committee, "will have an essential function to fulfill: in addition to its general role in coordinating the various bodies subordinate to it, the Committee will endeavor when preparing for the Council, to resolve as far as possible the substantive problems raised by the various dossiers"[328].

3.5. The European Council: Giving the Impetus

The European Council created in 1974 is the most prestigious forum of the EU[329]. It consists of heads of state and /or government and the President of the Commission, and

[326] See Michael Niemeier (1995), "The K.4 Committee and its Position in the Decision Making Process", in: Bieber and Monar (eds.), *Justice and Home Affairs in the European Union. The Development of the Third Pillar*, European University Press, Brussels, p, 326.
[327] See Report to the European Council in Edinburgh from the Coordinators' Group on Free Movement of Persons, December 3, 1992, CIRC 3687/1/92, Rev 1, Confidential.
[328] See Brussels European Council, October 29, 1993.
[329] It was Giscard d'Estaing who took the initiative to bring the leaders of the Member States together to informally discuss important topics. The main catalyst in this respect was the energy crisis of 1973. The French president was of the opinion that important matters are best discussed at the highest level. Originally, these meetings took place outside the formal framework of the institutional Treaties, and only after the Single European Act of 1986 were they integrated into the formal institutional framework. (Until

meets at least every six months in the country holding the presidency to discuss and shape the further progress of EU policy[330]. The main task of the European Council, as described by the Treaty of the European Union is to "provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof". The issues to be discussed during its meetings are chosen based on the interests of the Member States, and are often linked to major issues currently on the political agenda of the EU. For example, the political and economic conditions necessary for EU membership were established at its famous 1993 Copenhagen meeting. Other major issues, such as security, were also discussed by the European Council[331]. Increasingly, migration and asylum have become "popular topics" at the European Council meetings. The European Councils of Tampere (1999), Seville (2002) and Thessaloniki (2003) have largely focused on these issues. As Member States became increasingly concerned with the question of migration the Council strongly recommended on these occasions that suitable measures be taken to deal efficiently with the new waves of migration. For example, suggestions were made on how to reduce the influx of illegal migrants. The European Council as such is not a legislative body but, rather, a political forum, and thus its conclusions are not legally binding. Nevertheless, its conclusions are extremely valuable as they represent the basis for setting future policy. Based on the conclusions of the Council, Member States adopt a new set of measures after each meeting.

1987 the Council was an informal body lacking a legal recognition. Following the ratification of the Single European Act in 1986, however, it became a formal body and was later integrated into the Treaty.) Some major achievements of the European Council, were the decision to organize direct elections to the European Parliament and the compromise on the controversial British contribution to the Community budget.

[330] According to Article D of the Treaty of Maastricht the Council is supposed to meet, "at least twice a year". In recent years the country, which holds the presidency, tends to organize two meetings of the Council. In 2001 the Belgium Presidency, for example, organized a meeting in Ghent and then in Brussels. Under the Spanish Presidency in 2002, one Council meeting was held in Barcelona and the other in Seville.

[331] The terrorist attacks of September 11, 2001 drew much attention in the subsequent meeting in Laeken in December 2001. The Council called for an adequate response to tackle more effectively the new security threat. See the 2001 Laeken European Council.