The integration of a "Root causes"-approach in EU asylum and migration policies

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Abstract

This paper shows on one hand how preventing access to EU territory violates EU's human rights obligations and on the other hand how external policy, particularly development cooperation could make a lasting impact on the number of asylum applications in Europe. However, it will depend on how development cooperation is implemented. The relevance of a rights based-approach to development for preventing conflicts is highlighted. Finally it will be examined whether assistance to the Republic of Moldova, a potential source country of asylum seekers, follows such an approach.

The paper concludes that EU policies to address the root causes of conflicts would probably have in the long run a stronger impact on the number of applications in Europe than any number of measures to prevent asylum seekers from entering. Consequently, if the EU took human rights seriously in its external policies, there would not be the necessity to resort to control measures which do not discriminate between asylum seekers and economic migrants and violate human rights in the EU's "internal dimension".

Introduction

To prevent and reduce human rights violations in countries of origin will pose remarkable challenges for the EU's human rights policy and its implementation in the future.[1]

It was in the early 1990s - the end of the Cold War with the gradual evolution of human rights playing a major role - that at Member States-level (e.g. Sweden) as well as at EC-level the first steps towards taking a holistic view of the refugee crisis were taken. It was realised that refugee movements could not be successfully handled without measures aimed at eradicating causes of refugee flow.[2] Most of the Member States perceived asylum and migration still as matter of purely internal policies. However, in order to make a lasting impact in third countries, it would have required bringing in line all external policies (particularly human rights and assistance policies – both under the first and the second pillar) of all Member States.

The idea of a "comprehensive approach", i.e. addressing all stages of migration, was taken up at the European Council of Tampere in October 1999 which created the policy framework in order to implement the provisions of the Amsterdam Treaty. The objective was to create an area of freedom, security and justice. Since then the EU has increased its efforts to integrate its **internal** Justice and Home Affairs policy agenda relating to asylum and immigration into all areas of its **external** policy. According to policy papers key objective within this has been to develop co-operation with third countries in the management of migration flows *while* addressing their root causes as long term-measure.[3] Addressing root causes means was described (e.g. Tampere Council Conclusions) as addressing human rights and development issues in countries and regions of origin and transit by measures such as "combating poverty, improving living conditions and job opportunities, preventing conflicts, consolidating democratic states and ensuring respect for human rights, in particular rights of persons belonging to minorities, women and children."

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[1] *EU Annual Report on Human Rights 2000*, adopted by the Council of the European Union, Brussels, 9 October 2000.

[2] Swedish Ministry of Labour's Summary of the Government Bill on Active Refugee and Immigration Policy, May 1991, prop.1990/91:195.

[3] European Commission, *Communication Integrating Migration Issues in the EU's relations with Third Countries*, COM (2002) 703 final, 03.12.2002. see also Tampere Conclusions, para. 59.

That means that in order to achieve a goal of the "internal dimension", i.e. an area of freedom, security and justice for the enjoyment of freedom of movement of EU citizens, the "external dimension" has to act. The institutional structure provided by the Treaty of Amsterdam made co-ordination between JHA and External Relations more feasible. The EU as a major economic actor delivering together with its Member States more than half of all Official Development Assistance, has great potential to address root causes. Whether co-operation will finally lead to prevention of major causes of flight (e.g. violent conflict) depends on whether human rights are taking seriously during implementation of the co-operation programmes. This could ultimately reduce the EU's lack of coherence between its internal and external human rights policies.

This thesis will develop in the first part under which protection obligations the EU is bound and subsequently give an overview of current developments in the area of migration control. Due to the increasing shift in balance between human rights and control EU's protection obligations might be violated.

The second part turns attention to a new approach in migration management, i.e. addressing the root causes of forced migration, particularly root causes of conflict through ensuring respect for human rights in the country of origin. The role of a rights based-approach to development will be examined. Finally, it will be looked at the case of Moldova and how the Tacis programme contributes to a root causes-approach.

I. Preventing asylum-seekers from entering: violation of the protection obligation or legitimate exercise of sovereign control?

For the EU's human rights policy's credibility, it is essential that the treatment of persons who reside in or seek access to the territory of the Union follows international human rights standards.[4]

Due to territorial supremacy states have the right to control borders (physical borders as well as administrative thresholds) and consequently the right to manage the inflow, presence and outflow of non-citizens on state territory. Visa policy regulating the countries whose citizens need a visa is therefore a legitimate element of states' control over entry of foreigners. In this context, the EC Council Regulation of 2003[5] based on Art. 62(2)(b)(i) TEC lists the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.[6]

Compliance with visa requirements is normally monitored by the country of destination as feature of sovereign border control aimed at persons within its jurisdiction. Immigrants who cannot satisfy those requirements are "illegal" (either from the beginning on or they become illegal after "over-staying" their visa or residence permit and after being rejected as asylum seeker) and may be expelled.

However, the case of asylum seekers is a different one. Former UN High Commissioner for Refugees, Sadako Ogata, described the difference between forced and economic migrants as follows: "Refugees are forced to flee. Immigrants are supposed to have a degree of choice."[7]

In the following it will be examined under which protection obligations the EU is bound and whether these obligations contain a right to access to territory.

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[4] *EU Annual Report on Human Rights 2000*, adopted by the Council of the European Union, Brussels, 9 October 2000.

[5] Council Regulation (EC) 453/2003 of 6 March 2003, amending Regulation (EC) 539/2001 OJ L69 of 13 March 2003, 10.

[6] See S. Peers, *EU Justice and Home Affairs Law*, Longman, 2000, pp. 74-82.

[7] High Commissioner for Refugees, Sadako Ogata, Speech to the Trilateral Commission, 1992.

A. The duty to provide protection

1. Geneva Convention

The Geneva Refugee Convention[8] (as amended by its Protocol[9]) lays down in its Articles 3-34 the refugee status, i.e. the set of minimum rights, granted to refugees. In Art. 1 A (2) it defines a refugee as a person having a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.[10] The minimum set of rights granted corresponds to a certain level of human rights which should be safeguarded when the country of origin had failed to protect individuals under its jurisdiction.[11] Most of the rights crucial to refugee protection correspond to the fundamental rights stated in the 1948 Universal Declaration of Human Rights. The two 1966 Covenants[12] were designed to safeguard human rights under national jurisdiction whereas the 1951 Geneva Refugee Convention[13] was conceived as subsidiary means of human rights protection.[14]

As a matter of international law, a person is a refugee as soon as the criteria contained in the definition are fulfilled. Recognition of refugee status is *declaratory*, that is, a person does not become a refugee because of recognition, but is *recognised* because he/she is a refugee.

However, the Declaration on Territorial Asylum adopted by the General Assembly (the outcome of various failed attempts to agree a binding treaty) clarifies that asylum is the right of the state and the granting of asylum an act of sovereignty.[15] Despite the declaratory nature, the term "asylum-seeker" will be used in the following to refer to a person who has not yet received a decision on his/her claim for refugee status or who has not yet submitted an application. Only asylum seeker recognised by the asylum state under Art. 1A(2) Geneva Refugee Convention will be referred to as "refugee".

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[8] Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S.150.

[9] Protocol Relating to the Status of Refugees, 4 October 1967, 606 U.N.T.S. 267.

[10] Art. 1 A (2), 1951 Geneva Convention (189 *UNTS* 50), as amended by 1967 Protocol (606 *UNTS* 267).

[11] Gregor Noll, Jens Vedsted-Hansen, *Non-Communitarians: Refugee and Asylum Policies*, in Philip Alston (ed.), *The EU and Human Rights*, OUP, 1999, p. 363.

[12] International Covenant on Economic, Social and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR), both adopted by GA Res. 2200 A (XXI) (1966): in United Nations, *A Compilation of International Instruments* (1994), at 8 and 20.

[13] See also Convention relating to Status of Stateless Persons and Agreement relating to Refugee Seamen.

[14] B. Gorlick, *The convention and the committee against torture: a complementary protection regime for refugees*, in "International Journal of Refugee Law", vol. 11, 1999, pp. 479-495.

[15] General Assembly Resolution 2312 (XXII), 14 December 1967, Art. 1.

It is the State's discretionary decision to grant territorial asylum. In doing so, the state is not supervised. There exists no international body competent for supervision of the interpretation or implementation of the Geneva Convention and consequently no complaints mechanism.[16] Non-binding guidance can be derived from the UNHCR's Annual Executive Committee conclusions[17] and the "Handbook on Procedures and Criteria from Determining Refugee Status". The Agenda for Protection 2002 mentioned as goal to establish Complementary guidelines to this Handbook.[18] A major weakness of the Convention is that it lacks specific requirements for national refugee determination systems.

What is more, it is silent on the issue of a right to enter territory in order to seek asylum. It contains only a non-refoulement provision in Art. 33 which is now largely regarded as forming part of customary international law.[19]

As a result, the Geneva Convention (amended by the New York Protocol) by itself, does not impose a direct obligation on states to grant refugee status.

However, in order not to render the Convention meaningless, it needs to be seen in light of international human rights law. It is now generally accepted that international human rights law constitutes a broad framework within which refugee law provisions should be seen and which can "support, reinforce or supplement refugee law".[20] Conceptually, the inclusion of Art. 14 UDHR alongside unanimously agreed human rights and fundamental freedoms places international refugee law within human rights paradigm. The reference in the preamble to the Geneva Convention to the UN Charter, the UDHR and "the principle that human beings shall enjoy fundamental rights and freedoms without discrimination" confirms that international refugee law was not intended to be seen in isolation from international human rights law. The drafting of a separate treaty was response to reality surrounding Europe after World War II.[21]

As regards content of protection, human rights law can add value to the "right to enjoy asylum" component of Art. 14 UDHR. Refugees are entitled to rights accorded to them as

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[16] But Article 35 of the Refugee Convention and Article II of the 1967 Protocol contain an agreement for States Parties to cooperate with UNHCR to help UNHCR supervise the implementation of the provisions found in those treaties. The States Parties also agree to inform the UN Secretary-General about the laws and regulations they may adopt to ensure the application of the Convention.

[17] They are based on the principles of the Refugee Convention and are drafted and adopted by consensus in response to particular protection issues. represent the agreement of more than 50 countries that have great interest in and experience with refugee protection.

[18] UNHCR, *Agenda for Protection*, UN doc. A/AC.96/965/Add.1, 26 June 2002, Goal 1, Point 4.

[19] *Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol*, preambular para. 4.

[20] E. Mason, UNHCR, Human Rights and Refugees Collection and Dissemination of Sources, in "International Journal Legal Info", vol. 35, 1997, at 40.

[21] Alice Edwards, *Human Rights, Refugees, and the Right 'To Enjoy' Asylum*, in "International Journal of Refugee Law", vol. 17, no. 2, 2005, p. 298.

individuals and guaranteed under international human rights standards. Treaty interpretation and the underlying rationale behind international refugee law and human rights law lead to the conclusion that in event of inconsistency higher standard must prevail.[22]

It has been argued that countries of asylum try to keep refugee law separate from human rights law so that governments can choose minimum standards instead of higher standards as provided in human rights instruments.[23] The reciprocity rule in Art. 7 para. 1 Geneva Convention can act as barrier to equal rights with nationals: different categories exist on which extent of refugee's rights may be determined (simple presence, lawful presence, lawful residence, habitual residence)[24]. Only few rights apply to asylum seekers (Art. 31 non-penalisation, Art. 33 non-refoulement).[25]

The Vienna Declaration[26] adopted at the World Conference of Human Rights, reaffirmed that everyone, without distinction of any kind, is entitled to the right to seek and to enjoy in other countries asylum from persecution and stressed the importance of the Universal Declaration of Human Rights[27], the 1951 Convention relating to the Status of Refugees, its 1967 Protocol and regional instruments.

It is now also custom of UNHCR to view refugee law as part and parcel of broader international human rights framework, as laid down in its first memorandum on human rights 1997.[28] Human rights law is especially relevant with respect to non-state parties and the role in developing international customary rules applying to all states.

Human rights doctrine has been resorted to in order to fill in the "grey areas" of refugee protection, in particular, in giving fuller meaning to the terms "persecution" and "social group" within the refugee definition[29], in determining appropriate asylum procedures,

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[22] Alice Edwards, p. 330.

[23] Alice Edwards, *Human Rights, Refugees, and the Right 'To Enjoy' Asylum*, in "International Journal of Refugee Law", vol. 17, no. 2, 2005, p. 294.

[24] G. Goodwin-Gill, *The Refugee in International Law*, pp. 305-307.

[25] UNHCR, *Reception of asylum-seekers, including standards of treatment, in the context of individual asylum systems*, Global consulations on international protection, 3rd meeting, UN doc. EC/GC/01/17, 4 Sept. 2001, para. 1.

[26] *Vienna Declaration and Programme of Action*, UN World Conference on Human Rights, June 1993, UN doc. A/CONF.157/23, 12 July 1993, para. 23.

[27] Universal Declaration of Human Rights, 10 Dec.1948, UNGA res. 217 (LXIII).

[28] UNHCR, *UNHCR and Human Rights*, AHC Memorandum AHC/97/325, 6 Aug. 1997: "UNHCR stands for, and is entitled to invoke, the full array of rights, freedoms and principles related to refugee protection developed by the international community under the auspices of the UN or of regional organisations."

[29] See UNHCR, *Guidelines on International Protection no. 1: Gender-related persecution within the context of Article 1A(2) of Geneva Convention*, UN doc. HCR/GIP/02/01, 7 May 2002; UNHCR, *Guidelines on International Protection no. 2: "Membership of a particular social group" within the context of Article 1A(2) Geneva Convention*, UN doc. HRC/GIP/02/02, 7 May 2002.

in ensuring protection to those who fail narrow definition of a "refugee" in Geneva convention but who need protection against refoulement.

Under international human rights law there exists no right to asylum, but only a right *to seek* asylum as laid down in Art. 14 Universal Declaration on Human Rights (as the first declaration on human rights and fundamental freedoms as referred to in UN Charter):[30] "everyone has the right to seek and to enjoy in other countries asylum from persecution". Initial drafting proposals that incorporated correlative obligation "to grant asylum" were not accepted.[31]

But what does the "right to seek asylum" mean in practice? Who are the beneficiaries (does "asylum" encompass a broader range of persons than in the Geneva Convention) and does the right contain a right to enter a territory? The word "*asylum*" is not defined in international law. But UNHCR interprets it very broadly as "at the very least basic protection - i.e. no forcible return (*refoulement*) to the frontiers of territories where the life or freedom would be threatened - for a temporary period, with the possibility of staying in the host country until a solution outside that country can be found".[32] The Committee of Ministers of the Council of Europe adopted a Declaration on Territorial Asylum'[33] and stressed the "intention to maintain their *liberal* attitude with regard to persons seeking asylum on their territory" (Art. 1). They reaffirm to grant *asylum* to any person who fulfils the requirements of the Geneva Convention, but also to "any other person they consider worthy of receiving asylum for *humanitarian reasons*" (Art. 2).

As a consequence, the right to seek asylum applies to a broader category of persons than persons qualifying for Geneva Refugee-status.

However, the Universal Declaration adopted as General Assembly Resolution is non-binding. The right to seek asylum has no identically or similarly worded successor in treaty law with universal scope.[34]

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[30] Universal Declaration of Human Rights, adopted by GA Res. 217 A (III) (1948). In United Nations, *A Compilation of International Instruments* (1994), i, Part 1, 1.

[31] R. Plender and N. Mole, *Beyond the Geneva Convention: constructing a de facto right of asylum from international human rights instruments*, in F. Nicholson and P. Twomey (eds.), *Refugee Rights and Realities: Evolving international concepts and regimes*, Cambridge University Press, 1999, p. 81.

[32] *Refugee Protection: A guide to International Refugee Law*, Inter-Parliamentary Union, 2001, Published by the Inter-Parliamentary Union with the Office of the United Nations High Commissioner for Refugees, p. 15.

[33] Committee of Ministers of the Council of Europe, *Declaration on Territorial Asylum*, 18 Nov. 1977.

[34] On regional level Art. 22 para. 7 of the American Convention on Human Rights and Art. XXVII American Declaration or Art. 12 para. 3 of the African Charter on Human and Peoples' Rights affirm the right to seek asylum.

It has been argued hat Art. 14 is the "springboard for the subsequently concluded 1951 Convention"[35] and consequently Art. 14 is implicit within the Geneva Convention. EXCOM Conclusion no. 82 reaffirms that the institution of asylum derives directly from the right to seek and enjoy asylum set out in Art. 14 para. 1.[36]

As a result, the right to seek asylum is binding if seen in context with the Geneva Convention. Art. 1 and the non-refoulement provision Art. 33 which also applies to asylum-seekers read together place a duty on states parties to grant at a minimum *access to asylum procedures* for purpose of refugee status determination. This is also accepted by state practice.[37]

However, in this case Art. 14 is nothing else than a positive formulation of Art. 33, the non-refoulement provision and consequently covering only persons falling under the narrow refugee definition of Art. 1A(2) Geneva Convention.

Another argument made was that Art. 14 is an "important emerging norm of customary international law."[38] However, there exists no homogenous state practice and no corresponding opinio iuris.[39]

The right to seek asylum is assisted by Article 13 para. 2 UDHR as confirmed in Art. 12 para. 2 ICCPR: "*Everyone shall be free to leave any country, including his own.*" Art. 13 UDHR does not contain the right to enter a country apart from its own[40], but it was argued that it would make nonsense of Geneva Convention if was not intended at least for purpose of refugee status determination, especially where has reached territory.[41]

As a result, Art. 14 UDHR in combination with the Geneva Refugee Convention offers access to procedures through the prohibitions of non-refoulement of Art. 33.

Art. 3 of the Declaration on Territorial Asylum[42] makes clear that no person entitled to invoke the right to seek asylum (Art. 14 UDHR) shall be subjected to measures such as

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[35] Alice Edwards, *Human Rights, Refugees, and the Right 'To Enjoy' Asylum*, in "International Journal of Refugee Law", vol. 17, no. 2, 2005, p. 296.

[36] *Executive Committee Conclusion no. 82 (XLVIII) on "safeguarding asylum"*, 1997, para. (b).

[37] Alice Edwards, p. 301.

[38] S.R. Chowdhury, *A response to the refugee problems in post cold war era: some existing and emerging norms of international law*, in "International Journal of Refugee Law", vol. 7, 1995, p. 105.

[39] Gregor Noll, *Seeking Asylum at Embassies: A right to entry under international law?*, in "International Journal of Refugee Law", vol. 17, no. 3, 2005, p. 547.

[40] See Art. 12 ICCPR, *General Comment No. 27*, 02/11/99, CCPR/C/21/Rev.1/Add.9.

[41] *Amuur v. France*, European Court of Human Rights held that it was irrelevant that France referred to its airport holding as "international zone" and that applicants had not yet entered French territory according to French law; Art. 5 ECHR still applicable.

[42] Art. 3 para. 1, *Declaration on Territorial Asylum 1967*.General Assembly Resolution 2312 (XXII), 14 December 1967. see also *EXCOM Conclusion no. 22(XXXII)*, 1981, part IIA, para. 2.

rejection at the frontier or, if he has already entered the territory in which he seeks asylum, *expulsion or compulsory return* to any State where he may be subjected to persecution.

However, the personal scope of the non-refoulement prohibition of the Geneva Convention is rather narrow: it applies only to the category of persons falling under Art. 1A (2) and is not absolute.

2. Human rights law as de facto right to asylum – making up for the Geneva Convention's weaknesses

Two major weaknesses of the *non-refoulement* provision of the Refugee Convention can be identified: firstly, it requires that protection has to be linked to a well-founded fear of persecution (threat to life or freedom) on account of a person's race, religion, nationality, membership of a particular social group, or political opinion. Secondly, the Geneva Convention excludes persons if reasonable grounds exist for regarding asylum seekers as a danger to the security or asylum seekers who have been convicted of a particularly serious crime.

The presumed individual nature[43] of the Geneva Convention refugee definition has been challenged on the basis of a historical analysis in combination with the wording of the definition.[44] It was argued that the drafters were fully aware of the collective nature of many flight moments having people fleeing the Communist regime in mind, but did not think that definition was inherently individual. The necessity of drafting separate legal texts for subsidiary protection should therefore be only created by restrictive interpretation of the term refugee.[45] This argument is supported by the original practice following the adoption of the Convention, i.e. acceptance of a vast majority of refugees from communist Eastern European countries[46] without scrutinising the individual requirements. However, at that time only a limited number managed to flee from the "East" and were automatically granted asylum.[47]

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[43] *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR, 1979, paras. 164-166.

[44] Thomas Spijkerboer, *Subsidiarity in asylum law, the personal scope of international protection*, in D. Bouteillet-Paquet (ed.), *Subsidiary protection of refugees in the European Union: complementing the Geneva Convention?*, Brussels, Bruylant, 2002, pp. 19-42.

[45] Thomas Spijkerboer, *Subsidiarity in asylum law, the personal scope of international protection*, in D. Bouteillet-Paquet (ed.), *Subsidiary protection of refugees in the European Union: complementing the Geneva Convention?*, Brussels, Bruylant, 2002, pp. 28-29.

[46] Hungarian refugees after November 1956, Czechoslovak refugees after the entry of Warsaw Pact troops in Prague, Vietnamese refugees after the occupation of Saigon and the final victory of the North.

[47] "In the receiving countries of the West, anyone arriving from the Soviet Union or one of its allies was automatically granted some form of asylum; no detailed scrutiny of their reasons for leaving was felt necessary. In the Third World too, it was almost impossible to address the

However, the foregoing argument is not accompanied by practice. Reality is that with the end of the Cold War and the mass inflow of asylum seekers, states tried to reduce the number of asylum seekers who are granted full refugee protection by carefully examining the proof of the threat to the freedom and life of the individual asylum seeker during the status determination procedure.[48] Art. 63 para. 1 lit. c TEC seems to perpetuate this reductive approach to protection categories.[49]

As a result, refugee status is denied to people forcibly displaced by armed conflict, serious internal disorder, or other forms of serious harm, with no link to a specific Convention ground.[50] However, they would fall within the broader definition of a refugee contained in the OAU Convention and the Cartagena Declaration[51], and are also within UNHCR's responsibility ("persons considered to be of concern to UNHCR").

Consequently, the Refugee Convention cannot be considered anymore to be an adequate instrument in the context of various forms of forced displacement even though documents such as "The Agenda for Protection 2002" recognise the enduring importance of the 1951 Convention as the primary refugee protection instrument.[52]

In order to make up for this major weakness, complementary forms of protection have been created by referring to non-refoulement provisions.

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causes of flight if the source country could call on the protection of one of the superpowers – and almost all could to some degree." See in UNHCR, *The State of the World's Refugees: The Challenge of Protection* , Penguin, New York, 1993, pp. 8-9.

[48] Otto Hieronymi, *European Values and Interests: The need for liberal asylum and immigration policies*, Refugee Survey Quarterly, vol. 20, no. 2, UNHCR, 2001, p. 83.

[49] Gregor Noll, Jens Vedsted-Hansen, *Non-Communitarians: Refugee and Asylum Policies*, in Philip Alston (ed.), *The EU and Human Rights*, OUP, 1999, p. 376.

[50] Alice Edwards, p. 328.

[51] On a regional level, the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa is relevant. It asserts that the 1951 Refugee Convention is "the basic and universal instrument relating to the status of refugees", the OAU Convention is, to date, the only legally binding regional refugee treaty. The OAU Convention follows the refugee definition found in the 1951 Convention, but includes a more objectively based consideration: any person compelled to leave his/her country because of "external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality". This means that persons fleeing civil disturbances, widespread violence and war are entitled to claim the status of refugee in States that are parties to this Convention, regardless of whether they have a well-founded fear of persecution.

The Cartagena declaration contains the definition used throughout Latin American region, is legally not binding on States, but most Latin American States apply the definition as a matter of practice; some have incorporated the definition into their own national legislation. The Declaration has been endorsed by the Organization of American States (OAS), the UN General Assembly, and UNHCR's advisory Executive Committee. The definition includes the 1951 Refugee Convention definition and also persons who have fled their country "because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order".

[52] preambular para. 2.

The explicit non-refoulement provision of the Convention against torture (CAT) in Art. 3 protects any person who has substantial grounds for believing that he/she would be in danger of being subjected to *torture.*[53] As the CAT's protection is absolute, the UN Committee against Torture has decided a number of cases in favour of asylum-seekers whose claims had been rejected by refugee status determination authorities in the country of asylum.

Other non-refoulement provisions (but only in an implicit way) are contained in the International Covenant on Civil and Political Rights (Art. 7)[54] and the Convention on the Rights of the Child (Arts. 37, 40)[55].

In Europe the provisions of the ECHR are relevant.[56] Whereas the European Court of Human Rights has repeatedly ruled in judgements concerning Art. 3 ECHR that States are entitled to control entry of aliens on their territory[57], it interpreted this article in its far-reaching case law as comprising a prohibition to return a person to a situation where she/he would run risk to be threatened by torture, inhuman or degrading treatment.

Article 3 is subject to no derogation and applies to everyone, including illegal immigrants, whatever their activities or personal conduct. The individual does not need to be a citizen of a contracting party.[58]

In *Soering v. UK*[59] the Court recognised an extra-territorial effect of the ECHR. In *Chahal v. UK*[60], the Court held that a deportation order that would return a Sikh separatist to India on national security grounds where he would face "real risk" of being subject to treatment contrary Article 3 is in breach of the ECHR. In *Ahmed v. Austria*[61], the Court ruled that holding a deportation of a Somali convicted of serious criminal offence is a violation of Article 3 if the applicant is under the risk to be subject to inhuman and degrading treatment by

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[53] Committee against Torture, *General Comment on the Implementation of Article 3 in the context of Article 22 of the Convention against Torture*, U.N. Doc. CAT/CIXX/Misc.1 (1997), para. 3.

[54] General Comment no. 20 clarifies in its para. 9 that Art. 7 ICCPR has to be interpreted in a way that States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment *upon return to another country* by way of their extradition, expulsion or refoulement. Also actions of private actors are comprised (para. 2). See *Human Rights Committee General Comment no. 20*, adopted by the Committee at its 1138th meeting, on 3 April 1992.

[55] Convention on the Rights of the Child , 20 Nov. 1989, 1577 U.N.T.S. 3.

[56] European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, 4 Nov. 1950, 213 U.N.T.S. 222.

[57] See *Nsona v. The Netherlands*, ECHR (1996) V, No. 22, at para. 92.

[58] H. Lambert, *Article 3 of the European Convention on Human Rights and the Protection of Refugees and Rejected Asylum-Seekers against* Refoulement *from Europe*, in *European Convention on Human Rights and Protection of Persons in need of International Protection*, Chisinau, 2000, pp. 77-87.

[59] *Soering v. United Kingdom*, Ser. A 161, 7 July 1989.

[60] *Chahal v. United Kingdom*, Judgment 70/1995/576/662, 15 November 1996.

[61] *Ahmed v. Austria*, judgment 71/1995/577/663, 17 December 1996.

non-state agents upon expulsion.[62] Interestingly enough, in *BB v. France,* the European Court of Human Rights found an Article 3 violation whereby a citizen of Congo suffering from AIDS would be deported to the country of origin without access to adequate medical care.[63] Apart from Art. 3 also Art. 5 ECHR[64] has been interpreted to have extra-territorial effect.

The response: alternative forms of protection

As a consequence, in order to comply with those extra-territorial protection obligations and embrace persons who do not meet requirements of the Geneva Conventions due to its individual nature, European receiving states - pioneers were countries with proportionately highest number of asylum seekers such as Germany - responded with the concept of humanitarian status. The European Union refers to this category as "subsidiary protection" (see below), UNHCR as "complementary protection"[65].

The Geneva Convention is also inadequate in mass flight situations. Temporary protection is based on the principles of the international refugee protection regime, since all those displaced are refugees within UNHCR's mandate and many also fulfil the Refugee Convention definition. However, temporary protection is not an alternative to Convention Protection, but a precursor to it (or to subsidiary protection) until individual procedures are carried out or group recognition occurs.[66] In situations of large-scale influx, asylum seekers should be admitted to the State in which they first seek refuge and if that State is unable to admit them on a durable basis, it should admit them at least on a temporary.[67] Countries of asylum may end temporary protection when there is a fundamental change in the circumstances that prompted people to flee. At the same time it should be clarified to both the

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[62] Other cases: *Cruz Varas and others v. Sweden,* Judgment of 20 March 1991; *Amuur v. France,* Judgment of 25 June 1996; Reports 1996-III; *Vilvarajah and others v. UK,* European Court of Human Rights Judgment of 30 October 1991. (holding no breach of Article 3 although applicants faced forms of ill-treatment upon return to Sri Lanka, which did not pose a risk of treatment beyond the threshold of Article 3 noting that their personal situation was not worse than 'the generality' of other young male Tamils); *Jabari v. Turkey,* European Court of Human Rights Judgment of 11 July 2000. (holding violation of Article 3 in case of deportation that would return a woman who has committed adultery to Iraq.

[63] For a similar case, see European Court of Human Rights, *D versus United Kingdom*, case number 146/1996/767/964, 2 May 1997, full judgment available at www.dhcour.coe.fr.

[64] *Conka v. Belgium,* European Court of Human Rights Judgment of 5 February 2002: the detention and return of rejected Roma asylum seekers to Slovakia constituted a violation of Article 5, as well as the prohibition against 'collective expulsion' under Protocol 4.

[65] UNHCR, *The International Protection of Refugees: Complementary Forms of Protection*, April 2001.

[66] UNCHR, *Note on International Protection*, UN doc. A/AC.96/830, 7 Sept. 1994, paras. 45-51.

[67] UNHCR EXCOM, *Protection of Asylum Seekers in Situations of Large-scale Influx*, Conclusion No. 22 (XXXII), 1981, II A 1.

national electorate and to the asylum seekers that the refugees cannot count on permanent asylum and integration in Europe.[68]

UNHCR's Executive Committee has recommended that in a spirit of international solidarity, Governments should also seek to ensure that the **causes** leading to large-scale influxes of asylum seekers are as far as possible removed.[69] Consequently, a root causes-approach as dealt with in part II. is also relevant in the context of temporary protection.

In the next part, it will be established how the EC/EU as former economic actor is bound by those protection obligations.

B. EU and protection obligations

1. Competence

The entry into force of the Amsterdam Treaty on 1 May 1999 transferred human rights-sensitive issues of asylum, migration and visa policy to the supranational "first" pillar to join with free movement in the newly created Title IV "Visas, Asylum, Immigration and other policies related to free movement of persons". Articles 61 to 69 TEC established EC-competence in order to achieve an "area of freedom, security and justice".[70]

The European Community gained powers to adopt "measures on asylum in accordance with the Geneva Refugee Convention and the Protocol 1967 and other relevant treaties" (Article 63 para. 1 EC Treaty (TEC)), "minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection and promoting balance of effort between Member States in receiving and bearing consequences of receiving refugees and displaces persons" (Art. 63 para. 2 TEC) and immigration law measures (Art. 63 paras. 3 and 4).[71]

Immigration law measures are relevant to asylum issues in so far as they could prevent asylum seekers access to territory or facilitate expulsion of failed asylum seekers before their asylum claims receive adequate examination.

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[68] Otto Hieronymi, *European Values and Interests: The need for liberal asylum and immigration policies*, Refugee Survey Quarterly, vol. 20, no. 2, UNHCR, 2001, p. 82.

[69] UNHCR EXCOM, *Protection of Asylum Seekers in Situations of Large-scale Influx*, Conclusion No. 22 (XXXII), 1981, IV (6).

[70] The United Kingdom, Ireland and Denmark opted out from Title IV. However, United Kingdom opted in to all EC asylum measures, Ireland opted into almost all of them, but both opted out of family reunion Directive (Art. 69 TEC).

[71] Policy harmonisation is conducted in form of traditional EC regulatory measures binding upon Member States and to a certain extent directly applicable (adoption of EC acts according to Art. 249 TEC).

The JHA acquis[72] comprises not only instruments adopted by Member States[73] and instruments adopted by the Council after the entry into force of the Amsterdam Treaty[74], but also international Conventions and other binding international and regional instruments as they are inseparable from the attainment of the objectives of the Treaty on European Union. In the asylum field the 1951 Convention and the 1967 Protocol, as well as the European Convention on Human Rights (ECHR), are part of the EU asylum acquis.

In the following it will be examined how the EC is bound by the Geneva Convention and other human rights treaties.

2. Is the EC bound by human rights, if yes how?

The EC is no contracting party to any human rights convention or the Geneva Refugee Convention. Observance and protection of human rights and fundamental freedoms in the European Community are matters falling primarily within the jurisdiction of the Member States.

In order to make the EC institutions subject to direct supervision of the European Court of Human rights accession to the European Convention on Human Rights was proposed by the Commission more than once.[75] However, the ECJ has ruled that the EC is not competent to accede to the ECHR.[76] The draft European Constitution[77] – which has not yet entered into force - would not only maintain reference to general principles of EC law but also provide for EU's accession to ECHR.[78]

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[72] European Commission, DG Justice and Home Affairs, *Acquis of the European Union, Title IV of the TEC, Title VI of the TEU,* revised 30.09.2003, available at europa.eu.int/comm/justice_home/acquis_en.htm.

[73] Before entry into force of the Maastricht Treaty: e.g. 1992 London Council Resolutions on a harmonised approach to questions of host third country, on manifestly unfounded applications for asylum, on countries in which there is generally no serious risk of persecution. After entry into force of the Maastricht Treaty: 1995 Council Resolution on minimum guarantees for asylum procedures, 1997 Joint Position on harmonised application of the refugee definition, 1997 Council Resolution on unaccompanied minors who are nationals of third countries.

[74] asylum legislation on issues of responsibility for asylum seekers (Reg. 343/2003), replacing 1990 Dublin Convention; "Eurodac" system for exchanging fingerprints of asylum seekers in order to determine responsibility for them (Reg. 2725/2000), reception conditions for asylum seekers (Directive 2003/9), definition of refugee and subsidiary protection status (Directive 2004/83) including content of such status, asylum procedures, temporary protection (Directive 2001/55).

[75] In 1978 the Commission proposed the first time the accession to the ECHR, see *Memorandum adopted by the Commission*, 4 April 1979, *Bull. EC*, Supp. 2/79. Another try followed in the 1990s. See *Commission Communication on Community accession to the European Convention for the Protection of Human rights and Some of its Protocols* , Doc. SEC(90)2087 final (19 November 1990).

[76] *Opinion 2/94* (1996) ECR I-1759 (para. 36), the ECJ concluded that "as Community law now stands, the Community has no competence to accede" to the ECHR.

[77] Draft Treaty Establishing a Constitution for Europe, 2003, CONV 850/03, 18 July 2003.

[78] Title I, Arts. 1-9, also Protocol no. 32 and Declaration no. 2 on specific issues of EU accession to ECHR.

However, that does not mean that the EC is currently not bound by international human rights law. Even though human rights were not integrated in the operative part of the Treaties until 1993, the European Court of Justice (ECJ) has been affirming since the late 1960s that fundamental rights form part of general principles of EC law which the Court protects.[79] The case law built up from 1969[80] onwards by referring to constitutional traditions common to Member States and international treaties for protection of human rights on which Member States have collaborated or signed. In this regard the ECJ stressed the special significance of the ECHR.[81]

In 1992, the Treaty on European Union (TEU) finally explicitly provided in Art. 6 para. 2 TEU (ex Art. F.2 TEU):[82] "the Union shall respect fundamental rights as guaranteed by the ECHR and as they result from constitutional traditions common to Member States as general principles of EC law". Even though no express reference is made in Art. 6 para. 2 to treaties other than the ECHR, the ECJ has continued to refer to treaties other than ECHR occasionally.[83] The obligation to respect fundamental rights applies to EU institutions and to Member States in area of EC law.

Principal source of law for human rights in Community legal order are the general principles of EC law which has been affirmed by the Court in para. 33 of Opinion 2/94 (see above).

Since entry into force of the Treaty of Amsterdam, Art. 6 para. 2 TEU has become subject to jurisdiction of ECJ with regard to actions of institutions to the extent that the ECJ has jurisdiction under EC Treaties and under Treaty of Amsterdam (Art. 46 (d) TEU). The Treaty brought provisions on fundamental rights in Article 6 para. 1 TEU: "the EU is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and rule of law, principles which are common to Member States" reflecting the case law of the ECJ.

Art. 7 TEU reaffirms a general competence of the Commission to monitor the human rights situation in the Member States as it provides for the right of the Commission (alternatively one third of the Member States) to propose that the Council determine the existence of a serious and persistent breach by a Member State of principles mentioned in Art.

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[79] See Philip Alston (ed.), *The EU and Human Rights*, Oxford University Press, 1999.

[80] Case 29/69 *Stauder v City of Ulm* (1969) ECR 419.

[81] See case 222/84 *Johnston* (1986), ECR 1651.

[82] See, e.g., N. Neuwahl, *The Treaty on European Union: A step forward in the protection of Human Rights?*, in Neuwahl and Rosas (eds.), *The European Union and Human Rights* (1995), pp. 1-22 at pp. 13-22.

[83] See above *Opinion 2/94* and case C-249/96 *Grant* (1998) ECR I-649, referring to International Covenant on Civil and Political Rights. However, this judgment takes a dismissive approach to the Human Rights Committee's role interpreting the Covenant.

6 para. 1 TEU.[84] The Commission proposes the establishment of a European Union Agency for Fundamental Rights as independent centre of expertise on fundamental rights issues through data collection, analysis and networking. It is intended to advise the Union institutions and the Member States on how best to prepare or implement fundamental rights related Union legislation.[85]

Furthermore, the Treaty establishing the European Community (TEC)[86] brought provisions on police and judicial cooperation to fight racism and xenophobia (Art. 29 TEU), on non-discrimination (Art. 13 TEC) and on visa, immigration and asylum policy (Art. 61-69 TEC). States seeking admission must satisfy principles set out in Art. 6 para. 1 TEU (Art. 49 TEU).

An attempt to remedy the absence of written rules as regards human rights and fundamental freedoms the EU Charter of Fundamental Rights of the European Union[87] was proclaimed at the Nice European Council by the EU institutions – Council, Commission and Parliament – in December 2000.[88] However, it was not incorporated into the Treaties but in part II of the Draft Constitution. Until entry into force the Constitution, the Charter remains a reference document which has been invoked by Advocate-Generals of the ECJ in their conclusions[89] or the Court of first instance which even explicitly referred to it in judgments on 30 January 2002[90] and 3 May 2002. It is also referred to in preambles to EC and EU legislation, especially in asylum and immigration legislation.[91]

On 13 March 2001, the Commission took an important step when it suggested that all Commission legislative proposals or other draft instruments should first be examined to see whether they are compatible with the Charter (SEC (2001) 380/3). In the Communication on the EU's role in promoting human rights and democratisation in third countries (COM (2001) 252), Commission says that its action in the field of external relations will be guided by compliance with rights and principles set out in EU Charter.[92]

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[84] Already in April 1978 the Heads of State or Government declared that "respect for and maintenance of representative democracy and human rights in each Member State are essential elements of membership of European Communities".

[85] *Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights*, COM(2005)280, 30 June 2005.

[86] Treaty Establishing the European Community (1957), OJ C 325/33, 24 December 2002.

[87] Charter of Fundamental Rights of the EU, OJ C 364/1,18 December 2000.

[88] A first attempt to draw up rules in this regard constituted the Declaration of Fundamental Rights and Freedoms adopted by the European Parliament on 12 April 1989.

[89] For instance, C-377/98 *Netherlands v Council and EP* (2001) ECR I-8575.

[90] Max.mobil Telekommunikation Service versus Commission.

[91] See OJ 2000 C 364. In the asylum legislation right to seek asylum, see para. 20 of preamble to the definition Directive, para. 5 of preamble to Directive 2003/9, para. 15 of preamble to Reg. 343/2003.

[92] *Report on the human rights situation in the European Union* (2001/2014(INI)), Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, Rapporteur Joke Swiebel, Doc. A5-0451/2002 of 12 December 2002.

3. More precisely: how is the EU bound by the ECHR and the case-law of the Strasbourg Court/Geneva Convention

Departing from the arguments made above about the interaction of refugee and human rights law, the Geneva Refugee Convention (as amended by its New York Protocol) should be considered as human rights treaties in the context of Art. 6 para. 2 TEU. What is more, the Convention has been ratified by all Member States and is referred to in Art. 63 TEC and EC asylum legislation.

As above the conclusion has been made that Art. 14 UDHR's content does not go beyond the non-refoulement prohibitions, there is no need to examine how the EU is bound by the UDHR. However, it is noteworthy that the right to asylum is referred to in adopted EC legislation[93] and in the EU Charter of Fundamental Rights (Art. 18, Art. II-78 of proposed Constitution). However, Art. 18 EU Charter – even if it were binding – contains no clear-cut definition on exact implications of right to asylum. In any case, given the mandate of drafters it cannot be assumed to have created new protection obligations. The Charter is only secondary source confirming rights which are protected as general principles of EC law. Therefore, it contains no new rights apart from synthesising series of ECJ judgments (e.g. right to good administration).

As a result, there is little doubt that EC legislation must conform to and be interpreted in the light of the Geneva Convention and its Protocol as such. Art. 307 TEC would render EC legislation contradicting the Geneva Convention inapplicable. ECJ has already interpreted EC legislation and ruled on its validity in light of the Geneva Convention.[94]

As regards UNHCR-soft law such as EXCOM conclusions or the Handbook on refugee status the ECJ Grant judgment[95] is relevant: the ECJ did not accept the opinion of the ICCPR-treaty body, the Human Rights Committee (HRC) as source of general principles of EC law. However, there are good grounds to distinguish the role of UNHCR from that of the HRC. ECJ has accepted in context of EC external relations law that soft law adopted by organ

[93] See OJ 2000 C 364. In the asylum legislation right to seek asylum, see para. 20 of preamble to the definition Directive, para. 3 of preamble to Directive 2003/9, para. 15 of preamble to Reg. 343/2003.

[94] See *Khalil* and *Addou* judgment, Case C-95/99, 11 October 2001.

[95] Case C-249/96 *Grant* (1998), ECR I-649.

created by treaty binding EC can be of use interpreting relevant treaty in order to determine EC obligations.[96]

As regards non-refoulement protection, Art. 6 para. 2 TEU explicitly refers to the European Convention on Human Rights. As far as protocols to the ECHR are concerned, at least first and sixth protocol which all Member States have ratified should be recognised as part of general principles. As far as case-law of the ECtHR is concerned, the ECJ refers to the case law of the Strasbourg Court and will strive to ensure that general principle do not set lower standards than ECHR. If EC law did require Member States to violate their ECHR obligations it could be claimed that that EC law is inapplicable by virtue of Art. 307 TEC preserving legal effect of pre-existing treaty obligations of Member States to non-EU countries and ECtHR would likely extend its indirect review of EC acts to such measures.[97]

The ECHR forms also part of the asylum acquis. Only Protocols Nos. 4, 6, 7 are part of the acquis on a non-obligatory basis.

In any case, the ECJ has ruled that a breach of **customary international law** (like the principle of non-refoument) by itself (without link to general principles required) is potential ground for invalidity of EC act.[98]

The UN Convention against Torture (CAT) is ratified by all Member States and therefore there is no reason to distinguish this Convention from the ICCPR which the ECJ has already recognised as source of general principle.[99] As the CAT expressly bans return to face torture, there is no need to consider whether to rely on jurisprudence of Committee against torture.[100]

The EU Charter of Fundamental Rights expressly refers to the non-refoulement rule (Art. 19 para. 2, Art. II-79 para. 2 of proposed Constitution) and mentions in its explanation "the relevant case-law from the European Court of Human Rights regarding Art. 3 ECHR (see Ahmed v. Austria, judgment 17 December 1996, ECR VI-2206 and Soering, judgment 7 July 1989)".

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[96] See Case C-188/91 *Deutsche Shell* (1993) ECR I-363, para. 18 and Case C-162/97 *Nilsson et al* (1998) ECR I-7477, para. 49.

[97] See Steve Peers, *Human Rights, Asylum and European Community Law,* in "Refugee Survey Quarterly", vol. 24, issue 2, UNHCR 2005, p. 29.

[98] See Case C-162/96 *Racke* (1998) ECR I-3655, paras. 45 and 46.

[99] Case C-259/96 *Grant* (1998) ECR I-649, referring to ICCPR. But judgment takes dismissive approach to HRC's role interpreting the Covenant.

[100] See Steve Peers, *Human Rights, Asylum and European Community Law,* in "Refugee Survey Quarterly", vol. 24, issue 2, UNHCR 2005, p. 30.

In order to comply with the above-mentioned obligations, and in accordance with the newly gained powers under Title IV TEC, the Council adopted a Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and content of the protection granted.[101] Human rights considerations are expressly built into definition of persecution set out in the Directive on definition and content of refugee and subsidiary protection status[102] (Art. 9 para. 1). The Preamble (para. 25) states that criteria for subsidiary protection-status are drawn from international obligations under human rights instruments and practices existing in Member States. Art. 21 para. 1 states that Member States shall respect principle of non-refoulement in accordance with their international obligations.

The criteria for acquisition of subsidiary status in Art. 15 are met if persons would face one of three situations upon return, i.e. if they would face the death penalty or execution, torture or other inhuman or degrading treatment or punishment or it would involve serious and individual threat to civilian's life or person by reason indiscriminate violence in situation of international or internal armed conflict.[103] Thus the directive accepts that there is a Soering effect entailing right to immigration status not merely non-removal, not only in connection with Art. 3 ECHR but also with Art. 2 ECHR (as amended by Sixth and Thirteenth Protocols). But directive assumes that even if Soering effect – no obligation to grant subsidiary protection status (difference between right to non-removal and right to fully-fledged immigration status).

Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving such Persons and Bearing the Consequences thereof.[104]

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[101] Council Directive EC 83/2004 of 29 April 2004 *on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as* persons who otherwise need international protection and the content of the protection granted, OJ 2004 L 304/12.

[102] Directive on definition and content of refugee and subsidiary protection status , OJ 2004 L 304/12. Member States must apply Directive by October 2006.

[103] The Commission's preceding proposal defined the criteria in a more open way. It based protection on one specific human right and two general references to human rights or threat resulting from armed conflict: the violation of a human right sufficiently severe to engage the Member State's international obligations or threat to life, safety or freedom as result of reason indiscriminate violence arising in situation of armed conflict or the result of systematic or generalised violations of human rights. See Art. 15 of original proposal (COM (2001) 510, 12 September 2001.

[104] Council Directive EC 55/2001 of 20 July 2001 *on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof,* (2001) OJ L212/12.

To sum up, the EC is bound by the Geneva Convention and non-refoulement rules and has taken steps in order to provide protection on its territory for persons falling under temporary or subsidiary schemes. However, the next section will deal with migration control measures and their consequences for asylum seekers.

C. Europe's "asylum problem": Migration control versus protection obligations and how root causes could mitigate the imbalance

There has been growing concern in Europe about the "asylum problem", i.e. the high number of persons seeking asylum in EUrope. This resulted in policies changing the balance between migration control and protection. Many Western governments are implementing restrictive asylum policies and practices in order to deter and to prevent asylum-seekers from seeking refuge on their territory, including by interception measures, visa controls, carrier sanctions, "safe third country" arrangements, administrative detention and restrictive interpretations of the refugee definition.[105]

However, the "growing concern" about "asylum problems" has not always been justified – in terms of real numbers of asylum seekers arriving. It is true that asylum applications to Western European states grew beginning of the 1990s in comparison to the 1980s: whereas in 1983 only 50.000 applications were registered, in 1992 the number rose to 684.000 applications.[106] It was in particular the secession of former Yugoslavia which led to the outbreak of political and humanitarian crises producing refugee flows that vastly exceeded the forced migration during the cold war.[107] Intra-state conflicts between ethnic groups proliferated as secessionist tendencies arose in states where minority groups have suffered discrimination or groups seeing themselves as nation or people without territorial legitimacy of their identity moved towards self-determination.

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[105] M.J. Gibney, *The state of asylum: democratisation, judicialisation and the evolution of refugee policy in Europe*, New Issues in Refugee Research: Working Paper no. 50, UNHCR, October 2001, at 1.

[106] Gil Loescher Loescher G., Milner J., *The missing link: the need for comprehensive engagement in regions of refugee origin*, in "International Affairs", vol. 79, no. 3, 2003, p. 595.

[107] Hieronymi, Otto, *European Values and Interests: The need for liberal asylum and immigration policies*, Refugee Survey Quarterly, vol. 20, no. 2, UNHCR, 2001, p. 84.

In the last years, the number *declined* not only globally[108] but also in Europe. EU Member States registered a 17 per cent fall in new asylum applications submitted during the first six months of 2005 as compared to January to June 2004 and 30 per cent fewer requests than during the first half of 2003.[109]

As already stated above, states have the right to control entry to their territory. On the other hand, they are bound by right to seek asylum/non-refoulement provisions. As long as migration control measures contain safeguards in order to take account of these provisions, this is not problematic.

However, the trend in EUrope is to "externalise" migration control and thereby increasingly merge the fate of asylum seekers and economic migrants. As already stated, the fundamental difference between refugees and migrants is that refugees do not *choose* to leave their countries and do not enjoy the protection of their home countries anymore. Consequently, they have to be treated in a different way.

1. Harmonising for the Single Market: preventing access of irregular migrants... and asylum seekers

The necessity of harmonisation of policies regarding third country nationals was justified in course of introduction of the Single European Act 1986[110] aiming at the establishment of a common market within EUrope (White Paper on single Market 1985). An area without internal frontiers in which free movement of goods, persons, services and capital is ensured should be established by 1993. The abolition of internal borders necessitates reinforcing external border controls and harmonising policies towards third country nationals (first through intergovernmental and then through supranational cooperation). That is, freedom, security and justice in a secure and controlled environment for the realisation of free movement for EU citizens requires common policies limiting outside interference.

The Dublin and Schengen Conventions 1990 were adopted outside the EC-framework and created institutional mechanisms in an inter-governmental framework towards developing common border policies such as common visa lists and the application of procedural asylum

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[108] Globally seen, the number of applications during 2004 decreased by 19 per cent compared to 2003. See *2004 Global Refugee Trends*, UNHCR Geneva, 20 June 2005, para. 35.

[109] UNHCR, *Asylum Levels and Trends in Industrialized Countries Second Quarter, 2005 Overview of Asylum Applications Lodged in 31 European and 5 Non-European Countries*, para. 7.

[110] This act constituted the first constitutional revision.

matters. The Schengen system abolished border controls between five original parties (Member States of the European Union) and established a system for common conditions of entry and exclusion of third country nationals into the combined territory. The limited importance of the "third pillar" as introduced by the Maastricht Treaty is also due to the existence of such parallel forums on migration and asylum. The Schengen acquis[111] was incorporated into the EC Treaty by the so-named protocol[112] to the Amsterdam Treaty.

It has been argued that EU Member States have taken advantage of economic integration making it institutional pretext for restricting access for refugees in search of protection. However, common control of external borders does not in itself mean restricted criteria of access and not lead automatically to repressive enforcement of criteria. It would seem that control policies are open to modification according to political priorities allowing for human rights standards to influence control strategy.

During the harmonisation process different approaches by the EC/EU to design asylum and immigration policies vis-à-vis third country nationals existed.

The EC Commission's 1991 Communications on right of asylum and on immigration tried to keep immigration policies and inherent control strategies separate from issues pertaining to refugee protection. "Although both matters are linked and interrelated, they are each governed by specific policies and rules which reflect fundamentally different principles and preoccupations."[113] Immigration was regarded as economic phenomenon, whereas the right to seek asylum was considered as right and humanitarian challenge. The 1994 Communication Commission on Immigration and Asylum Policies[114] maintained this approach.

Recently, immigration control and asylum policies are increasingly merging. The prevention of "irregular" arrivals is regarded as overall rationale raising concern about EU's genuine commitment to human rights.[115]

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[111] The Schengen acquis consists of the Agreement signed in Schengen on 14 June 1985, between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders; the Schengen Implementation Convention; the Accession Protocols and Agreements to the 1985 Agreement and the 1990 Implementation Convention, Decisions and declarations adopted by the Executive Committee established by the 1990 Implementation Convention, as well as acts adopted for the implementation of the Convention by the organs upon which the Executive Committee has conferred decision making powers.

[112] Schengen Protocol to the Amsterdam Treaty (1999), OJ C 340/96, 10 November 1997.

[113] European Commission, *Communication from the Commission to the Council and the European Parliament on the Right of Asylum*: SEC(91)1857, at para. 2.

[114] European Commission, *Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies*, COM(94)23 final.

[115] See Council Conclusions Seville. See also Gregor Noll, Jens Vedsted-Hansen, *Non-Communitarians: Refugee and Asylum Policies*, in Philip Alston (ed.), *The EU and Human Rights*, OUP, 1999, p. 376.

The list of countries whose nationals must be in possession of visa[116] contains a considerable number of refugee producing countries such as Afghanistan, Somalia, Sudan and Iraq. Exceptions are made for persons as part of a temporary protection programme.[117] However, it is questionable whether they are broad enough to cover all persons fleeing countries where there are civil wars or systematic abuses of human rights, to enable them to gain access to Europe legally.[118] As elaborated in part I, rejection at the border means that the asylum-seeker is refused entry into a prospective country of asylum which may result in a violation of the principle of *non-refoulement*.

a) Strict visa requirements in combination with "externalised border control"

The EC Directive on Carrier Sanctions[119] engages private entities in immigration control (although document inspection takes place within framework not formally defined as border control) by imposing financial penalties on carriers, if one of their passengers is refused entry into the EU, i.e. bringing passengers without valid passport and visa. Already under the 1990 Schengen Convention[120] carrier sanctions were codified as compulsory control. The interrelatedness of asylum and immigration policies is acknowledged in Art. 26 which obliges Member States to impose penalties on carriers transporting aliens who do not possess necessary travel documents "subject to" obligations arising out of accession to Geneva Convention, especially Art. 31 and 33. While the compatibility with refugee protection was declared as principled objective no operational measures were taken to that

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[116] Council Regulation (EC) 453/2003 of 6 March 2003, amending Regulation (EC) 539/2001 OJ L69 of 13 March 2003, 10.

[117] Council Directive EC 2001/55 of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, Article 8.3.

[118] ECRE, *Broken Promises – Forgotten Principles*, an ECRE Evaluation of the development of EU minimum standards for refugee protection, Tampere 1999, Brussels 2004, p. 15.

[119] *Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985,* OJ L187 (10 July 2001), Article 4 (2). See also *Initiative of the Kingdom of Spain with a view to adopting a Council Directive on the obligation of carriers to communicate passenger data* OJC82 (5 April 2003), *Council Directive (EC) 2003/110 on assistance in cases of transit for the purposes of removal by air* OJ L 321/26 (6 December 2003).

[120] *Convention from 19 June 1990 applying the Schengen Agreement of 14 June 1985 between the governments of the states of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the gradual abolition of checks at their common borders,* Schengen, 19 June 1990, reprinted in H. Meijers et al., Schengen: *Internationalisation of Central Chapters of the Law on Aliens, Refugees, Privacy, Security and Police* (1992), 177. See Chapter 6 Measures relating to organized travel Articles 26-27.

effect.[121] A part of the responsibility for the screening of persons in need of international protection has therefore effectively been transferred to staff of transport companies who are untrained in refugee and human rights law, and also unaccountable for their actions under these laws.[122] The Directive does not ensure *non-refoulement* nor does it provide for any access to remedies for asylum seekers who have been refused permission to travel at their point of departure or are being forced to return to a country where they may face violations of their rights. UNHCR has declared the effects of carrier sanctions as incompatible with basic norms and principles of international refugee law.[123]

Extra-territorial state jurisdiction is created through a network of EU Immigration Liaison Officers based in countries of origin.[124] These officers should facilitate the return of illegal immigrants and help manage legal migration (Art. 1 Regulation). Immigration officers carry out training of airlines' check-in staff and delegate control and responsibility. They also control travel documents in foreign airports.[125] The officers are entitled to give "assistance in establishing the identity of third country nationals and in facilitating their return to their country of origin", with the inherent risk that protection to refugees will be denied by Member States acting in co-operation with the actual country from which protection is being sought.

It is unclear whether protection aspects will be taken into account in order to modify technical control of documents in accordance with human rights norms.[126] In absence of human rights and refugee protection considerations cannot be ruled out that these control activities affect people in need of protection blocking their access to asylum procedures.

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[121] J. Hathaway, *Harmonizing for Whom? The Devaluation of Refugee Protection in the Era of European Economic Integration*, 1993, 26 CILJ 719.

[122] ECRE, *Broken Promises – Forgotten Principles*, an ECRE Evaluation of the development of EU minimum standards for refugee protection, Tampere 1999, Brussels 2004, p. 16.

[123] UNHCR, *Transport Carriers and Refugee Protection*, Working Paper for the Tenth Session of the ICAO Facilitation Division, ICAO Doc. FAL/10-WP/123 (1988), in Gregor Noll, Jens Vedsted-Hansen, *Non-Communitarians: Refugee and Asylum Policies*, in Philip Alston (ed.), *The EU and Human Rights*, OUP, 1999, p. 384.

[124] Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network.

[125] The UK already posts immigration officers at diplomatic missions in countries from which they want to reduce population movements towards its borders or immigration and airline liaison officers at major international airports in countries of origin and transit to prevent the embarkation of undocumented and improperly documented travellers. In 2003 9,827 people traveling to the UK were turned back at Calais, France, and 33,551 people were stopped from coming to the UK by UK airline liaison officers, Speech by Tony Blair on migration to the CBI, 27 April 2004.

[126] Gregor Noll, Jens Vedsted-Hansen, *Non-Communitarians: Refugee and Asylum Policies*, in Philip Alston (ed.), *The EU and Human Rights*, OUP, 1999, p. 385.

In this regard, the UNHCR Executive Committee "Conclusion on Protection Safeguards in Interception Measures"[127] is relevant. Interception measures are defined as being employed by state to prevent embarkation of persons on international journey, prevent further onward international travel of persons who have commenced their journey or assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law where persons do not have required documentation or valid permission to enter. It recognises that states have legitimate interest in controlling illegal immigration but states that interception measures should not result in asylum seekers and refugees being denied access to international protection or returned and that persons implementing interception measures should receive training in this regard.

To sum up, all the above-mentioned measures entail the risk that potential asylum-seekers do not reach territories of Member States or vanish in illegality.[128] It is estimated that ninety percent of all asylum seekers are forced to enter EU irregularly and use dangerous channels of escape.[129] However, jurisdiction has to be exercised in conformity with international law and therefore it has to be complied with international human rights and refugee instruments without infringing on the right to seek asylum. As a consequence, *restrictive measures need to sufficiently discriminate between asylum seekers and other migrants*. This can be drawn also from Art. 6 TEU (stating that the EU shall respect fundamental rights as general principles of EC law) in combination with Art. 2 TEU stipulating that objectives of the EU shall be achieved in accordance with general principles set forth in Art. 6. Thus, human rights as general principles must guide adoption of measures under Title IV TEC concerning visas, asylum, immigration and other policies relating to free movement of persons as well as other measures establishing EU as area of freedom, security and justice and related measures under Title V TEU on Common Foreign and Security Policy.[130] The Commission Communication on Scoreboard paving way for implementation of Tampere conclusions confirmed this view by stating that human rights, democratic institutions and the rule of law are among the guiding principles of the Area of Freedom,

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[127] Conclusion No. 97 (LIV), 2003.

[128] Gregor Noll, Jens Vedsted-Hansen, *Non-Communitarians: Refugee and Asylum Policies*, in Philip Alston (ed.), *The EU and Human Rights*, OUP, 1999, p. 362.

[129] Oxfam, *Foreign territory, The internationalisation of EU Asylum Policy*, 2005, p. 35.

[130] Gregor Noll, Jens Vedsted-Hansen, *Non-Communitarians: Refugee and Asylum Policies*, in Philip Alston (ed.), *The EU and Human Rights*, OUP, 1999, p. 364.

Security and Justice. As a consequence, the area of freedom, security and justice has to cover all persons residing in or seeking access to the Union.[131]

b) Capacity building for migration control in third countries - assistance to third countries directly related to migration management[132]

Recently, the EU has moved into more direct cooperation with *third countries* whose authorities should undertake *control functions*, i.e. the enforcement is left with third states. Immigration control is replaced by exit control.[133] As a result, control is less transparent and less susceptible to influence from EU states on whose behalf undertaken. What distinguishes them from control delegation (e.g. carrier sanctions) is the capacity-building effort (assistance aiming at reinforcement of border controls).

The Commission's policy proposals on implementing the aims set out at the Seville European Council 2002, the Communication on Migration and Development[134], suggested the channeling of financial assistance towards the development of interception measures in third countries and support to develop their asylum systems. Regional and national approaches to co-operation in the migration field are particularly important for the regions bordering the future enlarged Europe.[135]

Regional programmes MEDA, Tacis and CARDS contain elements directly to strengthen third countries' capacity in border management and fight against illegal migration[136]: In the Mediterranean region, the *Justice and Home Affairs regional programme in MEDA*, covers police and judicial training and the establishment of a network of data

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[131] *EU Annual Report on Human Rights 2000*, adopted by the Council of the European Union, Brussels, 9 October 2000.

[132] Heading in the European Commission, *Communication Integrating Migration Issues in the EU's relations with Third Countries*, COM (2002) 703 final, 03.12.2002.

[133] Gregor Noll, Jens Vedsted-Hansen, *Non-Communitarians: Refugee and Asylum Policies*, in Philip Alston (ed.), *The EU and Human Rights*, OUP, 1999, p. 364.

[134] European Commission, *Communication Integrating Migration Issues in the EU's relations with Third Countries*, COM (2002) 703 final, 03.12.2002.

[135] Communication on Migration and Development, p. 18.

[136] The issue of migration is also becoming increasingly important in the discussion and cooperation with other regions even if it remains at an earlier stage: e.g. in Asia within the framework of ASEM, in Latin America on basis of political declaration of EU-Latin America and the Caribbean Summit held in Madrid in May 2002. The Cotonou Agreement contains specific provisions on co-operation on migration and in particular to prevent and combat illegal immigration (Article 13). The Cotonou Agreement contains a *readmission clause*, commitment to negotiate *readmission agreements*, if requested by one of the Parties. Within the legally binding arrangements of Cotonou it is therefore legitimate to put the issue of illegal migration or problems in the area of readmission on the Political Dialogue agenda of either the entire ACP group or concerned individual ACP countries (Article 8).

collection and pluridiciplinary research on migratory phenomena. The feasibility of a network between the southern Mediterranean ports to facilitate the exchange of information concerning suspect boats and illegal migration will be examined.[137]

In the Western Balkans, being "a neighbouring region of the EU with porous borders and weak infrastructures"[138], the CARDS Regional program aims to support border control through equipment and institution building. Particular emphasis is placed on control on borders with Romania, at international airports and on sea approaches and harbors but also on control at major border crossing points, on the development of appropriate state border services, on strengthening police and other agencies' capacity nationally and regionally to tackle crime and illegal migration, on coordination between border control authorities, national police authorities and customs agencies, on sharing of information and joint investigations. For the period 2002-06 a total of € 4.65 billion is provided for justice and home affair issues.[139]

In Eastern Europe and Central Asia, the current **TACIS** Regional Justice and Home Affairs Programme focuses on provision of border control equipment and training of border guards, strengthening the capacity of partner countries to administer legal migration and asylum matters. In addition, the New Tacis Regional Programme for Central Asia will include improvement of border management capacities.

Technical assistance for managing migration flows and implementing readmission agreements is granted through budget line "Financial and Technical Assistance to Third Countries in the Areas of Migration and Asylum" (AENEAS)[140] - initially within budget line B7-667.[141] The AENEAS Regulation is based on Articles 179 para. 1 and 181a TEC to support the policies as laid down in the Communication on migration and development. Due to ability of EP to exert greater influence through co-decision procedure has a more **balanced range of objectives** including the *development of reception capacities and of national laws*

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[137] Communication on Migration and Development, p. 18.

[138] European Commission, *Communication Integrating Migration Issues in the EU's relations with Third Countries*, COM (2002) 703 final, 03.12.2002, p. 18.

[139] European Commission, *Communication Integrating Migration Issues in the EU's relations with Third Countries*, COM (2002) 703 final, 03.12.2002, p. 18

[140] Regulation EC 2003/0124 replaced for 2004-08 budget B7-667, *Co-operation with 3rd countries in the field of migration,* multi-annual programme to assist third countries to manage migration flows and in implementing readmission agreements.

[141] B7-667 focused on improving national legislation and management of migration and asylum; more effective legislation to combat illegal immigration linked to fight against organised crime and corruption; institution building and technical assistance to combat people smuggling and human trafficking; capacity building for customs and law enforcement including technical assistance.

and practices to improve compliance with the Refugee Convention and the *non-refoulement* principle.[142]

Future asylum strategies are developed so as to make protection available extra-territorially for asylum seekers who are affected by externalised controls.[143] Even though this topic would be worth to examine, this is not topic of this thesis.

c) Re-admission clauses in cooperation agreements

In this way, it is tried to manage migration in a rather indirect way. Re-admission clauses are inserted in cooperation agreements with countries of transit (Eastern, Southern border) or in the framework of the Neighbourhood Policy (Middle East, North Africa, former Soviet countries).

At the Seville Council 2002 Great Britain and Spain submitted the proposal to make economic aid conditional on co-operation in migration management (e.g. readmission).[144] Retaliation measures such as economic sanctions (suspension of trade agreements and development aid) should be taken in case of "persistent and unjustified denial of such co-operation". NGOs refer to these proposals as "contamination of the development agenda".[145]

Any future cooperation, association or equivalent agreement which the European Union or the European Community concludes with any country should include a clause on joint management of migration flows and on compulsory readmission in the event of illegal immigration.[146] If full use has been made of existing Community mechanisms without success, the Council may unanimously find that a third country has shown an unjustified lack of cooperation and adopt measures or positions under the Common Foreign and Security Policy and other European Union policies, while honouring the Union's contractual commitments but not jeopardising development cooperation objectives.[147]

France and Sweden refused to impose sanctions on already poverty-stricken countries arguing that they would only increase flow of immigrants. What is more, they even rejected a "positive conditionality" compromise, i.e. offering more assistance as incentive to cooperate with EU aims. Instead, France underlined the importance of a root causes approach:

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[142] *Regulation (EC) No491/2004 of the European Parliament and the Council of 10 March 2004 establishing a programme for financial and technical assistance to third countries in the areas of migration and asylum (AENEAS)*, Article 2 (c).

[143] Gregor Noll, Jens Vedsted-Hansen, *Non-Communitarians: Refugee and Asylum Policies*, in Philip Alston (ed.), *The EU and Human Rights*, OUP, 1999, p. 388.

[144] This was already suggested in the first draft of the Austrian strategy paper 1998.

[145] Statewatch, *Statewatch comments to the International Development Committee inquiry into "Migration and Development"*, para. 2.

[146] Seville, para. 33.

[147] Seville, para. 36.

"development aid should focus on improving economic and social situation as means to prevent illegal immigration and trafficking in human being".

2. Conclusion: imbalance in Europe

Tampere reaffirmed the "absolute respect of the right to seek asylum". However, emphasis was put on the fight against illegal immigration without developing adequate safeguards for refugee protection. Policy documents as the recent Council Conclusions of the Brussels European Council highlight the preference of control measures such as the start of activities by the European Agency for the Management of Operational Cooperation at the External Borders.[148]

Even though documents such as the Action Plan implementing the Hague Programme on strengthening the area of freedom, security and justice[149] pay lip service to a "*balanced approach* to migration management dealing with legal and illegal migration" (no. 4 of Action Plan). However, the same text states "the human, social and economic costs of illegal migration are extremely high, calling for rules on return procedures, the speeding up of the conclusion of readmission agreements. *successful management of migrations flows* must become an integral element and comprise a **serious investment** in relations with third countries, both of origin and of transit, notably through assistance and cooperation, in the mutual interest of third-countries and of the Union."

To sum up, EU immigration control policies are implemented in a way which contradicts statements and actions made elsewhere by EU in support of human rights principles.[150] Taking into account those principles, the EU should ensure that in designing migration management measures access to international protection is not endangered through administrative measures.[151]

Kofi Annan, UN Secretary General, addressing the European Parliament, was concerned about the right to seek asylum: *"...when refugees cannot seek asylum because of offshore barriers, or are detained for excessive periods in unsatisfactory conditions, or are*

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[148] Council of the European Union, Brussels, 18 June 2005, Conclusions of the Brussels European Council, 16 and 17 June 2005, 10255/05, para. 14.

[149] Council draft multi-annual programme "The Hague Programme; strengthening freedom, security and justice in the EU", 27.10.2004; adopted 4.11.04, set objectives to be implemented 2005-2010; COM should present **Action Plan in June 2005** with detailed measures and calendar to implement programme, at http://www.europa.eu.int/comm/dgs/justice_home/external/dg_external_en.htm..

[150] This is reflected in the allocation of funds, e.g. in the CARDS programme for the Western Balkans where assistance for interception measures comprises a large majority of the budget for most of the countries. See Annex to European Commission, *Communication Integrating Migration Issues in the EU's relations with Third Countries*, COM (2002) 703 final, 03.12.2002, p. 18

[151] *EU Annual Report on Human Rights 2000*, adopted by the Council of the European Union, Brussels, 9 October 2000.

refused entry because of restrictive interpretations of the Convention, the asylum system is broken, and the promise of the Convention is broken, too."[152]

Ruud Luubers, High Commissioner for Refugees stated that *"the cumulative effect of these proposed measures is that the EU will greatly increase the chances of real refugees being forced back to their home countries."*[153]

II. The lasting solution: addressing root causes through development

As demonstrated in part I, international refugee protection is a surrogate to national protection resulting from the *failure of the state to protect human rights.*[154] The refugee's need for international protection and immediate impetus for flight arises from the violation of his or her rights combined with the state's failure in its duty to defend citizens against such violations – which of course includes the duty to refrain from violations itself.[155]

Thus, if the violations in the country of origin were prevented, no persons would be forced out and consequently less refugees were "produced".

Beginning of the 1990s, refugee flows increased and many receiving states regarded refugee flows and later also human rights violations per se as a **threat to international peace and security**.[156] Thereby the responsibility of states towards their citizens came under closer scrutiny and human rights were brought out from behind the shield of national sovereignty.

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[152] Kofi Annan, UN Secretary General, *Address to the European Parliament*, 29 January 2004.

[153] Ruud Lubbers, UN High Commissioner for Refugees, UNHCR Press Release: *Lubbers calls for EU asylum laws not to contravene international law*, 29 March 2004.

[154] The Geneva Convention provides post-flow relief after the human rights violations have already occurred. As this instrument has been established during the Cold War, the human rights situation in the country of origin was left out completely in order to uphold the principle of "non-interference in domestic affairs" (Art. 2 para. 7 UN Charter). Governments of source countries were assumed not to be susceptible to international pressure concerning treatment of their citizens. However, it was criticised that this system would be a "pull factor" creating refugees by omitting the responsibility of the country of origin: "Being a disaster response regime focused almost exclusively on post-flow relief and humanitarian protection, the current framework underwrites mass movement, thereby facilitating its occurrence". See J. I. Garvey, *The new asylum seekers: addressing their origin*, in Martin, D. A. (ed.) *The new asylum seekers: refugee law in the 80s*, Dordrecht, Martinus Nijhoff, 1986

[155] There is no universally accepted definition of „persecution", however from Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights for the same reasons would also constitute persecution. See *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979, para. 51.

[156] After the end of the Cold War, the promotion and protection of human rights were seen a legitimate concern of the international community and consequently no more interference in internal affairs (VDPA para. 4). "Reactive prevention" was the response to gross and

As a result, the concept of the state's responsibility towards its citizens was extended towards the international community for the way those citizens are treated.[157]

The big question of this part is how these human rights violations could be prevented and what the role of the international community is. Certainly, one would have to look at the specific situation in a potential country of origin. As today most of the refugees flee because of violent conflict[158], a focus will be put on conflict prevention. But first an overview of UNHCR's position towards prevention and comprehensive approaches is given.

A. UNHCR: human rights as solution to the refugee problem - comprehensive approaches and root causes

Traditionally refugee needs have been considered to be of a humanitarian nature. However, beginning of the 1990s UNHCR realized that humanitarian assistance - addressing immediate needs - is neither sufficient nor adequate. Since then, UNHCR generally distinguishes between short-, medium- and long-term needs.[159] Short-term needs should be met by protection and humanitarian assistance in the region at the outset of an emergency so that refugee outflows do not put pressure on neighbours and eventually on asylum systems in countries further away. In the medium term durable solutions in countries of origin and

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serious human rights violations. Initially only refugee flows themselves were regarded as threat to peace and security due to their destabilising impact in the region, e.g. in SC Resolution 688 (1991) the repression of the Iraqi civilian population leading to massive refugee flows across international borders. Also SC Resolution 713 (1991) describing the fighting in Yugoslavia recognises the consequences for the countries of the region as a threat to peace and security (See also the SC Resolutions concerning the situation in Somalia (SC Res 794, 1992) and Rwanda (SC Res 929, 1994). "reactive prevention" was a big step towards recognising human rights forming part of peace and security. In Resolution 1078 the "magnitude of humanitarian crisis" in the Great Lakes region was referred to as threat to peace in the region (UN Doc. S/RES/1978 (1996) of 9 November 1996) and in Haiti even the overthrow of a democratic regime (Haiti: UN Doc. S/RES/917 (1994) of 6 May 1994 and UN Doc. S/RES/940 (1994) of 31 July 1994). Threats to international peace and security justifying collective enforcement action against the will of the state occur today within states when human rights are violated or concepts composed of human rights such as democracy are absent. See also UNHCR, The State of the World's Refugees 1993: "attempts to tackle root causes often run foul of claims that such internal questions are not matters of legitimate international concern although arguments of this kind carry less weight as it becomes apparent that refugee flows frequently present significant threats to international peace and security."

[157] UNHCR, *The State of the World's Refugees 1993*, Chapter 1: The Dynamics of Displacement, Human rights and refugee flows.

[158] Main countries of origin of refugees were in 2004 Afghanistan, Sudan, Burundi, DR Congo, Somalia. See *2004 Global Refugee Trends*, UNHCR Geneva, 20 June 2005, p. 3.

[159] UNHCR, Tool Box 2: The Instruments

countries of first asylum should be achieved where it will be necessary to bridge the gap between humanitarian and development assistance.[160]

In the long term root causes should be addressed. In 1993, after the end of the Cold War and at peak of forced displacement of civilians from Bosnia and Hercegovina, UNHCR recognised that refugee problem is essentially a human rights problem. Human rights violations are one *direct* cause for refugees to leave their home country. As a result, UNHCR concluded that prevention was better than cure: putting up barriers against refugee movements should be discarded as inadequate strategy and *human rights* have to come in to find a *solution to the refugee problem.* Safeguarding human rights should be not only a key element in protection refugees, but also seen as *preventing conditions* that force people to become refugees.[161] UNHCR found that "in the long run there can be little doubt that the refugee problems left unresolved are not only an affront to humane values but also feed back into the dangerous cycle of violent conflict and further displacement."

Therefore, the totality of the problem – from root causes through to traditional durable solutions – has to be examined. Root causes should be addressed through *promotion of respect for human rights, participatory democracy and strengthening of the rule of law, development assistance and economic support as well as co-operation in societal, judicial and law enforcement matters.*[162]

However, UNHCR emphasised that prevention was only part of a "comprehensive strategy" and should not replace protection.

UNHCR's position was reaffirmed by the Vienna Declaration which recognised that "gross violations of human rights, including in armed conflicts, are among the multiple and complex factors leading to displacement of people" and that "in view of the complexities of the global refugee crisis .... a *comprehensive approach by the international community* is needed in coordination and cooperation with the countries concerned and relevant organizations." It also emphasised the necessity of developing strategies to address the root causes.[163]

The Agenda for Protection 2002, the so-called blueprint for future refugee protection, calls on states, intergovernmental organisations and UNHCR to examine root causes of

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[160] For many years UNHCR has made efforts to link humanitarian assistance with the development process in less prosperous regions of the world.

[161] UNHCR, *The State of the World's Refugees 1993*, The Challenge of Protection, Introduction, Emerging issues in protection, point 6.

[162] UNHCR, *The State of the World's Refugees 1993*, Chapter 1: comprehensive responses.

[163] *Vienna Declaration and Programme of Action*, UN World Conference on Human Rights, June 1993, UN doc. A/CONF.157/23, 12 July 1993, para. 23.

refugee movements and to devote greater resources in developing *respect for human rights, democratic values and good governance* in refugee-producing countries.[164]

UNHCR considers that long-term **development assistance** should address the underlying causes of refugee situations such as human rights violations, poverty, conflicts and environmental destruction. Assistance is a prerequisite for producing the structural, economic and political **changes** needed in order to prevent future refugee situations. **Development aid targeting projects improving living conditions, creating job opportunities, rehabilitating the environment, providing for better and more equal use of resources, good governance, the promotion of human rights and democratisation** can have a **stabilizing** influence on populations and help to avoid the **occurrence or recurrence** of causes resulting in forced migration. Adding issue of refugee needs as cross-cutting concern in EU development policy would acknowledge potential of refugees and returnees and allow them to become self-sufficient citizens and at the same time diminish pressure on European asylum systems.[165]

Human rights violations do not occur in a vacuum but exist in a complex environment of economic strains, political instability, a tradition of violence, ecological deterioration and ethnic tensions. One factor or another may dominate a particular situation while interacting with others. By the time serious and massive abuses of fundamental rights occur, the chances of averting refugee flows are slim.[166]

Apart from the contribution development makes to addressing root causes, it also makes return more attractive. High Commissioner for Refugees has sought to build **partnerships** with other interested actors to create an effective transition between emergency relief and longer-term development. Such a strategy relates both to the increased self-sufficiency of refugees in countries of asylum, contributing to local economy and sustainable development and to the reintegration of refugees when they **return** to their own countries.[167]

In the following it will be examined how development assistance can contribute to reducing refugee flows.

[164] *Overview to the Agenda for Protection*, UNHCR Executive Committee, 53rd Session, UN doc. A/AC.96/965/Add.1, 26 June 2002, at 11.

[165] *UNHCR Preliminary Positions: Protection and Durable Solutions for Refugees in the Context of Migration and Development*, in *Tool box II: The instruments*, Geneva, September 2002, p. 689.

[166] UNHCR, *The State of the World's Refugees 1993*, Chapter 1: The Dynamics of Displacement, Human rights and refugee flows.

[167] *Promoting and enabling sustainable livelihoods for refugees and returnees*, A Statement by the United Nations High Commissioner for Refugees at the World Summit on Sustainable Development, Johannesburg, 30 August 2002.

B. How a rights based-approach to development would make a difference in addressing root causes

There is no fix concept how development actors should address root causes. However, it will make a difference if they put political pressure on the country of origin by human rights conditionality (withdrawing aid in the case of human rights violations) or if they follow a human rights-based approach.

The former High Commissioner of Human Rights Mary Robinson considered that "today's human rights violations are the causes of tomorrow's conflicts" and that "all human rights including *the right to development* are the key to preventing future conflict."[168]

Thus, it is suggested that conflicts – as major cause for refugee flights - are caused by human rights violations and can be prevented by human rights. In the following a focus is placed on in what way human rights may prevent conflicts and what the role of development actors is.

1. How do the respect and promotion of human rights in development cooperation prevent conflicts?

The Secretary-General considers in his report on "prevention of armed conflict" that today human rights with their related concepts of good governance, rule of law and democracy and development form part of sustainable peace. In contrast, during the Cold War peace was defined in a negative way, i.e. the absence of conflict.[169]

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[168]Message of the UNHCHR Mary Robinson, Sicilianos, Linos-Alexander (ed.), The prevention of human rights violations, Contribution on the occasion of the Twentieth Anniversary of the Marangopuoulos Foundation for Human Rights (MFHR), 2001, Kluwer Law International, The Hague, pp. XV-XIII.; The assumption that conflicts are not only causes of human rights violations but even lead to further human rights violations escalating in a new conflict, i.e. its circular nature, is dealt with by empirical research of the Interdisciplinary Research Programme on Root Causes of Human Rights Violations (PIOOM) at the Dutch University of Leiden. The empirical research of this institute helps identifying countries with high likelihood of mass outflow of migrants.

[169] A/55/985–S/2001/574, 7 June 2001, General Assembly, Fifty-fifth session, Report of the Secretary-General on the work of the Organization Security Council, Fifty-sixth year, *Prevention of armed conflict, Report of the Secretary-Genera*, para. 170.

Starting with the Agenda for Peace 1992[170] conflict prevention was integrated in the UN's work. However, in 1992 conflict prevention was reduced to the more restrictive idea of preventive diplomacy consisting of actions "to prevent disputes from arising between parties."[171] It was tied to a phased sequence of activities, with conflict prevention taking place before a conflict occurred, and peace-building afterwards.

However, "rights based-approaches" started only in 1997 with the Secretary-General's "human rights mainstreaming" as aspect of its reform programme. Human rights should be integrated as cross-cutting concern of UN system activities including development.[172] The same programme of reform emphasised that "the UN of the 21st century must become increasingly a focus of preventive measures".[173]

In 1998, the Secretary-General Kofi Annan, drew international attention to the importance of addressing violent conflict in his report "The Causes of Conflict and the Promotion of Durable Peace and Sustainable Livelihoods in Africa". This effort was elaborated in 2001 when the Secretary-General released his report on "The Prevention of Armed Conflict"[174] which stressed that the United Nations needed – apart from operational prevention undertaken when violence appears imminent - to centre on the implementation of a *structural prevention strategy* addressing the political, social, cultural, economic, environmental and other structural causes underlying immediate symptoms of conflicts. The report clearly identified conflict prevention as the primary responsibility of member states by referring to Art. 1 para. 1 and Art. 55 UN Charter, with both government and civil society playing a role. Art. 1 para. 1 UN Charter commits Member States "to take effective collective measures for the prevention and removal of threats to the peace" and Art. 55 is the foundation for comprehensive and *long-term* approach to conflict prevention based on expanded concept of peace and security: "solutions to international economic, social, health and related problems; international, cultural and educational cooperation; and *universal respect for human rights* are all essential for the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations." The fact that primary

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[170] A/47/277 - S/24111, 17 June 1992, *An Agenda for Peace, Preventive diplomacy, peacemaking and peace-keeping.* GA Resolution 47/120A of 1992 had given the Secretary-General Boutros Boutros Ghali the mandate to pursue preventive diplomacy and strengthen early warning through collection and analysis of information.

[171] A/47/277 - S/24111, 17 June 1992, *An Agenda for Peace, Preventive diplomacy, peacemaking and peace-keeping,* para.20.

[172] *Renewing the United Nations: A Programme for Reform,* 51st Session, Agenda Item 168, pars. 78-79, 30-31 (organisational chart), UN doc. A/51/950/, 1997.

[173] UN doc. A/51/950, para. 110 (1997).

[174] A/55/985–S/2001/574, 7 June 2001, General Assembly, Fifty-fifth session, Report of the Secretary-General on the work of the Organization Security Council, Fifty-sixth year, *Prevention of armed conflict.*

responsibility rests with national Governments and civil society also helps establishing national ownership.

In his report, the Secretary-General identified *institution-building* in fields of democratisation, rule of law, good governance and national human rights institutions as effective strategy of preventing conflicts in the 21st century. In this context, he emphasised the important role, the EU as regional organisation and civil society actors have to play. The United Nations' role is to support national efforts and assist in building national capacity in this field.

The Secretary-General report on "the prevention of violent conflict" drew attention to the linkages between conflict and development and the role of development assistance in preventing violent conflict. The Secretary General's recommendations echoed the findings in the "Brahimi Report on UN Peace Operations": development work should be viewed through a conflict prevention lens and long-term prevention addressing the structural sources of conflict is a key focus. The United Nations Development Programme (UNDP) was identified as a key actor in the UN system in conflict prevention. UNDP also identifies itself as a key actor in preventive activities and capacity building which is also demonstrated by the creation of a Bureau for Crisis Prevention and Recovery.[175] It asserts that development assistance cannot by itself prevent or end conflict, but it can *strengthen a society's capacity for coping, managing and resolving tensions*.

In response to Programme of reform in 1997, UNDP issued a policy document on "Integrating human rights with sustainable development".[176] Sustainable development was defined as a process aiming at realising democracy, development and all human rights, a process of enlarging peoples' choices and of empowerment leading to maximal enjoyment of basic human rights. People are placed at the centre of all development activities in order to create an environment in which all human beings lead secure and creative lives.[177] UNDP stated that "while the conflict prevention agenda evolves at headquarters, operational policies continue to be influenced more by practices in the field."[178]

Its strong field presence with offices in over 160 countries, its good relations with host governments and societies and its long experience operating in countries experiencing or

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[175] UNDP Bureau for Crisis Prevention and Recovery, *From the discourse to the ground: UNDP activities in conflict prevention*, New York, May 2003.

[176] UNDP, *Integrating human rights with sustainable development*, 1998.

[177] 1998 UNDP, *Integrating human rights with sustainable human development*, see also 1986 Declaration on the Right to Development, Art. 2.

[178] UNDP Bureau for Crisis Prevention and Recovery, *From the discourse to the ground: UNDP activities in conflict prevention*, New York, May 2003.

recovering from conflict all attest to the important role of UNDP in conflict situations. In 2001, UNDP's Executive Board Decision highlighted the principle that "development will be sustainable only if strategies incorporate concern for their *impact on tensions* that could lead to violence and promote measures to counteract such tensions."

Consequently, the Secretary-General report on "Prevention of Armed Conflict" called on the international community to increase the flow of development assistance to developing countries.[179] Reduced levels of development assistance could make conflict-prevention efforts less effective, which in turn could *increase* likelihood of forced migration from these countries.[180]

Recently, the Secretary-General issued the report "In larger freedom: towards development, security and human rights for all" which builds on the assertion that much more needs to be done by the international community to *address today's threats to human rights* and that OHCHR must be considerably better resourced to play its central role in meeting this challenge.[181] The United Nations High Commissioner for Human Rights submitted a **plan of action and** argued that work in response to human rights problems posed today by poverty, discrimination, conflict, impunity, democratic deficits and institutional weaknesses will necessitate a heightened focus on *implementation.* Helping to close "implementation gaps" on the ground such as knowledge, capacity, commitment and security and helping to *empower people to realise their rights* must be seen as the essential mission of OHCHR. Further action points are more involvement in efforts to advance power reduction, greater country engagement[182], closer partnerships with civil society and United Nations agencies, stepped up commitment to action to activities for *rights-based approaches* and national protection systems.[183]

However, the big challenge for an era of prevention is to apply conflict prevention in practice: existing problems usually take precedence over potential ones. The benefits of prevention lie in the distant future and when prevention succeeds little is visible. However, the costs must be paid in the present.[184] States prefer to invest in humanitarian intervention

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[179] SG Conflict Prevention, Report on prevention of armed conflict (A/55/985-S/2001/574 and Corr.1), Recommendation 29.

[180] Oxfam, *Foreign territory, The internationalisation of EU Asylum Policy*, 2005, p. 75.

[181] Report of Secretary-General, *"In larger freedom: towards development, security and human rights for all"*, A/59/2005.

[182] For example expansion of geographic desks, increased deployment of human rights staff to countries and regions, establishment of standing capacities for rapid deployment, investigations, field support, human rights capacity-building, advice and assistance, and work on transitional justice and the rule of law.

[183] Plan of action submitted by the United Nations High Commissioner for Human Rights, Addendum 3 to Report of Secretary-General, *"In larger freedom: towards development, security and human rights for all"*, A/59/2005.

[184] Report of the SG on Conflict Prevention, para. 1 and paras. 165-66.

than in conflict prevention or early warning.[185] Political will existed in the case of the humanitarian interventions without SC-authorisation in Kosovo as massive outflows of refugees[186] had to be prevented. The OHCHR having a mandate in prevention of human rights violations[187] and offering technical cooperation in field of human rights dispatched human rights monitors to assess human rights and humanitarian crisis caused by ethnic cleansing in Kosovo. It was argued that it might have been possible to avoid the human tragedy in Kosovo, if the international community had had political will to react early on reports of human rights violations.[188]

2. The role of the right to development/human rights-based development in prevention

Mary Robinson mentioned the right to development as tool to prevent human rights violations and conflicts. As the preceding part showed, human rights and development were mentioned frequently in UN policy documents regarding conflict prevention. The question for donors like the EU remain: is the right to development of a binding nature and what is its content when it comes to implementation? How does development/the right to development contribute to conflict prevention?

a) The nature of the right to development and its content

The right to development received clear legal recognition and expression within the regional context of the 1981 African Charter on Human and Peoples' Rights (Art. 22). On a global level the Declaration on the Right to Development 1986[189] extended the meaning of the right beyond what had been achieved in 1981 – however in the form of a General Assembly resolution. It gave concrete expression to the objectives and principles contained in the Charter of the United Nations by defining the right to development as "an inalienable

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[185] Loescher, 2001, p. 172. in Gent S p. 6

[186] Loescher, G., Protection and Humanitarian Action in the Post-Cold War Era, in Zolberg, A & Benda, P. 2001, Global Migrants, Global Refugees, Berghahn Books, New York, p. 171.

[187] General Assembly resolution 48/141, 20 December 1993: "High Commissioner for promotion and protection of all human rights', para. 4 (f) states that the HCHR functions include "preventing the continuation of HRV"; number of countries resisted more straightforward way; but in practice now interpreted as "prevention of HRV".

[188] In September and October 1998, the UNHCHR issued two statements about situation in Kosovo; the second called for urgent preventive action.

[189] *Declaration on the Right to Development*, adopted by General Assembly resolution 41/128 of 4 December 1986.

human right by virtue of which every human person and all people participate in, contribute to and enjoy economic, social and cultural and political development in which all human rights and fundamental freedoms can be fully realised" (Art. 1). A few years later, the right to development as established in the Declaration 1986 was reaffirmed *by consensus* in the Vienna Declaration adopted at the World Conference on Human Rights.[190] The right to development also received prominent attention in the United Nations Millennium Declaration (2000) and in the activities of the Commission on Human Rights for at least the last 10 years.[191]

However, the major questions are what the content of this individual and collective right is.

(1) Content

The preamble of the 1986 Declaration describes development as "a comprehensive economic, social, cultural and political *process* which aims at *constant improvement* of well-being of entire population and of all individuals on basis of their *active, free and meaningful participation* in development and in *fair distribution* of benefits resulting therefrom."[192]

The independent expert on the right to development has highlighted the principle of participation by pointing to the process of development as central in understanding the right to development.[193] In other words, it is not only the outcome or product that matters but also *how* the outcome or product is achieved. Participation strengthens the sense of ownership, develops human capacity and personality, and increases the level of people's control over their lives. Since the right to development incorporates the realisation of *all other* rights, the participatory principle applies equally to efforts of promoting and protecting all rights.[194]

Apart from the requirement of direct participation by the people in development, the notion of *sustainability*[195] which aims at setting safeguards to the process in order to secure continuity is another element of the right to development. The UN High Commissioner for

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[190] Art. 10 Vienna Declaration

[191] Development was also one of the core topics addressed in the draft outcome document to be considered by Heads of State at the High-level Plenary Meeting of the General Assembly to review progress in the fulfilment of the commitments contained in the Millenium Declaration scheduled to take place in New York from 14 to 16 September 2005.

[192] *Declaration on the Right to Development*, adopted by General Assembly resolution 41/128 of 4 December 1986 (preamble).

[193] See C. Duckett (ed.), *The Right to Development: Reflections on the First Four Reports of the Independent Expert on the Right to Development*, Geneva, Franciscans International, 2003, at paras. 36-56.

[194] ECOSOC, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *"The legal nature of the right to development and enhancement of its binding status"*, E/CN.4/Sub.2/2004/16, 1 June 2004, para. 18.

[195] The notion of "sustainable development" was introduced by the synthesis of evolving principles that have accompanied environmental and intergenerational concerns since 1987, culminating with the affirmations at the World Summit on Sustainable Development (WSSD) in Johannesburg 2002.

Human Rights regards full sovereignty over natural resources, self-determination, popular participation in development, equality of opportunity, creation of favourable conditions for enjoyment of other civil, economic, social and cultural rights as key elements.[196]

UNDP introduced the notion of "human development" defined as "enlarging people's choices"[197] covering much more than knowledge, a long and healthy life and a decent standard of living. Issues like freedom, democracy and human security are regarded equally important.[198]

In conclusion, gradually the meaning given to development has evolved from a purely economic to a pluriform one incorporating as many aspects of life as relevant and from meeting basic needs to enlarging people's choices.[199]

(2) Obligations of donors to cooperate –what about conditionality?

The Declaration clearly identifies rights holders and duty bearers. Individuals and peoples as a collective hold the right to development.

As regards duty-bearer, Arts. 3 and 4 stipulate that states have the primary responsibility for creation of national and international conditions favourable to realisation of rights, the duty to cooperate with each other in ensuring development and *eliminating obstacles* to development and the duty to take steps individually and collectively to formulate international development policies with a view to facilitating full realisation of right to development. Art. 4 para. 2 clearly states that effective international cooperation is essential in providing development countries with appropriate means and facilities to foster their development.

The Vienna Declaration reaffirms the need for states to cooperate "in ensuring development and eliminating obstacles to development" (Arts. 11, 12, 14). This call to cooperate in development exists within international human rights framework.

All these documents are non-binding. However, through Arts. 55 and 56 UN Charter all members have pledged to take action to help it achieve higher standards of living,

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[196] Office of the United Nations High Commissioner for Human Rights, available at www.ohchr.org/english/issues/development/right/index.htm.

[197] UNDP, *Human Development Report 1996*, Oxford University Press, New York/Oxford, 1996, p. 11.

[198] Ibid., pp. 55-56.

[199] Karin Arts, *Integrating Human Rights into Development Cooperation: The case of the Lomé Convention*, Kluwer Law International, The Hague, 2000, p. 12.

conditions of economic and social progress and development, solutions for international economic, social, health and related problems. Art. 2 para. 1 ICESCR stipulates that *"each state party undertakes to take steps, individually and through* ***international assistance*** *and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of rights... by all appropriate means, including particularly the adoption of legislative measures."*[200]

Rich countries and international and multilateral agencies must have a *moral* obligation to assist.[201]

States do not acquire a right to development as such but an entitlement to *equality of opportunity* for development. Individual states are obliged to ensure equal and adequate access to resources. The international community has to promote fair development policies by effective international cooperation. It is accepted that international assistance is required for governments to realise some human rights goals.

As regards, positive and negative human rights conditionality, it has been argued argued that due to the great number of binding international human rights instruments adopted since 1945, the general evolution of international human rights law including the coming about of customary international human rights law, some of which erga omnes and jus cogens nature, there is no doubt that states and their institutions are allowed to pursue active human rights policies and use those as general framework for their development cooperation. The limit is Art. 2 para. 7 and Art. 2 para. 4 UN Charter.[202]

All in all, there is considerable support for conclusion that under international law there is general duty to cooperate for development.[203] However, developing countries do not have a right to development assistance from a particular developed country. The right to development does not form obstacle to negative or positive human rights related measures.[204]

[200] Compare also Art. 4 Convention on the Rights of the Child.

[201] ECOSOC, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *Concept document on the right to development*, Working paper submitted by Florizelle O'Connor, E/CN.4/Sub.2/2005/23, 24 June 2005, paras. 50-51.

[202] Karin Arts, *Integrating Human Rights into Development Cooperation: The case of the Lomé Convention*, Kluwer Law International, The Hague, 2000, p. 40.

[203] M. Bulajic, *Principles of International Development Law*, Nijhoff, Dordrecht, 1993, pp. 313-322.

[204] Karin Arts, *Integrating Human Rights into Development Cooperation: The case of the Lomé Convention*, Kluwer Law International, The Hague, 2000, p. 44.

(3) Necessity of a legally binding right to development?

The recent debate focuses on the question whether there is the case for an international legal standard of a *binding nature* on the right to development.

In resolution 2003/83, para.2, the Commission on Human Rights requested the Sub-Commission on the Promotion and Protection of Human Rights to prepare a concept document establishing an international legal standard of a *binding* nature and guidelines on the *implementation* of the right to development based on the Declaration on the Right to Development. The right to development is a self-standing human right but at the same time a composite of all other internationally recognised rights and freedoms.[205] As a result, the right to development falls within the letter and spirit of the principles contained in the Vienna Declaration and Programme of Action.[206] Section 1, para. 5 of the Declaration provides in part that: "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."

Due to the inextricable linkage of the right to both civil, political, economic, social and cultural rights, it is questionable whether there is a necessity for a legally binding right to development. The argument has made that if the legally binding component has failed to ensure the enforcement of these rights in these Covenants, what is the point of having another "legally binding right"?[207]

However, another important conclusion can be drawn from the fact that development is a subset of human rights:[208] As they are not separate there is no need to link them – consequently the human rights framework removes opportunity for conditionality to be used as tool of national interest.[209]

(4) Human rights-approach to development assistance versus social

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[205] ECOSOC, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *"The legal nature of the right to development and enhancement of its binding status"*, E/CN.4/Sub.2/2004/16, 1 June 2004.

[206] See *United Nations, Human Rights: A Compilation of International Instruments*, vol. 1 (First Part), Universal Instruments, pp. 43-68.

[207] ECOSOC, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *Concept document on the right to development*, Working paper submitted by Florizelle O'Connor, E/CN.4/Sub.2/2005/23, 24 June 2005, para. 13.

[208] The Human Rights Council of Australia, *The rights way to development: A human rights approach to development assistance*, 1995, Breakout Printing, Sydney, p. 26.

[209] The Human Rights Council of Australia, *The rights way to development: A human rights approach to development assistance*, 1995, Breakout Printing, Sydney, p. 34.

justice, welfare or basic human needs approach

The development paradigm based on the assumption that economic development and wealth-creation leads to social development, i.e. the "trickle down"-hypothesis, is not supported by evidence. It is rather subject to fluctuations of the market.

It has been argued that factors affecting achievement of social development are equitable income and distribution, increased gender equality and women's status, political democracy.[210]

International human rights law as the only agreed international framework offers a coherent body of principles and practical meaning for development cooperation. What is more, this framework is based on consensus.

In order not to make policies subject to strength of negotiating position of parties, development assistance policies should be grounded in international human rights framework based on international agreement.[211]

As the manner in which assistance has been forthcoming resulted in too many cases in Governments violating the basic rights of their citizens, it was suggested to draft guidelines on the implementation of the right to development and ensuring that emphasis is placed on the *human rights approach* in the right to development.[212] Successful identification of ways to infuse human rights values and principles into the development process would better serve the realisation of the right.[213]

The Sub-Commission on Promotion and Protection of Human Rights proposed the duty to provide effective redress to victims and survivors of violations and denials of the right and strengthening of implementation, enforcement and monitoring mechanisms as short-, medium- and long-term goal.[214]

Three major challenges are identified. Firstly, to rethink methods of cooperation on the basis of respect for sovereignty and the rights of citizens; secondly, the creation of human

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[210] Stewart MacPherson, *"Can we turn social science into social development studies?"*, in Laksiri Jayasuriya and Michael Lee (eds.), *Social Dimension of Development*, Paradigm Books, 1994, p. 187.

[211] The Human Rights Council of Australia, *The rights way to development: A human rights approach to development assistance*, 1995, Breakout Printing, Sydney, pp. 11-13.

[212] The comparative advantages of a human rights-based approach, see Mac Darrow and Amparo Tomas, *Power, Capture, and Conflict: A call for human rights accountability in development cooperation*, in "Human Rights Quarterly", vol. 27, 2005, pp. 485-489.

[213] ECOSOC, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *Concept document on the right to development*, Working paper submitted by Florizelle O'Connor, E/CN.4/Sub.2/2005/23, 24 June 2005, paras. 16-18.

[214] ECOSOC, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *"The legal nature of the right to development and enhancement of its binding status"*, E/CN.4/Sub.2/2004/16, 1 June 2004, p. 2.

rights indicators and thirdly a change in method of assessing the success of a project/policy, i.e. to replace a dollar-sign measure with the measure of improved human capital.

Human rights indicators need to be developed with an eye on measuring what is truly important from a human rights perspective. In the past, the tendency to focus on things that are easier to measure, like economic growth statistics which hide underlying inequities has prevailed. However, from a human rights perspective the impact on the people whom the project is supposed to serve has to be assessed. The consistent important factor would be focus on whether or not *people* have achieved any measure of development as a consequence of the project. Development thinking has traditionally focused on *outcomes* of social arrangements and measures outcomes in a way not sensitive to *HOW* these outcomes were brought about. Individual rights express limits on losses that individuals can permissibly be allowed to bear – even in promotion of noble social goals. Human rights protect individuals and minorities from policies that benefit community as a whole but place huge burden on them.

The notion of ownership will have to be broadened to include the people. In implementing and monitoring any development programme, diversities of the people and their local communities needs to be fully respected. ***Special needs of vulnerable groups such as*** women, children, indigenous peoples, migrant workers, persons with HIV/AIDS have to be ensured. Assistance should be determined on basis of commitment to common set of objectives, projects and policies which are determined by consensual, participatory discussions guided by the views of the recipients.[215]

A human rights approach looks at obligations.

Development must start with government actions which can deliver these entitlements. There is no international binding definition of "basic needs". However, the ICESCR clearly defines basic human needs in terms of government obligations.[216] Governments have clear obligations with respect to each of these rights deriving principally from International Bill of Rights: e.g. Art. 2 ICESCR the obligation to allocate maximum of available resources to human rights. What is more, human rights are indivisible and include freedom to define and prioritise needs.

Rights based-assessment focuses on denials and violations of human rights and is based on the idea that *others have duties to facilitate and enhance human development,* i.e. in

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[215] ECOSOC, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *Concept document on the right to development*, Working paper submitted by Florizelle O'Connor, E/CN.4/Sub.2/2005/23, 24 June 2005, paras. 46-47.

[216] The Human Rights Council of Australia, *The rights way to development: A human rights approach to development assistance*, 1995, Breakout Printing, Sydney, pp. 44-45.

case of lack of access to human rights, a rights based-approach focuses on locating accountability for failures within social system and constitutes therefore a powerful tool for seeking *remedy.* In asserting this right we are *claiming that all are entitled* to free elementary education

(5) Preventing conflicts means addressing Inequality – disempowerment - capture by elites – violent conflict

There appears to be a growing global consensus that the pursuit of the right to development must focus especially on poverty eradication and the narrowing of the gaps of inequality.[217]

During the past decades progress in human development has been uneven. Despite improvements in economic growth and democratisation, the number of people living on less than $ 1 a day worldwide dropped only slightly during the 1990s.[218] The argument was made that sharp increase in inequalities between and within countries has major consequences for peace and development prospects:[219] Growing inequalities may contribute to environment in which benefits of growth are "captured" by elites, even in situations where functioning democratic institutions exist. Public policies in education and health often neglect poor and favour wealthy. Accountability deficits at national and international level prevent gains of economic development from being translated into human well being for poorest sectors of society.[220] History has witnessed disenchantment of politically and socially disenfranchised boiling over into cycles of violent action and reaction.[221] During 1990s, a decade marked by

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[217] ECOSOC, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *"The legal nature of the right to development and enhancement of its binding status"*, E/CN.4/Sub.2/2004/16, 1 June 2004.

[218] United Nations Development Programme (UNDP), *Human Development Report 2002: Deepening democracy in a fragmented world*, 2002, p. 18. Available at hdr.undp.org/reports/global/2002/en/pdf/complete.pdf.

[219] Mac Darrow and Amparo Tomas, *Power, Capture, and Conflict: A call for human rights accountability in development cooperation*, in "Human Rights Quarterly", vol. 27, 2005, pp. 474-475.

[220] Mac Darrow and Amparo Tomas, *Power, Capture, and Conflict: A call for human rights accountability in development cooperation*, in "Human Rights Quarterly", vol. 27, 2005, pp. 474-475.

[221] A background paper for the World Development Report 2003 identified conflict indicators: income per capita and poverty levels, economic growth and unemployment, ethnic dominance v. ethnic diversity, ethnic linguistic or religious polarization,, democracy level and regime transitions, degree of representation of minority populations, legal and institutional framework. See Nicholas Sambanis, *Preventing violent civil conflict: The scope and limits of government action*, World Development Report 2003: Dynamic Development in a sustainable world, background paper 59, 23 February 2002, available at econ.worldbank.org/files/16693_Sambanis.pdf.

increase in inequalities, 3,6 million people died in civil wars and ethnic violence, more than sixteen times the number killed in wars between states.[222]

Inequality by itself is not always sufficient condition to trigger violent conflict, however "capture" of economic and political benefits associated with growing inequality may do so – particularly when it undermines basic human entitlements of the *excluded*. Studies show how horizontal inequalities may lead to grievances that in combination with other factors may form basis of group mobilisation by conflict entrepreneurs, thus increasing society's disposition towards violent conflict.[223] For greed and grievances to generate large-scale violence there need to be other factors most notably a weakening of the "social contract" that binds people and the state. "Violent conflict is unlikely to take hold in presence of framework of widely agreed rules that govern allocation of resources and peaceful settlement of grievances."[224]

As argued above a rights based-approach would offer a framework for *equality* and nondiscrimination in decision making, empowerment by giving the *disadvantaged* a right to claim something. This approach could prevent a vicious cycle of inequality, elite capture and disempowerment spiraling out of control by rectifying asymmetries of power, tackling phenomenon known as "elite capture" and transforming violent conflict.[225] A human rights-based approach uses objective norms to underpin specific claims and obligations of equal applicants to all human beings as human rights set objective limits on phenomenon of elite capture providing essential minimum human guarantees for benefit of those suffering consequences.

However, the practical application of a human rights-based approach is a context specific undertaking. Statement of "Common Understanding"[226] on key elements of right-based approach to development cooperation within UN system and agencies in May 2003 seeks to add value by identifying distinctive ways in which rights-based approach differs from "good practices in development programming."

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[222] HDR 2002, p. 11., HDR 2003, p. 45.

[223] Massimo Tommasoli, *Inequality, vulnerability to violent conflict and aid incentives for peace*, 21 January 2003, paper prepared for Fourth Annual Global Development Conference: "Globalisation and equity", Cairo, Egypt, available at www.gdnet.org/pdf/Fourt_Annual_Conference/parallels4/GlobalizationGrowthPovertyInequality/Tommasoli_paper.pdf.

[224] Mac Darrow and Amparo Tomas, *Power, Capture, and Conflict: A call for human rights accountability in development cooperation*, in "Human Rights Quarterly", vol. 27, 2005, p. 490.

[225] Mac Darrow and Amparo Tomas, *Power, Capture, and Conflict: A call for human rights accountability in development cooperation*, in "Human Rights Quarterly", vol. 27, 2005, p. 472.

[226] *The Human Rights-Based Approach to Development Cooperation: Towards a Common Understanding Among the UN Agencies*, in Second Interagency Workshop Report, available at www.undg.org/documents/4128-Human_Rights_Workshop_Stamford_Final_Report.doc, pp. 17-19.

Jurisprudence clarifying the content of human rights-based obligations may have practical importance for development programming.[227]

C. EU rhetoric of root causes and its actual undertakings to implement

At European Community-level, the Edinburgh Council Conclusions 1992[228] contain the first proposal to analyse causes of forced immigration pressure and approach them by coordinating Member States' external policies. "Restoring and preserving peace, respecting human rights and rule of law" were seen as the appropriate response to migratory pressure resulting from war and oppressive and discriminatory government. In the longer term "appropriate volumes of development aid" should be effectively used to encourage economic and social development by contributing to job creation and alleviation of poverty in countries of origin.[229]

The Commission responded to forced migration from Bosnia with a Communication on Asylum and Immigration Policies 1994.[230] This document suggests to address migration pressure and control immigration. However, it distinguishes between forced and economic migrants suggesting different policy responses to each.

Due to a high numbers of Iraqi asylum seekers in Western Europe and increased numbers arriving in Italy during winter 1997-98, the Council adopted the "EU Action Plan on Influx of Migrants from Iraq and Neighbouring Region"[231]. However, a mass influx had not occurred into any EU country neither had such situation been imminent.[232] The Action Plan termed affected individuals "illegal migrants", their displacement "illegal immigration" and

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[227] See Mac Darrow and Amparo Tomas, *Power, Capture, and Conflict: A call for human rights accountability in development cooperation*, in "Human Rights Quarterly", vol. 27, 2005, p. 529.

[228] Presidency Conclusions, Edinburgh European Council, 11-12 December 1992 (SN 456/92)", Annex 5, Part A: 'Declaration on Principles Governing External Aspects of Migration Policy', paras. ix, xv.

[229] Ibid., para. xvi.

[230] Commission of the European Communities, *On immigration and asylum policies*, COM (94) 23 final, 23 February 1994.

[231] *EU action plan on the influx of migrants from Iraq and the neighbouring region*, adopted by the EU General Affairs Council, 26-27 Jan. 1998 (5573/98 ASIM 13).

[232] UNHCR held the view that in spite of increasing numbers and their concentration in a few countries, the number of Iraqi asylum-seekers could not be considered a mass influx. See Gregor Noll, Jens Vedsted-Hansen, *Non-Communitarians: Refugee and Asylum Policies*, in Philip Alston (ed.), *The EU and Human Rights*, OUP, 1999, p. 387.

set up control measures engaging authorities of non-EU Member States such as Turkey. However, Turkey made a reservation to the Geneva Convention stipulating that Turkey has no Convention obligation towards non-European refugees. The EU's protective response was limited to exchange of information, policy review and monitoring of humanitarian needs (paras. 4-6). All in all, control measures seem far more operational than the few protection-oriented measures.[233]

The highly criticised "Strategy Paper on asylum and migration policy" established in 1998 under the Austrian presidency[234] suggested that the EU should concentrate on taking action in areas close to Europe, focusing activity on countries of transit.

The idea of a "comprehensive approach", i.e. addressing all stages of migration (root causes of migration, entry and admission, integration and return) was taken up at the Tampere Council in October 1999 where it was suggested to address political, human rights and development issues in countries and regions of origin and transit by measures such as "combating poverty, improving living conditions and job opportunities, preventing conflicts, consolidating democratic states and ensuring respect for human rights, in particular rights of minorities, women and children".[235]

The institutional structure provided by the Treaty of Amsterdam made coordination between JHA – now under the first pillar - and Development/External Relations more feasible. The Treaty of Amsterdam does not explicitly request measures concerning the country of origin in Articles 61 to 63 TEC which provide the legal basis for both rules of a common asylum and migration regime relating to access to territory, procedures, protection and return. The Vienna Action Plan[236] clarified that an integrated approach included the assessment of the country of origin.

The Tampere Council Conclusions request the integration of Justice and Home Affairs concerns in the definition and implementation of all external policies.[237] An External Relations and enlargement unit in DG JHA ensures the full incorporation of the JHA dimension into EU's external policy in order to "spread values of justice, freedom, *security* to third countries (rule of law, good governance, institution building by cooperating on border

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[233] J. van der Klaauw, *European Union* (1998), „NQHR" vol. 16, pp. 92-93.

[234] Austrian Presidency of the European Union, *Strategy Paper on Immigration and Asylum Policy*, 1998 (doc. 9809/98 LIMITE CK 4 27 ASIM 170).

[235] Tampere European Council 15/16 October 1999, Presidency Conclusions (para. 11), available at www.europarl.eu.int/summits/tam_en.htm

[236] Council and Commission Action Plan of 3 December 1998 on how best to implement the provisions of the Treaty of Amsterdam on the creation of an area of freedom, security and justice, ratified by European Council in Vienna in December 1998

[237] para. 59.

management, migration, law enforcement, judiciary and judicial cooperation, fight against terrorism and organised crime, incl. trafficking)". The suggested means to achieve this goal are among others assistance programmes and the inclusion of migration-related clauses in bilateral and multilateral external trade/association agreements.

The European Council of Seville stressed that measures for the joint management of migration flows must *strike* a *fair balance* between an asylum policy complying with international conventions, principally the 1951 Geneva Convention, and, on the other hand, resolute action to combat illegal immigration and trafficking in human beings. An integrated, comprehensive and balanced approach to *tackling the root causes* of illegal immigration must remain the European Union's constant *long-term objective.* Closer economic cooperation, trade expansion, development assistance and conflict prevention are all means of promoting economic prosperity in the countries concerned and thereby reducing the underlying causes of migration flows.[238]

In the Hague Council Conclusions[239] root causes are only mentioned briefly without details which measures could be taken. **partnership with third countries** concerned was mentioned as key element for the success of such a policy, with a view to promoting co-development. Member states were invited to contribute to a **greater coherence of internal and external policies** of the Union. Council, Member States and Commission should pursue coordinated, strong and effective working relations between those responsible for migration and asylum policies and those responsible for other policy fields relevant to these areas.[240]

The Brussels European Council of June 2005 stressed once more the growing importance of the external dimension of the area of freedom, security and justice and stated that it will be supplemented at the end of the year by the strategy to be adopted by the Council.[241]

To sum up, all the political documents since the Tampere European Council mention as key objective to develop **co-operation** with third countries in the **management of migration flows while addressing their root causes**. It depends what prevails. Europe regards the numbers of asylum seekers and associated cost of processing applications as problem. In 2003 and 2004 largest number came from Russian Federation, Serbia and

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[238] Conclusions of Seville European Council, 21-22 June 2002, Seville, para. 28.

[239] See also The Hague Council Conclusions, 1.2 Asylum, migration and border policy.

[240] The Hague European Council, para. 1.2.

[241] Council of the European Union, Brussels, 18 June 2005, Conclusions of the Brussels European Council, 16 and 17 June 2005, 10255/05, para. 12.

Montenegro, Turkey, China, India, Iraq and Iran. African countries did not count for a significant proportion of the overall total.

Estimated $10bn spent each year by the industrialised states on their asylum systems is substantially greater than the $1.1bn that UNHCR spends on the 20 million refugees and displaced persons in less prosperous countries around the world.

A 2000 COREPER statement to the Council is noteworthy: "Developing the JHA external dimension is not an objective in itself. Its primary purpose is to contribute to the establishment of an area of freedom, security and justice. The aim is certainly not to develop a "foreign policy" specific to JHA. Quite the contrary."[242]

a) The first try to implement root causes: HLWG on migration and asylum

Following a Dutch Foreign Ministry initiative, the Justice and Home Affairs-Council agreed to the establishment of a High Level Working Group on Asylum and Migration within the Council on 7 December 1998.[243] The group consisted of Member States' officials – most of them justice and home affairs officials[244] - thereby "re-inserting the inter-governmental perspective in asylum and migration issues".[245] Its initial task was to establish Action Plans for six priority countries of origin based on statistics concerning arrivals in EU Member States, four of which were refugee-producing countries: Afghanistan/Pakistan, Albania (later extended to Kosovo), Iraq, Morocco, Somalia and Sri Lanka.[246] Causes of influx should be analysed[247] and addressed by already existing policies such as foreign policy, development

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[242] Council of the EU, 'European Union priorities and policy objectives for external relations in the field of justice and home affairs', doc. 7653/00, 6 June 2000, p. 5.

[243] Within the Dutch government the responsibility for international migration and refugee strategies rests with the Foreign Affairs ministry. The EU approach thus reflected this Dutch attempt to "integrate" the internal and external dimensions of migration policy.

[244] Netherlands and Sweden sent teams headed by officials from the ministries of foreign affairs; the UK and Spain sent foreign-affairs ministry staff as part of their team. (See Van Selm J., 2002.)

[245] Joanne Van Selm, *The High Level Working Group: can foreign policy, development policy and asylum and immigration policy really be mixed?*, UNU WIDER Conference on Poverty, International Migration and Asylum, Helsinki, 27./28. September 2002, p. 1.

[246] Dutch Delegation to the Council of the EU, *Note from the Dutch Delegation: Task Force on Asylum and Migration*, doc. 13344/98 JAI AG 15, 23 November 1998.

[247] Data stemmed from existing reports at national, EU or third party level (UNHCR, NGOs): asylum and immigration matters in each region, third countries' relations with EU, statistics about size and age structure, life expectancy and infant mortality of the population, imports and exports to and from the EU and the rest of the world, GDP, development aid, existing trade cooperation and readmission agreements.

and economic assistance, migration and asylum, the fight against discrimination based among others on sex and the fight against illegal migration.

However, the plans contained only vague recommendations how to improve the social, political, economic and human rights situation in targeted countries and did not foresee implementing measures (measures would normally fall within competence of DG External Relations or DG Development). On the other hand, measures on ways to control migration were specific, clear and implementable: more airline liaison officers stationed at airports to prevent boarding; new laws criminalizing trafficking and illegal exit; equipment and training to detect forged documents, arrangements for identification and documentation of returning refugees.[248] The European Parliament concluded that "action plans neither make a real political contribution nor do they bring any EC added value to solution of problems remaining root cause of immigration and asylum-seeking".[249]

A report evaluating the work of the HLWG underlined that "countries in which the plans are directed, feel that they are the target of unilateral policy by the Union focusing on repressive action."[250] Although the Terms of Reference stipulated that the Working Group should make proposal for deepening political and diplomatic consultations, sometimes plans were established without contacting the government of the targeted country.[251] It failed in its task to direct political, development or economic co-operation from a human rights perspective to prevent causes of people fleeing their countries.[252] Action plans were accused of attempting "to pass responsibility for prevention to the countries of origin and of transit by tying trade and aid to the prevention and return of "refugee flows".[253] Given that at least four out of the six countries targeted for action were refugee-producing countries, none of action plans contained proposal allowing refugees to seek asylum in Europe.

At the Nice Council (December 2000) the Working Group admitted "the difficulty of integrating objectives relating to migration into development policies".[254] Tensions existed between the group and the Commission officials of DG Development and Relex (External

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[248] Statewatch, *International Development*, para. 7.

[249] European Parliament, 30 March 2000, para. F.

[250] High Level Working Group on Asylum and Migration, *Report to the European Council in Nice*, 13993/00 JAI 152, AG 76, Brussels, 29 November 2000, para. 53.

[251] Iraq and Afghanistan were at that time isolated internationally and subject to sanctions, Somalia had no real functioning government. In the case of Morocco the HLWG simply "forgot" to consult government resulting in reluctance of governments to implement the plan.

[252] Amnesty International, *Missing: A common asylum policy that is ambitious, coherent and protection-centred*, 2002, Open Letter to the JHA Council, 28-29 November 2002.

[253] Statewatch, *Statewatch comments to the International Development Committee inquiry into "Migration and Development"*, para. 5.

[254] High Level Working Group on Asylum and Migration, *Report to the European Council in Nice* (doc. 13993/00 (JAI 152 AG76)), 29 November 2000, para. 51.

Relations). It took not only powers of the Commission away but also made proposals for (ab)using development funds (e.g. use MEDA funds to analyse migration patterns and instruments). As a result, communication and info-sharing was a major obstacle to project development, implementation, and evaluation.

The mandate was modified in 2002[255] and is now a forum to bring together representatives of Commission and Member States from different policy areas to discuss protection capacity in regions of origin and developing the European Neighbourhood Policy.

UNHCR believes that HLWG can contribute to implementation of comprehensive strategies. action should include distinct focus on refugee protection and assistance to balance various activities aimed at management and control of migratory flows. Increased co-ordination between involved departments is needed. meaningful partnership with third countries can be achieved only if the latter are involved in drawing up joint operational strategies at an early stage. UNHCR reiterates its call for a balance in refugee protection and migration management and control measures.[256]

b) Economic/development cooperation: human rights-based development?

Following figures should let understand EU/EC/Member States' potential to address root causes: The EC's Official Development Assistance (ODA) (as opposed to Official Aid going to Countries in Transition) according to DAC amounted in 2003 in absolute terms to 7.173 million US-$ whereas EU's Member States' contribution amounted to 37.139 million US $ (out of total DAC 69.029).[257] In relative terms, Norway, Denmark, Luxembourg, the Netherlands and Sweden spent more than the UN target of 0,7 % of GNI. From 2002 to 2003 the total DAC increased 4,8 million US$ (EC contribution rose 7,7 million and EU countries combined 3 million).

The Proposal for a Joint Declaration on the European Union Development Policy "The European Consensus" adopted in July 2005 takes rights based-approach to development and acknowledges that development cooperation supports conflict prevention by addressing the root-causes of violent conflict, including poverty, degradation, exploitation and unequal

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[255] Council of the EU, *Modification of the Terms of Reference of the High Level Working Group on Asylum and Migration (HLWG)*, doc. 9433/02, 30 May 2002.

[256] Tool boxes, Tool box II: The instruments, Geneva, September 2002, p. 689.

[257] available at www.oecd.org/dac.

distribution and access to land and natural resources, weak governance, human rights abuses and gender inequality. Promoting dialogue, participation and reconciliation can promote peace and prevent outbreaks of violence.[258] It further considers that only financial support to address root causes of migration can be considered as ODA.[259] Financial support provided to countries of origin for transit of migration and control purposes (e.g. border controls, readmission agreements, reception centres and camps) does not contribute at all to solving the root causes of migration and therefore cannot be considered as ODA. Sustainable development is the best structural solution to address root causes linked to poverty and governance failures, of potentially violent conflict and of the emergence of terrorism.

The Report on the public consultation on the future of EU development policy (June 2005) affirms that root causes of conflict are treated by bringing benefits to the poorest sections of society and improving governance.[260]

Similarly, in 2002 the Communication on Migration and Development considers that the Community's development cooperation policy contributes best to migration policy's objective of managing migration flows by combating the root causes of forced migration through poverty eradication, conflict prevention, food security and good governance.[261]

As a result, conflict prevention[262] is mainstreamed in programming of development cooperation through Country Strategy Papers (CSPs). When drafting the political analysis section of the CSP, risk factors are systematically checked by using conflict indicators (the so-called "check-list of root causes of conflict"). The check-list looks among other things at

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[258] European Commission, COM(2005) 311 final ***Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Proposal for a Joint Declaration by the Council, the European Parliament and the Commission*** *on the European Union Development Policy "The European Consensus"* {SEC(2005) 929}, 13.7.2005, p. 22.

[259] The OECD Development Assistance Committee (DAC) defines ODA as grants or loans to countries on part I of DAC List of Aid Recipients (so-called "developing countries") which are undertaken by official sector with promotion of economic development and welfare as main objective. The directives covering what can be reported as ODA exclude supply or financing of military equipment or services and use of military personnel to control civil disobedience.

Aid to countries on part II of the DAC List of Aid Recipients ("more advanced" eastern European and developing countries) is recorded separately as "Official Aid" (OA). List is reviewed every three years.

[260] European Commission, DG Development, *Report on the public consultation on the future of EU development policy*, June 2005, p. 53.

[261] Communication on Migration and Development, p. 21.

[262] Conflict prevention is a goal of the second pillar, the Common Foreign and Security Policy. Art. 11.3 TEU states the objective of "preserving peace and strengthening international security". Numerous documents have been established in which the EU commits itself to be active in this area, such as 2001 Communication on Conflict Prevention (11 April 2001, COM (2001), 211 final); a 2003 Communication on the EU–Africa Dialogue (23 June 2003, COM (2003), 316 final); a 2003 Communication on Governance and Development (20 October 2003, COM (2003) 615 final), and also the 2003 European Security Strategy, 'A Secure Europe in a Better World' (prepared by Javier Solana, adopted at the Brussels European Council, 12 December 2003). The Treaty establishing Constitution for Europe proposes to insert prevention of conflicts in the Constitution. See more Javier Nino Pérez, *Working Paper n° 8, EU instruments for conflict prevention,* FRIDE (Fundación para las relaciones internacionales y el diálogo exterior), available at www.fride.org/eng/File/ViewLinkFile.aspx?FileId=618.

the human rights situation and the balance of political and economic power, the control of the security forces, the ethnic composition of the government for ethnically-divided countries, the potential degradation of environmental resources. The level of the programming of assistance is dealt with under the CSP chapter dealing with the "EC response strategy".

In the following the cooperation activities of the EU will be examined for the case of the Republic of Moldova, a country of origin of asylum applicants in Europe which moved up in the ranking (from 19th to 15th) from the first to the second quarter of 2005[263] and a country where serious human rights violations occur.

(1) Human rights-problems of the Republic of Moldova

Moldova has a lot of problems. To begin with, the ongoing internal conflict with the self-proclaimed Transnistrian Moldovan Republic[264] may impede implementation of human rights for persons living in this region.[265] But also outside this area, numerous cases of violations of basic human rights occur[266] - even though Moldova obtained during the transition period in the 1990s a number of attributes of democracy - multi–party elections, free press, emerging civil society institutions and much greater respect towards freedom and human rights.[267]

It was in the social sphere where problems appeared due to the weakening of the state and civil society[268] and people in Moldova were the *objects* rather than participants in shaping policies that affect their daily lives. Mistakes in socio–economic policy and the liberalisation of prices led to high levels of poverty with a huge gap between the incomes of the "new rich"

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[263] UNHCR, *Asylum Levels and Trends in Industrialized Countries Second Quarter, 2005 Overview of Asylum Applications Lodged in 31 European and 5 Non-European Countries,* para. 18.

[264] The EU supports the mediation efforts in the context of the Organisation for Security and Cooperation in Europe (OSCE) in order to ensure Moldova's control over its entire customs territory. See Country Strategy Paper 2004-06 for Moldova, para. 8.

[265] *Concluding Observations of the Committee on the Rights of the Child: Republic of Moldova,* 31 October 2002, CRC/C/15/Add.192, paras. 6-7.

[266] Common Country Assessment, p. 28.

[267] The Republic of Moldova joined the most important legal international instruments related to human rights, became a member of the UN, the OSCE, the Council of Europe, and adopted its own Constitution which even provides that in case of conflict with international treaties which Moldova is party to, the Constitution shall be revised (Art.8 (2)). It has even introduced the *Ombudsman institution*, known in highly democratic countries.

[268] *National Human Development Report / Transition and Human Security. Republic of Moldova*, 1999.

and "new poor" continuing to widen. Estimated 40 per cent of the population lives in absolute poverty, extreme poverty is especially pronounced in rural areas and among children.[269]

The Parliament of Moldova approved an Economic Growth and Poverty Reduction Strategy Paper (EGPRSP)[270] in December 2004, but deteriorating living standards affecting in particular families with children continue.[271]

Reduced state support to the education and health sectors diminished the access of the population to schools and hospitals especially for disadvantaged households.[272] Mass privatisation had low social and economic efficiency, a shadow economy and corruption spread widely.[273]

UN human rights treaty bodies affirmed that Moldova is facing difficulties in the implementation of the Conventions owing to the high rates of poverty and migration, especially of women, having a great impact on children.[274]

Children

The declining expenditure on education led to a drop in the quality and accessibility of education with a consequent decrease in enrolment across all levels of compulsory education and increase in of drop-out rates.[275] The incidence of child labour is high[276] having negative effect on their development and school attendance.[277] High rates of non-attendance and high dropout rates in primary and secondary education prevail. Main reason for non-attendance is acute family poverty.[278]

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[269] *Concluding observations of the Committee on Economic, Social and Cultural Rights: Republic of Moldova*, 12/12/2003, E/C.12/1/Add.91, para. 22.

[270] Poverty reduction strategies are the basis of all concessional lending by the World Bank. PRSPs are prepared by governments through a process that brings civil society and development partners, including the World Bank and the International Monetary Fund (IMF), together.

[271] *Concluding Observations of the Committee on the Rights of the Child: Republic of Moldova*, 31 October 2002, CRC/C/15/Add.192, para. 39.

[272] *Concluding Observations of the Committee on the Rights of the Child: Republic of Moldova*, 31 October 2002, CRC/C/15/Add.192, para. 33.

[273] *Human Development Report for Central and Eastern Europe & CIS. Transition*. 1999, p.111.

[274] *Concluding Observations of the Committee on the Rights of the Child: Republic of Moldova*, 31 October 2002, CRC/C/15/Add.192, paras. 6-7.

[275] *Concluding Observations of the Committee on the Rights of the Child: Republic of Moldova*, 31 October 2002, CRC/C/15/Add.192, para. 41.

[276] Despite the ratification by the State party of ILO Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.

[277] *Concluding Observations of the Committee on the Rights of the Child: Republic of Moldova*, 31 October 2002, CRC/C/15/Add.192, para. 43.

[278] *Concluding observations of the Committee on Economic, Social and Cultural Rights: Republic of Moldova*, 12/12/2003, E/C.12/1/Add.91, para. 29.

The principle of non-discrimination is not fully implemented for children living in institutions, children with disabilities, street children, children with HIV/AIDS, children of Roma origin and other ethnic minorities, especially with regard to their access to adequate health care and educational facilities.[279] Approximately 80 per cent of under-5 deaths are due to preventable causes. The current economic crisis and the consequent deterioration in the family environment have resulted in an increasing number of street children in Chişinău and other cities.[280]

Minorities

Despite improvements in their legal status, minorities (the Gagauz and the Roma) continue to suffer serious discrimination in practice, notably in rural areas.[281]

Women

The main problems are the high gap in wages between women and men, women's low representation in public and political life,[282] the double burden of women, the extent of trafficking in women, the widespread violence against women,[283] the poor health situation of women frequently caused by domestic violence,[284] the predominance of women in low-level educational sectors.

(2) Assistance to MD[285]

In the following it will be examined whether EU's assistance is in a position to tackle inequalities in Moldova, i.e. empowering vulnerable groups.

The Partnership and Cooperation Agreement (PCA)[286] concluded as so-called "mixed agreement" provides the framework for political dialogue. Assistance to the Republic of

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[279] *Concluding Observations of the Committee on the Rights of the Child: Republic of Moldova,* 31 October 2002, CRC/C/15/Add.192, para. 26.

[280] *Concluding Observations of the Committee on the Rights of the Child: Republic of Moldova,* 31 October 2002, CRC/C/15/Add.192, para. 47.

[281] *Concluding observations of the Human Rights Committee : Republic of Moldova,* 26/07/2002, CPR/CO/75/MDA, para. 19.

[282] *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Republic of Moldova,* 27/06/2000, A/55/38, para. 72.

[283] Concluding observations of the Committee on Economic, Social and Cultural Rights: Republic of Moldova, 12/12/2003, E/C.12/1/Add.91, paras. 19-20.

[284] *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Republic of Moldova,* 27/06/2000, A/55/38, paras. 79-80.

[285] See europa.eu.int/comm./external_relations/moldova/intro/

[286] Political Cooperation Agreement, signed on 28 November 1994 by EU and Republic of Moldova, entry into force 1 July 1998.

Moldova is provided in different ways: Technical assistance through the Tacis programme, macro-economic assistance (loans), humanitarian assistance[287] and the food security programme[288]. Moldova benefits also from the European Initiative for Democracy and Human Rights (EIDHR) based on Resolution 976/99[289] which aims at supporting institutions and NGOs dealing with civil and human rights. Through the Tempus programme Moldovan educational *institutions* have benefited from over 20 projects (worth a total of circa €4 million).

In the following it will be examined whether the Tacis programme provides assistance to vulnerable groups.

Technical assistance through Tacis[290]

The EU uses for economic aid granted to "countries whose economies are in transit" a different legal basis than for developing countries[291], i.e. Art. 308 TEC.[292] The aid is labelled "Official Assistance" (OA) instead of "Official Development Assistance" (ODA).[293]

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[287] As the social situation in Moldova deteriorated further in the wake of the Russian financial crisis of 1998, in 1999 the EC allocated around € 4 million for exceptional humanitarian aid. Projects concentrated on medicines, vaccines and food supplies for children and elderly people. However, it was phased out as Moldovan problems are of structural nature.

[288] *Regulation (EC) No 1292/96,* introduced a long-term development approach on food security, thus moving away from short-term food aid. It was selected for structural intervention as it was counted to the most vulnerable countries. Structural reform in agricultural and social sectors should be promoted and government programmes aiming at improving food security through budgetary support. The budgetary support is accompanied by a technical assistance component. See also *Special Report No 2/2003 on the implementation of the food security policy in developing countries financed by the general budget of the European Union, together with the Commission's replies,* 2003/C 93/01, 17 April 2003, para. 3.

[289] Council regulation 976/1999 of 29 April 1999 lays down requirements for implementation of development cooperation operations which contribute to the general objective of developing and consolidating democracy and rule of law and to that of respecting human rights and fundamental freedoms other than those of development cooperation, Official Journal L 120, 8/5/1999, page 8. Council Regulation (EC) no. 975/1999 of 29 April 1999 applies for cooperation with developing countries, Official Journal L 120, 8/5/1999, page 1.

[290] The Tacis programme will be replaced by a European Neighbourhood and Partnership Instrument by 2007 as laid down in the Communication on the instruments for external assistance under the future financial perspective. See COM(2004) 626 final, *Communication from the Commission to the Council and the European Parliament On the Instruments for External Assistance under the Future Financial Perspective 2007-2013,* Brussels, 29.9.2004

[291] For developing countries, Art. 177 TEC (ex Art. 130 u) is relevant. Paragraph 2 explicitly recognises the relevance of human rights for external policies of EC under first pillar: EC policy in the area of development cooperation shall contribute to general objectives of development and consolidation of democracy, rule of law and of respecting human rights and fundamental freedoms.

[292] Art. 308 TEC (ex Art. 235 TEC) provides for a general competence to take action if this is "necessary to attain in the course of the operation of the common market, one of the objectives of the Community" and if other provisions of the Treaty have not provided the necessary powers. There is a long-standing Community practice of using Art. 308 as legal basis for international agreements or external financing programmes. Already in 1971 ECJ in context of E.R.T.A.-judgment, case 22/70 Commission v. Council (E.R.T.A.), (1971) ECR 263. ECJ noted in para. 95 that Article 308 empowers the Council to take any "appropriate measures equally in sphere of external relations". This article exceeds the sole establishment of the "common market" (as opposed to Community's common policies). Under this article the Commission founded its view that EC had competence to adhere to ECHR.

[293] Simma, Bruno, Aschenbrenner, Beatrix, Schulte, Constanze, *Human Rights Considerations in the Development Co-operation Activities of the EC,* in Philip Alston, *Human rights in the EU,* 1999, p. 571.

However, Moldova has been added in 1997 to the DAC-list of ODA recipients. Thus, Moldova is a developing country.[294]

In general, the EU has changed its emphasis from programme aid (support for structural adjustment) to project aid (building infrastructure, governance and civil society). Project aid aiming at promoting human rights and democracy, civil society, independence of media, rule of law is channelled through programmes such as Tacis in form of financial and technical grants. The EU often refers to these aid as "governance and civil society" or "social infrastructure projects in education and training".[295]

The Tacis programme based on a Council regulation[296] was launched by EC in 1991 and provides grant-financed[297] technical assistance to Moldova in order to promote transition to market economy and reinforce democracy and rule of law (Art. 1). It also serves for implementing the Political Cooperation Agreement (PCA) and Art. 2 para. 1 bases the programme on principles and objectives set out in PCA.

In order to maximise impact, activities are concentrated on few areas of cooperation (Art. 2 para. 2) so that the programme can take into account differing needs and priorities of *regions* and need to promote democracy and rule of law. Apart from support for institutional, legal and administrative reform, support is also provided for addressing social consequences of transition (Annex II mentions the reform of health, pension, social protection and insurance systems; development of employment services; assistance to alleviate social impact of industrial restructuring; assistance to alleviate social impact of industrial restructuring).

The programme shall take into account differing needs of partner *states* and progress toward democracy and market-oriented reform. Measures shall be implemented taking into account need for sustainable economic development, social impact of reform measures, promotion of equal opportunities for women, sustainable use of natural resources (Art. 2 para. 6).

A human rights clause is provided both in Art. 16 Tacis regulation[298] and the Political Cooperation Agreement (PCA). Art. 2 of the PCA provides that respect for democracy, principles of international law and human rights as defined in particular in Helsinki Final Act,

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[294] Countries in this region such as Kazakhstan, Kyrgyz Republic, Tajikistan, Turkmenistan, Armenia, Georgia, Azerbaijan have been on this list since 1992/93.

[295] Ibid., p. 573.

[296] *Council Regulation No 99/2000,* 29 December 1999.

[297] Art. 8 Regulation

[298] Art. 16 provides: "when essential element for continuation of cooperation is missing (in particular in cases of violation of democratic principles and human rights), Council may on proposal from Commission acting by qualified majority decide upon appropriate measures concerning assistance."

Charter of Paris for a new Europe and principles of market economy including those in document of CSCE Bonn conference underpin internal and external policies of parties and constitute essential element. If a state party does not come up to its human rights obligations, this is a case of special urgency and immediately "appropriate measures" may be taken (Art. 2 in combination with Art. 99 PCA).[299] Reason for including this standard clause is to spell out the right of the Community to suspend or terminate an agreement for reasons connected with non-respect for human rights by third country. Suspension or termination can take place in a manner consistent with rules of customary international law codified in the Vienna Convention on the Law of Treaties (to which the EC is not formally a Contracting Party) without the need to follow all the procedural requirements (notification requirements) laid down in the Conventions.

Based on the regulation, a Country Strategy Paper (CSP) 2002-06 provides the strategic framework whereas the overall planning is effectuated in the National Indicative Programme (NIP) for 2005-06. A total allocation of € 42 million is foreseen for the period 2005-2006. The Tacis Programme 2005-2006 focuses on following areas:

- Institutional, legal and administrative reform

Support is provided for consolidation of the rule of law, improvement of business climate and fight against corruption; approximation of legislation, reform of the health sector, justice and home affairs issues, support to Moldovan customs and border troops to improve control over the Moldovan customs territory, support to improve certification of rules of origin, support to the civil society, support to Moldova in addressing migration issues, and in the fields of training, higher education, and statistics, and for people to people contacts. Support to the National Coordinating Unit (NCU) for the Tacis Programme is also foreseen.

- Private sector and economic development

The development of Small and Medium size Enterprises (SMEs), privatisation, support for trade and exports promotion, including creating conditions for increasing investments and in particular for attracting Foreign Direct Investments (FDI) should be supported.

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[299] If either party considers that other party has failed to fulfil obligation it may take appropriate measures, before doing so, except in cases of special urgency it shall supply Cooperation Council with information required for examination of suit with view to seeking solution acceptable to parties; priority must be given to those which least disturb functioning of agreement (Art. 99 para. 2). A Joint Declaration concerning Art. 99 annexed to the Agreement clarifies that the term "cases of special urgency" means cases of material breach of agreement by one of parties. A material breach consists in violation of essential elements set out in Art. 2.

- Alleviation of the social consequences of transition

Support will be provided to poverty reduction policies identified in the EG-PRSP and in the National Action Plan for Human Rights (NAPHR) through social assistance via strengthened NGOs, health and childcare.

Assessment

The EU seems to focus on the "well-being of the state and institutions" and follows a human needs-approach. Vulnerable groups are only briefly mentioned in the point "alleviation of social consequences of transition". However, such an approach reinforces disempowerment of already weak social groups.

Conclusion

Since the early 1990s the EU has recognised that it needs a comprehensive approach to migration including a root causes-approach which would involve addressing human rights and development issues in countries of origin, and that this requires inter alia combating poverty, preventing conflicts and ensuring respect for human rights, in particular the rights of minorities, women and children.

However, as has been demonstrated in the case of Moldova, the EU itself does not give special attention to empowerment of vulnerable groups. This would be crucial in order to achieve equality and eventually prevent conflicts in the long run through human rights-based development.

Apart from the question how the EU should implement its development cooperation policies, the problem remains that the political will to adopt and implement measures to reduce illegal immigration through traditional tools of border control precedes over a long term-approach where "success" is invisible in the short run.

Given the current lack of coherence between internal and external human rights policy, the EU should undertake efforts to address root causes of refugee flight. EU policies to address the root causes of conflicts would probably have more impact on the number of applications in Europe than any number of measures to prevent asylum seekers from entering and resources spent for external traditional control tools could be devoted to more effectively addressing the underlying causes of forced migration.

Addressing root causes remains a huge unused potential for "joined up" policy making in Europe which would establish coherence across EU's policies in areas of conflict prevention, CFSP, development aid policy. With its great comparative advantage deriving from its presence in numerous geographical locations, sectors and policy fields, the EU is well positioned to take a lead in the migration-development field. The question remains is whether it has the political courage to do so.

Bibliography

Alston P., Weiler J. H. H., *An EU Human Rights Policy*, in Philip Alston (ed.), *The EU and Human Rights*, 1999, Oxford University Press, pp. 5-60.

Apap J., Carrera S., *Towards a proactive immigration policy for the EU?*, Centre for European Policy Studies, Working Document no. 198, December 2003.

Arts K., *Integrating Human Rights into Development Cooperation: The case of the Lomé Convention,* Kluwer Law International, The Hague, 2000.

Boccardi, *After Amsterdam: Towards an EU Asylum Policy?*, in *Europe and Refugees - Towards an EU Asylum Policy* (The Hague: Kluwer Law International, 2002).

Brandtner B, Rosas A., *Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice*, in "European Journal of International Law", vol. 9, 1998.

Bulajic M., *Principles of International Development Law*, Nijhoff, Dordrecht, 1993.

Cholewinski R., *No Right of Entry: The Legal Regime on Crossing the EU Border,* in Groenendijk K., Guild E., and Minderhoud P. (eds.), *In Search of Europe's Borders,* The Hague, Kluwer, 2003.

Chowdhury S. R., *A response to the refugee problems in post cold war era: some existing and emerging norms of international law*, in "International Journal of Refugee Law", vol. 7, 1995.

Crawley H., *Europe: Fortress or Refuge?*, in "Forced Migration Review", no. 23, May 2005

Darrow M. and Tomas A., *Power, Capture, and Conflict: A call for human rights accountability in development cooperation*, in "Human Rights Quarterly", vol. 27, 2005.

Dodson M., *First Report 1993*, Aboriginal and Torres Strait Islander Social Justice Commission, Australian Government Publishing Service, Canberra, 1993.

Duckett C. (ed.), *The Right to Development: Reflections on the First Four Reports of the Independent Expert on the Right to Development,* Geneva, Franciscans International, 2003.

Durieux J.-F. and McAdam J., *Non-Refoulement through Time: the Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies*, in "International Journal of Refugee Law", vol. 16, 2004.

Edwards A., *Human Rights, Refugees, and the Right 'To Enjoy' Asylum*, in "International Journal of Refugee Law", vol. 17, no. 2, 2005.

Fitzpatrick J., *Temporary Protection of Refugees: Elements of a Formalized Regime*, in "American Journal of International Law", 2000, vol. 94.

Garvey J.I., *The new asylum seekers: addressing their origin*, in Martin, D. A. (ed.) *The new asylum seekers: refugee law in the 80s*, Dordrecht, Martinus Nijhoff, 1986.

Gent S., *The Root Causes of Migration: Criticising the approach and finding a way forward,* Sussex Migration Working Paper no. 11, September 2002.

Gibney M.J., *The state of asylum: democratisation, judicialisation and the evolution of refugee policy in Europe*, New Issues in Refugee Research: Working Paper no. 50, UNHCR, October 2001.

Goodwin-Gill G., *The Refugee in International Law,* xford: Oxford University Press, 2nd ed., 1996.

Gorlick B., *The convention and the committee against torture: a complementary protection regime for refugees*, in "International Journal of Refugee Law", vol. 11, 1999.

Grünfeld Fred, *Human Rights Violations: A Threat to International Peace and Security*, in M. Castermans, F. van Hoof and J. Smith (eds.), *The Role of the Nation-States in the 21st Century*, 1998, Kluwer Law International, Netherlands.

Guild E., *Reaching into the European State: Border Pressures and International Asylum Obligations*, in *Moving the Borders of Europe* (University of Nijmegen, 2001).

Guiraudon V., *Before the EU Border: Remote Control of the "Huddled Masses"*, in K. Groenendijk, E. Guild and P. Minderhoud (eds.), *In Search of Europe's Borders*, The Hague: Kluwer Law International, 2003.

Guiraudon V., *Constitution of a European Immigration Policy Domain: A political sociology approach*, in "Journal of European Public Policy", vol. 10, no. 2, April 2003.

Harvey C.J., *Refugees, Rights, and Human Security*, 2001, *Refuge,* vol. 19, no. 4.

Hathaway J. and Neve R.A., *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, in "Harvard Human Rights Journal, 1997, vol. 10.

Hathaway J., *The Law of Refugee Status,* Toronto, Butterworths, 1991.

Hayes B., Bunyan T., *Migration, development and the EU security agenda*, in Mollett, H. (ed.), *Europe in the World: Essays on EU Foreign, Security and Development Policies*, BOND, 2003.

Hieronymi, Otto, *European Values and Interests: The need for liberal asylum and immigration policies*, in "Refugee Survey Quarterly", vol. 20, no. 2, UNHCR, 2001.

Human Rights Council of Australia, *The rights way to development: A human rights approach to development assistance*, 1995, Breakout Printing, Sydney.

Kjaerum M., *'Article 14'*, in G. Alfredson and A. Eide (eds.), *The Universal Declaration of Human Rights. A Common Standard of Achievement,* The Hague: Nijhoff, 1999.

Lambert H., *Article 3 of the European Convention on Human Rights and the Protection of Refugees and Rejected Asylum-Seekers against Refoulement from Europe*, in *European Convention on Human Rights and Protection of Persons in need of International Protection*, Chisinau, 2000, pp. 77-87.

Lauterpacht E. and Bethlehem D., *The Scope and Content of the Principle of Non-refoulement*, in E. Feller, V. Türk, and F. Nicholson (eds) *'Refugee Protection in International Law' UNHCR's Global Consultations on International Protection,* Cambridge, Cambridge University Press, 2003.

Loescher G., Milner J., *The missing link: the need for comprehensive engagement in regions of refugee origin*, in "International Affairs", vol. 79, no. 3, 2003.

Loescher, G., *Protection and Humanitarian Action in the Post-Cold War Era*, in Zolberg, A und Benda, *Global Migrants, Global Refugees*, 2001, Berghahn Books, New York.

MacPherson S., *"Can we turn social science into social development studies?"*, in Laksiri Jayasuriya and Michael Lee (eds.), *Social Dimension of Development*, Paradigm Books, 1994.

Mason E., *UNHCR, Human Rights and Refugees Collection and Dissemination of Sources*, in "International Journal Legal Info", vol. 35, 1997.

McAdam J., *The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime*, 2005, "International Journal of Refugee Law", vol. 17.

Nagy B., *Is there a need for subsidiary protection in Europe? A view from a candidate country'* in D. Bouteillet-Paquet (ed.), *Subsidiary protection of Refugees in the European Union: Complementing the Geneva Convention?*, Brussels, Bruylant, 2002.

Neuwahl N., *"The Treaty on European Union: A step forward in the protection of Human Rights?"*, in Neuwahl and Rosas (eds.), *The European Union and Human Rights* (1995).

Niessen J., Migration Policy Group, *Five years of EU migration and asylum policy-making under the Amsterdam and Tampere mandates, Paper prepared for the German Council of Experts for Immigration and Integration* (Immigration Council), May 2004.

Noll G. and Vedsted-Hansen J., *Temporary Protection and Burden Sharing: Conditionalising Access Suspending Refugee Rights?,* in E. Guild and C. Harlow (eds.), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law,* Oxford: Hart, 2001.

Noll G., *Fixed definitions or framework legislation? The delimitation of subsidiary protection ratione personae*, Working Paper No. 55 New Issues in Refugee Research, UNHCR, 2002.

Noll G., *Negotiating Asylum. The EU acquis, Extraterritorial protection and the common market of deflection*, The Hague, Martinus Nijhoff Publishers, 2000.

Noll G., *Seeking Asylum at Embassies: A right to entry under international law?*, in "International Journal of Refugee Law", vol. 17, no. 3, 2005.

Noll G., Vedsted-Hansen J., *Non-Communitarians: Refugee and Asylum Policies*, in Philip Alston (ed.), *The EU and Human Rights*, Oxford University Press, 1999.

Noll G., *Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones,* 2003, in "European Journal of Migration and Law" vol. 5.

OECD (Organisation for Economic Co-operation and Development), Conflict Prevention and Peace Building: what counts as ODA?, 3 March 2005, available at www.oecd.org/dac.

Pabst, R., The *Impact of 11 September 2001 on the Developing Countries and the Implications for EU Development Policy*, European Parliament, DG Research Working Paper (doc. DEVE 106 EN 01/2003), 2003.

Peers S., *Human Rights, Asylum and European Community Law,* in "Refugee Survey Quarterly", vol. 24, issue 2, UNHCR 2005.

Pérez J.N., *Working Paper n° 8, EU instruments for conflict prevention,* FRIDE (Fundación para las relaciones internacionales y el diálogo exterior), available at www.fride.org/eng/File/ViewLinkFile.aspx?FileId=618.

Plender R. and Mole N., *Beyond the Geneva Convention: constructing a de facto right of asylum from international human rights instruments*, in F. Nicholson and P. Twomey (eds.), *Refugee Rights and Realities. Evolving International Concepts and Regimes,* Cambridge, Cambridge University Press, 1999.

Sambanis N., *Preventing violent civil conflict: The scope and limits of government action*, World Development Report 2003: Dynamic Development in a sustainable world, background paper 59, 23 February 2002, available at con.worldbank.org/files/16693_Sambanis.pdf.

Sicilianos, Linos-Alexander (ed.), *The prevention of human rights violations, Contribution on the occasion of the Twentieth Anniversary of the Marangopuoulos Foundation for Human Rights (MFHR)*, 2001, Kluwer Law International, The Hague.

Simma B., Aschenbrenner B., Schulte C., *Human Rights Considerations in the Development Co-operation Activities of the EC*, in Philip Alston, *Human rights in the EU*, 1999.

Spijkerboer T., *Subsidiarity in asylum law, the personal scope of international protection*, in D. Bouteillet-Paquet (ed.), *Subsidiary protection of refugees in the European Union: complementing the Geneva Convention?,* Brussels, Bruylant, 2002.

Swedish Ministry of Labour's Summary of the Government Bill on Active Refugee and Immigration Policy, May 1991.

Tommasoli M., *Inequality, vulnerability to violent conflict and aid incentives for peace*, 21 January 2003, paper prepared for Fourth Annual Global Development Conference: "Globalisation and equity", Cairo, Egypt, available at www.gdnet.org/pdf/Fourt_Annual_Conference/parallels4/GlobalizationGrowthPovertyInequality/Tommasoli_paper.pdf.

Van der Klaauw J., *European Union,* 1998, in „Netherlands Quarterly of Human Rights" vol. 16.

Van der Klaauw J., *Irregular Migration and Asylum-Seeking: Forced Marriage or Reason for Divorce?*, in B. Bogusz, R. Cholewinski, A. Cygan, and E. Szyszczak (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives,* Leiden, Martinus Nihjoff, 2004.

Van Selm J., *Temporarily Protecting Displaced Persons or Offering the Possibility to Start a New Life in the European Union*, 2001, "European Journal of Migration and Law", vol. 3.

Van Selm J., *The High Level Working Group: can foreign policy, development policy and asylum and immigration policy really be mixed?,* UNU WIDER Conference on Poverty, International Migration and Asylum, Helsinki, 27./28. September 2002, p. 1.

Vedsted-Hansen J., *Assessment of the Proposal for an EC Directive on the Notion of Refugee and Subsidiary Protection from the perspective of International Law*, in D. Bouteillet-Paquet (ed.), *Subsidiary protection of refugees in the European Union: complementing the Geneva Convention?* Brussels, Bruylant, 2002.

Weissbrodt D., Hortreiter I., *The Principle of Non-refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-refoulement Provisions of Other International Human Rights Treaties,* 1999, in "Buffalo Human Rights Law Review", vol. *5,* 1999.

UN documents

Treaty Law

International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 U.N.T.S. 171.

International Covenant on Economic, Social and Cultural Rights, adopted by GA Res. 2200 A (XXI) (1966): in United Nations, A Compilation of International Instruments, vol. 1 (First Part), Universal Instruments.

Geneva Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S.150., *Protocol Relating to the Status of Refugees*, 4 October 1967, 606 U.N.T.S. 267.

Convention on the Rights of the Child , 20 Nov. 1989, 1577 U.N.T.S. 3.

Soft law

United Nations Millenium Declaration, 55th Session, Agenda Item 60(b), UN doc. A/Res/55/2, 2000.

Vienna Declaration and Programme of Action, UN World Conference on Human Rights, June 1993, UN doc. A/CONF.157/23, 12 July 1993.

Universal Declaration of Human Rights, 10 Dec.1948, UNGA res. 217 (LXIII).

Declaration on the Right to Development, adopted by General Assembly resolution 41/128 of 4 December 1986.

Declaration on Territorial Asylum, General Assembly Resolution 2312 (XXII), 14 December 1967.

Human Rights Committee, *General Comment no. 15 on the position of aliens under the Covenant*, UN doc. CCPR/C/21/Rev.1, 19 May 1989.

Human Rights Committee, *General Comment no. 20 concerning prohibition of torture and cruel treatment or punishment (Art. 7)*, adopted by the Committee at its 1138th meeting, on 3 April 1992.

Human Rights Committee, *General Comment no. 27, Freedom of movement (Art.12)*, (Sixty-seventh session, 1999), U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999).

Committee against Torture, *General Comment on the Implementation of Article 3 in the context of Article 22 of the Convention against Torture,* U.N. Doc. CAT/ClXX/Misc.1 (1997).

Concluding observations of the Committee on Economic, Social and Cultural Rights: Republic of Moldova, 12/12/2003, E/C.12/1/Add.91.

Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Republic of Moldova, 27/06/2000, A/55/38.

Concluding Observations of the Committee on the Rights of the Child: Republic of Moldova, 31 October 2002, CRC/C/15/Add.192.

Concluding observations of the Human Rights Committee: Republic of Moldova, 26/07/2002, CPR/CO/75/MDA.

An Agenda for Peace, Preventive diplomacy, peacemaking and peace-keeping, A/47/277 - S/24111, 17 June 1992.

Renewing the United Nations: A Programme for Reform, 51st Session, Agenda Item 168, UN doc. A/51/950/, 1997.

Report of Secretary-General, In larger freedom: towards development, security and human rights for all, A/59/2005.

Report of the Secretary-General Prevention of armed conflict, 55th Session, A/55/985–S/2001/574, 7 June 2001, General Assembly.

Strengthening of the United Nations: an agenda for further change, 57th Session, Agenda Item 53, UN doc. A/57/387, 2002.

UNDP, *Human Development Report for Central and Eastern Europe & CIS. Transition*, 1999.

UNDP, *National Human Development Report, Transition and Human Security, Republic of Moldova*, 1999.

UNDP Bureau for Crisis Prevention and Recovery, *From the discourse to the ground: UNDP activities in conflict prevention*, New York, May 2003.

UNDP, *Human Rights and Human Development: Human Development Report 2000*, United Nations Development Programme, New York, 2000.

UNDP, *Integrating human rights with sustainable development*, New York, January 1998, Sales number E.98.III.B.10.

UNDP, *Human Development Report 1996*, Oxford University Press, New York/Oxford, 1996.

UNDP, *Human Development Report 2002: Deepening democracy in a fragmented world*, 2002, available at hdr.undp.org/reports/global/2002/en/pdf/complete.pdf.

UNHCR, Executive Committee, *Conclusion no. 82 (XLVIII) on "safeguarding asylum"*, 1997.

UNHCR, Executive Committee, *Conclusion no. 28, Follow-up on Earlier Conclusions of the Sub-Committee of the Whole on International Protection of the of the Determination of Refugee Status*, 1992.

UNHCR, Executive Committee, *Conclusion No. 22 (XXXII), Protection of Asylum Seekers in Situations of Large-scale Influx*, 1981.

UNHCR, Executive Committee, *Overview to the Agenda for Protection*, 53rd Session, UN doc. A/AC.96/965/Add.1, 26 June 2002.

UNHCR, *2004 Global Refugee Trends*, UNHCR Geneva, 20 June 2005.

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

Promoting and enabling sustainable livelihoods for refugees and returnees, A Statement by the United Nations High Commissioner for Refugees at the World Summit on Sustainable Development, Johannesburg, 30 August 2002.

Refugee Protection: A guide to International Refugee Law, Inter-Parliamentary Union, 2001, Published by the Inter-Parliamentary Union with the Office of the United Nations High Commissioner for Refugees.

Ruud Lubbers, UN High Commissioner for Refugees, *UNHCR Press Release: Lubbers calls for EU asylum laws not to contravene international law,* 29 March 2004.

Statute of the Office of the United Nations High Commissioner for Refugees, UNGA, A/RES/428, 14 Dec. 1950.

UNHCR, *Agenda for Protection*, UN doc. A/AC.96/965/Add.1, 26 June 2002.

UNHCR, *Asylum Levels and Trends in Industrialized Countries Second Quarter*, 2005 Overview of Asylum Applications Lodged in 31 European and 5 Non-European Countries.

UNHCR, *Guidelines on International Protection no. 1: Gender-related persecution within the context of Article 1A(2) of Geneva Convention*, UN doc. HCR/GIP/02/01, 7 May 2002;

UNHCR, *Guidelines on International Protection no. 2: "Membership of a particular social group" within the context of Article 1A(2) Geneva Convention,* UN doc. HRC/GIP/02/02, 7 May 2002.

UNHCR, Preliminary Positions: *Protection and Durable Solutions for Refugees in the Context of Migration and Development*, in Tool box II: The instruments, Geneva, September 2002, p. 689.

UNHCR, *Protecting Refugees: A Field Guide for NGOs*, August 2003, 18-22.

UNHCR, *Reception of asylum-seekers, including standards of treatment, in the context of individual asylum systems*, Global consultations on international protection, 3rd meeting, UN doc. EC/GC/01/17, 4 Sept. 2001, para. 1.

UNHCR, *Reconciling Migration Control and Refugee Protection in the European Union: A UNHCR Perspective*, Geneva, October 2000, p. 5.

UNHCR, *The State of the World's Refugees: The Challenge of Protection* , Penguin, New York, 1993.

UNHCR, *Transport Carriers and Refugee Protection*, Working Paper for the Tenth Session of the ICAO Facilitation Division, ICAO Doc. FAL/10-WP/123 (1988)

UNHCR, *The International Protection of Refugees: Complementary Forms of Protection*, April 2001.

Common Country Assessment, Republic of Moldova, United Nations, 2000.

ECOSOC, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *Concept document on the right to development,* Working paper submitted by Florizelle O'Connor, E/CN.4/Sub.2/2005/23, 24 June 2005.

ECOSOC, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *The legal nature of the right to development and enhancement of its binding status*, E/CN.4/Sub.2/2004/16, 1 June 2004.

Plan of action submitted by the United Nations High Commissioner for Human Rights, Addendum 3 to Report of Secretary-General, In larger freedom: towards development, security and human rights for all, A/59/2005.

EU documents

Treaties

Charter of Fundamental Rights of the EU, OJ C 364/1,18 December 2000.

Draft Treaty Establishing a Constitution for Europe, 2003, CONV 850/03, 18 July 2003, OJ 2004 C 310.

Treaty Establishing the European Community,1957, OJ C 325/33, 24 December 2002.

Convention implementing the Schengen Agreement, 2000, OJ L239.

Schengen Protocol to the Amsterdam Treaty (1999), OJ C 340/96, 10 November 1997.

Agreement signed in Schengen, 14 June 1985, between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.

Secondary legislation

Council Regulation EC 491/2004 of the European Parliament and the Council of 10 March 2004 *establishing a programme for financial and technical assistance to third countries in the areas of migration and asylum (AENEAS*).

Council Regulation EC 2003/0124 replaced for 2004-08 budget B7-667, *Co-operation with 3rd countries in the field of migration,* multi-annual programme to assist third countries to manage migration flows and in implementing readmission agreements.

Council Regulation 99/2000 of 29 December 1999, concerning the *provision of assistance to the partner States in Eastern Europe and Central Asia.*

Council Directive EC 51/2001 of 28 June 2001 *supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985,* OJ L187 (10 July 2001).

Council Directive EC 55/2001 of 20 July 2001 *on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*

Council Regulation EC 453/2003 of 6 March 2003, *amending Regulation (EC) 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external border*, OJ L69 of 13 March 2003.

Council Regulation EC 377/2004 of 19 February 2004, on the *creation of an immigration liaison officers network.*

Council Directive EC 83/2004 of 29 April 2004 *on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted,* OJ 2004 L 304/12.

Policy documents

Initiative of the Kingdom of Spain with a view to adopting a Council Directive on the obligation of carriers to communicate passenger data OJC82 (5 April 2003), *Council Directive (EC) 2003/110 on assistance in cases of transit for the purposes of removal by air* OJ L 321/26 (6 December 2003).

Commission of the European Communities, *On immigration and asylum policies*, COM (94) 23 final, 23 February 1994.

EU action plan on the influx of migrants from Iraq and the neighbouring region, adopted by the EU General Affairs Council, 26-27 Jan. 1998 (5573/98 ASIM 13).

Convention applying the Schengen Agreement of 14 June 1985 between the governments of the states of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the gradual abolition of checks at their common borders, Schengen, 19 June 1990, reprinted in H. Meijers et al., Schengen: Internationalisation of Central Chapters of the Law on Aliens, Refugees, Privacy, Security and Police (1992).

COM(2004) 626 final, *Communication from the Commission to the Council and the European Parliament On the Instruments for External Assistance under the Future Financial Perspective 2007-2013*, Brussels, 29.9.2004

Council draft multi-annual programme, *The Hague Programme; strengthening freedom, security and justice in the EU*, 27.10.2004; adopted 4.11.04.

Council of the EU, *European Union priorities and policy objectives for external relations in the field of justice and home affairs*, doc. 7653/00, 6 June 2000, p. 5.

European Commission, DG Development, *Report on the public consultation on the future of EU development policy*, June 2005.

Special Report No 2/2003 on the implementation of the food security policy in developing countries financed by the general budget of the European Union, together with the Commission's replies, 2003/C 93/01, 17 April 2003.

Council Conclusions of 24 February 1997, Council Declaration of 29 April 1997, Bull. EU 4-1997, point 1.4.6; Council Conclusions of 15 September 1997.

Political Cooperation Agreement, signed on 28 November 1994 by EU and Republic of Moldova, entry into force 1 July 1998.

Communication on Conflict Prevention, 11 April 2001, COM (2001), 211 final.

Communication from the Commission to the Council and the European Parliament On the Instruments for External Assistance under the Future Financial Perspective 2007-2013, COM(2004) 626 final, Brussels, 29.9.2004.

European Commission, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Proposal for a Joint Declaration by the Council, the European Parliament and the Commission on the European Union Development Policy "The European Consensus"*, COM(2005) 311 final ,SEC(2005) 929, 13.7.2005.

Speech by Commissioner for Development and Humanitarian Aid Poul Nielson, "Building Credibility: The Role of European Development Policy in Preventing Conflicts": Foreign Policy Centre, February 2001.

European Commission, DG for Development, Understanding European Community Aid (1997).

European Commission, DG Development, *Report on the public consultation on the future of EU development policy*, June 2005.

High Level Working Group on Asylum and Migration, *Report to the European Council in Nice* (doc. 13993/00 (JAI 152 AG76)), 29 November 2000.

Council of the EU, *Modification of the Terms of Reference of the High Level Working Group on Asylum and Migration (HLWG)*, doc. 9433/02, 30 May 2002.

Dutch Delegation to the Council of the EU, *Note from the Dutch Delegation: Task Force on Asylum and Migration*, doc. 13344/98 JAI AG 15, 23 November 1998.

Council of the European Union, Brussels, 18 June 2005, Conclusions of the Brussels European Council, 16 and 17 June 2005, 10255/05.

Austrian Presidency of the European Union, *Strategy Paper on Immigration and Asylum Policy*, 1998 (doc. 9809/98 LIMITE CK 4 27 ASIM 170).

Council of the European Union, Tampere, October 1999, *Presidency Conclusions*, available at www.europarl.eu.int/summits/tam_en.htm

Council of the European Union, The Hague, 2004, *Conclusions of the The Hague European Council.*

Council of the European Union, Edinburgh, *Presidency Conclusions*, 11-12 December 1992 (SN 456/92).

Council of the European Union, Seville, 2002, *Conclusions of the Seville European Council*.

Council of the European Union, Brussels, 18 June 2005, *Conclusions of the Brussels European Council*, 16 and 17 June 2005, 10255/05.

European Commission, *Communication Integrating Migration Issues in the EU's relations with Third Countries*, COM (2002) 703 final, 03.12.2002.

European Commission, *Communication on Community accession to the European Convention for the Protection of Human rights and Some of its Protocols*, Doc. SEC(90)2087 final, 19 November 1990.

EU Annual Report on Human Rights 2000, adopted by the Council of the European Union, Brussels, 9 October 2000.

Joint Declaration by the European Parliament, the Council and the Commission, 5 April 1977, OJ C103/1.

European Commission, *Memorandum adopted by the Commission*, 4 April 1979, Bull. EC, Supp. 2/79.

Report on the human rights situation in the European Union (2001/2014(INI)), Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, Rapporteur Joke Swiebel, Doc. A5-0451/2002 of 12 December 2002.

The Future of the European Union Agenda on Asylum, Migration and Borders, Conference of the European Policy Center and King Baudouin Foundation, Brussels, 4 October 2004. at http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/04/435&format=HTML&aged=0&language=EN&guiLanguage=en.

EU Annual Report on Human Rights 2003, adopted by the Council of the European Union, Brussels, 10 October 2003, Doc. 13449/03, covers period from 1 July 2002 to 30 June 2003.

Vienna Action Plan on how best to implement provisions of Amsterdam Treaty establishing an area of freedom, security and justice , ratified by European Council in Vienna in December 1998

Communication Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations, COM(2004) 4002 final, 2 June 2004, page 5 and 7; this has also been acknowledged in the Commission's Communication on the common asylum policy and the Agenda for protection, COM(2003) 152, 26 March 2003.

A People's Europe: Bull.EC Suppl. 7/85, at 8-9.

European Commission, *Communication from the Commission to the Council and the European Parliament on the Right of Asylum*: SEC(91)1857.

European Commission, *Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies*, COM(94)23 final.

European Council, *Declaration on Human Rights*, EC Bulletin 6-1991.

Resolution of the Council and of the Member States meeting in the Council on Human Rights, *Democracy and Development* of 28 November 1991, Bull. EC 11-1991.

ECJ decisions

Case 29/69 *Stauder v City of Ulm* (1969), ECR 419.
Case 222/84 *Johnston* (1986), ECR 1651.
Opinion 2/94 on the accession by the EC to the ECHR (1996), ECR I-1759.
Case C-249/96 *Grant* (1998), ECR I-649.
Case C-377/98 *Netherlands v Council and EP* (2001), ECR I-8575.

Case C-95/99, *Khalil and Addou*, 11 October 2001.
Case C-188/91 *Deutsche Shell* (1993), ECR I-363
Case C-162/97 *Nilsson et al* (1998), ECR I-7477.
Case C-162/96 *Racke* (1998), ECR I-3655.
Case C-268-94, *Portugal v Council* (1996), ECR I-6177.
Case C-259/96 *Grant* (1998), ECR I-649.

Council of Europe

Amuur v. France, European Court of Human Rights, 25.06.1996, Reports 1996-III
Committee of Ministers of the Council of Europe, *Declaration on Territorial Asylum,* 18 Nov. 1977.
Soering v. United Kingdom, Ser. A 161, 7 July 1989.
Chahal v. United Kingdom, Judgment 70/1995/576/662, 15 November 1996.
Ahmed v. Austria, judgment 71/1995/577/663, 17 December 1996.
D versus United Kingdom, judgment 146/1996/767/964, 2 May 1997.
Nsona v. The Netherlands, judgment 63/1995/569/655, 28 November 1996.

NGOs

Amnesty International, *Missing: A common asylum policy that is ambitious, coherent and protection-centred*, 2002, Open Letter to the JHA Council, 28-29 November 2002.
ECRE (European Council on Refugees and Exiles), *Broken Promises – Forgotten Principles*, an ECRE Evaluation of the development of EU minimum standards for refugee protection, Tampere 1999, Brussels 2004.
ECRE (European Council on Refugees and Exiles), US Committee for Refugees, *Responding to the asylum and access challenge, An Agenda for comprehensive engagement in protracted refugee situations*, April 2003 (RR1/04/2003/ext/AS).
Oxfam, *Foreign territory, The internationalisation of EU Asylum Policy*, 2005.
Statewatch, *Statewatch comments to the International Development Committee inquiry into "Migration and Development"*.