# EU migration management and imperialism

## A critique of the 'comprehensive' approach to migration

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## Abstract

This thesis constitutes an attempt to examine the constantly developing role of EU migration law within the 'new world order'. This new world order, which some define as globalisation, is analysed through the concept of imperialism in this thesis, reflecting current theoretical debates on this issue.

The main argument presented is that EU migration law, as part of an emerging 'global migration management', has become a cornerstone in creating and reproducing unequal global power relations in the current era of capitalist development, thereby helping to secure EU imperialist interests. Based on theoretical discussions on current forms of imperialism, the state and law, this thesis explores the role that treaties and legal provisions regulating migration within and outside the European Union today play with regard to global hegemony. Particular focus is therefore given to the question of how to define imperialism today, how the nation-state is changing with regard to globalisation and finally the role that global migration management plays within these changes.

Characteristic of the emerging migration management in the EU is the inclusion of migration clauses in EU external relations, a development which is often termed 'the globalisation of migration control', as well as the rationalisation of immigration control with the intent to negotiate labour and capital relations within the EU. Both policy trends appear to be an attempt to remain competitive in the global economy as well as to control autonomous aspects of international migration that stand in opposition to state interests. These legal developments are outlined and criticised in this thesis and placed in relation to imperialism.

Although the basis of this thesis is predominantly theoretical, it also uses examples of the implementation of legal practices from Germany and the UK with regard to migration control so as to underline and illuminate the arguments presented.

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## Abbreviations

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| AHGI | Ad Hoc Working Group on Immigration |
| AVG | *Asylverfahrensgesetz* (German equivalent of the Asylum Procedure Act) |
| BAFl | *Bundesamt für die Anerkennung ausländischer Flüchtlinge* (German 'Federal Office for the Recognition of Foreign Refugees') |
| CFSP | Common Foreign and Security Policy |
| CIREA | Centre for Information, Discussion and Exchange on Asylum |
| CIREFI | Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration |
| Coordinators' Group | Coordinators' Group on the Free Movement of Persons |
| Coreper | Committee of Permanent Representatives |
| ECHR | European Convention on Human Rights |
| ECJ | European Court of Justice |
| ECRE | European Council on Refugees and Exiles |
| ECRI | European Commission Against Racism and Intolerance |
| EFMS | Europäisches Forum für Migrationsstudien |
| EIS | European Information System |
| EP | European Parliament |
| EPC | European Political Cooperation |
| fn | footnote |
| FOM | Swiss Federal Office for Migration |
| HLWG | High Level Working Group on Asylum and Migration |
| IGC | Intergovernmental Consultations on Asylum, Refugees and Migration Policies in Europe, North America and Australia |
| ILPA | Immigration Law Practitioners' Association |
| IOM | International Organisation for Migration |
| JHA | Justice and Home Affairs |
| LTR | Long-term residents |
| NGO | Non-Governmental Organisation |
| OJ | Official Journal of the European Communities |
| PICUM | Platform for International Cooperation on Undocumented Migrants |
| SCIFA | Strategic Committee on Immigration, Frontiers and Asylum |
| SEA | Single European Act |
| SIA | Schengen Implementation Agreement |
| SIS | Schengen Information System |
| TEC | Treaty of the European Communities (EC Treaty) |
| TEU | Treaty on European Union (Maastricht or EU Treaty) |
| TNC | Transnational Corporation |
| TREVI | EU Working Group, acronym for 'Terrorisme, Radicalisme et Violence' |
| UNRISD | United Nations Research Institute for Social Development |
| VIS | Visa Information System |
| WWI | First World War |
| WWII | Second World War |

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## Chapter 1: Introduction

The 1980s and 1990s were marked by the restrictive development of immigration and asylum law in Europe, leading to the popular characterisation of Europe as a 'fortress'[1]. During the 1990s, a shift can be detected in the EU's approach to migration, towards a selective relaxation of legal restrictions to labour immigration, as well as an externalisation of the EU's migration and asylum policy. The latter was and still is being promoted by policy-makers and institutions as a 'holistic' or comprehensive approach to migration, where the success of a harmonised asylum and migration policy within the European Union is seen not just to depend upon the internal governance of the EU, but also upon the Union's capacity to address political, economic, development and human rights issues in countries of origin and transit (Sterkx, 2004:4). The Presidency Conclusions from the Seville European Council of 2002 confirmed the permanency of this policy by stating that "an integrated, comprehensive and balanced approach to tackling the root causes of illegal immigration must remain the European Union's constant long-term objective".[2] Both these developments (restriction and globalisation of control) have been widely recorded as well as criticised (see chapters 4 and 5). The EU is also experiencing growing protests from (undocumented) migrants and asylum seekers for their right to work and to stay, as well as their right to live in freedom and not be interned in detention centres and camps in and around Europe.

Despite this criticism, human rights concerns with regard to the deaths of migrants and refugees occurring at the EU's borders as a result of the implementation of EU migration policy are increasing.[3] Many have also noted the coercive character of EU negotiations with third countries on migration matters (Lavenex, 1999; Webber, 1999; Gent, 2002). The increasing level of migration and parallel coercion of migrants, asylum seekers and third countries with regard to this matter have again raised the issue of uneven distribution of wealth and 'global justice' and have led to an increasing body of recent literature attempting to understand and analyse global migration management within wider political economic developments. However, there has not been a systematic analysis of the theorisation of EU migration control in relation to change and continuity in global power relations, which are commonly described as globalisation.[4] This thesis is an attempt to fill this gap in the literature. It outlines some of the most common characteristics of globalisation and analyses how these are related to recent changes in the EU's

[1] 'Fortress Europe' is an inadequate term for the restriction of immigration into the European Union from the 1970s onwards. Immigration was never halted, not even slowed down during this period, but was, to a large extent, criminalised and/or legally differentiated with regard to residency rights and social entitlements.

[2] *Presidency Conclusions*, Seville European Council, 21/23.6.2002, point 33 (revised version, 24.10.2002, 13463/02, POLGEN 52).

[3] *The fatal realities of "Fortress Europe"* (United, 2003). On 19 June 2003, the European anti-racist network United recorded 4591 deaths of refugees and migrants at Europe's borders since 1993 (United Information Leaflet No 14, http://www.unitedagainstracism.org).

[4] Globalisation is not a comprehensive theoretical concept but commonly applied to describe a plethora of global technological, economic and cultural developments of the last thirty years. Chapter 3 describes and analyses globalisation in more detail.

approach to migration. The thesis thereby seeks to examine to what extent the changing relationship between capital, labour and the state, which characterises the current imperialist phase, is reflected in increasing attempts by imperialist nation-states to control skilled, unskilled and forced migration.

### 1.1 Focus of the thesis

By means of a theoretical discussion on current forms of imperialism, the state and law, this thesis explores the role that legal provisions regulating migration within and outside the European Union play with regard to the current imperialist phase. Particular focus is therefore given to the question of how to define imperialism today, how the nation-state is changing with regard to globalisation and finally the role that global migration management plays within these changes. Although the basis of this thesis is predominantly theoretical, it uses selected examples of globalisation and the implementation of legal practices with regard to migration control to underline and illuminate the arguments presented.

With regard to EU law, the dynamics described above are expressed by two developments which this thesis focuses on. Firstly, there has been a globalisation of migration control, which through the linking of aid and trade agreements to immigration policies is forcing countries of origin and so-called transit countries of refugees and migrants to implement EU migration policies.[5] The manner in which migration clauses are being incorporated into agreements with third countries and the direct challenge that it poses towards the sovereignty of third countries, points to a reconfiguration of international relations between the former colonial powers, such as the three strongest EU Member States (Germany, France and Britain) and newly dependent nation-states in eastern Europe and 'Third World' countries (in Africa and Asia) after the breakdown of the bi-polar system of alliances after 1989. Economically, it can be understood as an attempt by capitalist centres to retain an international division of labour and prevent a large number of poor populations from socially destabilising the centres and accessing social and welfare rights. This thesis specifically analyses this recent shift in EU migration policy towards exercising "its influence internationally"[6] through the former EU's 'third pillar' of Justice and Home Affairs (hereafter JHA),[7] against the backdrop of past and present discourses on imperialism.

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[5] These constitute readmission agreements where countries are forced not only to take back their own nationals but also third country nationals who are said to have entered Europe through that country. Also, the creation of refugee camps in transit areas, carrier's liability and visa impositions are all part and parcel of the global migration regime, which is notably imposed by the EU and other industrialised countries on Africa, Asia and the Middle East. Chapters 4 and 5 outline the development of migration management in EU law in more detail.

[6] *Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice* (Vienna Action Plan), 3.12.1998 (OJ C 19, 23.1.1999, pp 1-15).

[7] The policy area of Justice and Home Affairs incorporates immigration, policing/internal security and judicial cooperation.

Secondly, the dynamic described above is expressed by the increasing rationalisation as well as intensification of migration control. That is a shift away from the reified idea of Europe as a 'fortress' towards a more flexible immigration system that works closely with industry to identify labour shortages and adjust visa and work permit regimes accordingly. The changing approach of Member States to immigration is informed by the increasing demand for flexible labour, which states are trying to provide in their role as mediators between labour and capital. This regulatory framework is based on a diverse range of citizenship rights, which in turn are linked to legal access to residency and work opportunities. From a European perspective, the 'internal' aspect of migration control is therefore linked to the control of 'flexible' labour, itself a product of globalised, post-Fordist production relations and post-1989 political relations. In both respects, migration control is a central policy aspect of industrialised, or imperialist, countries in their attempt to deny access to rights of certain populations within their own jurisdiction, as well as outside it.

Although this thesis focuses only on the EU, it should be noted that the theoretical framework suggested here, that is explaining certain migration control practices by the constitution of capital and labour in the relevant economies, also applies to the remaining industrial centres, or rather, those countries that can be termed imperialist (if applying a political-economic analysis put forward here in chapters 2 and 3). These countries include the U.S., Canada, Japan and Australia. Given that the 'imperialist network' (Magdoff, 1969), or modern capitalist relations, are highly complex, it cannot be claimed that the world is only divided into imperialist countries and non-imperialist countries, in form of a dichotomous relationship, but imperialism constitutes a network, or rather a chain of dependencies, governed by a particular capitalist development within nation-states, the class strategies pursued by those who benefit from this development, and their interaction at the international level. There are newly industrialising countries such as the OPEC states, 'Asian Tigers' (Hong Kong, Taiwan, Singapore, and South Korea)[8] and also India and China, which have developed stronger economies in long-term need of unskilled, semi-skilled and highly skilled foreign labour. Countries within the South, who cannot be termed imperialist, are also experiencing large-scale migration movements which they seek to control. However, how far a capital-labour analysis explains South-South migration, or even the treatment of migration to the industrialised centres other than the EU, requires more specific analysis. Moreover, South-South migration is not subject to global migration control by the imperialist centres, unless it represents transit migration towards, in this case, Europe. Therefore, the interests served by global migration management remain that of the centres and, it could be argued, the newly or recently industrialising countries.

[8] Although since the 1997 Asian financial crisis these countries dependency on foreign capital and the IMF has been widely noted. The term Tiger however, has become synonymous with nations that achieve high growth by pursuing an export-driven trade strategy. This entails creating industrial policy to attract high levels of foreign direct investment.

In order to provide a wider background to the central debate of this thesis, the following chapters provide a historical overview of migration and how recent migration has been perceived in Europe. Migration is placed in the historical context of its control by the state and its political and economic character is highlighted. This overview serves, on the one hand, to put current migration discourses into context so as to avoid ahistorical argumentation, which often dominates politically motivated discussions on migration. On the other hand, the following introduction to the various aspects determining migration and its treatment introduces and explains the main concepts which this thesis applies with regard to migration and its control mechanisms of law and citizenship.

### 1.2 Migration: reality and perception

At present, the general consensus is that "[i]nternational migration is at an all-time high. Around 125 million people live outside their native countries in the mid-1990s and the number is increasing by 2 to 4 million each year" (Martin & Widgren, 1996:1). The IOM's World Migration Report 2000 claims that "[m]ore than 150 million international migrants celebrated the turn of the millennium outside their countries of birth". However, the dominant claim that there has been a significant quantitative increase in migration over the past centuries has been contested or at least qualified by some (see Hayter, 2000; Emmer & Mörner, 1992). Indeed, Cohen (1995:7) thinks that the recent depiction of Britain being "under siege from a horde of restless foreigners about to invade their historically undisturbed homeland" is a

> curious myopia as it takes little account of the many early invasions of Britain by the Vikings, the Normans, the Romans and others, or the fact that the British themselves have been highly energetic colonisers of other people's land.

Although this observation is certainly true, it is also a fact that with the introduction of new technologies and travel opportunities, migration has increased. Moreover, colonialism, two world wars, continued military conflicts and economic destitution have triggered significant population movements that differ from earlier migrations. The migration patterns of the late 20th century have become increasingly more complex and flight and migration have become, one could argue, the norm rather than the exception in the human condition. We can see temporary migration, return migration, voluntary and forced migration, family reunion and labour migration. Due to the outlawing of some migratory movements, irregular or undocumented migration has become a whole new subject of inquiry.[9] Since the World Wars, there has also been a significant increase in refugee populations, triggered by armed conflict, environmental destruction, unstable social systems and insecure living conditions (Zolberg et al., 1989). But yet again, it

[9] See Miller (1995), Düvell & Jordan (1999) or *Kein Mensch ist Illegal* (1999).

is important to retain a historical perspective on the much-cited increase in migration and be aware of its distorted representation in the media and of the constructed importance migration has gained through the continuing stress on national and migrant identity. Pointing towards future developments, Eltis (2002:3) points out that "[w]hile the global mixing of the world's peoples continues to accelerate in the twenty-first century, it is likely that this process is still in its infancy".

To retain a historical perspective on current discussions on migration, it is useful to briefly sketch earlier migration movements connected to Europe. Hayter (2000) distinguishes between four major migration movements between the 16th century and the present:[10] firstly, the slave trade; secondly, the indentured labour system; thirdly, European emigration to America and Australia; and fourthly, South-North migration after WWII. WWII further triggered large-scale refugee movements, which led to the establishment of an international legal framework dealing with the recognition and protection of refugees. Cohen (1995:1-3) begins with the modern period of world history (15th-16th century) to identify slavery and indentureship as the "two predominant forms of migration in the first 300 years of the world system", the end of which he sets at 1941, when the last indentured labour system (in the Dutch East Indies) officially came to an end. Recent studies have pointed out that various forms of slavery continue to exist with an estimated 28 million people world-wide living in "modern slavery".[11] African slavery was accompanied by voluntary emigration of European settlers to the colonies. Emigration from European countries has so far constituted the largest part of international migration movements. Between 1800 and 1960, around 61 million Europeans emigrated to North and South America, Africa, Australia, New Zealand, Asia and parts of Russia. This figure is contrasted with 5.6 million African and Asian migrants, half of whom were forced to migrate as slaves and around one million as indentured labourers. Up to WW II, around 60-65 million Europeans and around 15 million Africans and Asians took part in international migrations; the latter's migration was predominantly forced migration (Emmer & Mörner, 1992:4). Even between 1945 and 1975, "when Europe became a major destination zone, the numbers leaving Europe for other continents probably constituted about half the global total of intercontinental migrants" (Cohen, 1995:3). These figures show that European migration has constituted a large part of international migration; recent migrations from the Third World to the industrialised centres, however, are perceived and treated very differently and, as the following chapters show, are portrayed as threatening and unique. The second period of world migration that Cohen identifies is marked by the rise of the U.S. as an industrialised power and the consequent migration of northern, southern and eastern Europeans into the U.S., Australia and New Zealand.

Post-WWII migration is identified by Cohen as the third major migration movement, with voluntary labour migration gaining an increasing importance. The post-war period saw a significant shift

[10] See Eltis (2002:1-31) or Tehranian (1998) for accounts of pre-modern human migrations.
[11] *National Geographic*, Nederland/België, September 2003, pp 2-29.

in the character of international migrations. The United Nations estimates that between 1960 and 1990, around 35 million people from the majority world fled or emigrated to industrialised countries. The refugee population in 2003 alone was estimated by the UNHCR to amount to 6-7 million, and in January 2003 the UNHCR's estimated number of "persons of concern", who fall under the mandate of the UNHCR, was 20,556,781.[12] Around 3-4 million refugees were living in industrialised countries by the 1990s (Hayter, 2000:10). However, although these figures clearly indicate an increase in the refugee population and an increase in violent conflict, they can be misleading with regard to the volume of people migrating as a whole.[13] Similar to the "curious myopia" that Cohen noted above, Sutcliffe (cited in Hayter, 2000:11) has pointed out that "the demographic effect of immigration and emigration as a whole appears to be almost insignificant, which makes its apparent political importance the more striking".

Turning from the perception to the reality of migration, the following periodic categorisations can be made with regard to post-War migration into Europe and its treatment by the then EC states. From the 1950s to the 1970s, northern European industrialised states carried out labour recruitment programmes to satisfy the (skilled as well as unskilled) labour needs of their booming economies. Castles (2003:68) argues that European labour recruitment was part of the "chief economic strategy of large-scale capital" at the time, namely, "the concentration of investment and expansion of production in the existing highly-developed countries". Jobs offered mainly constituted hard labour in the industrial and factory sector. The countries in which an EC state would set up recruitment offices was mostly decided on the basis of the historical and geographical links to the sending countries. In Germany, these were Italy, Spain, Portugal, Yugoslavia and Turkey. France recruited in its former colonies in northern Africa (Castles & Kosack, 1973; Castles et al., 1987). This liberal yet selective practice at the time was mirrored by asylum policies whereby, until the end of the 1970s, asylum seekers faced relatively liberal rules and practice and refugees from eastern Europe were even welcomed by states and the media "because of the implicit vindication of west European liberal democracy that their movement provided" (Geddes, 2003:18). However, eastern European refugees were often also skilled workers who proved useful for key sectors in west European industries (Busch, 1995) and, as Shah (1999) shows, refugees from Africa and Asia received a less welcoming response. It has been widely noted that this first phase of post-War migration has led to the establishment of "new, ethnically distinct populations in advanced industrial countries" (Castles, 2003:68). This was not only the result of the above mentioned migration from European peripheries to Western Europe under the so-called 'guestworker system' and consequent family reunification (Cholewinsky, 1997), but also the result of migration from colonies to former colonial powers and migration from Europe

[12] UNHCR website, http://www.unhcr.ch/cgi-bin/texis/vtx/statistics, accessed on 28 March 2004.

[13] Although the number of 35 million people entering Europe within 30 years seems relatively large, it only amounts to 1% of the 1990 population of the Third World moving over a 30 year time span and it increased the population in the host countries by only 0.2% each year (Hayter, 2000). Similarly, between 1945 and 1960, around 7 million Europeans migrated, whereas only about 3 million non-Europeans took part in international migration (Emmer & Mörner, 1992:4).

and later Asia and Africa to North America and Australia (see Castles 2003:69-76 for a more detailed outline). More recently, it has become obvious that the treatment of foreign workers and refugees as a temporary phenomenon and the denial of citizenship or other social and employment rights, has led to deep-rooted social problems of what is often seen as a failure to 'integrate'. Recent riots in French suburbs, home to first second and sometimes third generation 'immigrants', can be seen as an outcome of, amongst other things, the French policy of separating migrant communities from the resident population by creating housing ghettos for immigrants in the *banlieues*.

Returning to a periodic categorisations of immigration, it has also been widely noted that increasing wealth disparities, restrictive immigration laws and armed conflict have led to shifts in migratory patterns during the second phase of post-war migration. Family reunion replaced labour immigration channels and led to the formation of new ethnic communities (see above). Former countries of emigration in Europe (notably Italy and Greece) became countries of immigration, refugee movements from Latin America, Asia and Africa grew to unprecedented numbers and created large-scale South-South migration. Newly industrialising economies and the Arab countries which discovered oil started recruiting labour from neighbouring regions to satisfy the flourishing economies (particularly from Asian and Africa but also Europe to Saudi Arabia and the United Arab Emirates) and skilled and managerial and internationally mobile labour started to increase in the industrialised centres (rotation and permanent forms). By the late 1970s, immigration had become a structural feature of international relations.

The restriction of organised recruitment of foreign workers in Western Europe from the 1970s onwards is well recorded and is commonly explained as "a reaction to a fundamental restructuring of the world economy" (Castles, 2003:78, see also chapter 2 and 3 below). Due to the impending economic crisis, which was exacerbated by the 1973-4 oil conflict with OPEC countries, many north-western European states started imposing labour recruitment bans in the face of growing unemployment numbers. As seen in the next chapter, the crisis accelerated the end of Fordism and the introduction of radical neo-liberal policies that undermined the position of labour with regard to capital, weakening labour rights and making production more flexible. In line with this increasingly hostile attitude towards immigration, European host countries denied they had become countries of immigration. In the case of Germany this official stance, against all evidence to the contrary, survived until the 1990s. Resistance was particularly geared towards guest workers (whose permanent stay was never intended by recruiting states) who had settled and started making use of family reunion laws. Attempts to restrict the same by various host states are also well recorded (Castles, 2003). As outlined below in chapter 4.1, the 1970s saw an improvement of residency and social rights of some non-citizens, notably as a result of migrant rights struggles and legal challenges.

The 1980s saw two developments, firstly the Europeanisation of economic and political life and also of migration policy and secondly, a further attempt to reduce undesired migration into Europe. EU states increasingly started imposing visa restrictions on countries whose citizens were unwanted (Busch,

1995:87-92 for an overview of the imposition of visa requirements in northern European states). Asylum law mirrored this development and mainly procedural restrictions led to a continuous undermining of asylum rights, coupled with the criminalisation of undocumented entry. This development is outlined below in chapter 4. It should be noted that asylum restriction by procedural means has led to a long-term asylum crisis in Western Europe with asylum seekers waiting up to 15 years for a final decision on their claim, and a large amount of appeals due to an increasing amount of negative first instance decisions on procedural grounds (see Shah, 1996). It should also be noted that restrictive responses at this time (1970s and early 1980s) were national, not European and differences between northern and southern European countries were significant (with northern European states driving restrictive approaches). Apart from economic reasons, the legal restrictions were a reaction to the increasing flight to Europe by non-European refugees from Latin America (e.g. Chile), Asia (e.g. Vietnam, Afghanistan) in the 1970s and the Middle East (e.g. Turkey) and Africa (e.g. South Africa, Angola, Mozambique) in the 1980s (Busch, 1995:79) and can be said to have also been racially motivated (Shah, 1999).

With the creation of the Ad Hoc Group on Immigration in 1986 (chapter 4.2.1), the EU started to organise and restructure Member States' restrictive policies at EU level, resulting in the Schengen Agreement and Dublin Convention (chapters 4.2.2 and 4.5.3). Whereas during the restrictive years the political rhetoric gave the impression of a bounded Europe which could no longer take in migrants and refugees for resource and race reasons (expressed in conservative election slogans such as 'the boat is full' in Germany, or Enoch Powell's 'rivers of blood' speech in the UK), in the mid-1990s the EU and its Member States slowly started opening up the debate on immigration, again driven by its economic necessity (chapter 5.4).

In the attempt to mediate this uneasy balancing act and deal with people's movements in a globalised world system, migration has gained major political importance over the past decade. States and international institutions claim migration to be the biggest security risk facing the world today. This became particularly evident on the 50th anniversary of NATO, where the organisation initiated its new security agenda to take account of the end of the Cold War and the necessity to review its role after the Warsaw Pact had ended. Particular attention was given to migration in the Euro-Atlantic Partnership Council (EAPC),[14] a multilateral forum created in 1997 to cooperate and consult on a range of political and security issues. Onur Öymen, Turkish Ambassador to NATO, reflected the general consensus when he said:

> We need to go forward by clearing every obstacle that may be a risk for the international security system that is now taking shape. We should be prepared to confront the new risks like instabilities stemming from

[14] The EAPC was formed on 29 May 1997 as the successor to the North Atlantic Cooperation Council (NACC) and works alongside the Partnership for Peace (PfP), both created post-Cold War in 1991.

> terrorism, mass migration, arms and drug trafficking, civil breakdowns, possible spread of weapons of mass destruction.[15]

In a speech to the EAPC Foreign Ministers Meeting in December 2001, Mikhail Khvostov, Belarussian Minister of Foreign Affairs, albeit driven by financial motives, painted a very dramatic picture of people's movements:

> [a] clear and major security challenge is a large-scale flow of illegal migrants moving westward from terrorism-prone countries. Illegal migration is closely associated with organized crime, drug trafficking; it is a breeding ground for terrorists. Belarus undertakes important efforts to restrain this intense wave rolling through its territory. At present there are up to 200,000 illegal migrants on our territory targeting to penetrate European states. In fact, Belarus at its western border shields many EAPC countries from this unwanted wave. But we do not have adequate means to continue to cope alone with this problem. We need to get a solid support in these efforts from NATO and EU, their member-states, as well as EAPC partner-nations.[16]

The legal conflation of security and migration at EU level is outlined in more detail in chapters 4.3 and 4.4.

Returning to the issue of perception of migration, a distorted picture might prevail, apart from racist sentiments, because migration is portrayed as a movement exclusively into Europe, thereby disregarding European emigration as well as return migration.[17] It is also implicitly claimed that migrants entering Europe remain static and do not leave, whilst return and constant migration are common features of modern 'age of migration' (Castles, 2003).

Following on from the above, it can be said that empirical evidence has shown that the dominant image of Europe as being subject to unprecedented immigration movements is a false one. Large-scale migrations have always been part of human history, but they have become significant today in that they are portrayed as a threat to national resources and international security. Further, the current populist immigration debate is based on false assumptions about international migration and the economic effects of immigration (Home Office, 2001) whilst at the same time denying, or at least ignoring, the existence of undoubtedly larger and more violent period of European mass migrations during and shortly after the colonial period. This does not, however, contradict the recent rise in international migration with an increasing number of refugees world-wide.

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[15] NATO 50th anniversary homepage, http://www.nato.int/turkey/turkey2.htm.
[16] NATO Speeches on-line library, http://www.nato.int/docu/speech/2001/s011207o.htm.
[17] Between 1815 and 1912, for example, some 21 million people alone left Britain to settle elsewhere, and net emigration continued for most of the period after WWII (Hayter, 2000:20).

### 1.3 Migration and its economic effect

International migration is influenced by and in turn influences political economic developments. Migration therefore has economic consequences for the migrant as well as host, transit and sending countries. It could be argued that historically, the migration of Europeans has in the long term led to a rise in living standards and until recently, the migration of African and Asians has led to a decline or stagnation in living standards during the slave trade and indentured labour (Emmer & Mörner, 1992). Undoubtedly, this imbalance is due to the appropriation of indigenous wealth by European settlers and colonisers and the human losses of the slave trade and the exploitative nature of the indentured labour system respectively. The inequality in the net socio-economic results of migration did not subside after formal decolonisation. Contrary to common belief, this migration pattern, whereby not only more Europeans than Africans and Asians have taken part in international migration, but where the results of this migration have been unequal in terms of social and economic position, was largely repeated after WWII (Emmer & Mörner, 1992).

However, labour migration is increasingly being used to support migrants' families in their countries of origin through remittances, which has led to an increase or sustenance in living standards as a result of migration, increasingly recognised in writings on the link between migration and development. Further, some migrant communities have been successful in establishing themselves in the middle-class within host countries. Receiving as well as sending states, on the other hand, have largely benefited from migration. Again, this has been increasingly recognised by studies and organisations concerned with migration and development.[18] In the past decades, migration patterns and their socio-economic results for migrants have become very complex, with an increase in living standards of those migrating from poorer parts of the world to the industrialised centres and, in form of remittances, also of the families of migrants who remain behind in the respective countries of origin.[19] According to the World Bank report *Global Development Finance 2003*, workers' remittances to developing countries reached $72.3 billion in 2001 and generally exceed official development assistance given by governments directly to low-income

[18] Amongst other initiatives, Princeton University founded the Center for Migration and Development (CMD) in 1998 to promote "scholarship, original research, and intellectual exchange" with a focus on the "relationship between immigrant communities in the developed world and the growth and development prospects of the sending nations". The UN has recently passed a resolution in which it "*[u]rges* Member States and the United Nations system to continue strengthening international cooperation and arrangements at all levels in the area of international migration and development in order to address all aspects of migration and to maximize the benefits of international migration to all those concerned" (*International migration and development*, Resolution adopted by the General Assembly, 13.2.2004, A/RES/58/208, point 2). The IOM has also started focusing on the issue and is trying to implement the regulation of remittances and many more development organisations are publishing on the potential economic benefits of migration for countries of origin.

[19] In Jordan, for example, worker remittances increased from 7.4 million Jordanian dinars to 440 million Dinars between 1972 and 1984, higher than the country's domestic exports and accounting for 25-33% of both, imports and GNP (Seccombe & Findlay, 1989:117).

countries or through multilateral institutions.[20] The World Bank only includes remittances paid through official channels and the unofficial figures will therefore be significantly higher. It is difficult to assess the economic impact of remittances on sending and host countries. There have been nearly as many studies which claim that remittances have a positive effect on the home country (e.g. Ferrán & Pessar, 1991; Ascher, 1994; Libercier & Schneider, 1996) as studies which claim that remittances have a net negative effect on the home country (e.g. Dinerman, 1982; Seccombe & Findlay, 1989). Ammassari and Black (2001:5) point out that there are no quick answers to understanding the relationship between migration and development:

> The existing body of theoretical and empirical evidence show that the impact of international migration and return on development varies considerably, depending among other things on the volume, type, and timing of migration flows. The characteristics of migrants, degree and direction of selectivity, and situation of the countries involved in migration are also critical factors which need to be taken into consideration. The consequences of migration also vary according to the level of analysis that is selected. There can be very different implications for individual migrants, their families, kinship or close social environments, and their home countries. The short-term effects of international migration may moreover differ significantly from its long-term effects.

However, whereas the specificities of migration and its impact are complex, it can be asserted that migration is intrinsically linked to capitalist development, since people always impact on and stand in a particular relationship to the state and the economy. Miles (1987:1-7) points out that it would be reductionist to claim that international migration is a direct outcome of the spread of capitalist relations. However, the correlation that exists between the internationalisation of capital and labour recruitment and the internationalisation of migration over the past centuries points to at least a "mediated connection" between the development of capitalism and of migration (Miles, 1987:7). Here it is useful to apply Miles' definition of migration as a movement of people that relocates them in the relations of production (from one class to another), however complex the classes and movements may be.

Dreher (2003:13) has pointed out that migration has not increased proportionally to the internationalisation of capital flows: according to the World Bank, only 2-3% of the world's population are classified as migrants, whereas internationalisation of trade and capital ranges from 9-45%. She explains the disproportionate mobility of people *vs.* capital by the fact that states have put limits to people's migration in contrast to capital (chapter 4.5). Nevertheless, the recognition of the relationship between the two, i.e. the political-economy approach to migration, has contributed to the explanation of modern

[20] See http://www.worldbank.org/prospects/gdf2003/ for the full report.

migration movements and their treatment by states, such as labour migration into Western Europe in the 1950s and 1960s (Castles & Kosack, 1973).

Apart from clarifying the role of the division of labour in states' migration policies, the understanding of migration as migrants relocating in different production relations, and therefore impacting on political-economic developments in sending and host countries, allows us to understand the creation and economic function of undocumented migrants. Undocumented migrants are almost always workers whose migration (or rather the criminalisation of their migration) has fundamentally changed their position within the relations of production with regard to the type of work they are doing, as well as their insecure status with regard to the organisation of labour (demand for better working conditions, often merely the demand to be paid). Indeed, in many instances the labour/capital relation itself becomes 'unfree' due to the irregular status, allowing for the extraction of 'super-profits' and exploitation. Research in undocumented migration is still rudimentary and due to its sensitive political nature until recently only publicised by Christian organisations, which could be explained by the fact that they view their humanitarian mission as fundamentally independent from state politics. Particularly Jesuits for a long time provided the only research into the situation of undocumented migrants in Europe,[21] although research on the subject is increasing (Düvell & Jordan, 1999; Alt, 1999, Bade, 2002, Vogel, 2003). Findings particularly highlight the role of the labour exploitation of undocumented migrants, for example in the greenhouse industry in Holland (Benseddik & Bijl, 2005) or the exploitation of migrant domestic labour ensuring reproduction mechanisms in the capitalist centres which are not counted in monetary terms by traditional economics but constitute a central element in capitalist relations (Anderson, 2000). Notwithstanding this, there have been struggles by undocumented workers to demand their wages which have been successful. A recent guideline by PICUM on concrete ways to protect undocumented migrant workers (2005:75) points out that

> [u]ndocumented workers can make a claim against their employers for withheld wages in the industrial tribunals in Belgium, France, Germany, Greece, Italy, the Netherlands and Portugal. If the worker was employed in Belgium, Germany or Greece, and was deported or voluntarily returned to his/her country of origin, s/he may still initiate a claim against the employer from abroad.

However, successful labour struggles are far and few between and undocumented migrants are still "criminalized and chased on the one hand, and desired and exploited on the other hand" (PICUM 2005:5). This situation is largely tolerated by nation-states because it is considerably more difficult for undocumented and sometimes documented migrants to demand the enforcement of their social rights and

[21] The German Jesuit Association, for example, has been conducting research on and campaigns against illegality for years (http://www.jesuiten-fluechtlingsdienst.de).

the exploitation of their cheap labour remains economically beneficial; the economic interest in irregular work is therefore always present (Vogel, 2003:162). Lack of citizenship therefore plays a central role in the enforcement and perpetuation of unfree forms of labour, in particular in the industrialised centres. It is increasingly admitted that undocumented work in the agricultural, cleaning or building industries, for example, constitutes a central element in ensuring capital accumulation through low wages and therefore the growth of capitalist economies in the centres.

Not only workers but also refugees have consistently been portrayed as potentially draining resources and affecting profits in highly industrialised nation-states. It is, however, entirely another question if autonomous migration or remittances are indeed harmful for industrialised centres.[22] It can only be observed that states are seeking to control them. Despite the links that exist between migration, labour and the national economy, it would be wrong to assume that decisions determining migration control policies are purely economic or indeed that migration has a simple and direct impact on the economy. There have been many studies on immigration and economic development, for example, where a direct link simply cannot be established. Stalker (2000:13) has pointed out that data on the relationship between international migration and international wage levels, for example, only show points of convergence, which cannot be reduced to a direct relationship between migration and wages:

> [...] the effect of immigration on wages is complex, for while the arrival of immigrants certainly increases the size of the labour force, it also creates more employment. For one thing, immigrants increase demand: they are consumers who will need, among other things, extra housing, food and infrastructure whose provision will itself create more jobs. For another, they also offer a fresh and vigorous labour pool that itself attracts new capital and then expands employment.

This insight however, is not new.[23] During the past few decades, the economically beneficial effects of immigration were not unknown, but merely ignored by the political rhetoric and media hype which have continuously exploited the issue of immigration for their own needs (in election campaigns or for increasing sales, respectively).

[22] Different theoretical approaches to migration come to different conclusion on the benefits of migration. While structural theorists tend to emphasize the benefits that migration can have on the receiving (fulfilling of labour needs) and the sending (reduction of unemployment) nations, the neoclassical theories tend to view migration in a more negative light for the receiving nation and assume that the sending nation reaps all the benefits of migration in the form of remittances.

[23] See Simon (1989) for a U.S. example, Spencer (1994) for a European one.

### 1.4 Migration and the state

As already indicated above, the fact that migration is related to political economic developments explains the attempts by many states to control it. This control has changed considerably over the past two centuries. The control of migration here refers to migration that involves movement from one jurisdiction to another. Although internal migration has potentially the same impact on sending and receiving regions as cross-border migration, it fundamentally differs with regard to the changing relationship between the individual migrant (citizen or non-citizen) and the state. This in turn defines the way in which the individual can demand social and welfare rights. The involvement of two (or more) political entities organised as a state, therefore, turns international migration into a political and economic event that is framed in the (hierarchical) relationship that exists between the states (Zolberg, 1994; Thränhardt, 2003).

The modern nation-state, based on clear boundaries and legal systems ordering entry and exit, is a rather recent phenomenon and the particular form of migration control reflects the constantly changing structure and role of modern nation-states (chapters 2.1.2 and 3.3.2). In the last 200 years, states have moved from being relatively open, as in the 19th century, to totalitarian (fascist), authoritarian (real-communist regimes) or restrictive states (e.g. increasing and racist U.S. entry control of the 1920s and 1930s) in the 20th century (Hollifield, 2003:36). Since WWII, capitalist nation-states have become 'open' again (compared to the war period), but have started applying selective entry criteria as well as increasing internal control of populations (see also chapter 1.2 above).[24] Since 1989/1990, the political and economic international framework has changed and international competition regarding spheres of investment and specific forms of skilled labour has increased. The 'welfare state', with bounded notions of sovereignty, together with its role of securing national growth and social coherence, has been transformed into a 'competition state', with the role of ensuring its competitiveness internationally (chapter 3.3.3). As a consequence, nation-states have changed their approach towards (im)migration so as to provide cheap labour for key industries and retain international competitive 'know-how', thereby increasing quality and productivity in industry (Hunger & Santel, 2003:9-10). This has led to a 'liberal paradox' (Hollifield, 2003), whereby economic liberalism, triggering and depending on flexible labour migration, is uneasily negotiated with the attempt to retain legitimacy, built on a citizenry that is distinguishable from other states (ethnicity) as well as loyal to the state and its institutions (nationalism): the issue of 'race' and 'culture' is central to this control, as both have always defined citizenship and belonging in modern nation-states (Smith, 1995:99, see also the following chapter). Increasing migration movements have questioned

[24] Internal control here refers to the introduction of mechanisms to control the citizen population. They range from the introduction of identity cards, biometrics, CCTV cameras, personal data storage and related restrictive bans on travel, increasing and arbitrary police stop and search operations and control orders and legal curtailments on civil liberties such as the right to demonstrate, freedom of speech, the right to be free from arbitrary detention by the state and the right to an effective remedy.

the basis of citizenship and states are now facing these challenges as well as the devil they once created, namely, increasing right-wing movements challenging their electoral strongholds (Morris, 2002:3).

Although migration control gained a distinctive character with the spread of capitalist relations, precapitalist regimes also tried to control migration. To give one example, under a manifesto issued in 1763 by the Russian (German born) Czarina, Catharine II (the Great), large numbers of Mennonite families from Germany (then western Prussia) migrated to the Ukraine region of Russia in the years 1788 to 1835. The manifesto contained articles that made immigration to Russia attractive to Mennonites and was intended to promote Russian agriculture and populate Russia. Recent attempts by Germany, for example, to attract Indian IT experts to Germany are therefore only "the last chapter of a long history of this form of globalisation" (Hollifield, 2003:38).

Whereas migration control was often liberal with regard to migration movement within the colonial or imperial centres, it was controlled very differently in the colonies. During the colonial period, migration control expressed itself violently through slave labour and later indentured labour.[25] The colonial period was therefore characterised by large-scale and very direct and violent control of migration: African, Asian and Latin American populations were made subject to European rule and labour needs, either by killing off the indigenous population and/or moving them into reservations in order to create room for transplantations, or by forcing them to work. At the same time, Europeans migrated towards the colonies (Magdoff, 1989:18). During colonialism, the direct control of other people's movements was therefore achieved with the use of force, rather than international legal mechanisms.

Attempts to control increasing and undesired migration started by setting down the principle of individual citizenship of only one country, an idea that was promoted by U.S. politicians and legal experts (Hollifield, 2003). Central immigration control systems were first introduced in national laws in the U.S. by the 1882 Immigration Act and the UK by the 1905 Aliens Act, closely followed by other European countries. During WWI, the political and economic demand for migration dropped and control increased. At the same time, increasing nationalism, supported by the institution of the principle of sovereignty, meant that people increasingly started to identify themselves with a 'nation', supported by citizenship and based on ethnicity, race and culture (Bommes, 2003). However, this process was not entirely repressive and also formed increasing individual rights against arbitrary state intervention. The legitimation of states was directly linked to their representative role and therefore their provision of security for the citizen (chapter 2.1.2).

[25] During the slave trade (16th to the 19th century), between 10-20 million people were forcibly removed from Africa to the Americas, where they were forced to work on European-owned plantations (http://webworld.unesco.org/slave_quest/en/links.html). The bonded labour system, known as indentured labour, temporarily contracted workers through employers or labour agencies. The indentured labour system mainly targeted Indians (around 30 million) and Chinese to work in South-east Asia, the Americas and South Africa (see Cohen, 1995:45-68).

The increasing rights of the individual *vis à vis* the state, with the institution of liberal democracy and modern notions of sovereignty, was followed by decolonisation after WWII, which led to the establishment of the right to national political self-determination in international law. Whereas, under direct colonial rule, Europe and North America could interfere in Third World populations as part of the economic exploitation of their colonies, national sovereignty meant that ex-colonial countries were not able to overtly control the movement of people from the majority world any more, except through the control of immigration, which became the exclusive domain of nation-states. Further, the European refugee crisis led to the Geneva Refugee Convention and the Universal Declaration of Human Rights. Although they did not force nation-states to admit foreigners, they obliged them to treat them in accordance with human rights principles and not to subject them to *refoulement.* These liberal developments in international but also national law on citizenship and civil rights created a set of rights for foreigners internationally and nationally (Joppke, 2001; Soysal, 1994). The question is how far states are still interested in maintaining an international protection regime for refugee and migrants, and to what extent it is located in individual rights and citizenship (Hollifield, 2003:42).

### 1.5 The state and citizenship

Following on from the above, it can be observed that immigration control today is intrinsically linked to the development of modern citizenship, which constitutionally binds individuals to a set of rights and obligations within the jurisdiction of a nation-state. Despite the fact that this development has taken varied forms in different parts of the world, it can be said that this process was formed from above through state politics as well as from below through the mobilisation of social forces (Tilly, 1975) and that it has formed the perception of the nation-state today as the central political "modern myth" (Anderson, 1983). Citizenship expresses 'belonging' in a legal constitutional sense as well as in an emotional sense (Wiener, 1996), which is usually expressed in 'identity' and historically with reference to 'race'. The current migration discourse is based on this notion of an 'imagined community' (Anderson, 1983) and can therefore be called a partially irrational discourse. This is due to the fact that the nation-state, as Ernest Renan already pointed out in 1882, is based on constructions rather than objective criteria of 'belonging'. He reminds us that

> [f]orgetting, I would even go so far as to say historical error, is a crucial factor in the creation of a nation, which is why progress in historical studies often constitutes a danger for [the principle of] nationality [...]. Historical enquiry brings to light deeds of violence, which took place at the origin of all political

> formations, even those whose consequences have been altogether beneficial [...]. The modern nation is therefore a historical result brought about by a series of convergent facts.[26]

Migration movements, in particular international migrations today, do therefore not necessarily receive significance with their occurrence or scale but through their political assessment. The nation-state constructs a legal person which forms the basis of social, political and racial constructions of national belonging. As Zolberg (1994:153) has pointed out, "the distinctive feature of international migration arises not from the nature of the movement, but rather from the fact that it entails a transfer from the jurisdiction of one sovereign to another". This might seem an obvious statement to make, but this insight is rarely present in populist discourse, and very rarely in academic inquiries into migration. As indicated above, this does not imply that migration, in particular instances, was not subject to firm state control before the advent of the nation-state. But the modern nation-state differs considerably from former empires, in that it seeks to homogenise its population with regard to 'culture' and 'race' and underpins this homogeneity with legal categories of citizens, semi-citizens, foreigners, refugees, workers and stateless persons, which are all linked to a differentiated set of rights and entitlements (Morris, 2002). The particular nature of migration and its control are therefore historically bound phenomena (defined by the organisation of space into mutually exclusive sovereignties) and in the present day, they are defined by notions of national identity and exclusive collectivity. Moreover, the international nation-state system is hierarchical in economic, military and political power, a fact which is, at best, not always understood, and at worst, deliberately obscured. Chapters 2 and 3 outline these relationships in more detail.

The conditions outlined above enable discrimination against the majority population of this world, supported and upheld by citizenship laws (Hayter, 2000:21-36). So although migration (and its control) are not new phenomena, the above realisation of their historicity helps us to understand the political nature of migration today. The classification of people into different legal categories, as well as the political nature of the present migration discourse, are recent phenomena. They are argued to be "motivated primarily by the need to control the immigration into [in this case] Britain of certain groups of people, established along racial lines, and as a consequence of a series of post-imperial realisations" (Shah, 1999:20). Migration control, through its intimate connection to the nation-state, national identity and citizenship, has started to play an unprecedented role in the political and economic developments of the current international order. This is expressed by the intensification and diversification of migration control, a qualitative shift in Europe's policy-making towards tackling the flight routes of refugees and migrants, thereby directly intervening in third country policy-making, paralleled by a rationalisation of immigration policies. This process has to be explained not only by economic criteria but within the wider framework of imperialism and its policy of international population control. The state remains central in

[26] Reproduced under http://www.emory.edu/ENGLISH/Bahri/Nationalism.html.

these developments, its role being the regulation of international economic relations and ensuring its own competitiveness by maintaining and reproducing national and internal labour divisions to ensure the exploitation of labour by capital.

### 1.6 Migration control and international relations

The realisation that migration and the economy do not stand in an antagonistic relationship to another, but rather the contrary, poses questions as to why there is such an elaborate system of control. Increasingly, questions are asked as to why we need immigration controls at all, from a humanistic and anti-racist, as well as from a liberal economic perspective (see Hayter, 2000 & Ebeling & Hornberger, 1995 respectively). However, although recent reports by the German and UK government seem to point towards a more liberal immigration system,[27] what they are demanding is in fact a more 'rational' immigration system, which is able to adjust to the labour market in a more flexible manner.[28] Indeed, the order in which the Commission published its 'new' approach to Community migration policy is classic for EU members' more recent migration proposals: first, there is an attempt to open up the immigration debate by retracting earlier positions, reflected in policy documents highlighting economic benefits and indeed the necessity of immigration (chapter 5). In the light of the anti-immigration propaganda of the past decades this is not an easy task for states without rebuffing the electorate. Reports then follow that clearly outline the actual intent of the 'new' immigration approach, where proposals aimed at

> regulating entries of labour (employed and self-employed) from third countries, constitute minimum standards based on the subsidiarity principle. Flexible though binding EU regulations, which take the varying labour market demands of EU member states into account, are to guarantee that legal migration flows into the EU are regulated and channelled in a reasonable manner. The proposals continue to grant priority to personnel from EU member states; non-EU nationals are only to be admitted in case of proved labour shortages for individual vacancies or sectors of industry, with nationals from countries that have applied for EU membership enjoying priority over other third-country nationals.[29]

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[27] Home Office (2001), *On a Community immigration policy*, Commission Communication, 22.11.2000, COM (2000) 757 final; in Germany, around the same year (2000/2001), Chancellor Schröder initiated a Greencard debate with policy proposals to facilitate immigration of skilled IT workers.

[28] *On an open method of coordination for the Community immigration policy*, Commission Communication, 11.7.2001, COM (2001) 387 final.

[29] EFMS migration report, 12.7.2001, http://www.uni-bamberg.de/~ba6ef3/djul01_e.htm, on the Commission paper COM (2001) 387 final.

The 'new approach' is rounded off with a proposal on fighting illegal immigration[30] and spending more money on external borders,[31] implying a further militarisation of borders despite the numbers of deaths occurring as a result of the same.

The nexus migration/economy and the rules governing the question of who primarily benefits from this migration as exemplified by the above quote, are shaped by international power relations. One of the few explicit studies in this field is Adler's 'International Migration and Dependence' (1977). He provides an in-depth analysis of "how the movement of workers across international boundaries affects the relationship between countries" with the example of Moroccan emigration to France and within the theoretical backdrop of dependency theory and the then newly emerging theory of 'interdependency'.[32] Adler's book stresses the complex nature of this relationship and he emphasises in this case Algeria's ability to use its migrant workers as a leverage in its political relationship to France after formal independence. However, the figures, although not his interpretation of the same, remain asymmetric. By 1973, the percentage of Algerians in full-time employment in France compared to those at home came to 20.7%, whereas the employed Algerian population in France represented only 2.1%, leaving Algeria much more dependent on France in relation to its labour market than vice versa (Adler 1977:193-194). Adler's argument (1977:214) that especially the foreign workers' sectors (characterised by executing tasks that Europeans do not want to do) can be strong, precisely because a strike in that sector would have a more devastating effect on everyday life (such as refuse collectors' strikes used to), does not correspond to any known considerable and especially structural (long-lasting) successes in migrant labour communities with regard to their pay.

However, his contribution is an example of the growing interest in international migration as an important aspect within international relations. As Berger (1977:xiii) points out in the preface to Adler's book:

> The transformation of migration from an issue for domestic political decision into an issue for resolution in interstate negotiations has largely taken place since the Second World War. In part, this change reflects the growing importance of foreign workers to the economies of the advanced Western societies and the importance of remittances in the economies of certain developing countries. But just as important, the shift

[30] *On illegal immigration*, Commission Communication, 15.11.2001, COM (2001) 672 final.
[31] *Proposal for a Council Decision adopting an action programme for administrative co-operation in the fields of external borders, visas, asylum and immigration* (ARGO), European Commission, 16.10.2001 COM(2001) 567 final, [2001/0230 (CNS)].
[32] Whereas dependency theorists saw the migration of workers from the ex-colonies to the industrialised centres as neo-colonialist capitalist exploitation in the form an unequal transfer of human resources, the interdependence approach stressed the mutual dependency between receiving and sending countries within international migration regimes, albeit not excluding the possibility of dependency.

reflects the fact that migratory flows are now widely believed to affect the relative power and influence of the countries they link.

If migration is therefore understood as a process of people's relocation within the same or between different modes of production, (assuming that states can benefit from the emigration of their citizens through remittances, for example), then migration control is indeed a political negotiation factor in international relations. The increase in and rationalisation of EU migration control, in particular the introduction of 'managed migration', is one attempt by dominant states in the global order to control this development according to their interests. It will be shown in this thesis that this control is increasingly taking place in a hegemonic manner. The renewed shift towards 'managed labour migration', exemplified by the efforts of EU Member States to promote skilled labour immigration, for example,[33] is today enforced with fewer rights to family reunion than existed during the guestworker system of the 1960s and 1970s.[34] Another example of an increasingly hegemonic approach to asylum and international relations is the externalisation of migration control, whereby asylum procedures and responsibilities are shifted abroad, a practice which is increasingly leading to a camp culture in third countries around the EU (see sub-chapter 5.3.10).

### 1.7 Parameters, concepts and methods

As outlined above, this thesis draws on far-reaching concepts such as imperialism, migration control, European integration and law. These concepts have been deliberately chosen to explain a phenomenon that cannot be analysed in the micro-field. However, if close scrutiny and analytical power are to be retained, their wide scope also demands a restriction as to the subjects the thesis can focus on. The following section therefore sets out the parameters of this thesis, on the one hand outlining the theoretical and methodological approach chosen and on the other hand presenting the themes that find closer scrutiny in this thesis and those that cannot be included.

The choice of imperialism as an explanatory framework within which to understand migration control is also a choice for a Marxist frame of reference in this thesis, as theories on imperialism typically

[33] This does not imply a decrease in refugee movements or an increase of labour migration but an increase and qualitative shift in the attempts by states to manage and regulate labour migration through regulations and active incentives with regard to specific economic sectors or with regard to the legal work status of non-citizens.

[34] The German 'Greencard' initiative which was applied only to IT specialists in the summer of 2000, for example, led to an immigration debate and changes in law that were by no means simply open to immigration. Family reunion was further restricted and measures were taken against irregular labour. The Greencard initiative has therefore also not been taken up by a large number of highly skilled migrants, who prefer the US and Britain as destination countries due to their more favourable family reunion possibilities (see also chapter 5.4.5). See http://www.proasyl.de/texte/gesetze/brd/zuwanderungsgesetz/positionen/positionen.htm for trade union and refugee organisations' positions on the recently introduced German immigration law.

originate within this political and theoretical tradition. However, this does not imply the inclusion of a discussion on Marxist theory *vs.* neo-liberal theories *per se*, although some reference is made to the main differences between the two approaches. Rather than providing a comprehensive theory, this thesis is an attempt to provide a theoretical approach or conceptual framework that is better suited to an understanding of the internationalisation of migration control increasingly promoted as a 'comprehensive approach' to migration at European level.

Following the Marxist framework, social and political developments are explained in this thesis with reference to the spread of capitalist relations over the past 100 years. The literature reviews therefore focus on authors who use this approach, be it in analysing the law, the role of the nation-state or the phenomenon of 'globalisation'. As a result, migration control is largely understood in this thesis as an attempt by nation-states to control economic developments. This is related to the centrality of labour in theories on capitalist development. More specifically, the international and national division of labour finds much attention in this thesis to explain the EU's changing migration control approach.

One driving force behind capitalist and legal developments over the past 50 years that is not dealt with in this thesis but deserves mentioning is the resistance to the forces described under imperialism or 'globalisation'. These include labour struggles as well as migrants' struggles for rights and equal treatment in law. These struggles are central to the development of law, including EU law on migration, as they make capitalism and law a continuous scene of conflict as well as exposing contradictions and inequalities in the current global economic order. However, it would have extended the scope of this thesis to analyse how these struggles are related to the recent changes in the EU's approach to migration control.

After some consideration, I made the decision not to include primary empirical evidence to substantiate the argument of this thesis. This is because on reviewing the literature, the lack of theoretical and multi-disciplinary analysis became apparent, warranting a more theoretical approach. It appeared that the analysis of the role of migration control within the current world order necessitated a more fundamental discussion on the nation-state, law and imperialism and their interrelationship. The approach of this thesis is therefore based on relating theoretical debates explaining political-economic developments to changes in EU law on migration. Empirical research substantiating the theories outlined in chapters 2 and 3 is sometimes referred to, if relevant for the argument at hand. Empirical evidence on the detrimental effects of migration control, which often substantiate critiques of EU migration law and its alleged necessity, is being systematically compiled by others and is referred to only in reference to the particular critique put forward.

With regard to a legal focus, some attention is given in this thesis to the decision-making aspect in the field of immigration and asylum insofar as it has impacted on the substantive outcome of law-making: over the past twenty years EU immigration law has been developed on an ad hoc basis, with either limited or no parliamentary scrutiny and consequently without public access to documents and working papers, making the decision-making process a non-transparent and complex one. Intergovernmentality has often

led to harmonisation on the lowest common denominator and to security-based approaches to migration. The broader issues relating to policy-making, transparency and parliamentary scrutiny are not dealt with in this thesis as the issue is dealt with in-depth elsewhere.[35]

This thesis does not investigate national laws but EU policy. However, Germany and the UK are used as representative for the laws analysed in this thesis in order to illustrate the impact of certain asylum legislation on the ground. The reasons for centering the discussions mainly on Germany and the UK are fourfold. Firstly, given the focus on providing an in-depth theoretical background to this thesis, a comparable outline of more than two countries' implementation of EU provisions would have extended the realms of this thesis. Secondly, the present author has more access to and knowledge of German and UK sources, which is why these two countries were chosen instead of, say, Italy and France. Thirdly, Germany and the UK appeared to be equally representative for the shift in the EU's liberalisation of specific work-related legislation as, in 2000, both countries, at the political and media level, started publishing research positively assessing skilled immigration and started shifting the national discourse towards selective liberalisation. Thirdly, although migration policy in the EU today cannot be viewed as national any more,[36] the nation-state system continues to be characterised by hierarchies of political and economic influence (see chapters 2 and 3): Germany, France and Britain, representing the largest economies in the EU, can therefore be said to have a strong influence on overall EU policy. This has been particularly evident in EU migration policy over the past two decades, where the EU has largely followed the policy developments of western and northern European Member States, notably countries of immigration, which have followed a restrictive policy towards migrants and refugees from the late 1970s onwards. Notwithstanding this argument, the relationship between national sovereignty and European supranational organisation, or the influence of dominant states on the overall European policy process, is not explored in-depth in this thesis as that would represent another field of inquiry beyond its scope (see Eberlein & Grande, 2005, for an overview and critique of some of the main theories on EU governance).[37]

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[35] Intergovernmental cooperation in the (then) EC started in 1967 with the signing of the Naples Convention on mutual cooperation between customs authorities (Bunyan, 1997:9). There is an increasing body of literature dealing with intergovernmentalism referring to decision-making structures and policy-making with regard to the changing nature of the nation-state and also the latter's interrelationship with non-governmental agencies. See for example Baumgartner & Jones (1993), Sassen (1995), Sandholz & Stone Sweet (1998) and Guiraudon (2000).

[36] Policies pursued by politically and economically dominant Member States (notably Germany, France and the UK) will find their way into EU law through immigration ministers meetings, Council discussion and presidency proposals and therefore have an impact on less dominant EU countries and will therefore eventually have a European effect. This does not mean to say that differences in national legislation are not important for individual migrant groups or that EU law eradicates all national specificities. On the contrary, these differences can have an important impact on refugees' or migrants' rights and the possibility of living and working in a particular country. However, in the light of the argument of this thesis, these differences are merely minor variations to the overall strategy of global migration management.

[37] One theoretical strand that tried to conceptualise sovereignty in the face of increasing integration of Member States into EU policy-making, but also with regard to privatisation of formerly public services, is regulation theory. "The form of governance arising from these developments has been termed the 'regulatory state'; it is held to replace the earlier 'positive state' (cf. Majone 1994, 1996, 1999, 2000; Grande 1993, 1997; Grande and Eberlein 2000; Scott

As Member States' policy-making on migration always interacts with and is reflected at the European level, the focus here will be on EU laws and regulations. Given the informal nature under which EU migration policy has been decided, 'soft law' such as Working Documents and Notes are included. However, the aim of this thesis is not to provide a comprehensive inventory of policy developments but merely to point to trends in EU migration and asylum law, with a focus on international aspects of migration control as well as changes in approaches to immigration. The aim of the legal analysis is particularly to provide insight into the interrelationship between migration control and imperialism, exemplified with the help of specific laws and regulations where relevant.

The EU enlargement process, although providing an example of the interrelationship between EU integration and migration control, hegemonic EU practices with regard to Eastern Europe and the enforcement of migration control practices upon third countries, is not given special attention in this thesis. The choice not to focus on enlargement is informed by the fact that extensive research already exists on the issue. This thesis is aimed at pointing to the *globalisation* of migration control, therefore including all areas of the world, not merely Europe. Although the enlargement process or the PHARE programme, for example, will find attention in this thesis, the whole enlargement procedure in all its detail will not be discussed.

Similarly, EU integration and its specific relation to globalisation is not theorised in this thesis. It should be noted, however, that EU integration is here viewed as a primarily neo-liberal project linked to the general dismantling of the welfare state to produce what Bob Jessop (1993, with reference to Thatcherism) calls a Schumpeterian workfare state and Joachim Hirsch (1998) calls a competition state. In this process the division of labour between EU and national institutions with regard to governance has changed. However, as developments at EU level with regard to migration policy prove, this does not imply that the EU has become a supra-national state (Jessop, 1999:18). Rather, the EU is a project that intends to create a coordinated domestic, foreign and migration policy strategy which can react to global economic developments in order to strengthen the political and economic position of European states. The EU therefore serves national interests that are continually negotiated at EU level and driven by the more dominant nation-states of Germany, the UK and France (see above). The process of harmonisation,

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2000; Moran 2002). Accordingly, the state is no longer seen as competent to directly provide certain public goods, yet it is still - as a 'regulator' - responsible for their provision on a private basis" (Eberlein & Grande, 2005:90). However, the movement of regulatory governance functions to the EU level has not implied, as is argued later on in this thesis with regard to globalisation, a loss of sovereignty at the national level. Eberlein & Grande (id.) also argue that despite the "rising need for uniform EU-level rules in the internal market, the bulk or formal powers and the institutional focus of regulatory activities continue to be located at the national level. This results in a supranational regulatory gap. Our thesis is that this gap is partly filled by transnational regulatory networks. Under certain conditions, regulatory networks offer a back road to the informal Europeanization of government regulation. However, the informalization of governance is vulnerable to strong distributive conflict, and, if effective, it raises unresolved problems of democratic legitimacy."

therefore, does not imply a simple shift from national to supra-national policy-making, but involves a relationship between the two entities that can be described as dialectical (Snyder, 2000).

Further, it should be noted that Europeanisation is a reaction to and at the same time an expression of globalisation. 'Flexible accumulation' and just-in-time delivery systems characteristic of globalisation (chapter 3) lead to regionalisation, because capital is not 'footloose' but bound by a relative 'fixivity' of productive assets, labour skill requirements, etc., which lead to international capital, represented by companies, creating integrated production networks within the three most important regions, i.e. North America, Western Europe and East Asia/Pacific, the so-called Triad (Overbeek, 2003:21). Politically, this regionalisation

> is manifested in the formation of regional blocs: in response to globalization, states initiate regional integration schemes (such as the EU, the larger European Economic Area, the North American Free Trade Agreement (NAFTA), Mercusor), which themselves in turn reinforce the incentives for TNC's to establish regionally integrated production networks.
> (*ibid*:22)

Europeanisation is an expression of globalisation insofar as it expresses globalisation's main ideology and state role, namely, purporting to be neo-liberalism and ensuring competitiveness. Some argue that the promotion of market competition has become the EU's main function as its institutions, "in the absence of any supranational *state-building*, have, in the words of Wolfgang Streeck, been reduced 'to the role of a *supranational liberalization engine*'" (van Apeldoorn, 2003:114). With the example of how the (un)employment question is being framed and dealt with at EU level through the so-called labour market reform, van Apeldoorn shows how the transnational policy arena of the EU is first and foremost a tool used by particular agents, i.e. transnational capitalist classes, to serve their interests. In contrast to intergovernmentalist and supra-nationalist accounts of European integration, van Apeldoorn follows the approach formulated by van der Pijl (1998). This approach emphasises the social forces underpinning the evolving European order, which are not necessarily seen as internal to the EU nor to its Member States, but as situated within a global political economy, characterised by the globalisation of capitalist production and finance. This in turn is reinforcing transnational class transformations:

> The class-theoretical premise underlying this research agenda is that the class domination by which capitalist societies are characterized cannot be understood from a structuralist perspective which merely focuses on the domination of capital over labour, but that the reproduction of this power of capital - and of the capitalist class - has to be explained also in terms of collective human agency within concrete social power struggles taking place on the structural terrain of the accumulation process [...].
> (van Apeldoorn, 2003:115).

This thesis does not provide this class analysis but applies its premises when explaining the process of globalisation in chapter 3.

Further, migration discourses can no longer be separated from discourses on 'security'. Again, it would extend the scope of this thesis to deal with the notion of security and its significance in the new world order. It should be noted, however, that although 'security' is consistently used to justify restrictive immigration controls, it is not an objective, analytical term but a political one that became dominant in the restructuring of global power relations after WWII. Biel (2000:57) argues that security started playing an increasingly important role in justifying emerging U.S. hegemony by creating "conditions for the élites to enjoy their wealth", because

> the major aspect of any security system (national or international) has always been to protect [the élites] against troublesome have-nots. In practice, this usually means that the have-nots are excluded from the security the rich enjoy. The endemic violence that capitalism, as an inherently conflictual system, constantly generates tends to be borne by them.

This observation is particularly relevant to the EU's argument that migration control serves security needs, because it refers to the aim of keeping poor populations and victims of imperialism and globalisation outside the benefits of economic prosperity (see chapters 3.1.1, 3.2, 3.3.1 and 4.5.1).

Finally, one important characteristic of global migration management will not be dealt with in this thesis, as it would require more in-depth analysis, namely, the involvement or 'co-optation' of non-governmental agencies and think-tanks in implementing EU migration policies (detention, 'return', 'safe havens', information campaigns, refugee support). Increasingly, it can be observed that these agencies take over policy implementation, leading to unaccountability and lack of recourse. The IOM, for example, has been implicated in numerous malpractices with regard to the 'voluntary return' of eastern European sex workers and the internment of refugee and migrants on Australian islands in the implementation of the government's 'Pacific Solution'. Given the seriousness and importance of the matter, however, this development requires detailed investigation and is therefore referred to only briefly in this thesis.

### 1.8 Scheme of the thesis

Given that the central proposition of this thesis maintains that migration control plays an increasingly central role in the current phase of imperialism, chapters 2 and 3 outline the emergence of imperialism and argue for its explanatory power in describing the phenomenon of 'globalisation'. Early theories of imperialism, influenced by the First World War and the growth of monopolies, described imperialism as representing the highest stage of capitalism. These theories defined imperialism as the outward thrust of

capitalism through capital export and the subjugation of less developed nations to economic dependency. On the basis of the central research questions that guide theories of imperialism, it is found that there can be no general theory of imperialism but that the concept of imperialism marks a specific stage in capitalist development. The theories of classical imperialism outlined in chapter 2.1 and 2.2 point to the inherently competitive character of capitalism which, combined with capitalism's nationalist tendencies, leads to continuous inter-imperialist rivalry. Further, this imperialist stage inscribed structural inequalities into international relations and radically changed the international division of labour, itself triggering migration movements. Germany's economic expansion into Turkey is used as an example of classical imperialism and how it created dependency. Chapter 2.1.2 shows how the emergence of imperialism is related to the growth of the modern nation-state, the principal agent of migration control. The nation-state rests on the notion of sovereignty which is legitimated through popular representation, which is in turn ensured through the principle of all citizens (identifiable by citizenship) being equal before the law. This chapter points out that the European nation-state has developed in a global conjuncture defined by colonial subjugation and notions of racial superiority. Again, Germany serves as an example for the relationship between imperialist expansion and its corresponding ideology of racial superiority. The racist construction of European identity and citizenship are highlighted and it is argued that they inform migration control to this day.

Chapter 2.2 returns to the economic premises of imperialism and outlines the changes they underwent in the post-war era. Corresponding theories concentrate on the changing capital-labour relations after WWII, represented by the labour-capital accord under Fordism, and the emergence of U.S. hegemony. National competition under imperialism was contained for various reasons in the post-war era, which included U.S. military and economic supremacy, socialism as a real alternative to capitalist development and the temporary weakening of the imperialist powers through decolonisation. However, imperial consolidation did not imply that competition disappeared. That competition remains central to imperialism is shown in chapter 2.2.4, which argues that relationships of domination and dependence characterise the 'imperialist chain'; in other words, imperialist consolidation and inter-imperialist rivalry continuously interact. This competition informs current migration control attempts, particularly with efforts by states to attract 'knowledge migrants' from the internationally mobile labour market, a development outlined in chapter 5. In the 1970s, dependency theory sought to explain continued economic inequalities between the first and the third world, despite the formal independence of the colonies. Chapter 2.2.5 outlines these discussions insofar as they clarify the role of labour control and the nation-state in the imperialist system. It is found that the continued existence of unfree forms of labour is central to imperialism, as is the maintenance and reproduction of a hierarchical international division of labour. More recently, nation-states increasingly depend on the existence of flexible labour. All these trends are reflected in current EU approaches to migration control.

In this thesis, the new 'comprehensive approach' to migration is related to the development of 'globalisation', the main characteristics of which are described in chapter 3. After outlining critiques of globalisation it is found that globalisation is not an inevitable process but the outcome of the capitalist crisis of the 1970s. Its main characteristic is its assault on labour and the radical reconstitution of capital-labour relations and changes in the international division of labour. They include specific changes to the constitution of the workforce in various sectors, particularly an increased racialisation and feminisation of formerly white and male labour[38] and the introduction of flexible production chains. Globalisation has therefore increased the gap between rich and poor, as well as increasing the profit margins of capitalists. These developments, together with the political events of 1989/90, have impacted on migration and informed changes in migration control practices (outlined in chapters 4 and 5). In particular, this chapter outlines the example of migrant domestic work and its relation to the reconstitution of the labour force with regard to gender. It is found that receiving states profit from migrant workers and that citizenship has become a central instrument in denying rights to such workers. However, not only citizenship but the flexibility of capital *per se*, combined with new technologies in production processes, have increased the profitable exploitation of workers.

Chapter 3.3.1 deals with the nature of citizenship and the changing role and powers of the nation-state under globalisation. First, the concept of citizenship is explained by the development of the modern nation-state already outlined in chapter 2.1.2. Citizenship serves numerous functions, a central one being the exclusion of other populations from social rights. The example of migrant domestic labour is again employed to show how citizenship is used by capitalist centres to exploit workers from less developed or economically weaker countries. It is argued that the legal categorisation of populations is used to deny certain rights to certain groups of populations, but not others, and that this is crucial to the maintenance of a global division of labour that imperialism depends on.

In chapter 3.3.2 it is argued that, contrary to common belief, the nation-state has not 'lost control' but enjoys a high level of sovereignty, whilst law in itself is gaining increasing importance in the regulation of international economic relations. This position is confirmed by the example of how EC trade law continues to regulate the internationalisation of capital, whilst Member States retain a strong bond with the capital (firms) located in their countries. Nation-states have therefore not lost control in the process of the internationalisation of capital but have rather subsumed the role of governing it. Notwithstanding this, the nation-state's relationship to the economy has undergone profound changes. Its relationship to labour is reduced to undermining labour rights and supporting capital.

Global migration management is built on and complements a set of legal measures that have restricted, controlled and illegalised immigration into the Union since the late 1970s. Chapter 4 therefore

[38] How far industrial labour in the centres has ever been exclusively white and male is contested, but it could nevertheless be argued that the role of female and black labour has increased with the flexibilisation of production relations and the decline in labour's bargaining position (Harvey, 1990).

provides an outline of the restrictive development of EU migration law, starting with early EU decision-making on migration under Trevi, Schengen and the Ad Hoc Group on Immigration (chapter 4.2). Particular attention is given to the Schengen process, as it laid down a more general policy approach towards migration in the EU, namely that of external exclusion and internal repression (chapter 4.3). As argued above, a discussion on decision-making on EU migration law is included here, because the Maastricht third pillar arrangement has had an impact on restrictive development of the substantive law (chapter 4.4). It is found that EU migration law is built on 'exclusionary combinations' such as visa policy (chapter 4.5.1), carrier sanctions (chapter 4.5.2), safe country principles (chapters 4.5.5-6), internal control mechanisms such as Eurodac, CIREA and CIREFI (chapters 4.5.8 and 4.5.10) and, finally, external border control and deportation (chapters 4.5.9 and 4.5.12). Restrictive policies, however, remained at the borders of the EU, while it increasingly became clear that the restrictive approach failed to stop people from entering. Policy-makers later admitted the failure of the Fortress Europe approach and found it necessary to extend their control beyond EU jurisdiction to control migration globally, which is the subject of the following chapter.

Chapter 5 outlines the changing approach to migration control, from the externalisation of migration and asylum policy to the explicit rationalisation of immigration policy. It outlines the arguments used to justify migration management and traces its increasing inclusion in EU external relations (chapters 5.1 and 5.2). It is shown that the fora of EU enlargement negotiations (chapter 5.2.2) and the European Mediterranean Partnership (chapter 5.2.3) are central to the development of this approach, the main regions targeted being eastern Europe and northern Africa. Chapter 5.3 outlines the 'comprehensive' approach to migration in detail. It starts with the Iraq Action Plan, the Austrian Strategy Paper and the Action Plans on countries of origin and transit which were drawn up by the High Level Working Group on Asylum and Migration (chapters 5.3.1 to 5.3.5). The Tampere and Seville summit conclusions are outlined in chapter 5.3.6. More specifically, readmission and external border policies are central elements in the imposition of migration interests on third countries (chapter 5.3.7 and 5.3.9). The 'leverage' used to impose this approach is typically the EU's 'political muscle' and its 'economic weight', where the Cotonou agreement serves as role model for the inclusion of migration clauses in third country agreements (chapter 5.3.8). More recently, the externalisation of EU asylum and migration policy has intensified with large-scale deportations to northern Africa. The example of Italian deportations to Libya is outlined in chapter 5.3.10. The Commission's role in consolidating the comprehensive approach is outlined in chapter 5.3.11.

Global migration management also includes the rationalisation of immigration policies to serve the interests of EU industries. Chapter 5.4 shows how these policies (selected liberalisation and global control) are not opposed but interlinked. Chapter 4.5.1 outlines the reasons for the recent drive towards liberalising legal entry channels for work at EU level. Although immigration policy has been slow to develop at EU level, the Commission proposals (chapter 5.4.2) are used as guidelines by Member States on liberalising labour immigration in national law (chapter 5.4.3). Specific examples of UK (chapter 5.4.4)

and German (chapter 5.4.5) legislation to this effect, as well as relevant Commission proposals, show that rationalisation is actively pursued by the EU and its Member States.

Chapter 6 summarises the findings of the preceding chapters and presents a summary of the conclusions. It further presents a more consolidated analysis of the links that were found to exist between imperialism and migration control (economic and non-economic), and proposes a framework within which to understand the globalisation of control. Some recommendations are made with regard to research areas not covered here, but of relevance to migration management in the current world order.

## Chapter 2: Imperialism - a theoretical framework

Underlying the argument that EU migration law has become a central element in imperialist practices in the present world order is the presupposition that the current international order can still be described as imperialist, which in turn implies that the concept of imperialism remains a viable analytical tool to explain global power relations today. These propositions and their implications for the current role and understanding of migration control are the subject of this chapter. Apart from providing an analytical basis for the main arguments of this thesis, the focus on a theoretical discussion in this thesis is two-fold.

Firstly, debates on the reasons or possible necessity for EU migration control have often conflated objective description and theorisation with unfounded presuppositions, as the subject of immigration "is a highly emotive subject in which personal opinions and beliefs mix uncomfortably with rationally and scientifically supported positions" (Menski, 1993:1). This uncomfortable mix can be explained by various factors[39] and has led to a lack of theorisation of migration and its control in relation to change and continuity in global power relations. Although the restrictive harmonisation of EU migration law as well as the globalisation of EU migration control have been widely recorded as well as criticised,[40] the current literature and analytical frameworks that deal with EU migration law, whether it be legalistic,[41] sociological, economic or from within "EU theory" on policy-making,[42] have hardly dealt with the qualitative shift in EU migration law in a methodical and interdisciplinary manner.[43] This shift, however, is significant in its overt coercion of migrant-producing and transit countries, namely Eastern Europe and former EU colonies that constitute the Third World. The inclusion of a theoretical background to the research question is therefore an attempt to address the general lack of inter-disciplinary analysis of the changing nature of migration control today.

Secondly, the globalisation of migration control is an important historical development and should be understood as a systematic attempt by imperialist nation-states to control and reproduce an international division of labour beneficial to them, where the control is determined by the current phase of flexible accumulation and mass migration. In order to understand the relationship between global power relations and global migration control, and to substantiate the argument that EU migration law has become

[39] Migration is politicised at the electoral level and subject to sensational media reporting. This has led to increasing racism and in reaction to this racism to defensive arguments that often fail to look beyond the initial reactionary debates, but frame their defence within the same points of (often emotive) reference.
[40] See for example Zolberg (1994), Webber (1994, 1995), Lavenex (1999), amongst many others.
[41] Goodwin-Gill (1983), Kälin (1992), Marx (1992), Gibney (1994), Joly (1995), Marshall (1996), Chibundu (1999), Lavenex (1999), Peers (2000), to name but a few.
[42] See for example Guiraudon (2000), Sandholtz & Stone Sweet (1998).
[43] An exception here is the recent work by Sterkx (2003), who provides a non-legalistic analysis of the externalisation of EU migration policy by using discourse theory to clarify the relationship between discourse and policy. By applying this conceptual framework to the comprehensive approach to migration control, he finds that 'language also constructs reality' and that the language used to justify the comprehensive approach disguises hegemonic practices.

a central aspect in imperialist policy-making in the era of 'globalisation', a theoretical basis needs to be outlined by exploring the possible links that exist between migration control and imperialism, as well as a critique of earlier theories insofar as they fail to explain certain aspects of imperialism. A theoretical discussion provides a conceptual framework that can help to explain the role of migration control in its current phase.

This chapter starts by providing the wider background to theories of imperialism, tracing its early political and economic developments and first theorisations. It is found that the modern-nation state is central to imperialism and that both rely on racial constructions of citizenship that legitimised colonial subjugation and later imperialist expansion (chapter 2.1). Chapter 2.2 traces the transformation imperialism underwent in the post-war era and outlines the main features of Fordism, the Keynesian welfare state and related labour-capital relations. It is found that despite the labour-capital accord in the centres, this phase of imperialism inscribed economic inequality into the international system through the setting up of the Bretton Woods system, the World Bank and the IMF (chapters 2.2.1 to 2.2.3). More specifically, Fordist production relations were exchanged with flexible production chains from the 1970s onwards and U.S. hegemony has become dominant within the 'imperialist chain'. Imperialism, however, should not be confused with U.S. hegemony, as dependency and competition within the imperialist chain are structural features of capitalism, whereas U.S. hegemony is only an expression of a specific historical phase (chapter 2.2.4). Decolonisation not only affected the international post-war system, it also had an effect on theories of imperialism. The ensuing debate on continued uneven capital development of the 1970s (dependency theory) is used here to exemplify some general characteristics of imperialism, while the importance of an international division of labour and continuing competition is highlighted (chapter 2.2.5). Unfree labour, the continued importance of the nation-state and continuing competition between the latter form the basis for the necessity of migration control by the capitalist centres.

## 2.1 Imperialism

All studies on imperialism take as their point of departure the "tremendous inequality, within and between nations [and the resistance towards the same], in almost all aspects of human living conditions, including the power to decide over those living conditions" (Galtung, 1971:81). Despite persistent claims of neo-classical economic theory and its political proponents that capitalism contains "equilibrating forces which narrow differences among firms, regions, and countries, [...] over the last hundred years there is no evidence of a levelling convergence of growth rates, and, therefore, levels of per capita income" (Weeks, 1999:2). In other words, poverty has risen and wealth has continued to be concentrated within certain nations and, within those nations, within certain classes. The UN Research Institute for Social Development (UNRISD, 1995:24) found that in 1995:

- nearly a third of the population in developing countries lived in absolute poverty,

- since WWII around 23 million people in the developing world had been killed as a result of war,
- 80-90 million people had been displaced as a result of infrastructural modernisation programmes and
- around 23 million people were then classified as refugees.

Despite these developments, imperialism has been neglected in the past few decades as a viable tool to describe the global political economy. Indeed, the American scholar Parenti (cited in Murray, 1999:1) goes so far as to say that "of the various notions of imperialism circulating today in the United States, the dominant one is that it no longer exists. Imperialism is not recognized as a legitimate concept, certainly not in the United States". Notwithstanding this, many have commented, like William and Chrisman (1993:1), that

> [i]f one of the most spectacular events or series of events of the twentieth century was the dismantling of colonialism [...] then one of the less immediately perceptible - but ultimately more far-reaching in its effects and implementations - has been the continued globalising spread of imperialism.

What then, is this concept of imperialism? The above declaration, informed by post-colonial theory, signifies a distinction between colonialism, the direct control of other people's land, and imperialism, the persistent and continuous reconstitution of an unequal North-South (and to a certain extent East-West) divide by political and economic means. Inequality here implies an unequal distribution of wealth, which is a result of uneven capital accumulation. From an economic perspective, imperialism concerns itself with the development of capitalism, its inherent tendencies towards exploitation, expansion and crisis. More specifically, Pritchett (cited in Weeks, 1999:2) argues that

> [a]ny theory that seeks to unify the world's experience with economic growth and development must address at least four questions: What accounts for continued per capita growth and technological progress of [the developed capitalist countries]...? [2] What accounts for the few countries that are able to initiate and sustain periods of rapid growth in which they gain significantly on the leaders? [3] What accounts for why some countries fade and lose the momentum of rapid growth? [4] What accounts for why some countries remain in low growth for very long periods?

To this list Weeks (1999:3) adds a fifth question:

> [a]nalytically prior to his four questions is, why does uneven development characterise the world? This implies a second, historical, question: how does one account for the relative concentration of capitalist development in Western Europe and the settler colonies of Western Europe?

The question of uneven capital accumulation, often referred to as 'underdevelopment', is central to the understanding of poverty and its relation to capitalist development and has therefore been central to theories of imperialism. It is worth noting here that the term imperialism is often used polemically to describe the rise and persistence of U.S. hegemony since the end of WWII:

> Just as British radicals at the end of the nineteenth century treated their country's imperial role as the defining and perhaps eternal characteristic of imperialism, U.S. radicals in the second half of the twentieth century have equated imperialism with U.S. domination. For many on the left, the term was less important as an analytical concept than as a political slogan to rally against the United States.
> (Dore & Weeks, 1996)

The authors point out that

> [s]uch a reduction of the term "imperialism" is ahistorical, however, since larger countries have dominated smaller ones throughout recorded history. Conflating "imperialism" and U.S. domination is also analytically problematic, since it fails to identify U.S. hegemony in Latin America as a general relationship within capitalism.
> (Dore & Weeks, 1996)

In a similar vein, Magdoff (1982:11) notes that although "history is full of examples of [...] the domination of weaker by stronger powers [...] there is a vital difference between empire-building of precapitalist times, such as the Iberian conquest of Latin America, and that of capitalist times".

Imperialism is therefore not mere domination, but refers to the nature of capitalism, its inherent tendencies towards uneven capital accumulation, its reliance on nation-states as the dominant form of political organisation and the consequent competition between powerful states to dominate markets, protect investments, and secure geopolitical positions: competition under capitalism drives capitalist states to divide the rest of the world into spheres of influence and investment (Dore & Weeks, 1996). Theories of imperialism have analysed these tendencies and different stages of imperialism have been analysed in relation to the prevailing modes of production. In this analysis, the relationship between capitalist development (imperialism) and the international division of labour is the most relevant to migration control strategies pursued by advanced capitalist centres such as the EU.

Pinpointing regularities in social relations is always historically specific. It has therefore been argued that it is neither possible nor useful to strive for a general theory of imperialism, but that it is necessary to understand certain phases of its development (Barone 1985:19). The imperialist condition is signified by different epochs and "one epoch does not lead tidily into another. Each epoch carries with it a

burden of the past - an idea perhaps, a set of values, even bits and pieces of an outmoded economic and political system. And the longer and more durable the previous epoch the more halting is the emergence of the new" (Sivanandan, 1979:111). The concept of imperialism captures a specific stage in capitalist development, which, it is increasingly argued, is more applicable than ever in describing current power relations (Petras & Veltmeyer, 2001; Boron, 2005). The next chapter outlines the emergence of classical theories of imperialism and explores its relation to the emergence of the modern nation-state, nationalism and racism, before turning to more current debates on globalisation.

### 2.1.1 Classical imperialism: Lenin and Germany's eastward expansion

The development of modern imperialism has its roots in the roughly 500 years of European conquest and domination that began at the end of the fifteenth century and marked the growth of the mercantile period with the increasing importance of trade and commodity production. These five centuries, leading up to what has been termed the period of classical imperialism, are characterised by European powers starting to conquer territories by military power and imposing large-scale social and economic changes onto these (as well as their own) regions by destroying existing trading systems and feudal (or other) social structures, in short, the age of capital and empire and "the drama of progress" (Hobsbawm, 1975:4). Colonial policy concentrated on serving the developing capitalist industries in the centres by introducing private property relations, slave trade and forced labour, money and commodity exchange systems, and by destroying local manufacturing industries. As Galtung (1971) points out, imperialism cannot be reduced to a one-sided domination but involves a beneficial relationship between the centre (industrialised nation-states) and the centres of the periphery (local élites in the colonies). Colonial policy therefore included the creation of local élite strata to ensure continued cooperation with foreign rulers through indirect rule. The introduction of legal systems upholding these new administrations and economic systems was central to that period of world history.

The late 19th century saw a transition from a colonial system, based on merchant capital, to a system based on industrial capital. This transformation would change the quality of this stage of imperialism "in contrast with all previous history" in that it no longer necessitated the physical control of territories because it had imposed the capitalist mode of production onto the conquered territories (Magdoff, 1982:19). The tendency of foreign direct investment to transform and reproduce capitalist relations within host countries has since been noted as a major feature of globalisation (Poulantzas, 1974; Overbeek, 2003:17). This process was and still is a violent one and entails the restructuring of the division of labour (and the reproduction of the same) so as to benefit the metropolitan centres. During classical imperialism, it also involved

> killing off the indigenous population and/or moving them into reservations in order to create room for the transplantation of the capitalist system by migration of people and capital from the advanced imperialist centres. In this fashion, the European nations spread their control [...] from 35 percent of the globe's land surface in 1800 to 67 percent in 1878, when a new major wave of expansion started.
> (Magdoff, 1982:19)

Population control in the form of extermination of populations, their forceful removal and the disciplining of labour power to serve the process of global capital accumulation has therefore always been central to colonialism and imperialism.[44] The worldwide extension of the capitalist market enforced a new international division of labour between countries specialising in the production of manufactured goods and those oriented towards the production of raw materials and commodities (Amin, 1977; Petras, 2001:13), which would later be unhinged again through the process of globalisation (see below). The period leading up to WWI (from 1887 to 1914) is defined in Marxist literature as the period of classical imperialism. It is marked by an acceleration of colonial expansion (most noteworthy in the scramble for Africa) and an increase in nation-states willing and able to colonise,[45] leading to a surge of inter-imperialist rivalry that would eventually lead to the two world wars (*id.*). The world wars can therefore be seen as a direct outcome of international competition between the colonial powers, which is characteristic of the classical phase of imperialism. Whereas during the mercantile period imperialist powers surpassed one another, the developments of capitalism reached a stage at the end of the 19th century that was marked by continuous inter-imperialist rivalry (Harris, 1998): "Once the division of the world was complete, any further territorial expansion had to be at the expense of rival colonial empires" (Brewer, 1980:7). The colonial system reached its ultimate contradiction by the increasing integration of economies all over the world into one capitalist world market, albeit differentiated with regard to modes of production.

One of the first and probably most famous attempts to theorise classical imperialism is Lenin's *Imperialism - the highest stage of capitalism*, published in 1916, which analysed the period of transition that capitalism was undergoing at the time, namely, the increasing concentration of capital and of production.[46] Lenin located the transformation from capitalism to imperialism around the turn of the century, when the concentration of production led to the financial oligarchy of a few powerful nations

[44] As is argued later on in this thesis, the externalisation of EU migration law can be viewed as an expression of this attempt to control the world's poorest populations for the benefit of metropolitan centres, where the specific expression of today's control is shaped by the current economic phase of imperialism. The EU does not kill off large populations, but has created a system of camps around Europe and is physically stopping poor and refugee populations from leaving their countries of origin and transit.

[45] Germany, the U.S. , Belgium, Italy and Japan, whereas British hegemony prevailed before that time.

[46] Lenin's pamphlet was a 'theoretical guide to the proletarian revolution', and was therefore not so much concerned with theory but political practice. In particular, it represented a polemical attack on the social democratic reformism of Karl Kautsky and Rudolf Hilferding at the time. It has received much criticism on theoretical grounds, particularly with regard to the economic predictions the pamphlet makes, as well as the reasons it stipulates for the necessity of capitalist expansion. This critique will not be outlined in this thesis.

over the majority world. Whereas before, "a large number of firms participated in each industry, turnover of enterprises was high, and the market power of any one firm was quite limited", growing investment in firms alongside competition meant that capital became concentrated in fewer hands and led to monopoly capitalism, whereby giant firms were "increasingly able to exercise considerable power over their markets and suppliers" (Magdoff, 1982:21). This, together with the rise of finance capital, enabled the export of large amounts of capital, which was then defined as a central characteristic of imperialist policies. Influenced by, yet critiquing Hilferding's *Finance Capital*,[47] Lenin argued that monopoly, together with the rise of finance capital, created the conditions for and increased the importance of capital export over commodity export: capital export "provided a solid basis for imperialist oppression and the exploitation of most of the countries and nations of the world; a solid basis for capitalist parasitism of a handful of wealthy states" (cited in Barone, 1985:50). Drawing on extensive empirical evidence[48] from France, Germany and Britain, Lenin pointed out that the four richest countries of the world (the afore-mentioned and the United States) owned 80% of the world's finance capital. "In one way or another, nearly the whole of the rest of the world is more or less the debtor to and tributary of these international banker countries, these four "pillars" of the world finance capital" (Lenin, 1982:59). This trend was further accelerated by technological innovation, and financial investment in research started to form another characteristic of these economic changes. Luxemburg, in her *Junius Pamphlet*, provides an analysis of Germany's increasing imperialist interventions in the then Ottoman Empire. German imperialism, at a time when there were no colonies left to conquer, developed by expanding its markets to eastern Europe[49] (Bürgel & Skubsch, 1997). In the classic form of monopoly capital imperialism, Germany's *Drang nach Osten*[50] exemplifies Lenin's assertion that capital export "provided a solid basis for imperialist oppression" (cited in Barone, 1985:50). A brief excursion on Germany's expansion towards the East exemplifies some of the main characteristics of imperialism and dependency outlined above.

Imperialist rivalry was expressed through competing capital exports in this period and with Germany's rise as a major power in Western Europe, and at a time when the Ottoman Empire was deeply indebted to Britain and France, German industrialists were able to increase their influence at the expense of their rivals as foreign investors in what was later to become Turkey. Especially after the creation of the Public Debt Commission in Turkey in 1881, which was fully under foreign control and collected revenues solely for paying off of the Empire's debts (Davison, 1988), Turkey looked for new financial investors in

[47] Hilferding defined finance capital as follows: "A steadily increasing proportion of capital in industry ceases to belong to the industrialists who employ it. They obtain the use of it only through the medium of the banks, which in relation to them represent the owners of the capital. On the other hand, the bank is forced to sink an increasing share of its funds into industry. This bank capital, i.e., capital in money form, which is thus actually transformed into industrial capital, I call finance capital" (cited in Lenin, 1982:45).

[48] Much of which was taken from J.A Hobson's *Imperialism* published in 1902.

[49] Poland, Russia, Czechoslovakia, Bosnia, Hungary and Macedonia.

[50] Literally: 'urge towards the East'. Regarding Germany's economic and military expansion at the time it is better translated with 'conquering the East'.

order to counterbalance further British and French influence. Paul Rohrbach (cited in Luxemburg, 1915:139) and other German industrialists note Turkey's weak position:

> [...] Turkey, surrounded on all sides by envious neighbours, must seek the support of a power that has practically no territorial interest in the Orient. That power is Germany.

This comment exemplifies the move from territorial control to capital export that characterises classical imperialism. At this time, the German Bank, Phillip Holzmann, Krupp and other enterprises entered the Balkans and other previously Ottoman territories[51] for the first time in a seriously influential way (Bürgel & Skubsch, 1997). Not only did Turkey become Germany's, and more particularly Krupp's, biggest buyer of arms in this period,[52] but Germany also took over the entire construction of Turkey's railways, more particularly, the Berlin-Baghdad railway line,[53] which would lead to the oil reserves of the Persian Gulf. Altogether, the German economy controlled around 2000 km of Turkey's railway lines (Bürgel & Skubsch, 1997:120).

One way in which Germany gained an advantage over its rivals was to make Turkey dependent on German manufactured goods. Turkey signed agreements with the so-called 'Krupp-Konsortium' (German steel conglomerate) and therefore relied fully on products specific to Krupp. This was reinforced by replacing the British-made 'Westinghouse break' with the 'Knorr break', which rendered Turkey dependent on German, and more particularly Krupp-specific railway parts production. Rudolph Nadolny (cited in Bürgel & Skubsch, 1997:243) writes at the time:

> Germany's industry was able to develop a great advantage against foreign competition by securing its economic supremacy in Turkey. The firms that were asked to invest through the sales contract expressed their gratitude to me. These included Friedrich Krupp, Otto Wolff, Ferrostahl, Maschinenfabrik Augsburg, Knorrbremse [...] and F. Schicha.[54]

That economic supremacy manifests itself in political dependency is also exemplified by this German example: when Turkey signed a solidarity pact with Germany's war rival Britain in 1939, Germany broke

[51] Such as Rumania, Bulgaria, Montenegro, Serbia and Croatia.
[52] Between 1891 and 1897 the value of the German arms trade to Turkey amounted to 43.3 million German marks with corresponding credits offered by the German Bank (in Bürgel & Skubsch, 1997:119).
[53] The Berlin-Baghdad railway served as a Eurasian axis with oil on either side (Rumania and Iraq) and as a short route to the Indian Ocean, which was first planned by Wilhelm I and the German Bank. Abdulhamid granted the concession in 1899 and Britain supported it to stifle Russian influence, yet still fearing Germany's increasing advances. Britain itself had plans for a railroad from the Cape to Cairo while Russia planned one from St. Petersburg to the Persian Gulf (Bland, 1971:136)
[54] For an explicit exposition of how German industrialists were still planning the Central European expansion programme at the time, see Rohrbach (orig. 1919) *Germany's position towards the East in the future Europe* or Onckens (orig. 1921) *The rebirth of the greater German idea.*

off all trade relations with Turkey, leaving it in deep economic crisis. To solve this crisis and confounded by Germany's increasing military advances towards the East, Turkey signed a peace treaty with Germany in 1940, which was followed by a complete recovery of trade relations (Ahmad, 1996:85). During the war period, Turkey was even dependent on Germany for its paper supply, which made it possible for Germany to censor the press and ensure the strong presence of fascist propaganda in Turkey (Çelik, 1997).

The exact nature of capitalist development at the time of classical imperialism was widely disputed. In particular, debates surrounded the question of why capitalism is inherently expansionist and the arguments between Luxemburg, Lenin and Bukharin dominated this debate.[55] Although Luxemburg's theory of underconsumption has since been proven inadequate in explaining the expansionist character of capitalism, it should be noted here that over the past 100 years capitalism has always employed the incorporation of non-capitalist areas (and non-capitalist modes of production and forms of labour, see chapter 2.2.5 below) and spheres as one of the ways in which it could combat its innate periodic crises (Wallerstein, 1983). "This is partly because of the new markets opened up and the new sources of cheap raw materials to be exploited, but also because in times of crisis capital will search for cheap labour power. And labour power will be the cheapest in areas where people have not yet been proletarized" (Overbeek, 2003:19).

Despite their theoretical differences, Barone (1985:55) finds that "classical theories of imperialism generally found that the analysis of monopoly and the rise of finance capital form the underlying basis for the outward thrust of capitalism beyond its national frontiers - in a word, imperialism".[56] Notwithstanding differences in theoretical attempts to explain these developments, many Marxists followed Lenin's historical differentiation of the term imperialism to describe the period since the end of the nineteenth century, because the developments outlined above

> were not accidental events but correlated with 1) major structural changes in the economies of the advanced capitalist economies and 2) the rise of competing industrial and financial powers who were increasingly challenging Great Britain's hegemony in world affairs - a hegemony that had been a determining aspect of the preceding period.
> (Magdoff, 1982:20)

The world wars, although not reversing the structural changes outlined above, were influential in redefining the balance of power between the imperialist nations, with the U.S. and Japan superseding Great Britain. They also temporarily weakened the imperialist powers which, together with the increasing

[55] It would go beyond the scope of this thesis to debate these arguments, see Barone (1985), Amin (1977) or Brewer (1980) for an overview.
[56] As is shown below, classical theories of imperialism would prove wrong in predicting the self-destruction and decline of capitalism, as well as the spread of advanced capitalist relations equally around the world.

dogma of an international structure based on nation-states underpinned by nationalism, provided the grounds for successful national independence struggles that would eventually lead to decolonisation. The inter-war period was marked by further military and economic expansion of those states that would form the central warring nations during WWII, namely, Germany (Africa, central and eastern Europe), Japan (Manchuria, China) and Italy (northern Africa). WWII had a devastating effect on the imperialist nation-states and the "imperialist system contracted as a result of the increase in the number of socialist countries, and it was further and further weakened as more and more colonies attained independence" (Magdoff, 1982:24). The Second World War forced the former colonial powers to rethink their global strategies as they learnt that the closure of national markets for exclusively national exploitation not only led to the stagnation of capital accumulation but self-destructive military conflict between the imperialist powers (Barone, 1985; Biel, 2000; Scherrer, 2000, amongst others).

The above section outlined the economic developments leading up to classical imperialism and the period up to the end of WWII. One important factor that allowed for the success of imperialism, however, was the emergence of the modern nation-state and its corresponding ideology of nationalism. As these are central to any understanding of citizenship and its role in migration control, the following section of this chapter briefly outlines the relationship between imperialism and the rise of the nation-state and its corresponding ideologies of nationalism and racism in Europe.

### 2.1.2 The emergence of the modern nation-state, nationalism and race

The reasons for the emergence of the nation-state are widely debated and concern economic, political and cultural developments (Smith & Hutchinson, 1994; Hobsbawm, 1990). It is commonly agreed, however, that the rise of the nation-state as the dominant principle of political-economic organisation is a specific historical event which is intrinsically linked to capitalist development, rather than representing a 'natural' form of political organisation. Similarly, ideas of nationalism are socially constructed rather than based on historical truths and they are the mobilising forces behind nation-state formation (Renan, 1990). Linked to modernity,[57] industrialisation, colonisation and capitalism (causal relationships are contested), the formation of nationalism and nation-states is commonly attributed to late 18th century Europe and America with the first partition of Poland (1775), the American Declaration of Independence (1776) and, of course,

[57] Gellner (1994) provides an extensive account of the links that exist between the emergence of the nation-state and its corresponding ideology of nationalism and modernity. For nationalism to be successful, he argues for the necessity of a modern, urbanised, rationalised society "in which an impersonal communication system allows context free messages to pass both vertically and horizontally across extensive social spaces" (cited in Mann, 1992:128). Technological advancement and the emergence of the press were able to link formerly isolated communities and through information flow and ideological propaganda created an *imagined community* (Anderson, 1983), which supposedly shares a common past in order to facilitate and justify a common future.

the French Revolution, which spread nationalist ideas all over Europe, the Ottoman Empire and South America (Hobsbawm, 1990).

At the turn of the 20th century, the nation-state became an economic necessity, as capitalist development increasingly relied on a rational state providing an infrastructure, information networks and an integrated political economic system. Changing processes of capital accumulation gradually transformed

> the theological foundations of territorial patrimony [i.e. the absolutist state] with a new foundation that was equally transcendent [i.e. the modern nation-state]. The spiritual identity of the nation rather than the divine body of the king now posed the territory and population as an ideal abstraction. Or rather, the physical territory and population were conceived as the extension of the transcendent essence of the nation. *The modern concept of nation thus inherited the patrimonial body of the monarchic state and reinvented it in a new form.* This new totality of power was structured in part by new capitalist productive processes on the one hand and old networks of absolutist administration on the other. This uneasy structural relationship was stabilized by national identity.
>
> (Hardt & Negri, 2000:94-95, emphases in original)

The principle of the nation-state therefore replaced the notion of Empire and power became (in theory) confined to a bounded area with the merging of the economic and political unit, facilitated through the nationalist ideologies outlined below. Despite its presently overwhelming dominance, the notion of power as bounded and territorially fixed is therefore comparatively recent.

Economically, the nation-state started to mediate the demands of capital with regard to labour; this regulatory function became central to capitalist development at the latest with the advent of the industrial revolution, with its requirement of mass labour: one of the "difficulties" in capitalist societies

> concerns the conversion of men and women's capacity to do active work into a labour process whose fruits can be appropriated by capitalists. Labour of any kind requires a certain concentration, self-discipline, habituation to different instruments of production, and knowledge of the potentialities of raw materials for conversion into useful products. Commodity production under conditions of wage labour, however, locates much of the knowledge, decision as to technique, as well as disciplinary apparatus, outside the control of the person who actually does the work. The habituation of wage labourers to capitalism was a long-drawn-out (and not particularly happy) historical process, that has to be renewed with the addition of each new generation into the labour force. The disciplining of labour power to the purposes of capital accumulation - a process I shall generally refer to as labour control - is a very intricate affair.
>
> (Harvey, 1990:123)

Labour control necessitates social and physical control, education, training, persuasion, the mobilisation of certain social sentiments such as work ethic, company loyalty, national or local pride, as well as "psychological propensities (the search for identity through work, individual initiative, or social solidarity) all [of which] play a role and are plainly mixed in with the formation of dominant ideologies cultivated by the mass media, religious and educational institutions, the various arms of the state apparatus [...]" (*ibid*:123-4). The control of labour and the particular form of industrialised labour also necessitated labour mobility (transport systems, recruitment programmes). All these necessary preconditions for the functioning of capitalism as an economic system could, then and now, only be implemented by a state apparatus, which has, uniquely, several disparate instruments at its disposal. They encompass physical force (police, army) legitimised and regulated through a political and legal process (liberal democracy based on the Rule of Law), constant capital income (taxes and revenues) which enables a provision of infrastructure (economic regulation, transport, energy) and the reproduction of labour (health care, education, family policy, gender relations). The function of labour control, including the reproduction of an international division of labour as is argued in this thesis, is still central to nation-states; migration control is one of its expressions. Continuing immigration and work permit regulations and global migration management are an indication thereof.

### 2.1.3 Nation-states as international phenomena

Rather than merely originating from within European economic and political developments, the emergence of the nation-state and nationalism was linked to global developments, namely, the colonisation of the majority world by European powers and competition within the imperialist network, represented by powerful nation-states (Segal & Handler, 1993). Barone (1985:22) explains this by the competitive nature of capitalism at the time of classical imperialism, where imperialist powers relied on a unified political organisation such as the nation-state if they were not to lose their spheres of influence:

> Imperialist expansion is explained by the needs of monopoly capitalists for new areas of raw material exploitation, export markets for the output of monopoly capitalists and profitable markets for capital investment. If a country does not expand, it will lose out on profitable opportunities, lose its competitive edge over rivals, and in extreme cases will become a satellite to other countries.

In order to maintain imperialist expansion, therefore, finance capital is in need of a strong state to secure its foreign interests, and the only way to ultimately secure these is firstly through structural capabilities and political organisation of the nation-state, and secondly, through the threat or actual use of force, notably in the form of national armies as "the basic test for a great power [is] its ability to wage war" (Lowe, 1994:3). But the state also has an important political and diplomatic function, that is "to extort

favourable treaties from smaller states, a state which can exert its influence all over the world in order to be able to turn the entire world into a sphere of investment" (Barone, 1985:22).

The precondition for the development of the modern nation-state is a corresponding powerful ideology that legitimises a state's monopoly of power and convinces people to feel associated with a set of rights and responsibilities despite existing conflicts of interests between them. The use of nationalist ideology is two-fold. On the one hand, it justifies and legitimates the violent subjugation of other peoples, while on the other hand it serves the suppression of class-based politics, which threatens the capitalist nation-state with revolution. By creating a notion of belonging on grounds of culture, race, common suffering and/or common history, nationalist identity formation serves to disguise oppositional interests in a class-based society and thereby stems the potential for social revolt. The latter became particularly evident in South Africa (O'Meara, 1983; Chanock, 1995). In Europe nationalism took the form of a bourgeois ideology in direct opposition to socialism, attempting to reinforce capitalist production "precisely at the unsuitable moment when the slavery of the majority resulting from this domination has become a generally known fact" and when the proletariat was advancing claims on the profits of capitalist production (Marx in Szporluk, 1988:30). Although Marx and Engels saw that exploitation was generated by 'industry, not England', they failed to realise the force of nationalism not only in disguising class conflicts but also in its powers to justify imperial oppression: the emergence of capitalism in Western Europe and the formation of nationalism within it, are, Segal and Handler (1993) argue, intrinsically linked to imperialism.

The construction of metropoles as nations therefore occurred in "globally dispersed colonial relations" and they were defined as nations in opposition to raced 'Others', who were denied the national status (Segal & Handler, 1993:3). Inclusion, by definition, involves exclusion and both stand in a hierarchical relation to one another. The collection of essays in *Nations, colonies and metropoles*[58] show that 19th century Europe and its hinterland (even in countries without colonies) "were infused with images from, and the hierarchical opposition of, colonizing" (Segal & Handler, 1993:4). Local contexts are therefore shaped by global relations and nationalism in Europe has consequently strong ideological connotations that justify or deny self-determination on grounds of race, thereby delineating the control over resources. The rise of the nation-state and its corresponding ideology is therefore not territorially and historically exclusively located in Europe but was constructed through globally dispersed colonial relations, which in turn, are intrinsically linked to the construction of 'races' (Negri & Hardt, 2000:103). Füredi (in Shah, 1999:10) writes that "race was central to the identity of Western political elites. It was inextricably interlinked to the Western notion of "civilization", which on the ideological level at least informed international relations".

[58] *Social Analysis*, September 1993, No. 33.

### 2.1.4 German nationalism

Again, German imperialism is a good example of the interrelationship between nation-state formation, imperialism and racism, at a time when capitalism and socialism were at the height of political competition. As early as 1841, the leading German economist Friedrich List propagated nationalism on the grounds of unequal trade relations existing between nations, which he sought to solve with national unity and protectionism, supported by notions of cultural and linguistic homogeneity. He advocated Germany's economic modernisation and political unification, arguing that culture, politics and economics are intrinsically interlinked, and thereby formed the first coherent German nationalist programme (Szporluk, 1988). Thirty years before Germany had even reached political unity, List had formulated a Central European Expansion Programme on behalf of Rhenish and Württemburgian industrialists, in which he put forward the appeal to buy up land and settle German traders in the Near East in order to secure a market for their manufactured goods, particularly in the Caucasus (Opitz, 1984:45-46). In 1891, on the initiative of Krupp director Alfred Hugenberg, Friedrich Naumann and other industrialists, the *Alldeutscher Verband* was founded in order to support the idea of German expansion and its claim to annex parts of Europe under the name of *Pangermanismus*. The explicitly racist motivation in this conquest is exemplified by the ideological foundations of the newly emerging industrialist class in Germany: Naumann explicitly polemicised against the freedom of other peoples, holding that "history has decided that there are leading nations and nations that are led, it is difficult wanting to be more liberal than history itself" (in Opitz, 1984:7). It is not surprising that the *Alldeutscher Verband* later formed a platform for the future fascist party NSDAP (Bürgel & Skubsch, 1997).

The racist basis of this phase of capitalist development is explained by Barone (1985:22-23) as follows:

> International competition gives rise to what Hilferding refers to as the ideology of imperialism: racism and nationalism. The struggle between capitalists of different nationalities appears, with the union of the state and finance capital, as the struggle between different nations and races, a "collective" struggle.

Although this particular function of nationalist ideology is not the subject of this thesis, it is interesting for the migration debate insofar as the "collective struggle" found its legal expression through juridical categories such as citizenship. Bounded notions of citizenship continue to remain important, despite a considerable de-territorialisation of economic and political life during the past century (see chapters 3.2, 3.3.1 and 5.4). The connection between racism and the nation-state is still particularly evident, not only with the rise of nationalist parties in Europe (Fekete & Webber, 1994), but can also be found in the selection criteria applied in immigration control in Western Europe today (Shah, 1999). After economic criteria such as skill, race continues to be used in EU migration control mechanisms as one way to

differentiate between desirable and undesirable migrants, particularly by stratifying their rights and entitlements, also after legal entry (Morris, 2002).

## 2.2 Imperial transformations and their theorisation

Whereas the post-war era (marked by the end of fascism, the introduction of an international humanitarian legal regime and formal decolonisation) is often portrayed as breaking with the colonial and imperialist period, a theoretical conception of imperialism marks out the continuities that exist between old forms of dependency and new imperialist expansion, as it explains the structural changes that occur in the organisation of capital world-wide. As indicated above, the classical imperialist phase inscribed the polarisation of wealth between the 'First' and 'Third' world as a major structural feature of the 20th century (Brewer, 1980:8-11). Below it is asserted that the laying down of these foundations of structural inequality is, just as William and Chrisman (1993:1) assert, "ultimately more far-reaching in its effect and implementation" than any other historical event in defining North-South relations until today.

### 2.2.1 The post-war regime

Major economic restructuring marked the immediate post-war era. As early as the Depression of the 1920s and 1930s, a series of economic and social reforms and the introduction of welfare provisions "were designed to save the capitalist system from its contradictory features and its propensity towards crisis" (Hirsch, 1998:41). The world wars and the refugee crisis it triggered forced European states to set up a series of measures and institutions that regulated economic and nation-state action and the control of migration. They concerned disparate areas such as the establishment of

- formal independence of the ex-colonies,
- domestic labour agreements and controlled national economic development (Fordism),
- international institutions regulating capitalist development (Bretton Woods),
- international legislation on the conduct of war,
- international obligations with regard to human rights and asylum in response to the European refugee crisis, institutionalised by the setting up of the United Nations and relevant intentional Conventions committing signatory states to respect individual rights.

As a response to the economic depression of the 1930s and revolutionary movements such as the Russian October revolution, capitalist nation-states started implementing a regulatory system of capital accumulation that fundamentally differed from that of earlier regimes, and which is commonly referred to

as Fordism[59]. Labour struggles had been partially successful in creating "the political conditions for a capital-labour accord on the share of labour in productivity gains, the social re-distribution of market-generated income, and the legitimacy of a capitalist state based on the provision of social programs (welfare, health and education)" (Petras & Veltmeyer, 2001:14). Fordism was built on a certain set of labour control practices, "technological mixes, consumption habits, and configurations of political-economic power" (Harvey, 1990:124). The economy in the imperialist centres was organised around mass production, consumption and economies of scale, which created a temporarily profitable global market and economic security (predominantly in the centres). The mass consumption of workers themselves became part of the national accumulation regime (Hirsch, 1998:20) and, together with the entire eradication of traditional subsistence production also within the centres, led to the 'complete capitalisation' of social relations, leading to the commodification of cultural as well as social aspects of life, the consequences of which would later be analysed as 'post-modernity'.

### 2.2.2 Labour-capital relations under Fordism

Fordist production fundamentally changed capital-labour relations. Kiely (2002) explains that Fordism is

> based on 'labour friendly' regimes (Silver and Arrighi 2001:53). While labour was far from experiencing a level playing field with capital, the former did win important concessions from state managed capitalisms - and maintained these through strong labour organisation. These concessions included commitments to full employment, welfare rights and improved living standards. This development occurred in the context of the increased generalisation of Fordist production methods, whereby standardised goods were manufactured on a mass basis (Harvey 1989:129-33). Workers were allocated strictly demarcated tasks and they utilised specialist machinery for each particular good produced (Dicken 1992:16). Production was focused primarily on the national market, which was usually protected from foreign competition, although there was still considerable scope for exports to, or investment in, foreign markets. Profitability was derived from the economies of scale of production which meant that the costs decreased as the amount produced of a particular good increased.

However, "in the developing world, labour did not win such concessions and was often subordinated in the quest for rapid development" (*id.*) as the international economic regime under Bretton Woods outlined below was not based on creating welfare states around the world and the international division of labour and its related creation of surplus profit remained important for the functioning of the capitalist centres.

[59] See chapter 2.2.2 for a more detailed description of the main characteristics of Fordist production relations.

With regard to the state, Fordism relied on a regulatory state that is often called the Keynesian welfare state. The capital-labour accord was dependent on the state becoming a central agent for implementing an economic model based on state-led industrialisation and modernisation, the protection of domestic industry, and the deepening and extension of the domestic market to incorporate sectors of the working class and direct producers into the Fordist mode of accumulation. This required systems of negotiation between employers, workers and the state on wages and working conditions as well as ideological nation-building through citizenship formation and nationalist ideologies.

However, whilst this focus on domestic economic development is often referred to as a strong state, it is more helpful to understand this particular phase with regard to the precise function the state played in this period in mediating between the demands of labour and capital. Whilst the nation-state had to protect domestic production, it was also engaged in constructing an international regime of capital relations to ensure and regulate the international movement of its own capital for its own benefit. Rather than remaining domestic, therefore, the role of the nation-state, just like its origins as shown above, was always the interaction with international developments and their regulation. This international dimension was expressed internally by the organisation of large-scale labour recruitment from the semi-peripheries (Eastern Europe) and the peripheries (Africa and Asia) to fill labour shortages in the centres at a time of full employment and war torn economies.[60] This development, which lasted until the economic crisis in the mid 1970s, has been well-recorded and analysed (Castles & Kosack, 1973; Freeman, 1979; Castles et al., 1987; Miles, 1987:147-155). Externally, it was expressed by an emerging international division of labour typical of the post-war era (1950-1970): at the same time as Western European countries were recruiting immigrant labour, its capital started migrating outwards and the changing patterns of imperialism with regard to capital movements led to a polarisation of labour between the periphery and the centre as well as within the centre itself. This mainly concerned the labour-intensive manufacturing industry which was transferred to the former colonies, displacing the "centre of gravity of the exploitation of labour by capital [...] from the centre of the system to the periphery" (Amin, 1977:57). It should be noted that in the long run, this 'new international division of labour' (Fröbel et al., 1980), which was also characterised by increasing investment in labour-saving technology in industrialised centres, is arguably the reason for the ensuing unemployment crisis of the 1980s. Fröbel argues that the 'jobless growth' created by technological revolutions in the centres has produced a structural labour surplus. Whereas the restructuring of the productive economy to include a growing service sector and 'immaterial labour' could absorb some redundant industrial labour, the experience of the 1990s has shown that structural unemployment has yet again become a structural feature of the capitalist centres' economies (Overbeek, 2003:20). Rather than hampering capitalist development, however, some argue that unemployment was

[60] Or rather, a lack of a labour reserve army, which leads to the necessity of increasing wages in order to attract workers, which in turn obstructs the surplus profit extraction from the exploitation of labour.

also deliberately created to undermine labour's bargaining position, which had been greatly enhanced during Fordism (Jessop, 1993).

The movement of capital also had a profound impact on migratory processes (within the peripheries as well as between the centre and the peripheries). With the example of Sri Lanka, Sivanandan (1979:114) describes this "new imperial ordinance for labour migration" as follows:

> The oil-rich Gulf states, for instance, have sucked whole sections of the working population, skilled and semi-skilled, of South Asia, leaving vast holes in the labour structure of these countries. Moratuwa, a coastal town in Sri Lanka, once boasted some of the finest carpenters in the world. Today there are none – they are all in Kuwait or in Muscat or Abu Dhabi. And there are no welders, masons, electricians, plumbers, mechanics – all gone. And the doctors, teachers, engineers - they have been long gone - in the first wave of post-war migration to Britain, Canada, USA, Australia, in the second to Nigeria, Zambia, Ghana. Today Sri Lanka, which had the first free health care service in the Third World and some of the finest physicians and surgeons, imports its doctors from Marcos' Philippines.

However, the relocation of capital to low wage countries has not only triggered labour migration within the peripheries, foreign direct investment has also become an alternative to labour migration. Fröbel, Heinrichs and Kreye (1980) argue that the movement of labour-intensive production to Asia and Latin America has "brought into existence a world market for labour and a real world industrial reserve army of workers, together with a world market for production sites" (cited in Overbeek, 2003:16). In other words, "mobility of capital can substitute for the mobility of goods and labour power. The concept of a global labour market has in this sense become at least a possible reality [and] [t]he implications for employment worldwide are obviously far-reaching" (Overbeek, 2003:17). It should be reiterated again that the mobility of capital is always structured on the basis of nation-states which stand in a competitive and hierarchical relationship to one another. The outlined development with regard to capital, labour and mobility was far from being a by-product of Fordism but was part of its international expression, as Fordism was not implemented in isolation but together with a system regulating international capitalism, namely Bretton Woods, with the U.S. as its power centre.

### 2.2.3 Bretton Woods and U.S. hegemony

With regard to the balance of power and its relationship to former colonies, after WWII, the U.S. rose up as the only power at the end of the wars that was able to maintain its imperialist position. Its foreign policy started focusing on rebuilding Europe to counterbalance Soviet influence and fighting the threat of socialist revolutions world-wide, as well as increasing its influence in the former European colonies. At the same time, the Soviet Union came to represent the consolidation of socialist powers together with the

victory of the Chinese Communist Party, and "in that period the powerful resurgence of national liberation movements and the dismantling of the colonial system became central" (Alavi & Shanin, 1982:1). This process was represented by the struggle over 'development' in the Third World, where some countries tried to make a radical break with world capitalism and embark on social revolutions that also challenged existing power structures within their nation-states; others attempted a 'third way' (a mix of planned and liberal economic systems), while again others followed the capitalist model.

The political independence of colonies, however, did not pose a threat to imperialism as long as the newly-created governments remained in the economic and political orbit of the imperialist nations. Magdoff (1982:25) provides a useful summary of the main aspects of imperial transformations in the post-war period with regard to the colonies:

> It soon became clear that if the metropolitan centres were to retain the benefits of informal empire they would have to influence the course of economic development in the neocolonies. This was facilitated by the method of decolonization itself: in most cases the key economic and financial components of dependency on the metropolitan centres were retained intact. Control and influence over the periphery was also sustained by the way economic aid was granted, and by the conditions that were imposed when loans were granted by the newly created international institutions, such as the World Bank and the International Monetary Fund. All this was backed up by direct and indirect interference by the United States and other powers in the politics and class conflicts of the ex-colonies, aimed at strengthening the most reliable sections of the ruling class, and providing them with the needed military assistance and military alliances. Further, the United States, using a chain of military bases around the globe, built up a highly mobile air force and navy as instruments to restrain defection from the imperialist network.

Post-war hegemonic relations were therefore contradictory: whilst the U.S. administration was largely committed to free trade, the threat of socialism and international pressure from weaker capitalist powers as well as pressure from powerful domestic interests (such as farmers) enforced a compromise in post-war political settlements that included protectionist measures such as tariffs against foreign capital. As already outlined above, internally, this compromise involved favourable concessions to organised labour. Externally, it was the Bretton Woods system, which did not create an international trade organisation as initially planned, but the General Agreement on Tariffs and Trade (GATT), a forum designed to liberalise trade through various rounds of negotiation. Further, Bretton Woods introduced fixed exchange rates that regulated international finance, centred around the U.S. dollar. This enabled ex-colonies to protect their domestic markets and many, particularly Latin American countries, chose the path of import substitutions (or rather, the promotion of export-driven economies) and modernisation and industrialisation:

> The organisations that emerged from the 1944 agreement at Bretton Woods, USA - the World Bank, IMF, and the GATT forum for international trade – largely reflected this compromise. On the one hand, there was a long term commitment to international free trade, reflected in successive rounds of GATT talks that lowered tariffs. On the other, the weaker capitalist powers had sufficient space to develop their 'national economies'. This applied to the European powers weakened by the war, and the countries that were beginning to win independence from the colonial powers.
> (Kiely, 2002)

This compromise would later be abolished with the full-scale liberalisation of trade and the removal of protective trade barriers for Third World countries. Sivanandan (1979:111) sums up the re-organisation of global power relations, which implied both a consolidation of the former colonial rivals and a re-organisation of the state:

> A new colonialism was emerging with its centre of gravity in the United States of America; a new economic order was being fashioned at Bretton Woods. Capital, labour, trade were to be unshackled of their past inhibitions - and the world opened up to accumulation on a scale more massive than ever before. The instruments of that expansion - the General Agreement of Tariffs and Trade, the International Monetary Fund and the World Bank - were ready to go into operation.[61] Even so, it took the capitalist nations of western Europe, Japan and the United States some twenty-five years to rid themselves of the old notions of national boundaries and 'lift the siege against multi-national enterprises so that they might be permitted to get on with the unfinished business of developing the world economy" (Rockefeller). The Trilateral Commission was its acknowledgement.

Therefore, although the immediate post-war system did provide relative capital growth for capitalist centres and development prospects for the peripheries (Petras & Veltmeyer, 2001), it is also characterised by the formalisation of economic arrangements that maintained economic inequalities by influencing economic developments in the ex-colonies through structural adjustment programmes, financed and supported by the World Bank and the IMF. They imposed on Third World countries "detailed consideration and stringent conditions concerning their economic policies, including those concerning foreign investment" (Alavi & Shanin, 1982:5). Magdoff (1969) analysed this development with reference to foreign aid, which started to control the 'imperialist network' and foster economic development in the former colonies to serve the interests of the former colonial powers (Barone, 1985:76).

[61] GATT was set up to regulate trade between nations, the IMF to help nations adjust to free trade by providing balance-of-payments financial assistance, the World Bank to facilitate the movement of capital to war-torn Europe and aid to developing countries (footnote in original).

2.2.4 Domination and dependence within the 'imperialist chain'

The imperialist network, as Magdoff calls it, has always been characterised by an internal contradiction, that is, the necessity for imperialist nation-states to cooperate and develop common strategies on the one hand, and their continued competition and rivalry determined by the inherently competitive character of capitalist expansion on the other. The post-war situation described above forced capitalist centres to "collaborate without wholly eliminating rivalry between them" (Alavi & Shanin, 1982:5). With its global military presence, the U.S. started to provide "the substance of the political force which maintains the imperialist system in the absence of colonies" (Barone, 1985:82).

However, hegemony, which implies not only economic domination but also the spread of a cultural and political system to other nations, is not uncontested and remains within a chain of imperialism, rather than imposing total control. This imperialist chain is characterised by competition, but since the increasing global integration of different national economies, this rivalry is unlikely to express itself today as it did at the beginning of this century and the 'classical' phase of imperialism, through the total destruction of capitalist economies by imperial nation-state wars. Contrary to some popular conceptions, the post-war shift from European to U.S. hegemony should not be understood as a simple inter-imperialist rivalry: rather than constituting a political rival to the EU, the U.S. has played an important role in pushing the latter towards integration (Lundestad, 1998). This was done both to share the burden of policing the new global order (now materialising through the EU Rapid Reaction Force) in the years to come, as well as to secure its dominant position in the global order. As Poulantzas (cited in Panitch, 2000:9-10) put it:

> Relations between the imperialist metropolises themselves are now being organized in terms of a structure of domination and dependence *within the imperialist chain.* The United States hegemony is not analogous to that of one metropolis over the others in previous phases [...]. Rather it has been achieved by establishing relations of production characteristic of American monopoly capitalism and its domination *inside other metropolises* [...] it similarly implies the extended reproduction within them of the ideological and political conditions for this development of American imperialism.
> (emphases in original)

Arrighi (1978) argues that this specific form of imperialist consolidation, whereby a globally integrated financial market has complicated the relationship between the state and the economy and intertwined international capital, has weakened the tendency amongst dominant capitalist nation-states to wage war.

It would go beyond the scope of this thesis to deal with U.S. hegemony, and extensive analyses on the subject exist elsewhere. However, it should be reiterated that U.S. hegemony is not identical to imperialism, but that it merely represents the specific phase of post-war imperialism discussed above.

Indeed, since the 1970s, the crisis of Fordism has weakened U.S. economic influence (although not its military superiority) in the face of advances of Western European and Japanese capital. Whereas on the other hand, until the 1970s U.S. corporations dominated the penetration of capitalism into the peripheries under the system of Bretton Woods (through multinational corporations and banks that were able to invest in dozens of countries at the same time), "the costs of maintaining a globe-straddling military establishment, extending economic and military aid, supplying funds for multi-national investment, and financing the war in Vietnam resulted in an unending U.S. balance-of-payments deficit and a vast overload of dollars abroad" (Magdoff, 1982:26). This crisis was not only due to U.S. extravagances on the global political scene, but a result of the inevitable capitalist crisis developing in the late 1960s (see below). The U.S. was forced to devalue the dollar and Western European and Japanese capital was able to take over significant parts of formerly U.S.-led trade and manufacturing. The 1980s again saw increased competition between the imperialist nations which has prevailed ever since. With regard to U.S. hegemony, Weeks and Dore wrote in 1996 that:

> Today, we are on the cusp of a significant historical change, with broad implications for progressive politics in Latin America: the relative decline of U.S. economic power. At the founding of NACLA in 1966, the United States accounted for one-third of worldwide GDP. In the 1990s, this proportion has fallen to about one-fourth. The United States still dominates capital investment in Latin America. Yet Western European and East Asian -- especially Japanese -- capital is increasingly important, marking what promises to be an increase in intercapitalist rivalry in Latin America into the next century. At the same time, the influence of the United States in the international financial community has shifted notably. By the early 1990s, Japan had displaced the United States as the largest donor to the World Bank and the International Monetary Fund (IMF). It was also the largest bilateral foreign-aid donor.

What this example of investment in Latin America shows is that imperialism, with its central features of inter-imperialist rivalry and exploitation amongst nation-states, continues to determine the global economy. Competition, albeit not yet threatening to lead to imperial wars, remains a central element of the capitalist system. As outlined in the next chapter, the EU tries to ensure its competitiveness, amongst other things, by ordering and providing flexible labour.

### 2.2.5 Decolonising theory and explaining 'underdevelopment'

With regard to theories on imperialism, two important changes occurred through decolonisation: first, classical Marxist theories, themselves having originated from Eurocentric models of development, started to be challenged within the Marxist tradition (often termed neo-Marxism) and secondly, neo-liberal

ideology and colonialism started to be challenged, or rather, these challenges started to be communicated internationally, by intellectuals from former colonies.

Whereas earlier Marxist theories, much like neo-classical theories, had assumed that the spread of capitalist relations would lead to a general, albeit uneven, homogenisation of the modes of production world-wide (characterised by a strong bourgeoisie, wide-spread industrialisation and wage labour, as capitalism had articulated itself in the centres), the situation in the peripheries actually looked very different. It became clear that earlier theories were not able to explain the rapid changes that imperialism, defined before as the "highest stage of capitalism", was undergoing. This concerned in particular the uneven development of capitalist relations in the peripheries and the fact that capitalism was expanding and not collapsing through its inherent contradictions, as some writers had predicted. Imperialism, it appeared, did not mark the highest but merely a particular stage of capitalism (Hirsch, 2001).

Another critique put forward was that dominant social science theories on development were culturally and academically imperialist. They were criticised for their presupposition that European modernisation processes were universally desirable and that capitalist development was the only viable path towards poverty reduction. One of the most important developments within social sciences which affected theories on imperialism but also anthropology, sociology and literature, was decolonisation. The voices of 'The Other' could no longer be ignored once formal independence from colonialism was achieved. The "process of indigenization, in development theory as well as in the social sciences as a whole, is fundamentally a movement of liberation from the colonial legacy and the imperialist world system" (Hettne, 1990:75).

This articulation of an unequal North-South divide after the dismantling of colonialism was analysed in the 1960s and 70s as 'dependency theory', which evolved out of the Latin American intellectual school, influenced by neo-Marxism and the discussions on alternative and independent economic development in Latin America. The dependency school argued against the dominant development discourse put forward by modernisation theorists (expressed in Andre Gunder Frank's critique of Samuel Huntington), which argued that industrialisation based on the model of the West was the only way for the peripheries to resolve their 'colonial legacy' and assume wealth. Dependency theory purported the view that it was in fact the connection of Third World economies to the metropolitan centres that kept them underdeveloped so that development and underdevelopment were seen as interrelated. Dependency theory is diverse, but the following comments by theorists Gunder Frank (1966) and Dos Santos (1970) summarise its main thrust. Frank, in his essay "The Development of Underdevelopment" published in *Monthly Review* in 1966, wrote that

> Underdevelopment is not due to the survival of archaic institutions and the existence of capital shortage in regions that have remained isolated from the stream of world history. On the contrary, underdevelopment

> was and still is generated by the very same historical process which also generated economic development: the development of capitalism itself.
> (cited in Magdoff & Foster, 2005:88)

He therefore argued that capitalism at a world scale, along with the development of the states at the centre of the capitalist world economy, reproduced the underdevelopment and permanent subordination of the states in the periphery. Some years later, Dos Santos (1970:231) would define dependency as

> a conditioning situation in which the economies of one group of countries are conditioned by the developments and expansion of others. A relationship of interdependence between two or more economies or between such economies and the world trading system becomes a dependent relationship when some countries can expand only as a reflection of the expansion of the dominant countries, which may have positive or negative effects on the immediate development.

The accumulation process of dependent countries is therefore conditioned by the position they occupy in the international economy. Although the reasons for this dependency are disputed (see below)[62] and the global economy has undergone far-reaching changes since the 1960s, this basic relationship of dependency has remained and is reflected, for example, by the recent debates on African debt relief and unequal wealth distribution at the G8 summit in Scotland in 2005. With regard to this thesis, the Lomé convention (or Cotonou Agreement), the Euro Mediterranean Partnership and the eastward enlargement of the EU, with its Association Agreements, are all expression of the continued dependency that is created and perpetuated through economic agreements and the liberalisation of trade agreements between the metropolitan centres and less industrialised (and typically migrant producing) countries.

[62] Weeks argues that accumulation is a result of progressive development of the forces of production (technology, knowledge) because capitalists are forced to develop them in the continuous economic fight to sell their commodities cheaply. This opposes the claim made in dependency theory that capital accumulated in the centres because of the surplus products (raw materials, slave labour exploitation) they appropriated from the ex-colonies. Following from this, it can be argued that one reason for 'underdevelopment' is that in developing countries, technology, for various reasons, does not undergo revolutionary changes fast enough. Weeks and Dore offer a materialist explanation of underdevelopment where various factors located purely within the realms of production hamper the development of an indigenous capitalist class and result in the denationalisation of ownership in developing countries. They argue that the reason for foreign capital continuing to dominate local capital in developing countries is due to the persistence of precapitalist relations, which forces a slower reduction in the necessary labour time than the total value of commodities (Barone, 1965:167). This, together with more advanced labour processes that foreign capital applies in those countries, leads to a slower rise in the rate of surplus value and therefore to uneven development. The rate of profit therefore has the tendency to fall in those branches that are dominated by foreign capital, leading foreign capital to move from one branch to another, and as it does so, destroying local capital development but also leading to the sectors becoming unprofitable after the initial profits have been gained. This forces capital to flow out of the countries and to be invested elsewhere so that, Weeks and Dore argue, capital flight is a symptom of, not a reason for underdevelopment.

The politicised nature of the dependency discourse, or indeed of all theories on the logic and inevitability of capitalist development, is reflected in the reactions that Frank's essay triggered in the 1970s. The U.S. government saw his work "as constituting a threat to its empire in the Americas and he was sent a letter from the U.S. Attorney General telling him that he would not be allowed re-entry into the United States" (Magdoff & Foster, 2005:88).[63] Leys (1982:347) noted that

> as far as I can tell, no review of Frank's first three books (all published in the United States) has ever appeared in the *American Political Science Review*, *Journal of Politics*, *World Politics*, *Comparative Politics*, or *Economic Development and Cultural Exchange* - the last of these being the journal whose school of thought Frank explicitly attacked in his celebrated 1967 critique of the modernization perspective.

This treatment of a scholar arguing against the dominant opinion at the time clearly portrays the political and ideological nature of economic debates and current theory is located within the same political and ideological frameworks.

Dependency theory has been widely criticised within the left-wing tradition on empirical and theoretical grounds. The wide body of literature debating and critiquing this approach ranges from discussions on the origin of capitalism (and the preconditions for its development), historical materialist methodology, the class struggle, modes of exploitation, the articulation of modes of production, the state (and its internationalisation) and the law of value (Barone, 1085:146 ff.). This far-reaching debate will not be discussed here as extensive literature on the subject exists elsewhere (Roxborough, 1979; Alavi & Shanin, 1982; Hettne, 1990; Seligson & Passé-Smith, 1993; Chilcote, 1999). However, some further discussions on and critiques of dependency theory are relevant to this thesis in that they clarify the role of labour control and the nation-state in the imperialist system.

Brenner (1977), analysing the origins of capitalism and the impact of capitalist penetration into non-capitalist areas, qualifies dependency theory in arguing that the articulation of capitalism depends on existing class structures in the colonies at the time they were forced into the capitalist orbit.[64] As class structures differed widely in colonised countries, the forms of labour exploitation differed widely as well. Indeed, old class structures needed to prevail in order to enable the forceful extraction of surplus labour out of the direct producers:

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[63] This decision was finally overturned in 1979 when Senator Edward Kennedy intervened to permit him and Ernest Mandel, the author of Marxist Economic Theory (*Monthly Review Press*, 1968) to teach a seminar at Boston University.

[64] In Europe, the origins of capitalism were determined through the historical process by which serfdom was dissolved and peasant property undermined, both of which led to the elimination of forceful methods of surplus extraction (and the development of 'free' wage labour).

> In some cases this was accomplished by imposing other forced labor systems, such as slavery, to expand the absolute surplus labor for the production of commodities to be sold on the world market. The result was not the development of capitalist social productive relations of production, but rather the intensification of existing precapitalist relations or the imposition of other forced labour systems.
> (Barone, 1985:149-50).

Capitalist relations therefore articulated themselves violently and unevenly in the ex-colonies, and the extraction of surplus value through labour exploitation did not take the same form as in Europe, because it depended on its interaction with existing production processes. "Thus the peoples who came into the orbit of Western capital expansion found themselves in the twilight of feudalism and capitalism enduring the worst features of both worlds, and the entire impact of imperialist subjugation" (Baran in Barone, 1985:88).[65] Brenner's work, amongst other things, explains why 'unfree' labour and 'non-capitalist' economic organisation remained common after the introduction of capitalist relations in the peripheries. Miles (1987) argues that unfree labour is in fact necessary for the capitalist mode of production to articulate itself with other, non-capitalist modes of production, which implies that unfree labour is a central component in globalisation.[66] This thesis argues that capitalism in its present imperialist form remains in need of 'unfree' forms or 'super-exploitable' forms of labour, so as to allow for the extraction of surplus value in an era of global competition, which is characterised by flexible labour-capital relations. Whereas unfree labour was, and in many parts still is, perpetuated through pre-capitalist modes of production in the former colonies, as dependency and subsequent theories have shown, current forms of super-exploitable labour in the centres are perpetuated through the withholding of legal and therefore workers' rights from non-citizens (chapters 3.2 and 3.3.1).

Weeks provides a materialist analysis of imperialism and criticises dependency theory on empirical and theoretical grounds. One point of his critique that is relevant to this thesis is that dependency fails to analyse the role of the nation-state in uneven capitalist development. By simply dividing the world into underdeveloped regions, rather than nation-states, dependency theory fails to grasp the particularities of international accumulation of wealth in that they rely on the perpetuation of political boundaries. Barone (1985:164) explains that Weeks offers "a theory of accumulation of capital located in

[65] This approach was refined to what became known as articulation theory, which traces the stages of capitalism's penetration of peripheral economies. Articulation theory challenges earlier dependency theories that viewed capitalism fully developed as a world system, but retaining developed and underdeveloped versions. The articulation of modes of production shows that capitalism in the peripheries is articulated with pre-capitalist modes of production, which implies that the transition to capitalism is incomplete rather than underdeveloped. See also Sivanandan (1979:123-125) for a descriptive account of this "disorganic development" of capitalism in the peripheries.

[66] The weakness of classical theories on imperialism, then, was their failure to provide a systematic analysis of the processes of capitalist development in the ex-colonies and the impact of foreign capital on existing modes of production. Post-war theories on imperialism attempted to fill this gap and analyse the uneven and 'disorganic' nature in which capitalism seemed to articulate itself as a global system.

the context of countries. Countries are defined [by Weeks] as territories defined by distinct ruling classes. The vehicle for rule is the state". Following from this, Weeks argues that a distinction must be made between domestic and international reproduction. Capital accumulation, together with the division of the world into distinct political boundaries, therefore explains uneven international accumulation (in Barone, 1985:159).

The nation-state debate has recently regained significance with discussions on globalisation. It is argued later in this thesis that much of this debate is misguided and that many have continuously pointed to the relentless importance of nation-state regulation within capitalism. Foreign capital continues to rely on its state to ensure the initial entry into other countries and maintain its position through international financial network such as the World Bank and IMF. Foreign capital is able to secure its investment with "direct and indirect military and economic pressure to ensure the survival of capital whenever it is threatened by nationalist, populist, or social movements" (Petras cited in Barone, 1985:172). This insight is confirmed by conservative columnist Thomas Friedman, who mocked Silicon Valley investors claiming to be nation-less when he said, "the next time Congress closes another military base in Asia, call Microsoft navy to secure the sea lines in the Pacific" (cited in Boron, 2005:15-6). Another means of excluding other countries from competition is to control the development of the forces of production (technology, genetically modified seeds) in the form of patenting and intellectual property rights (Aoki, 1998). It is surprising that writings on imperialism never refer to increasing migration control in their proof of continued nation-state relevance in political-economic organisation. The nation-state, after all, has continuously sought to control immigration and is increasingly trying to control migration movements beyond its jurisdiction. Whereas theories of imperialism often focus on the forceful extraction of political and economic agreements from weaker states, this thesis argues that globalisation has unleashed migration movements that challenge imperial nation-states, which, in consequence, attempt to control them. Apart from regulating national economic developments, migration control is also an attempt to regain some control over the international division of labour and to keep poor populations within specific territories.

Post-dependency theories and their critique also provide insight into the competitive nature of capitalism throughout all stages of imperialism which, for the purpose of this thesis, explains the necessity and drive of the nation-state to control and provide a continuous source of flexible labour. In support of Lenin's view, Weeks argues that monopoly "becomes not the negation of competition but the intensification of competition on a new level" (cited in Barone, 1985:162) and with the rise of monopoly, competition reaches its highest level in the form of imperialism so that imperialism is "capitalist competition raging on a world scale" (*ibid*:163). The nation-state remains important in the ordering of global capitalism, as competition remains central to capitalism, with new innovations and developments hindering the unfettered expansion of one monopoly, so that competition is

> shattering the monopoly positions, introducing the competitive contradiction suddenly and dramatically. This is the source of imperialist rivalry and conflict, accelerated when the competitors are from different national capitalist classes, and each turns to the state for aid in the struggle.
> (*ibid*:164).

Competition therefore remains central to the economic system as well as the current phase of globalisation. However, in order to survive the competitive economy, capital is in need of "the existence of a market for labor power" (Marx cited in Barone, 1985:161). Weeks emphasises capital's reliance on labour power: capitalism is "determined by the existence of a market for labour power [even though] it may take its outward form as the struggle for sales in a single market" (cited in Barone, 1985:161). In other words, in order to compete, firms need to buy labour power and the means of production and "deploy them in the form of productive capital wherever they will yield the highest rate of profit" (Barone, 1985:162). This insight supports the argument put forward here in chapter 5.4, where the rationalisation of immigration control is related to the need to provide a cheap and more diverse labour pool for the EU to compete in the global market, a fact that is recognised by the Commission in migration policy documents. The externalisation of migration control, on the other hand, controls an excess of unqualified labour power and exercises social control of populations that are potentially challenging the principle of the nation-state by making demands outside of citizenship regulations, as well as posing a potential threat of social revolt.

The above section has drawn out some central elements of post-war theories of imperialism which, among other things, argue that the nation-state is central to early forms of imperialism. They already pointed towards the importance of an international division of labour in upholding capital accumulation and towards the increasing internationalisation of capital. The next chapter will focus on the changes that have occurred since the world wars with regard to labour and the production process and argues they can help to explain the extension and externalisation of EU migration control practices. Although old relationships of dependency remain, the mechanisms through which imperialist relationships are being enforced are consistently changing. Global migration control constitutes one of these new mechanisms.

### 2.3 Summary

This chapter introduced imperialism as a framework within which current developments in the global political economy, it is argued, should be analysed. It was found that imperialism is historically specific but that it can be defined as a general tendency of capitalism to expand its markets by means of capital export and in the process transform production relations world-wide. Characteristic of this expansion is the tendency for capital accumulation to occur unevenly and under constant competition, not only between firms but between the political representations of capital, namely nation-states.

The role of the nation-state was analysed as a central element in imperialism and it was found that the emergence of the modern nation-state is intrinsically linked to capitalism and therefore imperialism, as well as being based on racist notions of European superiority. German history was used to exemplify both, the general characteristic of imperialism with regard to expansion and its correlating creation of dependent satellite nations, as well as the racist ideologies that underpin nation-states and imperialism.

Historically, classical imperialism is commonly ascribed to the rise of monopoly capitalism in the late 19th century, culminating in two world wars which were analysed as the expression of inter-imperialist rivalry at the time. Post-war international relations were marked by compromises in imperialism: decolonisation and weak economies in the centres enabled the rise of U.S. hegemony on the one hand, and concessions with regard to protected national economic development for the peripheries on the other. Critical to this thesis, the post-war regime was based on Fordist production relations, outlined in detail in chapter 2.2.2, where the labour-capital accord was particularly highlighted. Fordism, however, was not a national phenomenon, but was developed in a global conjuncture, transforming production relations and the international division of labour by increasingly relocating certain productive capital to low-wage countries and regions. The result was the creation of an increasingly global labour market.

The rise of Third World theorists challenging traditional European theories led to a flourishing debate on capitalist development from the viewpoint of the peripheries. Although dependency theory has been criticised in turn on empirical and theoretical grounds, it prioritised and led to new insights into uneven capital accumulation in the peripheries. In particular, debates outlined in chapter 2.2.5 give insight into the continued dependence of capitalism on firstly, unfree, or non-capitalist forms of labour and secondly, on the nation-state as a form of political organisation and defence of imperialism as an intrinsically hierarchical system. Further, competition was analysed in chapter 2.2.5 as dependent on the existence of a labour market, as cheap sources of labour are central for capital to remain competitive, labour being the most expensive part of production.

How precisely the nation-state mediates between capital and labour is therefore a central element of imperialism; migration control, as will be shown in the following chapter, plays a central role in this mediation. The following chapter traces the development of the relationship between capital, labour and imperialism outlined above under the new imperialist phase of globalisation.

## Chapter 3: The current phase of imperialism

This chapter follows on from the theoretical basis outlined in the previous chapter with regard to the main characteristics of imperialism and their role in forming (labour) migration and the consequent attempt by imperialist states to exercise control. The political-economic changes outlined in this chapter form the basis for understanding recent changes in the approach to migration outlined further below in chapter 5, namely, the rationalisation and globalisation of migration control.

Firstly, this chapter describes and critiques dominant theories of 'globalisation' (chapter 3.1). Marxist writings are used to explain globalisation as a class strategy (chapter 3.1.1) and it will be discussed if indeed it represents a new phase of capitalist development (chapter 3.1.2). Neo-liberalism is analysed as the dominant ideology informing globalisation and therefore the current EU approach to migration and employment (chapter 3.1.3).

Chapter 3.2 focuses on recent developments in the relationship between capital, labour and the nation-state insofar as they are relevant to migration and its control. The role of the nation-state, as the central political agent controlling migration and mediating between capital and labour, is analysed in more detail in chapter 3.3. Citizenship plays a central role in maintaining a hierarchy of control with regard to migration and is therefore analysed in more detail in chapters 3.2 and 3.3.1.

In chapter 3.3.2, debates on the loss of sovereignty under globalisation are criticised and it is argued that the nation-state remains a central agent in ordering capitalist relations today. With regard to this thesis, its role in mediating between migration and labour is highlighted. Finally, chapter 3.3.3 provides a more theoretical analysis of the state using the work of Hirsch (1998), which can be seen as representative of a general body of writing on the emerging 'national competition state' as a central feature of globalisation.

### 3.1 'Globalisation'

Globalisation is the term most frequently used to describe changes that have occurred in global economic, but also political and cultural systems over the past thirty years. Although apparently self-explanatory, it is alternately used to describe global chaos, a possible peaceful, integrated world community or a threat to national security, 'cultures' and identities. Hirsch (1998:14-7) provides a critique of the term globalisation for its unscientific and fetishist nature and argues that it disguises largely uneven economic development and growing income disparities within capitalist centres and between centre and periphery, driven by the neo-classical organisation of capitalism worldwide. Similarly, Petras and Veltmeyer (2001) claim to 'unmask globalisation' as an ideological term that disguises power relations and capitalist strategy and they provide analytical insights into its economic and political characteristics. On the basis of this, they 'rescue' the term imperialism, which, like many other explanatory models relating to socialism, was largely

abandoned after the crisis of the left, triggered by the breakdown of communism and the globalising spread of capitalism. They argue that theories on imperialism have greater descriptive and analytical value for understanding current developments popularly ascribed to globalisation. "It is ironic", they note, "that, precisely when the conditions so well described and explained by the concept of "imperialism" have become truly global, it has been abandoned as a tool for understanding what is going on and informing political practice" (Petras & Veltmeyer, 2001:8). This thesis refers to the above authors as well as the writings of Harvey (1990), Hirsch (1998), Harris (1998) and Kiely (2002), amongst others, to describe and analyse the process of 'globalisation'. The main aspects of globalisation highlighted here are the transformation of labour, capital and the nation-state. Although the increase and change in the nature of migratory movements is also a central element of globalisation, they are not scrutinised here, as they are pointed out in the context of legal developments in the next chapter, as well as being mentioned in their historical context in chapter 1. Further, the large-scale changes in culture, identity formation, commodification and related political struggles that are so characteristic of globalisation and 'post-modernity' are not dealt with in this thesis.

It is commonly agreed that globalisation is economically characterised by the increase in international capital flows and speculative finance through the liberalisation of finance and services, international production chains and the growth of multi-national companies. Technologically, this integration is enabled and accelerated by revolutions in data storage and transfer such as the internet and the exponential growth in cheap air travel, for example. Ideologically, globalisation is supported by proponents of neo-liberal policies and ideologies that deregulate national economies, exemplified by Thatcher's battle against organised labour in the miners' strikes and her assertion that 'there is no such thing as society'. Culturally, it has been supported by the spread of consumerism, the individualisation of formerly communal structures and global media monopolies (Hirsch, 1998:17-8). These developments have gone hand in hand with a change in the nature of the welfare state towards a 'competition state', which is discussed in more detail in chapter 3.3.3. Globalisation was accelerated in the early 1990s by the end of the Cold War, leading to a more radical spread of private property relations and the transformation of production systems and labour markets that were formerly inaccessible to foreign capital. Despite the fact that the most common features of globalisation are generally agreed upon, there is no general agreement about how these changes radically depart from earlier predictions or theories on capitalist development. The process of globalisation and a critique thereof is outlined below. It is far from comprehensive, but reflects the main elements discussed in most writings on globalisation.

### 3.1.1 Globalisation as class strategy against labour

Rather than representing an inevitable process, globalisation has been the result of specific policies being implemented in the 1980s and 1990s in response to a series of economic crises. Capitalism, under the

labour-capital accord, "experienced cracks in its foundations and began to fall apart under conditions of stagnant production, declining productivity, and intensified class conflict over higher wages, greater social benefits and better working conditions" (Petras & Veltemeyer, 2001:14). Fordism represented

> a major expansion of the capitalist world-economy [...] [and] came to an end perhaps in 1967, perhaps in 1973. It was the greatest single expansion in the history of this world-system going back to 1500 [...]. For all the standard economic reasons, this expansion came to an end and has been followed by an economic stagnation.
> (Wallerstein, 1992:123-4)

The 'standard economic reasons' Wallerstein refers to (tendency for the rate of profit to fall, the intrinsic competitive nature of capitalism, etc.) are, of course, subject to intense debates not outlined here in detail, as this would extend the terms of reference of this thesis. It is commonly agreed, however, that the Fordist accumulation regime, based on Keynesian macroeconomic policies (regulating supply and demand through standardised production and high wages supervised by the state) was confronted with its internal contradiction of different class interests, when growth and therefore profit rates began to fall in the late 1960s (Lazarus, 1998:98-9). Consequently,

> a consensus started to emerge among the ruling classes of the major western states that without the discipline of redundancy and mass unemployment on the workforce there was no possibility of overcoming the stagflationary crisis of the period and carrying out the economic restructuring necessary to meet the challenges from Japan and the Far East. In Britain, this ideology emerged in the form of monetarism which in due course turned into the free-market crusade of Thatcherism.
> (Costello et al., cited in Lazarus, 1998:99)

The evasion of labour demands was therefore central to the beginnings of and motivations behind globalisation. This, together with the oil crisis and following recession in the 1970s, compelled the UK and U.S. governments in particular to embark on a series of radical reforms that reduced state intervention, privatised public enterprises, liberalised prices, deregulated utilities and services and brought inflation under control. Overbeek (1995:28-9) summarises some of the measures introduced on labour relations:

> 1) the restructuring of the social relations of productions;
> 2) the replacement of the Fordist organization of mass production with concomitant entrenched power of organized labour and the safety net of Keynesian Welfare State (KWS) by the new structures of 'post-Fordist' flexible accumulation (sometimes called Toyotism);

3) the erosion of the position of what Cox calls 'established labour' and the structures of tripartism and state corporatism, to make way for 'enterprise corporatism', 'just-in-time' delivery systems and sub-contracting;

4) the expansion of the service sector employing non-established workers (women, ethnic minorities, migrants); and

5) the run-down of mass production, the traditional stronghold of the (white, male) organized working class [...].

Petras and Veltemeyer (2001:14-20) separate the wider developments characterising globalisation into eight 'strategy responses' formulated by the international capitalist class[67] to deal with the crisis of capitalism. As these characteristics of globalisation are reiterated in numerous writings on the subject, their classification is reproduced here:

1. The U.S. dollar was devaluated and flexible exchange rates were introduced, as already noted with regard to the declining U.S. hegemony (chapter 2.2.3). This led to an increase in speculative finance, which in turn made governments dependent on individual speculators' choices of withdrawing their capital from one day to another, based on economic and political prognoses.
2. Multi-national corporations started relocating their labour-intensive industrial operations in search for cheaper labour, thereby changing the international division of labour.
3. Capitalists started internationalising productive (trade and production) and speculative capital.[68]
4. New internationally integrated production systems were created that, based on this international division of labour and supported by new policy frameworks and technologies, enabled capital to use new communication and transportation structures so that productivity of labour was drastically raised, leading to the redundancy of large numbers of workers.
5. Flexible, post-Fordist production methods were adopted, which led to an ongoing struggle between capital and labour and a new international division of labour. After the introduction of neo-liberal programmes and large-scale privatisation, labour has lost out in this struggle, as the share of labour in national income has fallen significantly, particularly in developing countries.
6. Capital launched a direct assault on labour in terms of wages, conditions of benefit and rights to political organisation, which has led to a general fall in wages as a share of national income, and the polarisation of a spread of wages and "widely observed changes in the labour markets all over the world" (Petras & Veltmeyer, 2001:17).

[67] A term which Petras uses and which encompasses the owners of capital and finance in leading capitalist nation-states, as well as their corresponding representatives in international financial institutions.
[68] From the mid-1970s to the early 1990s, the daily turnover of the foreign-exchange markets rose from $1 billion to $1.2 trillion a day and it is estimated that for every U.S. dollar circulating in the real economy, $25-50 circulate in the world of pure finance (Sau, in Petras, 2001:15).

7. The global market has developed through successive rounds of GATT talks since 1949, gradually reducing tariff rates. The famous Uruguay Round of talks of 1995 led to the formation of the more formal World Trade Organisation, whose remits are wider than those of GATT, including an expansion into services and intellectual property, as well as promoting trade liberalisation in agriculture and textiles (Kiely, 2002).

8. The nation-state was restructured to "serve the imperial project" (Petras & Veltmeyer, 2001:19) in fulfilment of its role to secure "the long-term stabilization of the allocation of social production between consumption and production" (Lipietz, cited in Petras & Veltmeyer, 2001:19), in other words, to continue securing capital accumulation under the new global conditions.

Petras and Veltmeyer (2001:11) argue that globalisation, which is often "presented with an air of inevitability and overwhelming conviction", far from representing an inevitable process, is a "consciously pursued strategy, the political project of a transnational capitalist class, and formed on the basis of an institutionalised structure set up to serve and advance the interests of that class". The internationalisation and liberalisation of capital was followed through on a global scale by the World Bank under so-called structural adjustment programmes and trade agreements as indicated in the previous chapter. This process is described by UNRISD (1995:26) as follows:

> At the international level, the rise of market forces has greatly strengthened the hand of international investors and creditor countries as well as of the two major multilateral financial institutions [the World Bank and IMF]. At the same time, it has correspondingly weakened the position of countries heavily dependent on foreign capital or aid. There have also been profound power shifts within countries: the owners of capital, along with some managerial and professional groups, have generally gained whilst the organizing working class has lost out. A further effect of liberalization has been to unleash fierce competition both within and between nations. Again, this has often increased productive efficiency, but it has also driven down wages and increased unemployment and poverty.

The increasing flexibility and internationalisation of capital has changed the relationship between capital and labour because it has led to a restructuring of production relations and the constitution of work. These were facilitated by revolutions in the forces of production which in turn are the consequences of deliberate decisions by industrialised centres to invest heavily in technology (chapters 2.2 and 3.1). There was a gradual development from industrial capitalism to what is now often termed the 'knowledge economy' or

information capitalism, some even argue that we are now in a third stage of 'digital' capitalism.[69] The terms refer to the decline of manufacturing industry, the growth of the service sector and the development of 'jobless growth' (Overbeek, 2003). Harvey (1990) points out the complex nature of the economic-political developments of the latter part of the 20th century. He terms the developing new regime 'flexible accumulation', which rests on flexible labour processes, labour markets, products and patterns of consumption. He points out that flexible accumulation has led to new sectors of production, new ways of providing financial services, new technological innovations, a new round of "time-space compression" and continuous shifts in uneven development between sectors as well as geographical regions (1990:147).

Another area that represents a consciously pursued agenda with regard to globalisation is the EU's Employment Strategy (insofar as the deregulation of employment relations is an expression of globalisation). The establishment of a European employment policy as a response to unemployment was subject to intense political debate during the 1990s, with corresponding struggles over the content and ideological framework of the same. A European policy response to unemployment is, of course, in contradiction to neo-liberal ideology, which has increasingly defined the discourse on Europeanisation and according to which competitiveness created under the deregulated single market should in itself eradicate unemployment (Tidow, 2003:79). Employment policy therefore represents a point of conflict between proponents of traditional social democratic approaches to regulation (Germany and France) and proponents of neo-liberalism (UK). Notwithstanding this struggle, the content of the White Paper *Growth, Competitiveness, Employment*,[70] drafted by the Commission at the request of the Council in 1993, points to a move towards a deregulated and neo-liberal employment policy based on labour market and structural policy reform, albeit with a 'social dimension' and emphasis on 'human resource' development, i.e. investment in education and vocational training. The key concepts here are, as described below with regard to the ideology of globalisation, individual approaches to employment, where social security is replaced with 'active incentives', based on the notion that unemployment is the fault of the individual rather than the economic system (Overbeek, 2003). Citing the example of how the (un)employment question is being framed and implemented at EU level, van Apeldoorn (2003) shows how the transnational policy arena of the EU is first and foremost a tool used by particular agents, i.e. transnational capitalist classes, to serve their interests. In analysing the influence the European Round Table of Industrialists has had on EU-led labour market reforms, van Apeldoorn (2003) highlights the continued centrality of competitiveness to the current phase of imperialism (outlined in the previous chapter) as well as proving the deliberate nature of neo-liberal reforms.

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[69] See Laway (2001) for his analysis of 'information capitalism', the development of new processes of accumulation after the Cold War and its destructive effects on social life. Laway uses the term software imperialism to describe this latest imperialist phase. The extent to which an epochal shift in capitalism has indeed occurred is discussed further below.

[70] *White Paper on growth, competitiveness, and employment: The challenges and ways forward into the 21st century*, 5.12.1993, COM(93) 700 final.

### 3.1.2 Globalisation as a new phase of capitalism?

As indicated above, there is general agreement on the descriptive elements of globalisation, but there is much disagreement on the question as to how far these developments are significantly different from earlier theories on the development and nature of capitalism, i.e. whether the answers to the question of capitalist development discussed in the previous chapter fundamentally differ with regard to the latest economic developments. Lazarus (1998:101-2) argues that the strategies which capital deployed against labour as a response to the economic crisis (i.e. transnationalisation of production, development of new productive forces and technologies, prioritisation of speculative or finance capital over productive capital, etc.) were not new but have had "a long and chequered career in the development of capitalism over the course of the past several hundred years". Smith (cited in Lazarus, 1998:102) supports this position and describes globalisation as "not some drastic new phenomenon but a historically explicable one whose peculiar forms are dependent on the specific series of crises that capitalism has engendered within and for itself in the continual process of revolutionizing the means of production".

However, rather than representing the theoretical debate as simply split between pro and anti-globalisation theorists, it should be noted that within the Marxist materialist tradition some argue, not that the restructuring itself is necessarily a new phenomenon, but that it represents a new phase of capitalism: the epochal shift is likened to the one that Lenin noted at the beginning of the 20th century, triggered by radical advances in technological innovations, i.e. a significant development of the forces of production: "Just as colonialism was the foreign extension of mercantile capitalism and imperialism the highest stage of industrial capitalism, globalisation characterises information capitalism" (Harris, 1998:21). Kundnani (1998:49-50) points out that a "globalised economy does not exist simply because national markets are integrated into a world economy. Rather, it comes about when the time delay for information to flow around the world market approaches zero. At this point, the world market starts to act as a single organism". Sivanandan (1997:1) also argues that globalisation represents an epochal shift:

> [The] significance [of new technologies], firstly and fundamentally, is in the qualitative changes they have brought about in the productive forces, which in turn has predicated a mode of production based on information, data, gathered from dead and living labour. The magnitude of that change can best be understood in contrasting the industrial revolution to the technological revolution [...]. Imagine yourself in a society that was moving from handicraft to 'machino-facture' - from energy based on muscle power to energy based on steel power and then, in a second wave, to electricity. Think, now, how micro-electronics replaces the brain. That is the size of the revolution of our times.

Following from the above, it can be said that whilst it is now generally recognised that the post-war period displayed features of the classic imperialist system (monopoly competition on a global scale), theories on globalisation are far from forming a comprehensive understanding of the same. Indeed,

> many commentators have abandoned the pretence of theory, and simply resorted to data-chasing to keep pace with the rapid shifts. But here too are the problems - what data are key indicators rather than contingent series? The only general point of agreement is that something significant has changed in the way capitalism has been working since about 1970.
> (Harvey, 1990:173)

However, although there is no agreement regarding to which degree past theories have to be adjusted to reflect the restructuring of productive and social relations, there is general agreement in Marxist writings that globalisation is an inherently imperialist process, governed by the contradictory logic of capital that accumulates unevenly, ordered by the nation-state which has undergone corresponding changes to serve international capital and mediate between capital and labour, and beneficial only to certain sectors of society, namely the international capitalist class (Hirsch, 1998:138-149, Petras and Veltmeyer, 2001:20-5). Empirical data has always supported the latter position, and unequal distribution of wealth and insecure working conditions have increased over the last hundred years, as reflected in UN, ILO and even World Bank reports. The United Nation's Development Programme annual reports regularly reflect the growing gap between rich and poor: "if at the beginning of the 1960s the ratio between the richest 20 per cent and the poorest 20 per cent of the world population was 30 to 1, at the end of the twentieth century this ratio had grown to almost 75 to 1" (UNDP in Boron, 2005:37). The question therefore is: what are the reasons for this uneven development?

### 3.1.3 Globalisation as neo-liberal ideology

This thesis does not embark on an in-depth analysis of these reasons, but has shown that neo-liberal explanations are incapable of analysing uneven development, viewing it as a "product of clumsy political decisions, unfortunate and poorly informed choices made by the rulers, or easily removable inertial factors" (Petras & Veltmeyer, 2001:38). Uneven development is seen by dominant discourse as a result of almost everything but the capitalist system:

> The standard, off-the-shelf neoclassical explanation for disappointing growth rates is 'bad policies' by governments (the Policy Hypothesis). This is hardly a credible argument when low growth has persisted for at least one hundred years for many countries (Pritchett 1997). Even were this persistence not the case, state policy as an explanation for different growth rates in the long run offers no explanation for [the historical]

> question: how the presently developed countries initially achieved their status (i.e., why policy wisdom was so geographically concentrated for one hundred years).
> (Weeks, 1998:4)

Indeed, neo-liberal ideology has had a central function in obscuring the contradictions of capitalism that re-appeared in the 1960s and 70s, as well as the intentional and agency-driven nature of globalisation. Overbeek (2003:24) argues that the neo-liberalism of the 1980s was the result of the dialectical interaction of objective, subjective and institutional changes and that it "elevates identifiable fractional interests to the level of a claimed 'general' interest". The class whose interests are represented by neo-liberalism succeeded in presenting it as a solution to an economic crisis through monetary policies, i.e. by strengthening money capital and using it as a regulatory mechanism to control inflation. Monetarism was instituted in the UK, U.S. and Chile in the 1980s and its rise "resulted in a rapid shift in the class structure away from the corporate-liberal pattern to an individualist one in which the interests of the rentier and the 'venture capitalist' were predominant" (*ibid*:25). The ideology purported the virtues of the free market as its "core concepts and precepts (liberalization, privatization, deregulation and internationalization), as well as its new acquisitive individualist ethic, gradually became hegemonic and have apparently eclipsed traditional social democracy" (*id.*). This neo-liberal project of flexibility and deregulation can and must coexist with its antithesis of restrictive migration control (Dreher, 2003) as the state and its legitimacy remains central to the global capitalist system.

The above section outlined the main characteristics of globalisation and critiques against dominant discourses on globalisation. The following section looks in more detail at the changes globalisation brought about in the labour process, working conditions and the changing role of the nation-state with regard to labour and the national economy. Again, rather than providing a comprehensive outline, the focus remains on changes that are related to the EU's global migration management.

### 3.2 Capital, labour and migration under globalisation

At the centre of changing labour-capital relations under neo-liberalism, as described above, stand technology and mobility. The technological revolutions with regard to data and information are reflected in the conflation of the time-space nexus, and although it is debatable that the world market constitutes a 'single organism' (Kundnani, 1998), the flexibility of capital has

> allowed employers to exert stronger pressures of labour control on a work force in any case weakened by two savage bouts of deflation, that saw unemployment rise to unprecedented postwar levels in advanced capitalist countries (save, perhaps, Japan). Organized labour was undercut by the reconstruction of foci of

> flexible accumulation in regions lacking previous industrial traditions, and by the importation back into the older centres of the regressive norms and practices established in new areas.
> (Harvey, 1990:147)

In other words: flexible accumulation was first introduced in the peripheries, which lacked the support and defence mechanisms of organised labour structures, leading to 'super exploitation', and these strategies of labour exploitation developed by capital in these areas were then imported back into the capitalist centres and practised there. This process has also been termed the 'reconstitution of the third world within the first' (Koptiuch, 1996) and has been viewed by some as undermining the territoriality of Empire altogether (i.e. creating pockets of poverty and wealth all over the world that cannot be distinguished by nation-states anymore) (Negri & Hardt, 2000). Although this condition was recognised earlier on by Brazilian educator Paul Freire with regard to ghetto formation in the U.S., in this context it refers to Petras' and Veltemeyer's fourth characteristic of globalisation: whole flexible production chains have been set up within the capitalist centres, typically in the agricultural industry, sweat shops, the building sector, domestic work, etc., typically employing illegals and women (Overbeek, 1995). Flexible capital made centralised production redundant, leading to a fragmentation of the production process. The parts for products sold in the West are today being produced in Taiwan, Hong Kong, the Philippines and Indonesia, depending on where the production of a particular part is cheaper or more convenient for investors (Sivanandan, 1997). Rather than having to rely on a local work force, and responding to the demands of organised labour, investments can (albeit not without limits) be brought to the cheapest source of labour in the global market economy. Technology (microchip and data storage) and mobility (cheap air travel) have created the "global capitalist, the universal capitalist, and the universal factory [in which] capital [is] no longer restricted by time or place or labour" (Sivanandan, 1997:2). However, it has to be noted that the international movement of capital towards cheaper labour sources has not been as substantial as some contend:

> by far the largest share of capital flows is between wealthy countries (where the price of labour is comparatively high and the administrative force to guarantee exploitation comparatively low) with relatively little capital actually flowing from wealthy to poor countries.
> (Arrighi, 2002:7-8)

Further, as already indicated in chapter 1, flexibility has manifested itself in regionally integrated production networks within the three most important capitalist centres, i.e. North America, Western Europe and East Asia/Pacific, the so-called Triad, so that globalisation is characterised by regionalisation, which mirrors the hegemony by creating 'local peripheries'.

Local peripheries are characterised by their cheap source of labour combined with proximity to the centre, (e.g. Eastern Europe for the EU, Mexico for the U.S.) where the industrial powers are "partly competing and partly exploring collective hegemony" (Biel, 2000:277). This increasing importance of local peripheries in the new imperialist phase is partly a reaction to the lessons of the past, when the capitalist centres, (in the words of the German author Max Frisch) 'called for labour, but humans came'. The latter implies the failure of the *Gastarbeiter* system in the sense that many workers settled down with families, making the exploitation of their labour less economically desirable, as host states had to provide social security benefits, educational facilities, and wage increases. In economic terms, settled labourers require the state to provide for their 'reproduction' costs. At the same time, the strategy of local peripheries brings to mind the classic imperial 'divide and rule' policies, which had been applied so successfully to India and South Africa, always with a racial subtext. As one Ford executive put it: "Eastern Europe will become the new Korea of the motor industry, except this time cheap production will be available on our doorstep" (Biel, 2000:277).

There is then, a hierarchy of peripheries, and those able to gain the status of "buffer states" between the richest countries of the world and the poorest have little choice but to join the centres. Apart from the existence of local élites which use the collaboration with the centres for their own gains, Eastern European countries, for example, have very little choice but to ask for association status, given the breakdown of their existing economies through foreign capital investment and the dismantling of formerly non-capitalist production relations and industries (Marks, 1999, see also chapter 5.2.2). For the industrialised centres, the creation and maintenance of local peripheries is one solution to the problem of controlling their spheres of influence: "a compromise solution, where it is possible to avoid meeting the reproduction costs and at the same time to control the situation closely enough to prevent autonomous take-off" (Biel, 2000:277). Overbeek (2003:21) points out that regionalisation takes place not only with regard to capital flows but also with regard to political structures such as the EU.

Despite his reservations with regard to capital flexibility, Arrighi (2002) does not argue against shifts in capital *per se*, but maintains that they have not had an equalising effect on the North-South divide. Whilst the 'knowledge economy' remains predominantly within the centre (Sivanandan, 1997), the manufacturing industry has undoubtedly relocated to cheaper production in Asia:

> [...] while the overall North-South divide has remained remarkably stable, over the last forty years there has been a major relocation of manufacturing activities and world market shares from North America and Western Europe to East Asia. Thus, between 1960 and 1999, the East Asian share of world value added (a good measure of the share of the world market controlled by the residents of the region) increased from 13% to 25.9%, while the North American share decreased from 35.2% to 29.8% and the Western European share decreased from 40.5% to 32.3%. Even more significant was the shift in the shares of world value added in manufacturing, with the East Asian share increasing in the same period from 16.4% to 35.2%,

> against a decrease in the North American share from 42.2% to 29.9% and of the Western European share from 32.4% to 23.4%.
> Arrighi (2002:15)

But there has not only been a movement of industry branches to different parts of the world, including shifts in ownership, as seen in the Asian example above. As indicated in the previous chapter, there has also been a general reconstitution of global economic activity. Harris (1998:27-30) provides a comprehensive outline of how the de-concentration and increasing flexibility of manufacturing, together with the growth in 'knowledge economy', has led to a restructuring of the labour force to suit the new possibilities of capital exploitation. He points out that labour in the manufacturing industry in the U.S. has shrunk from constituting 33% of the work in the 1950's to 17% at the time of his writing. In addition to this, the constitution of the labour force has radically changed:

> Many of the jobs have been exported to a global labour force as technology has made the transfer of skills easier [...]. Today, there are 175 manufacturing free enterprise zones in the world, employing 4 million workers, 2.6 million of whom are women. For example, at one period in Indonesia, 12,000 mostly teenage girls were earning 82 cents a day, making shoes for Nike. Production costs per shoe averaged $5.60 for a product selling at between $75 to $135 a pair. Michael Jordan makes $20 million for his contract for Nike, while the workers earn a total of $5 million a year
> (Harris, 1998:27)

The international division of labour is therefore seeing major restructuring resulting in high profits for owners of capital. Central to this are flexible production chains on the one hand, but also labour migration on the other.

Anderson (2000) provides detailed research on the situation of female migrant domestic workers in the EU. She finds that domestic work fulfils the function of social reproduction in general, but increasingly of the reproduction of the female employer's status (middle-class, non-labouring and white). Whilst white upper-class women have always relied on domestic workers to reproduce their status, with the growth of the middle-classes in Europe, increasing households and women formerly forced into domestic work are increasingly able or forced to take up formerly male wage labour. In view of the persistence of patriarchal household structures and the lack of public provisions for child care, women have to pay someone else to do domestic work. The increase of migrant domestic work is therefore related to the feminisation of the labour force over the past 20 years: in France, for example, female participation in the labour force rose from 51% to 60% between 1975 and 1996 (*ibid*:109). "Thanks to the hidden labour of migrant domestic workers, some middle-class women gain access to the public sphere [...] Migrant domestic workers enable women citizens to fulfil the political duty of motherhood at the same

time as participating in the labour market" (Anderson, 2000:190). Migrant women are subject to extreme forms of exploitation by the fact that they not only sell their labour power but their personhood, particularly when forced to 'live-in' at the households they work for. As is explained in more detail in chapters 2.1.2, 3.2 and 3.3.1, this exploitation on a new scale is supported by racism and citizenship. With regard to this chapter, it can be noted that the "expansion and racialisation of prostitution, paid domestic work, and the 'mail order bride' phenomenon are a function of the expansion of capitalism" (*ibid*:197). And,

> [a]s well as individual capitalists, the receiving state might be said to profit from migrant workers, since their labour power has been produced without any outlay from this state and, theoretically at least, they are to return to their countries of origin one day, thereby saving the receiving state any expenses associated with their old age. Again, theoretically, they do not bring their children with them, saving the host state associated health and education costs. In practice immigrants are less likely to draw on social provisions than citizens, and yet they do pay taxes: a US Federal Department of Labor study of undocumented workers in the early 1980s found that 73 per cent had income tax deducted from their pay, 77 per cent paid social security, and 0.6 per cent received benefits [...].
> (*ibid*:108-9)

Intensified by the privatisation of formerly public services such as health care and child care, the demand for unskilled labour has grown, with the consequence that in the capitalist centres domestic labour is returning as a central element of capitalist reproduction, together with a re-emergence of sweatshops (Overbeek, 2003). A core-periphery structure has therefore developed again within the capitalist centres, but due to the increasing illegalisation of undocumented immigration in the centres, peripheral labour is now provided mostly by undocumented migrant labour, which "has become a condition for the continued existence of small and medium-sized firms, creating substantial economic interest in continued (illegal) immigration" (Overbeek, 2003:21). Again, citizenship is shown to regulate the distribution of wealth through differentiating entitlements depending on county of origin.

But not only the insecure citizenship status of migrant workers, the flexibility of capital in itself has increased the profitable exploitation of workers as a whole:

> The productivity gains from robots and numerical control machines are most clearly seen in industry. For example, in the 1980's, Ford cut hours by 47 per cent, but gained in productivity by 57 per cent. New technologies have also been used to control the labour process. Just-in-time production, flexibility and lean production are all ways management has organised information technology to squeeze workers.
> (Overbeek, 2003:21)

Flexible production systems have therefore also led to a rise of 'precarious working conditions' or 'non-standard work', which has been widely noted and debated.[71] Precarious labour is characterised by temporary contract, agency work, increased self-employment, sub-contracting, outsourcing, increase in part-time work and the above-mentioned "expansion of the service sector employing non-established workers (women, ethnic minorities, migrants)" (Overbeek, 1995). It is typically accompanied by poor pay, but precarious working conditions can also apply to well-paid jobs that only offer temporary contracts. Precarious work was facilitated by technological innovations in communication and information systems that "made it easier for organizations to specialize their production, assemble temporary workers quickly for projects, and rely more on outside suppliers. Labor laws designed to protect permanent employees also fuelled the growth in nonstandard work by encouraging employers to avoid the mandates and costs associated with these laws" (Kalleberg, 2000:342). Non-standard work was also facilitated by demographic changes in the composition of the labor force in the capitalist centres, such as the increase in women workers with children and older workers, who often preferred the flexibility available through nonstandard work arrangements (*id.*). It should be noted that precarious working conditions are not new: most work arrangements in the Third World did not fit the model of full-time work, and "history is replete with examples of peripheral labor forces and flexible labor markets in which work is unstable and temporary" (*id.*). Also within the centres, contracting systems based on flexible work existed in the U.S. in the nineteenth century, for example, so that "[t]he efficiencies associated with organizing work in standard, hierarchical employment relations and internal labor markets in the post-World War II period may have been more of an historical irregularity than is the use of nonstandard employment relations" (*id.*).

Given the gains of capital over labour over the last 40 years, the changing nature of capital-labour relations can be seen as a strategy by the transnational capitalist class to ensure the continued capital accumulation within the centres and industrial nation-states. This is done by ensuring that imperialist nation-states retain control either by ownership of technology or intellectual property (Aoki, 1998) as well as by controlling the labour force which, like capital, has become internationally mobile. More specifically, this strategy is based on a constant shifting of production processes and their geographical locations, a constant innovation on new technologies to optimise the exploitation of labour by capital, and more flexibility of capital to free itself from the restraints of location and demands of labour.

Just as post-war economic restructuring led to labour migration all over the world, the globalisation of new work relations under globalisation has accelerated and diversified migration movements because "when capital goes global, so does labour" (Harris, 1998:28). Rather than being an unwanted by-product of the process of globalisation however, the flexibility of labour has become a necessity. However, migration in the phase of globalisation has changed in two ways, both of which

[71] Castel (2000), Kocka (2001), Tàlos (1999), amongst others.

require its increased control from the perspective of industrialised centres: firstly, the increasingly uneven economic development of capital accumulation (see chapter 3.1.1) and resulting armed political struggles have led to a renewed increase in forced migration movements (Zolberg et. al., 1989). Secondly, migration and its control gained an added significance after the breakdown of border controls that had contained emigration from the Soviet Union up until 1989. Whereas, during the Cold War, freedom of movement was used by the capitalist centres as a major factor in portraying its superiority over the Communist bloc with regards to civil liberties, and the use of asylum was often political (see chapter 1), western European states started to intensify their attempts to control migration after the necessity of competing with socialism on the grounds of civil liberties had vanished and secessionist wars started producing refugee crises within Europe again.

Again, the above-noted regionalisation of production has had an impact on migratory processes as well. Overbeek (2003:22) notes that

> [t]he patterns of regional concentration in the globalization process simultaneously create a framework for the consolidation and intensification of regional migration networks. Movements of people are partly occurring in regional contexts as well, not just as a reflection of the emerging new production and labour market structures, but also because of a series of factors that are migration specific, such as geographic proximity, cultural affinity, historical linkages and migration chains.

Contrary to popular belief, foreign residents in western Europe predominantly originate from within western Europe (35%) and the Mediterranean countries that were traditionally suppliers of 'guest workers' in the 1950s to 1970s (30%); only 5% come from central and eastern Europe, "leaving less than 1 in 4 % who come from further away (Eurostat 1997:48-9)" (in Overbeek, 2003:22). As already indicated in chapter 1 and further discussed in chapters 4 and 5, in western Europe the regulation of labour migration has taken an extremely restrictive yet selective character, which shows that globalisation "is an ambiguous and contradictory process" (*ibid*:23).

The above section showed how transformations in the imperialist system affected the relationship between capital, labour and the nation-state and therefore the role of migration and its control. Despite continued U.S. hegemony, it was pointed out that imperialism remains an inherently competitive system based on nation-states and that the latter remain regulators of economies. Further, the persistence of migration control proves the continued strong role of the nation-state in ordering social and economic relations. Chapter 2.2.5 already highlighted the existence of an international division of labour and continuing competition. It was argued here that in the era of globalisation, the state's role continues to be strong and labour control has become one of its important functions in relation to capital. Further, access to and reproduction of flexible labour is ensured through migrant labour, which was typically racialised

and often gendered, and exploitable by means of its insecure legal status, upheld through the denial of citizenship (chapter 3.2).

The next chapter looks in more detail at the means by which labour is being divided and migration controlled, namely, the nation-state, law and citizenship. The origins of the modern nation state are traced to highlight the role and function that law started developing in emerging capitalist relations. It is found that law is the basis for modern citizenship and sovereignty and citizenship is the necessary basis for the control of migration. Globalisation is challenging some of these concepts but the nation-state is continuously devising ways of regulating contradictions and mediating between capital and labour.

### 3.3 The nation-state and new legal regimes

Chapter 2.1.2 already highlighted the importance of nation-state formation with regard to imperialism and showed the racialised nature of European citizenship and identity formation. With a view to the recent changes that the nation-state, the notion of sovereignty and therefore the role of the law in society have undergone, as well as in consideration of the centrality of law to this thesis, this section briefly traces the origins of modern law and sovereignty. Drawing on Bentham, it is argued that modern legal relations developed in conjunction with capitalist relations and started regulating emerging capitalist relations with regard to the mediation between labour and capital. Drawing on critiques of positivist notions of law, legal relations are further argued to be an expression of sovereignty and thereby constituting the link between the citizen and the state (through citizenship); legal relations are therefore found to be social relations, which in turn are based on classes; law therefore expresses certain class interests. As law and the nation-state are intertwined, the changing nature of the nation-state invariably impacts on how law is expressed. It is found that law is becoming increasingly important in a global economy.

Chapter 3.3.2 discusses the transformation of the nation-state and it is argued that rather than being in decline, the nation-state continues to fulfil an important regulatory function and governs its own reconstitution to facilitate the interests of international capital in the era of globalisation. The state's role in upholding citizenship is again highlighted with regard to the latter's function of controlling migration and stratifying rights and entitlements.

#### 3.3.1 The law, the right and the citizen: a Marxist approach

The development of classical jurisprudence and law as a central regulatory force in the capitalist process of production and reproduction is intrinsically linked to the emergence of the modern nation-state: as already outlined in chapters 2.1.2 and 2.1.3, the modern nation-state developed in conjunction with the decline of the patrimonial and absolutist state, which up to the 18$^{th}$ century was the political form required to rule feudal social relations and relations of production. Power formerly residing with the king shifted towards the modern nation-state, justifying its control over the territory and the people, in a word, its sovereignty, on grounds of 'popular consent' and the provision of security. Fine (1984:208) sums up the development of law and the state in Europe: "simple commodity production gives rise to private property, the generalization of commodity production gives rise to law, and the transformation of commodity into capitalist production gives rise to the state", with a distinctively national, territorially bound jurisdiction. The development of a modern legal system is therefore intrinsically linked to the emergence of capitalist relations, and in particular linked to the emergence of private property relations.

In prevailing neo-liberal discourses, law is typically treated as autonomous, i.e. relatively independent from wider political economic developments. Furthermore, the Rule of Law is seen as a vital

precondition for ensuring equality, individual liberty and, it is increasingly argued, international security. The arguments applied in this thesis view law as intrinsically linked to social processes which render it subject to interests of power, in the form of class domination, and never independent of them. It therefore draws on the principles of Marxist jurisprudence, which criticises the autonomous conception of law on the basis that the treatment of the individual in law as autonomous is in effect a false type of social analysis: social relations of capitalist production manifest themselves in economic and juridical forms, so that legal relations are not independent, but the expression of social relations.

Marx and Engels identified the social characteristics of law with the help of a historical analysis of how class interests expressed themselves in law in England (e.g. the Poor Law Amendment Act or factory legislation) and France (e.g. the constitution, electoral law, press law) in the 19th century. From these specific analyses (collected and explained in Phillips, 1980: 57-151), they drew some general conclusions as to the nature of law. Marx and Engels never provided a comprehensive theory of law, and legal scholars have developed principles and methods of Marxist jurisprudence from Marx's and Engels' general work on the critique of political economy and philosophy, a dilemma which is outlined in most introductions to writings on Marx and the law. This section will not provide a list of Marx's and Engels' statements on law, these can be found elsewhere (Phillips, 1980, Fryer et al., 1981, Collins, 1982, Fine, 1984). However, with regard to this thesis and its concluding discussion on rights-based approaches to the treatment of migration (chapter 6), the following principles might illuminate the function of law in regulating global migration and labour movements. They might also shed light on the question whether the demand for social justice, or the improvement of people's treatment by states, should be achieved primarily by an appeal to a different set of laws, if it requires social change located in spheres other than the legal, or if it requires a tactical or strategic application of both approaches.

The crucial question on one's approach to law as a tool for social change is: does law derive from 'power' or 'will', i.e. is law created by and serve the interests of those in power or does it remain independent from it? Particularly in early writings, Marx and Engels appear to have a fairly straightforward answer to this question: law derives from power and any theory that reduces law to will is a 'juridical illusion' (Phillips, 1980:33). Marxist jurisprudence has since been accused of reducing law to material conditions located only within production relations, and thereby reducing it by resort to economic determinism; this critique has, in turn, led to more sophisticated Marxist analyses that take account of the relative independence which law has shown to possess, particularly in the 1960s and 1970s in Western Europe, in form of the independence of the judiciary in modern democracies, where law-making not only served the dominant classes but decisions frequently collided with their interests (see especially Fine, 1984). With regard to the principal criticism of classical law theories (the liberal aspects of which Marx did not abandon but from which he drew further conclusions), however, or those that view law as autonomous, it is worth citing Marx and Engels (in Phillips, 1980:34) at length, to explain the principle of Marxist conceptions of law:

> If power is taken as the basis of right, as Hobbes etc., do, then, right, law, etc., are merely the symptom, the expression of *other* relations upon which state power rests. The material life of individuals [...] their mode of production and form of production and form of intercourse, which mutually determine each other - this is the real basis of the state [...] quite independently of the *will* of individuals. These actual relations are in no way created by the state power; on the contrary they are the power creating it.

The above implies that dominant sections within society (classes) have the power to determine the law, or rather, that which is defined as universal and then enshrined into law (*id.*):

> The individuals who rule in these conditions - leaving aside the fact that their power must assume the form of the *state* - have to give their will, which is determined by these definite conditions, a universal expression as the will of the state, as law, an expression whose content is always determined by the relations of this class, as the civil and criminal law demonstrates in the clearest possible way.

Based on this view, Marxists are of the opinion that the jurisprudence of a neo-liberal democracy is "but the will of your class made into law for all, a will, whose essential character and direction are determined by the economical conditions of existence of your class" (*id.*). With regard to this thesis, this statement is particularly relevant when applied to international law. As migration control at the international level takes place through law, recent trends in the externalisation of asylum law, readmission agreements, or the linking of migration control to trade and aid agreements, can be said to have a coercive character that favours the interests of industrialised nation-states.

The question whether international law serves as a legitimation of power in state affairs is also raised when considering the actual reality of national sovereignty after the formal independence of colonies: although no one would doubt that the current international nation-state regime represents a more egalitarian system than the one that existed under colonialism, it can also be observed that "formal legal sovereignty without economic or political strength is an empty vessel; as is shown by the experience of over three decades of negotiations between the Group 77 countries and the developed states in various forms" (Picciotto, 1997:20). Picciotto points out that the notion of law being neutral serves a two-fold purpose: on the one hand, internal sovereignty, based on the notion that the state and its institutions are given formal power over a territory (a jurisdiction), legitimises coercion through the concept of universalist principles of legality, claiming to represent equality and freedom. On the other hand, external sovereignty claims states are free and equal partners, thereby legitimising the distribution of political power. One leads to and provides the basis for the other, so that

> sovereignty should be seen as a particular way of distributing political power, within and between states. The fiction of unlimited internal sovereignty is complemented and sustained by its corollary, the sovereign equality of states. The exercise of power is legitimated within the state by the generation of consensus around the national common interest. Internationally, formally equal sovereigns bargain on the basis of the national interest of each for reciprocal benefits or to secure mutual or common interests.
> (Picciotto, 1997a:265).

With examples of negotiations of inter-state bodies such as NATO or the Paris Club, Picciotto points out that although the formal status of these international bodies is "quasi-legal at best", they work with law and make policies: "there are documents and rules and agreements to be drafted, above all they deal with legal concepts and ideas such as liability, prohibition, obligation and sanction", thereby creating "less formal but in many ways more functional arrangements for coordinating state policies and action" (Picciotto, 1997:24).

Despite the clear relationship between power and law, it should be noted that Marx and Engels were aware of the relative independence of law, and Phillips suggests that the change from law as "an expression whose *content* is always determined by the relations of this class", as was written in Marx's *German Ideology* in 1845, to law's "essential *character and direction*", as it was written three years later in the *Communist Manifesto* (1948), represents a conscious limitation by the authors. After all, "it would be far easier to maintain that the 'essential character' of law is bourgeois than to show that the whole of its content is determined by the relations of the bourgeoisie" (*id.*) Phillips further points out that "the latter view would conflict with their recognition of the independent existence of law (MEW V, p. 330)" (*id.*).

Again, when applying this recognition to international law on migration, it can be noted that international human rights and refugee protection standards exist, and that they do not only represent the interests of the dominant classes of the industrial centres. Law therefore represents a site of conflict, exemplified, for example, by repeated attempts by some governments of EU Member States to change the Geneva Refugee Convention, as it was suggested in the Austrian Strategy paper, or by the UK's "new vision" for refugees (see chapters 5.3.3 and 5.3.10). The recognition that law represents a site of struggle rather than merely an instrument for either repression (as crude Marxist theories put forward) or equality (as classical theories claim), has implications for those engaged in developing strategies towards social change. The approach to legal rights put forward in this thesis is based on this recognition and has been outlined in more detail in chapter one. With regard to rights of migrants and migrant workers (and many would argue this applies to the social struggle as a whole), law should be used in a tactical manner to improve the working and living conditions of those who face repression, even though, if legal cases are won, they only imply a limited victory and have to be accompanied by a more radical struggle which challenges the basis of hegemony, namely, the logic of capitalism and the nation-state. But legal challenges do not only take place in court: in recent decades, the form of public tribunals, set up by

community organisations, activist and/or NGOs, accusing violators of basic rights, be it states or companies, have applied the logic of international human rights law to sentence perpetrators of basic rights violations, even if only symbolically.[72] The use of these symbolic verdicts, it is increasingly argued (Bennis, 2006), is to lead a fight for justice at various levels and reclaiming representations of the 'people's will', that is reclaiming institutions for popular struggles. This concerns particularly the UN, which is being used by state powers to legitimate hegemonic practices, but which also retains elements representing citizens' and non-state interests (*id.*). The legitimacy of public tribunals, as is argued by the organisers of the World Tribunal on Iraq (WTI),[73] is located in the "collective conscience of humanity". Citizens therefore are taking the failure of international institutions and states to adhere to international law as a direct legitimation for taking action and 'sentencing' those accountable for violations. Again, the WTI argues that "if the official authorities fail, then authority derived from universal morals and human rights principles can speak for the world. Our legitimacy derives from the failure of official international institutions to hold accountable those who committed grave international crimes and constitute a continued menace to world peace [and] the will to bring the principles of international law to the forefront [...]".

The social basis of legal constructions can be exemplified with the treatment of individuals and private property in classical jurisprudence: private property is central to production and is a form of appropriation of nature by an individual within, and with the help of, a definite social organisation. No matter which particular historical form private property relations take, they all depend on social relations between people, so that "the idea that ownership of property could be an attribute of the abstract individual, taken in isolation from the people, is the juridic fetish of the modern age" (Fine, 1984:105).[74] Exchange relations come to appear as self-sufficient, independent from a particular mode of production as the "exchange relation itself makes no reference to the circumstances in which individuals seek to exchange, nor to the characteristics of the commodities offered for exchange" (Fine, 1984:107). The autonomy of law theory therefore ignores the fact that the necessity to engage in exchange in the first place is based on the different needs and possibilities of people (reflected in a hierarchy of economic classes, depending on their position in the production process). Paradoxically, these differences become "the preconditions of their social equality in exchange" (Marx cited in Fine, 1984:108). In contradiction to

[72] See chapter 4.5.2 of this thesis on the Basso tribunal, which passed a verdict against EU states for violating the rights of migrants through asylum and immigration laws; more recently the EU-Latin American summit held a public tribunal against European companies operating in Latin America in violation of ILO Conventions, and the US, with its war against Iraq which illegal under international law, has been subject to a public tribunal.

[73] The World Tribunal on Iraq was set up by the global anti-war movement at a meeting in Jakarta and held its first hearings in Istanbul in July 2005. The WTI "consists of commissions of inquiry and sessions held around the world investigating various issues related to the war on Iraq, such as the legality of the war, the role of the United Nations, war crimes and the role of the media" (www.worldtribunal.org).

[74] Legal theory is often criticised as fetishist, implying that, based on a false analysis of the origins and nature of a phenomenon, that phenomenon is then given positivist characteristics that lend it an air of independence and inevitability (Fryer et al., 1981).

classical jurisprudence, which treats private property relations as relations between individuals, Marxist jurisprudence and critical legal studies analyse exchange as being in itself an organisation of production. Under capitalist relations, people are forced to exchange their labour power, so what is perceived as private interest in classical jurisprudence is in fact a socially determined interest. The starting point of analysis therefore, is not the private individual as s/he appears at the moment of exchange, but the socially determined individual. Legal relations are in fact social relations.

If legal relations are social relations, juridical classifications (the citizen, the migrant) are an expression of historically specific social relations. Marx (cited in Hunt, 1991:105) noted the social nature of apparently individual properties as follows:

> Society does not consist of individuals, but expresses the sum of interrelations within which these individuals stand [...]. To be a slave, to be a citizen are social characteristics, relations between human beings A & B. Human being A, as such, is not a slave. He is a slave in and through society.

This explains the shift from the feudal order of the subject to the "disciplinary order of the citizen" which followed the transformation "from patrimony to nation" (Negri & Hardt, 2000:95). This development was paralleled by a break with former natural conceptions of law towards what is now termed 'classical jurisprudence', where the idea of an absolutist state, derived from the 'absolute' rights of a sovereign, was replaced by modern notions of democracy and popular consent. Modern political theory, heavily influenced by struggles for justice culminating in the French revolution, increasingly argued that the state had to be a public authority based on the 'will of the people', structured through a democratic process (Fine, 1984:12-4).[75] This created the notion of sovereignty as deriving from popular consent, as well as being territorially bound, but more importantly here, it introduced the legal concept of the citizen, with corresponding rights and duties, guarded by a juridical and law enforcement system.

The importance of law in providing a regulatory framework for emerging capitalist relations was first systematically analysed by Jeremy Bentham (1748-1832). Bentham transcended what he called "fictitious categories in law" and discarded "natural rights of property" in favour of a scientific analysis of "the structure of power existing in the real world" (cited in Annette, 1979:67). The process of legislation is thereby seen as a social process, and this insight made classical theorists, and therefore policy-makers, understand that laws needed to be adapted according to current relationships between the state, capital accumulation and labour. In particular, Bentham pointed out that the law provided social discipline necessary for the labour process and was a vital tool for ordering capitalist development at the time. A

[75] That this "consent of the people" remained largely illusionary has, especially since Marx's critique of Hegel's idea of the rational state, been largely understood. See Hardt & Negri (2000:101-5) for an exposition of how the modern nation "became explicitly the concept that summarized the bourgeois hegemonic solution to the problem of sovereignty".

legislative framework was necessary for the establishment and maintenance of the emerging capitalist economy. He consequently included "indirect legislation" in his analysis, in particular the Poor Laws, schools and prisons. Annette (1979:72) finds that "[t[here was an increased awareness of the relationship between unemployment and the accumulation of capital". For Bentham, this debate also involved the question of how the 'art of legislation' could provide for the process of capital accumulation, the main political objective being "the subjection of labour to capital in the labour process" (*id.*). With the advent of industrial capitalism, law therefore started to play a central role in the mediation between capital and labour.

Over the past century, this regulatory function of law in social life has increased, rather than decreased. Hunt (1991:116) argues that

> [m]odern law occupies a position of special importance in contemporary capitalist societies. Law comes to fulfil an increasingly important role in the legitimation of the whole social order. There is a significant sense in which law moves to centre stage in the general hegemonic process. It comes to replace earlier modes of legitimacy as traditional authority (deference, patronage, and so on) and, in particular, religions weaken and decline.

Law is becoming increasingly important in regulating and upholding the global political economy. As Picciotto (1997:17) has noted, "this is especially so now, in the closing decade of this century, with major changes and conflicts in the global system, in which international law is being revamped and pressed into playing an increasingly important role". The most evident examples of this are international trade agreements forcing countries to submit to an economic doctrine of open trade or the introduction of international law laying down ownership of intellectual property, but also the creation of supranational institutions such as the International Criminal Court (ICC), which in its own words, was "established to promote the rule of law".[76] This thesis argues that EU migration law can also be placed in that category of international law which is being 'revamped' into playing an increasingly important role, more specifically mediating between international and national labour-capital relations. Chapters 4 and 5 of this thesis outline this legal development in more detail.

### 3.3.2 Citizenship as regulating capital and labour

Law regulates migration control principally through citizenship (see above). The emergence of a legal definition of citizenship in its modern form (with a consistent application of assigning citizenship to

[76] The ICC is based on the Rome Statute which came into force in 2002. The ICC is the first ever permanent, treaty-based, international criminal court see http://www.icc-cpi.int.

individuals under nationality laws which define the boundaries of and entitlements to citizenship, see Fahrmeir, 2000:16) is a relatively recent phenomenon, related to the modern state developing apparatus in Europe. Whereas "multinational agrarian empires [such as the Ottoman Empire] were [...] built on the facts of ethnic difference rather than uniformity", the nation-state is a unique development in the history of world systems in that it homogenised the peoples living on its territory into ethnic uniformity under one legal rule (Tehranian, 1998:4). The state and the nation thereby became "the principle definer of citizenship" (Soysal, 1994:16). Nationality laws established a direct link between the state and the individual, and it is this link which is of particular interest for the discussion of law, imperialism and migration control.

As indicated above, capitalist development triggered large-scale migration movements through colonialism, urbanisation and forced labour migration, and the control of people's movements was placed firmly in the hands of nation-states. As Soysal (1994:17) remarks:

> [a]s it became increasingly important who was in and who was out, the states attempted to control any movement of population across their borders by means of elaborate immigration laws. In the early twentieth century, passports and national identity cards were introduced, formalizing the status of the national citizen and, by contrast, the alien.

Legal relations, in this case citizenship laws, thereby make social actors into legal subjects, which implies that the "legal subject does not coincide with the natural person" (Hunt, 1991:108). Hunt (*id.*) points out that "there is an important connection between 'legal subject' and 'citizen' which is neither homologous nor opposed and which has important implications for our understanding of politics, democracy and participation". Law is therefore not only one way of categorising people into citizens and non-citizens; law is the very bond between the citizen and the nation-state as it has become the expression of state sovereignty (Hunt, 1991:116). Law can therefore create social relations or define the conditions under which those relation are lived out. The labelling of vast numbers of people who reside outside their country of origin without proper documents as 'illegals', for example, creates new sets of social relations, defines their living and working conditions and political struggles (demands for legalisation programmes or the right to participate in the political process, for example).

One study already referred to above and outlined here in more detail provides an outstanding example of the creation of specific social and economic relations through law and citizenship, namely the case of migrant domestic workers in Europe as analysed by Anderson (2000). Migrant domestic work has already been defined above as central to changing divisions of labour within North-South relations in that it allows for labour exploitation. Anderson (2000:176) further notes that despite varying immigration statuses of migrant domestic workers in different states, they have two characteristics in common, namely that "those who have legal status are often dependent for that status on their employer; and second, that a

large proportion of domestic workers are undocumented". In Germany, but also in the UK and Holland, for example, particularly the (seasonal) agricultural industry, building sector and services (e.g. industrial and domestic cleaning, catering, hotel industry) heavily depend on migrant and more specifically on undocumented work. In Germany, this labour is often provided by Eastern Europeans (Hinken, 2003; Hunger, 2003). Even though they are exploited and are guaranteed no social rights, the wage differential between Germany and the Ukraine, for example is roughly 100:1, making it much more profitable to work in Germany under those conditions than to remain in poverty in the Ukraine. The Berlin based Research Centre for Flight and Migration (FFM cited in Anderson, 2000:182) points out that

> [t]he new border regime and the amended legislation on aliens not only cement the economic hierarchy between states but, as 'black' labour markets expand in all countries, also give rise to a whole continuum of exploitation ... which leads to the 'illegalisation' of people from more distant countries.

This continuum of exploitation is ordered by citizenship, and to illuminate this, it is worth quoting Anderson (2000:195) at length:

> When rights are cast in terms of access to citizenship rights, the implication is that if a person is not a citizen, it is legitimate to deny her certain rights, even if those rights would be considered basic human rights by citizens. So while citizenship rights guarantee that citizens' basic human needs are met, these rights do not derive from humanity but from membership of the community. As well as a guarantee of rights, then, citizenship therefore becomes a device by which demands on the state are controlled and this denial is perceived as legitimate. Historically class inequalities may have been ameliorated through citizenship, but at the expense of other non-citizens. [...]
>
> While citizenship is tied to the notion of the nation-state, these states are bound to each other in particular economic and political relationships which have direct implications for citizens' rights or lack of them.

On the one hand, the example of migrant labour therefore shows how citizenship, based on nation-states that do not stand in an equal economic and political relationship to one another, is used to stratify rights and exploit workers. On the other hand, the example of migrant domestic work shows how non-citizenship mediates conflicts in interest between citizens who have unequal access to social rights: whereas citizenship historically accommodated class differences within a liberal democracy by granting equal access to social and political rights despite their different class positions (Marshall, 1950), it could not mediate between gender differences in the same way, due to continued patriarchal household structures, based on unpaid domestic labour (motherhood, care of family, the elderly and household), which forces women into the private sphere. Women's access to the rights of citizenship is different from men's in that

the social rights of citizenship (unemployment benefit, pension rights. etc.) are tied to the individual's position in the labour market and generally to male patterns of employment (Anderson, 2000:186). The gender conflict on access to the public sphere and the latter's related access to social and economic rights, generated through wage labour, is circumvented by relying on migrant domestic labour: the "potential conflict between the rights of two groups of citizens (men and middle-class women) to participate in the public sphere is resolved without requiring restructuring of the public and private, by using the labour of non-citizens" (*ibid*:195).

Following from the above, it can be said that capital and labour have been mediated by states throughout the past century by means of law and citizenship. This has always been a contradictory process (citizenship itself mediating differences within a population) but more recently, this contradiction has gained a new dimension through the increasing de-territorialisation of sovereignty (the nation-state), and the persistence of the legal definition of citizenship as territorially and racially bound. The continued persistence of citizenship is necessary, despite increasing suggestions or demands for a 'global citizenship', for states to be able to legally categorise populations so that they can allocate certain rights to certain groups of populations but not others. It is argued here that this is the only way that imperialism, based on a necessarily hierarchical global division of labour, is able to sustain itself. Ensuring continued capital accumulation in an internationalised and mobile world necessitates the drawing of distinctions on who is entitled and who is not. Ambalavaner Sivanandan[77] describes the role of race in this process:

> Today, the colour line, is the power line, is the poverty line. Racism and imperialism work in tandem, and poverty is their handmaiden. Those who are poor and powerless to break out of their poverty are also those who by and large are non-white, non-western, third world. Poverty and powerlessness are intertwined in colour, in race. Discrimination and exploitation feed into each other today, under global capitalism [...].

The global political economy is increasingly dependent on controlling the movement and entitlements of people through means of legal separation (citizenship) and physical migration control. It can be observed that those who are disadvantaged with regard to their residency and work status come from predominantly poor countries whose citizens are, moreover, black. A BBC investigative programme on office cleaning in London's financial and banking district,[78] for example, found that over 90% of office cleaners working for the cleaning industry in Britain are black (mainly African and Latin American) non-citizens and the sub-contractors work along ethnic community lines. Within the exploitation of 'black' workers, there are many racialised hierarchies in which workers are played off against each other and certain types of jobs are reserved for certain ethnicities and/or nationalities. Based on her research in Athens, Barcelona, Bologna,

[77] Featured in the song *Colour Line*, by the UK-based group *Asian Dub Foundation*.
[78] *The secret life of an office cleaner*, BBC2, 19.9.2005, 9:00-9:50 pm.

Berlin and Paris, Anderson (2000:153) finds that "[b]roadly speaking [...], the lighter one's skin the better one's wages and the easier it is to find work". As racism is intrinsically linked to labour and the legal status of the workers, and reproduced by employers and agencies regulating domestic work in Europe, she concludes that "[r]acism dubs black people natural slaves, immigration legislation makes of them legal slaves [...]" (*ibid*:149).

### 3.3.3 National transformations: not losing control

The traditional premises of the nation-state have been challenged with the development of capitalist relations outlined in section 2.2, in particular with the changing accumulation processes under globalised capitalism. The reconstitution of the nation-state to "serve the imperial project" has already been noted as a characteristic feature of globalisation (Petras & Veltemeyer, 2001:19). Today's political organisation is reflected "in a new international legal superstructure; in the redefinition of sovereignty and state control of the economy; in the restructuring of the world labour force and its social entitlements, and in a new ideology of borderless free markets" (Harris, 1998:22). Mander (1996:1) even contends that "[e]conomic globalisation involves arguably the most fundamental redesign and centralisation of the planet's political and economic arrangements since the Industrial Revolution".

However, there are widely contested opinions, similar to the different assessments of global capitalism as a possible representation of a fundamentally new epoch, on the extent to which the increasingly multi-lateral nature of political organisation after the world wars represents the decline of the nation-state. Sassen (1995:38), although cautious to declare it obsolete, places great importance on the weakening of the nation-state and argues that "global financial markets represent one of the most astounding aggregations of new rights and legitimacy [...] powers historically associated with nation-states". On this changing relationship, Harris (1998:30-1) notes:

> As the digital economy gains strength, it changes the relationship of capital to the state, creating a new legal structure and dominant ideology. Industrial imperialism has key differences with digital globalisation. Imperialism was tied to the national sovereignty and the state of its origin. A key aspect was the development of a broad middle class and a labour aristocracy [...]. Today's neo-liberal ruling ideology sees no national borders, only markets. The creation of jobs and a growing middle class is not an object of globalisation. International financiers could not care less about creating an inner-city middle class in Detroit or Chicago [...]. When the chairman of Dow, Carl Gerstacher dreamed of buying "an island owned by no nation", he expressed the not-so-hidden desire of his class.

The state now increasingly functions to provide a structure for the new international economy and with this development, sovereignty is being decentred to a transnational legal system and a "supranational world trade organisation" (Harris, 1998:33).

In a recent and widely debated contribution on imperialism, Hardt and Negri (2000:xii) argue that sovereignty today has taken on a new form, "composed by a series of national and supranational organisms united under a single logic of rule. This new global form of sovereignty is what we call Empire". Making a clear distinction between imperialism and Empire, the authors argue, similar to Susan Strange, that today there is no "territorial centre of power" (*id.*), that Empire is managed through "modulating networks of command" and that the "distinct national colors of the imperialist map of the world have merged and blended in the imperial global rainbow" (Hardt & Negri, 2000:xii-xiii). Hardt and Negri, but also Strange (1989:169) allude to the old Roman Empire to conceptualise this new stage:

> What is emerging therefore is a non-territorial empire with its imperial capital in Washington, D.C. Where imperial capitals used to draw courtiers from outlying provinces, Washington draws lobbyists from outlying enterprises, outlying minority groups, and globally organized pressure groups [...]. As in Rome, citizenship is not limited to a master race and the empire contains a mix of citizens with full legal and political rights, semicitizens and noncitizens like Rome's slave population. Many of the semicitizens walk the street of Rio or of Bonn, of London or Madrid, shoulder to shoulder with the noncitizens; no one can necessarily tell them apart by colour or by race or even dress. The semicitizens of the empire are many and widespread.

Here again, we can see that citizenship is central to the debate on how the nation-state is changing in a new global economy, as well as to the issue of migration control. But before turning to the role of citizenship and its role in regulating migration control, it needs to be assessed if the nation-state is really in decline.

This thesis proposes that the nation-state is far from disappearing, but rather redefining its role to serve the interests of capital accumulation in the new 'digital' economy, a position which is being increasingly adopted. Panitch (2000:5) portrays how states, after playing an active role in opening up national border to foreign capital, "are now [increasingly] encumbered with the responsibility of sustaining [globalisation]". With the example of large-scale state intervention during the 1998 East Asian financial crisis (because "there is nothing like a crisis to clarify things"), Panitch (*ibid*:6) portrays how a new systematic relationship between the state and capital had indeed emerged, "but it was not one that diminished the role of the states". Drawing on Poulantzas, who argued that it was 'fundamentally incorrect' to see globalisation as an abstract economic process, he contends that the penetration of multi-national capital into the social formation of a nation-state occurred not merely as abstract 'direct foreign investment', but as a transformative social force within a country:

> far from losing importance, the host state actually becomes responsible for taking charge of the complex relations of international capital to the domestic bourgeoisie, in the context of class struggles and political and ideological forms which remain distinctively national even as they express themselves within a world conjuncture.
> (Panitch, 2000:8-9)

The continued centrality of the state in ordering international relations is also seen in the continued national rivalry between nation-states. Dow chairman Carl Gerstacher's dream of buying "an island owned by no nation", might express "the not-so-hidden desire of his class" (Harris, 1998:31), but this desire is informed by a rather naïve fallacy which assumes that capital could be independent from any state. It is worth citing conservative commentator Thomas Friedman (cited in Boron, 2005:15-6) at length here. He scorns Silicon Valley executives who want to say:

> We are not an American company ... We are IBM Canada, IBM Australia, IBM China ... Then, the next time IBM China gets in trouble in China, call Jiang Zemin for help. And the next time Congress closes another military base in Asia, call Microsoft navy to secure the sea lines in the Pacific. And the next time Congress wants to close more consulates and embassies, call Amazon.com to order a new passport.

It is true that imperial consolidation after WWII accelerated the creation of new international legal regimes, from trade agreements to human rights legislation. The economy in particular seemed to loosen itself from scrutiny by national governments. But as indicated with various examples in previous chapters, rather than representing the weakening of the nation-state, this development merely indicated the changing role of the nation-state with regard to capital and labour.

The creation of the EU can serve as an example of how decision-making moving to a supranational level does not mean that the nation-state is losing control in the era of globalisation, but that it is restructuring politics, law and institutions to serve the interests of global capital and that the processes accompanying this reconstitution of the state are complex. With the example of EC law, Snyder (2000:293) explores the "dialectical relationship" between Europeanisation and globalisation which he thinks are "complementary, partly overlapping, mutually reinforcing, but also competing processes". More specifically, he analyses the creation and subsequent Europeanisation of technical rules governing customs and trade law known as inward processing trade law (IPT, which allows firms to import materials for processing into the EU without paying customs duties) and outward processing trade law (OPT, which allows for the temporary export of materials for processing abroad to be re-imported with partial or total relief from duties).

The development of cross-national production networks created under flexible accumulation (chapter 3.2 above), requires "the organization across national borders of research and development

activities, procurement, distribution, product definition and design, manufacturing, and support service" (Snyder, 2000:296). Indeed, in the words of the Commission, "[o]utward processing trade using local advantages for lowering production costs or the logistics of distribution systems is turning even medium-sized companies into global players" (cited in *ibid*:297). Western European firms are therefore benefiting from deploying their capital in low-wage countries, whilst not having to invest in reproduction costs or reinvesting profits in industrial branches of those countries. In the process of regionalisation discussed in chapter 3.2, EU firms are using cheap labour from and establishing regional production chains with Eastern Europe, where EU outward processing is typically applied, thereby creating "one type of international division of labour" (*id.*). However, far from being intrinsic to Europeanisation, the trade regulations were in the first instance a national response to the globalisation of production activity in certain sectors. Consequently,

> the Europeanisation of the OPT regime was "a response to the internationalisation of firms' strategies adopted by national governments in order to recapture political control over growing economic independence". The EC (mainly the Commission) sought to capture political control of the internationalisation of production via OPT by means of the law, it sought to Europeanise the legal control of OPT, in other words, to shift the locus of control of globalising firms and the development of global economic networks from the Member States to the European Community.
> (*ibid*:302)

Snyder shows how this process of Europeanisation did not simply constitute a take-over of OPT's by the Commission, but that it remains an area of conflict where Member State and EC legislation continuously interact and "Member States, largely at the instigation at firms, were able, as Pelligrin shows, to negotiate the bits and pieces of EC OPT legislation so as largely to preserve the interests of these firms" (*ibid*:304). So, rather than representing the loosening ties between the state and economy, in this instance "the Europeanisation of IPT and OPT law [...] tended to strengthen the ties between each Member State and the firms based, or located principally, within its territory" (*id.*). Similarly, Snyder (2003:304) argues that far from resulting in common EU policy approaches, "the process and the results of the Europeanisation of IPT and OPT law shaped conflicts of interest between Member States", thereby representing continuous competition amongst different capital interests.

The example of EC law on inward and outward processing shows, firstly, that Europeanisation has not led to the loss of control by Member States, but rather that another layer of decision-making and negotiation has been added to economic and political negotiations. Secondly, it shows that the nation-state has not lost control in the process of the internationalisation of capital but that it has rather subsumed the role of governing it. Finally, it is shown that Member States and the EU attempt to govern these economic aspects of globalisation through law. Another aspect not dealt with here is the interaction between national

and EC laws on trade with international agreements such as GATT, which are, however, likely to reveal the same 'dialectical relationship'.

Another example of the reconstitution rather than abolition of the state's regulatory function has already been outlined above with regard to the European Employment Strategy. In the 1980s in particular, the state supported the interests of firms by weakening the position of labour. On the basis of the emerging neo-liberal ideology that replaced corporate liberalism with individualist approaches to work, and laid the responsibility of 'employability' with the individual rather than the state, the UK Thatcher government in particular "quite deliberately precipitated a serious recession upon coming into office and allowed unemployment to rise sharply before continuing to confront the trade union movement politically" (Overbeek, 2003:27). This policy approach was continued, albeit with differences, by New Labour and its 'Third Way' in the 1990s (Jessop, 2003). On the one hand, the state started dispensing with collective bargaining mechanisms, job protection, union rights and tripartite corporatism, and replaced it with flexible wage rates and flexible labour market regulations (hiring and firing). On the other hand, it helped to create the ideological framework which redefined unemployment as a problem of the individual, not one that was intrinsic to capitalism and caused by economic factors.

At EU and Member State level, the transformation of the Keynesian welfare state to the Schumpeterian workfare state (Jessop, 1993) can be observed in the development of employment strategies. Tidow (2003:77-8) suggests that the EU, having taken on the role of a 'supranational liberalization engine' in employment matters, modified the direction of EU integration towards a "supply-side-oriented neo-liberal restructuring" at the beginning of the 1990s, in an attempt to retain legitimacy and respond to continuing mass unemployment, which had reached 11% by 1992. Despite the explicit inclusion of an Employment Strategy in the Treaty of Amsterdam (Article 3 TEU), responsibilities remained with the Member States and attention focused increasingly on labour market restructuring, based on the view that "reduced unemployment would depend on improved competitiveness and macro-economic stability" (Tidow, 2003:85). In the era of globalisation, the EU and Member States have therefore taken on the role of ensuring competitiveness through deregulation of the labour market. The change of focus from unemployment to 'employability', i.e. defining unemployment as the inability of an individual to be employed (leading to ideas of 'life long learning', human capital investment, etc.) rather than representing a structural feature of capitalism that needs to be counterbalanced with economic reform, has led "to a new understanding of labour market policy and, with that, to a new role of the state" which actively promotes 'workfarism' and active labour market policy in collaboration with private companies and industry (*ibid*:93). Interestingly, the Employment Strategy also promotes selective liberalisation of immigration controls, which is discussed further in chapter 5.4.

As already noted in chapter 2.2.3, nation-state competition remains central to the current phase of globalisation, as it is a central element of capitalism (chapters 2.2.1 and 2.2.5) and in order to survive the competitive economy, capital is in need of "the existence of a market for labor power" (Marx cited in

Barone, 1985:161). The centrality of the labour market to competitiveness is exemplified by the European Employment Strategy, as is the new, or rather, more strongly articulated role of the state to ensure competitiveness in the era of globalisation: as "the bearer of human capital, labour power itself has become a resource for economic innovation, structural change and competitiveness" (*id.*). EU labour market policy is therefore not only aimed at reducing unemployment but at the total workforce, its constitution, its reproduction and its employability, so as to ensure international competitiveness and attract capital investment. Changes in Member States' immigration policies to attract highly skilled labour are an expression of this dynamic (see chapter 5.4).

Again, as already indicated above with regard to the changing relationship between capital and labour under globalisation, migration control plays a central role in this economic process and is one more example of how the role of the nation-state has changed with globalisation. Rather than having 'lost control', states started engaging in regulatory processes with regard to migration world-wide and continued to exercise a highly restrictive and selective immigration control. Both can be seen as attempts to control the composition of the population and work force and ensure social cohesion within the capitalist centres, as well as retaining an international division of labour. Whilst national boundaries seemed to lose importance with regard to the flows of global capital, the control over issues concerning migration started to become one of the most important tasks of the state. From immigration and asylum legislation to the logistical arrangements of border control and intelligence gathering, the nation-state proves to have retained its influence over the control of populations in the era of globalisation.

### 3.3.3 The national competition state

The above section outlined some concrete aspects of the changing nature of the nation-state under globalisation with regard to labour management and the regulation of the internationalisation of capital. The second part of this chapter will briefly outline the changing nature of the nation-state in more abstract terms, taking the contribution of Hirsch (1998) into account, as it summarises various themes that are reiterated in writings on the nation-state and its changing role under globalisation. Hirsch points out that the 'security state' that dominated western Europe during the Fordist era was characterised by 'welfare', i.e. the attempt to integrate classes into the process of capitalist accumulation, but also by repression and surveillance in the attempt to prosecute and suppress political alternatives. Globalisation, with all its aspects as outlined above, has changed the nature of the state towards a 'national competition state' (*nationaler Wettbewerbsstaat*) which does not involve a loss of sovereignty but a change in political priority towards ensuring optimum capital accumulation on its territory for an increasingly transnational and flexible capitalist class in competition with other nation-states. The result of this new role is that economic prosperity, growth and welfare for the masses have come to stand in opposition to one another and not, as during the Fordist era, to be dependent on each other, leading to pauperisation of large parts of

the population. Cut-backs in welfare provisions, privatisation in health care and workfarist policies are currently being introduced all over Europe and have led to widespread protests; in Germany, for example, thousands of people staged weekly demonstrations for over one year in 2003-4 after the introduction of the so-called *Hartz* welfare reforms. Structurally, the state's decision to pull back from its traditional redistributive role has resulted in the 'de-democratisation' of state affairs, as political decisions are increasingly subordinated to global economic forces. Central banks have become increasingly independent of parliaments and governments, where political decisions are increasingly reached in direct negotiation between government and multi-national companies, so that it has become difficult or superfluous for political parties to formulate political alternatives. The development of regional economic areas such as the EU has facilitated this process: under the Maastricht criteria, economic 'reforms' were enforced that led to mass unemployment, social deregulation and poverty (Hirsch, 1998:33-4). Resistance to 'de-democratisation' and growing social protests against the pauperisation of the population is contained by the state with neo-liberal ideology presenting the developments as inevitable on the one hand, and authoritarian and repressive law enforcement structures on the other. The implementation of these repressive reforms necessitates a strong and authoritarian state, rather than a weak one, as some writers on globalisation suggest.

The state's economic function is flanked by the initiation of new political and social exclusionary mechanisms, new 'enemies' and legitimation techniques. The Keynesian welfare state, based on a Fordist accumulation regime, with its corresponding political function of reaching class compromise in form of 'social partnerships' between companies, trade unions and the state, has become a barrier to profitability. The relative dependency on capital 'fleeing' to more profitable areas necessitates the demolition of social security mechanisms to ensure profitability. In this process, the role of the state is

> to retain the population, but not capital, within [its] national boundaries. In this manner, the specific form of the bourgeois nation-state creates the structural possibility to split social classes along political-economic lines and play them off against one another. The state as a means of class domination principally has this function. [But] in the course of capitalist globalisation [this function] is becoming increasingly significant. (Hirsch, 1998:32-3)

Furthermore, this process necessitates a transformation of liberal democracy and its concepts of social cohesion, egalitarianism and civil society. After all, classic concepts of liberal democracy are based on the existence of a population with is relatively homogenous with regard to material prosperity and value systems, the *Volk*, represented through elections by a parliament and government which have the power to take decisions on all areas affecting political and economic life. Although this idealistic notion of democracy was always flawed because "[h]istorical reality shows the [state] institutions to be the product of the collective efforts not of the people but of the ruling class" (Bunyan, 1977:304), resulting in the

relative independence of capitalist classes and industry from governments and more so from parliament, globalisation has intensified this class contradiction in democratic institutions. As a consequence, democratic control and participation become increasingly meaningless; this has far-reaching consequences for ideological formations and political expressions, as there are no other centralised political-democratic institutions beyond those of the nation-state (Hirsch, 1998:37). Social and regional inequalities remain unmediated and lead to nationalist, fundamentalist and racist tendencies, supported by the individualist ideology underlying neo-liberalism. The rise of the far right in Germany and Austria, for example, can be explained by the mutual reinforcement of economic liberalism, *Wohlstandschauvinismus* ('affluent chauvinism') and right-wing populism (Klein & Arzheimer, 1999). It is noteworthy that liberal democracy is not subject to revolutionary institutional changes but that its political content (role and ideological function) is significantly changing. As democratic institutions increasingly represent the interests and reproduction of a particular class, they are no longer undermined by the contradictions of a class compromise. Bourgeois democracy,

> even in those parts of the world in which it had established itself to a degree, is increasingly becoming a mechanism for the exclusion of those who, under the logic of global accumulation processes, have become dispensable, interfering or threatening. What today is understood as democracy therefore increasingly loses the universal claim which once justified the emancipatory meaning of the term. "Democracy" is turning into a mechanism of economic mobilisation and social exclusion.
> (Hirsch, 1998:39)

It has been widely noted that liberal democratic principles are being undermined within Europe, particularly through anti-terrorist legislation but also with regard to foreigner and immigration legislation. The dismantling of the social welfare state is therefore paralleled by the extension of the police and surveillance state. The rich, nation-wide and world-wide, increasingly seal themselves off from the poor (Singe, 1998). This process, as indicated earlier, is often justified on grounds of 'security'. It is worth referring to Biel (2000:57) again, who points out that 'security' creates "conditions for the élites to enjoy their wealth", because

> the major aspect of any security system (national or international) has always been to protect [the elites] against troublesome have-nots. In practice, this usually means that the have-nots are excluded from the security the rich enjoy. The endemic violence that capitalism, as an inherently conflictual system, constantly generates tends to be borne by them.

At the global level, which is characterised by the imperialist centre/periphery relation, this process is taking place through the containment of poor populations through the restrictive development and

externalisation of migration policies (chapters 4 and 5). As already shown, citizenship is used as a mechanism to structure entitlements in this process. Within the capitalist centres, ruling classes are increasingly excluding all those from the benefits of economic growth who have become 'dispensable, interfering or threatening' to the accumulation process, they are comprised by the homeless, the disabled, the sick, the old, and generally those that do not conform (punks, youth) and those who protest against this increasing marginalisation.[79]

### 3.4 Summary

The above chapter traced the developments that have occurred in the spheres of labour, capital and nation-state in the era of globalisation. Chapter 3.1 criticised the concept of globalisation as unscientific and fetishist and argued that its use disguises uneven capital accumulation at a global scale. It was found that globalisation is the result of specific policies and strategies pursued by capital against labour since the early 1980s onwards in reaction to the crisis of the Fordist accumulation regime under increased competition on a global scale. Central to these 'reforms' was the destruction of the organisation of labour and the erosion of the post-war international system that was described in chapter 2 as a compromise not only between capital and labour but between the First and the Third World. The EU's Employment Strategy was used as an example of how the neo-liberal project is pursued at EU level with regard to labour. However, although globalisation has led to changing labour-capital relations and has transformed the role of the nation-state, it is argued that it cannot be described as a new epoch in capitalist relations. Rather, production relations and accumulation regimes have become more flexible through increased mobility and technology.

Chapter 3.2 analysed the increased flexibility of capital with regard to labour in more detail and it was found that flexibility and competition is producing pauperisation, regionalisation and migration, leading to renewed changes in the international division of labour. This is not only influenced by the movement of capital and the replacement of labour by technology but a general change in economic sectors (growth of knowledge economy and service sector), all of which have led to precarious working conditions on the one hand, and the emergence of a global labour market regulated through the state on the other.

In chapter 3.3 the role of the law and nation-state in the above developments was debated, with specific focus on their role in regulating migration. By critiquing positivist notions of law, it was found that legal relations express social relations, which, in relation to this thesis, highlights the role of law in defining the relationship between the (non-)citizen and the state and its expression of sovereignty,

[79] The marginalised are increasingly excluded from public places and controlled through bans and control orders. Both *Cilip* and *Statewatch* have closely followed this development over the past 20 years.

whereby the denial of rights is central to the concept of citizenship. With the example of migrant domestic labour, it was found that citizenship helps to exploit labour migrants and therefore remains economically beneficial for capital and the state. It was found that in an increasingly global economy and global labour market, citizenship plays an increasingly important role in this regard (chapters 3.2 and 3.3.1).

Chapter 3.3.2 critically examined the claim of loss of state sovereignty in the era of globalisation and it was argued that the role of the state has changed, but has not lost its importance. Using examples from EC law on inward and outward processing and the EU's Employment Strategy, the state is found to be regulating international flexible capital flows to ensure the competitiveness of the nation-state. The changing role of the nation-state was outlined in more theoretical terms in chapter 3.3.3. With the help of neo-liberal ideology, the 'national competition state' is found to fundamentally transform traditional notions of democracy and erode egalitarian principles.

## Chapter 4: The development of EU migration control

This and the following chapter trace the legal development of global migration management in EU legislation from the early 1980s up till today. It has already been mentioned that the treatment of immigration and asylum in the EU and its Member States has changed in the post-war period from relatively open policies in the 1950s to 1970s towards an increasingly restrictive approach from the late 1970s onwards. This shift is commonly explained by labour control in an era of increasing unemployment (chapter 1) but was also informed by a racist agenda, enforcing a deliberate restriction of African and Asian immigration into Europe (Shah, 1999:128).[80] At the policy level, with the increase in flight and migration in the 1990s and the parallel lifting of border controls within the EU, each Member State started discouraging immigrants and asylum-seekers by making its policies even less attractive than those of its neighbours, a development which Overbeek (1995:15) has called "the dynamic of competitive devaluations". Thränhardt and Miles (1995) argue that European harmonisation followed a 'logic of inclusion and exclusion', upheld by citizenship law and visa regulations. Inclusion is practised with regard to industries and citizens of EU Member States through the abolition of internal border controls and equalisation of status, and, to a lesser degree, with regard to citizens from other industrialised nations (such as the EFTA countries,[81] the U.S. and Australia) by means of liberal visa, work and residency regulations.

As argued in the previous chapters of this thesis, the logic of inclusion is "grounded in a set of common interests arising from joint participation at a similar level of economic development within the world economy" (Thränhardt & Miles, 1995:6) and the logic of exclusion is reserved for "those originating from the peripheries of the world economy" (Thränhardt & Miles, 1995:3). The above development meant that harmonisation started taking place at the 'lowest common denominator' and started creating "multiple barriers to entry" (Overbeek, 1995:30). The Schengen and Dublin Conventions as the first European instruments of harmonisation were characteristic of this, as both "in effect severely restrict the access of asylum-seekers to a fair hearing of their case, and are in contradiction of the 1951 Geneva Refugee Convention" (*ibid*:31).

As already indicated in chapter 1 when setting the parameters of the thesis, there is no claim to comprehensive recording of existing legislation. However, it should be noted here that there have been several advances with regard to the strengthening rights of migrants or refugee rights in European law, which cannot be outlined in this thesis in detail. Most noteworthy here are the laws passed on family

[80] UK Cabinet papers released by the Public Records Office in January 2002 showed that former Prime Minister Edward Heath had told his ministers to use administrative measures to favour white over black immigrants from the Commonwealth (*The Independent*, 1.1.2002). Up to today, only one out of the six categories of British citizens created under the 1981 British Nationality Act has the fundamental right to enter the UK.

[81] Switzerland, Iceland, Liechtenstein and Norway.

reunification[82] and long-term residents (LTR).[83] Despite the fact that these Directives strengthen some rights, they have also been subject to much criticism, particularly for failing to guarantee rights in national law, in some cases even undermining national protection standards. With regard to rights of long-term residents, the harmonised EU law on this matter still provides only very limited rights for third country nationals who have long-term resident status in one Member State to undertake economic activities or non-economic activities in another Member state, thereby effectively restricting the free movement of long-term residents within the EU (ILPA, 2001a). Further, concern has been voiced about the exclusion of refugees and those with subsidiary protection from the scope of the LTR Directive (ILPA, 2005b:38). The Directive on family reunification is seen to contravene Article 8 ECHR and the European Parliament has, for that reason, applied for the annulment of certain provisions.[84] With regard to enshrining a refugee definition in EU law, it is shown below that procedural asylum measures have in any case long undermined substantive law definitions. Apart from these legal shortcomings, the externalisation of migration law as well as the rationalisation of labour immigration are not counter-acted by the named Directives.

Finally, the Directives are notable in that Community law, after all, has the obligation to act in accordance with international human rights obligations and Community legislation therefore has to grant LTR's individual rights such as the right to family life as laid down in Article 8 of the ECHR. Peers and ILPA (2000:142) provide a list of international obligations that should be integrated into EU law to protect the rights of long-term residents:

> [...] Article 3 of the European Convention on Establishment sets out substantive and procedural rights which affect expulsion after specified periods of residence, and the Fourth and Seventh Protocol to the ECHR respectively ban collective expulsion of foreigners and grant them procedural rights on expulsion. Article 13 of the UN's International Covenant on Civil and Political Rights also sets out procedural rights governing expulsion. Many important rights for migrant workers are set out in ILO measures:
>
> - Convention 97 (Article 6, equal treatment on remuneration, unions, accommodation, social security, employment taxes and legal proceedings; Article 8, expulsion);
> - Convention 143 (Article 10, equal treatment in employment, occupations, social security, union and cultural rights; Article 13, family reunion; Article 14, access to all employment after two years);
> - Recommendation 86 (Article 15, family reunion; Article 16, access to all employment of workers after five years, and access to all employment of family members; Article 18, expulsion); and

[82] *Council Directive on the right to family reunification*, 22.9.2003, 2003/86/EC.
[83] *Council Directive concerning the status of third-country nationals who are long-term residents*, 25.11.2003, 2003/109/EC.
[84] The European Parliament brought an action against the Council of the European Union before the ECJ on 22 December 2003, asking the Court to annul certain provisions in the Directive (Case C-540/03).

- Recommendation 151 (Article 2, equality of treatment; Article 6, access to all employment after two years; Article 7, assistance to adapt to host state; Article 9, social policy and migrant workers; Articles 13–18, family reunion; Articles 20–22, health; Articles 23–29, social services; Articles 30–34, expulsion)

The protection of long-term residents is therefore a long-overdue process that does not contradict the creation of an very selective and restrictive migration regime. It should also be noted that the strengthening of LTR rights does not stand in contradiction to the EU's migration regime, but is an expression of one of the state's functions outlined in the previous chapter, namely, to balance the maintenance of social cohesion and legitimacy in European societies increasingly characterised by income disparities and stratified (non-)citizenship(s). They are an expression of the balancing-act European states are continuously subjected to in their contradictory role of mediating conflictual interests and an internationalised labour force in the era of globalisation.

This chapter argues that the process of decision-making in EU law on migration, namely intergovernmentality, has negatively impacted on substantive law development. Some attention is therefore given to the development of decision-making structures on Justice and Home Affairs from Maastricht to Amsterdam before outlining the restrictive development of EU migration law (chapter 4.2). Chapter 4.5 in particular outlines restrictive policies that complement each other in criminalising and controlling migration through asylum legislation, but also data collection and information-sharing mechanisms, that have a direct or indirect effect on immigration law.

### 4.1 The Europeanisation of migration law

In the first decades following WWII, the control of emigration and immigration from European states was not subject to detailed regulation and "was perceived as a matter of unfettered discretion of the public authorities", where

> [b]oth in countries where immigration law was considered part of police law (*Polizeirecht*) and countries where the status of aliens was primarily approached as part of private international law the rules on immigration of non-nationals had only partially been published.
> (Groenendijk, 1999:1)

Further, judicial review was "either not available in law or hardly used in practice, [which] added to the powers of the public authorities" (*id.*). Groenendijk (1999) points to three turning points in post-war developments in migration law in Western Europe. The earlier lack of legal provisions changed with Member States' efforts to control migration with restrictive legislation in the 1960s (see chapter 1.2 above). As migrant populations increased, so did support organisations, critical immigration law journals.

legal aid groups. Liberal immigration law associations and practices started up in France,[85] Belgium,[86] the Netherlands,[87] Germany[88] and the UK[89]. From the 1970s onwards, judicial control was introduced or extended and parliamentary scrutiny became more frequent (Groenendijk, 1999:1-2). Immigration law in the 1970s and early 1980s was mainly national, with various bi-lateral or regional conventions and agreements restricting the rights of immigration authorities by granting some substantive immigration rights (see chapter 2.1 above). National interpretation of asylum law was restricted and individual rights of refugees were given some consideration by the ratification in 1967 of the Protocol to the 1951 Convention relating to the Status of Refugees.

The first Europeanisation and restrictive harmonisation of national immigration law concerning non-EU nationals started with the Schengen process and the work of the Ad Hoc Group on Immigration, which devised restrictive immigration measures, even before the advent of the Yugoslav wars and the events of 1989 (see below). Webber (1993a:130) remarked that as early as 1993, the year the Maastricht Treaty came into force,

> [t]he 'Fortress Europe' which refugee and immigrant groups have long been warning about is virtually complete. Over the past few years, by means of conventions and agreements, laws and procedures, detention camps and soldiers, nearly all EC and EFTA states have set out to make it impossible for immigrants and asylum-seekers to enter Europe.

Therefore, although the restrictive legal changes in Member States' and EU policy on migration implemented in the 1990s are often seen as a reaction to the noticeable increase in refugee and economic migration (bearing in mind the distinction of the two is difficult), which considerably politicised the migration discourse in the EU (Geddes, 2003:18), this development in fact started much earlier than 1989. The official justification for the first restrictive EU decision-making on migration in the early 1980s was the coming into force of the SEA in 1986, which also marked the beginning of the Europeanisation of migration law.

[85] Formed in 1972, the legal aid group GISTI publishes and provides training for immigration lawyers and has won many test cases against repressive migration law in France.
[86] Student demonstrations against deportations led to public discussion and legal changes to immigration law in Belgium and the first immigration law journal was also published in 1972.
[87] An immigration lawyers association was formed in the Netherlands and started publishing and lobbying for more immigration rights in 1972.
[88] Also in 1972, a group of critical lawyers founded the *Initiativkreis für die Reform des Ausländerrechts* and the 1967 German Aliens Act came under increasing criticism for granting wide discretionary powers to the Aliens Police.
[89] Ian Macdonald published the first edition of his textbook on UK immigration law in 1972.

### 4.2 Early decision-making on migration

As outlined above, Member States started closing down legal entry channels for immigration in the late 1970s and in the 1980s, national asylum and immigration legislation became increasingly determined by the European and, more specifically, the JHA Council and various immigration *ad hoc* Groups and Working Parties. The significance of intergovernmental policy-making, rather than cooperation based on community law, which underlies certain rules and specific jurisdictions, lies in the role of EU political and legal institutions, the legal effect of the rules adopted (den Boer, 1996; Bieber & Monar, 1995) and the transparency and therefore accountability of the decision-making process (Bunyan, 1993:37-40, 1999). The intergovernmental policy procedures[90] through which European migration law developed prevailed even after the Amsterdam Treaty came into force (transferring migration from the third pillar to the first and therefore to community competency).

It is argued here that the structures of decision-making have had a restrictive influence on the substantive law developed in intergovernmental settings, and intergovernmentality as a whole is an expression of the rise of the 'security state'[91] in Western Europe and the "degradation of democratic regimes" in the era of 'globalisation' (Boron, 2005:4). Overbeek (1995:31) notes that the increasing conflation of migration and security in intergovernmental structures points to "an increasing parallel between the issue of migration and of defence, another area where the [then] Twelve prefer to do business outside the corridors of the Brussels EU office blocs".

A brief outline is provided below of the main pre-Maastricht structures responsible for migration policy in the 1980s. The focus hereby is on the conflation of migration issues with those of security. The premise of this outline is that migration is always perceived through a political discourse and the (hierarchical) relationship between sending and receiving states defines the perception of migration in its current historical phase. Particularly, the assessment of migration depends on the views taken by organisations in receiving countries and "these views are more to do with decisions made within organisations than they are a result of the personality or character of individual migrants" (Geddes, 2003:2-3).

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[90] Intergovernmental decision-making in the EU is commonly traced back to the 1970s, when the mainly economic nature of the 1958 TEC Treaty was supplemented by *ad hoc* policy coordination outside the formal Treaty structures. This first became known as European Political Cooperation (EPC), renamed 'Common Foreign and Security Policy' (CFSP) with the coming into force of the Single European Act (SEA) in 1986. However, as Peers (2000:9) points out, "[i]t is not widely realized that cooperation on Justice and Home Affairs began even earlier than foreign policy cooperation", with discussions on criminal judicial cooperation in the attempt to avert potential fraud within EC finances.

[91] A 'security state' usually refers to the Western model of the security state that developed through and after the two world wars in the 20th century. 'State security' here refers to the "relationship between state and society where the state provides insurance against the impact of 'external' contingencies" (Mabee, 2003:143).

4.2.1 Trevi, Schengen and the Ad Hoc Group on Immigration

The conflation of migration with security was represented institutionally and at EU level by the Trevi[92] group of interior ministers and senior officials, which was set up in 1975 after a number of intergovernmental meetings on terrorism in the early 1970s.[93] Trevi's purpose was to counter terrorism and coordinating policing in the (then) EC. The creation of the Trevi group preceded that of Schengen and in the latter half of the 1980s (in the wake of the Single European Act), Trevi's remits were extended to include 'security aspects' of all matters of free movement, including immigration, asylum, visas and border control. Webber (1993b:142) has pointed out that

> [w]ith its informal discussions and secret agreements, far from the scrutiny of the European parliament or even the national parliaments, the Trevi group served as a model for the development of common immigration and asylum policies.

Intergovernmental decision-making and the conflation of security, policing and immigration under Trevi was influential in shaping policies; a senior officer at Scotland Yard[94] explained that

> [o]nce you get your proposal agreed around the individual working groups, you will get a ministerial policy decision at the end of the current six months. You must remember that the largest club in the world is Law Enforcement - and in Trevi you have that *plus* ministerial muscle.

In the late 1980s, Trevi started to put forward proposals on shared information systems on migratory flows (CIREA, CIREFI, 'early warning systems'), clandestine migration networks and forced return. Structurally, the conflation of the issue of migration with that of the ill-defined notion of 'security', implied the creation of close networks and decision-making procedures between authorities responsible for the disparate areas of policing, customs, immigration and intelligence gathering.

The Schengen process extended and refined this security-led development of the EU's migration approach, characterised by the 1985 Schengen Agreement and the 1990 Schengen Convention (or

[92] Although opinions on the origins of the term 'Trevi' differ (Bunyan (1993a:34, fn 3), the acronym is commonly ascribed to *Terrorisme, Radicalisme et Violence*. See Bunyan (1993a:15-20) for a detailed outline of the Trevi structure.
[93] Which resulted in a UK initiative at a Council of Ministers meeting in Rome in December 1975.
[94] *Interpol*, Fenton Bresler (1992: 161) cited in Bunyan (1993a: 15), italics in original.

Schengen Implementation Agreement, hereafter SIA).[95] Schengen began as an entirely intergovernmental process between five EU member states because the EU could not reach an agreement on the abolition of internal border controls. With the UK refusing to end entry checks, France, Germany, Belgium, Luxembourg and the Netherlands decided to start negotiations outside the Community legal system. Although it could have been argued that Article 100 or 235 TEC on visas and internal market measures respectively would call for Commission involvement, the Commission's attempts to gain control over matters on immigration and the field of JHA in general remained unsuccessful (see Hailbronner, 2000:47-51). After a failed attempt to use Article 100[96] for a Directive on illegal immigration and asylum, the Commission soon gave up on the issue, in particular in the face of the Schengen negotiations (Peers, 2000:63-6). Although the Schengen process did not take account of EU competencies, its aim was the implementation of the Single European Act, legally speaking, the insertion of Article 8a TEC[97] under the SEA reforms.[98] Peers (2001:36) explains the relationship between and conflation of the intergovernmental Schengen process with EU law:

> The ongoing 'widening' and 'deepening' of Schengen, as its organs made a number of decisions implementing the Convention, meant that the cross-over between Schengen and JHA cooperation was continuingly increasing. The convergent geographical and material scope of official European integration under the EU Treaty and 'black-market' Schengen integration led some Member States to suggest that the two processes should be formally reconciled. This was to become another topic for the Amsterdam Treaty negotiations to consider.

Far from being opposed to the actual process of Schengen, the European Commission always had an observer status at Schengen meetings and, as Webber (1993b:143) argues, the Commission

> regarded the drafts produced by the working groups as a 'laboratory' of what the Twelve (the EC) will have to implement by the end of 1992, since the Five are confronted by the same problems as those facing the Community.

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[95] The SIA obliges its signatories to the gradual abolition of checks at their common borders and outlines provisions on visas (Articles 1-27), with related measures on asylum requests (Articles 28-38) and police and judicial cooperation (Articles 39-91) as well as creating a Schengen Information System, or SIS (Articles 92-119). It was implemented by an Executive Committee (Schengen Executive Committee), which had the power to take decisions and was assisted by a Central Group similar to the K4 Committee (created under the TEU) with a similar set of working parties.

[96] Article 94 under the Amsterdam Treaty.

[97] After the Maastricht Article 7a TEC and after Amsterdam Article 14.

[98] Which required Member States to "adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992" and laid down that this internal market "shall comprise an area without internal frontiers in which the free movement of goods, services, persons and capital is ensured in accordance with the provisions of this Treaty".

The Commission also played an important role in shaping migration control policies with regard to the rationalisation of immigration controls, outlined in the next chapter.

Another major policy-making group that defined the restrictive approach to EU migration policy in the 1980s, and which prepared most of the policy proposals now in place, was the Ad Hoc Group on Immigration (hereafter AHGI).[99] The AHGI consisted of EC interior ministers[100] and was created with the remit to devise policies that should "end abuses of the asylum process" (Webber, 1993b:144). The AHGI met bi-annually with Trevi and immigration ministers, which, politically speaking, represented the formal conflation of migration issues with those of terrorism, crime and 'security' (Bunyan, 1993). Like Trevi, the AHGI was surrounded by secrecy without much publicly accessible information on its structures and documents produced,[101] and between 1986 and 1992, the AHGI drew up a series of restrictive and conservative immigration laws that have since defined national and EU approaches to legislation (see below). These include increased visa restrictions, the introduction of carrier sanctions, the concept of manifestly unfounded asylum claims (and related safe country principles), Eurodac and information exchange systems such as the Rapid Consultation Centre, CIREA and CIREFI.

### 4.2.2 The Schengen Agreement

Although the SEA was officially the last step to the creation of the single European market, the Member States' failure to abolish internal borders until the given deadline of 31 December 1992 (in spite of very active Schengen working groups) indicated that the Schengen process was primarily used to set the agenda for an increasingly restrictive migration management for non-EU nationals. As indicated above, the argument put forward by politicians and law enforcement was that the abolition of internal border controls would lead to an increase in migration and crime. A 1988 report of the UK House of Lords Select Committee on the European Communities went so far as to claim that once they had "breached the perimeter fence, terrorists, drug smugglers, other criminals, refugees and other undesirables would be able to circulate freely" (cited in Fekete & Webber, 1994:27). The frontier-free internal market was therefore

[99] Set up in 1986, the same year the Single European Act was signed, by a special meeting of interior ministers in London on 28 October under a UK presidency.
[100] The AHGI comprised five immigration sub-groups, on external borders, expulsion and admission, asylum, visas and forged documents.
[101] In 1993, six years after its initial creation, the *Guardian* newspaper revealed the existence of a previously unknown 'Expulsion Sub Group', which concentrated on deportations of non-EU citizens and planned rigorous checks to identify and expel foreign students and residents who took up undocumented work (*The Guardian* (26.5.1993) cited in *Statewatch Bulletin* 4(1), 1994). It also drew up plans for the stricter monitoring of short-stay visitors and those falling under family reunification regulations (*FECL* 16, June 1993).

made dependent on the control of the EU's external borders, the selective restriction of migration in general[102] and the control of migrants within the EU's borders.[103]

Although the Schengen process was said to regulate free movement within EU territory, as outlined by the SEA to be achieved by 1992, rather than ensure the possibility of free movement, the SIA has actually been regulating the gradual clamp-down at Europe's external borders. The core aims of the SIA are:

- to put a halt to unwanted immigration into Europe, through external border controls and the harmonisation of asylum laws in all Schengen states (further regulated by the 1990 Dublin Convention),
- to extend police co-operation at and across European borders,
- to facilitate exchange of data throughout Europe through the SIS, which holds personal data on asylum seekers and refugees either to be rejected at borders or wanted for deportation.

Only four of the 142 SIA Articles deal with free movement. The remaining 138 Articles introduce increased external border control, police cooperation, the SIS and restrictive immigration, asylum and drug trafficking regulations.[104]

### 4.2.3 The Belgian Presidency Declaration

Another important document consolidating the harmonisation process and the restrictive development in EU migration control was a Belgian presidency declaration of 1987.[105] It outlined first policy proposals and emphasised that "a reduction in [...] controls at the internal borders of the Community must be accompanied by, and depends on, a strengthening of the controls at the external borders of the Community". In the same document, the Trevi ministers declare that "safeguarding free society" is necessarily dependent on "examining in particular how to further intensify cooperation in the fight against terrorism, illegal immigration and drug trafficking".

During this ministers' meeting, policy directions were laid down with regard to visa policy, external and internal border controls. The treatment of asylum seekers was reduced to decisions on

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[102] Through the imposition of visas, readmission agreements, limited work permits, carrier sanctions and the regionalisation of refugee crises.

[103] By means of data collection on foreigners, visa impositions and particularly in Germany through stop and search operations, see below.

[104] These 'compensatory measures' were worked out in conjunction with a Trevi working group, the so-called Trevi 92 group, which was set up in April 1989 to assess the "policing and security implications of the creation of the Single European Market - namely the abolition of internal borders and the strengthening of the external borders of the EC". TREVI 92 worked closely together with the customs group (MAG 92) and the AHGI, which later extended the SIS to a Community based European Information System (EIS).

[105] *Declaration of the Belgian Presidency: Meeting of Justice and Interior Ministers of the European Community in Brussels*, 18.4.1987, reproduced in Bunyan (ed.) (1993:9-12), produced after the first official meeting of Trevi and immigration ministers on 28 April 1987.

introducing carriers' liability, harmonising procedural asylum rules in relation to 'manifestly unfounded' claims, simultaneous applications and deportations, as well as in the detection of false documents. These proposals were further developed in the Palma Document, which was published two years later (see below).

### 4.2.4 Formalising informality

Trevi and AHGI structures were integrated at the end of the 1980s, when the 'Coordinators' Group on the Free Movement of Persons' was set up at the Rhodes EC Council meeting in 1988.[106] The Coordinators' Group united the discussions on all the reports from the JHA working groups, including Trevi and the AHGI, and coordinated the existing working groups on immigration and asylum, policing, legal cooperation, customs, drugs and terrorism with a view to practical policy implementation. In their own words,[107] the Coordinators' meetings "are not an extra forum for discussions" but they are held with the intention of:

> - coordinating, giving an impetus to and unblocking the whole complex of intergovernmental and Community work in the field of the free movement of persons; and
> - submitting to the Madrid European Council a report on the free movement of persons and the establishment of an area without frontiers, including the measures to be adopted by the responsible bodies and a timetable for their implementation.

The group's remit was therefore to prepare the 'compensatory' measures related to the abolition of internal border controls under the SEA. Similar to the AHGI, the Coordinator's Group produced various documents that were to put 'Fortress Europe' into place; the most important measures are set out in the so-called *Palma Document*,[108] which was published in 1989 and adopted at the Madrid EU summit the same year. The group was also responsible for preparing the infrastructural arrangements that were to underpin Title VI. This meant drawing up the new JHA structures which were later created under the Title VI (Article K) TEU, namely the JHA Council, the K4 Committee, three Steering Groups and their respective working parties. The group was taken over by permanent structures based in the Council after the TEU came into force on 1 November 1993. The group's members, however, merely shifted to the K4

[106] The Coordinators' Group consisted of 12 senior officials from the interior ministries, a chairman and a vice president of the European Commission responsible for the interior market and held monthly meetings and prepared six-monthly reports to the EC Council meetings at the end of each presidency (Bunyan, 1993:28).
[107] *The Palma Document. Free Movement of Persons. A Report to the European Council by the Coordinators' Group,* Madrid, June 1989, reproduced in Bunyan (1997:12-13).
[108] Reproduced in Bunyan (1993:12-16).

Committee, which integrated all prior ad hoc groups. As outlined below, intergovernmentality remained the central form of decision-making under the TEU.

### 4.2.5 The Palma Document

The *Palma Document* sets out "the essential measures to be implemented in order to 'compensate' for the removal of internal border controls, and the transitional measures needed prior to the creation of permanent structures". The militarisation of the EU's external borders, increasing police powers and the 'fight' against irregular immigration thereby gained a central position in EU law-making. The document coincided with the breakdown of the borders upheld until then by Cold War policies in eastern Europe. The events of 1989 exacerbated the security focus in EU migration management and were henceforth used as a further justification for EU Member States to implement restrictive and repressive migration control measures.

Next to the restriction of asylum and other forms of legal entry into the EU, the catalogue of compensatory measures proposed by the Palma Document and later implemented by Member States included external border controls,[109] visa policy,[110] restrictive asylum measures[111] and technical aspects of migration management.[112] The Coordinator's Group painted a picture that blamed migration and therefore migrants for crime and economic crisis alike:[113]

> The actual deportation of people who are living illegally on the territory of the Member States should, according to the Presidency, be the subject of particular attention in as far as national efforts must be complemented by a European approach. [...] In effect, the increase in migratory pressure goes hand in hand

[109] Definition of common measures for checks on external borders, tightening checks at external borders and increased finance for the same.
[110] A common negative visa list to be updated every six months and the harmonisation of visa procedures (including a European visa), a common list of persons to be refused entry and the harmonisation of procedures for dealing with them, the computerisation of the exchange of information needed in visa processing.
[111] The prevention of asylum seekers from applying in more than one member state (preparation of the Dublin Convention), 'simplified or priority procedures' in the case of 'unfounded' applications (later known as 'manifestly unfounded asylum applications', see below), defining conditions governing the movement of the applicant between Member States whilst the claim is being examined (i.e. the restriction of movement to, for example, administrative districts, as is the case in Germany), or imprisonment (practised all over Europe and particularly in the UK, see 'Jail: our word for welcome', Kate Allen, *The Times*, 20.6.2005).
[112] Surveillance system with improved cooperation and exchange of information between law enforcement agencies and customs, combating illegal immigration networks, establishing an information exchange system on wanted and inadmissible persons (SIS and European Information System), deciding which state is responsible for deporting immigrants and rejected asylum seekers from EC territory and establishing a financing system for deportations and expulsions, the conclusion/establishment of re-admission agreements of third country nationals (which later became part of the Action Plans), introduction of the obligation for foreigners to fill hotel registration forms.
[113] *Group of Coordinators "Free Movement of people" - work programme of the Belgian Presidency*, 28.6.1993, CIRC 3653/93, Confidential.

with the economic crisis. Uncontrolled immigration could in the end destabilise our societies and undermine the integration of third country nationals who are legally resident in the Member States.

This statement would be significantly revised ten years later under the EU's 'new' approach to immigration (chapter 5.4.1). The asylum and immigration measures that followed the Palma Document were considerable. In the majority of cases, the realisation of the aims of the Palma Document (that is the legal work and adaptation of old provisions) were drawn up by the AHGI and all of them have by now found their way into EU and national law, as shown below.

### 4.3 Critique of the Schengen logic

In its *Civil Liberties Series*[114] (1997) the European Parliament writes that the SIA "produced a model for EC immigration policy based on a mix of tight external controls and random internal checks". The SIA can therefore be seen as representative of the EU policy approach towards migration and migrants and refugees as a whole. The 'logic' of tight external controls and internal checks and its impact upon migrants' and refugees' lives has been subject to much criticism.

In practice, the Schengen Convention made it virtually impossible for non-EU citizens to enter the EU without a visa as Schengen introduced the common visa lists, which placed considerable restrictions on individual Member States relaxing visa restrictions for certain countries, thereby giving the dominant Member States (and Schengen founders) the power of determining a restrictive visa list (Roth, 1997:13).

Through its external border control provisions and cross-border police cooperation measures, Schengen has led to a considerable increase in police, customs and military presence at the EU's external borders. The German border police in particular led the way in this development, deploying more than 10,000 police and customs officers at its eastern borders to Poland and the Czech Republic by 1997 (Diederichs, 1993). The interior minister Manfred Kanther at the time proudly declared that "there is no higher police density at any other European border" (cited in Schubert, 1997:6).

Internal checks have led to discriminatory police practices against ethnic minority and migrant communities at the hands of police and immigration officials:[115] internal checks on migrants by their very nature have to be carried out on the grounds of people's external appearance, and 'looking like a migrant' in Europe still implies being black. This principle of internal checks is enforced with particular vigour in Germany, which established a 30 km strip from its external borders inwards in which police can carry out

[114] *EU anti-discrimination policy: From equal opportunities between women and men to combating racism*, LIBE 102, December 1997.
[115] *EU anti-discrimination policy: From equal opportunities between women and men to combating racism*, LIBE 102, December 1997.

arbitrary stop and search operations on suspicion of illegal entry (Kant, 2000).[116] Whereas stop and search operations are met with suspicion and critique on the grounds of racist discrimination in the UK, for example, there is no such public outcry in Germany and people are regularly stopped and searched on the basis of the colour of their skin.[117] Stop and search operations are not new to Member States' police practices, but Schengen introduced arbitrary police controls with the explicit purpose of systematically controlling migrants in the form of the *Pilot Project [on] Illegal Immigration and Human Trafficking*, which was created through a decision of the Schengen Executive Committee (Kant, 2000). In October 1998, for example, the German Federal Crime Office, the Federal Border Guards and regional police forces took part in a three day international operation with coordinated border controls and inland stop and search operations, specifically targeting refugees along the "main trafficking routes". Around 706 refugees, who illegally entered or resided in Germany, were caught during this operation.

The Schengen Information System, created under Article 93 SIA "to maintain public order and security, including State security" has also been subject to much criticism: the SIS is a central element of the control aspects of the EU's migration regime and potentially violates data protection regulations due to its lack of clear legal protection in Community and national law (den Boer & Corrado, 1999:416-7). Further, it has an intrinsically discriminatory function, representing a central police database on foreigners in the EU with no regard to any criminal activity carried out by them. By 1 January 1999, 88% of all data entries concerning persons in the SIS concerned third country nationals (Busch, 2000).

Finally, the Schengen system has made it considerably more difficult for certain third country nationals to travel through the Schengen area, throwing up serious concerns about discrimination: third-country nationals[118] who must carry an airport transit visa (ATV) to pass through an international airport in EU territory, for example, are subject to stringent restrictions in the issuing of those visas. The reasoning for the imposition of such a visa requirement is that nationals of these countries represent a high-risk category for illegal immigration. However, the fact that eight of the countries listed as 'ATV countries' were in the top ten countries of origin of asylum seekers in Europe and the fact that asylum seekers from Afghanistan, Iraq and Iran have relatively high recognition rates in some Member States, "seems to contradict to a significant extent the apparent official reasoning that the ATV requirement is only imposed on those countries perceived as constituting a high risk for illegal immigration"

[116] Typically on thoroughfares (motorways, through-routes in Europe and other important cross border traffic roads), in public international transport facilities, at airports, in trains and train stations or in principle in public transport areas. The reasoning behind arbitrary stop and search, according to police regulations and the Federal Border Law, is the "prevention and ending of illegal crossings of national boundaries" and "illegal residence" as well as the "preventative fight against cross border crime". It is argued that due to the abolition of internal border controls by the SIA, the crime filtering effect of border controls is no longer present. "Criminal or offensive goods and illegal services", it is claimed, can now be transported easily from one country to another. Furthermore, the high "pressure of illegal migration" on borders is undiminished (Kant, 2000).

[117] *Statewatch Bulletin* (vol 11 no 2, March-April 2001).

[118] Annex III of the Common Consular Instructions defines these as Afghanistan, Bangladesh, Congo, Eritrea, Ethiopia, Ghana, Iraq, Iran, Sri Lanka, Nigeria, Pakistan and Somalia (Cholewinski, 2002a:35).

(Cholewinski, 2002a:37). The increased controls and more stringent rules on crossing external borders implemented through Schengen has undermined the fundamental right to be free from discrimination through the distinction made between EU national and third country nationals, whereby this distinction is arguably guided by racial and ethnic factors (*id*).

It should also be noted here that alarmist forecasts of uncontrolled migration and 'organised crime'[119] following the abolition of border controls was never actually validated by any data. In fact, there is still no proven link between the abolition of border controls and an increase in either migration or crime.[120] The argument that the implementation of the SEA would lead to a loss of security is viewed as untenable by the European Parliament[121] as well:

> - even before the mid-1980s, border checks were only random. The traffic resulting from greater integration of the EC meant that thorough checks on traffic crossing the border were only possible in exceptional cases [...]
> - as statistics from the Member States show, the border is useful as a search point for minor crime, but not for "organised crime" which has been at the centre of "security" campaigns since the 1980s.

And even if the control of people's movements is called for, the SIA[122] can be suspended at any time "in the event of a serious threat to public policy, public health or internal security", if signatories feel fit to do so.[123] Although Article 2.2 SIA holds that "[i]nternal borders may be crossed at any point without any checks on persons being carried out",

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[119] On grounds of an analysis of the statistics and definitions used in German police situation reports on 'organised crime', Pütter (1997:15-25) demonstrates how the very concept lacks analytical powers and is used as a political instrument to justify increasing law enforcement powers and technologies. In Germany, organised crime is the "planned perpetration of crimes that are of considerable importance as a whole or individually, if more than two people, for a longer or indefinite period work together a) under commercial or business like conditions, b) with the use of violence or intimidating tactics or c) whilst influencing politics, media, public authorities, the judicial system or the economy". A similar definition applies at European level, where the Commission itself defines it in its glossary as involving "groups of criminals, usually acting with a financial incentive e.g. traffickers in drugs and human beings". Because these definitions lack precision and do not show how organised crime differs from any other crime (except the stipulation that organised crime must involve at least two people or financial gain), Pütter shows how statistics on organised crime are so all-encompassing that they remain meaningless.

[120] At a Conference on *Free movement after enlargement: East-West migration and emerging cross-border labour markets*, organised by the Sussex European Institute and the Centre for Migration Research at Sussex University (26.11.1999), Marek Kupiszewski (Leeds/Warsaw, Institute of Geography) was supported by other contributors when he not only stated that the forecasting of international migration movements had previously been marked by errors "into thousands of percent", but that past experiences with Ireland, Spain, Portugal and Greece had proven that economic disadvantage and open borders do not lead to 'floods' of immigrants, not even to a substantial amount of migration in terms of labour demands.

[121] European Parliament Civil Liberties Series, LIBE 110, 2000, p 2.

[122] Now the integrated free movement provision in Article 62 TEC.

[123] This provision for suspension, originally laid down in the SIA, is in the process of being integrated into community law with the *Proposal for a Council Regulation establishing a Community Code on the rules governing the movement of persons across borders* 26.5.2004, COM (2004) 391.

> [n]evertheless, where public policy or national security so require, a Contracting Party may, after consulting the other Contracting Parties, decide that for a limited period national border checks appropriate to the situation shall be carried out at internal borders. If public policy or national security requires immediate action, the Contracting Party concerned shall take the necessary measures and at the earliest opportunity shall inform the other Contracting Parties thereof.[124]

Therefore, although no checks on persons shall be carried out when crossing internal borders, the unilateral introduction of controls at internal borders is granted "where public policy or national security so require" after consulting the other Schengen contracting parties (*id.*). The consultation requirement does not have to be followed in those instances when the state deems it necessary to act immediately when an 'extreme urgency' exists.[125] Apap and Carrera (2003:3) note that "[e]ven though this provision must be used exclusively under the exceptional circumstances of an emergency and for a limited period of time, looking at the states' practices, however, their use of the provision has not been so exceptional, but rather a common practice".

Border controls have in fact regularly been reintroduced for European summits or football matches, for example. Although "public information is lacking on when and how the states' authorities have implemented [the provision] and [...] looking at the public server of the EU Council, available information about every single application of the exceptional clause seems to be less than exhaustive" (*id.*), NGOs have monitored its use and it can be observed that states use the provision often and particularly for stemming public protests: between 2001 and 2003, states introduced border checks at least 26 times. Of these, controls were adopted

> 16 times to counter demonstrations taking place at international summits. This policy does not just mean that identity checks take place during the limited periods, but that hundreds (and in some cases thousands) of people are refused entry to the member states to which they are travelling - a massive restriction of the EU's four supposed fundamental freedoms (of movement).[126]

Other reasons given are regularisation programmes to prevent migrants from other countries benefiting from the scheme (Belgium), or Holland's liberal drugs policy (France) (Ireland, 1998:308). Visits of high-ranking politicians and political summits, however, are predominantly used as events to curtail freedom of movement. More recently (May 2005), interior ministers from all the German federal states published a

[124] The legal base of which are Articles 62.1 and 64 TEC.
[125] Schengen Executive Committee decision on the procedure for applying Art. 2.2 SIA, 20.12.1995, SCH/Comex (95) 20 REV 2.
[126] *Statewatch European Monitor*, Vol 3 No 4, 2003, pp 31-2.

security concept for the 2006 world football championship, which foresees the temporary suspension of the Schengen free movement article.[127]

To sum up: despite the fact that security and free movement have an undefined relationship, the continued claim[128] that they have a causal relationship has formed the basis for all repressive migration-related policy in the EU since the mid-1980s. This justification continues to be put forward despite the fact that Member States retain powers to reintroduce checks.

### 4.4 Decision-making under Maastricht and Amsterdam

As indicated above, intergovernmental decision-making has been criticised for its unaccountable procedures and lack of parliamentary involvement, as well as its weak legal implications, leading to predominantly procedural changes that have implicit consequences for substantive law (Peers, 2000; Hailbronner, 1998; see further below). The Maastricht Treaty, it was argued, would bring JHA decision-making under community competencies. At a European Council meeting, EU leaders pledged that the TEU, "for the first time in the history of EU integration [contains] provisions which define the framework for systematic cooperation between the Member States in the fields of Justice and Home Affairs" and that this will "increase the transparency of the decision-making machinery and facilitate the democratic control of activities".[129]

However, rather than abolishing intergovernmental decision-making, the Maastricht Treaty formalised it and removed EU migration law from community competence by creating the third pillar of Justice and Home Affairs[130] (with very limited involvement of the European Commission, the European Parliament or the ECJ[131]). The reluctance to bring these policy areas under Community competence was justified at the political level with reasons of national sovereignty, i.e. that 'sensitive' political issues such

[127] *Süddeutsche Zeitung*, 27.5.2005; *Jungle World*, 1.6.2005.
[128] In 2004, the Commission's website on establishing an area of freedom, security and justice repeats this claim in its introductory paragraph: "Falling frontiers between the European Union Member States are bringing many benefits, but they are also making it easier for criminal organisations to be active across Europe. Whereas the scourge of organised crime is not new, criminals have been taking advantage of fast moving technological advances such as the Internet, overall globalisation and, as far as the European Union is concerned, the freedom of circulation and establishment the single market entails" (http://europa.eu.int/comm/justice_home/fsj/crime/wai/fsj_crime_intro_en.htm).
[129] *Conclusions of the Presidency of 29 October 1993, European Council, Brussels: Chapter V: The area of justice and home affairs*, reproduced in Bunyan (1997:22-23).
[130] The first pillar came under the TEC and covered economic and social affairs and general rules and provisions. The second pillar came under the TEU and covered foreign, security and defence policy. The third pillar also fell under the TEU and covered policies and regulations on immigration, asylum, policing (internal security) as well as criminal and civil law (judicial cooperation).
[131] The only JHA area under community competence was that of visa control, laid down in Article 100c TEC, whilst asylum policy, rules governing border-crossing and controls at external borders, immigration policy and policies regarding third country nationals remained intergovernmental.

as migration and security cannot be decided on at supra-national level. Although now replaced by the Amsterdam Treaty, the Maastricht era was fundamental in creating the EU's current migration regime.

Legally speaking, the ad hoc arrangements were made permanent by the creation of the JHA Council and the K4 Committee (replacing Trevi, the AHGI and others) under the new Title VI (Article K) TEU.[132] Noteworthy with regard to migration and security is that Article K2 laid down that Title VI may not restrict Member States' responsibilities with regard to maintaining "law and order and the safeguarding of internal security", thereby leaving the door open for governments to restrict asylum and immigration rights with the argument of national security. Article K7 further laid down that the European Court of Justice (hereafter ECJ) had no mandatory jurisdiction in JHA matters, even for the application of Conventions, implying that governments could circumvent the involvement of EU political institutions for the sake of flexibility and closer cooperation by Member States agreeing measures between themselves outside the EC and EU structures (Hailbronner, 2000).

Because there was no central decision-making point, the K4 Committee (unaccountable to parliament, just like its predecessors, the AHGI and the Coordinator's Group) played a central policy-making role during the Maastricht era, with the coordination of visa controls among Member States being the only policy area within community competence. With regard to transparency in decision-making, it has been noted that far from clarifying non-transparent pre-Maastricht structures, post-Maastricht still retained five layers of decision-making until the UK presidency of 1998 abolished all Steering Groups (Peers, 1998:1239).

In the literature on EU law, the Amsterdam Treaty,[133] like the Maastricht Treaty seven years before, was generally seen as an opportunity to address the shortcomings of the pillar structure. It integrated parts of the third pillar (immigration, asylum and civil law cooperation) into the first,[134] putting matters of migration under Community competencies and related parliamentary and Commission powers and ECJ jurisdiction. Amsterdam therefore introduced far-reaching changes to the Maastricht decision-making structure.[135] The integration of the Schengen *acquis* into the *acquis communitaire* was one of the main changes the Treaty brought about, as well as introducing a comprehensive Title on migration

[132] For an explanation of the Maastricht arrangements and a full-text version of Title VI TEU (*Provisions on Cooperation in the Fields of Justice and Home Affairs*) see Bunyan (1997:23-25).
[133] Which was signed in 1997 and came into force on 1 May 1999.
[134] Whilst police, criminal and customs cooperation remained in the third.
[135] The Amsterdam Treaty introduced a complicated set of rules, as it did not only have to find a legal basis for all Maastricht and pre-Maastricht decisions and Conventions, but it had to satisfy all Member States according to their pro-EU, anti-EU or 'mixed-feelings' approaches (see Hailbronner, 1998; Peers, 2000, amongst others).

policies into the TEC,[136] therefore putting JHA at the centre of EU policy-making, which was further consolidated by the Tampere summit and its Conclusions.[137]

The Amsterdam Treaty was aimed at pressing on with European integration and creating an "area of freedom, security and justice", harmonising the EU's approach to migration and revising the shortcomings of the three pillar structure. However, community based decision-making and jurisdictional rules did not apply to the field of migration under a special 5 year regime, the so-called 'transition period', so that despite the claim that the pillar structure was about to be abolished, the third pillar distinction remained important even after the Amsterdam Treaty,[138] with corresponding influence on policy-making on migration in this period.[139]

Protocol 2 of the Amsterdam Treaty lays down the integration of the Schengen *acquis* into community law, defining the *acquis* as the 1985 Schengen Agreement, the 1990 SIA, all Schengen Executive Committee measures adopted under the SIA and all Acts and organs established by the SIA. It is worth reiterating that all these decisions were made without the input of national parliaments but still transferred into community law and later imposed on Eastern European countries as a precondition for accession. With regard to the transition period, Köppe (2002:159) argues that it snubbed long-standing calls to bring the Schengen process under community structures and therefore under some governmental accountability: because "unanimous decision-making structures remain in place [in central policy areas] and the role of the EU parliament remains insignificant, one can still talk of an intergovernmental decision-making structure". The Schengen working groups were either absorbed, abolished or reconstituted. The Schengen integration into community law led to a plethora of decision-making levels not outlined here.[140]

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[136] Chapter 2 of the Amsterdam Treaty adds a new Title to the TEC (Title IV), amends the old Title VI of the TEU (originally migration and policing) and foresees the "progressive establishment of an area of freedom, security and justice". See Hailbronner (1998) for a detailed outline of the legal implications of the Amsterdam Treaty on immigration and asylum and Hailbronner (2000:53-4) for a full list of the mechanisms (Articles, Protocols, Declarations) which regulate immigration, visa and asylum policies under the Amsterdam Treaty.

[137] The German presidency noted in its final presidency report that the period of 1998/1999 constituted a "decisive phase in the intensification of cooperation in the area of Justice and Home Affairs [...] it can be said that JHA has increased in weight and taken a central position in the overall framework of European activities".

[138] The Amsterdam Treaty drew divisions between firstly, 'mainstream' TEC law (which usually applies to all Member States with institutional rules on most issues), secondly, TEC provisions on immigration, asylum and civil cooperation which applied to only some Member States and thirdly, the revised third pillar provisions. This has led some to argue that "the treaty is almost unintelligible, even to the reasonably seasoned observer" (*Statewatch Bulletin* vol 7(3), 1997).

[139] Comprehensive accounts of the impact of the Amsterdam Treaty on justice and home affairs issues include *Statewatch Bulletin* (vol 7(3), 1997), European Parliament *Civil Liberties Series* (LIBE 110) (2000), Niessen & Rowlands (2000), Peers (2000:40-62), Hailbronner (1998, 2000), amongst others.

[140] The UK and Ireland can still join any parts of the Schengen acquis, they are currently taking part in the SIS, however not in the migration related aspects of the SIS. Denmark joined all parts of the Schengen acquis whilst having opted out of Title IV TEC.

4.4.1 The impact of intergovernmentality on migration law

There is a wealth of literature outlining and critiquing the inter-governmental decision-making process in the JHA field during the Maastricht era.[141] Criticism concerned policy proposals being made outside of parliamentary control and under the influence of law enforcement agencies, secret services and government officials, thereby blurring the line between executive and legislative powers (Guiraudon, 2000). Further, there was no formal role for EC institutions in JHA matters and legal effects were reached only by Member States' Acts, passed unanimously.[142] The Commission was reduced to an observer status only to ensure EC law was not violated through new Acts. The European Parliament and national parliaments had no opportunity to discuss the documents prior to the interior ministers' meetings and, if at all consulted on the decisions, had no powers to intervene. The third pillar has been criticised for 'clumsy decision-making' and lacking legally binding effects, thus bearing structural deficits that hampered Europeanisation of migration law, the only outcome being the lowest common denominator (Hailbronner, 2000:47-9). Bunyan (1997:9) points out that

> The various groups operated on an *ad hoc* basis which allowed for little or no scrutiny by national parliaments. Operating in secret with little media attention, the value of these groups - to the governments - was that they allowed officers and officials - police, immigration, customs, internal security, and ministry representatives - to "get to know each other" and to establish *"informal" contacts* in other member states.

Peers (2000:38) sums up the most common criticism of the third pillar:

> [w]ith a limited role for the ECJ, non-existent then high-speed consultation of the EP, a marginal role for the Commission, considerable delegation of power to civil servants and immigration and law enforcement officers, and an engrained culture of secrecy, the EU's Justice and Home Affairs law was unacceptably unaccountable.

The exclusion of parliamentary debate and non-governmental involvement and the blurring of the legislative and executive powers explains the exclusively technical, bureaucratic and 'security' based thinking that shaped migration law in the 1980s to 1990s. Köppe (2002:160) argues further that Member States deliberately reject EU institutional influence in migration matters in order to maintain restrictions

[141] For an in-depth discussion on intergovernmental decision-making during the Maastricht period, see Bunyan (1993 & 1997), Monar & Morgan (1995), Bieber & Monar (1995), O'Keefe (1995), den Boer (1996), Peers (2000) and Hailbronner (2000) amongst others.

[142] Only a limited range of legal instruments was applied in the intergovernmental process and the legal effect on intergovernmental agreements would be given through the different national institutions after EU 'guidelines' would find their way into national law through amendments to existing laws (Peers 2000).

on the civil and social rights of non-EU citizens: the ECJ, for example, passed a series of judgements on the EU's association agreements with Turkey, Yugoslavia and Morocco[143] that strengthened the social rights regulations in the agreements by interpreting them as directly applicable law, as well as strengthening the residency and work rights of certain categories of non-EU nationals. According to Ireland (cited in Köppe, 2002:161):

> whilst the activities of the ECJ broke through the barrier of guestworker and immigration politics and extended the reach of European legal protection, Member States reacted to the pressure of the ECJ and the sustained migration pressures: they developed strategies on the lowest common denominator so as not to lose their veto position. Intergovernmental cooperation - that is the aversion to common action in the EU institutions - became the 'via regia' on which national sovereignty and European interests were to be consolidated.

Levy (2002:13-14) says that "law and order officials employed the mechanism of supranational venues to avoid prying eyes", and to

> [a]void the annoying opposition of national courts, other more liberal ministries and NGOs. [...] These policy networks stressed security issues and drove the restrictionism of 'Schengenland' and the Dublin Convention. All forms of migration control were shifted from national courts and other ministries to Home Offices or private entities.

The informal and mostly secret nature of JHA policy-making, including immigration and asylum matters, has therefore hindered public criticism and the intervention by civil society, minority rights and migrant support groups in some of the most drastic changes to asylum and immigration law over the past 30 years. Thus, intergovernmentality not only concerns procedural aspects of migration law-making but also has an impact on its substantive outcome. This was admitted in 1991 by immigration ministers themselves, when their report from a European Council meeting concluded that "harmonization has not been regarded as an end in itself but as a means of re-orienting policies".[144]

### 4.4.2 Migration and security under the Amsterdam Treaty

Critique of the Amsterdam Treaty has been levelled particularly against the restriction of EP and Commission powers and ECJ jurisdiction (laid down in Article 67 TEC) under the 5 year transitional

[143] See Sieveking (1998:209).
[144] *REPORT from the Ministers responsible for immigration to the European Council meeting in Maastricht on immigration and asylum policy* (SN 4038/91 (WGI 930), 3.12.1991.

period which ended on 1 May 2004. They concern the JHA Council's having agreed on measures unanimously rather than by qualified majority voting during the transition period. Further, the European Parliament was only 'consulted', rather than allowed the right of co-decision.[145] The transition period therefore denied the right to co-decision to the EP and limited the jurisdiction of the ECJ, whereby the role of the ECJ differs according to post-Amsterdam divisions on TEC law on migration.[146] Another point of criticism has been the complicated working structure on decision-making under Amsterdam,[147] or the lack of the right of national parliaments to be informed by Member States' proposals and the law enforcement restriction on the ECJ's jurisdiction (likely to be defined in broad terms by national courts) as well as weak transparency rules (Peers, 2000:61-2).

With regard to migration and security, the Amsterdam Treaty as a whole (therefore also after the transition period) can be said to retain a public order approach as Member States' are given powers to invoke public order clauses contained in Title IV TEC, limiting the Court's jurisdiction: under Article 64(1) TEC "maintenance of law and order and the safeguarding of internal security" remain within national sovereignty, laying down that the ECJ has no jurisdiction with regard to national legislation (Hailbronner, 2000:102). 'The maintenance of law and order and internal security' covers all aspects of free movement, internal controls and checks, police operations, public order, 'illegal' migrants and refugees. The latter includes the 'centres' in which asylum seekers and migrants are held, the conditions in which they are imprisoned and the conduct of police and the authorities during their enforced deportation. The legality of this exclusion, Peers (2000) points out, is questionable, because Article 63 TEC expressly includes a Treaty commitment (therefore under community competence) to regulate matters of illegal immigration, as well as the presence of illegal third country nationals, including their repatriation.

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[145] Further, although the former K4 (renamed Article 36 Committee under Amsterdam) no longer had any role in those JHA matters transferred to the first pillar, it still worked closely with the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA), set up to "coordinate the relevant first pillar working groups just before the new Treaty entered into force". See *Competence of the Council authorities in the field of justice and home affairs after the entry into force of the Amsterdam Treaty*. Approved by COREPER 17.3.99, 6166/2/99 CK4 12 REV 2, unpublished. Further, the JHA Council continued to meet independently and the Commission and the Member States gained powers to make proposals. In the transition period, the European Parliament still had powers to intervene but only the right to be consulted, see *Statewatch Bulletin* (vol 7 (3), 1997).

[146] But under the revised third pillar, the ECJ also gained more powers such as direct judicial review, dispute settlement and human rights jurisdiction.

[147] Working groups remain divided according to their differing remits over the Schengen *acquis* (European Parliament *Civil Liberties Series*, LIBE 110, 2000:117.). The civil liberties committee (*id.*) points out that "[t]he current decision-making structure is thus quite complicated. The Article 36 Committee deals with issues coming under Title VI of the TEU and [SCIFA] deals with Title IV of the TEC. Under each of these Committees there are a number of Working Groups. There are now a number of "High Level Groups" and other groups dealing with "Horizontal matters". But even this distinction can be confusing as the HLWG, for example, is also a "cross-pillar" horizontal group". The decision-making structure on JHA and migration issues have therefore remained hard to follow.

4.4.3 The role of the Commission

The European Commission, far from being opposed to the restrictive policy developments outlined above, itself proposed accelerated asylum procedures and common criteria for 'manifestly unfounded' applications, the effective deportation of rejected asylum seekers, asylum claims to be considered at borders to make deportations easier as well as propagating the 'safe country of origin' principle.[148] In its 1991 Communication on asylum, the Commission demanded that readmission agreements be signed with third countries to make sure they took back rejected asylum seekers. These later became linked to aid and trade agreements as outlined in the next chapter. The Communication proposed that Member States' practices to deter asylum seekers should include measures "aimed at making the material situation of asylum-seekers less attractive while their case is being considered: withholding of certain social security benefits, restrictions of employment and freedom of movement" (cited in Webber, 1993b:144). Further, it proposed the registration and fingerprinting of asylum seekers to "aid identification and combat multiple applications," whilst approving of Council initiatives on restrictive visa policies and carrier sanctions. Webber (1993b:144) notes that its 1991 Communication on Immigration

> was no less repressive in its terms, concentrating on the need for measures to combat clandestine immigration, for the deportation of immigrants to third countries, and for the monitoring of 'migratory flows'.

The basic approach of the Commission to migration was therefore just as restrictive and driven by 'security' ideas as preceding intergovernmental policies.

The Commission, however, has more of a contradictory approach than the Council: in the past, at the same time as proposing restrictive asylum regulations, it has also published minimum asylum standards, that are seen as too liberal by Member States' governments and have therefore not been taken up by the Council. Hayes (2004:21) notes that:

> Refugees and asylum-seekers derive their rights from the Refugee Convention (which only ever envisaged 'temporary' protection) and the European Convention on Human Rights (ECHR). Rather than enshrining these minimum standards into EU law, the Council has incorporated all the methods used by the member states to limit, restrict and undermine these rights. In doing so, it lowered many of the standards proposed by the Commission, and enshrined the worst of the soft-law developed under the unaccountable Trevi framework more than a decade ago.

[148] *Communication from the Commission to the Council and the European Parliament on the right of asylum*, SEC (91) 1857 final, 11.10.1991; *Communication from the Commission to the Council and the European Parliament on Immigration*, SEC (91) 1855 final, 23.10.1991.

However, in view of the 1991 and 1994 Commission Communications on migration and asylum (see particularly chapter 5.3.7), which outlined the comprehensive approach to migration and were used as reference texts for the Council and Member States in this area, and when considering that readmission and third country 'cooperation' are central aspects of these Communications, it can be argued that as a whole, the Commission has played a decisive role in the restrictive and, with regard to third countries, coercive character of EU migration policy.

## 4.5 EU migration control

The above section outlined the background to EU migration law development, namely, the conflation of security and migration, the lack of parliamentary and civil society control over policy decisions under intergovernmentalism and the Single European Act. All these developments, it was found, helped to introduce very restrictive policy proposals such as the Palma Document, the Belgian Presidency Declaration and the Schengen provisions. Although a comprehensive outline of European migration legislation that followed these policy proposals would go beyond the scope of this thesis,[149] the following sub-chapter outlines the main characteristics of the restrictive changes introduced at EU level from the mid-80s to the late 1990s, as they form a central part of the EU's migration management approach.

Legal entry into the EU can take place on grounds of family reunion or visits, tourism, study or work of different categories, and is regulated differently in each Member State according to national work and residency permit, as well as citizenship and family reunion legislation. Harmonisation with regard to legal immigration has met with much resistance from Member States, and Commission proposals to this effect have not yet been taken up by the Council. However, asylum legislation, an increasingly important legal entry channel for refugees since the 1970s, when it became virtually impossible for large scale immigration to take place by any other means, has been restricted swiftly and effectively at EU level by intergovernmental channels. This started with legislation geared at restricting entry, such as visa policy and carrier sanctions.

### 4.5.1 Visa policy

As indicated above, the Palma document introduced a common list of countries whose citizens should be denied visas for entry into the EU, mirroring Member State policies, which implemented visa restrictions

[149] The UK civil liberties organisation Statewatch keeps a European observatory on Justice and Home Affairs Law development, for example (http://www.statewatch.org/semdoc). See Peers (1998) for a detailed account of EU migration policy developments during the Maastricht era and Hailbronner (2000:49-52) for a list of agreements made under third-pillar cooperation as well as outside the EU framework (i.e. Dublin and Schengen Conventions).

to cut down labour migration from the 1970s onwards (chapter 1). Today, the EU's visa policy is based on country lists determining the requirement of visas and a set of Common Consular Instructions (CCI), which regulate the application procedure and the granting of the visa. The so-called 'white list' is a common list of countries whose nationals do not require a visa for short stays. The EU's first 'negative list' of countries that require a visa to enter the EU (the 'blacklist') was agreed under the Maastricht Treaty in 1995 (an almost identical text was adopted as regulation in 1999), imposing visa requirements on 98 countries in Africa, Central America, the Middle East, Asia, Eastern Europe and the Southern Caucasus.[150]

As Hayes (2004:22-23) points out, the number of countries whose nationals do not require visas to enter the EU is very low:

> 44 countries [are on the 'white list'] whose nationals are exempt from the visa requirement (these are central European, Australasian countries, North and some South American countries, Japan, Israel and several others); leaving the rest of the world on the 'blacklist'.

Further, the Regulation allows Member States to impose visa requirements on stateless persons and refugees, even if they carry travel documents from countries whose nationals do not require a visa to cross the external borders. It can therefore be observed that the EU's visa policy not only 'white-lists' affluent countries and blacklists the rest of the world, but that it is targeted at refugees in general by refusing them entry, despite valid documentation from 'white-listed' countries. The blacklisted countries are further disadvantaged with regard to migration control measures imposed upon them under policy proposals laid down in the Austrian Strategy Paper and the Action Plans, for example (see next chapter). The EU's visa policy has therefore become a central tool in controlling the international migration movements of poor populations in search of economic and political security, which have characterised more recent phases of globalisation.

Another concern with regard to EU rules on visas is their potential violation of the non-discrimination principle, which is laid down in Community law and represents the cornerstone of international human rights law.[151] In a detailed examination of EU admission rules, which, due to the

[150] *Council Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement*, (EC) No. 539/2001, 15.3.2001. Published in OJ L 81/1, 21.3.01 (the UK and Ireland opted-out). The European Parliament successfully sued the Council to annul the measure because it had not been properly consulted and another regulation was adopted on 15 March 2001 to replace the earlier regulation.

[151] Articles 12 and 13 TEC lay down the principle of non-discrimination on grounds of nationality; the Racial Equality Directive, although nationality and admission policy was excluded from its scope due to fears of Member States it be applied to immigration control, prohibits discrimination on grounds of racial and ethnic grounds. The non-discrimination norm is also central to the UN Charter, the Universal Declaration of Human Rights (UDHR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the European Convention of Human

nature of sovereignty, are based on distinctions made on the basis of nationality, Cholewinski (2000:14-5) finds that external border and visa rules considerably undermine the fundamental right to be free from discrimination:

> The current rules on the entry of third-country nationals into the territories of Member States for shirt-term visits are potentially discriminatory in a number of ways. In addition to the gulf in treatment that exists between EU citizens and third-country national regarding their entry into EU territory [...], the rules also enable third-country national to be treated very differently from EU citizens when crossing the EU external border. Furthermore, significant differential treatment has been put into place between various groups of third-country nationals. Consequently, the obstacles facing American, Colombian or Sri Lankan nationals in respect of their entry into the EU are hardly the same. This is largely because Americans do not need a visa to enter the EU for visits of up to three months, while Colombians and Sri Lankans are required to apply for a visa at the consulates of EU Member States abroad. Moreover, Sri Lankans are also subject to an additional airport transit visa requirement if they wish to travel through the international airport of one of the Schengen states. In addition to the rules themselves, their application also risks leading to discriminatory treatment.

Reasons given in the preamble of the Visa Regulation for the imposition of visa requirement are irregular migration, public order considerations and international relations. As the first two are based on the activities of an individual rather than bi-lateral state relations, using the broad criterion of nationality to assess these risks ultimately constitutes a discriminatory practice (Cholewinski, 2002:ii). It is argued in the concluding chapter to this thesis that the current international order, based on nation-states with exclusive sovereign rights, together with their related and necessarily exclusive citizenship principles, form the basis for this institutional discrimination. These principles, their abolition or fundamental reform, would therefore have to be at the heart of any solution to the problem of this form of discrimination.

### 4.5.2 Carrier sanctions

Increasing documentation (visa and valid passport) requirements have led to a necessarily related increase in undocumented migration. By definition, undocumented migration requires clandestine travel channels, which usually rely on family and friendship networks and more recently on more organised networks that smuggle large numbers of people across borders (Cruz, 1991). This link is of course recognised by EU policy makers, who reacted accordingly, criminalising those that bring refugees and migrants into EU

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Rights (ECHR) (see Cholewinski, 2002:39-63 for a detailed outline of the provisions and their possible applicability to admission rules).

territory by imposing fines on individuals as well as airlines and shipping companies that carry undocumented and in some cases falsely documented passengers. The principle of so-called carrier sanctions was first proposed by the AHGI in 1987 (put in practice in the UK the same year, in Holland and Germany in 1994) and found its way into first drafts of an EU Treaty on External Borders by 1992.[152]

The EU's policy of visa impositions and carrier sanctions have been subject to much criticism for its innate illogicality which silently assumes that asylum seekers and refugees could receive travel documents or visas in a flight situation. It is worth citing at length an indictment against the EU drawn up by immigration lawyers and activists at a public tribunal in 1994, for it summarises much of the criticism levelled by other commentators:[153]

> Refugees do not normally get visas. The Geneva Convention defines a refugee as someone "outside the country of nationality and unable or unwilling to return there". This provision allows European states to deny visas to would-be refugees who are still in their own country; once they leave, visas are refused on the ground that they are out of danger and can stay where they are.
>
> The result of the exclusionary combination is that airlines and shipping companies refuse to carry passengers to Europe who have no papers or whose papers are suspected forgeries. The Portuguese airline TAP admitted photocopying the passports of all non-white passengers coming to western Europe. In Moscow, travellers to the west go through three separate passport controls. Egypt Air refuses as a matter of policy to take Somali passengers even with visas.
>
> The visa and carrier sanctions policies force those fleeing persecution into illegal and dangerous forms of travel often paying smugglers their life savings only to drown in inadequate and overloaded boats in the Straits of Gibraltar or the Baltic or as stowaways on cargo ships risking death at the hands of captains or death by suffocation or inhalation of toxic fumes in container lorries.
>
> Undocumented asylum-seekers are stigmatised as "illegal immigrants" and are systematically excluded from the territory of many western European states. By imposing visa requirements but denying visas the states of western Europe have turned refugees into illegal migrants. They then deny them entry and erect more and more barriers - military electronic and bureaucratic - to ensure they do not get in. A paper prepared for the Council of Europe's Vienna Group in June 1993 characterised the movement of refugees without visas from eastern to western Europe as "disorderly movements" contrasting them with "lawful migrants" and thus equating them with illegality.[154]

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[152] *Draft Convention of the Member States of the European Communities on the crossing of their external borders*, Ad Hoc Group on Immigration (Confidential) 1991, see *Statewatch Bulletin* vol 2 no 4 for an outline.

[153] The so-called 'Basso Tribunal' took place between 8 and 12 December 1994 and brought together European asylum and human rights groups to assess the impact of the EU's asylum laws. At the end of four days of first hand accounts and lectures on flight reasons, the tribunal passed a verdict, which was subsequently published by the Italian based Basso Foundation, available in English from the Institute of Race Relations, London.

[154] The extract of the verdict is taken from *Statewatch Bulletin* vol 5 no 1 (January-February 1995).

Hence, apart from leading to racist screening practices and denying asylum to refugees by these procedural measures, visa impositions and carrier sanctions have made it virtually impossible for refugees to flee from their country or region of origin by 'regular' transport means, thereby fostering the proliferation of the 'illegal human trafficking industry', forcing migrants and refugees to spend up to tens of thousands of dollars to enter the EU and other affluent countries such as the U.S., Canada, Australia and Japan, whilst at the same time forcing asylum seekers and undocumented migrants into precarious situations. The latter has not only led to the death of thousands of people at Europe's external borders every year, but to an unknown number of injuries and deaths through insecure trafficking channels as well.

Cruz (1991, 1995) compares and outlines in more detail the provisions regulating carrier sanctions in the EU, the U.S. and Canada and provides a critique of their incompatibility with international law as well as their consequences. He argues that carrier sanctions represent an attempt by Member States to reduce the growing number of refugees and asylum seekers by shifting the responsibility they should bear under international obligations onto carriers. Once the legal entry channels were made 'highly selective' by means of visa restrictions and carrier sanctions, policy-makers started restricting asylum law itself, again, often through procedural regulations.

The 'exclusionary combination' of visa policies and carriers sanctions has been complemented at EU level with restrictive asylum legislation. Procedural asylum measures in particular have made the life of asylum seekers often unbearable, with the explicit aim of deterring people from seeking asylum in Europe. These living conditions are then publicised in countries of origin through so-called 'information campaigns' under the misconceived notion that negative reporting will have a considerable impact on the overall numbers of people migrating to Europe. A recent Home Office report, for example, finds no direct causal relationship between policy and asylum figures, although it does suggest that policy which it believes helped identify 'fraudulent' applications (i.e. measures to detect 'manifestly unfounded' applications outlined here in chapter 4.5.4 - 4.5.6), has kept the tendency for applications to rise at check. Nevertheless, for the decade of 1990 to 2000, "the year-on-year figures for the decade consistently fluctuated between about 200,000-400,000 applications per annum" (Home Office, 2003a:117). From a statistical viewpoint, it therefore appears to be

> impossible to assess how application rates would have varied with a different range of policy instruments, nor indeed the consequences of much more limited intervention by EU Member States. A combination of other factors underpins this pattern in asylum applications in Europe between the start and end of the last decade - for example, the relative absence of on-going complex emergencies on the borders of the EU - may have been significant in this respect. At the same time, other contextual factors accounted for the variation

> in the scale and processes of asylum seeking such that policy impacts inevitably tended to be partial and fragmented. Moreover, it is difficult to attribute direct causal relationships between policy and outcomes. (Home Office, 2003a:118)

The Refugee Council (2002:20) adds:

> Since the UK Government started to implement policies to restrict asylum-seekers' access to benefits, beginning in 1996, the number of asylum claims in the UK has risen from 29,640 (1996) to 72,430 (2001). The number of applications did fall in 2001, compared with the previous year, but figures for the first quarter of 2002 indicate that they are rising again. The Home Secretary himself has noted that: "The overwhelming factor affecting asylum claims, which also affects the overall proportion of abusive and unfounded claims, as well as well-founded claims, is what goes on in terms of political stability in other countries in the world".[155] Additionally, the UNHCR points out that: "Asylum-seekers, when deciding where to lodge their application, are more swayed by the presence of their own community than by the reception standards and benefits"[156].

One might add that restrictive policies have certainly had a great impact as they have pushed many asylum seekers into illegality over the past 10 years. Work bans of those legally resident awaiting decision on applications have further exacerbated illegal work relations. Dispersal policies and voucher systems have forced refugees into social exclusion, have made them subject to racist attacks and have forced them into poverty. Even when voucher systems have been abolished, as recently in the UK, "the level of support to asylum-seekers is set so low, and the system set up to administer their payments is so badly designed and poorly run, that [asylum seekers] are forced to live at unacceptable levels of poverty and a cashless existence" (Refugee Council, 2002:4).

### 4.5.3 The Dublin Convention

The *Convention determining the state responsible for examining applications for asylum lodged in one of the Member States of the European Communities*,[157] which was drafted by the AHGI in 1990 and came

[155] Footnote 8 in original: Special Standing Committee Hansard, Col 470, 22nd March 1999.
[156] Footnote 9 in original: Europe: Uneven distribution trends, UNHCR Refugees Daily, 5th October 2000.
[157] Signed on 15.6.1990, came into force on 1.9.1997, implemented by the national administrations of the Member States and to some extent by national judicial authorities.

into effect in 1997,[158] lays down the asylum-related compensatory measures in Articles 28-38 SIA, which ceased to apply with the coming into force of the Dublin Convention, notably an inter-state treaty. With the coming into force of the Amsterdam Treaty, the Convention has come under community competence and been replaced by the Dublin Regulation (Dublin II), with the legal effect and judicial framework of community law.

The Dublin Convention lays down the specific criteria that determine the Member State responsible for dealing with an asylum claim and obliges signatories to accept returned refugees if these criteria apply. It is therefore aimed at stopping asylum seekers from choosing their country of asylum, as well as stopping asylum seekers from making consecutive or multiple applications and it was "hailed as ensuring that the problem of the 'refugees in orbit' would be brought to an end " (Shah, 1995:3). The Convention largely failed to be implemented properly since its coming into force in 1997 and was criticised by many as riddled with too many legal loopholes and difficulties to be applied in practice: although Member States are keen to return asylum seekers as soon as they arrive from another Member State, in many cases it remains difficult to determine a refugee's travel route and identity, amongst other things.[159] It is argued that the central contradiction of the Convention was that the procedural powers to return asylum seekers without a substantive claim examination has implications for *refoulement* provisions, even though all the Dublin signatories were also signatories of the Geneva Refugee Convention. The Convention is therefore criticised for violating various national laws, in that it assumes that the principles safeguarding asylum seekers' rights are the same in each Member State and thereby indirectly leads to *refoulement* (Shah, 1995). This was confirmed by various UK High Court decisions: in July 1999, the UK Court of Appeal held that France and Germany were, in some cases, not safe third countries, on the grounds that they did not offer Convention status to applicants who had suffered or feared persecution from non-state agents.[160] Despite these successful challenges, the UK Immigration and Asylum Act 1999 failed to abolish the principle of safe third countries into UK law and continued fast-

[158] As the convention is not a Community law instrument under the TEC, but a treaty under international law, it required ratification by all signatory states, which explains the time laps between signing and coming into force. Apart form the Twelve original signatory states (Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the UK) Austria, Sweden and Finland had all ratified the Convention by 1.1.1998.

[159] Apart from Member States being keen to send asylum seekers back to any jurisdiction outside of the EU, "the Dublin Convention presents practitioners with substantial problems when it comes to its interpretation and application" (Löper, 2000:17). Be it the term 'application for asylum' (Article 1(1)(b)), opt-in clauses (Article 3(4)), the relationship between the Convention and the concept of 'safe third country' (Article 3(5)), cases of withdrawal of asylum applications, family reunion (Article 4), varying definitions of residency permits (Article 5), 'illegal border crossings' (Article 6) or humanitarian reasons, the Dublin Convention was seen by commentators as in need of major revisions. See also Marinho (2000) and Commission staff working paper *Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in on of the Member States*, 21.3.2000, SEC (2000) 522.

[160] See Nicol & Harrison (1999) for a comprehensive list of all judicial review cases relating to the Dublin Convention that were lodged with the UK High Court.

tracking of those with 'manifestly unfounded claims' based on the above named principle.[161] The UK had practised removal to third countries already in the late 1980s and the third country removal policy was explicitly laid down in the Immigration Rules accompanying the Asylum and Immigration Appeals Act 1993 (Shah, 1995:3-4).[162] Another concern put forward by asylum and human rights groups is that the Dublin Convention was drafted with the aim to extend it to non-EU countries. Although serious concerns about *refoulement* have been voiced on the basis of its current signatories, the application of the principle to return asylum seekers to countries without examining their asylum claims is even more worrying when seeing it applied to non-EU states (Lavenex, 1999, 2001a). Following the Amsterdam Treaty, the text for the Dublin Regulation was proposed by the Commission in July 2001 and the Council Regulation[163] was adopted in February 2003. Dublin II consists of certain additions and amendments to the hierarchy of criteria applied to determine the responsible Member State along with acceleration of the procedure for transferring asylum-seekers between States.[164] There were some improvements with regard to introducing a right to family reunification. However, these remain narrowly defined and subject to exceptions, leaving families still in danger of being separated. Further, the Regulation does not "address the argument that the Dublin rules are an expensive waste of time, ultimately applying to only a very small percentage of asylum seekers" (Peers, 2003a:391). ILPA (2001) finds that the Regulation did not take preceding criticisms of the Dublin Convention into account and commented on the Commission proposal:

> Not only is the current proposed Regulation unlikely to be successful in terms of reducing multiple applications or secondary movements within the European Union, it lacks the scope to respond to the humanitarian concerns and to address the complex and uncertain situation in which many asylum applicants find themselves.

The Commission did address the problem of application with regard to *refoulement* as it had become obvious that harmonisation of interpretation and application of relevant obligations under international law became necessary in order to avert legal challenges on grounds of violating international obligations and allow the Dublin allocation system to work smoothly. The Commission therefore published a corresponding Directive on international protection[165] in September 2001, shortly after the proposal on

[161] See ECRE country report 1999 (http://www.ecre.org/publications/3legaldevel.shtml).
[162] The 1999 Act extended carriers' liability, detention criteria, removed social security benefits for all new asylum seekers (introducing the voucher system), introduced dispersal to designated housing and increased powers of entry, search and arrest for immigration officers (Home Office, 2003a:95-96).
[163] *Council Regulation on establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, 18.2.2003, No 343/2003.
[164] See Peers (2003a) for an outline of amendments and additions to existing provisions.
[165] Council Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of

Dublin II, on harmonising the interpretation of the core of the international law obligations concerning asylum (definition of refugee status, content of refugee status and subsidiary protection), which came into force in April 2004. Although this Directive was largely welcomed for introducing long-awaited harmonisation on substantive asylum law, criticism has been levelled at its slow uptake by the Council and the institution of subsidiary protection, which grants lower rights to protection.

Two related asylum regulations that are regularly criticised for their potential for *refoulement* are the resolutions drafted by the AHGI on manifestly unfounded asylum claims.[166] They were passed on 30 November 1992 and became known as the London Resolutions and have now been replaced by the *Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status.*[167] There was agreement on the general approach proposed in the Directive even though agreement on the 'safe country of origin' list was postponed at the JHA Council on 19.11.2004. The Directive was adopted as 'A' point at the JHA Council of 1-2.12.2005. As the main criticism against the safe country rules remain valid under the new proposed Directive, the following section briefly outlines the London Resolutions and critiques thereof before turning to more current criticism of the proposed Directive.

### 4.5.4 Manifestly unfounded asylum claims ('London Resolutions')

The creation of the principle of manifestly unfounded claims closed the last legal means of entering EU territory through the asylum door. Also drafted by the AHGI, its proclaimed aim was the shortening of asylum procedures and reducing asylum seekers' numbers. A draft of the confidential resolution was leaked in October 1992, one month before EC Interior Ministers met to conclude earlier working party plans on immigration and asylum matters. They created outrage amongst refugee support groups for openly undermining the principles of the Geneva Convention and announcing plans to stop refugees entering the EU altogether:

> Intercontinental movements are seldom necessary for protection [and those in fear of human rights abuses should] stay in their own country and seek protection or redress from their own authorities.[168]

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the protection granted, 2004/83/EC, 29.4.2004. Criticism has been levelled against this Directive for its insufficient level of protection granted to subsidiary forms of protection. See http://www.ilpa.org.uk/submissions/refugeedefinitionscoreboard.html.

[166] *Resolution on manifestly unfounded applications for asylum*, 30.11.1992, SN 4822/92 WGI 1282 ASIM 146, *Conclusions on countries in which there is generally no risk of persecution*, 30.11.1992, SN 4821/92 WGI 1281 AS 145, reproduced in Bunyan (1997).

[167] 20.9.2000, COM (2000) 578 final, 2000/0238 (CNS).

[168] *Resolution on manifestly unfounded applications for asylum*, 30.11.1992, SN 4822/92 WGI 1282 ASIM 146.

The resolution propagated the principle of alternative flight possibilities within the country of persecution and the regionalisation of refugee movements by containing them in neighbouring countries (see Shacknove, 1993).

The idea that an asylum claim can be deemed manifestly unfounded, without carrying out an individual assessment of the claim, is based on the notion that most asylum seekers are economic migrants and the idea that third countries can as a rule be deemed 'safe' in the absence of persecution. The resolution, however, goes much further than this alleged existence of substantive safety for the refugee and disqualifies asylum claims on procedural grounds, which remain notoriously subjective and therefore subject to abuse on the part of the assessor. The danger of subjective interpretation particularly concerns the following: the proposal laid down the reasons that can render a claim unfounded, namely, if

- the claim contains no details or is 'fundamentally improbable',
- false documents have been used or documents have been destroyed,
- the applicant has been refused asylum in another member state,
- the application was made to forestall expulsion,
- the applicant fails to comply with substantive obligations imposed by national asylum rules,
- a serious criminal offence has been committed,
- the authorities think or claim the applicant needs to be expelled on public security grounds.

The AHGI added a list of countries in which it thought there was "generally no risk of persecution",[169] which became known as the safe countries of origin principle. Following the logic that the existence of 'safe countries' relieves EU Member States of their obligation to provide refuge to those at risk of persecution, the principle of 'safe third country' was introduced at the same time (at EU level, as outlined above and below the principle was already being applied nationally) in order to cover transit countries of refugees and migrants as well. Both principles, intended to reduce asylum seekers numbers, have by now been implemented Europe-wide. Germany was the first to introduce the provisions by amending article 16(2)(2) of the Basic Law (*Grundgesetz* or German Constitution) which enshrined the subjective right to asylum in Germany (and its related guarantee to recourse to the courts). The amended Article 16a withdraws the right to asylum from refugees who have entered German via states that have signed the Geneva Refugee Convention or the ECHR, but also introduced the principle of 'safe countries of origin' and 'manifestly unfounded applications' (see above and Wisskirchen, 1994b:136-141 for a more detailed legal analysis). The UK, which already practised the safe third country principle, introduced the safe country of origin principle with procedural changes introduced with the 1996 and 1999 Asylum and Immigration Appeal Acts. Below is an outline of the critique of both 'safety' principles and related

[169] *Conclusions on countries in which there is generally no risk of persecution*, 30.11.1992, SN 4821/92 WGI 1281 AS 145.

procedural measures, for violating international and constitutional law. This section uses examples of German national law, which outline the effects the regulations have on the ground and illuminate how restrictive European and national policy-making mutually reinforce each other (as already outlined by Snyder (2000) with the example of OPT and IPT EC laws, chapter 3.3.2).

### 4.5.5 Safe third country principle

The 'safe third country rule', reflecting both the Dublin Convention and SIA, lays down that persons who enter one Member State via another Member State of the EC, or via a third country in which the application of the Geneva Refugee Convention or the ECHR is guaranteed, cannot claim asylum. In Germany, where this principle was introduced with the 1993 Asylum Act, the 'safety' of these countries[170] was at first to be assessed by a federal statute, which in turn required the consent of the *Bundesrat* (Chamber of the *Länder*) (Wisskirchen, 1994b:137).[171] However, by now the use of safe third country lists is based on information collected on non-EU countries in CIREA (now Eurostat) and has become common practice in Germany, which in turn promotes the same at European level (see below).

The state found responsible must allow the asylum seeker to return to its territory if it is proven that the applicant has passed though it. Apart from ignoring the recommendations of the UNHCR Executive Committee on 'Refugees without an Asylum Country', which states that "the intention of the asylum seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account" (cited in Marx & Lumpp, 1996:432), the 'safe third country' rule, just like the Dublin Convention, actually exacerbates the 'refugee in orbit' phenomenon which it was supposed to avert and places the refugee under great risk of *refoulement*. At the time, Hungary and the Czech Republic especially were not considered to provide adequate procedural standards that rule out *refoulement*.[172] Shah (1995:3) notes, that

> such allocation of responsibility [i.e. under the Dublin and Schengen agreements] means that, despite the existence of differing substantive laws relating to refugee status and the granting of asylum, as well as differences in procedural laws among Member States, the decision of one State is effectively the decision of all States.

[170] That is non-EC countries, all EC countries are categorically declared 'safe' due to the "broad common legal conviction within the EU" (Marx & Lumpp, 1996:425).

[171] All countries bordering Germany have been declared 'safe'. This results in the rejection of asylum seekers arriving by land at Germany's borders (around 90% of refugees). See Wisskirchen (1994a) for an argument of the unconstitutionality of this provision.

[172] See Shah (1995) for the legal and practical problems that the notion of a 'safe' third country poses, which ultimately renders it inadequate for the provision of protection granted under internationally binding instruments such as the Refugee Convention.

The Refugee Convention, however, binds each signatory individually and independently of other states and forbids direct as well as indirect *refoulement* under any circumstances. In April 1991, the Dutch government's supreme advisory council (*Raad van State*), which comments on the constitutional aspects of every bill presented to parliament, explicitly objected to the ratification of the SIA by Holland.[173] The main argument presented by the Dutch Council of State was the impossibility to guarantee that indirect *refoulement* does not occur under Schengen. According to Spijkerboer (1993:13-16), such a negative view on a Convention has never been voiced before in Dutch legal history. The Council (cited in Shah, 1995:9) states that:

> The State cannot pass onto another State its responsibility towards an application for asylum, and accordingly, it cannot hide behind another State's decision either [...]. In the opinion of the Council, the system under the Implementation Agreement [...] has no basis in the Convention of Refugees. It opens the possibility for Treaty states to back out of the obligations arising from [it].

As indicated above, apart from a substantive change in asylum law, it is the changes of procedural processes that rendered the new laws extremely restrictive. Article 34a(2) of the German asylum procedural law (AVG), introduced with the 1993 Act, abolished any suspensive effect of possible legal measures taken by the applicant in the case of an appeal. It also explicitly prohibits Administrative Courts from granting preliminary legal protection, even if they positively find that deportation would be illegal (Wisskirchen, 1994b). Any appeal must therefore be lodged outside Germany, making it unreasonably difficult for the refugee to appeal, as well as being in contravention to Article 13 ECHR, which obliges states to grant preliminary protection before deportation until an appellate body has taken a decision (*id.*). This abolition of suspensive effects of appeal measures and the curtailment of appeal rights and legal support thereof is mirrored in the 1995 EU Council resolution on 'minimum guarantees'[174] which implements parts of the Dublin Convention and harmonises criteria for granting asylum. The measures are intended to facilitate deportation and generally encourages the treatment of foreigners as second-class citizens to whom the basic guarantees of legal protection do not apply.

Under § 18(2)(1) AVG, "[b]order authorities were ordered to deny asylum seekers coming from 'safe' third countries access to German territory unless they were in possession of valid visas [...]. Police authorities were even instructed to remove asylum seekers after illegal entry from a 'safe' third country to that country, without forwarding the application to the [BAFL]" (§ 19(3) AVG), thereby opening up the

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[173] *Schengen Agreement: Opinion of the Dutch Council of State*, reproduced under http://database.statewatch.org/protected/article.asp?aid=15574.

[174] *Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures*, 23.7.96, 5585/95, ASIM 78, commented and reproduced in SEMDOC.

possibility of *refoulement* (Marx & Lumpp, 1996:421).[175] Another procedural restriction adversely affecting the guarantee for a fair and effective determination process is the introduction of accelerated airport procedures under § 18a AVG. Leuninger (1998:4) describes the situation for lawyers (and their clients) as follows:

> Within 48 hours, asylum applications have to be determined, the period for filing appeals is two days, courts have two weeks time [to come to a decision]. It is a matter of hours, if the deportation of a 'genuine' asylum seeker is to be averted. A data transfer provision supplies the federal office with recent information given out by the Nuremberg headquarters [on the 'safety' of the country to which the asylum seeker is to be deported], couriers rush inbetween Frankfurt and Wiesbaden to supply the records, lawyers work until late at night to substantiate claims and appeals, judges give hand-written decisions to be faxed them to the border police duty officer, judges from the Federal Constitutional Court pick up the phone at the last minute in order to prevent a refugee from being deported with the next plane to the 'safe' third country and from there to his/her country of persecution.

Under these circumstances, it can be argued that the acceleration of procedures in German (and any other European) law has not only served to reduce the 'pressure' on asylum determination systems. It has, in many cases, rendered them unnecessary due to the broad discretionary powers given to the executive powers (border police and airport immigration officers), and as for the remaining cases, determination systems are now absolutely inadequate because of the given time limit. As indicated above, these developments are mirrored at the European level and all Member States have consequently weakened substantive and procedural rights for asylum seekers at the national level.

Whereas the third country principle became obsolete within the old EU Member States with the accession round of 1 May 2004, it is now being exported to Eastern European Member States to be applied in turn to their Eastern European neighbours. Since the Dublin II regulation came into force in February 2003, Germany in particular is pushing for the safe third country principle to be incorporated into the proposed EU regulation on the harmonisation of asylum procedures. Therefore, "the shifting of burden sharing within Europe is threatening to produce a domino effect of shifting responsibility for refugee protection" (Pro Asyl *et al.*, 2005:9).

### 4.5.6 Safe country of origin and related procedural measures

The 'safe country of origin' rule or, as German courts refer to it, the 'normative establishment of certainty', was introduced in Germany also in 1993 with § 29a AVG, not even a year after the London Resolutions

[175] See Wisskirchen (1994b:137) for examples of how indirect *refoulement* can occur under this law.

were passed. If an applicant comes from a country where neither political persecution, nor inhuman or degrading treatment or punishment are thought to be taking place, the application is now automatically defined as 'manifestly unfounded' (*offensichtlich unbegründet*). In this case, the applicant has to leave Germany within a week (in the majority of cases, asylum seekers are detained during this period), with no suspensive effect in the case of an appeal (Wisskirchen, 1994b:139). The determination of 'safe' countries is based on assessing how many cases from a particular country have been deemed 'manifestly unfounded' in the past. In Britain, this has led to the establishment of the so-called 'white list'. In Germany, these countries, since the creation of the list, include Bulgaria, Ghana, Poland, Romania, Senegal, Slovakia, the Czech Republic and Hungary.[176] Many have argued that the reasoning of this determination procedure is circular. The UNHCR (cited in Winterbourne *et al.*, 1996:127) points out that:

> a narrow application of the refugee definition and tighter grants on exceptional leave to remain, reduce the number of successful applicants. The lower figures are then tendentiously used as evidence that 'bogus' claims are increasing, thereby justifying restrictive measures. We believe there are many dangers in such a self-justificatory and circular analysis.

Regarding the legality of these changes in the material law of asylum, Wisskirchen (1994b:141) thinks that

> it seems quite clear, that the other member states of the EU do not meet the minimum criteria that Germany, by its constitution, is obliged to uphold. In that respect, the procedural provisions seem to be a much greater problem than the material law.

Moreover, the above measures are not likely to reduce the numbers of 'insincere' asylum seekers but merely deem them 'illegal', which has led to asylum seekers going underground. In Berlin, the number of asylum seekers that 'disappeared' after a rejected asylum application increased from 539 in the first half of 1993, to 3,299 after the introduction of the so-called 'Asylum Compromise' (*Asylkompromiß*, Uni Kurier 36, 1998).

The most evident result of the changes outlined above, however, is a serious degradation in the refugee's legal and social status. The 1990 *Neuregelung des Ausländergesetzes* (Aliens Amendment Act)[177] (§51(1) *AuslG*) differentiated between four different kinds of status, each allowing for the

[176] Annex II AVG, last amended by Article 2 of the Law on the Amendment of Aliens and Asylum Procedural Regulations (*Gesetz zur Änderung ausländer- und asylverfahrensrechtlicher Vorschriften*) of 2910.1997 (BGBl. I S. 2584). This Annex is still in force but outdated by the 2004 EU accessions.

[177] The Act derived from the so-called *Karlsruher Modell*, an accelerated asylum practice first applied in Baden Württemberg in 1989 with the justification that the local authorities needed to be relieved of the asylum burden and asylum seekers should therefore be processed and, if rejected, deported as quickly as possible. This implied lessening

reconsideration and therefore deportation of an asylum case at any time or after a period of two years (see Spijkerboer, 1993:57-59). These different forms of status in turn determined what rights a refugee has under the newly founded *Asylbewerberleistungsgesetz* (Social Security Law for Asylum Seekers), which is characterised by a marked decline in social provisions, mostly issued as 'benefits in kind', often with the justification that asylum seekers are incapable of household management (Leuninger, 1998). The new Asylum and Immigration Act that came into force on 1 January 2005[178] replaces §51(1) *AuslG* and simplifies the different statuses (§60(1) *AufenthG*) but retains the weak residency status of "toleration", with the argument that it serves more "precise management" of refugees. In 2001, the degradation in asylum seekers material condition was laid down in EU law with the Reception Conditions Directive,[179] which gives Members States far-reaching powers to use the withdrawal of benefits as a form of social discipline: under Article 22 of the Directive, Member States may withdraw material support "if an applicant or an accompanying family member has repeatedly behaved in a violent or threatening manner towards persons performing duties in the running of an accommodation centre or to other persons staying at the centres". This provision appears to be aimed at curbing protests such as riots or hunger strikes of asylum seekers against their living conditions, which have increased in many Member States over the past decade. Further, benefits can be withdrawn "if an applicant or an accompanying family member does not comply with a decision requiring them to stay at a place determined by the relevant authority", which raises serious concerns about the fundamental right to free movement within a national jurisdiction. Finally, "Member States may reduce material reception conditions when an applicant prevents minors under that applicant's care from attending school or single classes in ordinary school programmes".

### 4.5.7 Commission Directive on Asylum Procedures

As indicated above, asylum procedures are in the process of being harmonised as part of Amsterdam Treaty commitments and long standing criticism by human rights and asylum support organisations of the Dublin Convention in failing to ensure the protection of refugees with an adequate standard of procedures and appeals, no matter where the application is dealt with. The *Commission Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*,[180] in short, the Asylum Procedures Directive, lays down the procedures that should apply in each

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the time span between the first asylum interview with the regional foreigners authorities and the second decisive interview with the Federal Office for the Acceptance of Refugees (BAFl). This model was promoted by all regional interior ministers, applied nation-wide in 1990 and enshrined into national law and extended to de facto refugees by the *Neuregelung des Ausländergesetzes* (Aliens Amendment Act) which was agreed in April 1990 and came into force on 1.1.1991 (see Schwarze, 2001:150-151).

[178] For an overview of the new law, see http://www.zuwanderung.de.

[179] *Council Directive laying down minimum standards on the reception of applicants for asylum in Member States*, COM (2001) 181, OJ 2001 C 213 E/286, adopted on 27.1.2003.

[180] 20.9.2000, COM (2000) 578 final, 2000/0238 (CNS).

Member State in first instance, and claims to maintain consistency with international obligations of refugee protection. On the one hand, the Directive lays down principles such as the right of appeal against negative decisions. However, the Directive also provides for accelerated procedures "to allow Member States to tackle fraud and misuse of their systems", as well as maintaining the principle of manifestly unfounded application to "help resources focus on more deserving cases".

Criticism has been levelled against various aspects of the Directive. ILPA (2005a) has severely criticised the Directive and, on its scoreboard for EU migration legislation, gives it only two points out of ten with regard to the proposal's compliance with the European Convention on Human Rights, three out of ten with regard to compliance with other international treaties, and four out of ten with regard to compliance with the principles of EU migration and asylum policy, and the safeguarding and strengthening of rights at national level. The ECHR is potentially breached by the proposed Directive's definition of 'manifestly unfounded' cases by failing to exclude Article 3 ECHR cases from the scope of these principles. The right to effective protection against rights violations before national authorities, as laid down in Article 13 ECHR, is potentially breached by "the considerable opportunities to derogate from the suspensive effect of an appeal" (*id.*). With regard to safe country principles, ILPA (*id.*) writes:

> The proposal risks undermining the application of the key non-refoulement rule in the Geneva Convention because it does not provide for the right to remain on the territory until the final appeal against denial of a claim for recognition of refugee status is exhausted. Additionally, the provision on safe third countries undercuts the Geneva Convention, because an applicant could be sent to a third state which has not even ratified that Convention. Furthermore, the rules on safe third countries and manifestly unfounded applications go well beyond the UNHCR Executive Committee Conclusions on these subjects.

Despite similar criticisms by the UNHCR, the Hague Programme[181] has pushed for the adoption and implementation of the Directive, despite the fact that there is a genuine risk that the Directive, in practice, may lead to breaches of international law. In its legal analysis, ILPA shows that "many of the Directive's provisions will lead to fundamental rights violations in their implementation" and it is argued that "[t]he volume of litigation this will bring forth can only be avoided by the annulment of the Directive in its entirety, and there is every likelihood, given the precedent of legal action brought in respect of the Family Reunification Directive, that the European Parliament will think it right to bring a challenge before the Court of Justice in respect of this instrument too" (ILPA, 2005b:30).

Further, procedural provisions are left open to undermine substantive rights: although the proposed Directive specifies a number of rights to be protected during consideration of claims and

[181] The Hague Programme resulted from the European Council meeting of 4-5 November 2004 and largely repeats the policy directions given at Tampere, Seville and Laeken, namely, fight against illegal immigration, common asylum procedures, including migration into external relations ("partnership with countries of origin").

specifies a detailed appeal system which Member States must apply, "it leaves open the prospect that Member States with more generous procedural rules will take the opportunity to lower their standards to the minimum level permitted by the Directive, which could be a very weak level indeed as regards manifestly unfounded procedures and derogations from the suspensive effect of appeals".

This concern is echoed by national asylum rights groups in Germany, which has a history of using procedural rules to circumvent the granting of substantive rights: the definition of a refugee under Article 1A(2) Refugee Convention has not been applied in German law since the 1982 Asylum Procedural Act, which introduced its own definitions regulating the ending of residency rights, rather than basing them on a material decision concerning a right to asylum (Pro Asyl *et al.*, 2005:14). Although the introduction of some EU regulations on asylum procedures[182] through the 2005 Asylum and Immigration Act oblige Germany to apply the Geneva Convention definition of refugees in assessing asylum claims, the EU Qualifications Directive also weakens refugee protection within EU states. Further, the application of the Geneva Convention refugee definition stands in opposition to a 25-year history of defensive and restrictive procedural practices designed to undermine the Convention. A broad coalition of human rights and asylum rights organisations have criticised the fact that the authorities have not prepared, informed or trained asylum officers about the procedural changes that should take place under the new law, leading to continued restrictive practices and failed implementation (Pro Asyl *et al.*, 2005:13).

Despite these concerns and contraventions to existing international obligations, the accelerated procedures on grounds of country lists have been refined in Germany over the last decade and then raised once again to the European level in 2003, when common safe third country lists were discussed in more detail by EU interior ministers. The Directive has been adopted without a list of safe countries of origin in its annex, due to the lack of unanimous agreement on the supposed "safety" of the 10 countries listed[183] and it was agreed to decide on the list at a later stage by qualified majority. Again, ILPA (2005b:30) points to the serious human rights concerns with regard to safe country lists, supported by the fact that Member States cannot even agree on their safety:

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[182] Article 63 TEC required the Council by 1 May 2004 to adopt asylum procedural regulations. In Germany, the 2005 Act introduced the following two Directives: *Minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*, Council Directive, 20.7.2001, 2001/55/EC and *Minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*, Qualifications Directive, 29.4.2004, 3/2004. The Qualifications Directive prescribes criteria for Member States to use in determining whether an applicant is entitled to "subsidiary protection". The Directive defines "subsidiary protection" as a form of international protection, separate from but complementary to refugee status, granted to third country nationals or stateless persons who are not refugees but who need international protection because they have well-founded fears of, for example, torture, inhuman treatment or severe violation of human rights in their countries of origin.

[183] Benin, Botswana, Cap Verde, Ghana, Senegal, Mali, Mauritius, Costa Rica, Chile and Uruguay.

> Given that EU Member States were divided on the proposed list on account of serious human rights concerns in the relevant countries, it is highly questionable that this list should be adopted at all, let alone pushed through by QMV to overcome a lack of agreement on issues of such a fundamental nature. Aside from the clear human rights concerns and the issue of procedural propriety in agreeing the common list by QMV, ILPA has serious reservations about the legality of a common EU list of safe countries of origin. As highlighted in our legal analysis of the directive, some Member States do not currently operate safe country of origin systems. Accordingly, this is the first time that EU Member States will be required to dilute their standards of protection by a measure of Community law. This raises serious competence concerns, as the EU is only entitled to establish "minimum standards" in this area. We believe that there is no power to adopt the common list under Title IV of the EC Treaty and any further efforts to do so should be abandoned.

However, former interior minister Otto Schily in particular continued to promote the lists and, despite all the knowledge and evidence proving their potential human rights violations, based on Germany's long-standing practice outlined above, continues to maintain that "the system [that Germany applies] as such is very sensible".[184]

Again, the 'exclusionary combination' of visa policies, carriers sanctions, safe country principles and the Dublin Convention are complemented at EU level with even more restrictive legislation, namely, internal control mechanisms. It has already been noted in chapters 3.3.3 and 4.2 that increasing internal population control measures are part of a wider development of the security state in western Europe and other parts of the world, reflected in fundamental changes in notions of democracy and justice. Further, it was pointed out that with regard to asylum and migration, however, control measures gain an added significance in that they target foreigners, leading to racist practices enshrined in law. These start with Eurodac, the fingerprinting system for asylum-seekers, which facilitates the practical implementation of the Dublin Convention and end with readmission agreements that support the practical implementation of extradition orders.

### 4.5.8 Eurodac, SIS II and the Visa Information System

The creation of a central database containing the fingerprints of all asylum seekers lodging an application within the EU was proposed by the AHGI in 1991 and complements the earlier creation of the SIS, which started operating in 1995 (see chapter 4.2 above). The Eurodac proposal was drafted as a Convention in 1998 but was 'frozen' and later adopted as an EC regulation.[185] Its official aim is to prevent 'multiple applications' and to enforce the Dublin Convention. However, during later stages of negotiations, the

[184] http://www.tagesthemen.de (3.10.2003).
[185] *Council Regulation concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention*, No 2725/2000, 11.12.2000

database was extended to cover undocumented migrants as well. In its first year of operation in 2003, it was recorded as holding the fingerprints of 246,902 asylum applicants.[186] In June 2004, the civil liberties organisation *Statewatch* summarised EU database systems on foreigners and their increased conflation with the purpose of criminal prosecution as follows:[187]

> Eurodac complements the Schengen Information System (SIS), which went online in 1995. Member states can put records on failed asylum-seekers and illegal immigrants in the SIS under Article 96 of the Schengen Convention and by March 2003, the member states had registered a total of 780,922 people. The EU has now agreed on the creation of SIS II, which will contain more types of data on more people for more purposes; the Commission has conspired with the Council to develop the new database under a veil of secrecy. SIS II will share a technical platform with a new EU Visa Information System (VIS) – a database containing the personal information from every visa application (irrespective of whether the visa was issued or the application refused). VIS will have a 'capacity to connect at least 27 member states, 12,000 VIS users and 3,500 consular posts worldwide'. A favourable feasibility study has been completed, based on the 'assumption that 20 million visa requests would be handled annually'. Again, key issues have been shielded from public scrutiny by the Council and Commission. The scope and function of VIS were set out in Council conclusions but no details were included in the subsequent Commission proposal on creating VIS. It is also proposed that 'biometrics' (facial scans and fingerprints) should be incorporated into VIS and SIS II (Eurodac already contains biometrics).

Yet again, Germany, and particularly interior minister Otto Schily, have proven to be a driving force behind these developments. During negotiations on the most recent reform of Germany's immigration law (see above and chapter 4.5.6 above and 5.4.5 below), the government coalition announced it would promote an "alarm database on visa policy" at European level, whereby all authorities issuing visa and residency permits would be allowed access to a central database holding data on persons and organisations that had ever had links with illegal entry. Whilst the Commission proposal from December 2004 on the VIS is still being debated by the Council, Schily has already started pushing for this alarm data base to be integrated into the planned VIS (Pelzer, 2005:25).

### 4.5.9 External border control

Following the Schengen principle, internal control measures have been accompanied by corresponding proposals and activities for external border control measures at the Community level. Since the SIA came

[186] *Implementing the Amsterdam Treaty: Cementing Fortress Europe*, Statewatch Analysis, June 2004, http://www.statewatch.org/news/2004/jun/03fortress-europe.htm.
[187] *Id.*

into operation in 1995, checks and surveillance at the external borders of the participating Member States have been governed by "common uniform principles", which are laid down in Chapter 2 of Title II SIA and received a new legal basis in Title IV TEC. More detailed implementation rules are spelt out by the Common Manual for External Borders and the Common Consular Instructions.

External border control is seen by EU nation-states as the essence of their "identity" and security and therefore unquestionably justified. Every relevant Council and Commission document repeats this notion, pervaded by presuppositions of nation-state ideology outlined in chapter 2.1.2 and corresponding nationalist discourses on identity. The Commission finds[188] that a

> coherent, effective common management of the external borders of the Member States of the Union will boost security and the citizen's sense of belonging to a shared area and destiny. It also serves to secure continuity in the action undertaken to combat terrorism, illegal immigration and trafficking in human beings.

There have been concerted efforts to harmonise police and border control practices at the EU's external borders starting with a draft Convention on external border control,[189] which was proposed by the AHGI in 1991, to establish common standards of control at the borders, a common visa regime and a joint list of "inadmissible aliens", in short, to "replicate for the Community generally the compensating measures developed by Schengen".[190] The 1991 proposal laid down sanctions for the crossing of external borders other than at authorised places and times, a duty of "effective surveillance" of all external borders by Member States, including the duty of cooperation by surveillance services, rigorous controls by visa and other requirements on the entry of third country nationals, carrier sanctions for airlines and other passenger carriers who fail to ensure that third country nationals have the necessary travel documents and visas, a common list of countries whose nationals require visas to enter any of the Member States, and the provision of a uniform visa valid for all Member States on common conditions and criteria.[191]

External border control directly impacts on national sovereignty, and negotiations proved just as difficult as those on harmonising immigration rules. Continuing disputes between the UK and Spain over the status of Gibraltar, as well as generally over the role of the ECJ (in applying, interpreting and resolving disputes arising out of the Convention), therefore eventually led to the Convention being aborted.

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[188] *Towards integrated management of the external borders of the Member States of the European Union*, Communication from the Commission to the Council and the European Parliament, 22.5.2002, 9139/02, p 2.
[189] *Draft Convention between the Member States of the European Communities on the crossing of their external frontiers*. Ad Hoc Group on Immigration, June 1991, SN 2528/91 WGI 822.
[190] House of Lords Select Committee on European Union, *Twenty-Ninth Report* (1.7.2003), http://www.publications.parliament.uk/pa/ld200203/ldselect/ldeucom/133/13303.htm.
[191] Summarised in *Statewatch Bulletin* (vol 2 no 4, July-August 1992).

However, the proposals were taken up at the level of practical cooperation in the form of Joint Actions on the "training, exchange and cooperation" of national staff dealing with asylum, immigration and external border issues, as well as the militarisation of the EU's external borders. Various funding programmes (especially since the launching of the Odysseus programme in 1998, which subsumed the Sherlock programme and has been replaced by the ARGO programme[192]), have practically implemented external border cooperation through common training measures, exchanges and studies in the area of external border crossings and controls. It has been noted,[193]

> that "ODYSSEUS" is perhaps the most contradictory name ever given to an EC or EU funding programme: the object of the programme is largely to assist in restricting movement of third-country nationals, not to facilitate journeys such as that of the mythical mariner.

The Council[194] describes the purpose of Odysseus as

> improving the coordinated application of the 1990 Dublin Convention [...] with regard to specific problems relating to its procedures, provisions on time limits and evidence. In the area of immigration, projects may not only concern the admission of third country nationals but also aim at combating illegal immigration.
>
> The Programme will also provide for financing the implementation of projects envisaged by the Action Plan on the influx of migrants from Iraq and the neighbouring region, adopted by the General Affairs Council on 26 January 1998.

Other external border activities include recommendations agreed in 1997 on effective control practices at the external border for applicant countries, and in 1998 on the provision of forgery detection equipment, as well as continued bilateral and multilateral cooperation, for example between the United Kingdom and France in the Channel area.[195] Moreover, a whole body of centres and joint actions has developed outside of community control over the past decade which include several ad hoc centres, such as the Centre for Land Borders in Berlin, the Air Borders Centre in Rome, the Maritime Borders Centres in Piraeus and Madrid, the Risk Analysis Centre in Helsinki, and the Centre for Border Police Training overseen by Austria and Sweden (Léonard, 2003:17). The newly adopted proposal to establish a common operational

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[192] *Council Decision adopting an action programme for administrative cooperation in the fields of external borders, visas, asylum and immigration (ARGO programme)*, 13.6.2002 and *Council Decision amending Decision 2002/463/EC adopting an action programme for administrative cooperation in the fields of external borders, visas, asylum and immigration (ARGO programme)*, 13.12.2004.

[193] *Statewatch European Monitor*, Vol 1 No 1, 1998.

[194] *Council press release*, No 6889/98 (19.3.1998).

[195] House of Lords Select Committee on European Union, *Twenty-Ninth Report* (1.7.2003), http://www.publications.parliament.uk/pa/ld200203/ldselect/ldeucom/133/13303.htm.

body, the European Border Agency, is discussed in more detail in the next chapter, as the agency and its related external control measures represent a direct involvement in third country affairs by effectively extending the EU's jurisdiction and operations to third countries as part of the fight against illegal immigration.

### 4.5.10 Rapid Consultation Centre, Vienna Group, CIREA and CIREFI

The increasing cooperation of or coercion upon third countries to implement external border control measures and accept readmission policies has been accompanied by the creation of corresponding information exchange systems. In the early 1990s, various conferences and initiatives formed the starting point for continued discussions between EC Member States, EFTA and Eastern European countries on information systems, visa policies, cross-border cooperation and strategies for reducing migration pressure, including economic aid to Eastern Europe. The Vienna Group, which was set up in 1978 to combat terrorism on the initiative of interior ministers from Germany, Italy, Austria, Switzerland and France, called a meeting to combat illegal immigration and, together with the AHGI, led the *Ministerial Conference on Movement of Persons from Central and Eastern European Countries*, held in Vienna on 24-25 January 1991. This conference set up the Vienna Group on Immigration, with the aim to "control East-West migration and third country migration through the new democracies by pursuing and encouraging policies and practical measures which will achieve that control" (Bunyan, 1993:181) and led to the Budapest process described in chapter 5.2.2.

The same year, the AHGI set up a "rapid consultation centre" on immigration problems, to advise countries confronted with "a strong and sudden immigration influx". Despite dealing with the remits of the UNHCR, the UN High Commissioner for Refugees was excluded from all the above-named intergovernmental initiatives.[196] Two additional information exchange fora were set up in 1992, namely, the Centre for Information, Discussion and Exchange on questions connected with crossing of external borders (CIREFI) and a forum on questions of asylum (CIREA).[197]

CIREA's function was mainly to improve the control of asylum seekers by improving statistical information on the number and origin of asylum seekers, and to exchange analyses, policy and future strategies of the Member States to reduce these figures. The group's initial work was therefore to create a

[196] *Statewatch Bulletin* (vol 2 no 1, February-March 1992).

[197] CIREA was formally set up at the interior ministers meeting on 11/12 June 1992 and produced and updated the European asylum practice manual. CIREFI was formally established at the interior ministers meeting on 30 November the same year to monitor the then 12 EC states immigration policy and the crossing of external border, including undocumented migration, forged documents, rejected asylum applications, expulsion and carriers' liability. CIREFI was made permanent under Article K of the Maastricht Treaty, subsuming the relevant sub-groups of the AHGI. See Bunyan (1993:173-174). After the Amsterdam Treaty, CIREA has now come under Commission competence, which collects migration statistics via Eurostat.

statistical system and harmonise statistical concepts, as well as to prepare joint situation reports available to Member States on the situation of countries of origin of asylum seekers. As such it can be seen as a forerunner to the High Level Working Group on Asylum and Migration, which later drew up Action Plans on third countries that would determine the EU's strategy on migration towards them. The forum itself also provided the space for Member States to exchange experiences on how best to deal with asylum seekers in times of crises, such as Albanians from Kosovo in 1993.[198] Debates also included the application of Article 1A of the Refugee Convention, no doubt in relation to possible circumvention of the same, as later developments confirmed (see chapter 5.3.3 to 5.3.6 on the Austrian Strategy Paper and the externalisation of asylum procedures). Finally, Member States used CIREA to exchange ideas on restrictive policy developments in their countries, or as it is put, "a detailed and thorough exchange of views on changes in legislation in certain Member States, especially Germany, the United Kingdom, Belgium, Greece and Portugal."[199] The asylum legislation passed in Germany and the UK in 1992/1993, for example, showed strong parallels in content, from the safe country principles to the introduction of vouchers systems for asylum seekers (see above).

CIREFI, like CIREA, was set up under intergovernmental structures and then incorporated into the Maastricht arrangements, but it was only in 1994 that the centre was assigned definite remits. The centre comprises "expert representatives" of Member States and its tasks are to "collect, exchange and analyse information on legal and illegal immigration with a view to formulating conclusions and, if necessary, giving advice".[200] Therefore, rather than remaining an information 'clearing house', the Council significantly extended CIREFI's remits to cover the prevention of and action against undocumented migration and facilitator networks, unlawful residence and crime in general, as well as "improving deportation and repatriation practices and instruments, particularly with regard to modes of transport".[201] This development was criticised by the European parliament in 1995, when it rejected the conclusion on the grounds that CIREFI was "designed as a basic instrument for controlling illegal immigration", and that its activities will therefore have "legislative implications under Title VI of the TEU".[202] The report concludes that "in spite of the ambiguous wording of the text in question", CIREFI's activities will produce legal effects, thereby conflating the Council's political and legislative roles:

> Although it is customary for political decisions to take the form of Conclusions, it is unacceptable for this practical system to be used to shield decisions with legislative implications. It must be stressed that this lack

[198] *Second Activity Report on CIREA*, REPORT from the Steering Group I (Asylum-Immigration) to the K4 Committee, 9940/93, CIREA 5, 15.11.1993.
[199] *Second Activity Report on CIREA*, REPORT from the Steering Group I (Asylum-Immigration) to the K4 Committee, 9940/93, CIREA 5, 15.11.1993, p 9.
[200] *Council Conclusions on the organization and development of the CIREFI*, 30.1.1994, OJ C 274, 19.9.1996, p 50.
[201] *FECL* 38, October 1995.
[202] Cited in *id.*

> of rigour in the formulation of Council acts constitutes an infringement of the principle of legal certainty, if nothing else.[203]

Further, the EP report criticised the secrecy surrounding CIREFI activities and held that "research into immigration may be useful, but should not be conducted in conditions of secrecy". It points out that CIREFI's data collection might overlap with the work of the European Communities' Statistical Office, the UNHCR, the planned European Information System, and Europol.[204] Apart from legislative effects, information systems such as CIREFI and CIREA play an important role in the effective implementation of deportation orders, particularly within the framework of the 'Transatlantic Dialogue'.[205] *Statewatch*[206] also finds that:

> There is an obvious if often unwritten link between the EU's policy on registering and placing immigrants under surveillance and its expulsion policy – checks and restrictions on refugees, asylum-seekers, visa residents and third-country nationals are implicitly tied to removing them from the EU and preventing their return.

Both CIREA and CIREFI started to involve third countries in their work from 1994 onwards.[207] Under the conviction that "a constant flow of illegal immigration controlled by international facilitator networks continues to threaten the Member States of the European Union," an early warning system was created within the framework of CIREFI in 1999 to provide information on "indications of illegal immigration and facilitator networks" and "events and incidents [...] which represent a threat such that immediate counter-measures are required, for example, concentration of specific nationalities, perceptible changes in routes and methods, new types of [...] travel document forgery, doubling of the monthly figures of illegal immigrants stopped at an external [...] border".[208] As is outlined in the next chapter, this development towards third country cooperation in the 'fight against migration' was later extended with the Risk Analysis Centre and external border control measures in 2003 (chapter 5.3.9).

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[203] Cited in *id.*

[204] *Id.*

[205] See *External relations: Transatlantic Dialogue: removal of third-country nationals where a transit stop is necessary between the USA and Canada and Member States of the European Union*, NOTE from the Presidency to Delegations to the meeting between CIREFI and representatives of the United States of America and Canada, 5.3.1998, 6541/98, LIMITE, CIREFI 13.

[206] *Implementing the Amsterdam Treaty: Cementing Fortress Europe*, Statewatch Analysis, June 2004, http://www.statewatch.org/news/2004/jun/03fortress-europe.htm.

[207] See *Relations with third countries in the fields of justice and home affairs*, NOTE from the Presidency to the K4 Committee, 11959/94, RESTREINT, CK.4 95, 15.12.1994 and *Possibility of third countries to participate in CIREFI*, NOTE from the Commission Services to the Migration Group and CIREFI, 10532/96, LIMITE, ASIM 137, CIREFI 28, 9.10.1996.

[208] *Council Resolution on the creation of and early warning system for the transmission of information on illegal immigration and facilitator networks*, 7965/99, LIMITE, CIREFI 20, MIGR 33, 11.5.1999.

The same year that CIREFI started cooperating with third countries, it also started streamlining its definitions of 'illegal presence of aliens' and 'facilitators' and combining efforts with the *Intergovernmental Consultations on Asylum, Refugee and Migration policies in Europe, North America and Australia* (IGC), the *Budapest Group*[209] and the *International Organization for Migration* (IOM). As already outlined in chapter 1.7, it would extend the scope of this thesis to discuss this here in detail, but it should be noted that non-governmental organisations and the UNHCR are being used as central implementation tools of the EU's global migration management strategy. This development could be explained by the general devolving of former state tasks to privatised agencies in line with the restructuring of the nation-state under globalisation (see chapters 3.3.2 and 3.3.3) but represents another line of enquiry.

### 4.5.11 Deportation

The final measure which a rejected asylum applicant faces in his/her treatment in EU law is deportation, that is, the enforcement of an expulsion order. Deportation is seen by the EU as a central element of its migration control policies, already clearly stated in the *Palma Document* of 1989 (see chapter 4.2.5). The Amsterdam Treaty expressly commits itself to the repatriation of illegal residents (Article 63 TEC), having been preceded by similar articles in almost all EU documents, such as the Dublin Convention and Dublin parallel Conventions, the London resolution on manifestly unfounded asylum applications outlined above and other resolutions specifically aimed at enforcing deportations. The AHGI actually comprised a specific sub-group on the issue of expulsion. The mutual recognition of expulsion orders within the EU has been discussed since 2000[210] and was adopted as Council Directive in 2001,[211] despite its rejection by the European Parliament. The existence of effective deportation legislation and practice was a precondition to accession,[212] and the EU has consistently worked on improving its own deportation

[209] The Budapest Group came out of the Budapest process, an intergovernmental forum comprising 36 governments intent to fight undocumented migration from CEEC countries. The group and a corresponding expert group were set up to oversee the implementation of recommendations passed at a Ministerial Conference held in Budapest on 14-15 February 1993. The Expert Group prepares the annual meetings of the Budapest group which comprises representatives of the EU and Schengen presidencies as well as "selected Central and Eastern European states" (Budapest (Expert) Group, 1996). Further, conferences are also attended by international organisations such as Interpol and by the U.S. For reports from the group's annual meetings, see the website of the *International Centre for Migration Policy Development*, http://www.icmpd.org.

[210] *Draft initiative by the French for the adoption of a Council Directive on mutual recognition of decisions concerning expulsion of third-country nationals*, NOTE from the incoming French Presidency to the Working Party on Migration and Expulsion, 30.6.2000, 9896/00, LIMITE, MIGR 51.

[211] *Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals* (OJL 149, 02.06.2001, pp. 34-36). An important factor in communitarisation for Member States is to gain financial backing from EC funds for implementing migration policy. This is regulated by the *Council Decision setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Council Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals*, 23.2.2004, 2004/191/EC (OJL 060, 27.02.2004, pp 55-57).

[212] *Criteria for Membership: Justice and Home Affairs: Ability to Assume the Obligations of Membership*, Commission, 1998, reproduced in SEMDOC database.

procedures through "worthwhile and interesting exchanges of views and experience of enforcement priorities and practices".[213] Just as CIREA's function is to exchange ideas between Member States on the best possible ways to legally restrict asylum rights (see above), the Migration Working Party's discussions led to the following recommendations to Member States' governments in 1998. Under Section E, entitled 'Enforcement activity and interface between enforcement authorities and other government departments or NGOs', the document[214] proposes that

> - Member States could exchange information on the use of detention, as part of the removal process, of illegal immigrants and others not entitled to remain in the Member States;
> - Member States could examine the effectiveness of reporting conditions for third country nationals in the territory awaiting removal to their country of origin or another third country;
> - Member States could examine whether there should be a link between reporting and the payment of benefits.

Deliberately making living conditions unbearable is therefore a central element of the EU's strategy to achieve the enforcement of expulsion orders, as was already suggested by the Commission in 1991 (see chapters 4.4.3 and 5.2.1 below).

Similarly, the harmonisation of asylum law at European level is used to enforce restrictive legislation on the 'lowest common denominator', also with regard to deportations: a 1995 resolution on 'minimum guarantees', that implemented parts of the Dublin Convention and the harmonisation of the criteria for granting asylum, was strongly opposed by NGOs for failing to provide for a universal right of appeal or the suspension of deportation pending appeal or review. There are no provisions relating to the criteria for detention (not even a legal maximum period, although the proposed EU Returns Directive from 1.9.2005 suggests a six-month upper limit[215]) or the right to free legal advice and assistance (also see critique of Asylum Procedures Directive in chapter 4.5.7).[216] The above-mentioned Return Procedures Directive[217] has been severely criticised for its broad scope. The UK Refugee Council and Amnesty

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[213] *Enforcement priorities: best practice in the Member States of removing clandestine migrants and persons not entitled to remain in the Member States*, NOTE from the Presidency to K4 Committee, 16.6.1998, 9446/98, LIMITE, ASIM 148, MIGR 2.

[214] *Id.*

[215] Amnesty International and the UK Refugee Council hold that a "maximum time limit of six months is an unacceptably long time for individuals to be kept in detention where no crime has been committed and where detention is to effect removal. We believe there is a particular need for a standstill clause to ensure that states don't view the minimum standard on detention as grounds for increasing their national time limits", see http://www.refugeecouncil.org.uk/downloads/policy_briefings/EU_Returns_dec05.pdf..

[216] *Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures*, 23.7.96, 5585/95, ASIM 78, commented and reproduced in SEMDOC.

[217] *Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for returning illegally staying third-country nationals*, 1.9.2005, COM (2005) 391 final.

International,[218] "do not believe that, as currently drafted, the returns directive will sufficiently safeguard the rights of those being returned, or of those who cannot or should not be removed. We believe that in order to ensure that returns from the EU are only ever carried out in a safe, dignified and durable manner, a substantial review of the directive is required". Amongst others, concerns are directed at the fact that the proposed directive allows enforced return to a third country other than an individual's country of origin or transit (Article 3), its requirement that states impose a re-entry ban of up to five years in removal orders (Article 9) and the fact that it obliges member states to detain individuals (Articles 14-15).

Finally, the inclusion of readmission agreements with third countries is by now standard practice in all of the EU's external relations negotiations. Particularly worthy of criticism is the EU's practice of mass expulsions.[219] Although joint deportations were already discussed during the Schengen negotiations in the 1980s, with Germany as a driving force behind these discussions, the French government has taken the lead more recently with the initiative to rationalise expulsion measures by means of 'group returns', and joint 'European charters'. The French interior ministry organises monthly meetings to work out the procedure, including a

> legal framework, operational constraints (security rules during flights, composition of escort, requests to overfly third states, etc), diplomatic constraints (issue of consular [EU] laissez-passer, reception by the authorities of the country of destination, etc.).[220]

In the UK, the idea of mass deportation in the form of charter flights was also pursued in the government's White Paper on immigration, nationality and asylum, issued on 7 February 2002.[221] In early 2004, a Decision authorising joint expulsion flights[222] was adopted despite criticism by the EP and despite the fact that the "[c]ollective expulsion of aliens is prohibited" under Protocol 4 Article 4 ECHR as well as Chapter II, Article 19(1) of the EU Charter of Fundamental Rights. In the ECHR ruling on *Čonka v. Belgium*[223], collective expulsions are defined as "any measure by which foreigners are forced, as a result of their belonging to a group, to leave a country, apart from cases in which this measure is adopted following and based on a reasonable and objective assessment of the specific situation of each of the foreigners who compose the group". Arguing that the deportation of over 1,000 would-be migrants in

[218] *Joint Refugee Council and Amnesty International UK submission to the House of Lords Select Committee on the European Union Inquiry into the Draft Directive on common procedures for the return of illegally staying third country nationals*, December 2005, published under http://www.refugeecouncil.org.uk/downloads/policy_briefings/EU_Returns_dec05.pdf.
[219] See *EU: Mass deportations by charter flight - enforcement and resistance*, Statewatch News Online, August 2003 for an outline of the practice in some EU countries.
[220] *Id.*
[221] *Statewatch Bulletin* (vol 12 no 1, January-February 2002).
[222] *Council Decision on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders*, 29.4.2004, 2004/573/EC.
[223] Judgment of 5.2.2002, Čonka v. Belgium, no. 51564/99.

specially arranged flights to Libya at the start of October 2004 constituted a mass expulsion and therefore violated these international protection standards, ten Italian, Spanish and French migrants' rights organisations filed a complaint in January 2005 with the president of the European Commission.[224] The practice of mass deportations has recently been comprehensively outlined by the Dutch *Autonoom Centrum* (2004) and the London-based *Institute of Race Relations* (Fekete, 2005).

### 4.6 Summary

It was argued in chapter 1 that global migration management is built on and complements a set of legal measures that have tried to restrict, control and criminalise immigration into the EU since the late 1970s. This chapter briefly traced the development of EU migration law and policy and critically examined the presupposition in policy debates that migration flows pose a security risk, and found that the concept of security, as implemented by EU policy makers, applies only to the privileged EU Member States and industrialised countries. The impact and logic of restrictive immigration law, as exemplified by the Schengen process, was criticised in 4.3. Chapter 4.4 provided an outline of intergovernmental structures in JHA decision-making with regard to its negative influence on substantive migration law development. After these discussions, existing EU asylum law was outlined from chapter 4.5.1 to 4.5.11. It was found that the steady curtailment of asylum rights since the 1980s is related to EU harmonisation and that this curtailment has often taken the form of procedural measures (chapters 4.5.1 to 4.5.7). The legal developments outlined in this chapter have already pointed to the globalisation of migration control (chapters 4.5.10 and 4.5.11). The next chapter follows on from this and analyses the externalisation of control and its political-economic dimension in more detail.

[224] For a translation of the complaint, see http://www.statewatch.org/news/2005/feb/04italy-expulsion-complaint.htm. The French version is published under http://www.gisti.org/doc/actions/2005/italie/plainte20-01-2005.pdf.

## Chapter 5: Towards global migration management

This chapter examines the qualitative changes that have occurred in EU migration control since the late 1980s, specifically, the globalisation of control and (albeit with significant differences with regard to its harmonisation at EU level) the rationalisation of Member States' immigration policies as a means to pursue strategies of what this thesis sees as imperialism (outlined in chapter 3 as 'globalisation'). Globalisation of control, or global migration management, here implies the extension of the remits of EU migration law to impact directly on non-EU countries, thereby intervening in people's flight routes and third countries' domestic policies. This intervention is typically enforced by linking the implementation of migration management provisions to the granting of aid and the signing of trade agreements. Rationalisation here refers to the changes in immigration approaches that Member States have been promoting since the late 1990s, namely, encouraging specific inward migration to satisfy labour needs, whilst at the same time combating the unwanted immigration of poor migrants and refugees.

Whereas the previous chapter indicated that externalisation in the form of third country cooperation was already prevalent during the 1980s, the focus lay on the restrictive development of migration law, i.e. the closing of borders. This chapter argues that in reaction to the changes in political and economic developments that occurred from the 1970s onwards (outlined in chapter 3), the EU's global migration control strategy became much more pronounced, and from the late 1980s onwards started developing independently as a body of legislation and state action that is no longer subsumed only under EU or national asylum and immigration legislation, but includes foreign and development policy, constituting a significant qualitative shift within EU migration management.

This chapter traces the gradual inclusion of migration clauses in EU external relations, or as it were, the increasing external relations aspect in migration law (chapter 5.2). The relevant body of legislation is outlined, that is, Action Plans, agreements and proposed strategies which have consolidated global migration management since the late 1990s (chapters 5.3). The externalisation of migration control is enforced in particular through readmission and external border controls, expressed by the deployment of military patrols to intercept refugees and migrants trying to reach Europe via the Mediterranean Sea and consequent internment in camps of asylum seekers and their mass deportation from Italy to northern Africa without their asylum claims being assessed (chapters 5.3.7 to 5.3.11).

The second part of this chapter shows that by loosening earlier work bans and opening up more legal channels of economic immigration, Member States have started reacting to changing labour-capital relations that demand an increasingly flexible approach from nation-states in order for them to remain competitive on the global market (chapter 5.4.1). This reaction has taken the form of Commission proposals to harmonise labour immigration laws, which are only reluctantly taken up by the Council (chapter 5.4.2). Although the formal adoption and harmonisation of EU immigration policy is slow, the proposals to open up legal routes for economic immigration have been followed by Member States

adopting skills-based recruitment programmes for foreign workers, which intersect with laws seeking to regulate asylum flows. The recent legislative changes to this effect are outlined in chapters 5.4.3 to 5.4.5 with the examples of Germany and the UK.

### 5.1 Global migration management: in the interest of all?

*Many members of the more prosperous economies are beginning to agree with Raspail's vision of a world of two 'camps', separated and unequal, in which the rich will have to fight and the poor will have to die if mass migration is not to overwhelm us.* [225]

The justification for global migration management ranges from humanitarian perspectives as, for example, promoted by the UN (Ogata, 2000) and security-based perspectives as promoted and implemented by industrialised nation-states. The reasoning behind the increasing calls for a 'global governance of migration', exemplified more recently by the Berne initiative,[226] consequently differs widely. Sometimes, different positions remain opposed, but more often they are conflated, as for example in the "root causes" approach, which combines utilitarian and security-based reasoning with lip service to humanitarianism (see chapter 5.1). The current practice of (rather than the more diverse literature on) global migration management is informed by the security-based approach that shaped the restrictive development of EU migration law from the 1970s onwards and which sees uncontrolled migration (i.e. migration that is autonomous from state intervention) as a threat to the world order and the integrity of nation-states (see chapters 4.1 to 4.3). It has already been shown in chapters 1.2 and 4.2 that when migration is depicted as a threat to security or wealth, politicians and the media are referring to the migration of poor people, not affluent migrants. The above comment by Kennedy also suggests that the new phenomena of global

[225] Yale professor and military expert Paul Kennedy in Atlantic Monthly (1994), cited in Düvell (2003:1).

[226] Launched in June 2001 by the Swiss Federal Office for Refugees and the Federal Office for Migration, in co-operation with the Swiss Department of Justice and Police, the Department of Foreign Affairs and the IOM. The Berne Initiative is termed a "states-owned consultative process, which aims at achieving a better management of migration at regional and global level through enhanced inter-state cooperation. It assists governments in identifying their different policy priorities and offers the opportunity to develop a common orientation to migration management [...]". A first round of international consultations was conducted in Berne in July 2003 and an "International Agenda for Migration Management (IAMM)" was drafted, representing a "reference system on migration management [...] based on a set of common understandings outlining fundamental assumptions and principles underlying migration management". It further outlines "effective practices drawing on the experience of governments". In 2004, a series of "regional consultations" were held in Africa, the Americas, Asia and Europe and discussed further at the Second International Conference on Migration held in Berne in December 2004 (Berne II), which was attended by 300 participants, representing 120 Governments as well as the IOM: "The "International Agenda for Migration Management" was recommended as an important reference system and useful tool for a national, regional or global migration dialogue at Berne II". The Berne initiative is "an ideal platform for the exchange of interests and experiences of states in the field of international migration. Its result, the IAMM, promotes a comprehensive approach to migration management and represents a valuable resource for policy makers and program managers when dealing with the challenges of international migration".

migration management is motivated by 'prosperous' nation-states seeking to control 'poor masses' so as to secure their wealth, a proposition which is discussed further in chapter 6.

Global migration management is characterised by the increasing reliance on inter-state actors (who implement return programmes, information campaigns or provide analysis). The argument put forward by those in favour of global migration control is that because the nation-state remit (i.e. external border control) is no longer sufficient to ensure migration management globally (i.e. migration needs to be controlled in countries of origin and transit), a more 'flexible' and supranational system of control needs to be set up. As Düvell (2002:4) points out, "[a]ny such approach inevitably lies well beyond the scope of nation-states, which have instead identified the need for supranational and transnational organisations. These include the Intergovernmental Consultations on Asylum, Refugees and Migration Policies (IGC), the International Organisation for Migration (IOM), and to some extent the International Labour Organisation (ILO), together with various think tanks and standing conferences".

Another characteristic of migration management is what the Berne initiative calls "natural differences in migration interests between origin, transit and destination countries" (FOM, 2005). These differences in interests are by no means 'natural' but social, as they have their roots in poverty, i.e. an unequal global distribution of wealth and economic prosperity, as Kennedy rightly pointed out. It is important to recognise that these differences are insurmountable and that the state's role is to mediate these conflicts of interest between labour and capital as well as rich and poor (see chapter 2.2); in a nutshell, between human rights and human exploitation.

In chapter 3.3.2 it was argued that one important state function under globalisation is the provision of attractive conditions for capital in order to remain competitive in the global market economy. However, the interest of cheap production and global competitiveness is incommensurate with the right to freedom of movement and labour rights. It is no coincidence then, that not a single EU Member State has signed the UN *Convention on the Protection of the Rights of all Migrant Workers and Members of their Families*, which came into force on 1 June 2003, and that the 45 countries who have ratified or signed the Convention[227] so far represent economically disadvantaged nation-states and therefore 'migrant-producing' countries. Countries of origin and transit have indeed no interest in implementing EU policies on migration, which has been recognised in various EU documents, and met with trade and aid 'leverage'. When the EU then talks of 'partner countries' in relation to migration management, it has to be noted that these can be divided into those that share the same economic prosperity and interests and those that do not.

[227] See http://www.december18.net/web/general/page.php?pageID=79&menuID=36&lang=EN#eleven for undated version of the ratification process.

This is reflected in the organisation of strategy fora, such as the Intergovernmental Consultations[228] in which the EU, the U.S., Canada and Japan has started to meet regularly since the 1990s to discuss global migration flows and the measures they should take to control them. Dreher (2003:16) aptly describes the IGC as "a form of counter regime of Western receiving states to the UN High Commission on Refugees".

There are many facets to global migration management. They encompass the criminalisation of undocumented migration, the creation of global data collection systems and analysis centres (see previous chapter), the imposition of EU immigration controls world-wide (through liaison officers, visa restrictions etc), military intervention in refugee-producing war zones, setting up refugee camps in countries of origin and transit, the organisation of mass deportations to regions of origin, the creation of more efficient skilled immigration systems and the adoption of international agreements and conventions on migration flows.

### 5.2 Migration and EU external relations

The development of global migration management is expressed in various EU documents dealing with third country cooperation in what used to be the third pillar (external relations and migration) and has now been partially communitarised. More specifically, the externalisation of migration law is expressed in the inclusion of migration clauses in existing financial, aid and trade instruments (e.g. Lomé Convention, rewritten as Cotonou Agreement in 2000) and the setting up of inter-state fora for the negotiation of agreements, such as the Barcelona and Budapest processes (see below). The principal geographical 'target' regions with which the EU is keen to conclude these agreements are Eastern Europe (CEEC and CIS states), the non-EU Mediterranean region (North Africa and some Arab states) and ACP countries (sub-Saharan African, Caribbean and Pacific states). In March 2005, readmission negotiations were ongoing or authorised to open with Russia, Ukraine, Morocco, China, Turkey, Algeria and Pakistan (Peers, 2005:118).[229] There have been other initiatives towards migration management agreements with Asia and Latin America, which are not covered in detail in this thesis.

As the European Union originated from an economic interest, its external relations policy is largely of a commercial nature. EU development cooperation with non-EU states started with the 1963

[228] Little is known about the organisational structure, remit and decision-making process of the Intergovernmental Consultations. Düvell (2003:4) writes that the IGC was "set up in 1985 when the previous Intergovernmental Committee on Migration turned into the IOM, is a small, informal and secret forum of sixteen members 'for the exchange of information and the planning of innovative solutions and strategies'. The IGC, possibly the central think tank in migration control politics, is the prime candidate for the source of such key international strategies and rallying cries as the protest calls against 'human trafficking', and even 'illegal migration'. Its organisational roots lie in the International Centre for Migration Policy Development (ICMPD) in Vienna, which also hosts the secretariat for the Budapest Process, a synonym for the extension of the European migration policy eastwards."

[229] Readmission treaties have been agreed with Sri Lanka (SEC (2003) 255, 21 Mar. 2003; Council doc. 7831/1/03, 9 Apr. 2003) and Albania (COM (2004) 92, 12 Feb. 2004) but have not yet been ratified.

EU-Turkey Association Agreement and the 1975 Lomé Convention (see chapter 5.3.8 below).[230] With the introduction of the CFSP in the Maastricht era (see fn 85 in chapter 4.2), the EU started to expand its external relations policy to include migration, amongst others. At the Lisbon summit in 1992, the EU identified three "priority interest zones of its foreign policy [...] Central and Eastern European Countries (in particular, the former USSR and the former Yugoslavia), Maghreb and the Middle East" (Niessen & Mochel, 1999:19). The main frameworks within which negotiations on migration control between the EU and these principal regions are taking place and by which migration control is often funded are Association Agreements. Depending on the geographical location of the third country in question (and particularly their future possibility of accession to the EU), there are different frameworks shaping association agreement negotiations. The most important fora are, firstly, accession negotiations and the PHARE programme for Eastern Europe,[231] secondly, the Euro-Mediterranean Partnership EURO-MED for non-EU countries in the Mediterranean region, thirdly, the trade and aid negotiations between the EU and ACP states (Lomé Convention), and finally, the European Neighbourhood Policy[232], which has become the main official negotiation forum for the EU with third countries since 2004. The more recent funding programme AENEAS encourages third countries to implement migration management without any geographical limitations.

[230] An EU Association Agreement is a treaty between the EU and a third country that creates a framework for cooperation on areas of politics, trade, culture and/or security and have to be ratified by all the EU Member States. They are often concluded in exchange for commitments to political, economic, trade, or human rights reform in a country, whereas the third country may be offered tariff-free access to some or all EU markets (industrial goods, agricultural products, etc.) and financial or technical assistance. Although the EU signed an Association Agreement with Turkey in 1963 (a protocol was added in 1970), which included preferential trade agreements and committed both partners to the strengthening of trade and economic relations as well as the establishment of a customs union, the Lomé Convention had more development aid objectives than the EU-Turkey Association Agreement. The latter also took account of the fact Turkish workers had become a structural feature of the labour market in many European countries and therefore included a clause on free movement of workers.

[231] Dealt with by the Enlargement Directorate of the Commission rather than the External Relations Directorate which covers relations with all other states except the accession candidates and potential candidates.

[232] The European Neighbourhood Policy (ENP) was developed in the context of the EU's 2004 enlargement and was originally intended to apply to the EU's immediate neighbours (Algeria, Belarus, Egypt, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, the Palestinian Authority, Syria, Tunisia and Ukraine). In 2004, it was extended to also include the countries of the Southern Caucasus with whom the present candidate countries Bulgaria, Romania and Turkey share either a maritime or land border (Armenia, Azerbaijan and Georgia). Although Russia is also a neighbour of the EU, EU-Russian relations are instead developed through a Strategic Partnership covering four "common spaces". A key element of the European Neighbourhood Policy is the bilateral ENP Action Plans mutually agreed between the EU and each partner country. These set out an agenda of political and economic reforms with short and medium-term priorities. At present, the implementation of the first seven ENP Action Plans (agreed in early 2005 with Israel, Jordan, Moldova, Morocco, the Palestinian Authority, Tunisia and Ukraine) is beginning. Their implementation will be promoted and monitored through sub-Committees and the Commission will report on progress in early 2007. A further five ENP Action Plans are under negotiation with Armenia, Azerbaijan and Georgia, Egypt and Lebanon. Once they are agreed, similar implementation and monitoring will also begin for these countries. Finally, the entry into force of the Association Agreement with Algeria will allow work on a Country Report to begin. Since the ENP builds upon existing agreements (Partnership and Cooperation or Association Agreements or the Barcelona Process), the ENP is not yet 'activated' for Belarus, Libya or Syria since no such Agreements are yet in force (http://europa.eu.int/comm/world/enp/policy_en.htm).

5.2.1 Third country cooperation in the context of the third pillar

In the context of the third pillar (under Maastricht), migration was given predominance and negotiation structures were shaped by a series of documents outlined in this chapter. As already indicated in the previous chapter, the 1991 Commission Communications on asylum and immigration recommended a series of restrictive measures such as manifestly unfounded applications, deportation and the monitoring of 'migratory flows', the latter indicating the shift to a globalised control of migration. 'Tackling root causes of migration pressure', for example, was also a theme in the 1991 EU immigration ministers' *Work Programme on migration and asylum policy*,[233] which foresaw increased economic, financial and social cooperation between the EU and countries of origin.

At the Edinburgh European Council of 1992, EU ministers passed the *Declaration on principles of governing external aspects of migration policy*,[234] which "synthesized the major European policy principles for the decade to come " (Bouteillet-Paquet, 2003:363). In its Declaration, the Council obviously feared that "uncontrolled migration could be destabilizing" and therefore welcomed "the work on East-West migration of the Berlin and Vienna groups".[235] It urged for measures to be implemented that prevented immigration from outside the Community and declared that refugees "should be encouraged to stay in the nearest safe areas to their homes", i.e. near areas of conflict, as well as proposing the signing of trade, aid and readmission agreements to that effect. Points 7 and 8 of the Declaration state:

> - in their relations with third countries, [the Member States] will take into account those countries' practices in readmitting their own nationals when expelled from the territories of the Member States.
> - [the Member States] will increase their cooperation in response to the particular challenge of persons fleeing from armed conflict and persecution in former Yugoslavia. They declare their intention to alleviate their plight by actions supported by the Community and its Member States directed at supplying accommodation and subsistence, including in principle the temporary admission of persons in particular need in accordance with national possibilities and in the context of coordinated action by all the Member States. They reaffirm their belief that the burden of financial relief activities should be shared more equitably by the international community.

The second point, seemingly concerned with root causes, was a response to the refugee movement from Bosnia-Herzegovina at the time and sets the EU agenda for 'temporary protection' of refugees and a

[233] *Report from the Ministers responsible for immigration to the European Council Meeting in Maastricht on immigration and asylum policy*, Ad Hoc Group on Immigration, WORK PROGRAMME, 3.12.1991, SN 4038/91 WGI 930.
[234] *Presidency Conclusions*, 12.12.1992, SN 456/92, reproduced in Bunyan (1993:89-90).
[235] *Ibid*:89.

harmonised EU response to war-related flight and migration. This represented the beginning of attempts various EU governments to undermine the principle of asylum as laid down in the Geneva Convention, discussed in chapter 4.5. The proposition in the Declaration to conclude readmission agreements with countries of origin and transit, with the aim of enforcing return, led to the Secretariat General of the Council mandating the AHGI to compile a list of existing bilateral agreements and to work out common principles to this effect. This resulted in the adoption of a recommendation on a standard bilateral readmission agreement between a Member State and a third country at a 1994 JHA Council,[236] which "had a great influence over national policies and is still used as a reference document in the bilateral agreements concluded today" (Bouteillet-Paquet, 2003:363). Readmission agreements[237] are one of the main means of controlling migratory flows and imposing migration control upon third countries, as they 'solve' obstacles to deportation (lack of third country cooperation in accepting deportees or lacking/false identity documents). The conclusion of readmission agreements with accession countries represented the second generation[238] of Member States' readmission agreements (Bouteillet-Paquet, 2003:359).

The Commission published another communication on immigration and asylum in 1994,[239] promoting the root causes approach, together with migration management and the integration of 'documented' migrants in the EU. Due to individual Member States' opposition to supra-national and therefore Commission involvement in decision-making in migration matters, the Commission Communications were not pursued by community structures, but third country cooperation in relation to these third pillar/migration issues was pursued through intergovernmental cooperation and formulated by the JHA Council and its relevant working parties, with the 1994 Commission Communication becoming "something of a reference text in the area" (Myers, cited in Gent, 2002:10). The Communication outlines the root causes approach by noting three elements. First, so-called action on migration pressure by means of third country cooperation, second, controlling immigration to keep it "manageable", and third, integration policies for 'legal' migrants. The Communication is further explicitly based on the assumption that uncontrolled migration is a threat to security (Gent, 2002:4).[240]

Although there is no comprehensive documentation of the pursuit of the external relations agenda in EU migration policy until 1998, Council meeting agendas and other communications point to discussions on the issue having taken place on a regular basis. The particular focus at the time was Eastern

[236] *Recommendation Concerning a Standard Bilateral Readmission Agreement Between a Member State and a Third Country*, reproduced in the Official Journal No. C 274 of 19.9.1996, p 20.
[237] EU readmission agreements, by now included in all major trade negotiations between third countries and the EU, oblige third countries to reply to an EU readmission or transit request for any national within 15 days of its issuing. The proof of a migrant having crossed the third country in question is set low (statements by the person to be deported, hotel bills, etc.) as well as being vague (other supporting documents). In case of a transit flight through a third country, EU Member States do not need an approval by that country at all, merely a notification of personal details of the expelled person, flight number, date and times and details on any official escorts.
[238] The first having been concluded among Member States in the 1960s (now redundant).
[239] *On Immigration and Asylum Policies*, Commission Communication, 23.2.1994, COM(94)23 final.
[240] See Gent (2002:10-11) for an analysis of the Commission Communication.

Europe, because of increased migration flows in the region after 1989, and with a view to accession and eventually EU enlargement. The implementation of migration management in Eastern Europe was intrinsically linked to discussions on 'organised crime' and took shape at a JHA Council meeting in Berlin on 8 September 1994. The Council meeting hosted the *Berlin Conference on Drugs and Organised Crime* and, together with the EU Member States, those participating included the European Commission, Ministerial representatives from the accession states, and the Countries of Central and Eastern Europe (CCEE). The resulting *Berlin Declaration*[241] ties the participating states to the EU's third pillar arrangements, fostering regular cooperation under the general title of Drugs and Organised Crime and is one of the first EU initiatives to incorporate the countries of central and eastern Europe into its priorities in the third pillar (Norman, 1998:385). The Berlin Declaration was preceded by the Budapest process and was followed by the Europe Agreements and the pre-accession strategy (see below). Again, readmission agreements were central to this process. Some time before the *Berlin Declaration*, in November 1993, the JHA Council already discussed the "[l]ink between European association and co-operation agreements and third countries' practice on readmission".[242] Readmission agreements with Eastern European countries were typically combined with the safe third country and country of origin principles, a practice which has raised serious concerns about refugee protection (chapters 4.5.5 and 4.5.6). Lavenex (2001a:34) sums up, that "[d]uring that period, the focus of cooperation clearly centred, from a realist perspective, on the question of illegal immigration including traffic in human beings and illegal immigration networks [...]". The Berlin Declaration therefore focused on tightening up visa regimes, implementing enforcement and deportation procedures, setting up effective sanctions against illegal migration and undocumented travel, intensifying the use of readmission agreements with eastern European countries and reinforcing border controls and border surveillance (*id.*).[243]

In September 1994, in the run-up to EU enlargement negotiations, the Council passed Draft Conclusions on relations with third countries in the fields of Justice and Home Affairs,[244] instructing the K4 Committee to create and uphold "contacts with third countries", that is to organise meetings between EU ministers and officers with their colleagues from countries of origin and transit and to discuss concrete cooperation on JHA matters, including third country cooperation in migration matters. It is worth noting the Council's introduction to EU and third country cooperation in the third pillar at length:[245]

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[241] *Berlin Declaration on Increased Cooperation in Combating Drug Crime and Organized Crime in Europe*, 8.9.1994. Published as Council press release, 14.9.1994, 9345/94, (Presse 182).
[242] *Provisional Agenda* for the 1710th meeting of the Council of the European Union (Justice and Home Affairs), Brussels, 22.11.1993, 10269/1/1993, REV 1, RESTREINT, OJ/CONS 76, JAI 5.
[243] See fn 234 in chapter 5.2.2 below for more detail on the Berlin Declaration.
[244] *Draft Conclusions of the JHA Council on relations with third countries in the fields of Justice and Home Affairs*, NOTE from the K4 Committee to the Permanent Representatives Committee, 20.9.1994, 8808/94, RESTREINT, CK4 64. The final Conclusions were adopted on 1.12.1994 (document dated 2.12.1994, 11608/94, RESTREINT, JAI 72).
[245] Not numbered in the original document but here for reference purposes.

The Council of the European Union,

(1) recalling the tradition of contacts with certain third countries in the earlier context of intergovernmental cooperation,

(2) anxious to strengthen its relations with third countries under Title VI of the TEU,

(3) aware that such development is necessary for the greater effectiveness of the European Union's cooperation action in these fields,

(4) bearing in mind the specific links already existing in various areas between the European Union and a number of third countries,

(5) concerned to develop complementarity between the policies implemented in the framework of the CFSP and JHA,

(6) desirous of explaining to the third countries concerned its intentions in this regard,

(7) believing that some variation in the level and nature of such contacts according to the partner concerned is justified on the basis of the interests of both sides,

(8) wising to define flexible general principles for each Presidency to apply when discharging the overall responsibility for the organization of work [...]

Several premises are laid down in this introduction. First of all, the EU explicitly recognises that third country cooperation is necessary to implement EU migration policies abroad (point 3). Secondly, it recognises that historical links between EU Member States and third countries (which usually derive from their specific colonial history and are reflected in bi-lateral aid and trade agreements) should be used as a basis for this third country cooperation (point 4), a political practice that was later used to draw up the Action Plans and is admitted by Commission officials (see chapter 5.3.7 below). Thirdly, the Council confirms that the general principle of linking foreign policy to the third pillar is now formally established, and can therefore be expected to be pursued in all Member States' foreign policy negotiations (point 5). Fourthly, the Council instructs Member States to make this agenda clear to third countries and leaves no doubt with regard to its intentions to use foreign policy to negotiate third pillar policies which the EU wishes third countries to implement (point 6). Finally, the Council yet again stresses the importance of 'flexibility' in these negotiations, i.e. not to implement these policies through Conventions that need to be ratified and tested against existing international obligations (or WTO rules) but through informal and intergovernmental agreements (points 7&8).

The Draft Conclusions on JHA cooperation with third countries further lay down that 'expert meetings' with third countries should take place within CIREA and CIREFI (see chapter 4.5.10). Also,

"contacts should be continued with those countries with which, under Trevi, such contacts were traditional: the United States, Canada, Switzerland and Morocco".[246] The Conclusions stress the importance of intensifying contacts with the CCEE and "other countries which are applicants for membership of the European Union [...]" where

> third countries may be grouped together on the basis of their affinities or the similarity of their situations or their relations with the Union: the United States and Canada, the CCEE, other third countries applying for membership of the Union, the Baltic states.

Following this logic, the EU set up a hierarchy of negotiations with non-EU states on third pillar matters, with the U.S. and Canada at the top, followed by the CCEE countries and future eastern European applicant countries. This would later be formulated more concretely in the Austrian Strategy Paper of 1998, which divided the world into 'concentric circles', with the industrialised countries in the centre and Africa at the periphery.

By the end of 1994, the K4 Committee had set up a programme for contacts with third countries for 1995, including CCEE countries, Cyprus/Malta, the U.S. and Canada, Norway, Switzerland, the Baltic States and Morocco, and reserving meetings with Slovenia, Russia, Belarus and the Ukraine. But already by 1995 "requests for contacts with third countries in the context of the Third Pillar [were] very numerous",[247] so that the list was officially extended to include Turkey, the Mediterranean countries, Russia and Slovenia. Outside the negotiations with Eastern European countries (European Agreements, pre-accession strategy and the so-called 'structured dialogue'), the EU Council was instructed to identify

> the topics and third countries for which cooperation in the field of Justice and Home Affairs is desirable and useful: visas, readmission of illegal immigrants, increased judicial cooperation, police cooperation, combating drugs, etc.[248]

In January 1995, a first meeting within this cooperation framework had already taken place between the Troika of the K4 Committee and CCEE representatives, where a timetable and programme for future

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[246] *Draft Conclusions of the JHA Council on relations with third countries in the fields of Justice and Home Affairs*, NOTE from the K4 Committee to the Permanent Representatives Committee, 20.9.1994 (23.09), 8808/94, RESTREINT, CK4 64, p 2.
[247] *Relations with third countries in the context of the Third Pillar*, NOTE from the Presidency to the Permanent Representatives Committee, 24.2.1995 (06.03), 5121/ 1/95, REV 1, RESTREINT, JAI 4.
[248] *Id.*

cooperation were prepared, specifically focusing on the implementation of the *Berlin Declaration* and meetings between CIREA and CIREFI experts.[249]

From 1995 onwards, each Presidency presented a programme for third country cooperation for the following year. In January 1996, the Italian presidency again stressed the importance of relations with third countries with regard to asylum and immigration "in the framework of decisions taken or to be taken at higher levels" and urged Member States to "**coordinate** their positions in **international fora**" better (bold in original).[250] At the same time, in a document on the role of the Steering Committees in defining and conducting third country relations,[251] the Council stated that "police, judicial, asylum and immigration matters were tending to increase in importance in the European Union's relation with third countries" and the document goes further to discuss how priorities should be defined and how to prevent possible 'work overload' for CIREA and CIREFI through contacts with third countries. It also sets relations with the CCEE as the first priority in EU relations with third countries.

### 5.2.2 European enlargement: the Budapest process

As already mentioned above, EU enlargement was an important negotiation forum in the externalisation of migration control and, in the JHA field, had the clear objective of providing 'buffer states' for the EU founding members against the perceived threats of drugs trafficking and undocumented immigration. For eastern European states, accession therefore meant the whole-sale adoption of the EU's asylum, visa and JHA regimes (Schengen and JHA *acquis*) and the implementation of advanced border control technologies.

This 'buffer state' development has been subject to criticism throughout the enlargement process. The adoption of the 'safe third country' principle in particular, linked with readmission agreements, has had a direct impact on eastern European countries in having to 'process' all asylum seekers and readmit undocumented migrants (including non-nationals) into their territory. The creation of asylum regimes within a period of a few years in accession countries has been driven by security considerations rather than humanitarian concerns, which is reflected in the accession states' asylum procedural systems and which in turn has caused great concern for the safety of the returned refugees (FFM, 1995, 1996, 1997, 2001; Lavenex, 1999:155-7). Furthermore, the impact of visa impositions on the citizens of Eastern European states, who used to be able to move within the former Soviet Union, has had devastating effects on the

[249] *Relations with third countries in the fields of Justice and Home Affairs. Implementation of the Conclusions of the JHA Council of 30.11.-1.12.1994 and of the European Council in Essen on 9/10.12.1994*, NOTE from the Chair of the K4 Committee to the Permanent Representatives Committee (Part 2), 27.1.1995, 4413/95, RESTEINT, CK4 3.
[250] *Presidency Programme for the first half of 1996*, NOTE from the Italian Presidency to Steering Group I, 11.1.1996, 4010/1/96, REV 1, LIMITE, ASIM 2.
[251] *Relations with third countries - proceedings of Steering Groups I, II and III in early January 1996*, NOTE from the General Secretariat of the Council to the K4 Committee, 16.1.1996, 4287/96, LIMITE, JAI 1 (pp 1, 2 & 5).

livelihoods of those in border regions, especially those engaged in petty trade across the borders.[252] Another critique of readmission policy towards eastern Europe has been the argument that it simply has not been effective in controlling irregular migration. Bouteillet-Paquet (2003:365-7) argues that the readmission procedures remain time-consuming and ineffective in practice, due to the unwillingness of Eastern European states to act as buffer zone for the EU. Secondly, readmission policy has not led to a decrease in human smuggling networks, and thirdly, the policy has violated international refugee protection obligations, as readmission has been applied since the 1990s, regardless of existing protection regimes in accession countries, and "even today [...] some CEEC's still grant an inadequate level of protection [...]" (Bouteillet-Paquet, 2003:367-8, see also Lavenex, 2001:29-30).

The formulation and implementation of the far-reaching array of control measures took place in various fora. An important one was the intergovernmental Budapest process, which saw a series of negotiations that started with the Vienna conference outlined in chapter 4.2, led by the Vienna, the Berlin and the Budapest Groups (see Lavenex, 1999:102-4). As already indicated above, the pre-accession strategy was informed by the *Berlin Declaration*[253] and the more in-depth Langdon report,[254] which provided a security-driven focus and set out "deficiencies" in applicant countries and suggested these should be remedied by the implementation of the whole EU JHA *acquis* and funded by the PHARE[255] programme. Another EU structure set up to deal with accession is the Europe Agreements, initially limited to trade and economic cooperation and the structured dialogue, which was supposed to combine all prior bi-lateral and intergovernmental consultations.

All the above processes have been criticised for the EU's imposition of its agenda upon accession countries without consultation or co-decision. Lavenex (1999:115) points out the "asymmetric nature of accession talks" and indicates that

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[252] For first hand research on the impact of the EU border regime on migrants and citizens of Poland, Romania, the Ukraine and the Czech Republic, see the publications of the Berlin Research Centre for Flight and Migration (FFM), published under http://www.ffm-berlin.de/deutsch/hefte/hefteindex.htm.

[253] The Berlin Declaration extended the power of liaison officers to prevent smuggling people across the border and laid down the coordination of statistical data on smuggling and the creation of a manual on legislation and administrative practice applicable to smuggling in the different European states. The Declaration was followed by more documents and meetings, such as the Council meeting in Essen on 9/10.12.1994 (12030/1/94, CK4 97, REV 1), setting up the framework for the accession negotiations and leading to the pre-accession pact, in which migration control always played a central part: *Pre-Accession Pact on Organized Crime Between the Member States of the European Union and the Applicant Countries of Central and Eastern Europe and Cyprus*, Council press release, 28-29.5.98, 8856/98 (Presse 170).

[254] UK Home Office official A.J. Langdon was contracted by the Commission to prepare a report on the situation of Justice and Home Affairs in the accession countries. Langdon finds that "the priority issues are combating unauthorised immigration, including border regimes [...]" (report reproduced in Statewatch, 1995:5-17, p 5).

[255] Originally created in 1989 to assist Poland and Hungary, the PHARE programme currently covers 10 countries: the 8 new Member States: the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia, as well as Bulgaria and Romania, assisting them in a period of massive economic restructuring and political change. Until 2000 the countries of the Western Balkans (Albania, Bosnia-Herzegovina and The Former Yugoslav Republic of Macedonia) were also beneficiaries of PHARE but since 2001 fall under the CARDS programme (Community Assistance for Reconstruction, Development and Stability in the Balkans).

> the CEEC's have neither been accepted as observers in the regular meetings, nor have they been informed about ongoing negotiations. Without this information, they had no chance to exert influence on co-operation amongst EU member states and are merely informed *ex post* of official decisions.

The arrogance with which EU states approached the enlargement process (and indeed the idea of any democratic input in JHA decision-making) was clearly reflected in the Langdon report:

> A totally different aspect of the structured dialogue on justice and home affairs that struck me quite forcibly was the sheer lack of knowledge about the EU system that exists in many of the Associated Countries. Most, though not all, of the Associated Countries seemed to have a good idea of the structure of committees and working groups that existed under the Justice and Home Affairs Council, but they also had the idea that this system was constantly producing a stream of decisions from which they were being excluded. [...] I think that it would [...] be possible to give the Associated Countries a better idea of the general way in which issues are being taken forward, without damage to any of the EU's decision-making capability.

The weak negotiation position that eastern European states find themselves in is explained by Gowan (1998:439-41) by the fact that they have already lost two of their most important bargaining tools: firstly, the opening-up towards Western European investment (which was already regulated through the Europe Agreements without any power of decision on how this common market should be regulated); secondly, the implementation of security measures was already fulfilled through the enlargement of NATO towards Eastern Europe, harmonising the foreign policy agenda of Eastern and Western Europe. Finally, there was no unity amongst the accession states themselves, which could have secured a stronger bargaining position (*ibid*:441). The precondition for the enlargement procedure in the first place is the fact that the accession countries did not really have any option but to join the EU,[256] as they themselves are faced with economically unstable neighbours on the East and have become highly dependent on western European capital during the "economic restructuring" that followed the breakdown of 'real' communism.[257]

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[256] It has to be noted that states do not represent the interest of one unified body of citizens but conflicting interests, which means that states cannot be simply seen as victims. Whilst some states are economically weak and therefore do not posses a strong bargaining position, the economic or political coercion of one state by another always necessitates willing helpers on both sides. The function of local élites in the structure of imperialist relations was already pointed out in chapter 2.1.1. Accession was therefore lucrative for many people, including eastern European elites (see next footnote).

[257] See the journal *Ost-West Gegeninformationen* vol 13(4) 2001 for a collection of articles on the socially and economically detrimental impact that EU foreign investment in Russia, Romania, Bulgaria, Hungary and Poland during the ten years of "transition" and privatisation had on the larger population of eastern Europe, whilst old elites could "transform their privileges that up until then had been based in [political] position, to privileges based in property rights" (Samari, 2001:5).

Following the Langdon report at the 1993 Copenhagen Council, which officially invited Central and Eastern European countries to apply for EU membership, the PHARE programme was extended to cover JHA and to support infrastructural investment. PHARE's total 'pre-accession' focus was put in place in 1997, in response to the Luxembourg Council's launching of the enlargement process.[258] It could be argued that the enlargement process and pre-accession strategy was for migration and external relations what Schengen was for EU harmonisation of asylum: a laboratory for policy-makers and think tanks on how to enforce EU migration interests in the most restrictive way possible. The insights and negotiating tactics gained during enlargement were later applied to other, economically even weaker regions of origin and transit surrounding Europe, in particular Northern Africa.

### 5.2.3 Euro-Mediterranean Partnership

In 1995, the EU embarked on a more structured dialogue with Mediterranean countries, which became known as the Barcelona Process. The Euro-Mediterranean Conference of Ministers of Foreign Affairs, held in Barcelona on 27-28 November 1995,[259] resulted in the *Barcelona Declaration* and marked the starting point of the Euro-Mediterranean Partnership, a wide framework of political, economic and social relations between the EU and Southern Mediterranean countries. The 'Euro-Mediterranean Partnership', or EURO-MED, currently comprises 35 members, 25 EU Member States and 10 Mediterranean Partners (Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Palestinian Authority, Syria, Tunisia and Turkey). Libya has observer status since 1999.

The *Barcelona Declaration* lays down three pillars for developing the main elements of a political and security partnership, an economic and financial partnership and a partnership in social, cultural and human affairs. Although the signatories committed themselves to respect a number of human rights principles,[260] the best known and most heavily funded aspect of the Declaration is the creation of a free trade zone (by 2010), and the lesser known but also well-funded aspect is the parallel control of migratory flows. The *European* newspaper (30.11.95) thought the motivation behind the Conference to be the following:

> Above all, the aim of the rich EU is to hold back the millions in north Africa, a tide of illegal migrants waiting to percolate through the thousands of kilometres of the frontier of the Mediterranean coast.[261]

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[258] See Commission summary under http://europa.eu.int/comm/enlargement/pas/phare.
[259] The conference was attended by governments of 27 countries, the Council of the European Union and the European Commission (the Partnership) and formally established the Euro-Mediterranean Partnership.
[260] The implementation of which is being promoted by the Euro-Mediterranean Human Rights Network, see http://www.euromedrights.net/english/engelsk.html.
[261] Cited in *Statewatch Bulletin* (vol 6 no 1, January-February 1996).

The importance of migration control in the EURO-MED programme became particularly visible in the economic negotiations with Libya since 1999. Not long ago, Gadhafi was isolated within the international community, but under the pressure of the recent Iraq war[262] and with the EU and the U.S. competing for dominance of the oil markets in the Middle East and Africa, Libya has more recently become a respectable negotiating partner again. Apart from oil interests, however, Libya's control of transit migration and its agreement to set up refugee camps on its territory is linked to economic rewards in the form of arms and trade deals with Germany and other EU Member States (see chapter 5.3.10 below).[263]

The *Barcelona Declaration* marked the beginning of the inclusion of the Maghreb countries of North Africa in EU global migration control, and the EURO-MED partnership was the forum in which these initiatives have since then taken place. EURO-MED is therefore part of a more general expansion of EU influence abroad, where EU foreign policy initiatives, given shape at a series of summits and meetings at the end of 1995,[264] showed the EU to reach for a more "global role". The EURO-MED summit in Barcelona explicitly excluded the U.S. even as observers, emphasising that it was a European initiative only. However, cooperation between the EU and the U.S. continues, as is particularly evident with regard to the 'fight against terrorism', by now fully conflated with the discourse on migration. A "largely unreported meeting" between the EU and the U.S. in Ottawa in 1995 initiated a global counter-terrorist initiative[265] in which migration control plays a central role:

> The ideology running through these meetings is a familiar one - the linking of terrorism, the threats of immigration and drug trafficking, and consequent organised crime and money-laundering - except this time the focus is global as well as European. Nor do the issues raised contain any surprises. They are the "threats" to European and global "security" that have "emerged" in the post-Cold War era.[266]

More recently, EU global migration management has been extended to cover Africa and Asia. With regard to Africa this took the form of EU-ACP relations in form of the Cotonou Agreement (see below) and with

[262] Shortly after the war, following months of secret meetings with U.S. and British officials, Libya had agreed to dismantle its weapons programmes and allow U.N. weapons inspectors access to key sites. Gadhafi admitted in an interview with CNN that his decision was based on the Iraq war. See http://www.cnn.com/2003/WORLD/africa/12/22/gadhafi.interview.

[263] For a detailed account of how the EU's oil interests are linked to the arms industry and migration control, see Helmut Dietrich (2004:22-26).

[264] Madrid European Council (15-16 December 1995), EURO-MED Summit, Barcelona (27-28 November 1995), EU-US Summit, Madrid (3 December 1995), New P8 group declaration (Ottawa, 12 December 1995), Interregional Cooperation Agreement (Mercusor), Madrid (15 December 1995).

[265] *Statewatch Bulletin* (vol 6 no 1, January-February 1996).

[266] *Id.*

regard to Asia of the inclusion of migration in the Asia-Europe Meeting (ASEM)[267]. The *ASEM Ministerial Conference on Cooperation for the Management of Migratory Flows between Europe and Asia*, held in Spain in April 2002 and initiated by China, Germany and Spain, discussed cooperation on migration management and agreed on a follow-up, including an exchange of information on flows of migrants and migration management, cooperation in improving the quality and security of travel documents, fighting forgery of documents, setting up networks of immigration and consular liaison officers and meetings "at expert and director-general level".[268] Here also, readmission agreements are one of the main elements in the negotiations.

### 5.3 Consolidating the globalisation of control

The political processes of EU enlargement, EURO-MED, EU-ACP cooperation, ASEM and more recently the European Neighbourhood Policy (see chapter 5.2) represent some of the main political structures within which the EU has negotiated its foreign policy with regard to global migration management in the past decade. The content of the agreements to be negotiated, i.e. the exact policy formulation and migration control elements to be imposed upon third countries, were consolidated within the EU at the end of the 1990s, when the globalisation of EU migration policy found a new impetus and was formulated more comprehensively with the use of specific Action Plans. The section below traces these discussion papers from the first Action Plan on Iraq and initiatives to remove 'obstacles' to deportation, to the formulation of a more comprehensive approach increasingly linked to 'development', which has been termed the 'root causes' approach. It is found, however, that the humanitarian or development concerns remain purely lip service, and that 'security' dominates EU migration and, increasingly, development policy.

#### 5.3.1 Draft Action Plan on Iraq: externalisation of asylum

The draft Action Plan on Iraq was formulated as a response to a wave of refugees from the Iraqi part of Kurdistan and represented the implementation of the externalisation of asylum policy. The Action Plan treated Kurdish refugees as illegal immigrants and, for the first time, systematically laid down a large-

[267] ASEM is an "informal process of dialogue and cooperation" initiated in 1996. Until 2004, it comprised 15 EU Member States, the European Commission and 10 Asian countries (Brunei, China, Indonesia, Japan, South Korea, Malaysia, the Philippines, Singapore, Thailand, and Vietnam). As a result of EU enlargement, ASEM Summits were extended to include the 10 new EU Member States as well as three new ASEAN countries (Cambodia, Laos and Myanmar). The ASEM process addresses political, economic and cultural issues. The first ASEM Summit was held in Bangkok in March 1996, followed by bi-annual summits, ministerial-level meetings and a range of "meetings and activities at the working level" (http://europa.eu.int/).

[268] *Statewatch Bulletin* (vol 6 no 1, January-February 1996).

scale practice of prevention of entry, universal fingerprinting and 'repatriation'. The Plan is outlined here, as is the criticism against 'third country cooperation' in asylum matters, in this case on grounds of the cooperating state, Turkey, being one of the main causes of the refugee problem.

The Action Plan was prepared by CIREFI, which reported to the K4 Committee in October 1997 that it had received "worrying" answers from Member States to a questionnaire on the illegal immigration of Iraqi citizens, noting a considerable increase in asylum seekers during 1997.[269] Based on these answers, CIREFI identified "general characteristics" which did not exactly provide new insights with regard to refugee movements, i.e. that a large number of "immigrants" were of Kurdish origin, that they arrived as "illegal immigrants" or asylum seekers, that they travelled with or without documents, used traffickers, and that they take similar routes:

> through Turkey, then through Greece to Italy, France, Germany, Belgium etc. Alternatively, they choose the Balkan route via Bulgaria, the states of former YU, Hungary, the Slovak and Czech Republics, Germany etc. They use all means of transport: bus, truck, car, ship, plane.

Without mentioning the reason for this sudden flight,[270] the document goes on to state that

> the present situation is made considerably more difficult because the current embargo against Iraq makes it difficult to repatriate the people concerned. [Only a limited number of Member States [France, Sweden] carries out repatriations to Iraq; repatriations are only possible if the foreigners are in possession of valid travel documents.]

CIREFI concluded that this 'problem' is related to specific deficits in control mechanisms, to the lack of travel documents of the people to be deported and to the fact that "Turkey, as an important first transit country, is *not prepared to cooperate* with the EU Member States in this area" (emphasis added). It then goes on to propose to make the Turkish authorities "more sensitive to the problems of EU member states" and to get in contact with Turkish authorities, and it points to the EU Association Agreement with Turkey, which includes a cooperation clause on the fight against illegal immigration:

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[269] *Influx of immigrants from Iraq*, NOTE from CIREFI to the K4 Committee, 24.10.1997, 11658/97, LIMITE, CIREFI 53.

[270] In May 1997, Turkish forces had invaded northern Iraq to attack enemy Kurdish rebels and establish a "security zone" and in October of the same year, the two largest Kurdish insurgent groups in Iraq ended a year-long truce with clashes that escalated into a major offensive in November whilst government political executions continued (Project Ploughshares, Institute of Peace and Conflict Studies, www.ploughshares.ca/content/ACR/ACR00/ACR00-Iraqk.html). In 1996, Iran counted over 75,000 refugees from northern Iraq (http://www.refugees.org/world/countryrpt/mideast/1997/iran.htm) whilst Germany only registered 1,549 undocumented Kurdish Iraqis.

**Therefore, CIREFI proposes that such cooperation shall be incorporated into the body of the second pillar. The ideal solution would be the conclusion of a readmission agreement with Turkey which would also extend to citizens of other third countries than Turkey.**
(Emphasis in original)

Other proposals include the possibility to deport 'immigrants' to the no fly-zone in Northern Iraq and 'supporting' transit countries through the training of airline and EU embassy personnel. The issue was then put on the agenda of the next meeting between CIREFI experts and third countries in November the same year.

After a series of restrictive measures and no mention of flight reasons or Turkey's human rights record, the final sentence of the document states that "aspects of humanitarian solidarity with the people concerned should not be forgotten". This lip service appears even more cynical in the face of the proposed readmission agreements with Turkey implying the deportation of Iraqi Kurds to Turkey, whilst Turkey continues to repress its own and the Iraqi Kurdish minority populations. A Human Rights Watch briefing paper from March 2003,[271] warning of Turkey's involvement in Northern Iraq in the context of the then imminent Iraq war, describes the ongoing conflict of interest between Turkey's army and the Kurdish-controlled region of Northern Iraq.[272]

With regard to the increased flight of 1997, the Council of Europe issued a report in June 1998,[273] which stated in Points 76 and 77 that

> The precise causes of the increase in influx of migrants and asylum-seekers of Kurdish origin movements are hard to pinpoint. The dramatic humanitarian situation described earlier in the report obviously constitutes an important incentive for migration. Further reasons are the lack of economic prospects and *discriminatory policies in both Iraq and Turkey towards the Kurdish minority.*
>
> On 6 January 1998 the President of the Turkish Human Rights Association, Mr Akin Birdal, issued a statement to the effect that *policies pursued over decades in Turkey* had made this massive migration inevitable. The internal migration which had been experienced over the past 5-6 years had now turned abroad. Those forced to migrate faced serious unresolved problems, with regard to accommodation,

[271] http://www.hrw.org/backgrounder/eca/turkey/turkey_violations.htm
[272] It states that Turkish forces are present in large numbers in the Kurdish-held enclave in Northern Iraq and that since 1997, an estimated 5,000 Turkish soldiers have occupied a 15-kilometre-deep strip along Turkey's border with Iraq. According to the report, Turkish forces were setting up camps into which they hoped to channel possible mass flows of Iraqi civilians fleeing the conflict, in order to prevent them crossing into Turkey. A much larger Turkish force was reported to be stationed on the Turkish side of the frontier with Northern Iraq, and, according to Newsweek of February 24, there were plans to deploy 60,000 to 80,000 Turkish troops up to 170 miles into Northern Iraq if Kurdish forces attempt to annex oil-rich Kirkuk.
[273] *Humanitarian situation of the Kurdish refugees and displaced persons in South-East Turkey and North Iraq*, Council of Europe, Committee on Migration, Refugees and Demography, Report, Doc 8131,3.6.1998.

> nutrition, work, health and education. The recent migrations showed that the Kurdish question had now become an international issue, rather than a problem internal to Turkey. It was a human rights problem, thus a problem for the international community.
> (Emphases added)

Although critical of the Turkish state's role in the Kurdish crisis, the Council of Europe fails to criticise the EU's response, outlined in the draft Action Plan (targeting Iraq and neighbouring regions).[274] The draft Action Plan aimed to develop contacts with the government of Turkey and with the UNHCR and, "in association with the Commission, to take forward discussions with the Turkish government on the basis of this action plan with the aim of identifying and implementing specific measures of improved co-operation".

The plan further promoted rapid ratification of the Eurodac Convention and proposed to extend it to "illegal immigrants from third countries", as well as proposing a series of measures to "combat illegal immigration", including "pre-frontier assistance and training assignments in relation to countries of origin and transit", "mutual assistance in the training of border control staff and airline personnel, e.g. by bi-lateral exchange programmes", "training and exchange between officials of Member States and third countries concerned, in cooperation with the Commission where EU financial programmes exist" and so forth.

All these measures are proposed and discussed without pointing out the paradox that the appalling humanitarian situation, which the EU admits is responsible for the flight of thousands of Turkish and Iraqi Kurds, is being created by the very state agents the EU wants to train in 'fighting off' the migrants. On the contrary, follow-up meetings were soon held in Ankara on 9 and 10 March 1998, where issues such as Kurdish asylum seekers, illegal trafficking, border management, detention, information exchange, readmission, deportation and technical assistance to the Turkish authorities were discussed.[275]

The policy of "regional protection" (recently promoted by the Italian and UK governments in 2003/2004 under the name of 'external processing centres') was also laid down in Point 3 of the draft Iraq Action Plan:

> The Presidency, in association with the Commission, has decided to take forward the close dialogue with the UNHCR, to obtain further information about the humanitarian situation and to explore the role which the UNHCR can play in the region in helping to deal with asylum-seekers, including the possible

[274] *Influx of migrants from Iraq and the neighbouring region: EU Action Plan*, there are various versions, the one used here is dated 22.1.1998 and referenced 5503/98, LIMITE ASIM 10, EUROPOL 9, PESC 24, COMEM 3, COSEE 3 and although there are no details to the document, *Statewatch* describes it in its database as presumably being a version presented to Coreper.
[275] *Influx of migrants from Iraq and the neighbouring region: report of the meetings held in Ankara on 9 & 10 March 1998*, NOTE from Presidency to the K4 Committee, 21.4.1998, 6938/1/98 REV 1 LIMITE ASIM 78.

development of regional solutions, with a view to identifying additional specific steps which could be included in a revised action plan.

These proposals would later be put forward to deal with the refugee movements triggered by the 1999 NATO intervention and preceding conflicts (see below).

5.3.2 Tackling 'readmission problems'

The year 1997 marked the beginning of an active and comprehensive pursuit of third country cooperation and coercion, not only in relation to Iraq and Turkey, and the regionalisation of refugee crises. Deportation, next to external border control, forms another main element of global migration management and EU efforts began concentrating on more effective enforcement by removing 'bureaucratic obstacles'. In November 1997, the Presidency proposed a joint meeting "to consider what can be done with regard to certain African countries giving rise to readmission problems (Nigeria, Ethiopia, Somalia and Liberia)", an initiative which was, like the Iraq Action Plan, based on information gathered by CIREFI, showing that "Member States of the Union often come against similar problems with certain third countries as regards the readmission of nationals of those countries."[276] A meeting on China, India and Vietnam has already been held in April 1997. The same document reiterates that EU implementation of deportation policies required 'cross-pillar' approaches and that

> it would be useful for representatives of the relevant working parties from all three pillars to make a joint study of the way in which the Member States could increase their cooperation and act with greater coordination vis-à-vis the third countries in question so that their policies on the subject of return could be made more effective.

This initiative on Africa, which proposed the facilitation and acceleration of "the procedures whereby travel documents are issued to nationals of these countries by their diplomatic representations" led to a series of scandals where African embassies, pressurised by the relevant Member State's authorities, started to issue identity papers to refugees without any guidelines or cross-checking with their countries of origin, so as to enable large-scale group deportations from EU Member States. In several known cases from

[276] *Proposal for a joint meeting of the relevant working parties from all three pillars to consider what can be done with regard to certain African countries giving rise to readmission problems (Nigeria, Ethiopia, Somalia and Liberia)*, NOTE from the Presidency to the Migration Working Party and Working Party on Africa, 11.11.1997 (14.11), 11962/97, LIMITE, ASIM 211, COAFR 30.

Switzerland, refugees from Sierra Leone and the Sudan were deported to the Ivory Coast. In July 1999, the civil liberties group Statewatch reported[277] that

> African refugees whose deportation from Switzerland is stalled because of missing travel documents have, for the last nine months, been deported illegally through the "west Africa route". The BFF [Swiss Federal Office for Refugees] issues travel documents which are sealed and sent to the airport in Zurich or to the destination airport. According to the anonymous police letter [written by a whistleblower], it is impossible to ascertain the validity of the identity on these papers, as a recent case showed discrepancies between statements by the refugee, the BFF and the African embassy concerned.
>
> The uncertainty of the refugees' identity, however, did not halt the deportation process. By issuing BFF 'travel documents', the Swiss deportation authorities circumvent an otherwise necessary official contact with the relevant authorities in Ghana and the Ivory Coast. Once deported to Accra or Abidjan, the Swiss police hand the refugee over to 'contact persons', usually local lawyers who are paid by the Swiss embassies on a 'case by case' basis.

Given that Switzerland takes part in EU ministerial meetings with the Troika and is traditionally part of the TREVI framework, these practices can be seen as consistent with the earlier EU policy proposal mentioned above, with the aim of diversifying the identification procedures for nationals of these countries who have no identity papers, thereby circumventing official procedures in order to enforce deportation on a larger scale. The federal agency in question, the Swiss Federal Office for refugees (BFF), has recently taken a lead in global migration management by heading the so-called Berne initiative (see chapter 5.2 above). In 1999, Statewatch reported a similar case in Germany, where

> the Hamburg Foreigners' Authority had started "identifying" refugees from Africa with the help of diplomats from the Ivory Coast "in order to create the preconditions for the swift return to their country of origin" [...]. The authority issued a notice of attendance to around 180 African refugees who were not in possession of papers. Of the 49 who turned up, 33 were then identified by a representative of the embassy. By what criteria he "identified" them was not clear.[278]

These incidents followed the proposals of the above-mentioned readmission initiative on Africa, which also demanded a cross-pillar approach to readmission, later implemented by the incorporation of a readmission clause into the Lomé Convention (see below). This development could be seen as the forerunner of what Bouteillet-Paquet (2003:371-4) classifies as the fourth generation of readmission

[277] *Statewatch Bulletin* volume 9 issues 3&4 (May-August 1999).
[278] *Statewatch Bulletin* volume 9 issues 5 (September-October 1999).

agreements[279] (worked out by the HLWG and parallel Commission negotiations), characterised by the linking of readmission clauses to external relations under the so-called root causes approach. Readmission agreements are detailed further below.

5.3.3 The Austrian Strategy Paper, root causes and the cross-pillar approach

In 1998, the comprehensive migration control approach was actively pursued through the Austrian presidency, which published the by now infamous strategy paper on EU migration policy, commonly referred to as the Austrian Strategy Paper. In September 1998, the Note by the presidency to the K4 Committee, dated 1 June 1998 and entitled *Strategy paper on immigration and asylum policy*[280], was 'accidentally' leaked to the public. The document received much public criticism for demanding outright the abolition of the right to individual asylum and for claiming that the Geneva Convention was outdated. It also envisages a very different role for the UNHCR, where rather than making sure the right to asylum was implemented in EU countries, it should help the EU in containing refugees within conflict areas and implement the principle of temporary protection. Further, the strategy paper introduces the cross-pillar approach to migration, by which EU trade and development aid are linked to imposing EU migration policies upon countries of origin and transit countries. Despite a subsequent wealth of "well-argued rejection from specialist NGOs, respected academics, UNHCR, the media and - significantly - governments of other Member States",[281] the strategy paper was not shelved but "simply [...] pursued by other means".[282] Save the amendment or abolition of the Geneva Convention, all restrictive aspects of the strategy paper have by now been implemented.

The strategy paper consists of five parts.[283] Parts 1 and 2 outline past and present migration trends (with regard to immigration into the EU) and assess the EU's progress in having achieved the goal of "more effective migration management", formulated in various EU documents since the early 1990s. Part 3 outlines a "reassessment of European migration policy," particularly evaluating the implementation of the 1992 London Resolutions, which were passed at the Edinburgh Council (see chapter 4.5.4), and the 1994 Commission Paper on immigration and asylum. As outlined in chapter 5.2.1 above, the 1994

[279] The first generation being readmission agreements between Member States before the SEA came into force. The second generation being readmission agreements with eastern European accession countries and the third generation being characterised by the new powers given under the Amsterdam Treaty (Article 63 (3b) TEC to the Commission to conclude EU multi-lateral readmission agreements as community instruments (to complement, not necessarily replace, the first and second generation bilateral ones).

[280] Reference: Brussels, 1.7.1998 (13.07), 9809/98 (OR. d), LIMITE, CK4 27, ASIM 170.

[281] *ECREs Observations on the September 1998 Revision of the Austrian Strategy Paper on Migration and Asylum Policy* (http://www.proasyl.de/texte/europe/ecre/revobs.htm). See also ECREs critique of the unrevised version, *Observations by ECRE on the Austrian Presidency of the European Union's Strategy Paper on Immigration and Asylum Policy* (http://www.proasyl.de/texte/europe/eu-a-e.htm).

[282] *Statewatch Bulletin* (vol 9 no 1, January-February 1999).

[283] Unless otherwise indicated, all following quotations are taken from the first version of the strategy paper.

Commission Paper provided one of the first comprehensive EU definitions of the "key elements of effective migration management", namely "activities to counter migration pressure, effective control of immigration and strengthening of the position of legal immigrants" and it proposed a 'comprehensive' EU migration policy, i.e. the cross-pillar approach, linking migration to external relations (Gent, 2002:10). The 1994 Communication was also the first comprehensive attempt to liberalise the EU's and Member States' immigration policies with the aim of allowing for flexible labour immigration so as to increase the EU's global competitiveness (see chapter 5.4.2 below).

This so-called comprehensive approach to migration control can be traced back to what became known in the 1980s as the 'root causes' approach to the refugee problem, which "focuses on identifying causes of forced migration and attempting to modify them through activities in the countries of origin" (Gent, 2002:5). Gent (2002), drawing on Zolberg et al. (1989), provides an excellent critique of the root causes approach and its political motivation as well as social implication. The criticism concerns empirical, structural and political elements which, Gent argues, render policies developed on the basis of the root causes approach ineffective, as well as detrimental to migrants and refugees. The lack of a scientific or empirical basis for the root causes approach as put forward in recent EU policy, as well as its politically motivated agenda, are reflected by the vague and ill-defined proposals on improving conditions in migrant-producing countries, whilst at the same time proposing well-defined and measurable policies on restrictive migration control mechanisms, which have little to do with root causes. Fundamental to this approach is its presumption that migration as a whole is undesirable or an exception to the norm, which constitutes a

> failure to see migration in its historical context, a failure to conceive of the two-way process that is migration and a failure to understand the complexities, variety of experiences and multiple cause and effect of different contexts within which migration happens.
> (Gent, 2002:21).

Being largely based on this root causes approach, the strategy paper and subsequent Action Plans therefore fail to address the nature of modern migration movements by conflating all types of migration, notably refugees and other migrants.

Although the conflation of all types of migration and consequent categorisation of all undocumented migration as 'illegal' is common to most EU documents on migration and is subsequently used to depict migration as a security risk, it is also the most blatantly scientifically incorrect one. Study after study has shown the clear relationship between asylum-seekers' movements and conflict in their areas of origin (Castles & Loughna, 2002, Schmeidl, 2001, amongst others), so that asylum-seekers on the whole clearly do not represent a sudden flow of labour migrants deciding collectively to leave their region of origin without bothering to apply for working permits. Criminalisation of undocumented migration

means that people crossing borders without or with false documents are accused of a criminal intent; migration is therefore assessed on grounds of the legal nature of the movement (documented/undocumented) rather than on grounds of its motivation, i.e. migration is defined merely as a jurisdictional matter rather than a rights-related phenomenon, be it human rights such as protection from persecution or economic rights such as the right to housing and work. This has significant consequences for the treatment of migrants with regard to entitlement to protection and subsistence. A rights-based approach would hold that the legal nature of migration is in itself irrelevant to the actual nature of the migration in question (fleeing from conflict, political persecution or migrating for work). Based on this legalistic approach, which could be argued to lead to the deliberate obscurification of the nature of migration, proposals on root causes mainly focus on "fighting illegal migration", an approach which is clearly politically biased rather than interested in root causes, whilst the term itself lacks any analytical power (see Zolberg, 1989:258-82 and Gent, 2002 for a more in-depth critique). The proposals detailed below have to be viewed in this light.

Based on the ideological premise outlined above, and the empirical observations on migration in the 1990s, the Austrian Strategy Paper proposes a comprehensive new approach to migration policy in part 4. It outlines a future global migration management where third countries are divided into 'concentric circles' around the EU, each circle being treated differently with regard to enforcing EU migration control interests (from accession promises in Eastern Europe to development aid for Africa). Part 5 proposes specific policies for the Council and the Commission to draw up and lays down that all EU and Member States' external relations and third country negotiations should include migration management clauses.

The paper takes as its starting point the insight that the EU's attempt to stop immigration through measures implemented only within its jurisdiction (asylum and migration restrictions and border control) has failed. With regard to the traditional 'Fortress Europe' approach to migration control, the authors state in point 5 that the EU has

> not really managed to influence sustainably the reality of immigration in a manner that can be ascertained empirically. Neither the potential will to emigrate nor actual emigration from the main regions of origin has decreased in the past five years (rather the opposite). Furthermore, neither the control activities at the external border of Schengen and the Union nor the Member States' laws on aliens and asylum stop illegal immigration.

It is therefore admitted that border control and restrictive asylum and immigration policies have not led to a reduction in immigration. Further, the paper explicitly links the reasons for migration to poverty and conflict and points out that "poor areas of the world are continuing to decline dramatically" and that "developments in Africa as a whole provide evidence that the situation there is now much worse than a decade ago" and that for "migration towards the rich, especially Western European states, this means that

total immigration continues to exceed 1.5 million immigrants per annum", where "it must be assumed that every other immigrant in the first world is there illegally" (point 21).

Because "no European country today would consider going it alone in opening up the right to asylum, making access easier for migrant workers or increasing social security benefits for immigrants" (point 25) and because "the possibilities of eliminating the [...] causes of migration from the Third World are undoubtedly very limited" (point 52), the strategy paper discards discussion on more liberal approaches to migration and advocates concentration on the "new issues" and a response to "the latest trend" (point 25), referring to the series of flights and migrations in Europe since 1989, where it portrays the refugee movements after the wars in Bosnia as "the major migration catastrophe of the 1990s"[284] (point 34). The paper holds that recent migrations are based on "inter-ethnic persecution and displacement by non-governmental power brokers", which, according to the paper, requires a different form of asylum, which "was not seen as a subjective individual right" (supposedly based on the argument that rights only derive from state persecution), "but rather a political offer on the part of the host country" (point 102). Public criticism on publication of the paper was mainly directed at this proposal, which concluded that the new approach could only be implemented "on the basis of a Convention supplementing, amending or replacing the Geneva Convention" (point 103), a sentence that was dropped in the second revision of the paper.

The attempted abolition of the individual's right to asylum is an important element of post-1989 migration management and is a reflection of the fact that the political necessity for the West to grant asylum had vanished with the dismantling of Communism and therefore asylum as a political bargaining tool had become obsolete. The use of asylum to highlight the problem of emigration that former Communist countries faced is expressed in the paper's recognition that "the formerly socialist countries were unable to prevent emigration as long as the West offered good conditions of admission" (point 58). In the context of this thesis, however, the strategy paper is interesting for its formulation of the EU's new "global approach", based on the insight that

> a successful migration policy can never be implemented solely by one party involved in this process. The formerly socialist countries were unable to prevent emigration as long as the West offered good conditions of admission, and neither can the Western European States now prevent immigration merely with border controls and rules of law. Here, political cooperation between host countries, transit States and States of origin is the only promising path.
> (point 58)

[284] Which was rephrased in the second revision "the greatest migration crisis".

Therefore "an effective entry control concept cannot be based simply on controls at the border, but must cover every step taken by a third country national from the time he begins his journey to the time he reaches his destination. Management begins in the country of origin where a visa is granted" (points 85&86). The EU's 'globalisation' of migration control, i.e. directly intervening in third countries' affairs by changing its trade and aid policy and in the case of Bosnia by some Member States' military intervention, implies an assertion of authority on the international arena which is part and parcel of the 'new world order' and the ongoing politics of power within the NATO alliance. The paper argues that "Europe [acting] independently in future in this field and not [confining] itself to joining in the activities of other bodies" (read: merely following the U.S. lead) is justified, because

> the effects on Europe of migration from various conflicts were dramatic, though the impact on other parties involved was less crucial, and that conflict resolution - for instance, in certain ethnic divisions in Bosnia - had particularly serious consequences for Europe from the point of view of migration policy. It is therefore quite legitimate for Europe to take its own decisions regarding intervention in such impending cases.
> (point 54)

The paper here refers to the redefinition of power bloc influences in the former non-alignment region of Yugoslavia, where the U.S. remains an influential 'partner' as well as competitor in deciding on economic and political matters concerning the 'new states' that came into being and were economically restructured after 1989. The competitive aspect of EU/U.S. relations has already been outlined in chapter 5.2.3 with regard to the Barcelona process, and in chapter 2.2.4 it was argued more generally that the EU's global aspirations were representative of the general competitive character of imperialism, in this instance between nation-states 'within the imperialist chain'. The internal political and economic redefinition of Bosnia, Herzegovina and Serbia invariably led to economic insecurity, a scramble for power and the related 'ethnic' conflicts and migration and flight, which in turn led to NATO intervention (Dietrich & Glöde, 1999).

With the Austrian Strategy Paper, the EU made migration matters overtly subject to economic relations for the first time: it is "impossible to take decisions involving Iraq, Pakistan, Afghanistan, the countries of former Yugoslavia or Turkey", it commented, "without taking account of the plainly visible tide of illegal migration currently taking place" (point 114). Therefore, "just about all the EU's bilateral agreements with third States must incorporate the migration aspect" (point 59). How this incorporation should take place is clarified when the following German Presidency later selected 48 of the 116 points and gave the Migration Working Party (Expulsion) the job of tackling "the increasing number of countries of origin [which] refuse to take back their own nationals" by the EU's use of "its international political and

economic muscle".[285] The strategy paper states that "[p]rogress in these areas should serve as an important criterion when development aid decisions are taken" (point 119).

### 5.3.4 Concentric circles

The ideology behind global migration management can be described as an imperialist one, reaffirming the status quo of affluent states and geographical separation that are reminiscent of old forms of Empire and colonialism: a whole section, which was cut entirely from the strategy paper in the second revision, outlines the basis upon which the EU should in future treat migrant producing and transit countries in their third country negotiations. Based on a "model developed in international discussion", the world is divided into concentric circles, where the EU resides in the middle (other rich and industrialised countries being treated as 'circle-centre affiliates', so to speak). The paper argues that one would get a "fundamentally clearer idea of what the Union's actual strategy for dealing with this issue" should be when allocating "third countries to three of four circles, whose various aspects also require various treatments in terms of migration policy" (point 115). It is worth quoting extensively from the paper, which explains the model as follows:

> 116. The first circle contains those countries which do not cause emigration, but which - like the EU member states - have become target countries on account of their advanced economic and political structures. Such countries can be expected to assume all the obligations incumbent on a transit country - full guarantees for those with refugee status, return of all those who cross border illegally, high levels of border controls, a policy on visas - which is why the freedom to issue visas and close cooperation relations in these countries fall primarily within the scope of the police and the security services.
>
> 117. In the current phase, this role falls in practical terms to (all or some) of the applicants for accession, which calls for tightening up of the pre-accession strategy towards the latter as far as issues of migration policy are concerned. Linking to financial benefits and the granting of privileges to specific objectives in the migration field is clearly prohibited. The aim of these countries will be to achieve total freedom of movement with regard to those of their neighbouring states which are EU members by fully applying EU immigration policy and following Schengen guidelines.
>
> 118. The second circle contains transit countries which no longer themselves create emigration to any extent but which on account of a relatively stable internal economic and political situation accept only very limited control procedures and responsibility for migration policy. A cooperation and support policy has been developed for such countries which should make it easier for them to reach the next circle in the foreseeable future. As it is still not possible to abandon visa restrictions on such countries and bilateral

[285] *Strategy paper on migration and migration policy*, the German Presidency, 19.1.99, 5337/99.

agreements mostly concern the repatriation of third country nationals in illegal transit, their main task should be to concentrate on transit checks and combating those who facilitate illegal immigration. A number of states in the Budapest Group, the CIS area and the Mediterranean region currently provide good examples of countries in this circle.

119. The third circle contains the emigration countries, against which the whole range of migration policy measures on the EU side needs to be effective, and which make it vital that forms of cooperation be developed which will reduce migratory pressure at all levels, i.e. not only in demographic, economic, social and ecological terms but also in political and human rights terms. Progress in these areas should serve as an important criterion when development aid decisions are taken.

This first circle around the EU is therefore represented by Eastern European accession countries who had to implement the JHA and Schengen *acquis*, i.e. "full guarantees for those with refugee status, return of all those who cross borders illegally, high levels of border controls, a policy on visas", where it has been noted above that refugee protection remains weak, and control and return are rigorously implemented. The second circle is represented by transit countries, namely, a "number of states in the Budapest Group, the CIS area and the Mediterranean region". These countries are graciously offered a place in the higher circle when they are better qualified to join the EU, it seems, but until then they should "concentrate on transit checks and combating those who facilitate illegal immigration". As outlined above, the enforcement of these policies is taking place in the political framework of EURO-MED and the Budapest process (second round of accession countries). Finally, there is the third circle, represented by all countries of emigration for which there is apparently no hope of ever entering the realm of the privileged first circle and "against which the whole range of migration policy measures on the EU side needs to be effective". Defence is the approach here, and although the strategy paper names improvement of human rights as an important goal to be pursued, in the face of the actual policy measures pursued and implemented with regard to ACP, Asian and Latin American states, the proposed plans "can be read either as utterly naïve or deeply cynical" (Hayes & Bunyan, 2003:73).

The model of concentric circles exemplifies the ideological framework that underpins the new imperialist surge of the EU and places migration control at its centre. The very division of nations into migrant-producing, transit and migrant-receiving countries in the manner that the strategy paper creates, is entirely Eurocentric, and blatantly ignores the fact that it is in effect the "third circle", i.e. Africa, Asia and Latin America, which receives most refugees in the world. As many have pointed out,[286] refugees largely remain within neighbouring regions and do not have the means or inclination to migrate to the industrial centres. Iran, for example, holds around 1.4 million refugees from Pakistan and around 2 million from Afghanistan, compared to just under 100,000 that have reached Europe (Hayes & Bunyan, 2003:78).

[286] Zolberg et al. (1989), Busch (1995).

Further, this figure does not even include internal migration, be it the vast rural-urban migrations within the third world or internally displaced persons. Finally, as in all EU policy proposals on migration management, there is no mention of international migration within industrialised centres as "it poses no threat in terms of perceived social and economic burdens for the sender and host societies, as well as being invisible in terms of ethnicity" (Findlay, 1995:515).

The strategy paper makes no distinction as to the nature of the migration the new comprehensive EU policy is meant to fend off, leaving the implicit conclusion that it refers to poor and/or undocumented migrants and refugees who move across borders on their own accord towards EU territory, where they might gain access to social provision through refugee protection or access to the domestic labour market. The tool to be applied in the containment of these refugee and poor migrant movements in transit countries was later formulated with the "external processing centres", i.e. by creating a ring of camps around Europe that hold refugees and migrants prisoners, as well as implementing mass return through joint charter flights (see chapter 5.3.10 below). The aim of the control of this migration clearly serves the development of EU imperialism described in chapters 2 and 3, and springs from an ideology of superiority and, as some have argued, post-fascist notions of population control (Mezzadra & Neilson, 2003). There is a deficit of concern here for the protection of refugees, let alone the implementation of international human rights instruments.

### 5.3.5 The Action Plans and the High Level Working Group on Asylum and Migration

The strategy paper was pursued by a cross-pillar task force, the High Level Working Group on Asylum and Migration, which was set up in 1999 to "rescue the strategy paper" from being shelved after the wide-spread public and some Member State criticism.[287] As outlined in chapter 5.3.5, the HLWG was created to draw up Action Plans on countries of origin and transit to establish "a common, integrated, cross-pillar approach targeted at the situation in the most important countries of origin of asylum seekers",[288] thereby following the Strategy Paper's proposal to carry out a "comprehensive analytical assessment of third countries with regard to the Union's immigration policy towards citizens of those countries".[289] The "cross-pillar combination of measures" was seen to "help reduce the influx of asylum seekers and immigrants into Member States of the European Union" and the group's "main aim is to analyse and

[287] *Statewatch Bulletin* (vol 9 no 1, January-February 1999).
[288] *Terms of reference of the High Level Working Group on Asylum and Migration; preparation of action plans for the most important countries of origin and transit of asylum-seekers and migrants*, "A" Item NOTE from Coreper to the Council, 22.1.1999, 5264/2/99, Rev 2, LIMITE, JAI1, AG1.
[289] *Strategy Paper on immigration and asylum policy*, NOTE from the Presidency to the K4 Committee, 1.7.1998 (13.07), 9809/98, LIMITE, CK4 27, ASIM 170.

combat the reasons for flight, taking account of the political and human rights situation".[290] The Action Plans conflate apparent human rights concerns with the EU's concern to control and selectively limit migration and, as indicated earlier in this chapter, form the basis for the EU's strategy of global migration management.

By January 1999, the HLWG had decided on the countries it would target for Action Plans, namely Afghanistan/Pakistan, Albania and the neighbouring region, Morocco, Somalia and Sri Lanka, and the earlier Iraq Action Plan was to be evaluated and "taken forward".[291] The terms of reference of the group were to draw up a list of existing initiatives (strategy paper, Iraq action plan, other country reports, UNHCR reports, CIREA/CIREFI data, JHA working programmes, readmission agreements, etc.) and draw up action plans covering a vast terrain of empirical research. These included pinpointing the "causes of influx" and policy recommendations for diplomatic strategies on third country cooperation, the use of development aid to influence migration, setting up regional refugee camps, readmission agreements to be concluded, information campaigns in countries of origin and transit, etc. All these were to be based on up-to-date empirical data on current affairs and migration collected from countries of origin and transit.[292] Another task was to "indicate the possibilities" to involve the UNHCR, NGOs and governmental organisations in the countries concerned in the 'grand plan' of migration control, deportation and the

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[290] *Strategy on migration and migration policy*, NOTE from the Presidency to the K4 Committee, 19.1.1999 (20.01), 5337/99, LIMITE, CK4 4, ASIM 4.

[291] *Terms of reference of the High Level Working Group on Asylum and Migration; preparation of action plans for the most important countries of origin and transit of asylum-seekers and migrants*, "A" Item NOTE from Coreper to the Council, 22.1.1999, 5264/2/99, Rev 2, LIMITE, JAI1, AG1.

[292] 1) an analysis of the causes of influx, on the basis of an up-to-date analysis of the political human rights situation in the country concerned as well as an up-to-date analysis of the migration and refugee problems;
2) in the light of the possible effectiveness of aid in preventing economic migration, the possibilities for strengthening the common strategy for development between the EC and (where they so wish) its Member States and the country concerned and/or neighbouring countries and making suggestions to that end;
3) the identification of the needs for humanitarian aid and rehabilitation assistance, including assistance in the reception of displaced persons in the region; on the basis of such identification, concrete proposals could be then made for the deployment of such aid in accordance with existing aid approval procedures;
4) proposals for deepening political/diplomatic consultations with the country concerned and/or neighbouring countries;
5) an indication of the possibilities or indeed of the actual state of play with regard to the inclusion of re-admission clauses in an association agreement and/or another mixed agreement with the country in question;
6) an indication of the possibilities for concluding an EC readmission agreement with the country in question after the Treaty of Amsterdam enters into force, taking account of any existing bi-lateral re-admission agreements between (a) Member State(s) and that country;
7) an indication of the possibilities for establishing, maintaining and improving reception and protection in the region;
8) an indication as to whether safe return to the country of origin is possible or whether internal settlement alternatives exist;
9) the preparation of proposals for joint measures in the field of asylum and migration, including information campaigns in the countries of origin and transit, as well as combating cross-border crime, with specific reference to police cooperation for an exchange of information aimed at an effective fight against criminal organisations involved in illegal immigration;
10) exploring measures aimed at favouring voluntary repatriation.

containment of refugee and migration movements. The IOM is included as a main partner in migration management in the regions targeted.

Although the wealth of data[293] included in the Action Plans would necessitate in-depth empirical research and a sound scientific basis to be set in a cause-and-effect relationship, the reports simply compile it and create a framework of relationships to present answers to migration flows, the main one being the enforcement of readmission agreements. The third countries targeted are to be forced into accepting EU readmission agreements by way of "measures for cooperation with the countries concerned in three integrated categories: foreign policy, development and economic assistance as well as migration and asylum".[294] Morocco for example, which then still refused to take back its own undocumented nationals, as well as other Africans who were said to have passed through the country before entering Europe, now not only has to take back third country nationals, but has to impose visa requirements on West Africans, particularly Nigerians, Senegalese, Malians and nationals of the Democratic Republic of Congo. Due to Morocco's position in the Euro-Mediterranean partnership and the Association Agreement signed in 1996, as well as its heavy dependence on EU trade, the country is in no position to reject these conditions (Webber, 1999). The EU's claim that the negotiations are based on "dialogue, cooperation and co-development"[295] appears cynical in the face of the imbalanced power relationship with regard to economic dependency, and the fact that the countries targeted in the Action Plans were not consulted. This is reflected in a statement by the HLWG in its report to the Nice European Council in 2000, where it describes the serious criticism by NGOs and Third World activists as a "misunderstanding" derived from a "sense of lack of consultation".[296] Gent (2002:18) finds that

> The countries targeted by the HLWG have been presented with a *fait accomplis* and there has been a 'lack of consultation' [...]. Countries targeted for action have been threatened with sanctions should they fail to comply. In discussion with Turkey (regarding the Iraq Action Plan), a report from the Spanish presidency states that Turkey 'had to be reminded of its candidate-country status' particularly with regard to potential 'funds and credits' [...] which denies the HLWG claims to 'cooperation and development'.

[293] On the demographic, economic, political and human rights situation in the target countries, the causes of migration from and through them, statistics on the population size and age structure, life expectancy, infant mortality, imports and exports to and from the EU and the rest of the world, GDP, development aid, existing trade, aid, cooperation and readmission agreements.

[294] *Final Report of the High Level Working Group on Asylum and Migration*, NOTE from the High Level Working Group on Asylum and Migration to the Permanent Representatives Committee, 14.9.1999, 10950/99, LIMITE, JAI 67, AG 27.

[295] *Id.*

[296] *High Level Working Group on Asylum and Migration - Adoption of the report to the Nice European Council*, NOTE to the Council/European Council, 29.11.2000 (1.12), 13993, LIMITE, JAI 152, AG 76.

In practice, therefore, 'cross-pillar' has meant that "instead of relying on 'third pillar' pressure and arrangements, 'second pillar' diplomatic and political pressure is to be brought to bear together with the overt use of economic and humanitarian aid as a bargaining mechanism".[297]

The true motivation behind the comprehensive approach to migration is revealed by the slow but steady dismantling of the substantive right to asylum. As in the preceding strategy paper, a notable shift can also be detected in the Action Plans with regard to an international commitment to the protection of refugees. On the one hand, it is clearly stated that refugees and migrants face the threat of persecution and death in their countries of origin. The 1999 Action Plan on Iraq,[298] for example, describes the country as a dictatorship with no civil rights, where 2,500 people have been extra-judicially executed in the past two years. The report quotes the UN Special Rapporteur saying that "the regime has effectively eliminated the civil rights of life, liberty, physical integrity, and the freedoms of thought, expression, association and assembly". However, the Action Plan lacks any detailed description of the systematic oppression and persecution in Iraq[299] and limits the analysis of the Iraqi human rights situation to only a few sentences, whilst concentrating on the humanitarian aid the EU is channelling towards Northern Iraq, which as a result is then considered a "safe haven" to return Kurdish refugees to. ECRE (2000:4) critically notes the absolving of responsibility in the Iraq Action Plan and comments that

> 'Regionalisation' of refugee protection [...] should not be considered as a substitute for the right to seek asylum in Europe. Nor should refugees ever be returned to a region solely on the grounds that EU humanitarian aid has sponsored camps or other facilities to which refugees supposedly could have fled. Reception in the region can comply with human rights standards and enhance their implementation, or it can in itself constitute a human rights violation.

In a similar vein, the 1999 Sri Lanka Action Plan[300] finds that the primary cause of migration is the conflict between the army and the LTTE. Whilst the report is careful to note that Tamil asylum seekers

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[297] *Statewatch Bulletin* (vol 9 no 1, January-February 1999).

[298] References are taken from the first version of the Action Plans, the *Draft Action Plan for Iraq*, 23.9.1999, SN 3769/2/99. The final versions of the six Action Plans are almost identical to the drafts

[299] At a speech held at the Parallel Summit of ECRE on 15.10.1999 in Tampere, Thomas Uwer from the German/Austrian development organisation *Wadi e.V.* criticises that the Iraqi Action Plan does not mention "the ongoing ethnic cleansing campaign against the Kurds in governmental controlled areas as well as the undeclared war against the Shiites in the Southern districts [...] Kurdish sources estimate a total of more than 90,000 Kurds who have been deported from the area of Kirkuk in the last few years alone. The military campaigns against Shiite civilians in the south have caused thousands of deaths and the devastation of a whole area. The British Foreign Ministry reports that "the regime has been engaged in a massive project to drain the marshes" and hundreds of square kilometres have been burned in military actions. Of a regional population of more than 500,000 people in the 1980's fewer than 50,000 remain in the region today. In deliberate and indiscriminate military attacks on civilian targets numerous villages have been destroyed, an unknown number of unarmed civilians were extra judicially executed and the UN Special Rapporteur claims that thousands of people have been deported to detention camps or simply disappeared".

[300] *Draft Action Plan for Sri Lanka*, 23.9.1999, SN 3443/3/99.

"claim" they face persecution, it also holds that "round-ups and interrogations of young Tamils [...] are frequent and occur in all parts of the country [...] and can also be advanced as a reason for seeking asylum" (point 12). It also recognises that Tamils face a double risk: that of forced recruitment by the Tamil Tigers and the risk of being suspected by the authorities to be part of the resistance movement. As Webber (1999) points out, the Action Plans on countries of origin consistently recount stories of floods, devastation, hunger, dictatorships, violence and gross human rights abuses, while Amnesty International confirms that the human rights assessments "in general may be defined as accurate" (cited in Gent 2002:14).

However, after having outlined the reality of refugees and migrants, none of the Action Plans actually propose that, as a consequence of this situation, the EU should grant asylum. On the contrary. The documents spell out concrete plans to contain migration, to force people to stay in unsafe areas, as well as to deport them. Prevention, deterrence and removal are the key policy aspects here, whereas measures to alleviate root causes, i.e. improve the human rights and economic situation, remain vague and lack concrete policy proposals. This substantiates the claim that the "desire of states to devolve responsibility for forced migrants is well served by the root causes approach" (Gent, 2002:7).

The political importance of the new global migration approach was stressed by the calling of a special European Council on Justice and Home Affairs in the wake of EU institutions preparing to draw up the main components of a future asylum and immigration policy under Amsterdam.[301] The next section traces the evolution of the cross-pillar or comprehensive approach with reference to documents laying down the externalisation of EU migration policy since the Tampere summit. Although the comprehensive approach was being suggested long before Tampere (see chapter 5.2.1 above), at the Tampere summit and its aftermath, "for the first time the conditions were sufficiently favourable to actually work it out" (Sterkx, 2004:4).

### 5.3.6 From Tampere to the Hague Programme

The Tampere summit, which took place on 15-16 October 1999 and at which the Action Plans were presented, put JHA matters at the centre of the EU agenda. Although 'tackling root causes' had already been addressed in the Commission Communications of 1991 and 1994 on asylum and migration, as well as at the Edinburgh European Council of 1992 (chapter 5.2.1), the Tampere Summit for the first time expressed the political will of European leaders to actually achieve such a comprehensive approach. The Tampere guidelines have therefore been regarded as 'milestones' in this development of a common European asylum and migration policy. Today, the external dimension is one of the most dynamic aspects

[301] Measures which shall be adopted in the asylum and immigration areas are set out in Articles 62 and 63 TEC. See *Statewatch Bulletin* (vol 9 no's 3-5, May-October 1999) for a pre- and post-Tampere account.

of EU asylum and migration policy (Lavenex 2001:867) and JHA cooperation is the fastest growing area of the Union's relations with third countries (Sterkx, 2004:2).

Tampere laid down that a future common EU asylum and migration policy should be based on partnerships with countries of origin, a common asylum system, fair treatment of third-country nationals and management of migration flows. Sterkx (2004:2) notes that "the innovative nature of these four tracks lies in the attention given to external aspects of asylum and migration issues, such as cooperation with countries or regions of origin and transit, in order to halt or better manage migration right at the source". The earlier JHA Council meeting of December 1998 had already defined three major Tampere items based on the work of the HLWG: 1) a strategy paper on migration and asylum, 2) the Vienna Action Plan[302] and 3) the Action Plans, with the aim of officially consolidating this migration agenda at the summit.

The Tampere discussions were pervaded by the inherently conflictual positions which on the one hand, concerned the implementation of an "area of freedom, security and justice", and on the other hand, following the migration control agenda, dominated by a repressive and restrictive approach. Many observers have commented, with reference to Tampere, that the EU was moving towards an obsession with security rather than ensuring an area of freedom and justice (Bigo & Guild, 2002; CEPS, 2005; ILPA, 2004, amongst others). Germany, France and the UK published a Joint Note during the summit, promising citizenship to third country nationals residing legally and long-term in the EU, but only when "good integration has been achieved and confirmed". It failed to clarify if this implied becoming EU citizens, residents with rights only in the country of residence, or "naturalised in some kind of half-way house as second-class citizens".[303] The non-committal nature of granting residency or citizenship rights was emphasised in point 8 of the Joint Note:

> Germany, the UK and France emphasise that foreigners have responsibilities as well as rights and that they have in particular the obligation to respect and to share the laws which exist in Europe both in private life (personal rights) and in social life. In this regard, common procedures for withdrawal of residence permits and for expulsion, where there is a threat to public order and security, should be sought by the European Union.

The increasing calls to fund and promote 'integration' of migrants and long-term residents were again ignored and repressive measures reiterated, including the threat of withdrawing residency permits. The summit was also dominated by notions of illegal immigration, prepared by the earlier Informal JHA

[302] The Vienna Action Plan was passed at the European Council in Vienna on 11-12 December 1998 and proposed guidelines on how best to implement the provisions of the Treaty of Amsterdam establishing an area of freedom, security and justice.
[303] *Statewatch Bulletin* (vol 9 no 5, September-October 1999).

Council in Turku in September.[304] At a press conference called by the UK interior minister Jack Straw, foreign ministers Robin Cook and prime minister Tony Blair, it was announced that the purpose of the summit was to tackle "illegal immigration and allow no hiding place for criminals", whilst Straw openly criticised UK courts for having recognised non-state persecution as a reason for refugee protection, and as a result stopped deportations to Germany on the grounds of possible *refoulement* (see chapter 4.5.3 on the Dublin Convention). Rather presumptuously, and in complete disregard of the judiciary's independence, Straw stated that "our courts adopted a wide definition, I want a narrow definition".[305]

The Tampere conclusions[306] were in fact merely an extension of earlier approaches to migration and asylum. With regard to asylum and migration,

> The Tampere European Council [...] began the institutionalisation within the EU structures of policies which turn refugee-producing countries into immigration police, completing the process which started in the 1980s with "Fortress Europe" and developed through the creation of buffer states around Europe. The new policies pass responsibility for prevention of immigration to the countries of origin of refugees and migrants and the countries through which they pass, through the adoption of action plans tying trade and aid with prevention and return of "refugee flows". Internally, the Tampere Council saw the foundations of a "single European asylum system" to ensure identical treatment of refugees no matter where they go in Europe.[307]

With regard to migration and external relations, Tampere was therefore the start of a political process that integrated the new comprehensive approach into all aspects of EU and therefore Member States' policies on asylum and migration, as well as extending the policy of 'buffer zones' from accession countries to other countries of origin and transit. Tampere laid down the HLWGs next task, which was to present an implementation report to the European Council in Nice in December 2000. This report feebly responded to the severe criticism by human rights organisations towards the root causes approach as outlined in the Action Plans (chapter 5.3.5). The main purpose for the report to the Nice Council, however, was to assess the progress made in implementing the comprehensive approach, and it concluded that more financial backing was needed if the Plans were to be implemented.[308] A new budget line (B7-667) was consequently created to support the 'Cooperation with third countries in the area of migration', which was increased from €10 million for preparatory actions in 2001 to €12.5 million in 2002 and around €20 million in 2003. In 2004, B7-667 was taken over by the funding programme AENEAS, to provide third

[304] *Statewatch Bulletin* (vol 9 no 5, September-October 1999).
[305] *Statewatch Bulletin* (vol 9 no 5, September-October 1999).
[306] See http://www.statewatch.org/news/2003/sep/tamp.htm for a full version.
[307] *Statewatch Bulletin* (vol 9 no 5, September-October 1999).
[308] *Report to the European Council in Nice*, High-Level Working Group on Asylum and Migration, 29.11.2000, 13993/00, JAI 152, AG 76, point 51.

countries with "technical and financial assistance in their efforts to better manage migration".[309] Under AENEAS, a total amount of €250 million was made available between 2004 and 2008 "for the support of third countries' efforts to improve the management of migratory flows in all their dimensions, and in particular to stimulate third countries' readiness to conclude readmission agreements, and to assist them in coping with the consequences of such agreements" (Sterkx, 2004:8).

It has to be noted that this 'cross-pillar approach' is not taking place without controversy within the political institutions that are supposed to formulate it. Sterkx (2004:16) notes that

> The cross-pillar framework advanced by the comprehensive approach is a new institutional development leading to what van Selm describes as an 'institutional tug of war' and a 'turf battle' between representatives for Justice and Home Affairs [...] and representatives for foreign policy matters [...]. The issue at stake is the ownership of this new policy area at the intersection of justice and home affairs and external relations.

The 'comprehensive' approach has therefore created tension in that the Justice and Home Affairs departments, by definition concerned with security and secrecy, have taken over matters that were traditionally located within foreign policy and therefore motivated by different agendas and institutional philosophies. Van Selm (cited in Sterkx, 2004:17) remarks that HLWG officials working on the Action Plans represent "third pillar people talking about second pillar subjects with the aim of doing work that is scheduled to fall under the first pillar". The HLWG is thus effectively deciding on humanitarian assistance, which should be dealt with by the Commission under the first pillar. These conflicting policy competencies are particularly evident with regard to development policy. Howard Mollett (2003:5-6), from the British network of development organisations BOND, sums up the current institutional and paradigmatic shift within the EU's development policy as follows:

> A mission creep has played out in the broader struggle over who controls the EU's financial muscle and what it is used for. Javier Solana, the Council's High Representative, has long argued that EC aid funds become the resource to plug the gap between expectations and capabilities in the Common Foreign and Security Policy. Rumours in Brussels suggest a further downgrading of development in the near future. The European Commission's Directorate for Development may be abolished following on from last year's abolition of the Council meetings of Development Ministers. The political voice for the world's poor is becoming increasingly marginalised.

[309] *Regulation No 491/2004 of the European Parliament and of the Council of March 2004 establishing a programme for financial and technical assistance to third countries in the areas of migration and asylum (AENEAS)*, OJ L 80 of 18.03.2004.

Although it is not likely that the Commission's DG Development will be abolished altogether, the development described above points to a change in policy focus in favour of law enforcement and security at the costs of 'traditional' development. Mollett points out that this is not only an 'institutional turf war' but also the marginalisation of the "political voice for the world's poor". Those EU institutions, whose starting point is indeed 'tackling root causes' rather than fighting off immigration, as with the DG Development, "are not very keen to use development budgets - limited as they are - for the prevention or management of migration" (Sterkx, 2004:17).

Tampere was followed by a series of documents shaping the inclusion of external relations into the third pillar, from policy proposals to changing working structures. A report on policy objectives in this regard was submitted to the June 2000 Feira European Council.[310] This was followed by an evaluation report on the implementation of the Tampere conclusions which was presented at the 2001 Laeken European Council.[311] Again, the problems with the cross-pillar approach were discussed and it was emphasised the CFSP should include migration control as a central element. A month before the summit, the Commission had published its Communication on illegal immigration,[312] supporting the Member States' approach:

> To ensure the effectiveness of migration management, the Commission proposed an 'actors-in-the-chain' approach. Management of migration flows needs to take place at all stages to keep track of irregular movements: in countries of origin, in transit countries and at the external borders of the Union. Therefore, external policy aspects need to be mobilised in the fight against illegal immigration, and migration issues in general should be integrated in the existing partnerships and relations with third countries. The Commission added that a Community readmission and return policy should be an integral and crucial part of this.
> (Sterkx, 2004:9)

Two more Commission Communications consolidated the externalisation of EU migration policy, that is the *Green Paper on a Community return policy on illegal residents*,[313] which is based on the *Comprehensive Plan to combat illegal immigration and trafficking in human beings in the European Union*,[314] (see below) and the *Communication on integrating migration issues in the European Union's*

[310] *Conclusions of the Presidency*, 19/20.6.2000, European Council, Feira. The report pointed out some difficulties (financial resources, lacking remits within JHA working groups, etc) with the implementation of the cross-pillar approach. External border control and readmission were again emphasized as the most important elements within global migration management.
[311] *Evaluation of the conclusions of the Tampere European Council*, Belgian Presidency, 6.12.2001, 14926/01 LIMITE JAI 166.
[312] *On a common policy on illegal immigration*, Communication from the Commission, 15.11.2001, COM (2001) 672 final.
[313] 10.4.2002, COM (2002) 175 final.
[314] 28.2.2002, 6553/02, which represents a post-11 September vigorous implementation plan for deportation. See chapter 5.3.7 below.

*relations with third countries.*[315] The latter was drafted at the end of 2002, following instructions to this effect from the Seville summit, and discussed the practical integration of migration issues in relations with third countries, together with a detailed outline of existing financial resources available for repatriation, management of external borders, and asylum and migration projects in third countries, with suggestions as to how the EU should fund its external migration policy. Based on the Tampere and Seville Conclusions, the Council adopted principles on *Intensified cooperation on the management of migration flows with third countries*[316] at the General Affairs and External Relations Council on 18 November 2002.

At the Seville European summit in June 2002,[317] the EU once again reiterated the political message to third countries: non-cooperation in migration control matters, namely taking back deportees, implementing migration control structures and cooperating in external border control would have negative consequences with regard to trade and aid. The Spanish and UK Prime Ministers proposed to make development aid expressly dependent on third countries' "efforts" in this regard, and foresaw sanctions for "non-cooperative" countries through the suspension of development aid. Although there was resistance from other Member States, the Seville Conclusions openly suggested that cooperation in the readmission of EU deportees would be the key element in successful relations with the EU. Points 35 and 36 of the Seville Conclusions read:

> The European Council considers it necessary to carry out a *systematic assessment of relations with third countries which do not cooperate in combating illegal immigration.* That assessment will be taken into account in relations between the European Union and its Member States and the countries concerned, in all relevant areas. Inadequate cooperation by a country could hamper the establishment of closer relations between that country and the Union.
>
> After 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* in joint management of migration flows. In that event the Council may, in accordance with the rules laid down in the treaties, *adopt measures or positions under the Common Foreign and Security Policy and other European Union policies*, while honouring the Union's contractual commitments and not jeopardising development cooperation objectives.
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> (Emphases added)

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[315] *Integrating migration issues in the European Union's relations with third countries*, Communication from the Commission, 3.12.2002, COM (2002) 703 final. See *Statewatch European Monitor* (vol 3 no 4, 2003) for a summary.

[316] 14183/02, Presse 350.

[317] See *http://www.statewatch.org/news/2002/jun/14seville.htm* for an analysis of the Summit Conclusions and a list of background documents that informed the summit discussions and particularly the externalisation of the EU's asylum and migration policy.

Further, "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" (point 34). Peers (2003) finds that this policy "sets out a clear threat to reduce the existing level of EU relations with a third state in the event of 'non-cooperation', but the summit did not spell out what measures might be taken or the grounds for concluding that there has been a failure to cooperate". Despite wide-spread critique of the coercive aspect of this policy, the Commission remains enthusiastic about the implementation of this comprehensive approach. A press release from 6 September 2002,[318] sums up the state of affairs:

> Migration issues are progressively gaining higher priority in EU relationships with third countries. The Laeken Council called for the integration of issues concerning migration flows into the external policy of the EU. The Commission is responding by including migration matters in the Country Strategy Papers, which it is preparing progressively for all third countries. At the 5th Euro-Mediterranean Ministerial Conference on the 22 and 23 April 2002 in Valencia, Spain, an Action Plan for co-operation on justice and internal affairs, in which matters concerning migration have an important role, was adopted. Asylum and migration issues are included in the special programmes with the candidate countries who will progressively be more closely involved in EU discussions on these issues. Migration is also an element in the CARDS programme for the Balkan States and in the EU common strategies on Russia and the Ukraine.
>
> With respect to the rest of the world a formal dialogue with China on illegal migration has now been established and following the EU-ASEM meeting in Lanzarote on 4-5 April 2002 partnership with a number of Asian countries has also been established. A specific article on migration issues was already included in the Cotonou Agreement with the ACP countries two years ago.

With regard to further initiatives in the field of externalisation, 2003 would be dominated by political leaders paving the way for external processing centres for asylum and migration, a further indication of the absolving of any responsibility with regard to refugee protection and the procedural undermining of the Geneva Convention (see, for example, chapter 5.3.3). Since 1 May 2004, when the deadline for the creation of a common EU immigration and asylum policy had expired, the Tampere process has been assessed for its achievements and followed through with the Hague programme (Tampere II). Tampere I was evaluated by means of a "scoreboard", drawn up by the Commission at the request of the Council to review the progress on the Tampere Action Plan every six months. Whilst the Commission has positively evaluated the progress,[319] migrant and asylum support groups have been severely critical.[320] On 4

[318] See http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/02/184&format=HTML&aged =0& language=EN&guiLanguage=en.

[319] *Area of Freedom, Security and Justice: Assessment of the Tampere Programme and Future Orientations*, Commission Communication, COM (2004) 401 final, 2.6.2004.

November 2004, the European Council adopted the Hague Programme[321] which set the objectives to be implemented from 2005 to 2010. In May 2005, the Commission presented an action plan with a set of detailed measures and a calendar to implement the Hague Programme and on 2 June 2005, the Council approved the Action Plan,[322] which will be the frame of reference for Commission and Council work over the next five years.

According to the Commission, "this new programme takes into account the final evaluation made by the Commission on the Tampere programme, as well as the comments received during the citizens' on-line consultation held in July/August 2004".[323] In an attempt to respond to the criticism of democratic deficits in EU policy-making, the Commission had invited 'civil society' groups to contribute. A consultation was also carried out by the JHA Directorate in the Council, which had asked Member States to provide the "political orientation" of the new programme. However, it appears that concerns put forward by civil society groups with regard to the EU's obsession with security, and inadequate protection of individual rights to asylum and legal protection, have not been taken up in the Hague Programme. ILPA (2005) writes that this "second five year plan for the area appears to have lurched into a securitarian understanding of the movement of persons". The critique levelled at the Hague Action Plan echoes the long-standing objections to the EU's migration control approach, namely, the lack of commitment to the principle of non-refoulement, the terminology used to depict irregular migration as a threat to be fended off at borders, the dominance of biometrics as a viable instrument to control migration flows, the criminalisation of undocumented migration by deeming it illegal and the failure to open up legal channels for migration (ILPA, 2005).

With regard to the theme of this chapter, namely, the consolidation of migration as an external relations instrument, the Hague Programme dedicates a section on the "external dimension of asylum and migration" and "calls upon the Council and the Commission to continue the process of fully integrating migration into the EU's existing and future relations with third countries".[324] Migration management being one of the ten priorities set out in the Action Plan for the coming five years, the EU is continuing to consolidate its "[s]trategy on all the external aspects of the Union policy on freedom, security and justice" and the Commission is preparing a corresponding Communication to be published this year (2005).[325] Within this strategy, the Commission is also invited to "complete the integration of migration into the

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[320] "The measures which have been adopted in the field of immigration and asylum have noticeably failed to fulfil the commitment of respect for human rights", ILPA (2004) wrote in response to the Commission Communication.
[321] *The Hague Programme: strengthening freedom, security and justice in the European Union*, 13.12.2004, 16054/04 JAI 559.
[322] *Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union*, 10.6.2005, 9778/2/05, REV 2, LIMITE, JAI 207.
[323] http://europa.eu.int/comm/justice_home/fsj/intro/fsj_intro_en.htm.
[324] *Hague Programme*, point 1.6.1.
[325] *Hague Action Plan*, point 1.5.

Country and Regional Strategy Papers for all relevant third countries by the spring of 2005".[326] Furthermore, the "Regulation establishing a European Neighbourhood and Partnership Instrument[327] provides the strategic framework for intensifying cooperation and dialogue on asylum and migration with neighbouring countries amongst others around the Mediterranean basin [...]".[328] From 2005 onwards therefore, the externalisation of migration will be pursued by means of the EU's country and regional strategy papers, similar to the Action Plans, as well the new EU Neighbourhood Policy, both of which are frameworks within which the EU is exerting its influence in Eastern Europe and Northern Africa, to 'encourage' reform in these countries to reflect EU standards with regard to legal and political systems.

The approximation of the legal standards of neighbouring states to EU standards will also be helpful in justifying the creation of external processing centres (see below), which are pursued by the Hague Programme's invitation to the Commission "to develop EU Regional Protection Programmes in partnership with the third countries concerned and in close consultation and cooperation with UNHCR".[329] The accompanying Hague Action Plan announces a forthcoming *Study, to be conducted in close consultation with the United Nations High Commissioner for Refugees (UNHCR), on joint processing of asylum applications outside EU territory* for 2006 (Point 2.6). Finally, the Hague Programme reiterates the EU's commitment to deportation: "Migrants who do not or no longer have the right to stay legally in the EU must return on a voluntary or, if necessary, compulsory basis" (Point 1.6.4). Again, externalisation in the form of external camps and deportation are the key aspects of the EU's comprehensive approach to migration.

### 5.3.7 Readmission policy

Since readmission agreements, as indicated above, remain the central aspect of migration and external relations, it is worth outlining them in more detail. The above outlined externalisation of EU policy outlined above is reflected in readmission policies in that they are "increasingly connected with the economic cooperation and CSFP instruments" (Bouteillet-Paquet, 2003:360). This reflects calls to that effect reiterated in the conclusions of Tampere, Seville, The Hague and various Commission documents. The Amsterdam Treaty brought readmission matters under Community competence, thereby empowering the Community to conclude readmission agreements. At a JHA Council meeting in 1999, the Council adapted the standard readmission clause developed in 1995 to reflect these competencies[330] and, according to Peers (2003), introduced two important changes:

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[326] *Hague Programme*, point 1.6.1.
[327] Footnote 1 in original: "established at the European Council meeting in Feira in 2000".
[328] *Hague Programme*, point 1.6.3.
[329] *Id.*
[330] See *Statewatch Bulletin* (vol 9 no 6, November-December 1999). The corresponding Council press release is published under http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/jha/ACFD4.html.

> First, there is now an obligation to negotiate a supplementary treaty with the entire Community, not just individual Member States, although there is still an obligation to negotiate with individual Member States in the meantime pending an agreement with the EC as a whole.
> Secondly, the EU policy is now that such clauses are mandatory: it will no longer sign any association or cooperation agreement unless the other side agrees to the standard obligations.

Thus, next to the conclusion of readmission agreements, all non-migration-related agreements between the EU and third countries now always include readmission clauses.[331] The readmission agreement adapted after Tampere forms the basis for the HLWG's Action Plans and all future EU-third country negotiations and includes the agreement "to conclude, upon request of a Member State, bilateral agreements [...] including an obligation for the readmission of nationals of other countries and stateless persons".

Given that readmission requests by poorer states to the industrialised centres are the exception rather than the rule, the readmission agreements can be read as a far-reaching policy instrument deployed by the EU to control migration through repatriation and deportation. Sterkx (2004:19) points out that "in practice we can hardly conceive of a situation in which the European Union would readmit". The core of these agreements is therefore "that they benefit the European Union" (*id.*). The important sentence in the above agreement is the obligation to conclude on request an agreement on the readmission of "nationals of other countries and stateless persons". This implies not only a transfer of an individual national back to his or her country of origin but foresees the mass deportation of an unidentified group of people to an area outside the EU's borders (currently practised between Italy and Libya, see chapter 5.3.10 below). This type of readmission agreement formed the basis for the next policy approach that was to put the globalised control of migration into practice: the creation of 'off-shore processing centres' for refugees and migrants, which would finally abolish the right to individual asylum and the obligation placed upon to EU Member States by the Geneva Refugee Convention to assess asylum claims individually and most importantly, not to practise *refoulement*.

Return policy gained a new impetus after the 11 September attacks in 2001, when external relation policy and security became intrinsically interlinked in political discussions and consequent policy proposals. The increased "efficiency" of EU return policy was pursued by the Council's *Comprehensive Plan to combat illegal immigration* in February 2002[332], which called for "action" and the creation of common standards of return, aims reiterated at the Seville Summit in June 2002. This was followed by the

[331] See Peers (2003), Bouteillet-Paquet (2003).
[332] *Comprehensive Plan to combat illegal immigration and trafficking in human beings in the European Union*, 28.2.2002, 6553/02.

*Commission's Green Paper on a Community Return Policy on Illegal Residents*,[333] adopted in April 2002 and followed by "criteria on states which the EC wanted to adopt new readmission agreements with" (and listing China, Algeria, Albania and Turkey as some of these states), adopted by the Council the same month.[334] Amongst others, the criteria for readmission agreements to be concluded are "the migration pressure" from or via third countries, together with the number of persons "awaiting return", obstacles to return and "the fact that a third country is adjacent to a Member State". Further, EU agreements "should involve added value for Member States in bilateral negotiations" and a "geographical balance" should be maintained "between the various regions of origin and transit of illegal migration flows". The political practice is somewhat inconsistent with regard to these criteria on selecting third countries: a Commission official of DG RELEX admitted that these criteria "have never been applied. Those criteria are never taken into account. Actually, the negotiation priorities are defined in the context of political discussion between Member States. It is the case that each Member State has its own priority and wants the Community to negotiate with the third country" (cited in Sterkx, 2004:20).

This spell of activity on return policy and strengthening external aspects of migration control reached a climax at the Seville summit (see chapter 5.3.6 above), which promised punitive measures to be imposed on third countries in case of "non-cooperation", and was followed by two EU Action Plans, which were adopted by the JHA Council in November 2002. The first aimed at returning an estimated 100,000 Afghan refugees (either voluntarily or forcibly, and on joint flights if necessary), which met with severe criticism from human rights organisations. This plan[335] was inherently contradictory in claiming to seek "safe and dignified" return, whilst at the same time allowing for forced deportations, which were promptly implemented by the UK and France and strongly criticised by Amnesty International for generating renewed cycles of internal displacement, lack of post-return monitoring and representing the beginnings of a systematic EU forced return policy in general.[336]

The second more general Return Action Plan[337] foresaw "immediate enhanced practical co-operation, including exchange of information and best practices, common training, mutual assistance by immigration officers and joint return operations; Common minimum standards for return to be envisaged

[333] See *Expelling migrants from the EU: Fast-track legislation and sham consultation*, Statewatch Analysis (July 2002). Return policy, in the form of the Return Action Plan mentioned further below, was laid down in the *Communication on a Community Return Policy on Illegal Residents* (COM (2002) 564, 14.10.2002), suggesting a number of short-, medium and long-term measures in the field of return. For an overview of the policy development see http://europa.eu.int/comm/justice_home/fsj/immigration/policy/fsj_immigration_policy_en.htm

[334] *Criteria for the identification of third countries with which new readmission agreements need to be negotiated - Draft conclusions*, CORRIGENDUM TO "I/A" ITEM NOTE from the General Secretariat of the Council to Coreper/Council, 16.4.2002,7990/02, COR 1, LIMITE, MIGR 32. The Commission was already authorised under Amsterdam to negotiate Community readmission agreements with Ukraine, Russia, Morocco, Pakistan, Sri Lanka and the Chinese Special Administrative Regions of Hong Kong and Macao.

[335] *Afghanistan Return Plan*, 4.12.2002, 15215/02, adopted by the Council on 28.11.2002.

[336] *Amnesty International Briefing on the EU Return Plan to Afghanistan. At the occasion of the JHA Council, 8-9 May 2003*, 6.5.2003, published under http://www.amnesty-eu.org.

[337] *Proposal for a Return Action Programme*, 25.11.2002, 14673/02, LIMITE, MIGR 125, FRONT 135, VISA 172

in the short, medium or long term; Country specific programmes; and intensified co-operation with third countries on return".[338] Despite "generous political statements" Bouteillet-Paquet (2003:372) finds that the "overall European policy incorporates preventative measures and fights against root causes in a very limited way". Peers (2003) shows that "EU policy has been backed up by harsher and harsher rhetoric and threats against third countries, as the EU becomes more and more unilateralist and focused solely on migration control. These policies are unbalanced, inhumane, and internally contradictory". The manner in which migration control is to be imposed upon third countries has been consistently spelt out in EU documents, namely, that "the EU should also use its political weight to encourage third countries which show a certain reluctance to fulfil their readmission obligations".[339] The fact that readmission agreements only serve the EU is of course reflected in the reluctance of third countries to conclude them, so that policy-makers are aware that they have to deliver a "package with carrots", as one Commission official put it (cited in Sterkx, 2004:19). What exactly is offered to the third country in question depends on its particular situation and the political relations it has with Member States: "Negotiations with Russia will - as the Kaliningrad issue has shown - centre on compromises in the field of visa policy, while negotiations with Morocco might entail economic or financial concessions" (*id.*). As a Commission official again helps to clarify: "it is a kind of trade, you exchange money against people" (cited in Sterkx, 2004:19-20). The first EU readmission agreement was signed with Hong Kong on 27 November 2002. As already outlined in chapter 5.2, by 2005, negotiations were ongoing or authorised to open with Russia, Ukraine, Morocco, China, Turkey, Algeria and Pakistan, whilst treaties agreed with Sri Lanka,[340] and Albania[341] had not yet been ratified (Peers, 2005:118). In addition, and not listed here, readmission clauses have been included in non-migration-related agreements between the EU and third countries, as well as bi-lateral agreements.

### 5.3.8 The Lomé Convention and Cotonou Agreement

Apart from political weight, the 'leverage' used to negotiate readmission agreements was given economic weight very soon after Tampere during negotiations between the EU and the African, Caribbean and

[338] *Statewatch European Monitor* Vol 3(4) 2003:5-6.
[339] *Comprehensive Plan to combat illegal immigration and trafficking in human beings in the European Union*, 28.2.2002, 6553/02, p 31.
[340] 7831/1/03, 9.4.2003.
[341] COM (2004) 92, 12.2.2004.

Pacific states (ACP) on the Lomé Convention.[342] The Lomé Convention has been the framework for trade and development aid ties between the EU and more than 70 ACP states since 1975 and expired on 29 February 2000, leading to the EU and Member States discussing a redraft of the conditions of the agreement from late 1996 onwards. The redrafting, i.e. the new terms of the Convention and therefore the economic relationship between the EU and African states, was politically and economically informed by the increasing liberalisation of the global economy outlined in chapter 3.2. In 1996, the European Commission published the *Green Paper on relations between the European Union and the ACP countries on the eve of the 21st century - Challenges and options for a new partnership*,[343] where it stated that "[i]n view of the major changes that have taken place over the last 20 years, the time has come to take a fresh look at the future of ACP-EU relations". The intentions of the redraft are summed up as follows:

> In a world now multipolar, the Union must make its presence felt in all regions of the world. It is striving to forge its external identity through a more effective and more global common foreign and security policy, an effective and differentiated development policy, and a multilateral trade policy designed to open up markets in accordance with negotiated common rules.

The main aim of the new negotiations was therefore a reassertion of the EU's economic position and the promotion of a neo-liberal agenda in the world, and specifically in Africa. In the face of increasing competition after the system of bi-polar alliances had broken down, the Lomé Convention became a very powerful bargaining tool to enforce these interests upon Africa. The issue linking migration control to the Convention was discussed from the beginning, albeit introduced only at the last minute in the negotiations with ACP states. The Commission set the political agenda already in 1997 with the following statement:[344]

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[342] The Lomé Convention regulated trade between the European Union and 71 (later 77) African, Caribbean and Pacific states (collectively known as the ACP countries) between 1975 and 2000. Established in 1975 in Lomé, Togo, the treaty used to preserve some of the preferential access rights of members of the Commonwealth of Nations to the United Kingdom market on its entry into the Union. It was renewed in 1979, 1985, 1989, and 2000 before being succeeded by the Cotonou Agreement. One of the major agreements entered into with Lomé IV (2000) was the determination of an eight-year transition period (until 2008) during which new negotiations on trade and economic arrangements with the EU are to be negotiated and concluded, following the earlier introduction of so-called adjustment programmes in ACP states. The reshaping of the EU-ACP cooperation legal framework is due to the creation of the WTO which laid down rules opposing the granting of any "asymmetrical trade preferences" such as those enshrined in Lomé IV. The new negotiations will therefore remove tariff barriers reciprocally and progressively, with the aim of "attracting investment". Formal negotiations began in September 2002, on new economic partnership agreements that will enter into force by 2008 at the latest. The ACP participants will then start to liberalise their trade over a transitional period of at least twelve years (Sources: http://en.wikipedia.org/, http://www.sardc.net/editorial/sanf/2000/Iss3/Nf2.html, http://www.afrol.com/News/afr005_sign_cotonou_convention.htm).

[343] European Commission, Directorate-General VIII/1, Brussels, 20.11.1996.

[344] *Id.*, chapter 1, section A1.

> Action on a national scale appears increasingly inadequate as the growing interdependence between the social and economic systems of various regions, *the appearance of new systemic environmental dangers, migration, terrorism, drugs, and international organized crime, call into question the notion of national sovereignty*. Global regulation is progressing very slowly; it seems likely that the parallel trends apparent today - a stronger multilateralism and regionalism - will continue.
> [Emphases added]

The Green Paper has been widely discussed by Member States at the national level since its publication, and set the tone of the negotiations. First of all, the above statement argues that the 'threat' of undocumented migration and terrorism calls "into question the notion of national sovereignty". Given that national sovereignty is one of the most influential achievements of decolonisation, this statement made by one of the world's most important power blocs gives an idea of ideological developments in world affairs since 1989. "Intervention", typically by industrialised nation-states into other states' affairs, is being justified on the grounds of 'security', be it 'humanitarian' intervention or increasingly 'preventative' intervention against migration flows. Apart from reducing the aid aspect and portraying liberal trade as a poverty alleviation measure, despite empirical evidence to the contrary (Fraser & Kachingwe, 2003),[345] the German government also identified migration as a central question to be negotiated under Lomé.[346] Besides reiterating the 'root causes' approach to migration, the German paper also states that it would be in Germany's interest to promote a "stronger cooperation in questions of illegal immigration, including readmission. To this end, [it is advisable] in future to harmonise and link and, if necessary, regionally differentiate, economic, development and migration policy measures by the EU towards the ACP states (integral approach)". In other words, to apply to Africa as a whole the cross-pillar approach to migration politics promoted by the EU. It further proposes the inclusion of a readmission agreement into the Lomé Convention.

The EU did introduce readmission clauses into the Lomé negotiations, which had begun in September 1998, but only at the last minute on 7-8 December 1999, two months after the Tampere Summit and just two months before the new agreement had to be signed. The Commission said about the meeting that a "thorny issue still has to be settled [...]: in the cooperation on migration, the clause on the

[345] The EU and German government claim that the faster and the more comprehensively ACP states would liberalise their economies and compete without regulation on the international market, the faster they could expect economic prosperity. According to international and African development agencies, however, empirical evidence shows the contrary, namely, that opening its markets to EU products is leading to bankruptcy of many small firms and businesses as well as mass lay-offs. The Association Development Politics of German Non-Governmental Organisations (*Verband Entwicklungspolitik deutscher Nichtregierungsorgnaisationen e.V.* (VENRO) published several working papers on the last Lomé Convention and its detrimental impact on Africa, see VENRO Working Paper on 'The Future of the EU-ACP Cooperation', http://www.venro.org/publikationen/archiv/arbeitspapier_1_engl.pdf).

[346] *Überlegungen zur Reform der Lomé-Konvention*, Bonn, 8.9.1997, BMWi/AA/BMF/BMI/BML/BMZ.

readmission or return of illegal immigrants is still under discussion".[347] In February 2000, the Commission described the process as follows:[348]

> Remaining on the agenda for the February meeting was the new dialogue on migration, and in particular the proposed EU arrangement to repatriate illegal immigrants to the country of origin. The ACP were willing to accept readmission of their own citizens, but rejected readmission of non-nationals or stateless persons who transit their territory. They held the view that the proposed clause had no basis in international law.
>
> The European Community was mandated by the Tampere European Council in October 1999, and by the recent Justice and Home Affairs (JHA) Council's decision to include standard clauses in agreements with third countries on the question of readmission. This issue gave rise to protracted bargaining, delaying discussion on other remaining questions. The Commission was firm on the principle, but not inflexible. Agreement was finally reached on a framework agreement - which provides a basis for negotiated bilateral agreements with each ACP state.

But not only the ACP states held the view that an obligation to accept non-nationals and stateless persons had no basis in international law. *Statewatch*[349] points out that:

> Indeed, the opinion of the Council's own Legal Service, dated 10 March 1999, goes further, it says: "it is doubtful whether, in the absence of a specific agreement to this effect [readmission] between the concerned states, a general principle of international law exists, whereby these states would be obliged to readmit their own nationals when the latter do not wish to return to their State of origin" (para 6., doc no: 6658/99). The implication of the Council's Legal Service view was that unless an agreement of readmission was in place there was no obligation in international law for non-EU countries to accept back their own nationals, third-country nationals or stateless persons. (The Legal Service Opinion also makes clear that readmission agreements, under the TEC Article 63.3.b., would cover not just those found to be "illegally" resident but also asylum-seekers whose application has been turned down: para 11).

In view of the importance of the Lomé agreement for ACP states in the form of aid and trade deals worth €12 billion, the ACP states had little choice but to accept the readmission clauses, despite their questionable legal and political nature. The EU's use of economic and political power to negotiate migration clauses was already reflected in the preparation of the Action Plans, where a report from the Spanish presidency admitted that Turkey "had to be reminded of its candidate-country status" particularly

[347] Cited in *Statewatch Bulletin* (vol 10 no 2, March-May 2000).
[348] EU-ACP Bulletin, 10.2.2000, *Id.*
[349] See *Statewatch Bulletin* (vol 10 no 2, March-May 2000) for a detailed outline of how readmission clauses were introduced in EU policy negotiations.

"with regard to potential 'funds and credits' before accepting the Action Plan" (see Gent, 2002:18 cited also at p185 above). The Lomé Agreement was negotiated in a similar manner, where "the ACP countries had little choice but to accept the EU terms, as these proposals were only introduced into the negotiations, involving £8.5 billions of aid and trade, at the last minute".[350] Article 13 of the Cotonou Agreement (which replaced the last Lomé Convention (Lomé IV) in 2000) lays down that the 77 relevant states will have to "accept the return and readmission of any of its nationals who are illegally present in the territory of a Member State of the European Union, at that Member State's request and without further formalities".

A few years later, the Commission refers to this bargaining tool of economic superiority as a form of leverage.[351] In its Communication from 2002,[352] the Commission addresses the biggest obstacle Member States have identified in their attempt to impose readmission agreements: that is, third countries' refusal to accept them:

> This is the reason why the Commission considers that the issue of "leverage" - i.e. providing "incentives" to obtain the co-operation of third countries in the negotiation and conclusion of readmission agreements [...] - should be envisaged on a country by country basis.
> (Section C, point 11)

In the section on policy development, the paper then goes on to detail various possibilities of leverage, weighing up the pros and cons. It is argued in the paper that if incentives in the form of financial support under the EU budget line B7-667 (Cooperation with third countries in the field of migration) is not "sufficiently attractive" to third countries (because readmission can cause "significant charges"), Member States could "consider supplementary types of incentives", whilst warning them that these must of course be "fully WTO compatible", in case Member States had contemplated "granting better access or tariff preferences to cooperating third countries" (point 11). As the Commission sees legal and political problems in granting favours to cooperating states, it concludes that agreements with in-built readmission clauses *à la* Cotonou provide "a comprehensive and balanced agenda for action, which could serve as a model for migration clauses to be negotiated in future agreements [...]" (*id.*). Given that a lack of documents often proves to be an obstacle to deportations, the Commission paper further suggests that "it would be appropriate to extend that obligation to cover also third country nationals [focusing on] practical

[350] *Statewatch Bulletin* (vol 10 no 2, March-May 2000).
[351] First in its *Green Paper on a Community return policy on illegal residents* (point 4.1.1), then in its Communication cited below (Section C, point 11).
[352] *Integrating migration issues in the European Union's relations with third countries*, Communication from the Commission, 3.12.2002, COM (2002) 703 final. With regard to third country cooperation, the communication proposes firstly, addressing root causes of migration, secondly, partnerships on migration based on the definition of common interests with the third countries involved, and thirdly, specific and concrete measures to assist these third countries in increasing their capacity in the area of migration management. On the latter point, the Commission calls for a significant increase of the budget, in particular to assist in the implementation of readmission agreements.

and administrative arrangements and other modalities of readmission and return". The Cotonou agreement is therefore suggested as a blueprint for how the EU is to enforce readmission agreements upon third countries in the future.

The above sections outlined in detail the inclusion of migration into the EU's foreign policy, or rather, the inclusion of external relations in the EU's Justice and Home Affairs agenda. This externalisation of migration policy has taken place in various fora, from EURO-MED to accession negotiations, and more recently in the European Neighbourhood Policy. The new 'comprehensive' policy has been formulated in summit conclusions and commission communications and implemented with the use of specific Action Plans targeting regions and countries. It has been shown that readmission is the central element in this externalisation policy. The following sections will concentrate on two more central elements of externalisation. Firstly, external border control, and secondly, the shifting of asylum responsibilities by the attempt to externalise internment and asylum procedures.

### 5.3.9 External border control

Chapter 4.5.9 has already indicated that the adoption of common external border policies has been slow at community level, with the External Borders Convention having been aborted due to Member States' reluctance to transfer powers in this regard to community level, albeit pursuing increasing control by intergovernmental means and exchange programmes. The year 2004 saw the adoption of a regulation on immigration liaison officers (ILOs),[353] on which Peers (2004:72) notes that

> [s]ince ILO networks are already operational, a formal Regulation to set out the legal rules applicable to the networks can only assist the transparency and accountability of their operations. The principal issue is whether the information collected and made available to the public is likely to be at all self-critical about errors made by ILO networks, in particular as regards the restriction of movement of persons who have a legitimate need on protection grounds to leave a country. It is unfortunate that the Regulation makes no reference to protection issues at all.

The Regulation defines the concept of ILOs (which can include third countries) and sets out their powers, namely, to

> *collect information* of use to the prevention of illegal immigration and may also assist with *establishing the identity of third-country nationals and facilitating their return to their country of origin* [...] The tasks of ILO networks include: regular meetings; *exchange of information*; coordinated positions as regards

[353] *Regulation establishing a network of immigration liaison officers (ILOs)*, 29.9.2003, 13024/03.

commercial carriers; organisation of information and training sessions for diplomatic and consular staff, when appropriate; *adoption of common approaches to collecting and reporting strategic information*; contribution to biannual reports on common activities; and establishing contacts with networks in neighbouring countries.

(Peers, 2004:71, emphases added)

The regulation therefore provides a legal basis for an existing and far-reaching practice, whilst not adequately protecting the rights and interests of refugees who are in need of protection; in addition, however, data protection issues also arise with the collection and exchange of personal data. A provision included in the initial proposal of the regulation on the transmission of data to the Council by ILO networks was deleted during negotiations (Peers, 2004:71).

Further, the EU has recently created a common border agency by adopting the *Council Regulation establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*[354] in October 2004. The European Border Agency also gives a legal basis to existing practices, namely, "the ad hoc development of a whole host of operational bodies and measures that are already in place", including the "de facto creation of an 'EU Expulsions Agency' [...] which [...] will coordinate and organise joint deportation operations of the Member States" (Hayes, 2003). Not mentioned in the Commission proposal, but in the preceding Council document, is the establishment of operational coordination centres on land borders, sea borders and airports, a Risk Analysis Centre, and a number of joint operations which "will continue to develop outside any meaningful democratic control" (*id.*).

The agency's main tasks will be the coordination of operational cooperation between Member States, assistance with training and common training standards, risk analysis, the follow-up to research on external borders, extra technical and operational assistance for Member States, management of an inventory of Member States' equipment, and provision of support for joint return operations. The Regulation also foresees the exchange of information between the agency, the Commission and the Member States. Because "a clause has been added to the preamble, following the opinion of the European Parliament, referring to the EC rules on personal data protection applicable to EC institutions, bodies or agencies [...] it appears that the Agency could indeed be involved in processing personal data. The Agency may also exchange non-personal data with Europol, third countries and international organisations" (Peers, 2004a:262).

Peers (2004:75) finds that :

[354] Council Regulation (EC) No 2007/2004, 26.10.2004, reproduced under http://www.statewatch.org/semdoc/observatory/observatory1.htm.

> Given that most of the tasks to be performed by this Agency are already being performed on an ad hoc basis by a rather rickety institutional structure established within the Council, the creation of an Agency would be a far more transparent and effective way of carrying out these functions. Much will depend on the willingness of the Agency to be transparent, although the enforceability of the access to documents rules before the Court of Justice should assist with this objective. However, fundamental objections remain as to the prospect of a 'borders' agency becoming involved with in-country expulsions, the application of the risk assessment principle could raise questions about discrimination and the scope of the potential information exchange provided for in the draft Regulation needs to be clarified.

External border management represents a direct involvement in third country affairs by effectively coercing third countries to cooperate operationally in external border control with the EU in the name of the fight against illegal immigration. Common training sessions and targeted funding programmes have facilitated this development. Given the role of external border management agencies outlined above, which includes operational tasks related to migration management (deportation, policing of border regions and 'interception' of carriers transporting migrants and refugees), it also presents the most direct threat to the life of migrants and refugees trying to enter the EU. This threat has been particularly evident in the EU's newly extended external border regions, namely Eastern Europe and the EURO-MED countries, which have been forced to militarise borders and cooperate with the EU in law enforcement matters. Exchange and training projects on asylum and immigration have largely concentrated on those two regions.[355]

The role of external border control in the welfare of migrants and refugees has recently been emphasised by the EU Network of Independent Experts on Fundamental Rights;[356] it said that "[t]he area where the right to life is under the most serious threat is in the operational measures taken to ensure the control of the external borders of the Union".[357] With regard to Article 3 ECHR, the Network points out that

> It is of course evident that States must protect the right to life of persons under their jurisdiction, and this would appear to apply to the situation of a boat being intercepted at sea: when making such interception, the State authorities are obliged to take all the necessary measures to avoid, in particular, drowning.

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[355] See the *Commission Staff Working Paper on pilot training and exchange projects in 1996*, SEC(97) 499, 11.3.1997 for description of the organisation and outcomes of such programmes.

[356] The EU Network of Independent Experts on Fundamental Rights has been set up by the European Commission upon request of the European Parliament. It "monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. It issues reports on the situation of fundamental rights in the Member States and in the Union, as well as opinions on specific issues related to the protection of fundamental rights in the Union".

[357] *Report on the Situation of Fundamental Rights in the European Union in 2003* (2004:37).

Further, the report holds that immigrants' rights "must be respected. They also must have the right to claim asylum upon being intercepted".[358]

On the part of the EU, a number of EU documents and practices[359] stand out in this regard, namely the *Feasibility study on the control of the European Union's maritime borders*,[360] which was conducted by CIVIPOL[361] at the request of the JHA Council in 2002 and its accompanying *Programme of measures to combat illegal immigration across the maritime borders of the European Union*.[362] The former EU feasibility study itself[363] admits that

> On the maritime borders of Spain and Italy, there were a hundred accidental deaths a year for about forty thousand crossings in 2001 and 2002. The increasing deterrent effect of improving the surveillance and control mechanisms of the Spanish and Italian authorities on the Straits of Gibraltar and the Sicilian Channel is shifting the focus towards riskier passages, the Canary Islands Channel and the Gulf of Sirte. There were consequently a number of serious accidents in the first half of 2003 and an estimate of 400 drowned does not seem exaggerated. On the Greek-Turkish border, the absence of figures does not necessarily mean that there were no accidents.

The latter programme on combating illegal immigration concedes that the "[u]se of makeshift craft (rubber dinghies and small or unseaworthy boats) gives rise to particular public concern, as they often sink with the loss of many lives". However, Statewatch points out that the same documents then show "no further concern for the safety of would-be immigrants. On the contrary, any existing rights are viewed as 'legal loopholes' that need to be 'plugged'"(Hayes, 2003).

With regard to the imposition EU interests upon third countries, *Statewatch*[364] analyses the feasibility study and accompanying programme for action as follows:

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[358] *Report on the Situation of Fundamental Rights in the European Union in 2003* (2004:39).
[359] See http://www.europarl.eu.int/comparl/libe/elsj/zoom_in/09_en.htm for a comprehensive overview of external border measures.
[360] NOTE from the Secretariat General to the Strategic Committee on Immigration, Frontiers and Asylum, 19.9.2003, 11490/1/03, REV 1, LIMITE, FRONT 102, COMIX 458 reproduced under http://register.consilium.eu.int/pdf/en/03/st11/st11490-re01en03.pdf.
[361] Consultancy agency set up by the French interior ministry and comprised of public (law enforcement officers, foreign office, defence and university members) and private sector representatives, with the intent to facilitate and drive forward international cooperation on the basis of the "know-how and expertise that France has developed in the areas of general and territorial administration, civil security and policing" (http://www.civipol.fr/).
[362] NOTE from the Presidency to the Strategic Committee on Immigration, Frontiers and Asylum, 21.10.2003, 13791/03, LIMITE, FRONT 146, COMIX 631, reproduced under http://www.statewatch.org/news/2003/nov/137911.en03.pdf.
[363] Cited in *id.*
[364] *Id.*

> CIVIPOL represents a law enforcement blueprint rather than any kind of objective or broad-based "feasibility study" and the subsequent action plan proposes police, military and naval operations against people trying to reach the EU by sea. Under the proposals, the EU is planning extensive police and naval operations in foreign waters and ports. This depends upon the conclusion of agreements with "countries of origin". These are not specified but can be expected to include Morocco, Algeria, Tunisia, Libya, Egypt, Lebanon, Turkey, Syria, Malta, Cyprus and Albania. The levers of aid and trade are to be used explicitly in this process.

The link between the EU's external migration control measures, namely, the militarisation of the EU's borders and its imposition of the same measures on migrant-producing and transit countries, and the EU's internal migration control measures, namely, asylum and migration policy, is exemplified by recent EU-Libyan cooperation in this field. As early as 2002, the JHA Council decided to start negotiations with Libya on 'joint migration management'.[365] The arrival of refugees from sub-Saharan Africa on the island of Lampedusa, a continuous process but highlighted in the mass media in the summer of 2003, the deportation of those refugees to Libya without individual claim processing and the parallel military border control and return cooperation between the EU and Libya (see next chapter below) have become part and parcel of the same 'comprehensive migration management policy'; and in this case the EU has found a willing partner in the implementation of repressive policies targeting migrants.

### 5.3.10 Extra-territorial refugee camps: from the 1990 Iraq war to Libyan relations in 2004

As part of the EU's strategy on global migration management, readmission and external border policies as outlined above have increasingly been linked to foreign policy and non-migration related agreements and instruments. If refugee and migrant movements, however, are to be controlled outside EU jurisdiction, it is not enough to return people and stop them from entering. They must be contained in regions of origin and transit as well. This containment is increasingly enforced through internment. Dietrich (2004) points out that

> [s]ince the beginnings of the 1990s, Western European migration and refugee strategy papers point to the EU intending to export the asylum procedures to places outside Europe. They outline a global migration

[365] The JHA Council found that "[f]ollowing the assessment of the relations with third countries, eight countries (Albania, China, the Federal Republic of Yugoslavia, Morocco, Russia, Tunisia, Ukraine and Turkey) have been selected, in this initial stage, with a view to developing intensified cooperation, on the basis of the cooperation which already exists with them. Furthermore, cooperation will be initiated with Libya. These conclusions also include the elements which the clause on joint management of migration flows and readmission, to be included in any future EU agreement with any third country, should contain. JHA Council, 28-29.11.2002, 14817/02 (Presse 375).

control approach that ensures that refugees and unwanted migrants from Africa, Asia and South America do not reach Europe anymore. Central to this concept are camps encircling Europe.

The first time the EU, and more specifically Germany, experimented with the practical implementation of this containment, was the 1990 Iraq war. Then, German authorities were unsuccessful in their attempt to declare a 'safe haven' for Iraqi refugees, meaning the no-fly zone that was created over Iraqi Kurdistan. This 'safe haven' would have been the destination of returned Iraqi and Kurdish refugees, first excluded from an individual asylum examination by special temporary protection regimes applied in case of 'sudden influx', and consequently deported from Germany (Dietrich, 2004). Although this plan failed during the 1990 Iraq war, the EU succeeded in implementing it during the NATO war in Kosovo in 1999. Within a few weeks of the beginning of the NATO bombings in March 1999, the war zone was surrounded by refugee camps, stopping hundreds of thousands of refugees on their flight to the EU. The containment strategy was streamlined with the war strategy to such an extent that some argue that the Kosovo war was motivated by the EU's interest in controlling refugee movements in the conflict area (Dietrich and Glöde, 2000). Whereas the reasons for the Kosovo war are manifold and cannot be reduced to a single factor,[366] Dietrich and Glöde nevertheless make a convincing case in arguing that the EU's central motivation in entering the war was to find a solution to the regional refugee crisis. The authors relate the 1999 Kosovo war and its strategic use to the developments within the EU's refugee politics since 1989. The war is seen as the second important turning point towards the policy of containment of asylum-seekers, paralleled by the changes introduced into asylum legislation in many EU countries in 1993 that undermined the Geneva Convention and its principles of *non-refoulement* and the granting of possibility to apply for asylum in countries of destination. Concepts such as 'safe havens' or 'persecution-free zones' could now be applied in practice, and the war allowed the principles of return and containment laid down in the 1997 and 1998 EU

[366] Much has been written about the armed conflicts that arose in former Yugoslavia in the early 1990s, the role that the EU and US played in them and the following NATO intervention. The events in Yugoslavia are seen by many as a consolidation of the 'new world order' that was announced by Bush Sr. after the 1991 Iraq war. Reasons for the NATO intervention are contested and more complex than 'humanitarian' or 'material' (oil interests) reasons. One explanation of NATO intervention and the 'new world order' is presented by the journal and writer's collective *GegenStandpunkt* (1999, issue 2) as follows: "As soon as they [NATO alliance partners] turn to the "means" of war and destruction, they are no longer concerned about material gain, but in all seriousness act "out of principle": the principle that they determine and control the power balance of the nation-state world order with their collective power. Where and when this question of principle is acted upon can neither be concluded from nor explained by the importance of specific material interests that are endangered somewhere - important interests in functioning suppliers, backyards, investment spheres, debtors etc. are present everywhere for capitalist world powers, as are reasons for dissatisfaction with foreign governments who are supposed to serve these interests. [The necessary requirement] for fundamentally extending the regular quarrels arising thereof, beyond everyday foreign policy [...], is the decision of the alliance to feel attacked as an ordering power. Such a decision does not follow an imperialist master plan but arises out of the continuous supervision of every disorder in the state world order; all with much quarrelling between the allies. In the end, the alliance stands behind its decision as if it was an inherent necessity that it cannot circumvent, it finds that it is itself questioned as universal authority and owes the punishing of an aggressor to itself. Because it is always about an aggressor as, by definition, the matter at hand is the aggression towards the legitimacy of western words of power - and, to reiterate the point, not only against a few oil springs".

Action Plans on Iraq to be implemented at EU level. Military protection zones had already been set up in Iraq in 1990, as well as in Rwanda, but the Kosovo war was the first comprehensive EU experiment with its new policies. From the perspective of the EU-NATO partnership, Dietrich and Glöde (2000:12) argue that the Kosovo war was supposed to achieve the pacification of a region

> from which, even before the start of the war, 200,000 people had fled to Western Europe and from which an unstoppable flow of refugees was threatening to continue, and at the same time to effectively block the "southern route" of migrants towards the EU, from Kurdistan via the Adriatic sea towards Italy. Already on 20 January [1999], the newspaper *NZZ* reported: "In the face of the increasing tensions in Kosovo, Italy is preparing for another mission in Albania. In case of war, a big refugee wave is to be expected. It is in Rome's interests that this wave does not engulf Italy, which is why she wants to set up camps in northern Albania. A NATO intervention would be fully supported by Italy." The fact that at the same time in Switzerland, the setting up of refugee camps outside Europe by the Swiss army was being discussed, is an indication of how well-elaborated such plans already were in the run-up to the war.

In 2001, the Australian government developed the idea of containment even further and dedicated whole islands to the internment refugees. This so-called 'Pacific Solution' made headlines when in August 2001, a few hundred refugees from Afghanistan, Iraq and Iran tried to reach the Australian coast by boat. The boat sank and its passengers were rescued by the captain of a Norwegian cargo ship. Although the captain was intending to call at the nearest port, the freighter was stopped by the Australian navy and the ship had to dock at the Cayman Islands, where the refugees were forced to go ashore. Under heavy security measures, the refugees were then transported to the island of Nauru, north-east of Australia, a small island with around 15,000 inhabitants and entirely dependent on Australian development aid. Since 2001, two detention centres have been built on the island and they are run by the International Organisation for Migration (IOM). It is now common practice in Australia to stop boats heading for Australia at sea and bring the refugees to Nauru and later Manus (Papua New Guinea). What follows for them

> is a long ordeal: refugees are held in the unbearable heat for an unknown period of time. Legal democratic structures have not been set up till today. Together with the Australian police, the IOM is responsible for guarding the camps and this situation has not changed up to now. Some asylum seekers were able to move on to Australia or New Zealand, but most are still detained and others have to return with the so-called "voluntary" return programmes. Amnesty International, other NGOs and also journalists have been denied access to these camps. Only one BBC journalist managed to obtain pictures from inside the camp with a hidden camera. But they did not put an end to the Pacific Solution either, despite numerous warnings and comments by those involved that condemn the catastrophic situation in Nauru. The psychologist Dr. Maarten Dormaar, for example, worked in the camps in Nauru for more than a year. According to Dormaar,

> the interned refugees are in appalling physical and psychological condition. In his role as a health carer he tried to address this issue with the responsible Australian authorities, as well as with the IOM: "I became again rather mad and realised that no-one, even in the IOM headquarters, ever gave a damn".[367]

An investigative ABC news programme, from 15 May 2003,[368] uncovered the extent of the physical and psychological and health problems refugees were facing in detention on Nauru, described by Dr. Dormaar as "a psychiatrist's nightmare", with refugees suffering from depression, sleeping disorders and anxiety attacks. Despite much public and health expert criticism towards the Australian government and the IOM, they continue to claim that those interned on Nauru and other islands are treated well and that they are "in good health".[369]

Notwithstanding all the human rights concerns put forward by Amnesty International and many migrant and refugee support groups, the 'Pacific Solution' received much interest in the EU. In March 2003, Tony Blair proposed his "new vision" for refugees, which comprises extra-territorial camps or, as he puts it, "transit processing centres", for discussion at the Brussels European Council.[370] "Our idea", he wrote to Costas Simitis,[371] then president of the EU Council, "is designed to achieve better management of the asylum process globally through improved regional management and transit processing centres. We have raised the idea with Commissioner Vitorino, Ruud Lubbers and the International Organisation for Migration [...]". Similar to the Austrian Strategy Paper, the "new vision" paper admits that "the current global system is failing", promotes the "root causes" approach, but ultimately details deterrent and restrictive mechanisms such as readmission and "transit processing centres". Whilst discussing the prospects of better "regional management",[372] the proposal concedes that

> [o]ne of the uncertainties is **whether protection in the regions should and could reach a level in which people could be moved from Europe to protected areas for processing** (in the same way as transit centres), for temporary protection or on a return route. Such a level of protection would need to satisfy Member States' domestic courts [...].
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> (Emphasis in original)

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[367] *STOP IOM ! Global movement against migration control*, Anti-Rassismus Büro Bremen (July 2004).
[368] http://www.abc.net.au/7.30/content/2003/s855996.htm
[369] *Id*
[370] The European Council, sometimes informally called the European Summit, is a meeting (on average four are held every year) of the heads of state or government of the EU and the president of the European Commission.
[371] Letter by Tony Blair To Costas Simitis (10.3.2003).
[372] Proposed to include the cooperation of the UNHCR and comprising four elements: tackling causes of migration such as poverty and armed conflict, better protection in source regions, "developing managed resettlement routes from source regions to Europe, on a quota basis", i.e. hand picking "genuine" refugees out a mass of people fleeing poverty and/or conflict. The fourth element is "raising awareness and acceptance of state responsibility to accept returns".

From this apparent concern to uphold the rule of law, the second proposal to set up camps outside Europe reads more like an attempt to circumvent the Geneva Refugee Convention ("there is no obligation under the 1951 Refugee Convention to process claims for asylum in the country of application"). The 'new vision' paper proposes that people lodging asylum claims within the EU should be sent to centres located outside the EU, possibly "managed by the IOM, with a screening system approved by the UNHCR", financed by Member States and the European Commission. Those chosen as "genuine" refugees would be transferred back to EU Member States on a "burden-sharing" basis, the rest would be deported back to their country of origin or given temporary protection in the EU if deportation was not possible for humanitarian reasons. Apart from asylum seekers who have lodged a claim in the EU, the paper proposes for the camps also to hold "illegal migrants intercepted en route to the EU before they had lodged an asylum claim but where they had a clear intention of doing so". Who is to determine the intercepted migrants' intentions remains unclear.

The logic behind off-shore centres to 'process' people is, quite cynically, claimed to be based on a true belief in human rights:

> Under the Geneva Convention and human rights instruments we are required to protect migrants who are suffering from human rights abuse. However, bizarrely, we are only required to protect *migrants* from such abuse: If a tortured African political dissident does not reach our shores then we are under no obligation to assist him; if he does reach the UK then we must protect him according to UK standards. It is this providing protection by migration that causes difficulties. There are too many people in the world whose human rights are not secure for these to be absorbed into democratic States. And migration, particularly from third to first worlds, is too much of a prize for it not to encourage aspiring migrants to fabricate a protection need in order to leap to the developed world. We need to divide migration from protection.[373]

Here it is spelt out clearly for those concerned with human rights who had not yet grasped the UK government's good intentions in curtailing asylum rights and deporting refugees back to their home countries over the past decade: the government's asylum policy was all in the service of applying the Geneva Convention directly in Africa, much like the motto: if the refugee does not come to his protector, then the protector will come to his refugee. Based on this insight, the "new vision" teaches us that

> Logically, we have two choices if we are to be fair to all:
> - Claim that there is no extra-territorial nature to human rights and therefore no right to asylum. Ensuring human rights are protected is the obligation of the State (or at least in the Region) and beyond this there is no international obligation; or

[373] *A new vision for refugees - Final Report - Draft* (Restricted - Policy), 5.2.2003, p 7.

- Take the international obligation to universal human rights seriously. Seek to provide protection for all in need wherever they are in the world. Provide this protection otherwise than by migration, by intervening in other sovereign states.[374]

Note that 'Region' is spelt with a capital R here, giving it the air of a State that can be deemed safe or unsafe for the refugee. Note also the promotion of intervention in third country affairs with the justification that the UK is practically forced to do so if it wants to adhere to the Geneva Convention. Exactly how seriously the UK and other leading EU states such as Germany, Italy and France take their human rights obligations and how precisely they "seek to provide protection for all in need wherever they are in the world", was soon exemplified by the setting up of camps in Libya, to which Italy was the first country to deport asylum seekers *en masse*, after a refugee ship arrived at the Italian island of Lampedusa. The EU has since started using existing Libyan military camps to hold refugees and migrants who are deported from the EU without a single individual case examination or a guarantee for their safety. Despite lack of information as to the existence of these camps and the human rights situation in them, Dietrich (2004) writes:

> *Le Monde Diplomatique* reported on several camps in which migrants and refugees have been held since 1996 - about 6,000 Ghanaians and 8,000 people from Niger are supposed to be held in one of them alone [...] The Somali Consultative Council appealed to Gaddafi on 22 February 2004 "to unconditionally release the Somali refugees who are imprisoned in your country and who have started a hunger strike immediately and not send them back to the civil war in Somalia". In the beginning of October 2004, the Italian state TV channel RAI showed pictures from a Libyan refugee camp. Hundreds of people were depicted in a court yard, heavily guarded; the barracks apparently do not have sleeping facilities. Reports of some of the Somalis who have recently been deported [from Italy] to Libya confirm the existence of these camps.

Dietrich further points out that

> [i]n practice, this proposal [to introduce camps outside Europe] implies that boat people coming through the Mediterranean are to be returned to camps located in Arab states - in a collective procedure and without an individual check on their nationality, their flight route or reasons for flight. This practice is called *refoulement* and is explicitly prohibited in the Geneva Refugee Convention. EU Member States' constitutions as well as the European Convention on Human Rights prohibit *refoulement* as well. However, this practice not only concerns the violation of rights of asylum seekers. In internment camps or when deported to desert areas without support, migrants, no matter if they flee from poverty and hunger or for

[374] *A new vision for refugees - Final Report - Draft* (Restricted - Policy), 5.2.2003, p 7.

other "economic" reasons, suffer the same fate they were trying to flee. They are in threat of imprisonment, abuse and death.

It seems the UK and other EU governments indeed have motivations other than human rights concerns in their pursuit of negotiations with Libya, Morocco and other Arab states to set up camps for rejected or deported refugees and migrants from the EU. When the UK proposals were discussed at the informal JHA Ministers meeting in Scheveningen on 30 September and 1 October 2004, Diedrik Kramers, the UNHCR spokesman in Brussels, commented: "What are we talking about? Information centres for immigrants? Centres to examine asylum seekers? To repatriate people intercepted at sea?".[375] The complaint about a striking lack of legal clarity in the proposals was also questioned at national level when German interior minister Schily promoted the camps in the interior committee (*Innenausschuss*) of the lower house of parliament (*Bundestag*) in September 2004. He was not able to clarify what these processing centres would look like and on which legal basis they would operate: he was unable to answer questions as to whether they were detention centres or bureaus, if German or EU officers would be operating in them and what rights migrants and refugees would actually have. However, he did clarify one question: "Those seeking protection do not always have to find it in Europe".[376] He also announced that the European Commission, together with SCIFA, were to test preliminary measures for "a European asylum office with interception functions" in Northern Africa.[377] If anyone was still harbouring questions as to the EU governments' plans for the legal basis of these camps, these were answered at the beginning of October 2004, when the designated and later suspended EU commissioner Buttiglione announced during his hearing before the European Parliament in Strasbourg that the EU did not want to create "concentration camps" in North Africa, but wanted to use the camps existing already, "in which refugees are living under the most difficult circumstances", presumably applying the legal basis of Libyan military camps. At the end of an informal JHA meeting in Scheveningen it finally became clear: the ministers agreed in principle that the EU is striving for the creation of "reception camps for asylum seekers" in Algeria, Tunisia, Morocco, Mauritius and Libya, not under supervision of the EU, but of the countries in question. The EU Commission has already started negotiations with Morocco, Libya and Egypt on the matter.

Dietrich (2004) traces the parallels that exist between the EU's migration control interests in Libya and the economic interests of Italy and Germany in particular with regard to Libya's oil reserves. He argues that several developments have facilitated the externalisation of asylum in the form of intercepting migrants in the Mediterranean. The first is a change in the international political, military and economic sphere which has facilitated the increasing militarisation of the EU's external borders, implemented and intensified through EU enlargement and the global 'fight against terror'.

[375] Cited in *Statewatch Bulletin* (vol 14 no 5, August-October 2004).
[376] Schily after the meeting of 29 September, cited in *Statewatch Bulletin* (vol 14 no 5, August-October 2004).
[377] Schily in *FAZ*, 23.7.2004, cited by Dietrich (2004).

> The second aspect which brought the Libyan desert camps within reach of Pisanu and Schily is of economic nature. Since the mid-1990's, Gaddafi has slowly opened up Libya's economy and thus the oil and gas industry to foreign investors. Besides Russia, Libya is the most important non-European oil supplier for Germany, whereas Germany is the most important goods supplier to Libya after Italy.

He traces state visits and ensuing military and oil deals between the UK, Italy, Germany and Libya between March and October 2004, exactly the same period that the 'Mediterranean Solution' was being implemented. Amongst those involved are *Shell* (Dutch-British-owned), which received a €165 million contract to produce oil and gas in Libya, and Berlusconi, who visited Libya four times in 2004, amongst other things to attend the official opening of the pipeline *Greenstream* of the *West Libyan Gas Project,* built and operated by the Italian energy giant ENI, the number one among the foreign companies operating in Libya (6.6 billion dollars were invested in the 520-kilometre long pipeline, now supplying gas from the Libyan Mellitah to Sicily). In October 2004, the German chancellor Schröder visited Libya, accompanied by German industrialists, and signed a bilateral investment agreement on oil and gas concessions granted to the German *Wintershall*, a subsidiary of the BASF group, present in Libya since 1958 and one of the leading foreign producers, with an investment of 1.2 billion dollars. During Schröder's visit, the German RWE group also started business in oil and gas production, and the German *Siemens* group received contracts worth €180 million. Germany also expressed interest in ordering "technical material like night-vision gear or thermal cameras for border protection" (*id.*). In July 2004, Libya cleared the way for the participation of foreign investors in state companies and on 11 October 2004, EU foreign ministers resolved the political barriers to economic cooperation with Libya at a Council meeting in Luxemburg by revoking UN sanctions from 1992 and 1993. The arms embargo had already been revoked by the general EU framework for arms exports to third countries.

What the above parallels show is not only the re-establishment of an imperialist relationship, particularly with regard to foreign investors taking over domestic industries in northern Africa, but the use of this imperialist relationship to enforce migration control outside EU jurisdiction. On the one hand, this is taking place by the 'virtual' extension of European borders to North African coasts, where the EU is demanding a ban on the docking of the wooden boats in which poor migrants cross the Straits, and the deployment of EU border police and secret services in the Sahara-Sahel zone to contain migration, but also secure the oil and gas pipelines. On the other hand, migration control is taking place by the creation and use of detention camps in the Libyan desert. Tunisia is also operating 13 Italian-funded deportation prisons, of which 11 are kept secret and safe from public scrutiny. "It is said that many of the refugees and migrants deported from Italy are being transported to the Tunisian-Algerian desert and abandoned there" (Dietrich, 2004).

Since the commissioning of two feasibility studies[378] and the publication of the December 2002 Communication on integrating migration into the EU's third country relations[379] (see chapters 5.3.8 and 5.3.8), external processing has been more explicitly promoted by the Commission in Communications issued in March 2003,[380] June 2003[381] and June 2004[382]. The March 2003 Communication concluded that three complementary objectives should be pursued to improve the management of asylum in the context of an enlarged Europe: improvement of the quality of decisions ("frontloading") in the European Union, consolidation of protection capacities in the region of origin, and "the treatment of protection requests as close as possible to needs and the regulation of safe access to the European Union for some of those in need of international protection". The June 2003 Communication took budgetary concerns as its starting point: EU states, it asserted, were spending significant amounts on processing asylum claims in the EU, where the majority of applicants "did not qualify for international protection", while the majority of refugees, including the most vulnerable groups, remained in poorly resourced circumstances in third countries in their region of origin. As already pointed out in chapter 5.3.3, this statement reflects the mixing, in documents on the comprehensive approach, of alleged humanitarian concerns on the one hand (about inadequately protecting refugees in regions of origin) whilst applying an extremely utilitarian approach to asylum seekers who reach Europe on the other (asylum procedures are expensive and acceptance figures show the majority are not 'eligible' for protection, thus should not be allowed to enter EU territory in the first place). The June 2003 Communication concluded from the above that there was a clear need to explore new avenues to complement the stage-by-stage approach adopted at Tampere, which had already led to the establishment of the first phase of the Common European Asylum System (with, for example, the Asylum Procedures Directive outlined in the previous chapter 4.5.7). It proposed three specific but complementary policy objectives:

1) the orderly and managed arrival of persons in need of international protection in the EU from the region of origin;

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[378] *Study on the asylum single procedure ("one-stop shop") against the background of the common European asylum system and the goal of a common asylum procedure* (Hailbronner, 2002) and the *Study on the feasibility of processing asylum claims outside the EU against the background of the common European Asylum System and the goal of a common asylum procedure* (Noll et al., 2002)

[379] *Integrating migration issues in the European Union's relations with third countries*, Communication from the Commission, 3.12.2002, COM (2002) 703 final.

[380] *On the common asylum policy and the Agenda for protection*, Commission Communication, 26.03.2003 COM (2003) 152 final. (Second Commission report on the implementation of Communication COM (2000) 755 final of 22 November 2000).

[381] *Towards more accessible, equitable and managed asylum systems*, Commission Communication, 3.6.2003, COM (2003) 315 final.

[382] *On the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin. "Improving access to durable solutions"*, Commission Communication, 4.6.2004 COM (2004) 410 final.

2) burden and responsibility-sharing within the EU, as well as with the regions of origin, enabling them to provide effective protection as soon as possible and as close as possible to the needs of persons in need of international protection, and
3) the development of an integrated approach to efficient and enforceable asylum decision-making and return procedures.

The policy proposals encompassed resettlement schemes, 'protection in regions of origin', external processing and 'orderly and managed arrival'.

5.3.11 Improving access to durable solutions?

As mandated by the Council, one year later, the Commission published another Communication making more detailed proposals "[o]n the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin", entitled *Improving Access to Durable Solutions*.[383] The Communication is a response to Conclusion 26 of the Thessaloniki European Council of 19-20 June 2003, where the Commission was invited

> to explore all parameters in order to ensure more orderly and managed entry in the EU of persons in need of international protection and to examine ways and means to enhance the protection capacity of regions of origin with a view to presenting to the Council before June 2004, a comprehensive report suggesting measures to be taken, including legal implications.

Although the Communication allegedly provides a more detailed plan to develop the comprehensive approach to migration, the legal details are surprisingly scarce. It proposes the setting up of an EU resettlement scheme and claims to examine ways to enhance the protection capacity of the regions of origin, suggesting the establishment of EU Regional Protection Programmes which would provide a 'tool box' of measures to be implemented by the EU by December 2005. The funding of such programmes

> could be taken under the new AENEAS Programme for financial and technical assistance to third countries in the area of migration and asylum. This financial instrument offers the opportunity to Member States, third countries, international organisations or NGOs to propose in response, in particular to protracted refugee situations or situations of influx from a particular region, in full partnership with all countries concerned and in close cooperation with UNHCR, projects enhancing the protection capacity of the country or region concerned. Work has already started in this area with UNHCR projects under the former B7-667

[383] COM(2004) 410 final, 4.6.2004.

> Budget line on needs-based protection planning as a precursor to building effective protection capacities in selected countries in Africa.

So although the Commission eagerly pushes for the rapid implementation of 'durable solutions', with ample funding of the technical and bureaucratic requirements for the same, the Communication fails to outline any protection for refugees against procedural violations of their substantive rights in the form of monitoring programmes, for example, despite the fact that there is ample evidence of violations, particularly with regard to external processing. Especially experience with the shifting of asylum procedures eastwards and southwards, and the lack of relevant monitoring mechanisms with regard to refugee protection, not only concerning asylum procedure, but also the right to liberty in the face of the wide-spread practice of internment of asylum seekers, has shown externalisation to be an area of much concern (Lavenex, 1999; FFM, 1995, 1996, 1997, 2001).

Further, questions should be raised with regard to the Commission's insistence that the externalisation of asylum should not take place at the expense of undermining national procedures, reiterated by many NGOs and exemplified by ECRE's (2004) comments on the Commission Communication:

> We strongly underline however that any expanded use of resettlement and efforts to enhance protection capacities in regions of origin does not replace Member States' responsibilities to consider and process asylum applications of persons arriving spontaneously on their territory.

These pledges or pleas appear dangerously naïve, when considering the fact that Member States are already practising deportations to Africa under the guise of external protection, and that those deported obviously did not receive an individual case examination, despite having reached EU territory, as was the case with the deportations to Libya in October 2004. The French migrants' rights organisation GISTI,[384] together with nine other French, Spanish and Italian migrant and refugee groups, accuse Italy of having violated international protection standards with these deportations:

> During the first week of October 2004, the Italian authorities deported to Libya close to 1500 boat people who had recently come ashore on the coast of Lampedusa island. Without even attempting to hide it from European public opinion, the government of Sylvio Berlusconi organised what amounted to an airlift to return the fugitives to a dictatorship whose record of human rights abuses and mistreatment of foreigners has been consistently denounced. There was no reaction from the European nor from any of the Member States.

[384] http://www.gisti.org/doc/actions/2005/italie/index_en.html

> And yet the complaint lodged by Italian, French and Spanish organisations[385] proves the operation took place in breach of fundamental principles to which the European Union is committed. By reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights adopted by the European Union in 2000 and the Geneva Refugee Convention, the main principles violated were prohibition of collective expulsion, protection against inhumane and degrading treatment and the principle of non-refoulement of asylum seekers.

Although the European Parliament thinks that 'persons in need of international protection must have access to the territory of Member States', it also welcomes the initiatives towards 'protection in the region'.[386] In practice, however, these concepts have proven incompatible because of the lack of political will to ensure the former. As the Commission communication clearly outlined, 'access to the territory of Member States' is only granted selectively and on the grounds of criteria that fall short of individual case examination.

As is often the case, exclusionary mechanisms are created by several policy approaches that are pursued in combination. In the words of the Commission, these three objectives, namely, creating 'safe havens' for refugees to remain in regions of origin, 'resettlement programmes' for hand-picked categories of refugees who are allowed access to EU territory, and the creation of asylum systems in regions of origin for (some argue) potential permanent externalisation, "have cross-links and strategically reinforce each other". Noteworthy is also the lack of specification of rights of appeal to negative decisions. As the EP points out, "authorities accept 3 to 5% of asylum applications, although at the end of asylum procedures in the Member States 30 to 60% of asylum seekers are granted asylum",[387] but in the Commission Communication there is no mention "of the increasing number of successful appeals in cases that are refused - at present, in the UK, over twenty per cent of initial refusals are overturned on appeal (this in turn raises questions about the quality of first instance decisions)" (Hayes, 2004a).

The Commission Communication abounds with arguments and concepts that point to anything but a fair system: "[t]here would also be a provision for predeparture security checks which could also facilitate the exclusion from the resettlement programmes of those persons who are not entitled to international protection because they fall under the exclusion clauses of the Qualification Directive", the

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[385] ANAFE (F) *Association nationale d'assistance aux frontières pour les étrangers* - ARCI (I) - *Asociaciòn Andalucía Acoge* (E) - ASGI (I) *Associazione per gli Studi Giuridici sull'Immigrazione* - APDHA (E) *Asociación Pro Derechos Humanos de Andalucía* - *Asociaciòn Sevilla Acoge* (E) - *Cimade* (F) - *Federación de Asociaciones SOS Racismo del Estado Español* (E) - GISTI (F) *Groupe d'information et de soutien des immigrés* - ICS (I) *Consorzio italiano solidarietà.*

[386] *European Parliament resolution on the Communication from the Commission to the Council and the European Parliament entitled 'towards more accessible, equitable and managed asylum systems'* (COM(2003) 315 - C5-0373/2003 - 2003/2155(INI)), P5_TA(2004)0260, published under http://www.europarl.eu.int/registre/seance_pleniere/textes_adoptes/definitif/2004/04-01/0260/P5_TA(2004)0260_EN.pdf.

[387] *Id.*

document states. The Communication also suggests the globalisation of the fingerprinting system Eurodac: "[t]he UNHCR registration scheme "Profile", which will ultimately utilise biometric technology, constitutes a fundamental protection tool to better manage who requires protection in a third country". Chain deportations appear on a global scale: "[r]eturn could be aimed at the third country's own nationals, as well as other third country nationals for whom the third country has been or could have been a country of first asylum, if this country offers effective protection" and protection in a third country is guaranteed if it fulfils five 'benchmarks'[388]. However, Hayes (2004a) points out that

> "Principles" and "possibilities" are all very well on paper, but potentially meaningless in practice. Many states around the world claim to respect minimum human rights standards and do offer the possibility of refugee protection, but the reality on the ground may be very different. EU member states were satisfied last year, for example, that Afghanistan was safe for the return of refugees despite reports to the contrary from NGOs on the ground, ongoing military action and serious questions over public safety. Does the EU simply intend to designate zones or countries in Africa, the Middle East, the Americas and Asia as offering "effective protection"? The Communication is silent on this issue, though this was the main objective of the UK proposals for the creation of "safe havens".

The reality rather than lip service should therefore serve as a 'benchmark' here: reports exist to show that after deportation to Libya, for example, refugees' treatment falls far short of international standards. Indeed, in his analysis of documents outlining the externalisation of asylum procedures, Noll (2003:303) shows that the UK and other Member States' governments' endeavours to push for so-called Regional Processing Areas and Transit Processing Centres constitute an attempt to radically change the internal protection regime so that

> the UK, Denmark and other supporters are intentionally and proactively creating a state of the exceptional in the international refugee regime, in which legal and factual protection of certain classes of individuals are gradually done away with.

[388] These are outlined in Point 45 (p 16) of the Communication:
(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; and
(b) the principle of non-refoulement in accordance with the Geneva Convention is respected; and
(c) the right to freedom from torture and cruel, inhuman or degrading treatment is respected as well as the prohibition of removal to such treatment; and
(d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention; and
(e) the possibility exists to live a safe and dignified life taking into consideration the relevant socio-economic conditions prevailing in the host country.

It is noteworthy that the feasibility study on external processing ordered by the Commission and co-written by Noll (2002), which proposed "Protected entry procedures" (PEP), was not taken up by the Commission. PEPs allow refugees to submit their asylum applications at embassies or diplomatic representations in third countries, which issue an entry permit if the application is accepted or subject to a positive preliminary decision. The Commission cites a lack of "perspective and confidence among the member states" as its reason for not suggesting "an EU [PEP] mechanism as a self standing policy proposal" (Hayes, 2004a). The numerous examples outlined above leave no doubt about the fact that far from being driven by a desire to improve protection abroad, the EU is attempting to keep refugees abroad and hand-pick those deemed desirable by Member States.

The recent incident of Lampedusa has highlighted the problematic nature of external processing: on 14 April 2005, the European Parliament narrowly adopted a Resolution[389] that condemns Italy for the violation of human rights in relation to the mass expulsions of migrants between October 2004 and March 2005, for failing to

> take precautions to prevent the expulsion of genuine refugees to Libya, not allowing the United Nations High Commissioner for Refugees (UNHCR) access to the reception centre in Lampedusa, the fate of migrants that are expelled to Libya, where there is no asylum system nor effective respect for refugee rights, where practices of arbitrary arrest, detention and expulsion occur, and where the conditions under which expulsions are executed are reported by Libyan sources to have resulted in 106 deaths. The EP found that the expulsions from Italy to Libya (including those on 17 March 2004) are a violation of Italy's international obligations and of the non-refoulement principle, and calls on the "Italian authorities and all Member States to refrain from collective expulsions of asylum seekers and irregular migrants", to guarantee that asylum applications are examined individually and to adhere to the non-refoulement principle. Italy is invited to grant the UNHCR free access to the Lampedusa reception centre to ascertain whether any people in need of international protection are detained therein.
>
> The EP calls on the Commission to put a stop to collective expulsion and to insist that Italy and other Member States comply with their obligations under EU law, and goes further, reiterating "its deep reservations about the lowest common denominator approach in the proposal for a Council Directive on asylum procedures (COM(2002)0326)". The Resolution calls on the Commission to conduct a transparent dialogue on this issue, on Libya to allow access to international observers and to "halt the expulsion and arbitrary arrest of migrants", to ratify the Geneva Convention on Refugees and to make public any readmission agreements it reaches, in an apparent reference to a secret bilateral agreement reached on this issue by Libya and Italy.

[389] *Lampedusa - European Parliament resolution on Lampedusa*, Texts Adopted at the sitting of Thursday 14 April 2005, P6_TA-PROV(2005)04-14, Provisional Edition, PE 357.267, pp71-73, published under http://www.europarl.eu.int/registre/seance_pleniere/textes_adoptes/provisoire/2005/04-14/P6_TA-PROV(2005)04-14_EN.pdf

The EU practice, which was given renewed impetus with the Hague Programme, is further criticised by ILPA (2005) for abdicating responsibility with regard to international obligations to refugee protection and the danger of *refoulement*:

> ILPA believes that the EU's recent focus on protection and solutions in regions of origin is unduly influenced by self-interest, i.e. the desire to ensure that refugees and asylum seekers are prevented or deterred from making their way to the territory of EU Member States. It constitutes a form of burden-shifting. The UK experience of 'migration partnership' so far has shown that engagement with third countries is more a means to enhance their border controls with the intent of preventing people moving on. This is equivalent to abdicating protection responsibilities.
>
> EC legislation should more clearly prohibit refoulement at the border (whether at a maritime or other border) or refoulement by means of interception on the high seas. Under no circumstances should EC law or policy encourage interception on the high seas with a view to refoulement, rather than ensuring the safety of the persons concerned.

In summary, since the early 1990s, the EU has been following a policy that seeks to undermine the Geneva Convention and export the asylum and refugee "problem" to a jurisdiction that lies outside of Europe. The conceptual framework behind this policy is best outlined in the Austrian Strategy Paper that divides the world into concentric circles, where barriers between these circles stop migrants and refugees coming towards the centre (see above). These barriers are permeable according to the economic or political desirability of the refugee or migrants (see chapter 5.4.3 below). In order to enforce migration controls more effectively, however, the EU needed to overcome the obstacles to deportation, which are of a humanitarian (*refoulement* is prohibited by international law) and bureaucratic (lack of identity documents) nature. The problem of lacking identity documents was solved through ill-defined readmission agreements, the humanitarian obligations are currently being circumvented by externalising the asylum system through extra-territorial asylum procedures and a system of large camps detaining refugees and migrants caught trying to enter Europe or deported from Europe. The following section outlines the second aspect of the EU's changing approach to global migration control, the rationalisation of its use of migrant labour for its own economic benefit, and relates it to changes in the global economy outlined in chapters 2 and 3.

### 5.4 The rationalisation of immigration control

The rationalisation of immigration control is based on the EU's increasing need of immigrants as a cheap but also highly qualified labour force. In chapter 3 it was shown that with the restructuring of the world

economy through the world-wide liberalisation of trade and industry, accelerated by the end of the Cold War, the constitution and division of labour has changed. Industrialised nation-states increasingly need a flexible, internationally mobile but also more easily disposable labour force, exemplified by the rise of precarious working conditions (chapter 3.2).[390] Migration plays a central part in this process, migrants being the most flexible form of labour due to their insecure social rights status (chapters 3.2 and 3.3.1). The political discourse around immigration has therefore undergone changes since the late 1990s towards the promotion of this flexible approach, thus shifting away from the 'Fortress Europe' ideals of the 1980s. However, rather than representing a humanitarian argument for the rights of refugees and migrants or promoting the right to free movement,[391] this discourse is informed by a liberal market economy view of human life, where people are reduced to 'human capital', that is either useful or obsolete in the capitalist production process, and should be temporarily accepted or rejected according to labour shortages identified in specific sectors. In this thesis, the 'new approach' of industrialised nations to control these economic developments with regard to migration is therefore termed 'rationalisation' of migration control, as it is driven by the idea of a migrant's 'use value': migration control is explained and/or justified by applying principles of scientific management, namely, the "processing" of migrants outside and within the EU by diversifying and curtailing rights and benefits, and "managing" migration by interning and if necessary deporting certain migrants. This produces the economic result desired, which is to direct the labour force to industries according to an efficient allocation system, not paying reproductive costs or social benefits for the labour force, solving the problem of pensions in an "ageing population" and averting a perceived threat.

### 5.4.1 Reasons for rationalisation

Rationalisation is promoted by various actors, from governments to migrants rights groups. A plethora of studies, often initiated by the government, started appearing in Germany and the UK in 2000,[392] predicting a decline in Europe's population as a result of falling birth rates, leaving a population gap that, as is sometimes argued, needs to be filled with migrants. At the EU level, this shift in policy approach to migration was first pursued publicly in 2000. At an EU meeting in Marseilles on 28 July 2000, then

[390] Flexibility is here identified as an insecure form of employment with reduced labour rights and lack of permanent contract. As outlined in chapter 3.2, the increase of precarious working conditions is linked to changes in the global economy (see Hunger & Santel, 2003; Köppe, 2002, Kalleberg, 2000; Hirsch, 1998; Sennet, 1998 amongst others).

[391] It is often pointed out that there is no right to free movement in international law, this is increasingly demanded by proponents of an open border policy, as outlined in the conclusions to this thesis.

[392] The German interior ministry produced statistics predicting a fall in the population until 2050 (Bundesministerium des Inneren, 2000); the United Nations Population Division published statistics, based on its 1998 review, predicting a population drop in Europe from 729 million in 2000 to 628 million in 2050 whilst the world population would rise from 6055 million to 8909 million (see *United Nations Population Newsletter*, no. 68, December 1999:9). This was accompanied by a UN report (March 2000) entitled *Replacement Migration: Is it a Solution to Declining and Ageing Populations?*

French interior minister Jean-Pierre Chevènement produced a document arguing that the EU could admit up to 75 million migrants in the next fifty yèars and must be prepared to become a racially hybrid society, which he called "cross-fertilisation" (*métissage*, this also translates as cross-breeding).[393] Similarly to the Commission papers outlined below, EU Member State governments were aware of the fact that this stance marked a decisive shift from earlier political ideologies put forward by them, so the French document urges that "public opinion needs to be enlightened and convinced, and more so in countries of recent immigration than others". But, Chevènement concedes that "to allow access is not to renounce all forms of control. Ensuring cross-fertilisation requires a careful and controlling hand, in immigration terms".[394]

Because of changing production and therefore capital-labour relations and demographic changes affecting the domestic pool of labour power (chapter 3.2), industrialised nations have started competing for skilled labour on the international labour market, especially in the IT sector: the *Financial Times*[395] called it the "Battle for Brains", writing about the competition between the U.S., the EU and Japan, resulting from an estimated shortage of 85,000, 600,000 and 200,000 information technology workers respectively. The UK even sent its then e-commerce minister, Patricia Hewitt, to India to "boost Britain's links with the hi-tech industry there".[396] The U.S., however, is winning the race, as it is less reluctant to pass immigration-friendly legislation by increasing the annual quota for skilled foreign workers from 115,000 to 195,000 in 2000.[397]

Finally, the least researched aspect of the impact of migration on the economy is that of undocumented migrants. Although EU policy portrays undocumented migration as undesirable and even dangerous in terms of "security" implications, the fact is that key sectors of EU industries depend on undocumented migration, not only in terms of the required numbers of workers, but also with regard to the level of exploitation, in the form of low wages and lacking social security and benefit provisions (see also chapter 3.3.1). This is particularly evident in the agricultural industry in Spain and Holland (Benseddik & Bijl, 2005), as well as in the building industries all over Europe (Hunger & Santel, 2003). The fact that European industries rely on this undocumented labour, however, is hardly acknowledged by EU governments, which alternate between imposing fines on employers for using undocumented labour, carrying out raids on work places, but largely accepting this form of labour.

From the mid-1990s, the same time that the EU started formulating its neo-liberal Employment Strategy (chapters 3.2 and 3.3.2), the Commission started producing a series of documents attempting to outline a coordinated response to migration in order to secure the EU's competitiveness in the global economy. As indicated above, this promotion of 'managed migration' was exemplified at the national level

[393] *The Guardian* (28.7.2000) 'Europe 'should accept' 75m new migrants'.
[394] *Id.*
[395] *The Financial Times* (12/13.8.2000).
[396] *The Guardian* (30.10.2000) 'The new migration. Fortress Europe confronts the unthinkable'.
[397] *The Guardian* (30.10.2000) 'High fliers get first-class welcome but unskilled stay grounded. US: More visas as hi-tech firms snap up India's best brains'.

by some Member States' efforts to backtrack on earlier zero immigration stances. The recent recruitment drives, however, fundamentally differ from earlier campaigns in differentiating between the rights of migrants and often curtailing family reunion or social security. The following chapter traces these recent changes in EU policy towards economic immigration and illustrates the policy shift with the example of national debates and laws, in particular from Germany and the UK.

### 5.4.2. Commission Communications on economic migrants

The first initiative by the Commission on the rationalisation of EU immigration policies was taken by the 1994 Commission Communication on asylum and immigration,[398] which is based on the assumption that uncontrolled migration is a threat to security, and promotes the control of immigration to keep it "manageable". As indicated in chapter 5.2.1, the Communication was not pursued within EU structures, but nevertheless became "something of a reference text in the area" (Myers, cited in Gent, 2002:10) to intergovernmental migration management policies.

Another Commission Communication on immigration[399] was drafted in 2000 with a view to creating an overall framework for the EU's new migration policy, including the new aspect of external relations and new forms of management. On the one hand, it makes suggestions as to the precise funding of the external relations aspect of migration control and, and on the other, the Communication outlines how migration control can serve the EU economy by being coordinated with the European Employment Strategy and therefore benefit the newly introduced structural economic reforms introduced by this Strategy. The Commission touches on several issues in this Communication, including integration and the equal treatment of third country nationals. With regard to rationalising its approach to immigration, however, the following position is outlined.

Echoing the Austrian Strategy Paper, the Communication confirms that "there is growing recognition that the "zero" immigration policies of the past thirty years are no longer appropriate" and that "as a result of growing shortages of labour at both skilled and unskilled levels, a number of Member States have already begun to actively recruit third country nationals from outside the Union".[400] It suggests opening up legal channels of immigration for this purpose, as well as "fighting illegal immigration". In order to achieve the goals set out in Article 63 TEC, as well as the Tampere conclusions (both proposing a common EU asylum and immigration policy), the Communication proposes that Member States first cooperate by information exchange, which would require them to prepare periodic reports consisting of two parts. The first part would review the development and impact of the previous period's immigration policy; the second would set out future intentions, including a projection of labour migrants to be admitted

[398] *Communication on Immigration and Asylum Policies*, Commission, 23.2.1994, COM(94)23 final.
[399] *Communication on a Community Immigration Policy*, Commission, 22.11.2000, COM (2000) 757 final.
[400] Executive Summary.

with an indication of the skills levels required (point 4). The Communication suggests that Member States draw up "indicative targets" rather than quota systems (point 3.4.1) and proposes for itself to present a synthesis of reports to the Council, which would then lay down the principles of the common approach for the next period, taking into account the progress made in implementing the European Employment Strategy. Remittances are recognised as a central aspect of immigration from poorer countries, and the Commission proposes to "maximise the benefits" (point 2.1) from remittances but does not suggest a precise mechanism.

With regard to the legal basis of control, the Communication distinguishes between humanitarian migration, migration based on family reunion, and immigration "which can be generally described as driven by economic and market forces" (point 3.1). The latter is to be controlled, the Commission argues, in order to be able to respond adequately to labour market needs. It suggests that legal immigration channels might reduce undocumented migration, and points out that an estimated 500,000 people entering the EU illegally every year poses "practical difficulties of returning people" (point 3.1). Further, a coherent, open and more flexible immigration policy is needed in order to control migration globally:

> Globally, migration movements change direction, rise and fall depending on the evolution of the economic and demographic situations both in receiving and sending countries. In order to regulate migrant flows successfully, therefore, and to reduce illegal immigration, the EU needs to adopt a co-ordinated approach which takes into account all the various interlinked aspects of the migratory system and to work in close partnership with the countries of origin and transit.
> (point 3.2)

It admits that this more flexible approach to immigration will necessitate a change in climate in most Member States, where the past 50 years have been shaped by anti-immigration ideology, which was actively pursued by EU governments and which has directly contributed to the rise of far-right and anti-immigration parties and movements in Europe.[401] The Commission therefore says that EU political leaders "need to create the environment necessary for the acceptance of diversity" (point 3.5).

To reach full economic flexibility, i.e. to "allow European industry, particularly small and medium-sized industries, to recruit - in cases of real need - successfully and quickly from third countries, employers need a practical tool for demonstrating that there is a concrete shortage on the EU labour market" (point 3.5). The Communication therefore proposes an economic-needs test, to be developed using the European Employment Services, i.e. if a vacancy is posted through that service and no suitable EU applicant is found, the employer may recruit from outside the EU.

[401] See *European Race Bulletin* by the London based Institute of Race Relations for a regular update on domestic racism and anti-immigration policies from all over Europe (http://www.irr.org.uk/europe/index.html).

The Commission recognises that to attract more skilled labour migrants from a global market, the EU must offer some form of security with regard to residency status. It therefore suggests "differentiating rights according to length of stay" based on a core of rights that should be "available to migrants on their arrival" (point 3.4.2). It suggests a legal status for temporary and seasonal workers, which could be followed by a permanent work permit. In order to facilitate "integration", the Communication proposes the development of civic citizenship compromising a common set of core rights and responsibilities (point 3.5).

With its Communication, the Commission intended to stimulate debate on a common approach within the next few years. However, its proposed Directive on economic migrants, published in 2001[402] has been discontinued but several Commission papers have followed since then.[403] The Vitorino paper in particular, *On an Open Method of Coordination for the Community Immigration Policy*,[404] was positively received by migrant support groups as an attempt to liberalise the EU's entry policy.

More recently, the Commission published a Green Paper *On an EU Approach to Managing Economic Migration*[405] and a *Policy Plan on Legal Migration*[406]. They represent another attempt at proposing a more long-term and common strategy for Member States, "particularly in light of the implications which an economic migration strategy would have on competitiveness" and "to meet the needs of the EU labour market and ensure Europe's prosperity".[407] Repeating the earlier policy proposals, in its Green Paper on managing economic migration, the Commission calls for the minimisation of the administrative burden and the introduction of an admission procedure "capable of responding promptly to fluctuating demands for migrant labour in the labour market", a clause that was also outlined in the Hague Programme. However, the Green Paper attempts to be more flexible and gives several options for policy proposals, followed by a list of questions to Member States on their preferred choices. It tackles the degree of harmonisation, the admission procedures for paid and self-employment, the application procedure for work and residency permits, the possibility to change employer or sector, rights and "accompanying measures" such as integration, return and cooperation with third countries. Concerning the level of harmonisation, the Commission outlines three possibilities. First, the horizontal approach as outlined in the 2001 Commission paper (conditions of entry for third country nationals exercising employed, self-employed or other economic activities). Second, a sectoral approach, such as the proposal for a Directive on the admission of students, but geared towards "seasonal workers, intra-corporate transferees, specially

[402] *Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities*, 11.7.2001, COM (2001) 386 final, 2001/0154 (CNS).
[403] See http://www.euractiv.com/Article?tcmuri=tcm:29-134074-16&type=News for a list of official EU documentation and NGO and think tank commentary on the matter.
[404] 11.7.2001, COM (2001) 387 final.
[405] 11.1.2005, COM (2004) 811 final.
[406] 21.12.2005, COM(2005) 669 final.
[407] Introduction, 11.7.2001, COM (2001) 387 final.

skilled migrants (not necessarily only highly qualified), contractual service suppliers and/or other categories"; this option is obviously proposed for its non-committal nature for governments and therefore for its facilitation of EU-wide adoption. Finally, the Commission proposes a common fast-track procedure to "admit migrants in cases of specific labour and skills gaps", in order to "avoid unnecessary and potentially harmful competition between Member States in the recruitment of certain categories of workers" (point 2.1). Concerning admission procedures, the Commission proposes to extend the "Community preference principle" (where EU citizens and non-Community nationals lawfully resident in the labour-seeking Member State are given preferential treatment in the labour market) to "third-country nationals residing in a Member State different from the one where the labour shortage arises". The EU, the Commission points out, "could then count on a "stock" of manpower that has already started to integrate" (point 2.2.1). The shaping of EU immigration policy to fit EU labour needs is worked out in more detail under the section "admission systems", where green-card options, economic-needs tests and quota systems are discussed. An option, according to the Commission, is "an EU selection system to respond to the needs for specific skills [...]":

> A common framework at EU level could be established (e.g. years of experience, education, language skills, existence of a work offer/labour shortages, family members in that Member State, etc) and then each Member State could choose whether to apply it and, if so, how to shape it to the need of the labour market. Alternatively, there could be several systems, e.g. one for low skilled workers (e.g. preference to years of experience in a certain sector) and one for medium/highly-skilled workers (e.g. preference to education, then to experience), and Member States could decide which one to apply. Such a system could co-exist with both the "individual assessment" philosophy and the "green cards". Finally Member States wishing to introduce "job seeker permits" for certain skills, sectors, could do this.[408]

There are, it seems, no limits to the possibilities of labour management. Some would argue that this unlimited list of proposals reads as a desperate attempt by the Commission to urge Member States into action with regard to at least some commonality in policy. It does, however, also reflect a very real process of the shaping of the EU's immigration policy exclusively in the interests of industry, leaving the migrants seeking work to be classified solely in terms of their usefulness to the EU's economy, reflected in the fact that not a single EU Member State has as yet ratified the *UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (chapter 5.1).

To sum up, it can be observed that the Commission has urged Member States from the mid-1990s onwards to draw up a common migration policy, which Member States have been reluctant to implement. However, despite the reluctance to divulge decision-making in this regard to the EU level, various policies

[408] 11.1.2005, COM (2004) 811 final, p 8.

on rationalising immigration control have been implemented at national level. Levy (2002:13) points out that

> when one talks of the evolution of refugee and asylum policy after the Treaty of Amsterdam the emphasis must be on the European Union as a policymaking community, a 'Regulatory State' rather than the 'political system' of a democratic polity. Though bounded by the injunctions of the Geneva Conventions, the tendency has been to solve problems of migratory flows and security threats to the European Union and its Member States, not to achieve a new democratic consensus in Europe on the place of refugees, asylum seekers or economic migrants.

Therefore, despite the repeated promise at various European Council meetings to draw up a common approach and a related set of rights of migrants, heads of Member States' governments have not fulfilled these promises. As Jean-Louis De Brouwer, Head of the Unit on Immigration and Asylum from the Commission's JHA Directorate commented: "Although [Member States] all have channels for immigration, they do not want to discuss it at the European level [...] This is still a taboo for all states".[409] The latest Commission proposal therefore reads as a lowest common denominator compromise that guarantees maximum flexibility to industry and governments and does not commit itself to strong migrants' rights with regard to gaining citizenship and/or long-term residency. Further, no mention is made of any protection from abuse by employers, who will gain a considerable increase in power over the employee if his/her residency status remains dependent on the work itself. It remains to be seen if it is true that the skilled migrants the EU so desperately needs will or "will not come without the prospect of citizenship".[410]

### 5.4.3 The "new approach" at the Member State level

This chapter finally traces some developments in the rationalisation of immigration policy in the EU at the national level. Although specific to national economies, the policy changes of the last year within Germany and the UK can be seen as representative of the EU, as they reflect the response to economic changes already indicated by earlier Commission proposals, in particular concerning the aim to remain competitive in the international market by having access to a flexible labour force. The control of a labour market was identified in chapter 2.2.4 as a precondition for competitiveness, and in chapter 3.2 it was proposed that flexibility in national labour markets is a precondition for states to retain competitiveness in

[409] Cited in the *Süddeutsche Zeitung* (3.4,1,2004).
[410] *The Guardian* (30.10.2000) 'High fliers get first-class welcome but unskilled stay grounded. US: More visas as hi-tech firms snap up India's best brains'.

the era of 'globalisation'. The EU initiative for the liberalisation of immigration policy with regard to labour migrants initiated in 2000 was particularly noticeable in the UK and Germany.

### 5.4.4 The UK

In the UK, the *New Statesman* reflected the general feeling about the UK government's novel attempt to change Middle England's mind on migration matters with the headline: 'The minister for immigration says the unsayable: let in more immigrants'.[411] *The Guardian* commented 'Fortress Europe confronts the unthinkable'.[412] In September 2000, the UK Institute for Public Policy Research (IPPR) organised a public hearing on immigration with the then immigration minister Barbara Roche, followed by a public discussion in February 2001 with the then Home Secretary Jack Straw, on "reforming" the Geneva Convention. Roche, known for her hard-line stance against asylum seekers, told a surprised audience, presumably in an attempt to convince the public of the desirability of immigration, that her own parents had been immigrants and that "evidence shows that economically driven migration can bring substantial overall benefits both for growth and the economy".[413] In 2001, this was followed by a Home Office publication called *Migration: an economic and social analysis*, which, based on statistical analysis and the Labour Force Survey, argued that immigration was desirable and indeed necessary to the UK economy.[414]

This was followed by an increase in issued work permits in October 2000[415] and a debate on the introduction of green cards, paired with repressive asylum measures, as part of a "major overhaul of the asylum and immigration system".[416] Work permit schemes and "working holiday" programmes have always existed for students, and particularly sectoral workers, (operating on a quota system to match industry needs, as well as regulating the entry of specific nationalities).[417] But these were always dependent on a specific job and therefore employer. Summerville (2006:12-3) sums up the policy changes in the UK toward a work-based approach to migration control:

> The immigration system has been systematically re-centred around work and employment. This has taken a number of forms that fall under the umbrella term of 'managed migration'. Managed migration emerged from 2000 onwards as a number of different schemes dedicated to both low and high skill work. The low skill routes are sector based schemes (SBS) and include hotels and food processing. The SBS had the

[411] *New Statesman* (23.10.2000. pp 18-9), also see *The Independent* (21.7.2000:1) 'New open door policy for 'skilled' immigrants'.
[412] *The Guardian* (30.10.2000).
[413] *Migration in a global economy*, speech by Barbara Roche MP, immigration minister, held at the conference 'UK: migration in a global economy' at the IPPR on 11 September 2000.
[414] *Migration: an economic and social analysis* (2001), Home Office, RDS Occasional Paper No 67.
[415] An extra 30,000 permits were granted for 2001, see *The Times* (17.10.2000).
[416] *The Guardian* (3.10.2001).
[417] See http://www.workingintheuk.gov.uk/ for an overview of schemes and programmes.

> precedent of the Seasonal Agricultural Workers Scheme (SAWS) which had existed since the Second World War. The high skill routes were based on the rapidly and hugely expanded work permit system and, in a new policy direction, points-based systems such as the Highly Skilled Workers Programme. Reform has also come through emphasising the work element of some migration routes. These include existing schemes, specifically the Au Pair and Working Success and Failure under Labour Holidaymaker schemes. For example, the Working Holidaymaker visa (which allows Commonwealth citizens to work and holiday in the UK) was altered in 2002. The age limit was raised to 30 and visa holders can now switch to a work permit scheme after a year in the UK (Somerville, 2004e, p20-22). The decision to allow EU workers from the ten accession countries the immediate right to work (with a registration scheme for A-8 nationals) - rather than impose a seven-year restriction - also falls under this category. Student visas have also been reformed to include a potential work element. Schemes such as Fresh Talent in Scotland or the Science and Engineering Graduate Scheme (SEGS) have allowed some students to move seamlessly into work from study. The recent consultation, Selective Admission, points towards the evolution of the system into a simplified points system made up of five 'tiers'. The tiers relate to a grading system of skills: Tier 1, for example, is aimed at the very highly-skilled and will subsume the Highly Skilled Workers Programme.

The above-mentioned "Highly Skilled Migrant Programme" (HSMP), launched by the Home Office Immigration and Nationality Directorate on 28 January 2002, provides "an individual migration route for highly skilled persons who have the skills and experience required by the UK to compete in the global economy".[418] The focus on labour migration was also emphasised during the passing of the Nationality, Immigration and Asylum Act of 2002, although the Act itself failed to specify recruitment policy or procedures, following the UK tradition of detailing labour migration rules in subordinate rather than primary legislation (and in the guidance of the Work Permits Agency of the Home Office) (Cholewinski, 2002a:103). The government did, however, promote 'managed migration' as a new policy approach during the publication of the 2002 Act:

> In 2002, the publication of *Secure Borders, Safe Havens: Integration with Diversity in Modern Britain* marked the second major step [in the Labour government's changes to the UK's migration policy]. The legislation that followed, the 2002 Nationality, Immigration and Asylum Act, was built around the concept of 'managed migration'. New to a UK audience [...] 'managed migration' rests on the idea of migration as a positive economic asset that contributes to macroeconomic health. [...]
>
> The legislation that followed the 2002 Act, the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 and the current Immigration, Asylum and Nationality (IAN) Bill, continues in the same vein as the

[418] Work Permits (UK) web page (28.1.2003), http://194.203.40.90/default.asp?PageID=2754

> 2002 legislation, with an increasingly tough stance on asylum and emphasising control, while upholding the value of economic migration.
> (Somerville, 2006:11-2)

The Highly Skilled Migrant Programme is different from the regular work permit scheme in that the applicant does not need a specific job offer in the UK to apply, therefore increasing flexibility. Further, it is more flexible for self-employed migrants, as it does not demand a detailed business plan or investments in the UK economy. The acceptance procedure is based on a points-based scheme, where points are scored in five main areas: educational qualifications, work experience, past earnings, achievement in a chosen field and the husband's, wife's or unmarried partner's achievements. The applicant needs to score 65 points or more to qualify as a highly skilled migrant. If successful, s/he is given permission to stay in the UK for one year to seek work or self-employment opportunities. After one year, s/he can apply to stay for longer, but must be "economically active". After having lived continuously in the UK for four years with Home Office permission, permanent residency can be applied for. Initially set up for a 12-month test period, the HSMP was extended indefinitely in 2003.

This liberalisation was followed in 2002 by the UK announcing that it would not make use of the transition arrangements between the EU Member States and the Commission, under which free movement and access to the labour markets of the "old" Member States by citizens of the new Member States can be regulated by national policies and bilateral agreements between the former and new Member States until at least 2011[419] (see chapter 5.2.2). Foreign Secretary Jack Straw explained that the decision "will attract workers we need in key sectors and is part of our managed migration agenda. It will ensure they can work here without restrictions and not be a burden on the public purse".[420] The liberal treatment of the transition arrangements in the UK, Ireland and Sweden might confirm De Brouwer's statement that Member States "all have channels for immigration" but that they "do not want to discuss it at the European level". UK work permits were extended to Eastern European *au pair* workers in November 2002, with 12,000 Eastern Europe *au pairs* registered in the UK in 2001 alone (*id.*). The government's announcements were timed with the publication of yet another Home Office research paper based on the "empirical analysis of the impact of immigration on outcomes of currently resident workers in local labour markets" which showed

[419] The Accession Treaty, which was signed on 16 April 2003, sets out the conditions for freedom of movement for workers to and from the new Member States after EU enlargement on 1 May 2004. It lays down that "[t]he EU-15 Member States may allow total or partial freedom of movement for workers from the new Member States. Thus, they may restrict this freedom during the transitional period, which starts on 1 May 2004 and is due to last for a maximum of seven years" (see http://europa.eu.int/scadplus/leg/en/cha/c10524.htm).
[420] *The Independent* (11.12.2002).

that immigrants do not take jobs from the resident population, but that they may even boost the national economy and create more jobs.[421]

Largely ignored in the recent debate on the role of migrants in economic growth and employment rates are ethnic minority businesses, particularly pronounced in Britain[422] due to its relatively deregulated economy, compared to mainland EU Member States (Barrett *et al.*, 2002:11). It is difficult to assess the specific impact ethnic minority businesses have on the economy, although generally it can be noted that migrants have

> a direct impact on Government expenditure and revenue by paying taxes, claiming benefits (where entitled) and consuming Government-provided goods and services. They also generate indirect fiscal effects through macroeconomic and labour market impacts that alter the level, and growth, of GDP, and the returns to, and employment of, native labour and capital.
> (Home Office, 2002:15)

It has been observed that self-employment cannot be explained by cultural factors alone, e.g. by ethnically specific entrepreneurial traditions, but is often a reaction to the disproportionate unemployment ethnic minorities face in host countries:[423] post-Fordist restructuring in industries using immigrant labour led to heavy job losses, which created a "multitude of surplus workers to whom self-employment offered a last resort survival strategy" (Barrett *et al.*, 2002:17). As such, the tendency within ethnic minority communities to resort to self-employment could be said to save the government social support expenditure. Moreover, although ethnic minority businesses often suffer from overwork, low returns and lack of upward mobility due to a variety of reasons (e.g. few human capital resources, 'bank racism' denying starting capital, predominant location in sectors faced with high corporate competition, etc.), by the early 1990s, over 100 Gujarati millionaires were recorded living in Britain (Mattausch in Barratt *et al.*, 2002:18).

Evidence suggests that due to the forces of globalisation described here in chapters 2 and 3 , states will be forced to take account of immigrant businesses, and that those that do will gain an advantage with regard to labour flexibility, which in turn will significantly shape size and character of immigration and the opportunities migrants face. With the example of Chinese entrepreneurs to Australia, Collins (2002:128) finds that contradictions began to emerge as a result of racist immigration policy, "principally

[421] *Migrants in the UK: their characteristics and labour market outcomes and impacts* (2002) Home Office, RDS Occasional Paper No 82.
[422] Of those in employment in Britain, the UK-born percentage of self-employed people is the lowest (10,7%), whilst migrants from Middle Eastern origin represent the highest (25%) (Home Office, 2002:15).
[423] In Britain, the unemployment rate for men belonging to ethnic minority groups amounted to 16.2% whilst only 9.4 % of the male white population was unemployed (with a national unemployment rate of 9.8%). Based on 2002 census figures, outlined in Barrett *et al.* (2002:13).

because such policy constrained the internationalisation of the Australian economy in general and its enmeshment with the Asian region in particular", so that successive governments have "embraced economic rationalism and globalisation":

> These policies have led to fundamental changes to the Australian economy, particularly the decline of manufacturing and the growth of finance, telecommunications and media [...]. This in turn has the led to changes in immigration policy, which has been fine-tuned to reap economic benefits. As a result, today's Chinese immigrants in Australia are very different from those of a century ago, or even two decades ago. A number of ethnic Chinese in Australia [...] are moving into professional managerial jobs, including those in the telecommunications, personal computer, finance, business services and Internet industries.
> (Collins, 2002:129)

In contrast to the upward mobility Chinese entrepreneurs seem to develop in Australia due to changes in immigration and settlement policy, Barrett *et al.* (2002:12) note that Britain's ethnic minorities remain substantially marginalised economically, resulting "largely from a combination of deindustrialisation and racism". So although ethnic minority businesses are much larger in Britain than elsewhere in Europe, this appears to be a reaction to rising unemployment, "perhaps an aggravated, racialised variation on a universal theme", and exacerbated by "much greater socio-economic inequality which prevails in Britain" (*id.*).

The UK government has not yet attempted to change its immigration policy to support small scale ethnic minority businesses, although, as noted above, it has started to introduce labour immigration schemes allowing for 'individual' migration routes, carefully making the distinction between low-skilled and highly-skilled migrant workers: in 2002, the Home Office and Department of Trade and Industry issued a report entitled *Knowledge Migrants*,[424] to "assess the influence of factors that affect a skilled individual's decision to migrate to work in the UK" and to "collect information on factors relevant to possible future migration decisions." It includes a survey of over 300 highly-skilled migrants[425] who entered the UK with a work permit in 2000/01. The research had a specific focus on the motivations and experiences of those who had chosen to come to the UK from outside the EEA. The findings were used as a basis for possible work permit reform and to advise UK employers on how better to attract migrants. Despite the obviously positive approach to migration that is useful to the UK economy, the government could still not bring itself to call its objects of research "economic migrants", with the argument that "[w]hile prospects for economic improvement in terms of earnings were a significant factor for some from developing countries it was not a dominant factor overall. As such the surveyed migrants can be

[424] The report can be downloaded under http://www.dti.gov.uk/migrantworkers/.
[425] The report focused on the sectors of information technology, electronics and communications (ITEC), financial services, hospital consultants and biotechnologists.

considered knowledge migrants rather than economic migrants." This statement clearly distinguishes "the poor" as "economic migrants" whilst those migrants that voice a personal choice in their migration other than mere survival have now been classified with the more positive description of a "knowledge migrant". Finally, In December 2002, the then immigration minister Beverly Hughes announced that the government was issuing a four-year work-permit scheme that selected refugees could apply for, so as to prevent them becoming a "burden on the taxpayer".[426] This fact, however, should not be read as an attempt to integrate asylum seekers *per se*,[427] but as an extension of rationalisation and flexibility with regard to legal categorisation of migrants and refugees. Asylum-seekers, for example, who face wide-spread stigmatisation by politicians and press as 'scroungers' and 'bogus' are being redefined as 'knowledge migrants' if they skills suit the UK economy. This is expressed in the government's initiative to allow 'refugee doctors' to work to solve the NHS deficits: "It makes fundamental sense for us to enable refugees with medical skills to work in the NHS", the then health minister John Denham told the *Guardian* in 2000.[428] The article says it is estimated that around 2,000 doctors are registered as refugees in Britain; their labour would not only be needed, but also save the government the training costs for new doctors.

The flurry of government activity in work permit liberalisation was widely discussed in the years 2000 to 2003, and the government was eager throughout to emphasise its tough stance on irregular entry and 'unfounded' asylum claims. This led to a political balancing act between the anti-immigration lobby and the economic need for immigrant labour which is characteristic of the EU's managed migration strategy. Immigration ministers were trying to convince the public of the benefits of immigration whilst at the same time staging public "crack-downs" of illegal work-places and even a publicly-aired mass deportation of Roma asylum seekers to the Czech Republic.[429] Newspapers and migrant support groups pointed out the hypocrisy of these policies, arguing that the "state turns a blind eye" to illegal work whilst a Home Office advisor admitted to the *Times* "if they [undocumented workers] all disappeared overnight, London and the South East would break down before breakfast".[430]

As argued in chapters 1 and 2, the role of the state is precisely to mediate this liberal paradox (Hollifield, 2003) and its attempt at migration control can therefore not be dismissed as serving only the purpose of appeasing a popular electorate. The deportation figures of 1999[431] show that there is an actual

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[426] *Red Pepper* (January 2003:9).
[427] In 2002, the government deported 65,460 people (failed asylum seekers and their dependents, 'landed migrants', overstayers and visitors) from the UK.
[428] 'Refugee doctors to help ease NHS staff crisis', *The Guardian*, 3.11.2000.
[429] On 20 September 2002, 48 Roma were deported to the Czech Republic by the UK government, which invited media film crews (the footage was later screened in the Czech Republic), see *Statewatch Bulletin* (vol 13 no 2, March-April 2003).
[430] Cited in *The Guardian* (25.5.2004). 'Immigrants the rich love - Hysteria over legal migrants allows lucrative exploitation of illegal workers to go on unchecked'.
[431] *Analysis of replies to the questionnaire concerning the practice of Member States, including Iceland and Norway, with regard to transit for the purpose of expulsion by air*. NOTE from the General Secretariat to the Migration and Expulsion working party, 4.5.2000, 7941/00, LIMITE, MIGR 36, COMIX 355.

attempt to keep poor or 'undesired' populations out of the EU. The UK deported 45,000 people by plane in the year 1999, that is around 27% of the total EU figure of 166,909.[432] Statewatch[433] commented on the contradiction in the government's lip service to liberalising immigration, whilst carrying out deportations, that "the 170,000 people expelled from the EU last year could be seen as 0.2 percent of the immigrants the bloc needs over the next 50 years. Instead, the massive human suffering arising from mass-deportations looks set to be followed by more expense and more bureaucracy in the name of managed migration".

### 5.4.5 Germany

In the UK, changes to work permit procedures have taken place rather swiftly in comparison to other EU Member States, although since 2000, many Member States have allowed liberalised access to their labour markets for family members, increased exemptions from labour market tests and introduced the possibility to switch between employers or from student to work status. Particularly Germany has tried to introduce schemes to encourage skilled migration, but compared to the UK it has been much more difficult to introduce these changes. The German red-green coalition government's initiative to introduce a greencard system for Indian IT specialists met with public resistance and much racism, including derisive high-profile conservative campaigns against it.[434]

Nevertheless, the relevant employment and residency regulations for a greencard system for highly-qualified IT workers came into force in August 2000. On closer analysis, however, the system failed to reach the desired level of recruitment for the high-tech industry (20,000) and remained at 8,500 non-EU migrant workers for the year 2001. The failure of the German greencard system to attract highly skilled workers was explained on the one hand with the expectations of racist attacks (Indian IT specialists preferred America for that reason),[435] on the other hand, the unfavourable residency conditions and spouse regulations were obviously not attractive enough for skilled migrants. As Kolb (2003:165) concludes:

> The tradition to recruit "on demand" [which has been prevalent in Germany up to the present] is not successful anymore. It is becoming clear that Germany is in need of a regulatory framework which is favourable towards foreigners. A "defensive and confusing law" or a "philistine and small-minded regulation" which restricts residency, imposes income limits and forbids spouses to take up work (Prantl 2001:4) is not suited for getting the much sought-after resource "highly-qualified labour".

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[432] The data was collected from Member States response to a questionnaire by the EU Council's Migration and Expulsion Working Party, see *Statewatch News Online* (September 2000).
[433] *Statewatch New Online* (September 2000).
[434] The conservative CDU candidate to be premier of North Rhine-Westphalia, Jürgen Rüttgers, received much public attention when he coined the slogan "Kinder statt Inder" (children, not Indians) and used it, albeit unsuccessfully, in his election campaign.
[435] *Financial Times* (19.4.2000) 'Indian IT specialists lukewarm over Germany's invitation'.

The government's attempt to extend liberalisation of existing regulations to attract more migrant workers, however, was squashed when the conservative opposition party went to court on the issue on procedural grounds, leading to a negative decision by the German Constitutional Court in December 2002.[436] After the introduction of the new Immigration Act in January 2005, the preconditions for gaining permanent residence under the greencard scheme remain deterring: unless the applicants are "scientists, university lecturers, specialists and leading managers with long professional experience", they will have to have

> stayed and worked for 5 years in Germany, [...] paid 60 months into the pension insurance fund, [be without] criminal records for the last 3 years, [have] sufficient knowledge of the German language and basic knowledge of the German judicial and social system.[437]

That public opinion certainly is indeed in need of "enlightenment" and "more so in countries of recent immigration than others"[438] if EU governments want to liberalise their immigration laws, is therefore best exemplified with the case of Germany. Its attempt to reform the Immigration Act took 4 years, from the initial publication of the White Paper in August 2001 until it came into force on 1 January 2005, with ongoing battles with the conservative opposition, which yet again went to court against the government on procedural grounds. The battles finally ended in an Act that barely resembled the initial White Paper, and which still included the general recruitment ban introduced in the 1970s. In direct opposition to the actual intent of the reform, conservative parties had demanded more restrictions on foreigners' rights to work and framed the debate in "security" terms by demanding more powers to deport "terrorists". After the Madrid bombings in March 2004, the debates started to focus exclusively on terrorism and finally led to the introduction of far-reaching security measures. After the watering-down of more liberal proposals, the final draft was announced on 5 August 2004 (BGBl. I S. 1950) and its title: *Law on the management and restriction of immigration and on the regulation of the residency and integration of EU citizens and foreigners* indicated the philosophy governing the approach. Although the Act's main aims are allegedly the facilitation of skilled labour immigration, the integration of foreigners and the inclusion of EU guidelines in asylum law, the asylum law in particular was considerably restricted, and labour migration is enabled only for entrepreneurs with vast amounts of starting capital.[439]

In 2004 and 2005, the question of labour and immigration started receiving wide publicity in German newspapers. Similarly to the UK, the German government is eager to present a 'hard-line' against undocumented migrant workers, but unlike the UK, the German authorities have not started a drive to

[436] *The Independent* (19.12.2002) 'Germany slams door on 'green card' immigrants'.
[437] http://www.green-card-germany.com/index.html.
[438] As French interior minister Jean-Pierre Chevènement argued in 2000, see above.
[439] See *Statewatch Bulletin* (vol 15 no 2, March-April 2005) for a detailed outlined of the new Act.

convince the public that immigration creates rather than takes jobs away from the resident population. This could be explained by Germany's continued denial that it is a 'country of immigration' and the unemployment rates in Germany, which are high compared to other Member States, which appears to be a major reason why any German government at present cannot argue in favour of more immigration. Arguments put forward are therefore promoting the regulation of seasonal work in the building and agricultural industry to avoid the undercutting of wages,[440] as well as the regulation of domestic work by taxing households using paid cleaners.[441] The workers concerned are mainly Eastern European (see chapters 1.2 and 3.3.1). Dreher (2003:21) comments on Germany's policies towards migrant labour:

> The question is now why the liberalisation trend in the area of migration is resulting in precarious working conditions and why, in other respects, there is an attempt to prevent immigration. As discussed earlier, this article ascribes this development to the dominance of neo-liberal ideas in the political discourse and in state practice.

The current migration management practices are here explained by a neo-liberal policy that is characteristic of the nation-state ideology of today's imperialist phase of globalisation. This transformation from the welfare state towards a 'competitive state' (Hirsch, 1998) was described in chapter 3.3.3, and reflects the globalisation of capitalist relations analysed as post-Fordist in chapters 3.1 and 3.2.

### 5.5 Summary

This chapter traced the development of EU global migration management, from the arguments used to justify migration management to its increasing inclusion in EU external relations. It has been shown that the fora of EURO-MED and EU enlargement are central to the development of this approach. The 'comprehensive' approach to migration was followed through from the Iraq Action Plan to the Tampere and Seville summit conclusions. More specifically, readmission and external border policies have been shown to form a central element in the imposition of migration interests upon third countries. The 'leverage' used to impose this approach is typically the EU's 'political muscle' and its 'economic weight', where the Cotonou agreement serves as role model for the inclusion of migration clauses in third country agreements.

Global migration management also includes the rationalisation of immigration policies to serve the interest of EU industries as outlined in chapter 5.4. It was argued that these policies (selected

[440] *Süddeutsche Zeitung* (11.4.2005) 'Furcht vor osteuropäischen Arbeitern. Große Koalition gegen Billiglöhne'; *Süddeutsche Zeitung* (12.4.2005) 'Kampf gegen Lohndumping. Den Andrang aus dem Osten stoppen'.
[441] *Süddeutsche Zeitung* (9.1.2004) 'Eine eigene Putzfrau, ganz legal'; *Süddeutsche Zeitung* (10/11.1.2004) 'Green Card für illegale Putzhilfen'.

liberalisation and global control) are not opposed, but interlinked. Throughout this chapter, the changes in capital-labour relations outlined in chapters 2 and 3, and their impact on migration, citizenship and exploitation, were linked to identified changes in the EU's approach to migration and immigration, namely, the containment of poor masses and the selective liberalisation of Member States' labour markets. Although immigration policy has been slow to develop at EU level, the examples of Germany and the UK, as well as relevant Commission proposals, show that rationalisation is actively pursued by the EU and its Member States. The concluding chapter will summarise the findings and point to lines of enquiry that could not be covered by this thesis.

# Chapter 6: Conclusions

Rather than providing a comprehensive summary of the previous chapters, this concluding chapter first outlines the links that were found to exist between the control of migration and the current imperialist phase. This chapter then points out some wider observations that can be made from the analysis of migration control, as certain elements of global migration management are merely an expression of a more general development in world affairs. They represent different lines of enquiry that could not be covered in the present study. The notion of global apartheid also finds some attention here, as it has been increasingly applied as a conceptual framework within which to understand migration control, and because it illuminates certain elements of global migration management with regard to race, space and exploitation. Finally, the last section of this chapter outlines some conclusions that can be drawn with regard to political practice.

## 6.1 Findings

This thesis argued that migration control increasingly plays a role in governing imperialist relations. This proposition necessitated a theoretical approach, and two initial chapters therefore outlined theories of imperialism, the nation-state and law, to underpin the arguments put forward. More specifically, it was argued that recent changes in the EU's approach to migration control, namely, the externalisation of its asylum and border control policies and the selective liberalisation of its labour immigration laws, can be described as 'global migration management', analysed here as a response to political-economic changes under globalisation.

It was found that global migration management is a combination of 'exclusionary mechanisms', created by several policy approaches that are pursued in combination by the capitalist centres, in this case the EU and its Member States. Chapter 3 outlined the restrictive aspect of migration management, predominantly but not exclusively national, which is comprised of visa policy, carrier sanctions, procedural asylum regulations, external border control and deportation. These policies were implemented during, and intensified by, the process of Schengen and EU integration, and displayed some external aspects in their implementation, such as the Dublin Convention and the safe country principle. From the early 1990s onwards, migration management gained an added coercive external dimension and was increasingly combined with the selective liberalisation of labour immigration laws, both policies being the expression of the 'liberal paradox' of our times.

This research started out with the intention of not limiting itself to the economic aspects of migration control. However, during the course of this research I have found that although not entirely driven by economic motivations, the economic aspects of global migration management could not be ignored and necessitated further analysis. In looking for the links that exist between imperialism and

migration control, the following themes and relations appeared to be central to any understanding of migration management:

- the uneven development and increasing flexibility of capitalism and its impact on migration movements,
- the creation of an international labour market under globalisation, based on a hierarchical division of labour,
- the hierarchical relationship between nation-states, representing centres and peripheries,
- the global dimension of all political-economic processes,
- the nature of the nation-state and its continued link to capital,
- the necessity to control a labour market for national capitalist economies to remain competitive.

Law, specifically migration and citizenship laws, were found to be the central regulators of these above developments, as law was found to be an expression of the modern nation-state and the social relations within it.

One central aspect of migration control, it was found, is the necessity for nation-states to be able to control a labour market. This conclusion was drawn from discussions on the nature of capitalism *per se*. The observations made can stand separate from each other, i.e. they do not all necessarily follow on from one another, but as a whole, they explain the continued and increasingly global control of migration by the capitalist centres. They can be sketched as follows:

1) Monopoly is a central tendency within capitalist development and was analysed as competition on a new level. If states lose their competitive edge, they are in danger of becoming 'satellite states' and so, dependent on other states.
2) Under 'globalisation', the nation-state remains intrinsically connected to capital, leaving it as the central political unit that governs global capitalism.
3) Competition is expressed in the nation-state struggling for spheres of influence in a global economy and it can be observed that all states stand in a hierarchical relationship to one another.
4) To remain competitive, national economies are in need of a market for labour power. In order to compete, firms need to buy labour power and the means of production, to deploy them in the form of productive capital. Devaluation of labour power has been a traditional response to crises of profitability. With the creation of a global labour market and new legal categories of non-citizens, this devaluation is increasingly taking the form of the exploitation of migrant labour. The globalisation and rationalisation of migration control are an expression of this attempted control. Citizenship is the central regulatory framework within which this control takes place, by stratifying rights and entitlements

Following on from the above, it can be argued that migration control is a post-1989 necessity, where imperialist consolidation increasingly depends on the re-establishment of a flexible North-South division. Interdependent capitalist economies are regulated through regional production chains that benefit from wage differences and labour mobility. The free movement of all people poses a challenge to nation-states and uneven capital accumulation; some argue because it would equalise the rewards of labour (Biel, 2000:260), others because it questions the uneven accumulation of wealth, so that today "the enemy [of the capitalist centres] is not so much ideology as poverty" (Fekete, 2001:4).

Global migration management is a strategic response to the result of increasing poverty, namely, the migration of poor populations to the centres of wealth. The paradox is, of course, that neo-liberalism purports to create a borderless world, so that migration control remains a contradiction and as such exposes the power relations underlying neo-liberalism. The conclusion to be drawn from this contradiction is not to demand improved migrants' rights or 'global citizenship', as many do (although these demands might be necessary, both to prevent immediate violations in human rights and improve living conditions).[442] The ultimate conclusion should be to question the economic system as a whole, and with it the logic that underpins nation-states and borders.

### 6.2 Wider observations that can be made from analysing migration control

Throughout the enquiry into the subject, some more general observations came to light that are related to migration management but which would require more in-depth research. It was surprising, for example, to find that writings on imperialism rarely refer to increasing migration control, despite its focus on continued nation-state relevance in political-economic organisation. The nation-state, after all, has always sought to control immigration and is increasingly trying to do so beyond its jurisdiction. This lack of focus on migration control in imperialist writings may be explained by the fact that classical imperialism was approached theoretically from a purely economic perspective. It would be interesting, however, for writers on imperialism to engage in more in-depth analyses of migration control and the role within it of the economy and nation-states, looking specifically at the impact of migration control on the international division of labour.

Another insight gained during this enquiry on migration management is its connection to much more fundamental changes in the international system as regards increased military and imperialist coercion, together with a fundamental change in notions of democracy and equality. This is expressed by various interlinked developments. Firstly, there is a current institutional and paradigmatic shift within the

[442] See Hardt & Negri (2000) on global citizenship, Wiener (1996) on the fragmentation of citizenship, Spencer (1995), amongst others.

EU's development policy which represents not only an 'institutional turf war' between foreign affairs and development, but shows how the 'political voice of the world's poor' is being marginalised. Secondly, there is a general movement towards authoritarian state structures that resort to biometrics and control orders to rule over populations. Whereas 'exceptional' laws have traditionally been used against 'foreigners', they are being increasingly applied to everyone who challenges the political-economic order. Thirdly, documents on global migration management offer an insight into the growing disregard for sovereignty, justified by insecurity and triggered by poverty. The UK's 'new vision', which holds that there are "too many people in the world" suffering from human rights abuses for them to be "absorbed into democratic States", and which calls for intervention in other sovereign states,[443] is indicative here. Given that national sovereignty is one of the most influential achievements of decolonisation, this statement made by one of the world's most important power blocs (and former coloniser) points to an ideological shift in world affairs since 1989. 'Intervention', typically by industrialised nation-states into other states' affairs, is steadily growing in importance as a tool to control world affairs and control migration flows.

Finally, during this enquiry I have found a plethora of motivations and ideological constructions behind migration control which I believe go far beyond the economic sphere. The concept of imperialism, in particular in German post-war and feminist theories, implies more than just labour control, but should be understood as a violent relationship that upholds and reproduces unequal political-economic relations through a variety of mechanisms which ultimately concern the control of populations. It could also be seen as a form of control over reproduction as a whole, in a word, population control. Some feminist theories illuminate the relationship between labour control and population control by examining the relationship between current population control efforts and the demand for cheap labour by transnational corporations, and they argue that women's wombs have become the 'final frontier' of colonisation (Kuumba, 1995). When focusing on the continued control of migration, the geo-political aspect of imperialism and the centrality of the physical control of populations within imperialism is illuminated.

### 6.3 Global apartheid as conceptual framework

A concept increasingly used to analyse migration control in the 'New World Order' is global apartheid, and as such deserves to be mentioned here. The concept does not analyse the logic of capitalist development *per se*, which somewhat limits its analytical power to explain imperialist developments (globalisation, for example). However, as is shown below, it does identify the relationship between race, space and exploitation, all of which are central to migration control. Underpinning the apartheid system in South Africa was the same logic that underlies imperialism, namely, the mediation of capital and labour to retain economic supremacy for a specific section of society, namely the white middle-class. The ideology

[443] *A new vision for refugees - Final Report - Draft* (Restricted - Policy), 5.2.2003, p 7.

of apartheid is based on white supremacy, argued to be a God-given right. The control of people's movements, in a system heavily dependent on migrant labour, was also central to the South African apartheid regime.

Almost ten years after the South African apartheid regime was dismantled and declared a failed hegemonic project, it is now reappearing as an ideological framework in an attempt to secure the political-economic superiority of the centres. It can be argued that this old framework, on a new global scale, was verbalised in relation to EU migration control in the 1998 Austrian Strategy Paper. Its metaphor of building 'concentric circles', according to which there is a hierarchy of living spaces and their respective, or rather, 'imagined communities', once again conjures up images of apartheid. The very notion of concentric circles, with its racial undertones, is in effect based on the same principles that underpin apartheid, which was based on extreme differences in power, status and wealth, combined with geographic and social separation (Richmond, 1994).

There are, of course, major differences between the EU's migration regime and South Africa, where immigration procedures were explicitly racist in law and justified on grounds of biology. However, its function bears resemblance to global migration management: selective immigration served to compensate for demographic imbalances and fill labour shortages for 'precarious' jobs (agriculture, mining, manufacturing and domestic services). Richmond (1994:210-1) argues that EU and Member States' migration legislation and institutions have remarkable similarities to those of South Africa, and that the same themes are recurring in the rhetoric of those who wish to restrict immigration into Western Europe, North America and Australia. Some of the parallels found in this thesis to apartheid are: selective immigration control relying on racial criteria, separated housing and welfare for asylum seekers and, in the case of Germany, even travel bans for asylum seekers (this practice is called apartheid by the refugees themselves[444]) and racist stop and search operations. The introduction of legislation to control, administer and separate the population according to their legal status, through the introduction of identity cards, for example, is also an increasing element of EU immigration and asylum law.[445]

The principle of national sovereignty and citizenship creates a hierarchy of citizenships in the world, "with similar effects to those of racial classification, creating separate bodies of law for the Western minority and the non-Western majority" (Alexander, 1996:17). The restriction of movement is the ultimate, or rather, the 'clearest measure' of global apartheid. Denial of the freedom to move, even after successfully entering the European Union and undergoing assessment procedures with regard to legal stay, is becoming the mainstay of EU asylum politics.

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[444] See *The Voice e.V., Africa Forum* (www.humanrights.de) for campaigns against the travel restriction law for asylum seekers in Germany. Also the essay on self-organised migrant and refugee communities in Germany (kmii, 1999).

[445] See House of Lords Select Committee report on Border Controls, in particular the Fourth Special Report (Government Reply to the First Report) to be found at http://www.parliament.the-stationery-office.co.uk/pa/cm200001/cmselect/cmhaff/375/37503.htm

Again, poverty is central to migration control: free movement remains a reality for people who have money, often irrespective of their nationality. Political barriers to migration are only directed at the poor masses, because "[t]oday the most widespread qualification of citizenship is wealth. In many respects money is the chief qualification for international citizenship" (Alexander, 1996:180). Poverty is therefore the defining factor in the EU's migration discourse. As one tourist on the island of Lampedusa put it, when confronted with the arrival of poor migrants and refugees at his holiday destination: "Just seeing these boats gives me a terrible sense of anxiety, an insight into the poverty of these desperate people and their determination to reach the Italian coast. Yesterday, I saw all the refugees lined up. It makes me feel very anxious. It's hard to express what it does to you".[446]

Evidently, apartheid is not a uniquely South African phenomenon. Elements of an apartheid system have become increasingly common with the development of capitalist relations all over the world. The need to exploit labour in a 'rational' system which has destroyed old relationships of dependency between specific social groups, together with the attempt to retain political-economic power by certain classes, necessitated the use of mechanisms which help to 'divide and rule' the majority population. Race, gender and citizenship remain key aspects of socially-defining, varying entitlements to wealth and justice.

### 6.4 The way forward: open borders

One observation that was made in this thesis is that globalisation has succeeded in imposing a neo-liberal ideology upon political and economic processes with the result that political action has been individualised and has also led to irrational analyses of social phenomena which, as asserted in this thesis, has resulted in the demonisation of poor migrants. As Comaroff & Comaroff (1999:25) point out, globalisation, expressed through dislocated employment relations and the breakdown of social structures, is experienced "by all but the most affluent, as an unprecedented mix of hope and hopelessness, promise and impossibility". The question arises: what must be done about the increasing poverty and violence that is shaping the world today and how should migration be dealt with?

To answer this question, it must be understood that the current global system is volatile and contradictory. The new capitalist phase is dependent on a constant flow of labour, flexible labour, which requires the mobility of work forces. It is dependent on the exploitation of migrant and/or black labour for low-paid jobs, as well as migration labour for skilled jobs, so that the envisaged system of global apartheid will always remain an ideal, unworkable on the ground. The Austrian Strategy Paper itself admitted: "The European Union has not really managed to influence sustainably the reality of immigration".

The analysis of migration control as imperialist practice exposes the political nature of global migration management. It throws up the question of global justice, and any discussion of migration also

[446] 'Refugee crisis on Lampedusa', Channel4.com, 22.6.2003.

has to adopt a stance on global justice. This is reflected in debates on open borders, be it from conservative, neo-liberal or Marxist perspectives. The debate on the question if liberal democracies should follow an open border policy, a closed border policy or a selective approach is not new but is gaining prominence in the era of globalisation and increased forced and voluntary mobility. Debates on open borders ultimately question the right of nation-states to control their borders and position this right *vis a vis* the rights of individuals to free movement. The questioning of nation-state logic has a history in religious ethics and related debates on migration,[447] in Marxist debates on class-based approaches and related human rights and social justice based discourses that promote the right to mobility, often based on the notion that rights derive from humanity and not from states (Carens, 1995, 1999, etc.; Hayter, 2000; Dummett, 2001; Cohen, 2003, Pécoud & de Guchteneire, 2005). But also liberal economists have promoted the free movement of people following the economic argument that free movement of labour serves the free market which according neo-liberal ideology promotes economic growth (Ebeling & Hornberger, 1995).

The open borders debate often starts with the ascertainment that international human rights law acknowledges the right to leave a country and to return to the country of which one is a citizen, but that there is no corresponding right to immigrate into a country of which one is not a citizen.[448] With the increasing human rights violations occurring as a consequence of closed border policies in the era of globalisation, there are increasing demands for a rights-based approach to migration, rather than a nation-state approach: human rights proponents argue that even if it were true that open borders would result in all poor people migrating to the capitalist centres, this should prompt concern for their reasons for coming, not fear and restrictive policies.[449]

When considering the criticism put forward in this thesis of existing migration policies, the position taken here is that open borders are necessary to ensure human rights are respected; it was also argued that nation-states are hegemonic constructs, serving class interests nationally as well as internationally. The right to free movement is seen here as a precondition for the enjoyment of most other human rights, where human rights are not defined as a concession granted by states but as a right inherent to every human being, by nature of their existence. The rights-based approach is chosen over a nation-state approach for reasons outlined above and in chapters 2 and 3, informed by an economic-justice perspective and anti-racist position. However, the social nature of law as outlined in chapter 2, that is the fact that it derives from within existing national class and international state hierarchies, render it a limited tool, but a tool nonetheless (see chapter 3.3.1).

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[447] See in particular the contributions in the special issue of *International Migration Review* (1996, Vol 30, No 1), "Ethics, Migration, and Global Stewardship".

[448] Article 13.1 and 13.2 of the Universal Declaration of Human Rights lays down that "Everyone has the right to freedom of movement and residence within the borders of each state" and that "Everyone has the right to leave any country, including his own, and to return to his country".

[449] The Manifesto of the No One Is Illegal Group (UK), 6.9.2003, published under http://noii.trick.ca/OurManifesto.

From a human rights perspective calling for the establishment of a right to mobility, Pécoud and de Guchteneire (2005) find that borders have become the site of major ethical challenges, namely, they affect the asylum principle, they exacerbate human trafficking and they lead to deaths at borders (i.e. closed borders lead to the violation of basic human rights protected by international law that states have signed up to). After reviewing common arguments against open borders and arguing that these claims are not based on empirical facts (that immigration triggers social unrest or harms the economy), the authors (2005:7) maintain that moving towards a right to mobility is the solution to the closed borders dilemma and the human rights challenges it poses, because

> [e]laborating a right to mobility is not about adding one more right to the list; rather, it is about fostering the respect for existing human rights. Nevins (2003) convincingly argues for example that, in a world of economic globalisation and gross socio-economic inequalities, the human right to free choice of employment (article 23 of the Universal Declaration of Human Rights) and to adequate standard of living (article 25) are hard to achieve in the absence of migration opportunities. A right to mobility would also fit into other human rights principles, such as the fight against all forms of discrimination and persecutions (Nett 1971). Empirically, undocumented migration can be interpreted not only as a consequence of inadequate migration policies, but also as the expression of people's claim to their right to migrate. Their often desperate attempts to enter other countries than their own shows the inextricable connection between mobility and the enjoyment of basic human rights.

The arguments against open borders include the claim that uncontrolled immigration would endanger the welfare state as national resources are limited and that immigration endangers the homogeneity and security of "communities" (resident populations, notably citizens). This view is particularly put forward by Walzer (1983, 1993, 1996) who argues that "[f]reedom will undercut itself" when "groups and associations cannot sustain an inner life" and when there is no "collective effort [...] to create and recreate stable social settings" (1998:47). Walzer's view is based on several assumptions: firstly, that there is such a thing as a homogenous community that feels morally bound to a nation-state. Although this moral community is certainly an aim of nation-states, it is, as argued in chapters 2 and 3 here, a construction that serves very particular class interests, which challenges the claim of a shared 'national' interest and homogeneity. Secondly, Walzer believes this homogeneity ensures stability. This view also rests upon the belief that a 'community' that lives in a particular territory shares the same interests, in this case a welfare state and social norms. Again, Marxist as well as anti-racist positions would disagree with this notion with the argument that nationalist ideas conceal class interests as well as cultural/ethnic diversity and are based on racist notions of nationality. Already in 1870, Marx (1975) made the following analysis on nationalism and its role in dividing the working class in Britain:

> Every industrial and commercial centre in England now possesses a working class divided into two hostile camps, English proletarians and Irish proletarians. The ordinary English worker hates the Irish worker as a competitor who lowers his standard of life. In relation to the Irish worker he regards himself as a member of the ruling nation and consequently he becomes a tool of the English aristocrats and capitalists against Ireland, thus strengthening their domination over himself. He cherishes religious, social, and national prejudices against the Irish worker. His attitude towards him is much the same as that of the "poor whites" to the Negroes in the former slave states of the U.S.A.. The Irishman pays him back with interest in his own money. He sees in the English worker both the accomplice and the stupid tool of the English rulers in Ireland.
>
> This antagonism is artificially kept alive and intensified by the press, the pulpit, the comic papers, in short, by all the means at the disposal of the ruling classes. This antagonism is the secret of the impotence of the English working class, despite its organisation. It is the secret by which the capitalist class maintains its power. And the latter is quite aware of this.

Some argue that the fact that immigration controls are racist, should be enough reason to abolish them. Cohen (2003:241) writes that immigration controls

> are either to be supported or rejected in their totality. There is no political or moral middle ground. In particular the proposition that there can be fair or non-racist controls has to be rejected.

The question of open borders, especially when reviewing arguments such as those put forward by Walzer, is therefore a question of interests and of ideology. Whose interests are and what sort of ideology is being promoted when arguing for or against open borders? Any writing on migration is by definition political, and the question of poverty and the findings of this thesis confirm that if the interest at heart is that of human rights rather than power and affluence for a selected few, based on their coincidental birth in the wealthy geographical regions of this world, migration has to be answered not, as the UK government does, by saying that there are simply too many poor people in this world to be 'absorbed by democratic states'. Migration, that is the active pursuit of a better life, questions the current distribution of resources and throws up the question of an economic system based on needs and not profits and it challenges the economically and politically hierarchical order of nation-states. The debate on citizenship in chapter 2, particularly its use as a tool to deny or grant rights entitlements, throws up the question of what gives citizens of affluent countries the right to access resources and welfare states, whilst citizens of poor states cannot claim that right? Pécoud and de Guchteneire (2005:12) summarise:

> Many will say that a right to mobility is an utopia. But today's utopia may be tomorrow's realities. While the social and economic consequences of a right to mobility are extremely complex, it remains that it constitutes an option that may be desirable from a human rights perspective, in which case it would be worth promoting despite its apparent unfeasibility.
>
> Others will say that it is naïve to believe that a right to mobility can provide answers to the current challenges raised by international migration. But it is equally naïve to assume that relatively minor arrangements of the contemporary system will provide long-term and successful answers. A right to mobility has the advantage of being ethically defendable and of usefully complementing the human right to emigration. In a globalised world, movement of people is not an anomaly to be exceptionally tolerated; it is a normal process embedded in socio-economic structures as well as in migrants' transnational lives and identities.

It is noteworthy that the question of utopia is raised when putting forward a case for open borders. This is presumably because within the current migration discourse and political reality, it is hard to imagine a world order not based on nation-states, national boundaries and national interest representations (governments, armies, etc.). It would extend the realms of this thesis to discuss political alternatives to the current world order, these can be found elsewhere (e.g. Harvey, 2000; Albert, 2003). Most 20th century anti-capitalist movements, and more recently alternative globalisation networks, have discussed and some have experimented with alternatives to capitalist forms of organisation, including alternatives to the nation-state.[450] It should be emphasized here that the argument for open borders does not imply that fears about a world without borders should be ignored or underplayed, but that these fears should not be pandered to but addressed and solutions found with the view to ensure social and economic justice, so as not to serve an abstract and ideological notion of national sovereignty. As Cohen (2003:249) puts it:

> There is a battle for ideas here and part of it is to completely switch the argument as it is posed by supporters of controls. It is to challenge some fundamental and popular assumptions - not least about nationalism and racism. It is to raise questions about why some economies are so bankrupt that whole populations are destitute and feel compelled to migrate. It is to ask who is causing the wars that are producing the asylum seekers. And it is to explain that housing shortages and all other shortages in the imperialist heartlands are not caused by migrants, immigrants or refugees but by a system that is premised on the accumulation of capital and not on the satisfaction of human needs.

[450] See also the yearbook 2004/2005 of the German civil liberties organisation Komite für Grundrechte und Demokratie (2005) for an elaboration of different notions of democracy and political systems of organisation.

Popular arguments putting forward the claim that migrants are taking over 'limited' resources can be shown to be unfounded by demonstrating that there is no actual limitation of resources, but only their unequal distribution, as well as by highlighting the function of the state with regard to mediating these conflictual interests, and finally, by identifying the function of citizenship law in stratifying entitlements. The argument that a state has the right to control its own borders can ultimately be resolved only by questioning the nature of the nation-state itself. Social and economic support structures are increasingly being undermined and life is becoming precarious for the majority of people and, as such, social justice and access to resources are goals common to everyone. The only conclusion that can be drawn from this is that ultimately the nation-state needs to be abolished as it is not a viable and just form of political organisation, and in order to achieve this, common analyses and solidarity networks need to be created between all those fighting for social justice, so as to overcome the divisiveness and mistaken social analyses deriving from identity-based politics. Ultimately, citizens need to join forces with migrants, and vice versa, if the goal of social and economic justice is to be achieved.

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