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Visa Policy within the European Union Structure: Competence, Convergence and Consistency

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Abstract

This study focuses on European integration of national visa policies as a case study on the constitutional structure of the European Union (EU).

The thesis starts by tracing the nature of visas in international practice and in national laws. Visas are inextricably linked to the concept of the State and to some of its essential functions. They express the sovereign right to control entry into the State, play an important role in recognition of other States and governments, and reflect information from overseas embassies. From the national point of view, they are an instrument of foreign policy and of internal security.

The present constitutional design of the EU permits the Member States to retain sovereign status and autonomy in the maintenance of internal order and security through recourse to the intergovernmental method for cooperation on foreign and security policy (the Second Pillar) and for police and judicial cooperation in criminal matters (the Third Pillar). Increasingly, the two legal methods deployed by the EU (the Community and the intergovernmental methods) cross-fertilize and the EU acts as a 'unity'.

Against this background, the thesis traces the development of the common policy on short-term visas and its characteristics. Within the EU constitutional structure, the nature of visas is at the heart of the difficulties which have been encountered in the process of harmonization and explains the *sui generis* character of the common policy. The thesis describes cooperation before the Treaty on European Union adopted at Maastricht, under the Schengen Convention and under the Maastricht Treaty. It considers the highly complex legal framework introduced by the Amsterdam Treaty and changes proposed in the Draft Constitutional Treaty.
It further considers the issue of 'consistency' with regard to the overlap of powers under different Pillars of the EU on visas and with regard to policy formulation on the 'area of freedom, security and justice'.

The thesis finally draws conclusions on what visa policy reveals on constitutional issues such as vertical division of competence, convergence of legal methods, consistency and the increasing complexity of the European legal framework.

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Preface

I would like to thank my supervisor, Professor Eileen Denza, for her dedication and constant support.
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Annalisa Meloni
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Table of Abbreviations

AJIL	American Journal of International Law
Bull. EC	Bulletin of the European Communities
BYIL	British Yearbook of International Law
CCI	Common Consular Instructions
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 Borders and Immigration
CML Rev.	Common Market Law Review
Coreper	Committee of Permanent Representatives to the European Community
EC	European Community When following a Treaty Article, Treaty establishing the European Community
ECHR	European Convention on Human Rights
ECR	European Court Reports
EEC	European Economic Communities
EFA Rev.	European Foreign Affairs Review
EHRR	European Human Rights Reports
ELJ	European Law Journal
ELR	European Law Review
EPC	European Political Cooperation
ETS	European Treaty Series
EU	European Union When following a Treaty Article, Treaty on European Union
Europol	European Police Office
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
HLWG	High Level Working Group on Immigration and Asylum
ICAO	International Civil Aviation Organization
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice

ICLQ	International Comparative Law Quarterly
IGC	Intergovernmental Conference
IOC	International Olympic Committee
ILM	International Legal Material
ILPA	Immigration Law Practitioners Association
JCMS	Journal of Common Market Studies
JHA	Justice and Home Affairs
LIEI	Legal Issues of European Integration
NATO	North Atlantic Treaty Organization
OJ	Official Journal of the European Communities
PJC	Police and Judicial Cooperation in Criminal Matters
SEA	Single European Act
SIS	Schengen Information System
TEU	Treaty on European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNTS	United Nations Treaty Series
US	United States
VIS	Visa Identification System
YEL	Yearbook of European Law

INTRODUCTION

The European Community (EC) has been surrounded by much debate as to its nature. Difficulties in describing the Community derive from its combination of both federal and intergovernmental characteristics. On the one hand, the Community owes its existence to a treaty among sovereign States. It operates under the principle of 'conferral of powers', and the Member States acting as the Council have a prominent role in its operation.

On the other hand, the doctrines of supremacy and direct effect of Community law, as developed by the Court of Justice, give a federal constitutional character to the Community. The development of these doctrines by the Court rests on the claim that the Community established a 'new legal order'.

At national level, national courts have resisted the Court of Justice's approach. The doctrines of direct effect and supremacy are generally applied by national courts on the basis of national constitutional or legislative provisions transferring or delegating sovereignty to the Community, rather than on the basis of the higher nature of Community law. This implies that national courts may declare Community law invalid if it breaches fundamental constitutional rights, and that they retain the ultimate *Kompetenz-Kompetenz*. As one commentator put it: 'They would not be allowed under their own constitution to sign up and ratify a treaty the consequence of which was that they had no ultimate control over the size of the slice of the apple pie which they had given away'.[1]

The difference between the Court of Justice and the national courts with regard to the foundation of Community law illustrates the existence of a lack of consensus on the constitutional nature of the Community. The result of this lack of consensus is that the Community continues to be *sui generis*. This *sui generis* character is at the heart of the Community's democratic deficit.

On the other hand, the conditions for developing the Community into a federal State do not seem at present to exist. This implies that the democratic deficit will not be addressed by transposing the national model of parliamentary democracy to the Community, but that a different model is to be constructed.

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[1] Evidence given by Professor Craig, House of Lords Select Committee on the European Union (2003-04a), q. 7, p. 7.

The establishment of the European Union (EU) by the Treaty on European Union (TEU) agreed at Maastricht modified the whole picture. With the TEU, the Community was absorbed into a wider legal framework predominantly intergovernmental in character.

The newly established 'European Union' rested on three 'Pillars': the European Community (the First Pillar), the Common Foreign and Security Policy (CFSP – the Second Pillar) and Cooperation on Justice and Home Affairs (JHA – the Third Pillar). The three Pillars were united by the Common and Final Provisions of the TEU. The Second and Third Pillars were essentially 'intergovernmental'. They differed from the Community with regard to decision-making procedure, institutional competences and most importantly the legal effect of adopted instruments on national autonomy.

The three-pillar structure thus represented a compromise in the search for consistency between the Community and intergovernmental cooperation. Recourse to the three-pillar structure made it possible to retain the 'international law method' for CFSP and JHA (and thus national autonomy in these areas), but it also made it possible to 'unite' the Community and intergovernmental cooperation through the establishment of common objectives, common principles and values, a 'single institutional framework', and a requirement for the Commission and the Council to ensure 'consistency' of Union activity.

The actual extent that the TEU could be considered to have 'legally united' the Pillars became the object of much debate. Any answer to this question has important implications for the nature of the Community and the Union.

The unity of the Union was initially denied by commentators on the basis of the different nature of the Pillars. This approach was however criticized on various grounds. First, the Community itself, increasingly, envisages a whole range of different procedures with different institutional competences, and even a different legal effect for instruments adopted in different areas. Second, the approach seems to overlook the efforts of the TEU to unite the Pillars. Third, it also overlooks the Union's capacity to adopt binding legal instruments, its increased decisional autonomy and its emerging international identity. Consensus is emerging that the Union, on the basis in particular

of the 'single institutional framework' and the requirement of consistency of Union activity, constitutes a single legal system.

The operation of the Union as a single legal system has however been problematic. The differences between the Pillars with regard to institutional competences and the difficulties in clearly demarcating competence between them have often led to institutional conflict with regard to the correct allocation of competence between the Pillars. Similar problems do happen within the Community context when different legal bases envisaging different procedures may potentially be used for the adoption of a measure. The demarcation of competence between the Community and the intergovernmental Pillars, however, assumes more significance in the light of the more crucial legal and constitutional implications.

The TEU offers very little guidance for resolving the competence allocation problem. One of the few examples where the TEU regulates the interaction of the Pillars is constituted by Article 301 on economic sanctions. Article 47 (requiring that nothing in the TEU shall affect the Treaty establishing the European Community) constitutes a further criterion. However, as has been pointed out, an unconditional reliance on Article 47 whenever issues on competence allocation arise is probably not intended and would empty many of the other provisions of the TEU of any significance.[2] A further (last resort) mechanism for determining the allocation of competence is the Court of Justice. The Court has indeed affirmed its jurisdiction to determine the boundary between the Pillars in the *Airport Transit Visas Case*.[3]

In this context, it seems that the practical operation of the Union as a single system depends on the institutions agreeing their respective competences and acting as interlocking components in pursuance of one and the same goal. There have been many examples of institutional conflict on demarcation of powers, but also examples of successful cross-pillar action. Increasingly, issues are tackled by a combination of instruments under the different Pillars. At the same time, increasingly Community policies contain elements of potential conditionality, and political decisions are 'implemented' through Community instruments.

This result has also been achieved thanks to a refinement of the three-pillar structure. This refinement has taken two forms. First, it has concentrated on reformulating the allocation of competence between the Pillars (see for example the dual-use goods

[2] Wessel (2000a) p. 1148.
[3] Case C-170/96 Commission v. Council [1998] ECR I-2763.

regime) and eliminating what can be called 'unreasonable' overlaps or unclear fragmentation of policies between the Pillars (see for example visa policy).
Second, it has concentrated on creating or strengthening 'procedural and institutional bridges' between the Pillars.[4]
This last aspect leads to the issue of 'convergence of methods'. The strengthening of procedural and institutional bridges between the Pillars has implied a certain extent of convergence of methods. The role of the institutions within the intergovernmental Pillars has been strengthened. The organization and procedures of the intergovernmental Pillars have to some extent been aligned to those of the Community. At the same time, the role of the European Council as the ultimate director of Union activity has been strengthened, and provisions have been inserted in the Treaty with the aim of increasing the political pressure on the Commission to execute CFSP decisions.
Convergence of methods has also resulted from a different process. This process is a continuing attempt, both within the framework of the Community and within that of the intergovernmental Pillars, to reconcile conflicting interests, namely uniformity versus diversity and efficiency versus democracy.

Unity has important implications for a definition of the EC and the EU. Some commentators have submitted that unity 'requires a rethinking of age-old doctrines about the nature of European Community law'.[5] At the same time, however, it has been argued that unity implies that 'the legal principles developed in the context of the EC Treaty can be extended to the EU Treaty as long as they are not expressly excluded'.[6] Furthermore, the issue of unity opened the debate on whether internal unity necessarily implied external unity (i.e. a single identity or even legal personality).

The Constitutional Treaty, with its aim to 'simplify and reorganize' the Treaties, introduces significant changes. The pillar structure is abandoned in favour of a unitary structure, and a single entity with legal personality – the European Union – is created. Important institutional changes accompany the introduction of this unitary structure. It remains unclear whether this new design implies an extension of the Community legal method to the Second Pillar, with the relevant constitutional implications. The almost

[4] Schmalz (1998).
[5] De Witte (1998) p. 65.
[6] Von Bogdandy (1999) p. 909.

complete exclusion of the Court of Justice from the Second Pillar would seem to preclude a definitive answer to this crucial question.

This study is intended to contribute to the understanding of the structure of the European Union through an analysis of the EU visa policy. The common visa policy has been selected for three reasons. First, its formation documents the development of the structure of the European Union. In particular, visa policy shows how this structure was developed and refined over time in order to increase the efficiency of intergovernmental cooperation and permit the smooth functioning of the Union as a 'unity'. The development and refinement of the Union structure have thus been characterized by a continuous strengthening of the framework for intergovernmental cooperation and its association with the Community, and by reformulation of competence allocation (which in the case of visa policy has implied the introduction of variable geometry arrangements).

Second, visa policy, notwithstanding its 'communitarization' with the Treaty of Amsterdam, continues to straddle all the Pillars of the Union because of the ramifications of visas into areas for which the Member States retain ultimate competence and which increasingly form the object of cooperation within the intergovernmental Pillars.

Visa policy, because of its cross-pillar nature, therefore provides an opportunity to consider the interaction of the Pillars. In particular, it is possible to consider issues relating to delimitation of competence, the impact of the Pillars' overlap on the nature of the common policy, the consequences of the overlap in terms of convergence of methods, the sustainability of the pillar structure and whether in the context of visa policy the Union acts as a 'unity'.

The third reason for selecting visa policy relates to the fact that visa policy is part of the Union's wider policy on the formation of an 'area of freedom, security and justice'. In relation to the construction of the area of freedom, security and justice, the Union has declared its determination to act as a 'unity'. The construction of the area of freedom, security and justice requires the coordination of policies falling under different Pillars, the integration of justice and home affairs concerns into the Union's external activity and the coordination of different Treaty objectives. In this context, it is possible to trace some of the institutional and legal implications of the Union acting as a unity, as well as some of the obstacles to the smooth functioning of the Union structure.

This study thus essentially focuses on the issues of 'consistency' and 'convergence of methods' which are ultimately relevant for a definition of the Community and the Union.

The first and second chapters of the thesis provide the background for this analysis. The first chapter traces the nature of visas. This is at the heart of many of the difficulties encountered in the process of harmonization of national visa policies, such as differences between the Member States over allocating competence to the Community. The nature of visas also explains the cross-pillar character of the common visa policy. The second chapter introduces the structure of the European Union.

The third and fourth chapters trace the development of the structures for cooperation and the characteristics of the common policy. The fifth chapter considers the issue of consistency both with regard to the functioning of the common visa policy and with regard to the construction of the 'area of freedom, security and justice'.

Finally, some conclusions will be drawn as to what visa policy reveals on constitutional issues such as division of competence, consistency, convergence of methods, and the increasing complexity of the European legal framework.

1 VISAS IN INTERNATIONAL AND MUNICIPAL LAW

This Chapter considers the significance of visas and passports in international law and practice and from the domestic point of view. For this purpose it is divided in two parts. The first part considers the international law rules which directly or indirectly govern movement of persons across state frontiers. More precisely, it considers the limits on state discretion to control movement stemming from international customary and treaty law, the basic rules on movement, and the role of nationality.

The second part of the Chapter analyses against the international background the legal and political significance of visas and passports. It considers their definition, implications and functions under international law and practice and from the national point of view.

This Chapter provides the background to look at the process of European integration with regard to visa policy. In particular, by highlighting the significance of visas and how they are linked to the concept of sovereignty, it provides the background for an analysis of European integration on visa policy as a case study of the constitutional structure of the European Union.

1. Limits on state discretion over the movement of persons across state frontiers

1.1 State discretion over entry, residence and expulsion of aliens

It is generally accepted that States are free to control the entry and residence of aliens into their territory, and to expel or deport aliens, especially for reasons of public order and national security.[1] Such discretion is inferred from sovereignty. In contemporary international relations, it is however apparent that state sovereignty in this area is not absolute.[2] Principles of general international law and obligations arising out of treaties limit state discretion as to entry, transit, residence and expulsion of aliens. Such limitations are reflected in domestic legislation.

1.1.1 Limits on expulsion under rules of general international law

[1] See for example *The Chinese Exclusion Case (Chae Chan Ping v. US)* 130 US 581, 609 (1889). For the sources of the principle see Plender (1988) pp. 1-4; Harris (1998) pp. 525-526.
[2] See Goodwin-Gill (1978); Plender (1988).

Rules of general international law regarding the treatment of aliens provide for limits on the circumstances and the manner in which a State may expel aliens. As Goodwin-Gill argues: 'The power of expulsion is a discretion, not absolute, but limited by the rules and standards of international law'.[3] In particular, a State may not expel aliens in an arbitrary or discriminatory manner, or in breach of its international obligations. Thus, a State may not use unnecessary force, mistreat the alien or refuse to give the alien sufficient time to wind up his affairs.[4]

Moreover, it has been argued that any claim of 'ordre public', forming the basis for the expulsion decision, is to be weighed against the interests of the individual, including his basic human rights, family, property and legitimate expectations, in accordance with the principles of good faith and 'reasonable cause'.[5]

A number of multilateral treaties also impose restrictions on the State's discretion to expel aliens.[6]

1.1.2 Movement of special categories

Rules of general international law and treaties exist with regard to special categories of aliens.

(i) Acquired rights

With regard to aliens who, under the law of the host State, have an indefinite right of residence in the host State, it has been argued, on the basis of congruence of state practice, that they are vested with 'acquired rights' or 'legitimate expectations' as to their entry and stay in the State.[7]

(ii) Diplomats and consuls

Diplomats and consuls are a further category in relation to whose movement across frontiers special rules exist. Such rules are part of the privileges and immunities attached to this special category which are justified on functional necessity.

It is generally accepted that a diplomat who arrives at the frontier of the State to which he is to be accredited is to be admitted. Any objection to his appointment is to be raised

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[3] Goodwin-Gill (1978) p. 204.

[4] For the sources of this rule see Harris (1998) pp. 527-530.

[5] Harris (1998) p. 529.

[6] See for example Article 4 of the Fourth Protocol to the ECHR 1963 (ETS 46) which prohibits the collective expulsion of aliens. See also Article 1 of the Seventh Protocol 1984 (ETS 117) which states that an alien can be expelled only in pursuance of a decision reached in accordance with law, and that he has a right to have his case reviewed, unless public order or national security require that he is expelled before he exercises such right. See also Article 13 of the ICCPR 1966 ((1967) 6 ILM 368).

[7] See Goodwin-Gill (1978) pp. 259-261; Plender (1988) pp. 161-162.

before he is dispatched to take up his post.[8] Such a rule is reflected in domestic legislation. The United Kingdom Immigration Act 1971 as amended, for example, provides that laws affecting non-patrials are not applicable to members of diplomatic missions and members of their families.[9] There is however no general rule by which diplomats are exempt from visa requirements, but, as a matter of international comity, visas, when required, must be issued promptly.[10]

A right of transit through third States does not seem to exist. Article 40 of the Vienna Convention on Diplomatic Relations 1961[11] provides that a diplomatic agent passing through a third State, *which has granted him a visa if such visa was required*, while proceeding to take up or returning to his post, or when returning to his country shall be accorded inviolability and such immunities as are necessary to ensure his transit. Article 40, accordingly, provides no right of transit to diplomatic agents, but confirms the right of the transit State to refuse passage.[12]

Article 44 of the Vienna Convention lays down the receiving State's obligation, in case of armed conflict, to grant facilities for departure. The duty to grant facilities for departure was interpreted in some States as conferring exemption from exit visa requirements in ordinary circumstances.[13]

Similar rules exist with regard to the admission of consuls. Furthermore, Article 46 of the Vienna Convention on Consular Relations 1963[14] provides for exemption from obligations in the matter of alien registration, residence and work permits for consuls, members of their families and certain of their staff.[15]

(iii) Representatives to, staff and experts of international organizations

Special rules also exist with regard to representatives to, staff and experts of international organizations. Before modern practice became established, international officials were treated by analogy with diplomats. As Goodwin-Gill argues: 'This practice could clearly compromise their independent status by subjecting them to the vagaries of national passport regimes and to the personal objections of receiving

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[8] See Goodwin-Gill (1978) pp. 147-148; Plender (1988) pp. 163.
[9] C.77, Section 8(3).
[10] Goodwin-Gill (1978) p. 150.
[11] 500 UNTS 95.
[12] See Denza (1998) p. 369. The issue of transit may be regulated by treaty. The 1929 Lateran Treaty between the Holy See and Italy, for example, stipulates the right to transit through Italy for representatives and envoys of the Holy See, diplomatic representations and envoys of States to the Holy See and dignitaries of the church if they possess passports issued by the countries from which they come and visas issued by papal representatives abroad. See Turack (1972) p. 210; Denza (1998) p. 368.
[13] See Denza (1998) p. 389.
[14] 596 UNTS 261.

States'.[16] Today, Article 105 of the United Nations (UN) Charter provides that representatives of Members of the UN and officials of the UN shall enjoy such privileges and immunities as are necessary for the independent exercise of their functions. Building on Article 105, the 1947 General Convention on Privileges and Immunities of the United Nations[17] provides that Members' representatives to the UN and UN officials are to enjoy, while exercising their functions and during their journey to and from the place of meeting, exemption from immigration restrictions and alien registration. Similar provisions are provided with regard to UN specialized agencies by the 1947 Convention on the Privileges and Immunities of Specialized Agencies.[18] These Conventions are supplemented by bilateral headquarters agreements. The United States (US)-UN Headquarters Agreement,[19] for example, provides that US authorities will not impede transit to and from the headquarters, independently of the relationship between the US and the government of the individual concerned. Visas may be required, but these must be issued promptly. It however appears that in a number of occasions States have departed from the obligations to grant admission for political reasons.[20]

The UN Conventions and Headquarters Agreements have also formed models for subsequent agreements made by other organizations including the Council of Europe and, to a lesser extent, the European Community.[21]

Such international obligations are implemented in the United Kingdom under the Immigration Act 1971 and the International Organizations Act 1968 as amended.

(iv) Visiting forces

Armed forces of foreign countries or international organizations may also be exempt from provisions of immigration laws, in accordance with international treaties or as a result of special agreements with the host State.[22]

(v) Seamen and aircrews

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[15] Goodwin-Gill argues that similar principles apply to the admission of special missions. See Goodwin-Gill (1978) p. 152.

[16] Goodwin-Gill (1978) p. 152.

[17] 1 UNTS 15.

[18] 33 UNTS 261.

[19] 11 UNTS 11.

[20] In the early 1990s, for example, the US government denied Arafat a visa for a trip to the UN. See also Plender (1988) p. 173, with regard to the practice by some Islamic countries of refusing to admit representatives sent by Israel to meetings of international organizations taking place within their territories.

[21] See Plender (1988) p. 171. See for example the Protocol on the Privileges and Immunities of the EEC 1957, 298 UNTS 170.

[22] See for example the NATO Status of Forces Agreement 1952, which provides that members of the forces are to be exempt from passport and visa requirements and immigration inspection on entering or leaving the territory of the receiving State. See Plender (1988) pp. 176-180.

Seamen and aircrews are further categories which, because of functional necessity, benefit from their own special international travel regimes. As Goodwin-Gill states: 'The International Civil Aviation Organization and the International Maritime Consultative Organization have both pioneered the widespread adoption of international standards and practices regarding the movement of seamen and aircrews. Most of the progress has been accomplished in the years since 1950 and, as with many such developments, the process began through the medium of the bilateral treaty'.[23]

With regard to aircrews, Annex 9 to the Chicago Convention on International Civil Aviation 1944[24] stipulates that holders of a crew member license or certificate, complying with certain requirements, are to be exempted from passport and visa requirements, provided certain conditions as to their stay are fulfilled.[25] Implementing such recommendations, the United Kingdom Immigration Act 1971 provides that aircrews do not require leave to enter when they enter on engagement and leave within seven days, provided certain conditions are fulfilled.[26]

Despite the general acceptance of Annex 9, some States implement it through bilateral agreements based on reciprocity.[27]

With regard to seamen, the Seafarers' National Identity Documents Convention 1958[28] provides for the issue by Contracting States to their national seafarers of a seafarers' identity document. This identity document may also be issued to non-nationals seafarers. In such a case, no statement of the holder's nationality is required (and if one is included it is not treated as conclusive proof of nationality) but the issuing State is under an obligation to re-admit the holder into its territory.

The 1958 Convention further stipulates that the Contracting Parties are obliged to admit a seafarer holding a valid seafarers' identity document for temporary shore leave, to join a ship, or for transit.[29]

The Convention on Facilitation of Maritime Transport 1965[30] provides that a valid seafarers' identity document or a passport shall be the basic document providing public

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[23] Goodwin-Gill (1978) p. 156.
[24] 15 UNTS 295.
[25] For a full analysis see Turack (1972) pp. 149-153. Article 22 of the Convention requests the Members 'to adopt all practical measures, through the issuance of special regulations or otherwise, to facilitate and expedite navigation by aircraft between the territories of Contracting States, and to prevent unnecessary delays to aircraft, crew...especially in the administration of the laws relating to immigration ...and clearance'.
[26] Section 8(1).
[27] Turack (1972) p. 152.
[28] 389 UNTS 277.
[29] See Turack (1972) p. 140.

authorities with information relating to the individual member of the crew on arrival or departure of a ship. Furthermore, the Convention provides that a seafarers' identity document is to be accepted in lieu of a passport when it is necessary for the seaman to enter a country to join a ship or transit to join a ship in another country or for repatriation, provided the document guarantees the holder re-admission to the issuing State. Implementation of the Convention's international regulations is voluntary. In the United Kingdom, implementation takes place through the Immigration Act 1971, which provides that members of ship crews may enter and remain without leave until the departure of the ship on which they are engaged, provided certain conditions are satisfied.[31]

(vi) Other categories

A number of other multilateral and bilateral treaties affect the movement across frontiers of special categories of persons. Agreements may be concluded, for example, with regard to the hosting of international sporting events. Rules established by the International Olympic Committee (IOC), entrusted by the 1894 Congress of Paris with the control and development of the modern Olympic Games, provide, for example, that the national government of a city applying to host the Olympic Games must give the assurance that every competitor will be given free entry without discrimination on grounds of nationality, religion, colour or political affiliation. This involves the assurance that the national government will not refuse visas to any of the competitors. States have however often breached such rules and the prospect of sanctions by the IOC has not worked as a deterrent. In 1976, for example, the Canadian government refused visas to the representatives of Taiwan for the Montreal Olympic Games because they were unwilling to forgo the title of the Republic of China under which their National Olympic Committee was admitted to the IOC.[32]

Other treaties affecting the movement of special categories of persons across frontiers include the European Agreement on Travel by Young Persons on Collective Passports

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[30] 4 ILM 501. Under the Convention, the Contracting Parties, with the aim of facilitating and expediting international maritime traffic, bound themselves to 'co-operate in securing the highest practicable degree of uniformity in formalities, documentary requirements and procedures in all matters which would facilitate and improve international maritime traffic'. See Turack (1972) p. 142.

[31] Section 8(1).

[32] Encyclopaedia Britannica CD 99.

1961,[33] the European Agreement on the Abolition of Visas for Refugees 1963,[34] and the European Agreement on Au Pair Placement 1969.[35]

1.1.3 Common travel areas and passport unions

After the Second World War efforts were made among governments to reduce the restrictions on movement of persons that had developed in response to the state of emergency brought about by the two World Wars. Various 'common travel areas' and 'passport unions' were established.

(i) The Benelux Economic Union

In 1958 Belgium, Luxembourg and the Netherlands signed the Treaty establishing the Benelux Economic Union.[36] This Treaty was the culmination of a number of agreements concluded by the Parties between 1945 and 1958,[37] and provided for the free movement of persons, goods, capital and services. It provided that nationals of the Contracting Parties could enter or leave the territory of any other Contracting Party, and that they were to receive the same treatment as nationals with regard to movement, sojourn, settlement, freedom to carry out a trade or occupation and the provision of services. The Treaty stipulated that a further Convention was to be concluded with regard to the provisions under which a Contracting State might justify restricting the movement of nationals of another Contracting State on grounds of public order, public security, public health or morality.

Two Conventions were accordingly concluded in 1960: the Convention on Establishment and the Convention concerning the Transfer of Entry and Exit Controls to the External Frontiers of the Benelux Territory.[38] This latter Convention provides for the Parties to abolish internal frontier controls and effect external border controls valid for all the Benelux territory. A common visa policy and common conditions of entry for non-Contracting Parties' nationals were established. It was further provided that a person admitted to the Benelux territory was to be free to travel within the territory of the Contracting Parties for a limited period of time. The Parties undertook to harmonize their laws relating to the punishment of infringements and reserved the right to re-impose internal frontier controls for reasons of public order or national security.[39]

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[33] ETS 37.
[34] ETS 31.
[35] ETS 68.
[36] 5 Ybk (1959) 167.
[37] Plender (1988) p. 274.
[38] 374 UNTS 3.
[39] For a detailed analysis see Turack (1972) pp. 89-100; Plender (1988) pp. 273-276.

(ii) The Nordic Community

In 1957 Denmark, Finland, Norway, Sweden and Iceland concluded the Convention concerning the Waiver of Passport Control at the Intra-Nordic Frontiers.[40] Since nationals of States other than the Contracting States enjoy the benefits of the Convention, the Convention provides for the establishment of common standards for passport controls at the external borders. The Convention is complemented by agreements establishing a common labour market and recognition of social security entitlements.

(iii) The Common Travel Area between the United Kingdom and Ireland

A common travel area was also established in 1952 between the United Kingdom and Ireland.[41] Under the arrangement, citizens of either country may cross the frontiers between the two countries without producing a passport or other identity document. Third country nationals are subject to immigration control only on initial entry to either country from abroad.

(iv) Efforts within the framework of the Council of Europe

After the Second World War efforts to reduce the strictness of the existing passport regimes were also undertaken within the Council of Europe. Work on the feasibility of introducing a European passport was referred to the Committee on Legal and Administrative Questions of the Council of Europe. Following recommendations from the Legal Committee, in 1949 the Consultative Assembly recommended to the Committee of Ministers to instruct each Member State to study the question of a European passport. However, replies from the Member States indicated that the emergence of a European passport was not feasible, but only standardization of national passports was acceptable. The Committee of Ministers accordingly adopted a resolution establishing the governmental Committee of Experts on Passports and Visas to study standardization of national passports and measures to facilitate freedom of movement.[42] Intergovernmental efforts produced a series of multilateral and bilateral agreements between the Member States. Among these was the European Agreement on Regulations governing the Movement of Persons between the Member States of the Council of Europe signed by Austria, Belgium, France, the Federal Republic of Germany, Greece, Italy and Luxembourg on 13 December 1957.[43] The Agreement provided that nationals

[40] 322 UNTS 245. For an account see Turack (1972) pp. 81-87; Plender (1988) pp. 288.
[41] See Section 9 of the Immigration Act 1971. The Agreement has not been published. See Turack (1972) p. 118.
[42] See Turack (1972) pp. 67-74.
[43] ETS 25.

of a Contracting State could enter or leave the territory of other Contracting States for visits of no more than three months on presentation at the frontier of one of the documents contained in the Appendix. These included passports, identity cards and other identity documents. As Turack states: 'This meant that the passport was no longer essential for travel, however, the use of the passport as one of the identity documents suitable for travel was maintained because a number of member states expected to sign the agreement did not issue identity cards – Iceland, Ireland, the Netherlands, and the United Kingdom'.[44] Under the Agreement each Contracting State reserved the right to forbid the entry of nationals of other Contracting States considered 'undesirable', and to temporarily suspend the operation of the Convention on grounds of 'ordre public', security or health. Several Contracting States invoked such power in the 1980s to suspend the operation of the Agreement in relation to Turkey.[45]

Other instruments agreed within the framework of the Council of Europe include: the European Convention on Establishment 1955,[46] by which the Contracting States undertook to facilitate the entry into their territory of each others' nationals for the purpose of temporary visits provided this was not contrary to 'ordre public', national security, public health or morality;[47] the Fourth Protocol to the European Convention on Human Rights 1963,[48] which requires *inter alia* respect for the right to move freely within the territory of the Contracting States and for the right to leave that territory subject to restrictions necessary in the interest of public order and national security; the European Agreement on Travel by Young Persons on Collective Passports 1961;[49] the European Social Charter 1961;[50] the European Convention on Social Security 1972;[51] and the European Convention on the Legal Status of Migrant Workers 1977.[52]

(v) Efforts between the Member States of the European Community

The establishment of a passport union was also considered by the Member States of the European Community during the 1970s.[53] However, as a result of increased terrorism in

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[44] Turack (1972) p. 75.
[45] Plender (1988) p. 344.
[46] ETS 19.
[47] The European Convention on Establishment deals with all questions affecting an alien permanently resident in a European State such as entry, residence, expulsion, exercise of private rights, judicial and administrative guarantees, individual and political rights, taxation, expropriation and naturalization. See Plender (1988) pp. 236-240.
[48] *Supra* n. 6.
[49] *Supra* n. 33.
[50] 529 UNTS 89.
[51] ETS 78.
[52] ETS 93.
[53] For a fuller account see Chapter 3.

particular, active consideration was eventually given only to the establishment of a uniform format for national passports.

A non-binding intergovernmental Resolution was agreed on 23 June 1981.[54] Under this the Member States would issue their passports in an agreed uniform format – described in the Resolution – by 1 January 1985. The data page of the uniform format passport was to be the data page agreed within the context of the International Civil Aviation Organization (ICAO).

1.1.4 Treaties on commerce and establishment and economic integration

Treaties on economic integration and on commerce and establishment are a further category of treaties establishing limitations on the State's discretion over entry of aliens. With regard to treaties on economic integration, mention has already been made of the Benelux Economic Union and the Nordic Community. The European Community constitutes a special case. The EC Treaty provides for an 'individual right' for nationals of the Member States to move freely within the Community for the purpose of employment, establishment or the provision or reception of services.[55] Secondary Community law clarifies the public policy, security and health grounds under which a Member State may exclude an EC national in derogation from the free movement provisions.[56] The European Court of Justice has interpreted such grounds restrictively.[57]

With regard to bilateral treaties on commerce and establishment, they generally provide, with the purpose of securing 'national treatment', that nationals of each contracting party 'shall have a right of entry subject to compliance with national immigration and police laws'. Such clauses have posed two problems of interpretation. Firstly, it is unclear to what extent 'treaty-aliens' enjoy rights beyond those of 'aliens' in general. Secondly, it is unclear in which circumstances reliance on national rules or on concept such as 'public order' or 'national security' may limit or nullify the right granted under the treaty.[58]

1.1.5 Human rights

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[54] Resolution of the Representatives of the Governments of the Member States, OJ 1981 C 241.

[55] Articles 39-55 EC Treaty. By virtue of secondary Community law, economically inactive but self-sufficient EC nationals also enjoy free movement rights. See for example Directive 90/364, OJ 1990 L 180/26.

[56] Directive 64/221, OJ Sp. Ed. 1964 L 850/64.

[57] See for example Cases 67/74 *Bonsignore* [1975] ECR 297; 30/77 *Bouchereau* [1977] ECR 1999.

International instruments and customary international law on human rights have curtailed state discretion over admission and expulsion of aliens.

(i) Asylum-seekers

The 1951 Geneva Convention relating to the Status of Refugees[59] as extended by the 1967 New York Protocol[60] defines a 'refugee' as a person who is outside his country of nationality and unable or unwilling to return to it owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

In international law the 'right of asylum' is the right of each State to grant asylum to a fugitive, rather than the right of the individual to be granted asylum.[61] This view is consonant with the premise that international law creates rights and duties between States only, and leaves the State free to exclude aliens from its territory. It is however arguable that there have been some developments towards the establishment in international law of the right of the individual to be granted asylum.[62]

The Geneva Convention 1951 represents the principal basis for the international legal protection of refugees. The Convention does not guarantee a right of entry for refugees. Still, it imposes a number of obligations on the Contracting States with regard to the admission and expulsion of refugees. Article 31 of the Convention stipulates that the Contracting States shall not impose penalties for illegal entry on refugees coming directly from a territory where their life or freedom was threatened, provided they report to the authorities without delay and show good cause for their actions. Article 32 stipulates that the Contracting States shall not expel a refugee lawfully in their territory, save on grounds of national security or public order. Under Article 33 a refugee shall not be expelled or returned to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion (*non-refoulement*), unless he is reasonably suspected of being a security risk or, having been finally convicted of a particular serious crime, constitutes a danger to the community.

Refoulement describes an administrative act by which a person seeking admission, or admitted temporarily or conditionally is returned to the country whence he came. Thus,

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[58] For an analysis see Goodwin-Gill (1978) pp. 186-195. For an analysis of the establishment provisions of a specific treaty (a 'Europe Agreement' between the European Community and its Member States and a Eastern European country) see Weiss (2001) pp. 255-260.

[59] 189 UNTS 150.

[60] 606 UNTS 267.

[61] See Boccardi (2002) p. 3.

[62] Plender (1988) pp. 394-415.

the act of refusing admission may amount to *refoulement*.[63] It has been argued that the rule of *non-refoulement* has become a rule of general international law.[64]

The right to be granted asylum (in the sense of '*non-refoulement*') is guaranteed in many national constitutions.[65] Moreover, the obligations imposed by the Geneva Convention 1951 are reflected in domestic legislation. The United Kingdom's Immigration Rules, for example, provide that a person is not to be refused entry if removal would be contrary to the provisions of the Convention and Protocol.[66]

The European Convention on Human Rights (ECHR) 1950[67] extends the obligation of *non-refoulement*. Under the Convention, removal of an alien to a State where he faces persecution or the death penalty has been held to amount to inhuman or degrading treatment prohibited by Article 3.[68] Also, an extradition decision may infringe Article 6 (the right to a fair trial) where the affected person risks suffering a flagrant denial of a fair trial in the requesting country.[69]

(ii) Family re-unification

The 'right to family life' is proclaimed in many international instruments of varying legal effect.[70] As Plender explains:

> 'Even if they are taken together, these international and regional provisions do not amount to evidence of a right to family reunification in general international law. They do, however, establish the widespread acceptance of the moral or political proposition that States should facilitate the admission to their territories of members of the families of their own citizens or residents, at least when it would be unreasonable to expect the family to be reunited elsewhere. Thereby, they influence the content of bilateral agreements and domestic law. Indeed, the special position of the family, as a fundamental unit of society entitled to the protection of the State, is the subject of explicit constitutional provisions in at least fifty countries'.[71]

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[63] See Boccardi (2002) pp. 10-11.
[64] Goodwin-Gill (1978) p. 140.
[65] See for example Article 10 of the 1947 Italian Constitution.
[66] HC 395, para. 334.
[67] European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (213 UNTS 221).
[68] See *Soering v. United Kingdom* (1989)11 EHRR 439; See also *D v. United Kingdom* (1997) 24 EHRR 423, where it was held that removal of a person in terminal stages of AIDS to a place where there was no appropriate medical treatment, no social welfare and no family support would violate Article 3.
[69] See *Soering v. United Kingdom*, *supra* n. 68; *Mamatkulov and Abdurasulovic v. Turkey* (Nos. 46827/99 and 46951/99), 6 February 2003.
[70] See for example Article 16(3) of the UDHR 1948 ((1949) AJIL 142 Supp. 127); Article 23 of the ICCPR 1966, *supra* n. 6; Article 19 of the European Social Charter 1961, *supra* n. 50; Articles 8 and 12 of the ECHR 1950, *supra* n. 67; and the Helsinki Final Act 1975 ((1975) 14 ILM 1292).
[71] Plender (1988) pp. 366-367.

The ECHR leaves the Contracting States free to decide on the adoption and implementation of family re-unification policies.[72] However, the European Court of Human Rights established that the enjoyment of a right to family reunification provided under national law is to be secured without discrimination on grounds of sex.[73] Moreover, it is established that refusal of entry into a country as far as it results in the separation of the affected person from close members of his family (i.e. it is not reasonable to expect the affected persons to conduct their family life elsewhere) may raise issues under Article 8 of the Convention.[74]

Restrictions on family reunification, introduced as part of the enactment of restrictive immigration policies since the 1960s, have often also been challenged as unconstitutional.[75]

(iii) Other

The ECHR may affect other aspects of immigration law. In the *East African Asians* Case,[76] for example, the Human Rights Commission found the United Kingdom's Commonwealth Immigrants Act 1968 discriminatory on ground of colour or race.[77] According to the Commission such discrimination could in certain circumstances amount to inhuman or degrading treatment within the meaning of Article 3 of the Convention.

Human rights may also be violated by state authorities during the examination of an individual at the border. The individual may be unlawfully detained in violation of Article 5 of the Convention.[78] It may also be argued that intrusive questioning may amount to a violation of the right to private life under Article 8(2) of the Convention.

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[72] Article 8 provides: '(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

[73] *Abdulaziz, Cabales and Balkandoli v. United Kingdom* (1985) 7 EHRR 471. The case arose out of United Kingdom's legislation by which only men enjoyed an absolute right to be joined by their spouses. After the judgement, the United Kingdom abolished such an absolute right for men (HC 503, 15 July 1985, paras. 41-47).

[74] See *Berrehab v. the Netherlands* (1989) 11 EHRR 322; *Sen v. the Netherlands* (2003) 36 EHRR 7.

[75] In France, for example, the right to family reunification was abolished in 1974 and restored in May 1975 following a ruling from the Consél d'Etat declaring the suspension unconstitutional. See Silverman (1992) p. 53. The Consél d'Etat also ruled that deportation order could not be enforced if enforcement resulted in family break-up. See Hollifield (1999) pp. 68, 83-84. The prohibition on working, as a condition of entry for family members, applied by France and Germany up to the late 1970s was also declared unconstitutional or illegal. See Layton-Henry (1985) p. 63.

[76] *Patel and Others v. United Kingdom* (1971) 10 ILM 6.

[77] The Act subjected to immigration control holders of United Kingdom passports unless they had an ancestral link to the United Kingdom (they were born or one of their parents or grandparents was born in the United Kingdom). This limited the access of non-whites but ensured the free entry of the progeny of white people who had migrated from Britain to its overseas possessions.

Moreover, limited possibilities of challenging a decision at the border may violate the right to an effective remedy laid down by Article 13 of the Convention.

The ECHR has also had an indirect impact on immigration law. In *Roth v. Home Secretary* the United Kingdom's Court of Appeal found that the scheme adopted under the Carriers' Liability Act 1987, and extended under Part II of the Immigration and Asylum Act 1999, which imposed penalties on those responsible for bringing clandestine entrants to the United Kingdom, was incompatible with Article 6 and Article 1 of Protocol 1 of the ECHR. The scheme was contrary to Article 6 due to the imposition of a high, fixed penalty with no possibility of mitigation. This aspect of the scheme deprived the carrier of his right to have the penalty determined by an independent tribunal. Moreover, the scale and inflexibility of the penalty in conjunction with other aspects of the scheme imposed a disproportionate burden on the carrier in violation of Article 1 (the right to property).[79]

1.2 Limits on the State's discretion over exit of its nationals

In the same way as it is inferred from sovereignty that a State has discretion with regard to admission, residence and expulsion of aliens, it is inferred that a State has discretion whether to permit its nationals to travel abroad. Such discretion is often reflected in domestic law. Generally, the issue of passports – in most circumstances indispensable for travelling outside one's own State – is a power exercised by the executive, and, although passports are usually denied only on certain specific grounds, it amounts to an unfettered exercise of discretion. In some States however nationals may have a right to a passport by virtue of their right to travel under the constitution[80] or domestic legislation.[81] Under the EC Treaty, nationals of the Member States enjoy an individual right to leave their Member State of origin for the purpose of exercising their free movement rights under the Treaty.[82]

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[78] *Amuur v. France* (1996) 22 EHRR 533.

[79] *International Transport Roth GmbH and Others v. Secretary of State for the Home Department* [2002] EWCA Civ 158. Carriers' sanctions are arguably also contrary to Annex 9 (para. 3.37) to the International Convention on Civil Aviation, *supra* n. 24, which provides that carriers are only under an obligation 'to take precautions' to ensure that passengers have the appropriate documentation and envisages liability only in the case of carriers' negligence in carrying out controls.

[80] Freedom to leave and re-enter Italy, for example, is a constitutional right under Article 6 of the 1947 Constitution.

[81] For judicial cases where discretionary decisions to deny passports were held against the 'right to travel' see Goodwin-Gill (1978) pp. 29-32. For the reaction of US Courts to the government's post Second World War practice of denying and withdrawing passports and imposing 'area restrictions' on foreign policy and national security grounds, see Ehrlich (1966).

[82] See for example Article 2 of Directive 68/360, OJ Sp. Ed. 1968 L 257/13.

The 'right to leave any country, including one's own' seems to be protected by customary international law, although it is fraught with difficulty of interpretation, and often with the possibility of qualification.[83]

This right is provided for in Article 13(2) of the Universal Declaration on Human Rights (UDHR) 1948,[84] Article 12(2) of the International Covenant on Civil and Political Rights (ICCPR) 1966,[85] Article 5(d) of the International Convention on Elimination of All Forms of Discrimination 1966,[86] and Article 2(2) of the Fourth Protocol of the ECHR 1963.[87] The Human Rights Committee considered the right to leave, as laid down in Article 12 of the ICCPR in a number of cases involving refusals to renew a passport. It consistently held that, since the passport is an instrument enabling the holder 'to leave any country, including his own', refusal to renew a passport may constitute a breach of Article 12, particularly when the applicant is not given any reasons for the decision.[88]

1.3 Basic international law rules governing movement across frontiers

The basic rules of international law with regard to the movement of persons across state frontiers are set out in Oppenheim:

> 'Nationality is the principal link between individuals and international law. This function of nationality becomes apparent with regard to individuals abroad, or to property abroad belonging to individuals who are themselves within the territory of their home state, especially on account of one particular right and one particular duty of every state towards all other states. The right is that of protection over its nationals abroad which every state holds, and occasionally vigorously exercises, as against other states; .... The duty is that of receiving on its territory such of its nationals as are not allowed to remain on the territory of other states. Since no state is obliged by international law to allow foreigners to remain within its boundaries, it may, for many reasons, happen that certain individuals are expelled from all foreign countries. The state of nationality of expelled persons is bound to receive them on its territory'.[89]

1.3.1 The State's duty to admit its own nationals

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[83] See Higgins (1988).
[84] *Supra* n. 70.
[85] *Supra* n. 6.
[86] 60 UNTS 115.
[87] *Supra* n. 6.
[88] For the cases see Higgins (1988) pp. 153-156.
[89] Oppenheim (1992) pp. 857-858.

One of the basic rules of international law with regard to the movement of persons across frontiers is that each State is obliged to admit its own nationals to its territory. Such a duty is a corollary of the right of the State to expel aliens.

The issue of the duty of the State to admit its own nationals arose, for example, in relation to the expulsion of Asians from Uganda in 1972. When Uganda became independent, many Asians in Uganda kept their United Kingdom and Colonies citizenship under an exceptional arrangement.[90] However, by virtue of the Commonwealth Immigrants Act 1968, which was originally passed to stop the inflow of Asians from Kenya, those Asians from Uganda with United Kingdom and Colonies passports were subject to immigration control in the United Kingdom, unless they had an ancestral link to it.[91] While domestic legislation permitted the United Kingdom to deny admission to the Asians from Uganda in possession of United Kingdom passports, they were 'nationals of the United Kingdom', and so under international law the United Kingdom was under a duty to admit them if they were otherwise by reason of expulsion from some other country to become refugees. The United Kingdom acknowledged its obligations under international law. The Lord Chancellor stated: '...the Attorney General...advised us that in international law a State is under a duty to other States to accept in its territory those of its nationals who have nowhere else to go. If a citizen of the United Kingdom is expelled, as I think illegally from Uganda, and is not accepted for settlement elsewhere, we could be required by any State to accept him'.[92]

A related issue is whether the right of the individual to enter his own country has acquired the status of a customary rule of international law. Such a right is provided for in Article 13(2) of the UDHR 1948,[93] Article 12(4) of the ICCPR 1966,[94] Article 5(d) of the International Convention on the Elimination of All Forms of Racial Discrimination 1966,[95] and Article 3(2) of the Fourth Protocol to the ECHR.[96] With regard to the

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[90] When Uganda became independent it adopted its own nationality law. Uganda gave its citizenship automatically only to those who had been born there and had at least one parent born there. There were therefore many people who did not become Ugandan citizens automatically but kept their United Kingdom citizenship. The British government accepted this in order to prevent these people becoming stateless and many obtained United Kingdom passports. See Layton-Henry (1985) p. 104; Hiro (1991) p. 199.

[91] Under the Act holders of United Kingdom passports who were citizens of the United Kingdom and Colonies were subject to immigration control unless they or at least one of their parents or grandparents were born, naturalized or adopted in the United Kingdom or became a citizen of the United Kingdom and Colonies by registration in the United Kingdom or in an independent country within the Commonwealth.

[92] Hansard, HL, Vol. 335, col. 497. Quotation from Harris (1998) p. 531.

[93] *Supra* n. 70.

[94] *Supra* n. 6.

[95] *Supra* n. 86.

United Kingdom's Commonwealth Immigrants Act 1968, the European Commission of Human Rights, independently from the issue of the right to enter one's own country, found in the *East Africa Asians* Case[97] that the United Kingdom's enactment discriminated against the applicants and this could amount to degrading treatment under Article 3 ECHR.

1.3.2 The State's right to protect its own nationals

It is a universally accepted rule of customary international law that every State has the right to protect its citizens abroad. The identification of a State's nationals becomes accordingly of crucial importance.[98]

In the context of the European Union (EU), a practical consequence of the establishment of 'EU citizenship' is that a EU national is entitled, in the territory of a third country where the Member State of which he is a national is not represented, to protection by the diplomatic and consular authorities of any Member State.[99] Thus, for example, under a Decision of the Representative of the Governments of the Member States meeting within the Council, an emergency travel document may be issued by any Member State's diplomatic mission in a third country to citizens of a Member State which has no permanent diplomatic or consular representation there (on the authority of and with clearance from the latter Member State).[100]

1.3.3 Limits on the State's discretion to define nationality and denationalize

It is generally held that each State has discretion to determine who its nationals are.[101] Determination of nationality is considered a matter for municipal law, and a State may have different categories of nationals subject to varying rights and obligations.

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[96] *Supra* n. 6.

[97] *Supra* n. 76.

[98] See for example the *Panevezys-Saldutiskis* Case, PICJ Rep., 1939, Ser. A/B, No 76. The identification of a State's nationals may be bundled with claims of sovereignty, as is the case for China and Taiwan. China's policy is to provide protection for Taiwanese abroad while Taiwan aims at strengthening its efforts to offer care and emergency services to its nationals living or travelling abroad, see www.fmprc.gov.cn and www.mofa.gov.tw.

[99] Article 20 EC Treaty and Decision of the Representatives of the Governments of the Member States meeting in the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations, OJ 1995 L 314.

[100] Decision on the Establishment of an Emergency Travel Document for Community Nationals, 25 June 1996, OJ 1996 L168/4.

[101] See for example the *Nationality Decrees in Tunis and Morocco* Case, PCIJ Rep., 1923, Ser. B, No 4, p. 24. See also Brownlie (1998) p. 385. See also the European Court of Justice's approach in Case C-369/90 *Micheletti* [1992] ECR I-4239.

State discretion with regard to nationality has led inevitably to anomalies such as dual and multiple nationality and statelessness. However, as far as the determination of nationality has consequences under international law – in view of the two basic rules of the State's right to protect its own nationals and the State's duty to admit its own nationals – international law imposes certain limitations on the State's discretion to determine who its nationals are.[102]

Goodwin-Gill identifies three situations in particular where international law imposes limitations on state discretion: (i) the imposition of nationality upon immigrants or residents, (ii) denationalization, and (iii) the issue of nationality in relation to diplomatic protection.[103]

With regard to the imposition of nationality upon immigrants and residents, the automatic imposition of nationality by a State on aliens entering its territory need not be recognized by other States if such imposition is not accompanied by request or consent, unless a 'genuine connection' between the individual and the State by parentage or permanent domicile exists.[104] Automatic imposition would in fact result, if accepted, in the State avoiding its duties with regard to the treatment of aliens. In the case of succession of States, the nationality of resident or domiciled inhabitants follows the change of sovereignty. Accordingly, there must be a 'sufficient link' (domicile or habitual residence) between the successor State and those whom it claims its nationals.[105]

The limits imposed by international law on the State's discretion with regard to denationalization are explained by Plender as follows:

> 'Modern State practice provides some support for the proposition that a decree of denaturalization may be ineffective to relieve the State of its duty to admit a person covered by such a decree. ...A decree which discriminates on racial grounds, or is in any other sense 'arbitrary', need not be recognized by other States as effective to deprive of their nationality those to whom it purports to apply. Where the element of arbitrariness is absent, the denaturalization decree may nevertheless be ineffective to relieve the former State of nationality of its obligation to readmit the individual. This will be the case if the decree deprives of nationality a person who has already gained admission to another State, on the understanding

[102] See for example the Hague Convention on Certain Questions relating to the Conflict of Nationality Laws 1930, 179 UNTS 89. Article 1 provides: 'It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality...'. As to the doctrine of 'genuine link' or 'effective link' see Brownlie (1998) pp. 401-424.

[103] Goodwin-Gill (1978) p. 6.

[104] Goodwin-Gill (1978) p. 7; Harris (1998) p. 587.

that he will be readmitted to his country of origin, and who has not obtained any other national status'.[106]

Finally, international law limits state discretion with regard to the determination of nationality as far as such determination has consequences with regard to diplomatic protection. The relevant rules were stated by the International Court of Justice in the *Nottebohm* Case.[107] The Court held:

> 'It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation...It does not depend on the law or on the decision of Liechtenstein whether that State is entitled to exercise its protection in the case under consideration.'

The Court went on:

> 'The character thus recognized on the international level as pertaining to nationality is in no way inconsistent with the fact that international law leaves it to each State to lay down the rules governing the grant of its own nationality. The reason for this is that the diversity of demographic conditions has thus far made it impossible for any general agreement to be reached on the rules relating to nationality...On the other hand, a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection against other States....Conferred by a State, [nationality] only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national'.

1.3.4 Legal consequences flowing from the admission of aliens

Although entitled to expel aliens, the State is under international law obligations with regard to their treatment.[108] Among them are obligations arising from treaties or general international law which limit the State's power over the circumstances and manner of expulsion.

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[105] Goodwin-Gill (1978) p. 7.
[106] Plender (1988) p. 149.
[107] ICJ Rep., 1955, p. 4.

2. Legal and political significance of passports and visas

2.1 Definition and functions of passports

A passport may be defined as an official document attesting the holder's identity and nationality issued by a State to its own national for the purpose of travel abroad.

Regulations in relation to applications for passports were first formulated in 1846. However, it was generally rare before the First World War for someone travelling abroad to apply for a passport. Possession of a passport was confined largely to merchants and diplomats, and the vast majority of those travelling overseas had no formal document.[109] The modern international passport and visa systems originated during the First World War.[110]

Under international customary and treaty law, a statement of the bearer's identity and nationality is essential for the international recognition of the passport.[111]

While the issue of passports is accepted as the prerogative of States, there have been cases were passports have been issued by other international legal persons whose sovereign status was questioned, such as the Holy See, the Order of Malta and the Condominium of Andorra.[112]

International customary law and many municipal law systems do not recognize the passport as conclusive proof of nationality. Not only is the discretion of a State with regard to the acquisition of its nationality limited under international law insofar as the determination of nationality has consequences under international law, as in the case of diplomatic protection and admission of the State's own nationals,[113] but it is also apparent that some States issue passports to non-nationals.[114]

Passports, however, have been used as corroborative evidence concerning nationality before international tribunals.[115]

The function of the passport as a *laissez-passer*/safe conduct bears witness to the document's origin in diplomatic practice.[116]

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[108] An account is beyond the scope of this work.

[109] The *Times*, 1 August 2002 (Questions Answered).

[110] See Torpey (2000) particularly pp. 112-116.

[111] See Turack (1972) p. 21. This is reflected in domestic legislation. The Immigration Rules, HC 395, para. 320(10), provide that 'a person who produces...a passport or travel document which does not comply with international passport practice (e.g. 'World Service' passports) may be refused entry on that ground alone'.

[112] See Turack (1972) p. 21.

[113] See for example the *Nottebohm* Case, *supra* n. 107.

[114] Plender (1988) p. 150. Plender cites as an example Costa Rica's Law 4812 of 28 July 1971. Other examples are provided by Turack (1972) p. 225.

[115] Turack (1972) p. 231.

2.1.1 Passports and 'returnability'

Although a passport is no conclusive evidence of nationality, under customary international law it indicates the existence of a duty on the issuing State to admit the holder if he is expelled from another State and has nowhere else to go.[117]

Thus, even when a passport is issued to a non-national it may create an obligation for the issuing State to admit the holder if the State of nationality does not admit him, as it may be shown that in issuing the passport the issuing State impliedly warranted to a third State that the holder would be returnable to its territory.[118]

Because of such guarantee of 'returnability', municipal law generally prescribes the possession of passports by aliens as a condition of admission into the State's territory.[119] Deportation may be frustrated if the deportee lacks a passport since the passport is usually required by the receiving State to avoid the deportation of non-nationals.[120] Re-admission agreements may provide that the parties are to admit their nationals without a valid passport provided a presumption of nationality is established by virtue of documentary evidence (such as identity cards, passports which have expired or other travel documents) or other factors.

The requirement of a passport as a condition of entry may be dispensed with by virtue of reciprocal bilateral or multilateral agreements. Such agreements may provide for the abolition of frontier controls between the contracting States, as in the case of common travel areas or passport unions,[121] or for the use of alternative documents such as identity cards in lieu of passports.[122] In such cases, suitable arrangements may be made to secure deportation.

A number of other documents may be accepted in lieu of passports under international agreements. These include: collective passports, refugees' and stateless persons' travel

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[116] See Torpey (2000) p. 160. Passports may contain a request by the issuing State that the bearer be given all lawful aid and protection. Such request of protection is only formal and carries no legal significance. As to diplomatic protection see *infra*.

[117] See Turack (1972) p. 234; Goodwin-Gill (1978) p. 46.

[118] See Turack (1972) p. 20; Plender (1988) p.150.

[119] Immigration Act 1971, Sch. 2, para. 8 and Sch. 3 para. 1; see also the Immigration Rules, paras. 21-23 and 320(13), which make provision for holders of 'restricted' travel documents and provide that 'lack of returnability' is a ground to refuse entry.

[120] In the Brazilian case of *Feldman v. Justica Publica*, Brazil could not deport a Romanian national as Romania refused to issue the deportee a passport (Ann. Dig. 1938-40, Case 144).

[121] See *supra*.

[122] On this see for example Article 2(1) EC Directive 68/360, *supra* n. 82.

documents, aircrew and seamen licenses and *laissez-passer* issued by international organizations.

With regard to refugees and stateless persons, the International Convention relating to the Status of Refugees 1951[123] and the International Convention relating to the Status of Stateless Persons 1954[124] provide for the issue by the Contracting Parties of Convention Travel Documents to refugees and stateless persons within their territory for the purpose of travel outside that territory, unless compelling reasons of national security or public order require otherwise.[125] The Contracting Parties are bound to recognize the validity of such documents.[126] The Convention Travel Documents contain a 'return clause' guaranteeing that the holder will be re-admitted into the issuing State's territory at any time during the period of the validity of the Documents.

Similarly, the special travel documents established to facilitate the international movement of aircrews and seamen (see *supra*) must contain a certification that the holder will be re-admitted into the issuing State.

With regard to the UN *laissez-passer*, Section 24 of Article VII of the General Convention on the Privileges and Immunities of the United Nations 1946[127] provides that: 'The United Nations may issue United Nations *laissez-passer* to its officials. These *laissez-passer* shall be recognized and accepted as valid travel documents, by the authorities of Members...'.

The purpose of the UN *laissez-passer* has been well described by a jurist: 'Passports also play their part in making an agent of the international community dependent upon his own country, and it is open to question whether the necessity of holding a national passport is strictly compatible with the independence which such agents should have in their movements. Clearly, the fact that an agent of the international community has to ask his government for a passport enables that government to limit his independence to some extent'.[128]

It has been suggested that one reason for US reluctance to ratify the General Convention, and one reason why it did not recognize the UN *laissez-passer* as an international travel document had to do with its strict policy on returnability of aliens

[123] *Supra* n. 59.
[124] 360 UNTS 117.
[125] Article 28 of both Conventions.
[126] Para. 7 Schedules.
[127] *Supra* n. 17.
[128] Secretan (1935). Quotation from Turack (1972) p. 155.

and the fact that the UN *laissez-passer* did not show the holder's origin, nationality and his ability to re-enter some country.[129]

While most documents which, under international agreements, are accepted in lieu of passports provide for a guarantee of re-admission of the holder by the issuing State, they naturally do not entitle the issuing State to exercise protection since the right of protection flows exclusively from the bond of nationality.[130]

2.1.2 Passports and diplomatic protection

It is a universally recognized rule of customary international law that a State has the right to protect its citizens abroad. 'It is the bond of nationality between the State and the individual which alone confers upon the State the right to diplomatic protection'.[131] The passport is considered *prima facie* evidence of the nationality of the bearer from which the possibility of protection by the issuing State may flow, though in itself it does not confer on the issuing State a right to protect the bearer.[132] In the *Nottebohm* Case[133] it was held that the acceptance by Guatemala of Nottebohm's passport and the issue to him of a visa did not amount to an act of recognition of his status as a national of Liechtenstein, on which Liechtenstein's right to diplomatic protection depended.

From the point of view of the individual, a passport constitutes evidence of a legitimate claim on the resources and services of the embassies and consulates of the issuing State. Traditionally, one of the functions of passports was to designate the bearer as someone entitled to receive the diplomatic protection and good offices of the diplomatic and consular officers of the issuing State.[134] Since passports could express an intention to extend diplomatic protection to the bearer as well as a request to others to protect him, national policies on passport refusal for travel to unrecognized countries or countries with which diplomatic relations were not maintained, or the imposition of 'area restrictions' by which passports were not valid for such countries, were linked to the

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[129] See Goodwin-Gill (1978) pp. 28-29.

[130] See *supra* n. 107. There are, however, cases in which protection may be exercized by a State on behalf of persons not having its nationality. The International Court of Justice held in its Advisory Opinion in *the Reparation for Injuries suffered in the Service of the United Nations* Case, ICJ Rep. 1949, p. 174, that the United Nations has a 'right of functional protection'. The UN Charter implies the Organization's power to afford its agents the limited protection that would consist in the bringing of a claim on their behalf for reparation for damage suffered during a mission.

[131] See *supra* ns. 107 and 130.

[132] See the *Nottebohm* Case, *supra* n. 107.

[133] *Supra* n. 107.

[134] See Turack (1972) p. 19.

issuing State's inability to extend normal diplomatic and consular protection to its citizens in such countries.[135]

Possession of a passport was also held sufficient to impute allegiance to the issuing State. In *R v. Joyce*, the House of Lords held that possession of a passport, even when the passport has been acquired by misrepresentation, confers on the bearer a duty of allegiance, just as it gives the bearer rights and imposes obligations on the issuing State.[136]

2.1.3 Passports as an expression of sovereignty

As an official document issued by the government for international use, the passport has important implications in international relations.

It is a customary rule of international law that a State will recognize the passport issued by another State to its own citizens.[137] As Turack states: 'When one state or government recognizes the existence of another, it usually recognizes the other's passports. No international agreement is signed to constitute the recognition of passports; it is merely the operation of the comity of nations'.[138]

An unrecognized State or government is considered to have no authority to issue passports. Documents issued by unrecognized States or governments are not regarded as 'passports'.[139] They are accorded no official standing: generally, no visa is affixed on an unrecognized passport, or if a visa is affixed such action is expressly said not to imply recognition of the issuing authority. Similarly, in the case where deportation of a person to an unrecognized State (or to a State whose government is unrecognized) is considered by the deporting State to necessitate the authorization of the authorities in *de facto* control, a permit to execute the deportation may be requested from them rather than a formal passport.[140]

Holders of unrecognized passports may be refused entry under domestic immigration rules.[141] Immigration rules however often make provision to enable such persons to enter nevertheless. They may be provided with a travel document by the diplomatic post

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[135] See Goodwin-Gill (1978) p. 33.
[136] [1946] AC 347. See Turack (1972) p. 20; Goodwin-Gill (1978) pp. 35-37.
[137] Turack (1972) p. 211.
[138] Turack (1972) p. 237.
[139] Turack gives the example of passports issued by Manchukuo, East Germany, and Southern Rhodesia. See Turack (1972) pp. 237-241. See also Grossman (2001).
[140] See Turack (1972) p. 235.
[141] See for example the United Kingdom's Immigration Rules, para. 320(10).

of the country that they wish to visit, or their travel documents may be accepted for travel purposes, although no visa will be affixed in them.[142] Returnability of such persons must however be guaranteed. Commonly, nationals of unrecognized States are treated like stateless persons or refugees who for visa purposes happen to have a right of return to a particular country of origin.[143]

The nature of passports as an expression of sovereignty is well illustrated by their use in those cases where a State is divided into parts governed by different governments with each government, or one of them, claiming to be the legitimate government of the whole State, thus not recognizing the other.

Before German reunification, for example, West Germany did not require passports from East Germans since East Germans were not considered 'aliens'. West German policy – the so called 'Hallstein doctrine' – maintained that Germany as a whole was a continuing State (with one nationality) of which the West German government was the only legitimate government.

East Germany, similarly, did not require, up to 1968, passports from West Germans. In 1968 it decided to use the passport to create the impression that it was a State enjoying equal sovereignty with West Germany and to gain further diplomatic recognition. Accordingly it announced that West Germans would be required to carry passports with an East German visa on them to travel to and from Berlin.[144]

A similar situation currently exists with regard to China and Taiwan.[145] China provides 'travel permits' to 'Taiwanese residents of Chinese nationality' who wish to travel to mainland China while Taiwanese Immigration Rules provide that people travelling with a travel document issued by the authorities of Mainland China do not qualify for

[142] Under the United Kingdom's Immigration Rules holders of unrecognized passports may be issued with a 'Declaration of Identity for Visa Purposes', which together with an entry clearance will permit them to enter the country. The unrecognized documents, although invalid for travel purposes, may be used by the authority issuing the document as a means to establish the identity of the person concerned. United States practice with regard to holders of Somali Democratic Republic passports, for whose issuance there is little security, is to issue them with consulate-provided controlled and secured documents on which a visa is affixed. Often nationals of unrecognized States use passports issued by third countries. This is the case of Palestinians who use passports issued by the Palestinian Authority, their country of residence or a neighbouring country (such as Jordan). See Grossman (2001) p. 861.

[143] Grossman (2001) p. 874.

[144] Turack (1972) p. 239.

[145] Both the Chinese and Taiwanese governments claimed to be the one government of the one State of China, with Taiwan as part of it. This situation developed after the 1949 revolution following which the defeated Nationalist Government withdrew to Taiwan. While this policy is still followed by China, Taiwan seems now to claim to be a 'sovereign State'. See www.mofa.gov.tw.

Republic of China visas in accordance with the Statute Covering Relations Between Peoples of the Taiwan Area and the Mainland Area.[146]

With regard to the situation in Cyprus, the policy of the Republic of Cyprus is to deny entry to holders of 'passports' issued by the 'Turkish Republic of Northern Cyprus', although restrictions on movement have recently been eased.[147]

The nature of passports as an expression of sovereignty is also well illustrated by the practice of recognizing passports issued by governments in exile, as was the case for the Baltic States during Russian annexation, or by States which have been invaded, as was the case for Kuwait during occupation by Iraq.[148]

Bodies appointed by the UN to administer a territory may have the power of issuing travel documents to the inhabitants of the territory.[149] This is the case, for example, with the current UN Mission in Kosovo (UNMIK).[150] In such cases, arrangements may be made between the UN and certain third countries with regard to consular assistance, returnability and recognition of the travel documents.[151]

2.1.4 Passports as a political and security instrument

The nature of the passport as a mechanism of state control has been well documented.[152] Such nature is illustrated in particular by the function of the passport as an instrument to control entry and exit of individuals into and from the State.

With regard to entry, the passport plays the role of a certificate of identity and returnability. With regard to exit, the executive – which generally has a discretionary power over issuing passports – may deny passports to prevent exit from the State.[153] It seems however that a 'right to leave one's own country' exists in international law, and

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[146] www. fmprc.gov.cn and www.mofa.gov.tw.

[147] Such a policy is in response to the 'illegal demographic change'. See www.mfa.gov.cy. The 'Turkish Republic of Northern Cyprus', which was created following the invasion of Cyprus by Turkey in 1974, was declared illegal through UN Security Council Resolutions 541/83 and 550/85.

[148] UN Resolutions required continuing recognition of Kuwait as a State.

[149] See for example the UN Temporary Executive Authority (UNTEA) for West New Guinea of 1962, and the UN Council for South West Africa of 1966. For an account see Turack (1972) pp. 243-244.

[150] UNMIK press briefing, 13 March 2000. No short-term visa is required to visit Kosovo, and long-term visa arrangements have yet to be decided by UNMIK, see www.fco.gov.uk.

[151] In the case of West New Guinea, for example, both the Netherlands and Indonesia undertook to offer consular assistance and protection abroad to Papuans carrying the travel documents issued by UNTEA. Many Members of the UN expressed their readiness to recognize the documents issued by UNTEA. With regard to the documents issued by the UN Council for South West Africa, neighbouring governments agreed to the return to their countries of South West African using such documents. See *supra* n. 149.

[152] See Torpey (2000).

[153] See *supra*.

many national courts have recognized and upheld a constitutional right to travel.[154] Inter-state arrangements for the use of identity cards in lieu of passports have also had an impact on the individual's right to travel since in many cases individuals have a legal entitlement to identity cards.[155]

Control over exit through denial of passports was practiced by the US after the Russian Revolution and in the years after the Second World War.[156] Travel was restricted for members of Communist organizations on grounds of national security and national interest. Another practice was the imposition of 'area restrictions' whereby the validity of passports was excluded with regard to unrecognized States or governments, States with which diplomatic representation was not maintained, States where armed conflict existed, and States where health endangering conditions were present.[157]

Control over exit through denial of passports and exit permits was also notoriously practiced by countries of the Eastern block before the collapse of the Berlin Wall.[158] With regard to East Germans, since East German passports were not recognized by NATO countries as East Germany was considered to be under Soviet control, those East Germans who were permitted to leave East Germany had to apply to the Allied Travel Office in Berlin for a temporary travel document. The criteria for eligibility for temporary travel documents were agreed in NATO and were confidential. Persons considered as likely to engage in undesirable political activities during their visits would be refused the document.[159]

Limitations over exit have also been imposed by developing countries on 'brain drain' grounds.[160]

2.2 Definition and functions of visas

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[154] See for example the Supreme Court of India in *Sawhney v. Assistant Passport Officer* [1967] AIR (SC) 1836; the United States Supreme Court in *Kent v. Dulles* [1958] 357 US 116.

[155] Goodwin-Gill (1978) p. 40. In the context of the European Community see, for example, Directive 68/360, *supra* n. 82. Article 2 provides: 'Member States shall grant [their] nationals the right to leave their territory in order to take up activities as employed persons and to pursue such activities in the territory of another Member State. Such right shall be exercised simply on production of a valid identity card or passport'.

[156] For an account see Ehrlick (1966).

[157] In the US, for example, area restrictions existed with regard to Cuba, North Korea, Vietnam, China, Albania (during the 1939 Italian occupation), Spain (during the Spanish civil war) and Belgium (during the 1915 famine). The Italian 1967 Passport Law established that passports issued by the Italian State were valid for all countries that Italy recognized. Vietnam, China, North Korea and East Germany were excluded. See Turack (1972) pp. 151-152.

[158] As to Soviet emigration and the Helsinki Final Act 1975 see Higgins (1988) pp. 146-153.

[159] See Turack (1972) p. 239.

[160] Torpey (2000) p. 162.

A visa is an official government stamp applied on foreign passports by the consular or immigration authorities of a State to authorize entry or stay in that State. Possession of a visa may be a pre-requisite for admission to the State for certain nationalities or classes of aliens.[161] A visa normally implies acceptance of the passport's validity/authenticity. Under passport unions, States may establish a 'common visa' valid for their territories as a whole.[162]

2.2.1 Implications of the visa as a government official stamp

Because of its nature as an official government stamp that is affixed on official documents issued by other governments (passports), the visa plays a significant role in the recognition of States and governments.

When a government does not recognize a State or government it refuses, *inter alia*, to give any official standing to official expressions of the latter's sovereignty, whether these take the form of a flag or passport.[163] Accordingly, no visa is generally affixed to passports issued by an unrecognized State or government (particularly if they purport to be diplomatic or official passports) or if a visa is affixed such action is expressly said not to constitute recognition of the issuing authority.[164]

Under the United Kingdom's Immigration Rules, for example, passports issued by the 'Turkish Republic of Northern Cyprus' must not be endorsed by immigration officers and any visa is to be placed on a separate form. Visas may be affixed on passports issued by Taiwan, with the exception of official and diplomatic passports. Passports issued by the Palestinian Authority may also have visas affixed on them, but such action 'does not imply recognition of a separate State of Palestine'.[165]

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[161] The United Kingdom's Immigration Rules lay down the categories of persons who need a visa to enter the United Kingdom as visitors or for transit. These comprise: (a) nationals of approximately 108 countries; (b) persons who hold passports or travel documents issued by the former Soviet Union or by the former Socialist Federal Republic of Yugoslavia; (c) stateless persons; (d) persons who hold non-national documents (such as refugee travel documents issued under the 1951 Geneva Convention). These persons do not need visas for transit if they have a confirmed booking on an onward flight within 24 hours of arrival by air unless they are nationals of a country listed in the schedule to the Immigration (Transit Visa) Order 1993 (which lists approximately 19 countries).

[162] See for example the common visa for the Benelux territory under the 1960 Convention concerning the Transfer of Entry and Exit Controls to the External Frontiers of the Benelux Territory, *supra* n. 38.

[163] In 1966 for example the United Kingdom Foreign Office banned a Post Office stamp designed to commemorate the World Football Cup because the stamp bore the flag of North Korea which was unrecognized by the British government. Historically, unrecognized passports included passports issued by Manchuko, East Germany, North Korea, Southern Rhodesia and Franco Spain.

[164] See *supra*.

[165] Para. 320(10).

The visa itself, as a government official stamp, is an expression of sovereignty. Thus, as mentioned above, in 1968, for example, East Germany, in an attempt to create the impression that it enjoyed equal sovereignty with West Germany and gain further diplomatic recognition, required West Germans to carry passports with an East German visa to travel to and from Berlin.[166]

The government of the Republic of Cyprus refuses admission to holders of passports with stamps or visas of the 'Turkish Republic of Northern Cyprus'. They are only allowed to enter after the stamps or visas are cancelled by the Republic of Cyprus immigration authorities.[167]

It is also interesting to note that some Arab States including Iran, Jordan and Egypt as part of their policy of non-recognition of Israel, refused admission to bearers of passports of any State which had an Israeli visa affixed in them.[168] Also, Cuban authorities do not affix Cuban visas on tourists' passports because of fears that tourists may encounter problems entering other countries such as the US. A tourist card is instead provided on which the visa is affixed. The card is then removed from the passport on departure leaving no physical evidence of the visit.[169]

With regard to the situation of Serbia and Kosovo, the fact that Serbia does not recognize its border with Kosovo results in the fact that it is illegal to enter Serbia from Kosovo as no valid Serbian entry stamp can be acquired.[170]

Moreover, unrecognized States or governments will of course face practical difficulties in issuing visas since they may have no diplomatic representations abroad. Before the fall of the Taliban government, for example, a visa for Afghanistan was only obtainable from Pakistan, one of three countries that recognized the Taliban government.[171]

UN bodies appointed to administer a territory often apply their own entry stamps on the passports of visitors to such territories. Thus, a UNMIK stamp is affixed on passports of visitors to Kosovo.[172]

2.2.2 Legal consequence of a visa in international law

(i) Recognition of nationality

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[166] *Supra* n. 144.
[167] www.mfa.gov.cy
[168] Turack (1972) p. 241.
[169] *The Guardian*, 'Will a Cuban stamp in my passport make US visit difficult?', 20 January 2001.
[170] www.fco.gov.uk
[171] *The Observer*, 'Welcome to our beautiful country...', 5 November 2000.
[172] *The Guardian* (G2), 29 May 2002.

A visa does not imply recognition of nationality as attested in the passport for the purpose of diplomatic protection. In the *Nottebohm* Case, the International Court of Justice regarded the acceptance of Nottebohm's passport by Guatemala through the act of affixing a visa as nothing more than an administrative act to facilitate the entry of Nottebohm in Guatemala. The Court held that: 'When Nottebohm...presented himself before the Guatemala authorities, the latter had before them a private individual; there did not thus come into being any relationship between governments'.[173]

(ii) Recognition of diplomatic status

Neither a diplomatic passport granted by the sending State nor a diplomatic visa granted by the receiving State guarantee the bearer's right to diplomatic privileges and immunities. A diplomatic passport is *prima facie* evidence that the bearer is a foreign service officer of the issuing State and should accordingly be treated with due respect.[174] A diplomatic visa is only evidence that the bearer is entitled to enter the territory of the State that issued the visa.[175] In *US v. Noriega and Others*,[176] a US District Court held that General Noriega was not entitled to diplomatic immunity either on the basis of holding a Panamanian diplomatic passport or on the basis of US diplomatic visas. The Court held that a visa was an 'administrative action in connection with United States immigration law and quite independent of the process of diplomatic accreditation.' The same outcome was reached in *R v. Lambeth Justices ex parte Yusufu*.[177] Here the English Divisional Court rejected the argument that Yusufu (charged with kidnapping of the Nigerian Minister Dikko, found in a crate about to be flown to Lagos) was entitled to diplomatic status on the basis of a diplomatic passport and a diplomatic entry visa. There had been no notification of Yusufu as a diplomatic agent to the Foreign and Commonwealth Office. The Court also rejected the claim that Yusufu was a 'diplomatic agent in transit' on the basis that, while working in the Nigeria High Commission in London, he had been granted a diplomatic multiple entry visa to the US.[178]

(iii) A duty to admit?

Under international law a visa may also be significant with regard to returnability.

Under United Kingdom immigration law one of the conditions of entry is that the person seeking entry must satisfy the immigration officer, in the case where he intends

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[173] *Supra*, n. 107, p. 18.
[174] Lee (1991) p. 204.
[175] Plender (1988) p. 165.
[176] US District Court, Southern District of Florida, 8 June 1990, 99 ILR 143, pp. 165-167. See Denza (1998) pp. 255.
[177] [1985] Criminal Law Reports 510. See Denza (1998) pp. 255-256.
[178] See Denza (1998) p. 371.

to travel to another country after his stay in the United Kingdom, that he will be admitted there.[179] Similarly, visitors in transit must satisfy the immigration officer that they will be assured entry into the country of final destination.[180] Possession of a visa issued by the country of final destination normally constitutes such proof.

It may therefore be argued that a visa in certain circumstance may impose an obligation of admission on the issuing State. Arguably, if State A grants leave to enter on the basis that returnability is assured by virtue of a visa issued by State B, State B is obliged to admit the holder of the visa in case State A wishes to deport him and no other State is prepared to accept him. Given that as a rule the obligation of readmission lies with the State of nationality, such a scenario would arise only in special circumstances.

A visa may also be significant in the context of readmission agreements. Readmission agreements may provide not only for an obligation for the parties to readmit their own nationals but also for an obligation to readmit third country nationals and stateless persons coming from or having resided in their territory. A visa may be proof and indicative evidence of residence or transit.[181]

(iv) Visas and the right to leave one's own country

It is unclear whether a visa granted by a State has any impact on the exercise of the right to leave one's own country. In the *Lopez Burgos* Case (concerning a claim by an Uruguayan trade unionist that he had been kidnapped from Argentina by Uruguayan intelligence forces and then subjected to torture and unlawful arrest) the Human Rights Committee established under the Optional Protocol of the ICCPR did not find that Uruguay violated Article 12 of the Covenant (on the right to leave one's own country) by not releasing Lopez Burgos after completion of his sentence. It noted however: 'that the Austrian Government has granted Lopez Burgos an entry visa. In this connection and pursuant to Article 12 of the Covenant, the Committee observes that Lopez Burgos should be allowed to leave Uruguay, if he so wishes, and travel to Austria to join his wife'.[182]

2.2.3 Visa requirements and bans as a political instrument

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[179] Immigration Rules, para. 320(13).

[180] Immigration Rules, para. 47(3).

[181] Within the framework of readmission agreements between the Contracting States of the Schengen Convention, see Decision of the Executive Committee of 15 December 1997 on the guiding principles for means of proof and indicative evidence within the framework of readmission agreements between the Schengen States (SCH/Com-ex (97)39 rev.), OJ 2000 L 239/188.

[182] Communication n. 52/1979, Selected Decisions, p. 91, para. 11.8. Quotation from Higgins (1988) p. 155.

Visas are traditionally a foreign policy instrument. Visa requirements or restrictions are often imposed on certain nationalities to indicate political disapproval of their governments' policy. In the same way, exemption from visa requirements, generally under bilateral visa exemption agreements, indicates political approval and friendly relations.[183]

Many European States, for example, granted exemption from visa requirements to nationals of ex-colonies. This is the case for the United Kingdom with regard to some Commonwealth countries, and formerly for Spain with regard to South American countries in pursuance of Spain's policy of forging an 'Ibero-American Community of Nations'.

Many international events have resulted, on the other hand, in the imposition by States of visa requirements or visa restrictions on certain nationalities. During the Cold War, visa requirements were imposed by the United Kingdom and other European States on nationals of the Soviet Union, the Communist countries of Eastern Europe, Cuba and certain African and Asian countries.[184]

The Member States of the European Union have often imposed visa requirements collectively.[185]

Within this context it can be noted that bilateral visa exemption agreements generally contain suspension clauses to the effect that either party may with immediate effect temporarily suspend the agreement in whole or in part with an obligation to notify the other party without delay. Visa exemption agreements also generally contain a denunciation clause.

Visa denial to particular nationalities has also been used. Increasingly, however, visa bans concern identified persons, with the aim to hurt those who are politically responsible for a particular state of affairs ('target sanctions' or 'intelligent sanctions').[186] In the early 1990s the US, for example, denied Yasser Arafat a visa for a trip to the UN.[187] The US also consistently denied visas to government officials of

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[183] In this context see for example the agreement between South Korea and Japan to relax visa restrictions in occasion of the Football World Cup 2002. See *The Guardian*, 'World Cup scores for Asian detente', 26 March 2002.

[184] See Bevan (1986) p. 164.

[185] See Chapter 5.

[186] Paasivirta and Rosas (2002) p. 208.

[187] This was as a result of the fact that notwithstanding that the Palestinian National Council voted in 1998 to accept UN Resolutions 242 and 238 calling for Israel to evacuate the occupied territories and for all countries of the region to live in peace within secure and recognized borders, Arafat refused to declare whether such course of action implied Palestinian Liberation Organization recognition of Israel right to exist. Encyclopaedia Britannica CD 1999.

Myanmar, Thailand and Bolivia during the 1990s in an attempt to influence these governments' stance on drug trafficking.[188]

Visa bans are often agreed within the UN Security Council.[189] In the United Kingdom visa bans agreed within the framework of the UN Security Council and the Council of the European Union are implemented through the Immigration (Designation of Travel Bans) Order 2000 which is based on Section 8B of the Immigration Act 1971.

International obligations to grant access to the State territory have an impact on the State's ability to impose visa bans, at least when such bans are not prescribed by a UN Security Council resolution.[190] The Immigration (Designation of Travel Bans) Order 2000, for example, excludes the imposition of travel bans when these would be contrary to the United Kingdom's international obligations under the ECHR or the Geneva Convention relating to the Status of Refugees. On the other hand, a breach of treaty obligations resulting from the imposition of sanctions decided by the Security Council will not be problematic since Article 103 of the UN Charter provides that where there is a conflict between obligations under the Charter and obligations under any other international agreement, the former prevail.

2.2.4 Legal implications of a visa under domestic legislation

Under United Kingdom law, a visa is equivalent to 'leave to enter' provided it specifies the purpose for which the holder wish to enter and it is endorsed with the conditions to which it is subject, or, if there are no conditions, with the statement 'indefinite leave to enter'.[191] The concept of a visa as conferring leave to enter is not a novelty. Visas were so treated until the 1960s. With the increase in migration pressure and the alleged spreading of fake or forged documents, immigration officers were instructed in 1965 to treat visas only as *prima facie* evidence of eligibility for entry.[192] The current reversal in policy seems the result of a perception that re-examining passengers who had already undergone an examination as part of the visa issuance procedure is usually unnecessary

[188] Encyclopaedia Britannica CD 1999.

[189] This has been the case, for example, in relation to members of the governments or de facto governments of Haiti (Security Council Resolution 917(1994)), Angola (Security Council Resolution 1127(1997)), Afghanistan (Security Council Resolution 1333(2000)), Liberia (Security Council Resolution 1343(2001)), Sierra Leone (Security Council Resolution 1171(1998)).

[190] See for example, *The Times*, 'Mugabe's Rome visit beats EU travel ban', 8 June 2002.

[191] Immigration (Leave to Enter and Remain) Order 2000, based on Section 3A(3) Immigration Act 1971. Transit visas are not treated as conferring leave to enter. See Section 41 Immigration and Asylum Act 1999 and Article 2 Immigration (Transit Visa) Order 1993.

[192] See Roche (1969) pp. 237-238 and 242.

and too time-consuming.[193] Indeed, as a result of the tendency to 'externalize' immigration control, embassies and consular posts are increasingly equipped to detect false or forged documents and *mala fide* applicants.

The visa will often directly or indirectly determine the legal position of the holder in the issuing State (the length he is allowed to stay in the country, whether he can take up employment, and whether he can claim social benefits).

Under Italian legislation a visa is only *prima facie* proof of eligibility for entry.[194] Once the visitor is on Italian territory he must, within eight days from entry, apply for a residence permit, which is the only document legitimating his stay on the Italian territory for the purpose and duration prescribed in his visa.[195]

2.2.5 Policy functions of visas

Since visa systems are an instrument to control entry into the States, one of their most evident policy functions is to guarantee national security by keeping out 'undesirables'. This security function of visas often intertwines with their function as a foreign policy instrument. The modern international passport and visa systems originated with the First World War with the aim of ensuring the exclusion or internment of enemy aliens. Visa requirements introduced during the First and Second World Wars were subsequently abolished through visa exemption agreements.[196]

Later, France introduced visa requirements in the 1980s in response to terrorist attacks so as to leave only EU nationals and nationals of Switzerland visa exempt.[197] The United Kingdom introduced visa requirements for nationals of Argentina in 1982 on the invasion of the Falklands Islands,[198] and in 1990 when Iraq invaded Kuwait it decided to refuse student visas to nationals of Iraq and later to refuse visas to all Iraqi nationals.[199] Morocco imposed visa requirements on nationals of Algeria in August

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[193] Explanatory Notes to Immigration and Asylum Act 1999 c. 33, para. 28.

[194] Article 7(1) decreto del Presidente della Repubblica of 31 August 1999, n. 394 (1).

[195] Article 5 decreto legislativo of 25 July 1998, n. 286 (as amended) and Articles 9 and 10 of decreto del Presidente della Republica of 31 August 1999, n. 394(1). Special rules exist for tourists and other categories of visitors.

[196] In the 1926 Geneva International Passport Conference, the League of Nations recognized the value of passports as a means of establishing the identity of people and assisting the right to travel. The conference recommended the simplification of issuing formalities and the progressive reduction of visa requirements. Most States concluded agreements for the reciprocal abolition of visa requirements. Visa requirements were reintroduced during the Second World War. After that, the United Kingdom concluded visa abolition agreements with a number of European States and by the 1960s visas were required only from nationals of Communist countries. See Roche (1969) pp. 112, 114 and 126; Bevan (1986) p. 164; Lee (1991) pp. 224-225.

[197] Lee (1991) p. 228.

[198] Statement of Change in Immigration Rules of 6 December 1982.

[199] Statement of Change in Immigration Rules of September 1990 and 18 January 1991.

1995 following the killing of two Spanish tourists in Marrakech by members of an Algerian-Moroccan Islamic group based in France.[200] In the United States after the events of 11 September 2001 there were proposals for the denial of student visas to nationals of seven States considered to be 'sponsors of international terrorism'.[201]

Visa requirements are also used in an effort to keep out crime. The Italian *Legge Martelli*[202] introduced in 1990, for example, based the criteria to determine the list of countries whose nationals would be subject to visa requirements on the nationality of those sentenced for drug trafficking during the three-year period prior to the determination. Similarly, the United Kingdom has recently introduced visa requirements for nationals of Jamaica in an attempt to clampdown on crack cocaine smuggling.[203] Such a ground for imposing visa requirements specifically relates to the activities of individuals rather than to the policies of their State of nationality.[204] The imposition of visa requirements in this context is the first step towards the assessment of individual risks. Under national law, cases where a visa may be denied generally include: (i) where the applicant has been issued with a deportation order; (ii) where the applicant's exclusion is in the national interest; (iii) where the applicant has failed to respect the time limit and conditions attached to a previous leave to enter; and (iv) where the applicant has been convicted for a crime punishable in the national territory with imprisonment for one year or more.[205] The implementation of such conditions is assisted by a list of individuals to whom visas must be denied.

Within the context of visas as an instrument contributing to 'internal security', one of the primary policy functions of visa regimes today is control over migration inflows. Since the 1980s visa requirements have been imposed by Western European States on nationals of countries deemed to be 'pressure to emigrate' countries or producers of

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[200] British Encyclopaedia 99 CD.

[201] *The Guardian*, 'US abandons changes to student visa policies', 26 November 2001.

[202] Law n. 37/90, *Gazzetta Ufficiale* 49, February 1990.

[203] *The Guardian*, 'Visa move to stem drug trade', 11 February 2002.

[204] On the significance of this shift see Guild (2001) p. 34.

[205] With regard to United Kingdom law, see the Immigration Rules, para. 320(1)-(19). See also Sections 22(1) and 2(a) of the Anti-terrorism, Crime and Security Act 2001, C. 24, under which leave to enter or remain in the United Kingdom may be refused to a person who has been certified by the Secretary of State to be a 'suspected international terrorists'. With regard to Italian law, see Articles 4(3) and (6) decreto legislativo of 25 July 1998, n. 286 (as amended) and decreto del Presidente della Repubblica of 31 August 1999, n. 394. These mention as a possible ground for exclusion that the applicant has been convicted of offences relating to smuggling immigrants or trafficking in people for the purpose of prostitution or exploitation of minors.

asylum-seekers.[206] The United Kingdom, for example, introduced visa requirements for Iranians in 1980 following the revolution, for nationals of Sri Lanka in 1985 arguing that Tamils were economic migrants, for nationals of India and Bangladesh in 1986, for nationals of Nigeria and Ghana in 1987, for nationals of Turkey and Haiti in 1989, for nationals of Uganda in 1991 and for nationals of Zimbabwe in 2002.[207]

Most Member States of the EU introduced visa requirements for nationals of Bosnia-Herzegovina in 1993.[208]

Often, visa requirements are lifted under various conditions such as the conclusion of re-admission agreements, undertakings as to the enactment of measures to combat travel document fraud and trafficking, and the adherence to human rights instruments, which contribute to the classification of the third country as 'safe' in the context of assessing asylum applications.[209]

In the context of immigration control, visa regimes are generally described as 'external' measures (i.e. aimed at preventing the arrival of migrants). They are complemented by a number of other measures such as carrier sanctions,[210] border controls, information campaigns in source and transit countries, training of airline staff and immigration officers and the posting of liaison officers for the detection of fake or forged documents. External measures are generally seen less problematic than 'internal' ones.[211] State action in relation to 'within-the-country immigrants' is limited by human and civil

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[206] Such development is part of the policies of Western European States of halting primary immigration and reducing secondary (family re-unification) immigration and asylum inflows. Such restrictive immigration policies were firstly introduced in the late 1960s (much later in the case of Southern European States) and signalled the end of the labour recruitment policies that had been practice from 1945 until then. For an account see Hammar ed. (1985); Collinson (1994). For an analysis of the justification for such restrictive policies see Hakura (1998).

[207] Statements of Change in Immigration Rules of May 1985, October 1986, 29 January 1987, 14 January 1989, 26 March 1991. See also *The Guardian*, 'Zimbabweans must get a visa to enter the UK', 8 November 2002. Already in 1939 visa requirements were imposed by the United Kingdom on nationals of Germany and Austria to control the inflows of Jewish refugees resulting from the rise of the Nazi party and the introduction of anti-Semitic laws. See Roche (1969) pp. 112, 114 and 126.

[208] In April 1993 only Denmark, Italy, Spain, Portugal and France (this latter requiring a letter of sponsorship) did not require visas from Bosnians. See Collinson (1994) p. 140. Moreover, the fact that no Member State of the EU had a diplomatic mission in Bosnia, made necessary for Bosnians to travel to a third country in order to seek a visa for a Member State. In such situation asylum could be refused as the principle of 'safe third country' requires the asylum-seeker to apply for asylum in the first safe country it enters. See Guild and Niessen (1996) p. 298.

[209] Visa requirements were lifted by the European Community for nationals of Hong Kong and Macao in 2001 in return for the conclusion of re-admission agreements. See Commission Green Paper for a Return Policy at para. 4.1.1, COM (2002) 0175/final.

[210] Penalties for airlines or other carriers transporting passengers lacking the necessary documentation or using false documents.

[211] Internal measures include identity checks, residence and work permits requirements, employer sanctions, inspections, removal, restrictions on access to social benefits, restrictions on legal integration, etc.

rights, [212] it is more costly, and may involve unpopular measures such as identity checks.

Visa systems have resulted in the development of a number of criminal activities. An underground industry has emerged for the production of fake visas and passports, which has in turn led to the introduction of increasingly sophisticated counterfeit-proof passports and visas. More people attempt to cross borders illegally often relying on the services of traffickers, which has led governments to fortify borders and introduce severe penalties for traffickers. Moreover, many illegal immigrants are visa overstayers.[213]

Among the new developments with regard to visas as an instrument of immigration control is the tendency towards transforming visas into identity documents and creating databases containing information on visas issued or denied. At EU level, measures have been agreed, following the events of 11 September 2001, providing for the insertion of biometric data in the visa and for the creation of a database containing information on visa holders.[214]

Apart from security and foreign policy considerations, many other factors are relevant in shaping visa policies. The facilitation of economic activities and tourism may be a reason to practise a more relaxed visa policy. Interest in tourism was one of the reasons why Italy and Spain, before their entry into Schengen, pursued a relaxed visa policy.[215] A desire to facilitate global economic activities, for example, has resulted in proposals to create a GATS Card, which would take the place of or require the automatic issue of visas, work or residence permits for the period of employment.[216] The objective of facilitation of movement for transfrontier workers may also result in special arrangements. Also, ethnic links may result in special arrangements to facilitate cross-

[212] As Hollifield states: 'Respect for human (and civil) rights can compel liberal states...to exercise caution in dealing with migrants. Purely realist behaviour by states towards migrants (and refugees) has become increasingly problematic; hence international migration has developed and important humanitarian and political, as well as economic dynamic, making it difficult for any state with liberal pretensions to regulate it'. Hollifield (1992) p. 578.

[213] In the United Kingdom, plans to adopt a financial bond scheme for visitors under Sections 16 and 17 of the Immigration and Asylum Act 1999 were finally abandoned on 28 July 2000, the *Guardian*, 'Immigration bond scheme dropped', 29 July 2000.

[214] See Chapters 4 and 5.

[215] In Italy, before the *Legge Martelli*, nationals of 78 countries were exempt from tourist visas. See Circolare del Ministero dell'interno, 19 August 1985, n. 559/443/225388/2/4/6/ reproduced in Nascimbene (1988) p. 221.

[216] Guild (2001) p. 64.

border movement.[217] The objective of achieving national territorial continuity may also result in special arrangements with third countries regarding transit through their territory when such transit is necessary to travel from one part of the country to another.[218]

3. Conclusion

Visas are inextricably linked to the concept of the State and to some of its essential functions. They are a symbol of the sovereign right to control entry into the State (which is limited by international law). They play a role in recognition of other States and governments. They are also a foreign policy instrument in the more general sense. Further, they are linked to diplomatic representation abroad. From the domestic point of view, they fulfil a function, that of ensuring internal security and control over territory, on which the very existence of the State is based.

The European Union, in an attempt to reconcile conflicting tendencies towards integration and towards retention of national sovereignty, has been characterized by a search for efficient and effective ways of cooperation which leave ultimately intact the sovereign status of the Member States. This has also been important in the light of the diversity which characterizes Europe. This exercise in reconciliation has resulted in a *sui generis* character for the European Community, and in a three-pillar structure for the European Union whereby those areas more strictly linked to the concept of sovereignty are tackled through the international law method, rather than the more integrationist Community method, at the expense of efficiency and effectiveness.

Cooperation on visas, because of the nature of visas, has most been affected by the conflict between the different forces at the heart of the process of European integration. This has found expression in the constant reformulation of the framework for cooperation and in the fragmented and flexible nature of the ensuing common visa policy.

Cooperation on visas has also been characterized by practical difficulties deriving from fundamental differences between the Member States, and from the fact that visa policy touches on areas (such as diplomatic representation) which remain within the

[217] This is the case, for example, with regard to Romania and Hungary, and also with regard to Ireland and Northern Ireland.

[218] See the example of Kaliningrad in Chapter 5.

competence of the Member States, and in which it has been particularly difficult to achieve greater integration.

The thesis will now consider the formation of a common visa policy against this framework, after introducing the structure of the European Union.

2 THE STRUCTURE OF THE EUROPEAN UNION

1. Introduction

The European Union is an entity of a hybrid nature. The Union rests on three Pillars: (i) the First Pillar is the European Community; (ii) the Second Pillar is Cooperation on Foreign and Security Policy (CFSP); (iii) and the Third Pillar is Judicial and Police Cooperation in Criminal Matters (PJC). Notoriously, the three Pillars are of a different nature. The European Community is an international organization with international legal personality and the capacity to conclude treaties. Internally the Community is characterized by a special legal method which presents some of the characteristics typical of the constitutional order of federations. These features, whose foundation rests on the controversial claim that the Community established a 'new legal order', have called into question the very classification of the Community as a treaty regime.[1]

The Second and Third Pillars are essentially 'intergovernmental'. The relationship between the Member States within the Second and Third Pillars is governed by the rules of public international law.[2] The choice for a looser method of cooperation in these fields is dictated by a desire on the part of the Member States ultimately to maintain national autonomy in these areas. In particular, national autonomy in the field of foreign and security policy (i.e. independence in the conduct of foreign relations) remains a key-defining feature of the State.

As Forster and Wallace explain:

> 'Transfer of effective authority over foreign policy and defence would create – or require – a European federation. Policy cooperation in this field has therefore operated under contradictory pressures, in which the rationality of common action and of sharing scarce resources has been balanced by concern for the preservation of national sovereignty and of diverse national traditions and taboos. Thirty years after the establishment of European Political Cooperation, preoccupation with procedure, status and constitutional authority remains at the heart of this policy domain, and is reflected in its weak institutionalization and marginal policy output'.[3]

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[1] As de Witte points out: 'The argument linking supremacy/direct effect and the nature of EC law has gradually acquired an element of circularity. At first, supremacy and direct effect were to be recognized because the EC Treaty was unlike other international treaties...but now...the direction of the argument is often reversed: EC law is now often presented as being unique because it is endowed with direct effect and supremacy. De Witte (1999) p. 208.

[2] See Hendry (1993) p. 310; Müller-Graff (1994) p. 495; Picchio Forlati (1999) p. 461; Hailbronner (2000) p. 48; Denza (2002) pp. 14-17.

[3] Forster and Wallace, W. (2000) p. 462.

The situation has been different in relation to the Third Pillar. The introduction of the Third Pillar by the Maastricht Treaty (as opposed to reliance on the Community method) was dictated by the sensitivity of the subject matter and the wide divergences between the Member States. The Third Pillar was however seen by a number of Member States as a 'waiting room' for communitarization, and the Amsterdam Treaty indeed communitarized many of the areas previously within its scope at the price of the opt-out of some Member States.

The different nature of the Pillars initially led writers to treat them as legally 'separate', with important repercussions for a definition of the Union. However, as appears clear from the Common and Final Provisions of the Treaty on European Union (TEU), the aim of the three-pillar structure is to unite the Pillars notwithstanding their differences. The key provisions are those establishing a 'single institutional framework' for the Union and requiring 'consistency' of Union activities.[4]

The concept of consistency (which was first introduced by the Single European Act (SEA)) has notoriously been an ambiguous one.[5] There has been disagreement on how consistency between the Community and intergovernmental cooperation should be achieved. An 'intergovernmental' approach to consistency sees the CFSP as the legitimate forum where political issues should be decided, and the Community as bound to 'implement' CFSP decisions. A 'communitarian' approach to consistency, on the other hand, maintains the independence of the Community system, and advocates achieving consistency through a strengthening of the role of the Community institutions within the intergovernmental Pillars.

The question of the division of competence between the Community and intergovernmental cooperation thus remains open. Should economic matters with political implications be decided within the CFSP or the Community? In practice, on such a choice of constitutional importance depends the applicable decision-making procedure.

The problem of consistency has been tackled in a number of ways. Firstly, some formulae have been devised. One of these is Article 301 EC on economic sanctions.

[4] Article 3 EU.

[5] For the development of the concept of 'consistency' and its practical application see Nuttall (1992) pp. 260-281 and 319-320, and (2000) pp. 25-28 and 181-184.

Article 301 EC provides that once a CFSP decision has been reached on the imposition of sanctions, the Council (acting by qualified majority on a proposal from the Commission) is to give effect to such decision through a Community instrument. Other formulae and practices have been developed by the institutions. Among these are the dual-use goods regime, 'model common positions' and 'mixed' agreements.[6]

Secondly, the problem of consistency has been tackled through the creation of 'procedural and institutional bridges' between the Pillars.[7] Accordingly, the role of the Community institutions within the intergovernmental Pillars has been gradually strengthened. This has led many authors to describe the intergovernmental Pillar as not 'purely' intergovernmental but as a 'third way' between 'intergovernmentalism' and the Community method.[8]

Also, the provisions of the Second and Third Pillars (whether on planning, decision-making, instruments, implementation or representation) have been gradually refined to enable the Pillars to be more efficient, effective, transparent and accountable. In some cases this refinement has meant that the intergovernmental Pillars have assumed some of the positive features of the Community method.[9]

Moreover, a few provisions have been introduced which aim specifically at facilitating the achievement of consistency, although the legal effect of some of them remains controversial.[10] Among these are the Common and Final Provisions of the TEU prescribing common objectives and principles, a 'single institutional framework', and a duty for the Council and the Commission to achieve consistency of the Union's activities.[11] Provisions specifically aiming at consistency further include those on the role of the European Council,[12] and Article 14 EU which reads that 'the Council may request the Commission to submit to it any appropriate proposals relating to the common foreign and security policy to ensure implementation of a joint action'.

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[6] See Timmermans (1996); Rummel and Wiedeman (1998); Hillion (2000b) pp. 1216-1223; Koutrakos (2001) pp. 104-106; Smith, M. (2001) p. 185; Denza (2002) pp. 103 and 303-304.
[7] Schmalz (1998). See also Wessel (1999) p. 304.
[8] Anderson, den Boer and Miller (1994) p. 116; O'Keeffe (1995) p. 901; Regelsberger and Wessels (1996); Rossi (1997) p. 103.
[9] Denza (2002) pp. 5-32.
[10] For example, to what extent are European Council guidelines legally binding on the Commission in view of Article 47 EU? See Timmermans (1996) p. 68. This uncertainty remains linked to the fact that the constitutional issue of how consistency is to be achieved remains unresolved.
[11] Articles 2, 6 and 3 EU.
[12] Articles 4 and 13 EU.

Thirdly, the Court of Justice has also proved to be a 'consistency insurer'. In the *Airport Transit Visas Case*,[13] the Court affirmed its jurisdiction, in accordance with Articles 46 and 47 EU, to decide on the demarcation of competence between the Community and the intergovernmental Pillars. The Court has also affirmed its jurisdiction to assess whether powers retained by the Member States are *exercised* in a manner consistent with Community law.[14]

While the Court does not have jurisdiction to interpret provisions of a 'mixed' agreement falling within the exclusive competence of the Member States, it is apparent that it has jurisdiction to interpret provisions of association agreements which relate to a field covered by the Treaty.[15]

The Court, on the basis of the 'single institutional framework', has also held that certain Treaty rules applicable to the institutions apply in an across-the-pillars fashion.[16]

The three-pillar structure may therefore be seen as a further stage in a continuing process which aims at achieving consistency between the Community and intergovernmental cooperation in a situation where it is not possible to sharply divide competence between the two frameworks. Three combining factors seem to underlie the pillar construction: (i) A determination on the part of the Member States (or at least some of them) to maintain their status of sovereign States, which dictates reliance on the intergovernmental method for foreign and security policy (the 'policy appropriateness' argument); (ii) A quest for greater efficiency and effectiveness for intergovernmental cooperation, which could imply an alignment of the intergovernmental method to that of the Community (the 'policy effectiveness' argument); (iii) A determination to maintain the independence and integrity of the Community system, which has proven efficient and effective.

The picture which emerges from the pillar structure and the search for consistency is one of convergence between the intergovernmental and the Community methods.

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[13] Case C-170/96 *Commission v. Council* [1998] ECR I-2763.

[14] Cases C-367/89 *Aime Richardt* [1991] ECR I-4621; C-70/94 *Werner v. Germany* [1995] ECR I-3189; C-83/94 *Leifer* [1995] ECR I-3231; C-432/92 *Anastasiou* [1994] ECR I-3087; C-124/95 *Centro Com* [1997] ECR I-81. See Article 10 EC which provides that the Member States 'shall abstain from any measure which could jeopardize the attainment of the objectives of the EC Treaty'. For an analysis see Klabbers (2002) p. 167.

[15] Case 12/86 *Demirel* [1987] ECR 3719. See Macleod, Hendry and Hyett (1996) p. 157; Gaja (2002) pp. 119-120; Eeckhout (2004) pp. 104-105.

[16] Cases T-174/95 *Svenka Journalistforbundent v. Council* [1998] ECR I-2289; T-188/98 *Kuijer v. Council* [2000] ECR II-1959.

It remains to be seen how the system will develop. An underlying point is that the Member States have different attitudes to European integration, with some more keen on maintaining the intergovernmental method for certain areas and others assuming a more relaxed attitude to 'communitarization'. This divergence has already found expression in the introduction of 'variable geometry' arrangements.[17]

In this context, the Constitutional Treaty represents a further step forward. The Constitutional Treaty abolishes the three-pillar structure in an attempt to 'simplify and reorganize the Treaties', but the exact implications of such a move are unclear. Although the pillar structure is abolished, cooperation on foreign and security policy is to be governed by its own special provisions with regard to procedure and institutional competence. Still, the Constitutional Treaty leaves unclear to what extent, if any, Community legal doctrines of a federal character extend to the field of foreign and security policy.[18]

This Chapter will analyse the structure of the European Union. It will firstly briefly outline the essential features of the Community method. Secondly, it will consider the intergovernmental Pillars, and particularly how their provisions have been refined in order to improve them and make coordination with the Community easier. Thirdly, it will consider the relationship between the Pillars. Fourthly, it will consider the changes which will be introduced if the Constitutional Treaty is ratified.

This Chapter (together with Chapter 1) provides the foundation for an analysis of the working of the pillar structure in relation to the common visa policy. Such an analysis is ultimately an attempt to shed some light on the constitutional nature of the Union.

2. Essential features of the Community method

The Community legal method is characterized by special features promoting an exceptional degree of integration between the Member States. Some of these features

[17] A Protocol and an Agreement on Social Policy introduced by the Maastricht Treaty permitted the United Kingdom to opt-out from the provisions of the 1989 Social Charter. Special arrangements also permitted derogation from the provisions on economic and monetary union. See further the opt-outs from Title IV EC (in Chapter 4) and the provisions on enhanced cooperation introduced by the Treaty of Amsterdam. For an appraisal see Dashwood (1998) pp. 213-216.

[18] See Cremona (2003) p. 1351 and (2004) pp. 571-572; Dashwood (2003a) and (2004) pp. 364-366; Denza (2003b). See also de Witte (2004) p. 97, who argues that 'the merger of the *structure* was not accompanied by a merger of the *method*'.

are clearly established in the EC Treaty while others have been developed by the Court of Justice.

Those features contained in the EC Treaty, although making the Community an 'advanced' international organization, are ultimately consistent with a definition of the Community as an 'international organization'.[19] On the other hand, the legal doctrines developed by the Court of Justice (the doctrines of direct effect and supremacy of Community law) give a constitutional federal character to the Community and challenge the classification of the Community as a 'treaty regime'.[20]

The Community seems thus to 'combine the hitherto incompatible'. On the one hand, the Community owes its existence to a treaty among sovereign States, which arguably remain free to amend it as they please,[21] to wind up the Community or to withdraw unilaterally. It operates under the principle of conferral of powers, and the Member States acting as the Council have a prominent role in its functioning. On the other hand, the Court of Justice has claimed that the Community established a 'new legal order' and, on this basis, has developed legal doctrines which create a relationship of a federal constitutional character between the national laws of the Member States and Community law.

In this light, it has been difficult to establish the nature of Community law.[22] What can be said is that the doctrines of direct effect and supremacy are generally accepted by national courts on the basis of national constitutional provisions or acts transferring or delegating sovereignty to the Community rather than on the basis of the higher nature of Community law. This means that these doctrines are accepted by national courts within the overall framework established by their national constitutions. A reflection of this is that national courts may declare Community law invalid (i.e. reject the primacy of Community law) if Community law breaches fundamental constitutional rights,[23] and that they retain the ultimate *Kompetenz-Kompetenz* (i.e. the final say of whether a matter is within Community competence).[24]

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[19] Hartley (1999) pp. 128-139.

[20] See Mancini (2000).

[21] See however the Court of Justice in *Opinion 1/91 (first EEA)* [1991] ECR I-6079.

[22] See, for example, Schilling (1996); Ballarino (1997) pp. 4-9 and 131-141; Weiler and Halter (1998); Hartley (1999).

[23] See the German Constitutional Court in *Brunner v. European Union Treaty* [1994] 1 CMLR 57.

[24] Evidence given by Professor Craig, House of Lords Select Committee on the European Union (2003-04a) q. 7, p. 7 of evidence. As he states, this does not mean to deny that: (i) the Court of Justice has authority to rule on all aspects of the EC Treaty including the boundaries between EC and Member States competences; (ii) national courts generally avoid direct confrontation with the Court of Justice; and (iii) the national courts' approach potentially threatens the uniform application of EC law. See q. 3, pp. 4-5 of evidence.

It seems that Article I-5a of the Constitutional Treaty[25] which 'constitutionalizes' the principle of primacy of EU law would not in principle resolve the discrepancy between the national courts' and the Court of Justice's approaches, but it would perhaps increase the pressure to resolve the issue before or after ratification.[26]

The essential characteristics of the Community method are as follows.

First, the Community presents a very sophisticated institutional framework.[27] The task of proposing legislation is entrusted exclusively to the Commission, an independent body dedicated to the achievement of the Community long-term interests.[28] The Commission is also the body that negotiates, under Council's directives, international agreements to be concluded by the Community, and which represents the Community in international organizations and fora on matters for which the Community has exclusive competence. The Commission is also responsible for the implementation of Community policies.[29]

The entrustment of these functions to an independent body is meant to ensure that the Community serves the 'common interest' rather than the Member States' specific national interests. It also ensures a constant flow of proposals and coherence in policy development. Moreover, the fact that the Commission is required to publish its proposals and amendments to these ensures transparency of the law negotiating process.[30]

The Commission also fulfils the role of 'guardian of the Treaty'. It has a duty to ensure the enforcement of Community obligations by the Member States and may for this purpose have recourse to the Court of Justice.[31]

The Council, since the SEA of 1986, generally adopts internal legislation by qualified majority voting.[32] Decisions to conclude international agreements are also generally

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[25] See provisional consolidated version of the draft Treaty establishing a Constitution for Europe, 25 June 2004, CIG 86/04.

[26] Evidence given by Professor Craig, House of Lords Select Committee on the European Union (2003-04a) q. 17, p. 9 of evidence.

[27] The account given is meant only to be a sketch. For a full account of the institutional framework see, for example, Nugent (1999) pp. 101-317.

[28] The Council may amend Commission's proposals only by unanimity.

[29] See however the 'comitology' phenomenon, Nuttall (2000) p. 28.

[30] Denza (2002) p. 10.

[31] Articles 211 and 226 EC.

[32] As Hooghe and Marks state in the original Treaty of Rome there were at least as many treaty provisions envisaging majority voting as unanimity but a 'veto culture' existed (the so called Luxembourg compromise), Hooghe and Marks (2001) p. 17.

subject to qualified majority voting, except for association agreements and agreements covering fields for which unanimity is required for the adoption of internal legislation.
The European Parliament, directly elected since 1979, has an ever-increasing role within the Community rule-making process. Under the 'co-decision' procedure, which has been extended and simplified by the Treaty of Amsterdam, the Parliament has an opportunity to shape the final outcome of legislation.[33] Under the 'assent' procedure, it can veto the adoption of a measure. Under the 'consultation' procedure it has a legally enforceable right to be consulted.[34]

The Court of Justice has compulsory and extensive jurisdiction under the Treaty. The Court may review the conformity of action by the Community institutions with the Treaty and the conformity of the Member States' action with primary and secondary Community law.[35]
With regard to actions of the second type, under the preliminary reference procedure in particular, the Court has jurisdiction to interpret primary and secondary Community law and consider the validity of secondary Community law on a reference from any national court.[36] Although this procedure is on the face of it designed to ensure a uniform interpretation and application of Community law, in practice, given the acceptance of the doctrines of direct effect and supremacy of Community law by national courts, it can result in a national court declaring, under more or less clear directions from the Court of Justice, that a national measure cannot be applied because it violates Community obligations. Given the keenness of individuals to invoke Community law and the binding effect of national courts' judgements on their governments, such a

[33] Article 251 EC.
[34] Cases 138/79 *Roquette Frères v. Council* [1980] ECR 3333; 139/79 *Maizena v. Council* [1980] ECR 3393.
[35] With regard to actions of the first type, firstly, the Court may, under Article 230 EC, rule on the validity of secondary Community legislation on the ground of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty (including the general principles of Community law) or misuse of power, on request from a Member State, a Community institutions or, subject to strict rules as to their locus standi, a natural or legal person. Secondly, the Court may, under Article 232 EC, rule on a claim from a Community institution or a Member State that a Community institution has 'failed to act' when it had an obligation to do so. Thirdly, in accordance with Article 300(6) EC the Council, the Commission or a Member State may request the Court to deliver an opinion as to the compatibility of a proposed Community external agreement with the Treaty. With regard to actions of the second type, the Court may, *inter alia*, under Articles 226 and 227 EC, rule on a claim from a Member State or the Commission that a Member State has 'failed to fulfil an obligation' under Community law. A Member State so in breach must take the necessary measures to comply with the Court's judgement, and the Court has the power to fine a Member State that fails to do so. Moreover, in *Francovich* (Case C-6 and 9/90 [1991] ECR I-5357) the Court held that a Member State is liable for loss and damage caused to individuals as a result of a breach of Community law for which it is responsible.
[36] Article 234 EC.

procedure becomes a formidable instrument to ensure compliance with Community obligations.

Another special feature of the Community method is the 'direct applicability' of Community legislation in the legal systems of the Member States. Regulations are immediately directly applicable, and their transposition into a national instrument is prohibited. Directives leave discretion to the national authorities only as to the 'form and method' by which their objective is to be achieved.

Uniform direct applicability is a feature that distinguishes Community law from international law. With very few and limited exceptions,[37] the effect of international law in the legal system of States depends on their constitutional approach to incorporation. In States that adopt a dualist approach, international law instruments will take effect in the internal legal system only after they have been transposed into national measures. Given the long time ratification by national parliaments usually takes, Community law thus presents the practical advantage of becoming applicable swiftly and at a precise and predictable point in time.[38]

Notoriously, the other side of the coin is the so-called 'democratic deficit'. Given that the Council is not directly elected (and may take decisions by qualified majority) and that the European Parliament has a weak position in the legislative process,[39] direct applicability causes a democratic deficit which becomes increasingly serious as Community competence expands. The effectiveness of Community law (as resulting from the doctrines of direct effect and supremacy) highly exacerbates this democratic deficit.[40]

The answer that has been given to the democratic deficit focuses on a progressive strengthening of the roles of the European Parliament (particularly in the light of the extension of qualified majority voting in the Council)[41] and of national parliaments. The

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[37] See Cassese (2001) pp. 79-85.

[38] Denza (2002) p. 12.

[39] Not only because of the limited powers of the European Parliament against the Council in the law-making process, but also because of the citizens' weak perception of the European Parliament as their direct representative.

[40] See Weiler (1999) p. 38, who holds that the Member States accepted the 'constitutionalization' of the Community legal structure also because it enhanced the powers of their governments. See also Ballarino (1997) p. 45, who argues that 'normative supranationalism' was paralleled by a movement towards 'intergovernmentalism' at the level of policy-making, reflected in particular in the increased importance of the European Council.

[41] The 'consultation' procedure was the only one envisaged by the original EC Treaty. The SEA introduced the 'co-operation' (now used only in very limited cases) and 'assent' procedures. The Maastricht Treaty introduced the 'co-decision' procedure, which has been extended and simplified by the Treaty of Amsterdam. In general the Maastricht and Amsterdam Treaties have strengthened the

Protocol on the Role of National Parliaments in the European Union[42] attached to the Treaty of Amsterdam provides that all Commission consultation documents are to be 'promptly' forwarded to national parliaments. Moreover, before a proposal may be placed on the Council agenda there must be a six-week period from the date copies of the proposal have been made available to the European Parliament and the Council so as to allow scrutiny by national parliaments.

The Constitutional Treaty strengthens the role of national parliaments in various ways and particularly by giving national parliaments a 'yellow card' procedure to appraise the principle of subsidiarity.[43]

Addressing the Community democratic deficit through *(inter alia)* a strengthening of the role of national parliaments affirms a refusal to transpose the national model of parliamentary democracy to the European level, which is underpinned by the lack of consensus on developing the Union into a State.[44]

The most striking feature of the Community method is the effect of Community law in the legal systems of the Member States as it results from the legal doctrines developed by the Court of Justice.

The Court of Justice has ruled that Community law is capable of 'direct effect'.[45] When it is clear, precise and self-sufficient, Community law can be invoked by individuals before any national courts in a Member State, which must afford adequate legal remedies. By developing and requiring a uniform approach to enforcement by individuals, Community law sharply differentiates itself from international law. As mentioned earlier, the effect of international law in the legal systems of States depends on their constitutional approach to incorporation. In States that adopt a dualist approach an international law instrument capable of conferring rights or duties on individuals will not in itself be enforceable in the internal legal system. Only the transposing national measure can be invoked before the national court as a source of rights and duties.

Parliament's role by providing for more intense participation procedures where less intense participation procedures were envisaged. The 'co-decision' procedure has become the rule for the adoption of legislative acts.

[42] OJ 1997 C 340/113.

[43] Article I-9(3) and Protocol on the application of the principle of subsidiarity and proportionality.

[44] See Draetta (1999) p. 45; Verhoeven (2002) p. 71.

[45] Cases 26/62 *Van Gend en Loos* [1963] ECR 1; 41/74 *Van Duyn* [1974] ECR 1337. International agreements to which the Community is a party, as an integral part of Community law, may be capable depending on their nature of direct effect: Cases 87/75 *Bresciani*[1976] ECR 129; 104/81 *Kupferberg* [1982] ECR 3641.

Parallel to the doctrine of direct effect, the Court of Justice developed the doctrine of supremacy of Community law.[46] According to the doctrine of supremacy, Community law takes precedence over national law to the effect that national law which conflicts with Community law, including national constitutional law, becomes inapplicable.[47] The doctrine of supremacy again sharply distinguishes Community law from international law. Although international law regards itself as hierarchically superior to national law and compliance with national law cannot justify a failure to comply with international law obligations, international law remains result orientated. A conflict between obligations emanating from international law and national law does not result in the invalidity of one or the other obligation but in responsibility for breach of the relevant obligation.[48]

The doctrine of supremacy realizes in full the effect of the doctrine of direct effect. While the doctrine of direct effect results in the automatic incorporation of Community law in the internal legal systems of the Member States regardless of their constitutional approach, the doctrine of supremacy establishes a hierarchy of norms to the effect that Community law may not be set aside by national law adopted subsequently or by constitutional norms.[49]

Two other important doctrines characterize the Community legal method: the doctrines of implied powers and pre-emption.

The Community, as an international organization, operates under the principle of attribution of (defined and limited) powers. The Court of Justice has, however, adopted a purposive approach to the determination of the scope of Community powers. It has ruled that the existence of a given objective or task implies the existence of any power

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[46] Cases 6/64 *Costa v. ENEL* [1964] ECR 585; 106/77 *Simmenthal* [1978] ECR 629.

[47] It remains for national courts to declare national law inapplicable.

[48] See however Joined Cases C-10-22/97 *IN.CO.GE* [1998] ECR I-6307, where the Court held that the doctrine of supremacy does not render a national rule automatically invalid, but requires a national judge to refrain from applying it. See Dashwood (2004) p. 378.

[49] See, however, the position expressed by the German Constitutional Court in *Brunner, supra* n. 23. The German Constitutional Court held, at para. 23, that: 'If a Council decision made in accordance with Titles V or VI of the Union Treaty should be implemented by a legal measures of the European Community...and constitutional rights were infringed as a result, then the European Court or alternatively the Federal Constitutional Court would offer adequate protection of those rights. Here too, the Constitutional Court and the European Court are in a relationship of co-operation for the guarantee of constitutional protection, under which they complement one another'. Further, at para. 49, the Court held that: '[T]he Federal Constitutional Court will review legal instruments of European institutions and agencies to see whether they remain within the limits of sovereign rights conferred on them or transgress them.'

necessary to carry it out.[50] Such an approach lies at the basis of the doctrine of implied powers regarding the Community external powers. The doctrine of implied powers recognizes that the attainment of a Community internal objective may require the exercise of external powers by the Community. This may be so when the attainment of the Community objective is 'inextricably linked' to the exercise of an external power by the Community,[51] or when the exercise of an external power by the Community is necessary in order to preserve common internal rules.[52] Accordingly, external Community competence does not exclusively arises from an *express* conferment, but it may also be *implied* from Treaty provisions or acts adopted by the Community institutions.[53]

The Court of Justice's approach to the determination of the scope of Community powers has been regarded suspiciously by the Member States particularly in the light of another related doctrine developed by the Court, the doctrine of pre-emption or exclusivity.[54] According to the doctrine of pre-emption (which may partly be seen as a reflection of the doctrine of supremacy), the existence of a Community rule will preclude even parallel national legislation.[55] Also, whenever the Community adopts common rules internally, the Member States are precluded from undertaking external obligations that may affect those rules, and the Community alone is in a position to assume contractual obligations towards third countries.[56]

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[50] Case 281/85 *Germany and others v. Commission* [1987] ECR 3203. See however the Court's position (following the judgement of the German Constitutional Court in *Brunner*) as to the scope of Article 235 EC, expressed in *Opinion 2/94 (ECHR)* [1996] ECR I-1759. The Court, at para. 30, held that: 'On any view, Article 235 cannot be used as a basis for the adoption of provisions whose effect would, in substance be to amend the Treaty without following the procedure which it provides for that purpose'.

[51] *Opinion 1/94 (WTO)* [1994] ECR I-5267; *Opinion 2/91 (ILO Convention)* [1993] ECR I-1061; *Opinion 1/76 (Rhine Navigation)* [1977] ECR 741.

[52] Case 22/70 *Commission v. Council (AETR)* [1971] ECR 262.

[53] *AETR Case, supra* n. 52, para. 4.

[54] For example, the German Constitutional Court held at para. 99 of the *Brunner* judgement, *supra* n. 23, that: 'Whereas a dynamic extension of the existing Treaties has so far been supported on the basis of an open-handed treatment of Article 235 of the EEC Treaty as a 'competence to round-off the Treaty' as a whole, and on the basis of considerations relating to the 'implied powers' of the Communities, and of Treaty interpretation as allowing maximum exploitation of Community powers ('*effet utile*'), in future it will have to be noted as regards interpretation of enabling provisions by Community institutions and agencies that the Union Treaty as a matter of principle distinguishes between the exercise of a sovereign power conferred for limited purposes and the amending of the Treaty, so that its interpretation may not have effects that are equivalent to an extension of the Treaty. Such an interpretation of enabling rules would not produce any binding effects for Germany'. See also the subsequent position of the Court of Justice as to the use of Article 235 EC, expressed in *Opinion 2/94 (ECHR), supra* n. 50.

[55] Cases 16/83 *Prantl* [1984] ECR 1299; 222/82 *Apple and Pear Development Council v. Lewis* [1983] ECR 4083; 272/83 *Commission v. Italy* [1985] ECR 1057; 216/84 *Commission v. France* [1988] ECR 793.

[56] *AETR Case, supra* n. 52. Exclusive Community competence thus depends on the extent of internal harmonization. If a field is regulated exhaustively by Community rules, the Community will have exclusive competence. On the other hand, if common rules establish only minimum standards, the

The doctrines of implied powers and pre-emption aim at maintaining uniformity and imply a considerable loss of national autonomy. Such doctrines further differentiate the Community method from the international law method, which, besides requiring compliance with international law obligations, does not limit the actions of States.[57]

3. The intergovernmental Pillars

3.1 The Maastricht Treaty

3.1.1 The Second Pillar

Cooperation on foreign policy began in 1969. European Political Cooperation (EPC), as cooperation on foreign policy was named, was then kept strictly distinct from the Community system. As Nuttall explains:

> 'EPC was designed to operate in such a way as to guarantee that national sovereignty in the conduct of foreign policy should not be diminished by contamination with the Community system. In the early years, not only was the Commission excluded from many of EPC's activities, but Member States were reluctant to make use of Community instruments to implement the policies of EPC. Countries like France, and later Denmark and Greece, anxious to keep the intergovernmental nature of Political Cooperation unsullied, were reticent, but so also were countries like the Netherlands which did not wish the methods of EPC to be imported into the Community'.[58]

Since then, the development of cooperation on foreign policy has been driven by two factors. The first factor is a search for greater efficiency and effectiveness which has led to concentration on improving EPC procedures, with some Member States and the Commission advocating an alignment of EPC procedures to those of the Community. The second factor is a need for consistency between foreign policy resulting from political cooperation and the Community external policies.[59] The question of how consistency should be achieved (through an intergovernmental or Community emphasis) is of constitutional importance and remains unanswered. What has been

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Member States will retain a degree of control and competence will be 'shared'. See *Opinion 2/91 (ILO Convention)* and *Opinion 1/94 (WTO)*, *supra* n. 51. Even when common rules have not been adopted, the Community may have exclusive external competence. This will be so when the exercise of exclusive external competence by the Community is 'inextricably linked' with the attainment of a specific Community objective. See *supra* n. 51.

[57] Denza (2002) p. 17.

[58] Nuttall (1992) p. 260. See also Baches Opi and Floyd (2003) p. 303.

[59] See for example the 1973 Copenhagen Report, 1981 London Report, the 1983 Solemn Declaration of Stuttgart and Article 30.5 of the SEA 1986. See Schmalz (1998) p. 422-424; Nuttall (2000) p. 26-27;

reached so far is a compromise that relies on cooperation between the two systems, which is often successful, but does not rule out the possibility of conflict.[60]

Thus, over the years EPC evolved into a progressively more formal and institutionalized system and one increasingly closely linked to the Community. The first significant step in this direction was the SEA of 1986 whereby EPC was for the first time put in treaty form and its provisions featured alongside those for amending the Treaty of Rome.[61] Article 30.5 of the SEA prescribed that 'the external policies of the European Community and the policies agreed in European Political Cooperation must be consistent. The Presidency and the Commission, each within its own sphere of competence, shall have special responsibility for ensuring that such consistency is sought and maintained'.

Notwithstanding some success and the fact that it slowly but significantly transformed working practices within national diplomatic services,[62] EPC became increasingly criticized for its inability to deal adequately with international crises, its reactive character and its confinement to declaratory diplomacy.[63]

The collapse of Communism in Eastern Europe and the reunification of Germany were the main events that led to greater focus on the issue of 'political union'. The Dublin European Council of 25-26 June 1990 reached agreement on convening an Intergovernmental Conference (IGC) on Political Union on 14 December 1990, which was to parallel the IGC on Monetary Union. The Franco-German initiative for an IGC proposed to concentrate on strengthening the democratic legitimation of the Union and its institutions, ensuring coherence of Union activities, and defining and implementing a common foreign and security policy. What a common foreign and security policy meant was however unclear until the Rome European Council of 27 and 28 October 1990.[64]

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[60] This compromise is the pillar structure. The pillar structure maintains the intergovernmental method for foreign and security policy, declares the independence of the Community, and at the same time introduces a 'single institutional structure' and a requirement of consistency.

[61] Nuttall (2000) p. 19.

[62] Forster and Wallace, W. (2000) p. 465; Denza (2002) p. 39; Baches Opi and Floyd (2003) p. 307.

[63] Regelsberger and Wessels (1996) pp. 32-34. See also Forster and Wallace, W. (2000) p. 466, who conclude that there was little evidence that EPC had exerted any direct influence on Arab-Israeli relations or on events in Sub-Saharan Africa or in the Persian Arabic Gulf. See also Soetendorp (1999) pp. 93-113; Baches Opi and Floyd (2003) pp. 304-306. For an in-depth analysis of EPC see Nuttall (1992).

[64] Nuttall (2000) p. 126.

Although there were ambitions for closer integration of EPC within the Community structure, during the 1990 IGC the Member States ultimately expressed a preference for the draft Treaty prepared by Luxembourg as the basis for negotiations.[65] This draft Treaty essentially maintained the distinction between the Community and EPC by proposing a three-pillar structure for the European Union whereby the Community would be complemented by provisions on intergovernmental cooperation on a Common Foreign and Security Policy and on Justice and Home Affairs. This draft Treaty was severely criticized by the Commission for perpetuating the division between the Community and EPC.[66]

The Treaty on European Union agreed at Maastricht in February 1992 confirmed the Luxembourg proposal, and introduced a three-pillar structure for the European Union. The Common and Final Provisions of the TEU held the three Pillars together. Of particular significance were those establishing a 'single institutional framework' and requiring 'consistency' of Union activities.[67]

Title V EU contained the provisions on a CFSP. The scope of the CFSP was generously defined as covering 'all areas of foreign and security policy'.[68] Specific objectives included safeguarding the independence of the Union, strengthening the security of the Union and that of the Member States, preserving peace and strengthening international security, developing and consolidating democracy and the rule of law, and respect for human rights and fundamental freedoms.[69] These objectives were to be pursued by the Union through two forms of activity: (i) systematic co-operation between the Member States, and (ii) the gradual implementation of joint action in areas where the Member States had important interests in common.[70] Systematic co-operation between the Member States entailed: (i) an exchange of information and consultation within the Council on matters of general interest, (ii) the definition of 'common positions', and (iii) the co-ordination of the Member States' action in international organizations and at

[65] Notoriously, the more integrationist Dutch Draft Treaty was rejected.
[66] Nuttall (2000) p. 164.
[67] Article C EU.
[68] Article J.1(1) EU. See Neuwhal (1994) pp. 228-233. Security was also included as an issue for co-operation (arguably particularly following the events of the Gulf War), a remarkable development from EPC.
[69] Article J.1(2) EU.
[70] Article J.1(3) EU.

international conferences. Co-operation was also envisaged between the Member States' embassies and consular posts and the Commission delegations.[71]
On the other hand, what was meant by 'the gradual implementation of joint action' was not spelt out. The inclusion of the concept of 'joint action', implying operational activity, was however an improvement from EPC which concentrated mainly on systematic co-operation.

While in line with the intergovernmental method the Member States continued to play the central role under the CFSP, a significant development was that now, as a reflection of the principle of the 'single institutional framework' introduced by Article C EU, the Member States when taking decisions acted as the EC Council. Previously, even proposals to merge EPC's and Council's meetings, in an attempt to align procedures, had been rejected, and the only concession granted was that EPC issues could be discussed during EC Council meetings.[72] Under the CFSP the EC Council became the main executive body and was specifically invested with the task of ensuring the 'unity, consistency and effectiveness of action by the Union'.[73]
The Council was to define and implement the CFSP on the basis of general political guidelines adopted by the European Council. It was to be served by a Political Committee consisting of Political Directors. The primary role of the Committee of Permanent Representatives (Coreper) – the body responsible for preparing the work of the Council within the Community framework – was however safeguarded.[74] Proposals prepared by the Political Committee were transmitted to the Council through Coreper, which normally commented only on proposals with First Pillar implications.[75]
The Council could adopt two kinds of measures: common positions and joint actions.[76] These were left undefined. It was however prescribed that joint actions were to spell out their scope, the Union's objective, if necessary their duration, and the means, procedures and conditions for their implementation.
The general voting rule remained unanimity. Qualified majority voting was envisaged only for procedural questions and for matters for which the Council so decided.

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[71] Articles J.2 and J.6 EU.
[72] See the 1981 London Report, the 1983 Solemn Declaration of Stuttgart and the 1986 SEA. See Denza (2002) p. 38.
[73] Articles J.8(2) and J.11 EU.
[74] Article J.8(5) EU.
[75] On the problems in relation to the division of competence between the Political Committee and Coreper, and the fusion of the EPC and the Council working groups, see Regelsberger and Wessels (1996) p. 36; Wessel (1999) pp. 79-85.

The right of initiative was shared between the Member States and the Commission.[77] In practice, most proposals originated from the Presidency.

The Presidency was invested with the task of representing the Union on CFSP matters and implementing the common measures by expressing the Union position in international organizations and conferences. The entrustment of these functions to the Presidency emphasized the intergovernmental character of the CFSP. At the same time, it undermined continuity of approach. This lack of continuity was only partly redressed by the fact that the Presidency was to be assisted by the previous and next Presidency (the so called 'troika' formula), and that the Commission was to be 'fully associated'.[78]

The Treaty prescribed mandatory effect for common positions and joint actions. This was a remarkable development from EPC, whose instruments carried no legal force. Under the CFSP, the Member States were to 'ensure that their national policies conform to common positions'.[79] They were to uphold common positions in international organizations and at international conferences, regardless of whether all Member States participated.[80] The Member States embassies and consular posts and the Commission's delegations were also required to co-operate in ensuring that common positions and measures were complied with and implemented.[81] Joint actions were to 'commit the Member States in the positions they adopt and in the conduct of their activity'.[82]

Common positions and joint actions were thus intended to bind the Member States under international law. The Treaty did not however provide for enforcement mechanisms.

The jurisdiction of the European Court of Justice was excluded by virtue of Article L EU. The Court had jurisdiction only in relation to the division of competence between the Community and the CFSP by virtue of Article M EU. The exclusion of the Court was due to fears on the part of the Member States that the Court might erode the intergovernmental character of the CFSP through introduction of pro-integration legal doctrines developed within the Community sphere. A further reason for the exclusion of the Court was that the conditions for judicial resolution of disputes did not really exist

[76] Articles J.2(2) and J.3 EU.
[77] Article J.8(3) EU.
[78] Article J.5 EU.
[79] Article J.2(2) EU.
[80] Article J.2(3) EU.
[81] Article J.6 EU.
[82] Article J.3(4) EU.

because of the nature of CFSP measures and the nature of the CFSP itself, which implied the continuing existence of national foreign policies.[83]

As a reflection of the intergovernmental character of the CFSP, the other EC institutions were involved in the CFSP only to a limited extent.

The Commission formally shared a right of initiative with the Member States and was to be 'fully associated' in the activities of the CFSP.[84] The European Parliament was to be 'consulted' by the Presidency on the main aspects and basic choices of the CFSP. The Presidency was to ensure that the views of the Parliament were taken into consideration. The Parliament was to be kept 'regularly informed' by the Presidency and the Commission on CFSP developments. It could submit questions to the Council and make recommendations to it, and was to hold an annual debate on progress in implementing the CFSP.[85]

The operational expenditure of the CFSP was either to be charged to the Member States or, following a unanimous decision of the Council, to the Community budget, in which case the budgetary procedure of the EC treaty would be applicable. In the latter case, therefore, in view of their powers in the Community budgetary procedure, the Parliament and the Commission could increase their influence over CFSP measures.[86]

3.1.2 The Third Pillar

The Third Pillar is considered more fully in Chapter 3 on the development of a common visa policy under the Maastricht Treaty. This section will cover only some essential points.

The Third Pillar marked an important step forward from pre-Maastricht intergovernmental cooperation on JHA as it provided for a more structured framework for cooperation and was inserted among the activities of the newly created European Union.

The institutional and procedural provisions of the Third Pillar reflected its intergovernmental character. The Community institutions (other than the Council) had a very limited role. The jurisdiction of the Court of Justice was excluded. Under Third Pillar provisions, it was however possible to attribute jurisdiction to the Court with

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[83] Denza (2002) p. 312.
[84] Article J.9 EU. Some form of 'association' had been provided for since the 1981 London Report.
[85] Article J.7 EU. The SEA had already provided for the close association of the European Parliament
[86] Article J.11(2) EU. On the institutional disputes in connection with the CFSP financing, see Schmalz (1998) p. 429.

regard to the interpretation and application of conventions adopted under the Third Pillar. This flexibility resulted in endless negotiations in the Council over the role of the Court in individual conventions. The general voting rule was unanimity, with qualified majority envisaged only for procedural and implementing measures. The Commission was granted a right of initiative for some of the areas covered which it shared with the Member States. It however made very little use of it because no agreement existed among the Member States as to the Commission's proper role under the Third Pillar.

The Third Pillar was characterized by some serious structural deficiencies that arguably prevented it from delivering adequate results. It lacked specific objectives. The legal effect of some of its instruments ('joint actions' and 'joint positions') remained unclear and the Member States developed the practice of relying on clearly non-binding instruments, which were often not implemented at national level. International conventions were the only clearly legally binding instruments available under the Third Pillar. As a result of slow and uneven national ratification, they took years before coming into force and no real monitoring of their implementation took place. Moreover, the Third Pillar was characterized by a cumbersome five-layer decision-making structure which considerably hindered decision-making. A further problem was that it overlapped with Community competence with regard to certain areas, which gave rise to bitter disputes between the institutions.

3.2 The Amsterdam Treaty

3.2.1 The Second Pillar

In preparation for the 1996 IGC required under the Maastricht Treaty, the Corfu European Council of June 1994 decided to set up a Reflection Group and invited the Community institutions to prepare reports on the functioning of the TEU.[87]

Both the European Parliament and the Commission advocated the integration of the CFSP and the external competences of the Community into a single framework for the sake of consistency and in order to strengthen the identity of the Union. According to the Commission, the 'single institutional framework' had not proven capable of ensuring consistency between the Community and the CFSP. Both institutions also advocated improving the CFSP through the introduction of qualified majority voting and the strengthening of the role of the Community institutions.[88]

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[87] For an assessment of the functioning of the CFSP under Maastricht see Denza (2002) pp. 85-122.

[88] European Parliament Resolution on the functioning of the TEU with a view to the 1996 IGC; Commission Report for the Reflection Group 1995.

The Reflection Group identified the need for more effective external action. It suggested strengthening the CFSP at the levels of policy formulation, decision-making and implementation. Specific proposals included the setting up of a policy planning unit and the appointment of a High Representative.[89]

The Treaty of Amsterdam, signed on 2 October 1997, introduced various innovations to improve the efficiency and effectiveness of the Second Pillar and ensure consistency between the Community and the CFSP.

The way in which the *Union* is to pursue the objectives of the CFSP was clarified and elaborated, and emphasis was laid on operational action. Accordingly, the Union is to pursue the objectives of the CFSP by: (i) defining the principles and general guidelines of the CFSP; (ii) deciding on common strategies; (iii) adopting joint actions; (iv) adopting common positions; and lastly (v) strengthening systematic co-operation between the Member States.[90]

Common strategies are decided unanimously by the European Council in areas where Member States have 'important interests in common'. They are implemented by the Council in particular by adopting joint actions and common positions.[91]

This new instrument was introduced specifically to further consistency between the Community and the CFSP, and thus increase the effectiveness of Union action.[92] In line with the over-arching role of the European Council envisaged by Article 4 EU, common strategies express the Union's overall position towards a third country or particular theme, bringing together First, Second and Third Pillar issues.

In view of Article 47 EU, it remains doubtful to what extent the Commission and Council are legally bound to implement common strategies through First Pillar measures. Still, since common strategies are defined by the European Council and may create expectations on the part of third countries, the Commission comes under considerable political pressure to execute them. A problem which remains is that common strategies do not rule out the possibility of institutional conflict as to the choice of legal basis for their implementation.[93] In any case, little use has been made of them, arguably as qualified majority voting is prescribed for their implementation.[94]

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[89] Reflection Group's Report 1995, SN 520/95 (Reflex 21). For an assessment of the working of the CFSP under Maastricht, see Baches Opi and Floyd (2003) particularly p. 319.
[90] Article 12 EU. The issue of defence is not considered in this work.
[91] Article 13 EU.
[92] For a critical appraisal see Hillion (2000b) pp. 1228-1235.
[93] Hillion (2000a) pp. 297-300.
[94] See for example Cremona (2004) p. 569.

'Joint actions' and 'common positions' were clearly differentiated. Joint actions are to 'address specific situations where operational action by the Union is deemed to be required'.[95] Common positions are to 'define the approach of the Union to a particular matter of a geographical or thematic nature'.[96] A novelty introduced by the Treaty of Amsterdam in relation to joint actions, with a view to achieving consistency, is that the Council can now request the Commission to submit to it any appropriate proposals to ensure the implementation of a joint action.[97] This provision considerably increases the political pressure on the Commission to execute CFSP decisions within the Community Pillar.[98]

The Treaty of Amsterdam also introduced a provision whereby the Council can conclude international agreements in the field of CFSP (and PJC),[99] while it did not expressly grant the Union legal personality (proposals to that effect having been rejected).[100] Such a provision was accompanied by a Declaration which specified that the provision and any resulting agreement 'shall not imply any transfer of competence from the Member States to the European Union'.

As regards voting in the Council, the Amsterdam Treaty marked a move away from insistence on unanimity by introducing the possibility of 'constructive abstentions' and qualified majority voting for certain cases.[101] Under the provisions on 'constructive abstentions', abstaining Member States can make a formal declaration qualifying their abstention. In such a case, they are not bound by the decision adopted, but are under a

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[95] Article 14(1) EU.
[96] Article 15 EU.
[97] Article 14(4) EU.
[98] Schmalz (1998) p. 436.
[99] Article 24 EU provided that the Council, acting unanimously, could authorize the Presidency, assisted by the Commission to open the necessary negotiations for the conclusion of an agreement with one or more States or international organizations. The Council was to conclude the agreement on a recommendation from the Presidency and the Member States were to be bound by the agreement subject to their national ratification procedures. The Treaty of Nice prescribed action by qualified majority when the agreement was envisaged for the implementation of a joint action or common position. Further, it provided that agreements 'shall be binding on the institutions of the Union'.
[100] Article 24 EU gave new impetus to the discussion as to whether the EU possesses legal personality. See Cremona (1999) pp. 167-168; Neuwahl (2001); Editorial Comments (2001); Denza (2002) pp. 173-178; Dashwood (2003b); Eeckhout (2004) pp.157-160. If the position is taken that the Union has legal personality, the situation is unsatisfactory with regard to possible remedies against the Union since the TEU makes no provision on remedies or responsibility, the ECJ has no jurisdiction over the CFSP and the Union cannot be taken before the ICJ. See Denza (2003a); Vitsentzatos (2003). On the agreements so far concluded see Eeckhout (2004) pp. 159-160.
[101] Article 23 EU. Such a move resulted in particular from irritation at Greek obstruction of common policies on Macedonia and Turkey. See Forster and Wallace, W. (2000) p. 484.

duty to refrain from taking actions likely to conflict with or impede Union's action based on the decision.[102]

Qualified majority voting was introduced for the adoption of joint actions, common positions and other measures on the basis of common strategies, and for the adoption of decisions implementing common strategies. A Member State can oppose the use of qualified majority voting for important and stated reasons of national policy. In such a case, a vote is not taken and the Council can, acting by qualified majority, refer the matter to the European Council.[103]

The Treaty of Amsterdam introduced further important innovations. Firstly, it introduced a Policy Planning and Early Warning Unit (PPEWU) whose tasks include: (i) monitoring and analysing relevant international developments; (ii) providing assessments of the Union's foreign policy interests and identifying areas where the CFSP could focus in future; (iii) providing timely assessments and early warning of events which may have significant repercussions for the CFSP; (iv) producing argued policy options papers to be presented under the responsibility of the Presidency as a contribution to policy formulation in the Council.[104] The Commission is represented in the PPEWU (which strengthens its role in the CFSP and thus contributes towards consistency).

Secondly, it strengthened the external representation of the Union by introducing a 'permanent face', the High Representative for the CFSP, who, as Secretary General of the Council, is to assist the Presidency. His tasks include contributing to the formulation, preparation and implementation of policy decisions, and, when appropriate, conducting political dialogue with third parties.[105] The High Representative also takes part in the new style troika alongside the Presidency and the Commission.[106]

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[102] This provision was strongly criticized on the ground that it has the effect of upgrading the position of a dissenting Member State to a formal act of dissociation. This would not only send a clear sign to third parties that strong disagreement existed between the Member States, but it would also make it difficult for the dissenting Member State to modify its position to conform to that of the Union. See Monar (1997a) p. 419. On the other hand, the possibility of constructive abstentions was described as to 'provide the only means of effecting a CFSP that retains consistency and coherence with the policies adopted within the EC framework'. See Edwards and Philippart (1997) p. 32 quoted in Cremona (1999) p. 169. See also Gormley (1999) p. 60, who holds that 'the constructive abstention technique...effectively recognizes the political reality that a Member State might find itself unable to support a decision (because of particular relations with a third country) yet be unwilling to frustrate Union action'.

[103] This provision has been criticized as amounting to a formal codification of the Luxembourg compromise. See Monar (1997a) p. 420; Dashwood (1999) pp. 215-216.

[104] Declaration to the Final Act on the establishment of a Policy Planning and Early Warning Unit.

[105] Article 26 EU.

[106] Article 18(3) EU.

Furthermore, the Council is given express power to appoint, whenever it thinks necessary, a special representative with a mandate in relation to particular policy issues.[107]

As regards financing, it is provided that operational expenditure is to be automatically charged to the Community, and an Inter-institutional Agreement on financing was reached between the institutions.[108]

The CFSP procedures, following the Treaty of Amsterdam, have been described as 'gradually resembling those of the First Pillar': a single authority is to be responsible for planning and development; a hierarchy of instruments is introduced; the possibility of qualified majority voting is contemplated; representation is strengthened; and the Parliament, as a result of the Inter-institutional Agreement on financing, increased its degree of control.[109]

Furthermore, some provisions were introduced specifically on consistency including those on common strategies, on the Commission's participation in the PPEWU and on the possibility for the Council to request the Commission to put forward proposals for the implementation of joint actions. Still, a number of missed opportunities have been identified.[110]

[107] Article 18(5) EU. For the background to these provisions see Forster and Wallace, W. (2000) pp. 482-484.
[108] Article 28 EU.
[109] See de Zwaan (1998) pp. 188-189; Schmalz (1998).
[110] Monar (1997a) pp. 432-434.

3.2.2 The Third Pillar

During the 1996 IGC leading to the Treaty of Amsterdam, JHA emerged as one of the areas most in need of reform. Given the underlying differences between the Member States, the reforms introduced were marked by extreme complexity and differentiation.[111] Many areas previously within the scope of the Third Pillar were transferred to Community competence.[112] The scope of the remaining Third Pillar is now restricted to police and judicial co-operation in criminal matters – which has dramatically increased in importance and volume – and the Third Pillar has been completely recast.[113]

The Third Pillar now covers, as well as co-operation between the authorities of the Member States, approximation of Member States' legislation on criminal matters.[114] New instruments have been introduced.[115] There are now four types of measures: (i) 'Common positions', which define the Union approach to a particular matter; (ii) 'Framework decisions', which can be used for the approximation of laws and which are binding on the Member States as to their result to be achieved but leave to them the choice of form and method; (iii) 'Decisions', which can be used for any purpose other than approximation of laws; and (iv) 'Conventions'.

The legal effect of each type of instrument is spelt out. All the instruments except common positions are legally binding, while any direct effect of framework decisions and decisions is explicitly excluded.

As regards conventions two important innovations were introduced in an attempt to reduce uncertainty and delays as to their entry into force. Firstly, the Council can by unanimity set a time limit by which the Member States have to begin ratification procedures. Although this time limit does not bind national parliaments, it was believed that it can at least put pressure on the Member States governments to lay conventions before their national parliaments without delay.[116] Secondly, unless otherwise provided, conventions are to enter into force as soon as they are adopted by at least half of the

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[111] Monar (1998) p. 321.

[112] See Chapter 4.

[113] For a critical analysis of justice and home affairs provisions following Amsterdam see Den Boer (1999). She concludes, at p. 320, that 'the new situation under Amsterdam may present us with an even more fragmented picture. Not only will justice and home affairs issues remain scattered across the EU and EC Treaties, and be hurdled by different compartmentalized administrative bodies, the flexibility arrangements and opt-in arrangements will contribute to a rather confusing and heterogeneous set-up. Depending on the issue at stake different voting procedures will apply to different Member States; conventions may be in force in one Member State and not in others; bilateral and multilateral security agreements may give rise to unfavourable coalition building within the Council etc.'.

Member States. This, it was hoped, can exercise additional pressure on the Member States to proceed swiftly with ratification.[117]

It is however apparent that since the new instruments were introduced, the Council has tended to adopt measures in the form of framework decisions and to avoid recourse to international conventions which, because of the failure of national parliaments to proceed swiftly with ratification, have proved to be a too inefficient and ineffective law-making instrument.

Another important innovation is the possibility for the Council to conclude international agreements with third countries on matters covered by the Third Pillar.[118] International agreements envisaged by the new provision of the CFSP can cover matters falling under the Third Pillar. The introduction of this provision underlines the necessity of external action for the attainment of Third Pillar objectives. Also, the CFSP provisions on external representations are now applicable to matters falling within the Third Pillar.[119]

Decision-making in the Council is still by unanimity. However, measures implementing decisions are now to be *automatically* taken by a special qualified majority, and measures implementing conventions are to be taken by a two-thirds majority.[120]

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[114] Article 29 EU.
[115] Article 34 EU.
[116] Denza (2002) p. 25.
[117] Monar (1998) p. 327.
[118] Article 38 EU. The first agreement signed is with the United States and concerns extradition and mutual assistance, see Council doc. 9153/03 (www.statewatch.org). On this see Eeckhout (2004) p. 161.
[119] Article 37 EU.
[120] Article 34(2)(d) EU.

The role of the Community institutions was strengthened. The Commission now shares a right of initiative with the Member States in matters of police and judicial co-operation.[121] The greater role for Commission initiatives was expected to result *inter alia* in a more transparent law-making process.

The role of the European Parliament was likewise strengthened. The Council is now required to consult the Parliament *before* adopting framework decisions, decisions and conventions.[122] Consultation is excluded in the case of common positions, which seem to have no legally binding force. The Parliament is granted a period of no less than three months for the scrutiny of proposed measures.[123]

The role of national parliaments was also strengthened, without prejudice to the Member States internal rules on parliamentary control over the executive. The Protocol on the Role of National Parliaments in the European Union, attached to the Treaty of Amsterdam, prescribed *inter alia* that proposals of 'measures' to be adopted under the Third Pillar are not to be included on the Council agenda for a period of six weeks from the date copies of such proposals are made available to the Council and the European Parliament. Such a period extends the possibility of effective scrutiny of proposals by national parliaments.

The Third Pillar also provides for more extensive jurisdiction for the Court of Justice.[124] Three types of proceedings were introduced. Firstly, the Court can give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions and on the validity and interpretation of measures implementing them.[125] The Court is not given jurisdiction to interpret Third Pillar Treaty Articles – though it is difficult to see how the Court can avoid evaluating the provision attributing jurisdiction to it, or how it could adequately interpret Third Pillar measures without being able to interpret their legal bases.[126]

The jurisdiction of the Court to give preliminary rulings is however not automatic but subject to acceptance by the Member States.[127] The Member States can opt either for allowing any of their national courts to make a reference or for limiting such a possibility to their courts of last resort.[128] These provisions on optional jurisdiction spring from the compromises negotiated in relation to conventions adopted under the

[121] Article 34(2) EU.
[122] Article 39 EU.
[123] The Parliament is not mentioned among the institutions which may bring annulment action under Article 35(6) EU. The Court may however recognize the Parliament's locus standi for the purpose of protecting its prerogatives.

old Third Pillar.[129] The implications of this flexibility are identified in an unequal treatment of Union citizens before national courts, a possible lack of uniformity of interpretation of Third Pillar measures[130] and a threat to the Court position as a uniform arbiter.[131]

The jurisdiction of the Court of Justice is excluded in relation to 'the validity and proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibility incumbent upon the Member States with regard to the maintenance of law and order and the safeguarding of internal security'.[132] This limitation underlines the intergovernmental character of the Third Pillar by drawing a clear distinction between the international instrument and national application of the instrument, which is not to be reviewed by the Court.[133] This provision, together with the exclusion of any direct effect for framework decisions and decisions and the fact that individuals cannot initiate an action for annulment of a Third Pillar measure, results in the exclusion of individual remedies.

The second type of proceedings introduced is action for annulment.[134] The Court has jurisdiction to review the legality of framework decisions and decisions (but not conventions) on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers. Actions can be brought by a Member State or the Commission (the Parliament and individuals are excluded) within two months from the publication of the measure.

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[124] Article 35 EU.
[125] Article 35(1) EU. Common positions are excluded since they carry no legally binding force but only express a political strategy.
[126] Curti Gialdino (1998) p. 60.
[127] Article 35(2) EU.
[128] Article 35(3) EU. By the time the Treaty of Amsterdam entered into force, ten Member States had declared that they would allow any of their courts to make a reference. Of these, seven Member States reserved the right to make references compulsory for courts of last resort. Spain allowed only courts of last resort to make a reference, while the United Kingdom, Ireland, Denmark and France made no provision for reference. See OJ 1999 C 120/24. Whatever their chosen position, under Article 35(4) EU, all Member States may present to the Court statements and written observations in preliminary ruling cases.
[129] See Arnull (1999) p. 116.
[130] Still, it is expectable that national courts of Member States which do not provide for the possibility of a reference to the Court will follow the Court's interpretations. See Curti Gialdino (1998) pp. 61-62; Arnull (1999) p. 116; Denza (2002) p. 317.
[131] See Fennelly (2000) pp. 8-10.
[132] Article 35(5) EU.
[133] See Denza (2002) p. 317.
[134] Article 35(6) EU.

Lastly, the Court has jurisdiction to rule on disputes between Member States regarding the interpretation or the application of Third Pillar acts whenever the Council cannot settle a dispute within six months of the matter being raised.[135] The Court has also jurisdiction to rule on disputes between the Member States and the Commission but only as regards the interpretation and application of conventions. The Commission was given no right to bring proceedings against Member States for breach of Third Pillar commitments.

The introduction of some degree of judicial control over Third Pillar activity represented an important step forward. However, the jurisdiction of the Court is subject to significant limitations to the effect that individual remedies and supervision of national implementation are excluded, it is partly optional, and it does not extend to measures adopted under the old Third Pillar.[136]

The Third Pillar also improved from the point of view of transparency as a result of a greater role for Commission initiatives and encouragement for publication of Member States' initiatives. In a Declaration on Article 34(2) EU attached to the Treaty of Amsterdam the Member States agreed that initiatives for measures referred in Article 34(2) EU and measures adopted by the Council are to be published in the *Official Journal* in accordance with the relevant Rules of Procedure of the Council and the Commission.

Furthermore, greater transparency and control of intergovernmental activities under the Second and Third Pillar results from the strengthening of the citizens' right of access to documents of the Community institutions as resulting from the case law of the Court of First Instance[137] and from the introduction of Article 255 EC.[138]

More transparency and control also resulted from the strengthening of the role of national parliaments as envisaged by the Protocol on the Role of National Parliaments in the European Union.

4. Relationship between the Pillars

[135] Article 35(7) EU.

[136] For a different opinion see Curti Gialdino (1998) pp. 63-65.

[137] See Cases *Svenka* and *Kuijer*, *supra* n. 16.

[138] Article 255 EC prescribed that 'any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents' subject to the principles and limitations expressed in the institutions' Rules of Procedures.

The different nature of the Pillars led writers initially to treat them as 'legally separate'.[139] In particular, the TEU was at first not seen as establishing any meaningful connection between the Community and intergovernmental cooperation. The Community, with its unique character, was seen as remaining autonomous and strictly legally separate from intergovernmental cooperation.[140] The 'Union' on its part was considered to be only a 'term' to describe the *Contracting Parties* acting within the CFSP and PJC.[141]

This approach was criticized as unduly focusing on the differences between the Pillars (with regard to institutional competences and the legal effect of instruments) and as overlooking the TEU's efforts to unite them in a single system with a view to achieving consistency of Union's action.[142] It also overlooked the Union's capacity to adopt binding legal measures and its increased decisional autonomy, as well as its emerging international identity.[143]

Although the three-pillar structure evidently rejects a complete fusion between the Community and intergovernmental cooperation in the form of homogeneity of procedures and of legal effect of instruments (which would make the current division between political and economic aspects of external issues redundant), it is arguable that it has established a single system whereby the Pillars only demarcate different capacities with partially specific legal instruments and procedures.[144]

Such conclusion can be based in particular on the fact that the TEU has established a 'single institutional framework' and the requirement of 'consistency' of Union activity.[145]

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[139] See in particular Dehousse (1994); Koenig and Pechstein (1998); Draetta (1999) pp. 53-54.

[140] Curtin (1993) pp. 23-26.

[141] Or alternative: an 'entity', Heukels and de Zwaan (1994) p. 200; a 'loose association', Hendry (1993) p. 296; an 'organizational framework', Everling (1992) p. 1063; an 'organization without legal status', German Constitutional Court in *Brunner*, *supra* n. 23.

[142] See for example von Bogdandy and Nettesheim (1996) pp. 272-273; Curtin and Dekker (1999) pp. 92-95; Shaw (2000) p. 169; Wessel (2000b) p. 507; Tizzano (2002) pp. 141-144.

[143] Shaw (2000) p. 169; Wessel (1997); Cremona (1999) pp. 166-174.

[144] Von Bogdandy (1999) p. 887.

[145] Article 3 EU. The EU has been defined as a 'layered international organization' with one legal system that governs in a vertical way the three Pillars as sub-legal systems of the Union. Accordingly, the Community as a sub-organization of the Union has its own existence (and legal personality) and its own specific legal regime. See Curtin and Dekker (1999); de Witte (1998). This definition has however been attacked on the ground that the 'single institutional framework' makes it impossible to speak of the Community as an independent organization within the Union. Accordingly, the Union and the Community have fused in one single organization with one single legal personality. See von Bogdandy (1999); Wessel (2000b) p. 507; Tizzano (2002).

Claiming that the Union forms a single legal system has important implications for the debate on the foundation of Community law and for a definition of the Union. Inevitably, any claim that the Community has been absorbed into a wider framework of an intergovernmental nature would seem to strengthen the international law foundation of Community law. At the same time, however, a single legal system would imply that the special features of the Community method, which the system clearly intends to preserve,[146] can potentially extend over the system as a whole insofar as they are not expressly excluded.[147]

In this light, it is perhaps right to talk of the Union as a 'constitutional order of States'.[148] As Verhoeven stated: 'Calling the European Union a 'constitutional order' implies that it can no longer be viewed as a loose set of treaty arrangements and diplomatic agreements that are the will of the Herren der Verträge'.[149]

Although the TEU, by maintaining a dual method for external relations, cannot exclude the possibility of institutional conflict over competence, it has introduced a number of provisions specifically to facilitate the achievement of consistency.[150] The institutions themselves have developed practices to manage the 'dualism' of the EU external relations and achieve consistency of Union action.[151] Increasingly, issues are tackled by a combination of instruments under the different Pillars. At the same time, increasingly Community policies contain elements of political conditionality, and political decisions are 'implemented' through Community instruments.[152] Overall, the institutions have proved capable of working within the TEU structure.[153]

5. The Constitutional Treaty

The Constitutional Treaty is largely based on the Draft Constitutional Treaty prepared by the European Convention. The European Convention was convened by the Laeken

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[146] Article 2 and 47 EU.
[147] Von Bogdandy (1999) p. 909.
[148] Dashwood (1998) p. 216.
[149] Verhoeven (2002) p. 123.
[150] These include those on the role of the European Council (Articles 4 and 13 EU), Article 14 EU, and those strengthening the Commission's role within the CFSP.
[151] See for example the dual-use goods' regime, 'mixed' agreements, and 'model common positions', *supra* n. 6. See also the Court of Justice's approach to consistency in *Centro-Com*, *supra* n. 14 and in *Opinion 1/94 (WTO)*, *supra* n. 51.
[152] See Cremona (1999) pp. 161 and 171; Wessel (1999) pp. 321-322. For an account of this development see Nuttall (1992) pp. 260-281; Kuijper (1993).
[153] von Bogdandy (1999); Curtin and Dekker (1999); Wessel (2000a) p. 1168; Denza (2002) p. 308-309.

European Council of December 2001 as part of the process of 'debate on the future of Europe' that was originally launched by the Nice European Council of December 2000 and which was to culminate in an IGC on treaty revision in 2004. The mandate of the Convention was to produce a document reflecting consensus among its members on how the Union could be reformed to better achieve the objectives set by the Declaration on the Future of the European Union, including a more precise delimitation of competence between the Union and the Member States, the simplification and reorganization of the Treaties, and the improvement of the efficiency, transparency and democratic accountability of the decision-making process.

The Draft Constitutional Treaty so produced was declared by the Thessaloniki European Council of 20 June 2003 to be a 'good basis' for negotiations on treaty revision. The final Draft was presented to the President of the European Council in Rome on 18 July 2003. The IGC was opened on 4 October 2003, but negotiations collapsed in December 2003 mainly because no agreement could be reached on voting arrangements in the Council.[154] Agreement was finally reached on 18 June 2004.[155]

The Constitutional Treaty, in an attempt to 'simplify and reorganize' the Treaties, abolishes the three-pillar structure and introduces a unified structure for the Union. One single entity is created – the European Union – which is endowed with legal personality.[156]

From the point of view of procedure and institutional competence, the CFSP continues to be governed by its own special provisions – unanimity is largely retained, the Court of Justice jurisdiction continues to be largely excluded,[157] the European Parliament's role remains very limited, but important institutional changes are introduced with regard to the Commission's role.[158]

On the other hand, the Constitutional Treaty leaves ambiguity as to whether the international law nature of the CFSP is preserved. In particular, certain provisions of the

[154] The changes in the distribution of votes proposed by the Draft Constitutional Treaty were unfavourable to Spain and Poland. Also problematic were the issues of the Commission's composition and of the extension of qualified majority voting to certain areas.

[155] See *supra* n. 25.

[156] Articles I-1 and I-6.

[157] This has been severely criticized. In particular, it is submitted that accession by the Union to the ECHR in a situation where the Court's jurisdiction over the CFSP is excluded automatically puts the Union in breach of the Convention as far as the obligation to provide legal remedies is concerned. See Denza (2003a).

[158] These changes relate to the creation of the Minister for Foreign Affairs who will also be Commission Vice-President (Article I-27 and III-197).

Treaty seem to open the possibility of extending to the CFSP some of the features of the Community legal method, with important constitutional implications.

Article I-1 on the establishment of the Union states that the Union 'shall exercise in the *Community way*' the competences conferred on it. Article I-5(a) on Union law provides that 'the Constitution, and law adopted by the Union's Institutions in exercising competences conferred on it, shall have *primacy* over the law of the Member States'.[159]

Does Article I-5(a) have the effect of extending the application of the Community legal doctrine on primacy to the CFSP? Could CFSP external agreements concluded by the Union assume some of the features of Community external agreements?[160] What effect would they have on the treaty-making capacity of the Member States?

The situation is all the more unsatisfactory since the exclusion of the Court of Justice's jurisdiction from CFSP matters would preclude any clarification of these crucial questions.[161]

The Constitutional Treaty also introduces important changes to improve the functioning of the CFSP and to ensure consistency of the Union's external action.

The Union's external policies are grouped under a single title headed 'the Union's External Action'.[162] In an attempt to ensure consistency, a single set of objectives, principles and values is introduced, and the European Council is invested with identifying the strategic interests and objectives which should guide Union external action in general, including external aspects of internal policies.[163]

Among the other significant changes, the Constitutional Treaty introduces the new figure of 'Minister for Foreign Affairs'. The Minister for Foreign Affairs will also be Commission's Vice President.[164] Under the CFSP he has power to make proposals, represent the Union and implement the CFSP.[165] While it was believed that this

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[159] Emphases added.

[160] See Cremona (2003) p. 1351; Denza (2003b). While Article III-227, governing the conclusion of Union external agreements, prescribes a special procedure for the conclusion of agreements covering matters within the CFSP, it is silent on their possible different legal effect.

[161] See Article III-282 which excludes the Court's jurisdiction in respect to Articles I-39 and 40, Chapter II of Title V (CFSP and CSDP) and Article III-194 on the strategic decisions of the European Council. It seems however that under Article III-227 the mechanism for *a priori* review of the constitutionality of envisaged international agreements extends to all EU agreements. Moreover, the possibility of preliminary rulings on the interpretation of CFSP agreements is not clearly excluded. See de Witte (2004) p. 106.

[162] Title V.

[163] Articles III-193 and 194.

[164] Article I-27.

[165] Article III-197.

'double-hatting' approach would contribute towards consistency,[166] it has been criticized as raising insuperable problems of conflicting loyalty.[167]

A further change aimed at enhancing consistency is the introduction of a European External Action Service which is to assist the Minister for Foreign Affairs. This would bring together staff from the Commission, the Council and the Member States, and would provide the staff for EU delegations abroad, which would replace the current Commission's delegations.[168] It is believed that this change could help achieving convergence of views on international events, and could improve the Commission's analysis capacity.[169]

The Constitutional Treaty also introduces changes in relation to the external representation of the Union. The new figures of President of the European Council and Minister for Foreign Affairs are responsible for representing the Union, but the division of competence between the two remains unclear.[170]

The Constitutional Treaty also reforms CFSP instruments.[171] Only one type of instrument is now available – European decisions. However, as Cremona comments, in practice several different versions of this act are envisaged to the effect that 'although common strategies, common positions and joint actions are no longer separate legal acts, the Union is still empowered to adopt European decisions which essentially reflect these existing acts'.[172] This situation is unsatisfactory as it results in ambiguity and lack of transparency rather than simplification. This is also so since the existing clearly differentiated instruments will survive as part of the *acquis*.

The Constitutional Treaty also introduces major changes in the field of JHA. The Treaty introduces a new Chapter headed 'Area of Freedom, Security and Justice' which brings together current First and Third Pillars' competences. This Chapter – Chapter IV – contains eight articles of general application and divides its subject matter into four distinct sections: (i) policy on border checks, asylum and immigration; (ii) judicial cooperation in civil matters; (iii) judicial cooperation in criminal matters; and (iv) police cooperation.

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[166] See Final Report of Working Group VII, 16 December 2002, CONV 459/02, part A, para. 5.
[167] See for example Cremona (2003) p. 1355; Denza (2003a).
[168] See Chapter 5.
[169] See Final Report of Working Group VII, *supra* n. 166, part B, para. 64.
[170] See Articles I-21(2) and III-197(2).
[171] Article III-195(3).
[172] Cremona (2003) p. 1357.

The normal Community decision-making procedure (qualified-majority voting and co-decision) is introduced for most of these areas[173] and most of the current limitations as to the jurisdiction of the Court of Justice under the Title IV EC and the Third Pillar are removed.

Such changes would of course considerably strengthen the judicial control of current Third Pillar areas. The abolition of the limitations on the Court of Justice's jurisdiction over Third Pillar activity is particularly important given that activity under the Third Pillar touches directly on areas relevant for the individual and given that such a move would introduce the possibility for the Commission to resort to infringement proceedings against non-compliant Member States.[174]

Article III-283 continues, however, to exclude the Court's jurisdiction over the validity and proportionality of operations by the police or law enforcement agencies, and the exercise of responsibility of Member States with regard to the maintenance of law and order and the safeguarding of internal security. This limitation has been widely considered unacceptable from the point of view of judicial protection of individual rights.[175]

The provisions also significantly increase the role of the European Parliament, as a result of the introduction of the co-decision procedure. A number of provisions have also been introduced conferring a monitoring role to national parliaments, particularly in order to compensate the decrease in their role following from the extension of the use of the Community method.[176] These, however, have been criticized by some national parliaments as insufficient.[177]

The normal Union instruments (laws, framework laws, regulation and decisions) – capable of direct effect and supreme – are introduced for all the areas covered by Chapter IV with the aim of increasing efficiency by facilitating implementation.

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[173] Unanimity is retained in relation to: the establishment of a European Public Prosecutor's Office (Article III-175); extension of the scope of approximation of substantive criminal law (Article III-172); police operational cooperation (Article III-176); law enforcement action in the territory of another Member State (Article III-178). Moreover, a special decision-making procedure is introduced for approximating substantive and procedural criminal law (Article III-171-172), see *infra*.

[174] See Final Report of Working Group X, 2 December 2002, CONV 426/02.

[175] See House of Lords Select Committee of the European Union (2003-04a) paras. 115-123.

[176] National Parliaments would ensure that initiative under the Chapter comply with the principle of subsidiarity in accordance with the Protocol on the application of the principles of subsidiarity and proportionality (Article III-160). Further, they would be kept informed as to the activity of the proposed standing committee in the Council dealing with operational cooperation (Article III-162). They would also be kept informed as to the results of evaluations of implementation of Union policies by national authorities in accordance with Article III-161. Moreover, the proposed provisions envisage the introduction of European laws introducing arrangements for the scrutiny by the European Parliament and national parliaments of the activities of Eurojust and Europol (Articles III-174 and 177).

[177] House of Commons European Scrutiny Committee (2002-03) para. 15-25.

Although the Constitutional Treaty extends the Community legal method to the Third Pillar, some qualifications apply. Firstly, the Constitutional Treaty clarifies that with regard to the 'area of freedom, security and justice' emphasis is placed not only on legislative action but also on operational cooperation in relation to which procedures may apply in a different way.[178] Secondly, with regard to the specific fields of judicial and police cooperation on criminal matters, the right of initiative is shared between the Commission and the Member States (a quarter of the Member States would be necessary to initiate a proposal).[179] Moreover, a special decision-making procedure applies in relation to harmonization of substantive and procedural criminal law in the light of their sensitive nature (see *infra*), and under a 'Declaration re Article III-227 concerning the negotiations and conclusion of international agreements by the Member States relating to the area of freedom, security and justice', the Member States may conclude agreements with third countries in the fields of judicial cooperation in civil and criminal matters, and police cooperation insofar as such agreement comply with Union law.

Among some of the further innovations introduced is the possibility of introducing a mechanism for the evaluation by the Member States, in collaboration with the Commission, of implementation of Union policies by national authorities.[180] A further innovation consists in the setting up of a standing committee within the Council entrusted with ensuring that operational cooperation on internal security is promoted and strengthened, and with facilitating coordination of the action of Member States' competent authorities.[181] This committee, which would replace the current Article 36 Committee, would extend its competence over all areas covered by Chapter IV. Democratic control over the committee activity is limited (the Parliament and national parliaments are only to be 'kept informed'), and in general concerns have emerged about its scope, powers and accountability.[182]

Further significant changes have been introduced. With regard to judicial cooperation in criminal matters, although the principle of mutual recognition of decisions is

[178] See Article I-41 and Final Report of Working Group X, *supra* n. 174.
[179] Article III-165.
[180] Article III-161.
[181] Article III-162.
[182] House of Commons European Scrutiny Committee (2002-03) para. 11.

emphasized (and 'constitutionalized'),[183] the new provisions increase the scope for substantive harmonization of criminal law and introduce a new legal basis for the approximation of procedural criminal law in order to facilitate the application of mutual recognition and judicial and police cooperation in criminal matters having a cross-border dimension.

Notoriously, mutual recognition of national laws and judicial decisions in a context where convergence of substantive and procedural national laws is lacking has been problematic.[184]

Criminal law remains however an area where the principles of respecting national identities and of democratic accountability assume particular relevance. This has been reflected in the introduction of a special decision-making procedure for this area. Although qualified majority is introduced for the approximation of substantive and procedural criminal law, a Member State may refer a proposed measure to the European Council if it believes this measure 'would affect fundamental aspects of its criminal justice system'. Failing agreement at European Council level, enhanced cooperation among at least one third of the Member States may be established.[185]

With regard to further changes, a legal basis is introduced for Eurojust, whose powers are strengthened.[186] A new legal basis is also introduced for the establishment of the new office of European Public Prosecutor, which is to prosecute offences against the Union's financial interests.[187]

With regard to police cooperation, the proposed provisions give a legal basis to Europol, whose mandate is also enlarged,[188] and introduce a specific legal basis with regard to police operation in another Member State.[189]

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[183] Article I-41.

[184] With regard to the application of the principle in the context of the EU visa policy see Chapter 5. In the context of the internal market the application of the principle has been underpinned by two related concepts: some degree of convergence in national regulation and the establishment of minimum standards at EU level. See Peers (2004) p. 18. Divergence between the Member States' laws capable of undermining mutual recognition can also result from different adherence to (or different interpretation of) human rights instruments. See, for example, *R v. Secretary of State for the Home Department ex parte Adan and Aitsguer* [2000] UKHL 67. See also Nicol (2004); Alegre and Leaf (2004); Guild (2004).

[185] Article III-171-172.

[186] Article III-174. More offences may now fall within the scope of Eurojust. Moreover, Eurojust is now given a power to propose the initiation of prosecutions conducted by national authorities. The introduction of a legal basis for bodies such as Eurojust and Europol makes it easier to develop them.

[187] Article III-175. Unanimity is prescribed for the creation of this new body. Its powers may be extended unanimously by the European Council to include serious crimes having a cross-border dimension.

[188] Article III-177. The mandate of Europol is extended to 'serious crime affecting two or more Member States', thus it would no longer cover only enumerated offences.

[189] Article III-178. Unanimity is applicable.

The United Kingdom, Ireland and Denmark have retained their opt-outs.[190] An innovation is that Denmark has now the option to exchange the provisions governing its position with new provisions whereby when it decides to opt-in to measures proposed or adopted under Chapter IV it will be bound by them under Union law.

6. Conclusion

The Community, the intergovernmental Pillars and the pillar structure are outcomes of an effort to 'reconcile almost irreconcilable interests', uniformity versus diversity and efficiency versus democratic choice.[191]

The pillar structure permits recourse to the international law method for CFSP and PJC (thus allowing the Member States to retain national autonomy and control in these areas), preserves the independence of the Community, and, at the same time, introduces a 'single institutional framework' and the requirement of 'consistency' of Union activity.

While the pillar structure does not rule out the possibility of institutional conflict over competence (since its architecture refuses to introduce homogeneity or establish a hierarchy between the intergovernmental and the Community spheres), the institutions have overall proved capable of working within the system.

While there is still scope for improving the efficiency and effectiveness of the intergovernmental Pillars and their interaction with the Community, it remains arguable what the best course of action to do this is. The extension of the Community method over the intergovernmental Pillars is often described as a 'simplifying measure' which would remedy the pillar structure's potential to generate institutional conflict over the choice of legal base, and which would result in greater efficiency and effectiveness for the Union. However, an extension of the Community method over the intergovernmental Pillars has implications which do not sit easily with the principles of maintaining diversity and of democratic accountability.

An extension of the Community law doctrine of primacy over the Second Pillar would create or require a European federation. In this context, the Constitutional Treaty is highly unsatisfactory precisely because of its ambiguity on whether the Community law

[190] See Protocol on the position of the United Kingdom and Ireland on policies in respect of border controls, asylum and immigration, judicial cooperation in civil matters and on police cooperation; Protocol on Denmark. On the opt-outs see Chapter 4.

doctrine of primacy extends over the CFSP, and thus its failure to clarify the competence of the Union in this field.

If the aim is to preserve the international law nature of the CFSP, it is unclear how the introduction of a unified structure which obfuscates the differences between the Pillars can make the whole system more legally certain and comprehensible.

The extension of the Community method over the field of criminal justice also raises a number of concerns. It disregards the desirability of maintaining national diversity and the importance of democratic choice in such a sensitive field.

It is questionable to what extent the extension of the Community method to the Third Pillar can be considered to increase its democratic accountability. National parliaments do not seem to think that that is the case. As the House of Commons has recently stated: 'The intergovernmental method has been criticized as government-controlled, and it is undoubtedly true that the negotiation of a convention or framework decision leaves the national parliament with far less scope to review, or reject, the principles of such a measure than it has when changes to the criminal law are proposed in a Bill. However, the Community method of qualified majority voting with co-decision by the European Parliament will not address the concerns over legitimacy, but will aggravate them'.[192]

[191] Verhoeven (2002) p. 71.

[192] House of Commons European Scrutiny Committee (2002-03) para. 84.

3 FROM EARLY STEPS TO FAILURE OF THE MAASTRICHT SYSTEM

This Chapter gives an historical overview of the development of the EU visa policy. It continues with an analysis of the legal framework introduced by the Maastricht Treaty, with an account of the weaknesses of the Third Pillar and the reasons which prompted the transfer of visa policy to the First Pillar.

1. The proposed passport union

The establishment of a common policy on short-term visas was first contemplated by the Member States during the 1970s as part of a plan to establish a Passport Union.[1]

The original EEC Treaty already provided for the free movement of persons in the Community. This however was relatively limited in scope, being concerned only with movement for economic purposes and applied only in relation to nationals of the Member States.[2]

The European Court of Justice considerably developed the free movement rules by establishing an 'individual right' of entry into the Member States for EC nationals which could only be curtailed on public policy, national security and health grounds.[3] This had repercussions on entry formalities and border controls applicable by the Member States. The Member States could neither require visas from EC nationals nor stamp their passports with the effect of granting 'leave to enter' at the moment of entry into the national territory.[4] Border controls in order to be compatible with the free movement provisions were not to be carried out in 'a systematic, arbitrary or unnecessarily restrictive manner' and had to remain limited to identity checks for all Member States' nationals.[5]

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[1] See House of Lords Select Committee on the European Communities (1979); Evans, A. (1981); Denza (1983).

[2] Articles 48-66 EC (now 39-55).

[3] See for example Case 157/79 *Pieck* [1980] 3 CMLR 220. The grounds which can justify exclusion are governed by Directive 64/221, OJ Sp. Ed. 1964, 850/64. The Court of Justice has interpreted these restrictively, see for example Case 67/74 *Bonsignore* [1975] ECR 297.

[4] See *Pieck* Case, *supra* n. 3, and Directives 68/360, OJ Sp. Ed. 1968 L 257/13, and 73/148, OJ 1973 L 172/14.

[5] Cases 321/87 *Commission v. Belgium* [1989] ECR 997; C-68/89 *Commission v. the Netherlands* [1991] ECR I-2637.

Third country nationals remained excluded from Community law, with few exceptions and notwithstanding some tentative steps on the part of the Commission to act on the matter.[6]

The idea of a Passport Union was launched by Commission President Mansholt in April 1972 as part of the development of the notion of 'European citizenship'. The proposal constituted one of the first examples of the expansion of the agenda of cooperation to include the development of forms of political symbolism.[7]

The proposal was taken up two years later by Chancellor Schmidt at a Heads of Government meeting, and at the Paris Summit Conference in December 1974 the Member States decided to set up a working group to study the possibility of establishing a Passport Union and, in anticipation of this, the introduction of a passport of uniform format. The working group was to prepare a report on abolition of passport controls within the Community and stage-by-stage harmonization of legislation affecting aliens, including conditions of admission, visa requirements and deportation.[8]

The Member States decided not to allocate any formal role to the Council and the Commission. The reason was explained by Evans in the following way:

> 'The reason for excluding the Community institutions in this way was probably that establishment of the passport union involved sensitive issues. In particular, it is the distinctiveness of his national passport which normally provides evidence of an individual's nationality. The Member States may have been concerned to ensure that such distinctiveness was not lost as a consequence of the introduction of a uniform European Passport. For this reason they may have preferred to undertake the arrangement for its introduction as far as possible among themselves'.[9]

Thus, the intergovernmental method was considered preferable in the light of the wish of the Member States to maintain their sovereign right to grant nationality and to issue passports as evidence of it. The rejection of the Community method – with its implications for national autonomy – illustrates both the role of national symbols as part

[6] For the position of third country nationals under Community law see Cremona (1995); Peers (1996b). On the Court of Justice's attitude see Guild and Peers (2001) particularly p. 271. For the Commission's tentative steps to act on the matter of admission and treatment of third country nationals during the 1970s and 1980s see Plender (1988) p. 197; Papademetriou (1996) pp. 18-22.
[7] Wallace, H. (2000) p. 56.
[8] Bull. EC 12-1974, 7-12, p. 8.
[9] Evans, A. (1981) p. 9.

of the explanation for resistance to Community regimes,[10] and, in the light of the nature of passports in international law, the determination of the Member States to maintain their character of sovereign States.

Notwithstanding the decision to keep the Community institutions out of the project, the Commission was required by Coreper to produce a report on the matter, which it submitted to the Council in July 1975.[11]

In its report, the Commission suggested that the European Passport should be issued by individual Member States but in a uniform format demonstrating the holder's relationship not only with his State of nationality but also with the Community. The Commission emphasized the role of the European Passport in strengthening the international identity of the Community and creating among nationals of the Member States a feeling of belonging. It recommended that the introduction of the new Passport should be accompanied by the abolition of internal frontier controls and the conclusions of agreements with third countries on the treatment to be accorded to holders of the Passport.

The Commission concluded that there was no provision in the EC Treaty conferring on the Community competence to enact the necessary measures for the establishment of the Passport Union, but maintained that since the Passport Union amounted to a natural extension of the free movement provisions of the EC Treaty, the Community institutions should be associated in the negotiations.

However, the project predictably appeared arduous from the start and, as a result of increased terrorism in particular, the Member States soon abandoned it, continuing to give active consideration only to the establishment of a uniform format for passports.[12]

Even with regard to this aspect, it took six years from the time the European Council took the decision of principle to introduce a passport of uniform format to final agreement on a resolution. This delay resulted mainly from the fact that parallel work was being undertaken by ICAO.[13]

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[10] See Schnapper (1992) quoted in Wallace, H. (2000) p. 57.
[11] COM(75) 322 final.
[12] For the difficulties involved see House of Lords Select Committee on the European Communities (1979).
[13] Denza (1983) p.489.

A Resolution on the introduction of a passport of uniform design was finally adopted on 23 June 1981 by the Member States meeting within the Council.[14] This type of instrument (in contrast to a Council resolution) implied that there was no Community competence.[15] Under the Resolution, the Member States were to endeavour to issue a uniform format passport, as described in the Resolution, by 1 January 1985. The ICAO format laminated data page was accepted in replacement of the conventional data page, bringing significant protection from forgery.
The Resolution also emphasized the political significance of introducing a passport of uniform format and the benefits with regard to facilitation of movement across borders.

The Member States currently cooperate on an intergovernmental basis on the uniform format for passports with the aim of strengthening the security of their passports against forgery and falsification in order to prevent illegal immigration and terrorism.[16] There seems to be no legal base in the EC Treaty for the adoption of measures on the matter.
The Commission's recent proposal for a Regulation on standards for security features and biometrics in EU citizens' passports,[17] solely based on the Community powers on external border controls, was considered, in view of the multiple functions of passports, to exceed Community powers. As a commentator explained: 'Given the exclusion of EC powers to regulate the free movement aspects of passports [Article 18(3)], and the absence of any powers in the EC Treaty for the EC to regulate any aspect of EU citizens' crossing of borders of non-EU countries or the use of passports within a single Member State for identity purposes, it may be concluded that no powers conferred upon the EC by the EC Treaty, taken separately or together confer upon the EC power to adopt the proposed Regulation'.[18]

2. Pre-Maastricht Cooperation

[14] OJ 1981 C 241.
[15] While several Member States would have accepted a hybrid instrument (with a EC element based on Article 48), France held out most strongly.
[16] The latest Resolution was adopted on 8 June 2004 (10030/1/04). It supplements the original Resolution as well as subsequently adopted Resolutions (17 October 2000, 14 July 1986 and 10 July 1995).
[17] COM(2004)116 final.
[18] 'EU biometric passport proposal exceeds the EC's powers', www.statewatch.org/news.

The issue of a common visa policy arose again during the middle 1980s as a result of the revitalization of the idea of a European Community without internal frontiers, and in the context of a changing European environment.[19]

2.1 The Single Market Project and interpretation of Article 8a

With the signing of the SEA in 1986 the Member States, determined to restore momentum towards European integration, agreed to amend the Treaty of Rome to introduce the commitment to create a 'single market' in the Community by December 1992 (Article 8a, now 14) and qualified majority voting for the adoption of the necessary measures for this purpose (Article 100a, now 95).[20]

Article 8a provided:

> 'The Community shall adopt measures with the aim of progressively establishing the internal market...The internal market shall comprise an area without internal frontiers in which the free movement of goods, *persons*, services and capital is ensured in accordance with the provisions of this Treaty'.[21]

The nature of the obligation imposed by Article 8a with regard specifically to the establishment of the free movement of persons became the object of disagreement between the Commission and some Member States.[22] The legal meaning of Article 8a was of crucial importance for the division of competence between the Community and the Member States, and disagreement on it was ultimately underpinned by fundamentally different visions as to the depth European integration should reach.

The Commission interpreted the 'internal market' as equivalent to a national market and thus Article 8a as requiring the achievement of the goal of complete abolition of border controls between the Member States.[23] Such an interpretation could have also supported an argument for Community competence with regard to the necessary 'compensatory' measures for the abolition of internal frontier controls (including common external border controls). In its White Paper 'completing the internal market', which had led to

[19] The Adonnino Committee established by the Fountainbleu European Council of June 1984 and invested with the task of preparing a report on citizens' Europe, already made clear that the abolition of internal frontier controls was inextricably linked to the adoption of 'compensatory' measures. See Plender (1990).

[20] Qualified majority voting was excluded with regard to measures on the free movement of persons.

[21] Emphasis added.

[22] See House of Lords Select Committee on the European Communities (1988-89); Papademetriou (1996) pp. 23-24 and 64-65; Geddes (2000) pp. 70-72; Peers (2000) pp. 64-66; Denza (2002) pp. 65-69.

[23] Commission Communication on the abolition of border controls, SEC(92) 877 final.

the SEA, the Commission did include proposals on asylum, refugees, visas and the status of third country nationals.[24]

The United Kingdom and Denmark argued that the free movement of persons envisaged by Article 8a related exclusively to Member States' nationals. The United Kingdom pointed out that the Article was explicit on the point that free movement was to apply 'in accordance with the provisions' of the EC Treaty. These gave rights to free movement exclusively to EC nationals and generally for economic purposes only, and provided for the possibility of restrictions based on public policy, national security or health grounds.[25]

This more restrictive interpretation justified the continuation of internal border controls aimed at distinguishing between EC nationals, who enjoyed a right of entry, and third country nationals, who were subject to immigration control. This position was also eventually endorsed by the Court of Justice.[26]

A further consequence of the Member States' interpretation was the refusal to accept Community competence over the adoption of the necessary compensatory measures. Community competence seemed already excluded by virtue of a Declaration attached to the Single European Act on the insistence of the United Kingdom.[27] This provided that:

> 'Nothing in these provisions shall affect the right of the Member States to take such measures as they are considered necessary for the purpose of controlling immigration from third countries, and to combat terrorism, crime, the traffic in drugs and illicit trading...'.[28]

The lack of a common position with regard to the desirability of internal frontier controls abolition did not prevent the Member States from establishing intergovernmental cooperation on justice and home affairs. Some Member States, such as the United Kingdom, considered such cooperation as valuable *per se* independently

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[24] COM(85) 310 final.

[25] The United Kingdom was one of the strongest opponents to the abolition of internal frontier controls on persons. It considered such controls, as a result of its island-geography, to be an efficient instrument to control unwanted immigration, crime and terrorism, and one which contributed to the exclusion of unpopular internal control measures such as compulsory identity cards and identity checks. Such position had already been expressed on the occasion of the proposed Passport Union. See House of Lords Select Committee on the European Communities (1979) paras. 11 and 15. For the United Kingdom's position on Article 8a see House of Lords Select Committee on the European Communities (1988-89).

[26] See *Commission v. Belgium* and *Commission v. the Netherlands*, *supra* n. 5. See also Case C-147/91 *Laderer* [1993] ECR I-4097. The Court also denied the direct applicability of Article 8a by holding that, even after December 1992, the abolition of internal frontier controls remained subordinate to the adoption of the necessary 'compensatory' measures. See Case C-378/97 *Wijsenbeek* [1999] ECR I-6207.

[27] The effect of such Declaration is not completely clear. See Peers (2000) p. 64.

[28] General Declaration on Articles 13-19 of the SEA.

of the objective of internal frontier controls abolition.[29] Other Member States saw it as a necessary pre-condition to the abolition of internal frontier controls. Moreover, cooperation appeared most compelling in the light of changing European circumstances particularly increased cross-border crime and migration inflows.[30]

A Declaration attached to the SEA provided that the Member States, with the aim of relaxing internal border controls:

> 'shall cooperate without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of nationals of third countries. They shall also cooperate in the combating of terrorism, crime, the traffic in drugs and illicit trading...'.[31]

Intergovernmental cooperation on justice and home affairs took place within the pre-existing structures of the 'Trevi' Group, whose mandate was broadened in view of the '1992 project'.[32]

In parallel, those Member States which shared the goal of abolishing internal frontier controls concluded the Schengen Agreement in 1985 followed by the Schengen Convention in 1990. Cooperation therefore took a dual track. While at the level of the Schengen States the 'compensatory' measures were accompanied by the (eventual) abolition of internal frontier controls, at the level of the Member States, notwithstanding the declared objective of relaxing controls and facilitating free movement, the focus remained on restrictive measures.[33]

As to the choice for the intergovernmental method, the Commission came finally to adopt a pragmatic and moderate stance. In 1988 it proposed that:

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[29] See for example House of Lords Select Committee of the European Communities (1993-94) para. 57.

[30] See den Boer and Wallace, W. (2000) pp. 495-497; Turnbull and Sandholtz (2001) particularly p. 215. On increased immigration flows see United Nations Department of Economic and Social Affairs (1998) p. 207 and United Kingdom Government, Home Office (1998) para. 1.10. Germany appeared to have specific concerns with regard to crime. Chancellor Kohl called for a 'European FBI' in 1988 following police reports on the Italian Mafia infiltrating the restaurant trade in Germany. The fall of the Berlin Wall in 1989 increased concerns on migration inflows.

[31] Political Declaration of the Member States on the free movement of persons.

[32] For an account of the origins of the 'Trevi' Group, see Nuttall (1992) pp. 299-302; Pastore (1995) pp. 15-21; den Boer and Wallace, W. (2000) pp. 494-495. Trevi III was established in 1985 to enhance cooperation in the area of serious international crime. Trevi '1992' was established in 1988 and was tasked with elaborating the compensatory measures necessary for the abolition of internal frontier controls.

[33] The Commission at a later stage made some proposals on free movement but the Council did not act on them, see *infra* n. 169.

'Community legislation in this field be applied only to those cases where the legal security and uniformity provided by Community law constitutes the best instrument to achieve the desired goal. This would mean therefore that large scope would be left, at this stage, to cooperation among the Member States notwithstanding the fact that the Commission should be permitted to participate on an informal basis, in this form of cooperation with a view to ensuring compliance with the above mentioned objectives'.[34]

The Commission's stance was explained by the lack of prospect of action at Community level and the Commission's anxiety to secure its association with the intergovernmental work.[35]

2.2 Intergovernmental cooperation: the Ad hoc Group on Immigration and the Coordinators Group

In the context of the extension of intergovernmental cooperation during the 1980s in response to the '1992 project', a meeting of justice and home affairs ministers in London in October 1986 established the Ad hoc Group on Immigration which was to be the organizational vehicle for pursuing cooperation on immigration policies.[36]

The Ad hoc Group on Immigration was composed of high level immigration policy officials from the Member States and divided into six subgroups (asylum, external frontiers, false documents, admission, deportation and information exchange).[37] A representative of the Commission was included as an observer. Its mandate covered a wide set of issues related to the relaxation of internal border controls on persons and the strengthening of internal and external controls for the purpose of counteracting illegal immigration, terrorism, drug trafficking and crime.

One of its tasks was to evaluate the feasibility of harmonizing the Member States' visa

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[34] COM(88) 640 final, para. 14.

[35] Monar (1994) p. 71. See also Peers (2000) p. 65. The lack of prospect was already evident when the Member States challenged the Commission's Decision of 18 July 1985 under Article 118 EC 'setting up a prior communication and consultation procedure on migration policies in relation to non-member countries', OJ 1985 L 217/2. See Joined Cases 281 and 283-287/85 *Germany and others v. Commission* [1987] ECR 2303.

[36] For an account of cooperation pre-Maastricht, see Pastore (1995) pp. 3-21; Papademetriou (1996) pp. 19-50; Geddes (2000) pp. 67-68; den Boer and Wallace, W. (2000) pp. 494-495; Denza (2002) pp. 64-74.

[37] Later the working groups on admission and expulsion were merged into one and a working group on visas was introduced. In 1992 Cirea (Centre for Information, Discussion and Exchange on Asylum) – now redundant – and Cirefi (Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration) were added to the working groups. In 1994 Eurodac (European Automated Fingerprinting Recognition System) was added. See Papademetriou (1996) pp. 28 and 79; Peers (2000) p. 24.

policies (at the risk of duplicating similar work in EPC)[38] and the effect of such action on improving external controls. It prepared a common list of fifty countries whose nationals were required by all Member States to have visas to enter their territories (the 'black' list). This was adopted by the ministers responsible for immigration at Copenhagen in December 1987. It was further expanded following their meeting in Munich in June 1988 to include eleven additional countries.[39]

In 1988 the European Council meeting in Rhodes established the Group of Coordinators on Free Movement of Persons.[40] Its creation was prompted by a perceived need of achieving congruence among the various positions adopted in the different intergovernmental groups. The mandates of these various groups (the Ad hoc Group on Immigration, the Trevi Group, the Horizontal Group on Data Processing, the Customs Mutual Assistance Group and the Judicial Cooperation Group of EPC) overlapped and conflicts often resulted. The Group of Coordinators was therefore to oversee their agendas and activities.

One of its first tasks was to prepare a report on the measures necessary for creating an area without internal frontiers before 1993. This report known as the 'Palma Document' was adopted by the European Council in Madrid in June 1989.[41]

The Palma Document included a common visa policy among the necessary measures for creating an area without internal frontiers.

The components of visa policy whose adoption was considered 'essential' were: (i) the list of countries whose nationals were required by all Member States to have visas to cross their external borders (the so called 'black' list), which was to be updated every six months; (ii) harmonized criteria and conditions for issuing visas and the strengthening of diplomatic and consular cooperation; and (iii) a common list of 'undesirable' persons and a convention establishing a procedure for prior notification in the event of a visa being issued by a Member State to a person on such a list.

Components considered 'desirable' included: (i) a common visa application form, to be

[38] Nuttall (1992) pp. 301-303. Following the terrorist attacks at Rome and Vienna airports in December 1985, the Member States decided to strengthen cooperation in certain areas including visa policy. A Working Group on Cooperation to Combat International Terrorism was established.

[39] At their meeting in Copenhagen in June 1993 the Ministers took note that the 'black' list expanded to 73 countries, while 19 were the countries whose nationals did not require a visa for any Member State and 92 those whose nationals were subject to visa requirements by some Member States only. See COM(93) 684, 10.12.1993.

[40] Bull. EC 12-1998, para. 1.1.3.

created by 1989; (ii) a common 'European visa', to be introduced by 1992; and (iii) the computerization of the exchange of information needed in visa processing, to be completed by 1991.

The Palma Document marked the beginning of the drafting of the External Frontiers Convention under the authority of the ministers responsible for immigration.[42]
The Draft External Frontiers Convention, submitted by the Group of Coordinators to the Dublin European Council in June 1990, provided the rules governing the crossing of the external frontiers of the Member States including a common visa policy.[43] It was complemented by a Draft Convention on a European Information System, negotiated within the framework of the Horizontal Group on Data Processing.[44]
Adoption of these Conventions seemed a pre-requisite for shifting the Member States' focus towards the abolition of internal frontier controls. The United Kingdom however never accepted that the underlying purpose of the Draft External Frontiers Convention was the removal of internal controls on persons.[45] The Draft Convention was never signed due to a dispute between the United Kingdom and Spain over the Convention's territorial application to Gibraltar.[46]

In general progress under the established intergovernmental framework was slow and meagre. The intergovernmental structure was described as reactive, chaotic, overlapping, inefficient and unaccountable.[47] The agenda of the various

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[41] Published as an appendix to the House of Lords Report on Border Control of People, House of Lords Select Committee on the European Communities (1988-89). Also reproduced in Statewatch (1997) pp. 12-20.
[42] The provisions of the Draft Convention are considered below within the context of the revised draft proposed by the Commission. See also Pastore (1995) pp. 12-15.
[43] The Draft Convention remained secret. It subsequently became public when the Commission proposed its adoption under the Maastricht Treaty, see *infra*.
[44] This Draft Convention also remained secret.
[45] See House of Lords Select Committee on the European Communities (1993-94) para. 57. The United Kingdom pressed for the possibility of making a unilateral declaration to be annexed to the Draft Convention whereby for a transitional period its ports and airports would be considered to be external frontiers with regard to nationals of third countries. This dispensation was to be reviewed before January 1995. *Agence Europe*, n. 5513, 15.06.1991, p. 10.
[46] House of Lords Select Committee on the European Communities (1993-94) paras. 3 and 7. More progress was achieved in the field of asylum with the signing on 15 June 1990 of the 'Dublin Convention' (Convention determining the State Responsible for Examining Application for Asylum lodged in One of the Member States of the European Communities, OJ 1997 C 254/1), which came into force only in 1997. The Group of Coordinators also presented two reports to the Rome European Council of December 1990 respectively on the integration of third country nationals in the Member States and on entry and movement conditions for third country national, but the European Council took no action. See Papademetriou (1996) pp. 44-49.
[47] Guild (1998) p. 67; Papademetriou (1996) p. 51; Geddes (2000) p. 80; den Boer and Wallace, W. (2000) p. 495; Turnbull and Sandholtz (2001) p. 197; Denza (2002) p. 74.

intergovernmental groups overlapped and their work remained largely uncoordinated. Practice and procedures remained informal and decisions took the form of non-binding resolutions and recommendations. Progress remained dependent on enacting international conventions, which needed to be signed by all Member States and then ratified by all at national level before they could enter into force.[48]

A different problem was political accountability. The secrecy surrounding intergovernmental activity precluded monitoring by national parliaments, putting the whole activity beyond any kind of detailed public scrutiny.

It remains true that cooperation did result in the development by 1992 of an extensive network which operated under the overall authority of the European Council on several political and executive levels and well-established habits of consultation and information exchange among national officials.[49]

Increasingly, the Member States also engaged in discussions on immigration issues with the countries of Central and Eastern Europe.[50] Various groups were established (such as the Vienna Group, the Berlin Group and the Budapest Group) to discuss issues including efforts by Central and Eastern European countries to prevent conditions which might result in a uncontrolled influx of migrants to the West, programmes to promote development, common measures against illegal immigration, enhanced border controls and surveillance, and re-admission.[51]

2.3 The Schengen Convention

As mentioned earlier, the inability to reach agreement among all the Member States on the removal of internal frontier controls resulted in those Member States which shared such an objective establishing cooperation among themselves, which paralleled cooperation on justice and home affairs among (all) the Member States.[52]

Thus, in 1985 the Benelux countries, France and Germany concluded the Schengen Agreement intended to remove controls at their internal frontiers by January 1990 and

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[48] Geddes (2000) p. 80; Denza (2002) p. 73. See also Peers (2000) p. 16, who points out that of the ten conventions agreed before 1993 only the Rome (1980 Convention on the Law applicable to Contractual Obligations) and Dublin Convention, *supra* n. 46, were ratified prior to 2000, with the Dublin Convention taking seven years before ratification by all Member States was completed. Some Conventions were applied on an administrative basis.

[49] Anderson, M. (1994) p. 12; den Boer and Wallace, W. (2000) pp. 495-499.

[50] Papademetriou (1996) p. 34.

[51] In the following years a number of Member States concluded re-admission agreements with these countries. Germany took the lead in the conclusion of such agreements. See Lavenex (1998) p. 123. A Recommendation was also adopted by the Council in 1994 on the model for a normal bilateral agreement for readmission between a Member State and a third country, OJ 1996 C 274.

[52] O'Keeffe (1991) p. 186; Turnbull and Sandholtz (2001) p. 201.

transfer them to their external borders.[53] The background to this Agreement was the Sarrebruck Accord of 1984 between France and Germany, which was prompted by a series of protests by truck drivers about delays and congestion at the German-French frontier points resulting from controls.[54] Following the Sarrebruck Accord, Germany and France invited the Benelux countries, which had had a common travel area since 1960, to join them thus establishing the Schengen group.

The Schengen Agreement listed the compensatory measures necessary for the removal of internal frontier controls which the Parties endeavoured to take, including the approximation of their visa policies, the establishment of common external border controls, police cooperation, judicial cooperation and the conclusion of extradition agreements.

Most of these measures were defined as 'applicable in the long-term'. The approximation of visa policies and the application of procedures for issuing visas in a way that took into account 'the need to ensure the protection of the entire territory of the five States against illegal immigration and activity which could jeopardise security' were defined as measures to be taken in the short-term.

The Agreement was treated by the Contracting Parties as a declaration of intent, and Article 32 expressly stated that the Agreement did not necessitate ratification at national level.[55]

It soon became clear that the implementation of the compensatory measures envisaged by the Schengen Agreement necessitated a further international instrument. On 19 June 1990, after four years of secret negotiations, the original Schengen States signed the Schengen Implementing Convention.[56] The Convention elaborated the objective of the Schengen Agreement (extending the deadline for the abolition of internal frontier controls to 1993) and provided for the necessary compensatory measures.

The Convention clarified its relationship with Community law by providing that it applied only insofar as it was compatible with Community law, and that once the Member States concluded conventions 'with a view to completion of an area without internal frontiers' its relevant provisions were to be amended or replaced accordingly.[57]

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[53] Agreement on the gradual abolition of controls at the common frontiers, signed in Schengen on 14 July 1985, (1991) 30 ILM 73.

[54] See Papademetriou (1996) p. 26.

[55] Only the Netherlands felt that national ratification was necessary. See Boccardi (2000) p. 34.

[56] Convention Implementing the Schengen Agreement, (1991) 30 ILM 84. For in depth analysis see O'Keeffe (1991); Shutte (1991); Bontempi (1995).

[57] For in depth analysis see O'Keeffe (1991) pp. 209-211. The Preamble to the Convention expressly stated that the aim of the Contracting Parties was to achieve the objective of establishing an internal

The compensatory measures provided by the Convention focused on the strengthening of the external borders and on cooperation between national law enforcement agencies. Accordingly, the Convention laid down the conditions that aliens (non-Community and later non-EEA nationals) had to fulfil to enter the Schengen territory.[58] It provided for the harmonization of the Contracting Parties' visa policies and for the introduction by the Contracting Parties of carriers' sanctions and penalties for assisting illegal entry and residence (expressly made subject to the Geneva Convention relating to the status of refugees).[59] It further laid down rules on the organization of external border controls (including an obligation for the Contracting Parties to punish unauthorized entry) and on responsibility for assessing asylum applications. The Dublin Convention later replaced the latter rules.[60]

With regard to 'police and security', the Convention included measures on: (i) police cooperation for the purpose of preventing and detecting criminal offences, cross-border observation and hot pursuit;[61] (ii) mutual assistance in criminal matters, the application of the principle *ne bis in idem*, extradition and the transfer of the execution of criminal judgements;[62] (iii) the prevention and punishment of illegal trafficking in drugs;[63] (iii) the acquisition, possession and trading in firearms and ammunition.[64]

A central element of the Convention was the Schengen Information System (SIS) – a joint database containing information on persons and objects used for the purpose of maintaining public order and security.[65]

The body responsible for implementing the Convention was the Executive Committee composed of one minister for each Contracting State and acting by unanimity.[66] A Central Group of senior officials was responsible for preparing the Executive Committee's work. The Commission participated as an observer in the meetings of the two bodies. The Executive Committee made more than 200 decisions, many of which

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market, as provided in the EC Treaty, without prejudice to the measures to be taken to implement the provisions of the EC Treaty.

[58] Articles 5 and 19-20.

[59] Articles 9-17 and 26-27.

[60] Articles 3-4, 7-8 and 28-38. On the Dublin Convention see *supra* n. 46.

[61] Articles 39-47.

[62] Articles 48-69.

[63] Articles 70-76.

[64] Articles 77-91.

[65] Articles 95-100 made provision for the kind of data which could be stored in the SIS. These include data relating to persons wanted for arrest for extradition purposes, aliens to be refused entry, witness or parties in a judicial proceeding and persons to be kept under discreet surveillance for the purpose of prosecuting criminal offences or preventing threats to public safety. Article 101 identified which national authorities were entitled to access the SIS, and Articles 102-118 provided for a privacy protection regime.

[66] Articles 131-133.

were declared 'confidential' and remained unpublished.[67]

Like intergovernmental cooperation among all Member States, because of its secrecy the system established by the Convention came increasingly under criticism for lack of parliamentary control. Further criticism was based on the lack of a judicial control mechanism.[68]

The Convention was also criticized for some of its substantive provisions including those laying down an obligation for the Contracting Parties to introduce carriers' sanctions, on the ground that these affected the ability of asylum-seekers to escape from countries where they feared persecution,[69] and those on the SIS, particularly with regard to the possible grounds for inclusion and the lack of adequate remedies for wrongful inclusion.[70]

Full implementation of the Convention was for many years delayed as a result of concerns on terrorism and immigration, French concerns over the liberal Dutch drug policy and Dutch concerns over data protection in cross-border information exchange.[71] While full implementation was set for March 1995 for Germany, France, the Benelux countries, Spain and Portugal, which had meanwhile acceded to the Convention, France invoked again the national security clause on grounds of terrorist threats and problems relating to the Dutch drug policy.[72]

Between 1990 and 1996, all Members of the Community, except for the United Kingdom and Ireland, ratified or acceded to the Convention. Italy's full participation was delayed until 1997 due to French concerns over Italy's ability to properly carry out frontier controls and practical and legislative problems.[73] Greece was fully admitted to the frontier free area only in 2000 because of its difficulties in policing its sea frontiers

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[67] This was notwithstanding that a Joint Declaration attached to the Convention provided that the Contracting Parties were required to inform their national parliaments of the implementation of the Convention.

[68] See O'Keeffe (1991) pp. 188 and 212; Bontempi (1995) pp. 43-45.

[69] Carriers' sanctions were also arguably in breach of Annex 9 to the International Convention on Civil Aviation. Carriers' sanctions imposed by the United Kingdom were later found in breach of Article 6 and Article 1 of Protocol 1 ECHR by the Court of Appeal in *Roth v. Home Secretary* [2002] EWCA Civ 158. See Chapter 1.

[70] See also *infra* n. 168 with regard to criticism to the same provisions in the Draft External Frontiers Convention proposed by the Commission.

[71] Den Boer and Wallace, W. (2000) p. 498; Papademetriou (1996) p. 27.

[72] Turnbull and Sandholtz (2001) p. 202.

[73] These amounted to the absence of national laws on protection of personal data, which were required by Articles 117 and 126 of the Convention, difficulties in establishing the Italian national section of the SIS, and difficulties in adapting Italian airport structures. See Lo Iacono (1995) pp. 56-57; Nascimbene (1999) p. 422; Rossi (1997) pp. 124-125. Before its entry into Schengen, Italy did not have any comprehensive legislation on asylum and immigration. See Nascimbene (1997) pp. 153-154.

and its border with Albania.[74]

Accession by Denmark, Finland and Sweden led to negotiation with Iceland and Norway in order to maintain the Nordic Union passport free area among these countries.

2.3.1 Rules on visas under the Schengen Convention

As part of the harmonization and strengthening of external border controls, the Schengen Convention provided for the establishment of a common visa policy.

The common visa policy rested on three components. The first component was the harmonization of the Member States' visa requirements.

The second component was the introduction of a 'uniform visa' (implying mutual recognition of visas issued by the Member States for the purpose of external border crossing and free circulation) which was underpinned by the establishment of common entry conditions for aliens and common rules and procedures to be followed by the Member States when issuing visas.

The third component was constituted by the common instructions for the Member States' diplomatic and consular posts in capitals and consular cooperation at local level.

The common visa policy so formed was characterized by flexibility allowing the Member States to retain individual control as to who could obtain a visa to enter their territories.

The Schengen common visa policy constituted the model for the current EU visa policy.[75]

(i) Harmonization of the Member States' visa requirements

Article 9 of the Schengen Convention prescribed the harmonization of the Contracting Parties' visa policies. Such harmonization was to be total: any third country was either to be included in a 'black' list, whereby its nationals would require visas to cross the external borders of the Contracting Parties, or in a 'white' list, whereby its nationals would be visa-exempt.[76] Once the position in relation to a third country was harmonized, the Contracting Parties could amend it only by common consent. However, in exceptional cases where overriding reasons of national policy required urgent action, they could derogate from the common visa arrangements in relation to a third country,

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[74] Den Boer and Wallace, W. (2000) p. 498.

[75] Moreover, the Schengen *acquis* was, in May 1999, incorporated into the European Union legal order by virtue of the Protocol 'integrating the Schengen *acquis* into the framework of the European Union' attached to the Treaty of Amsterdam, see Chapter 4.

[76] Complete harmonization was a necessary pre-condition to the abolition of internal frontier controls.

after consulting the other Contracting Parties and taking account of their interests and the consequences of such decision on them.
Harmonization was a gradual process since the visa policies of the Contracting Parties diverged widely. Thus, for a long time a list of countries on which agreement could not be reached (the so called 'grey' list) continued to exist, and the Contracting Parties maintained individual discretion in relation to such countries, with only an obligation to notify the other Contracting Parties of their position.

The common visa policy that eventually developed was extremely restrictive. Such restrictiveness resulted from the method which was used for developing the 'black' list. It was evident that the Contracting Parties proceeded by (almost) cumulating their individual visa restrictions, which varied widely. In the case where national visa restrictions derived from immigration and security risks such a process was justifiable – no State could have been expected to relax in relation to those concerns, which constituted the very reason for establishing the common visa policy.
Nevertheless, it would have been desirable to agree common criteria for establishing what constituted 'immigration and security risks'. This was so since, given the wide divergences among the Contracting Parties (often derived from their different historical links, geographical positions and general effect as a 'magnet' to immigration flows), even cumulation of national visa requirements based on 'immigration and security risks' resulted in a very restrictive common visa policy with a corresponding negative impact on the Contracting Parties' bilateral relations with third countries and on other interests such as tourism.
A negative impact was experienced by Spain and Italy, for example. Spain had traditionally granted visa-free access to nationals of Latin American countries as part of its policy of forging an 'Ibero-American Community of Nations'. Such policy was reversed when Peru and the Dominican Republic (and eventually Colombia and Ecuador) were included in the 'black' list as posing problems in relation to drug trafficking and illegal immigration.
Italy, before the *Legge Martelli* (Law n.37/90) was passed in 1990, kept 78 countries visa-free as a result of its interest in tourism and its low key Mediterranean policy. Shortly afterwards, as part of Italy's entry into Schengen, visa requirements were introduced for a number of these countries. In 1995, after some resistance, Italy also introduced visa requirements for nationals of Serbia and Montenegro, which had been

kept visa-free notwithstanding their inclusion in the 'black' list and considerable protest from Germany.[77]

It remains doubtful to what extent the Contracting Parties had at their disposal instruments permitting a uniform evaluation of the conditions justifying the imposition of visa requirements.[78]

The negative impact of the common visa policy should have been an even more powerful argument against cumulating national visa restrictions based purely on reciprocity or political disapproval.[79]

While it is understandable that a State may be reluctant to grant privileged treatment to the nationals of another State in the absence of reciprocity, insistence on reciprocity in a context where the Contracting Parties' relations with third countries varied widely resulted in an extremely restrictive visa policy, which was disadvantageous particularly to Parties with wide external links.

In this context, it would at least have been desirable to reduce the variation in reciprocity between the Contracting Parties in their relations with third countries. It appears however that this was not done and many reasons can be adduced. Firstly, external relations may be difficult to change for a number of reasons. Secondly, EPC – the framework within which the Contracting Parties hammered out political convergence – was then embryonic. Thirdly, there might have been a deliberate political decision to give priority to restrictive positions in the circumstances.

(ii) The 'uniform' visa

The Schengen Convention also provided for the introduction of a uniform visa. A uniform visa was a visa for stays not exceeding three months or for transit valid for the entire territory of the Parties.[80] Uniform visas were to be issued only if an alien fulfilled the entry conditions established by the Convention and according to certain criteria and procedures provided by the Convention or by decisions of the Executive Committee.

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[77] See Cornelius (1994) p. 350; Nascimbene (1988) p. 221; Santel (1995) p. 76; Foot (1995) p. 140; Papademetriou (1996) pp. 93-96; Sciortino (1999) p. 243.

[78] This question is considered more fully in Chapter 4.

[79] See Home Office evidence to the House of Lords, House of Lords Select Committee on the European Communities (1993-94) para. 71, and p. 81 of evidence.

[80] Article 10. Under Article 19(1) a uniform visa entitled its holder to circulate freely in the Schengen territory for the period of the visa's validity providing he continued to fulfil the conditions of entry.

The common entry conditions

The entry conditions established by Article 5 of the Convention provided that in order to be granted entry into the Schengen territory an alien had: (i) to present a valid travel document; (ii) to present documents justifying the purpose and conditions of his visit and proving he had means of support; (iii) not to be reported on the SIS as a person to be denied entry; (iv) not to be considered a threat to the public policy, national security or the international relations of *any* of the Contracting Parties.

A Contracting Party could still issue a visa to an alien not fulfilling all these conditions on humanitarian grounds, on grounds of national interest or because of international obligations. In such a case the validity of the visa was restricted to the national territory of the issuing Party (a limited territorial validity visa).[81]

It is thus evident that the visa arrangements established by the Convention allowed the Contracting Parties to individually decide who could obtain a visa to enter their territories. A uniform visa (i.e. entitling the holder to enter *any* of the Contracting Parties) could be issued only if the conditions laid down in the Convention were met. These amounted to a cumulation of nationally determined requirements. Under the same rationale, the Convention allowed the Contracting Parties to grant access into their national territories to aliens who did not fulfil the common entry conditions through the issue of limited territorial validity visas (i.e. national visas).[82]

The possibility of unilateral action was in some cases justified on constitutional grounds, as in the case of recognition of passports. It was also justified by the Contracting Parties' duty to honour their international law obligations regarding validity of travel documents or access into the national territory. Lastly, it made it possible for the Contracting Parties to give expression to their individual national interest.

As Hailbronner remarked with regard to virtually the same provisions contained in the Draft External Frontiers Convention:

> 'During the negotiations on the Draft External Frontiers Convention, it became obvious that the conditions for issue of a uniform visa as well as for a mutual recognition of national visas touch upon very sensitive issues of national security. In spite of certain common conditions and criteria Member States consider it essential to refuse entry to third country nationals deemed a security

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Aliens in possession of a residence permit issued by a Contracting Party were entitled to cross the external borders and circulate freely for three months (Articles 21 and 25).

[81] Article 16.

[82] Under Article 18 the Contracting Parties also retained discretion to issue visas for stays exceeding three months in accordance with their national laws. These, since not granted according to common criteria, did

risk or unwanted for political purposes. On the other hand, Member States may want to deviate from politically motivated decisions to refuse entry for humanitarian or other political grounds'.[83]

Even considering the granting of limited territorial validity visas as an exceptional course of action, it is difficult to reconcile their existence with the idea of an area without internal *frontiers*.[84] There was an evident tension between the project of abolishing internal frontiers and the retention of sovereign status by the Contracting Parties. Sovereign status implied that the Contracting Parties continued to be individually bound by international law obligations governing directly or indirectly entry into their territories. In this context, frontiers continued to exist for delimiting the application of international law in a given case, and this was reflected in practice in recourse to limited territorial validity visas. Even more obviously, sovereign status implied that the Contracting Parties retained the right to exclude an individual from their national territory on national security grounds or because of political considerations.

Mutual recognition and the possibility of departing from its application also characterized the SIS. The SIS contained the common 'black' list of 'undesirable' persons to be denied entry by the Contracting Parties.
Article 96 of the Schengen Convention provided for some of the criteria on which national decisions to include an alien in the SIS were to be based. It stipulated:

'2. Decisions may be based on a threat to public policy or public security or to national security which the presence of an alien in national territory may pose.
This situation *may* arise *in particular* in the case of:

(a) an alien who has been convicted of an offence carrying a penalty involving deprivation of liberty of at least one year;
(b) an alien in respect to whom there are serious grounds for believing that he has committed serious criminal offences, including those referred to in Article 71 [illicit trafficking in drugs], or in respect of whom there is clear evidence of an intention to commit such offences in the territory of a Contracting Party.

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not carry the right of free circulation but permitted the holder, provided certain conditions were satisfied, to transit visa-free through the Schengen States in order to reach the State which issued the visa.
[83] Hailbronner (1994) p. 991.
[84] It also remains unclear how the territorial limitation of limited territorial validity visas could be enforced in the absence of frontier controls.

> 3. Decisions *may* also be based on the fact that the alien has been subject to measures involving deportation, refusal of entry or removal which have not been rescinded or suspended, including or accompanied by a prohibition on entry or, where applicable, a prohibition on residence, based on a failure to comply with national regulations on the entry or residence of aliens'.[85]

The SIS provided therefore only for limited guidance as to the grounds on which national decisions to include an alien in the SIS were to be based. Concepts such as 'national security' or 'public order' were left undefined,[86] and when a possible definition was provided it was limited. Thus, while conviction for an offence carrying a penalty of at least one-year imprisonment was identified as a possible ground for inclusion in the SIS, there was no harmonization as to which offences carried such penalty. The SIS was based on mutual recognition of the Member States' public policy and national security concerns and their legislation with regard to denial of entry. Such mutual recognition was again subject to the possibility of derogations based on humanitarian grounds, on grounds of national interest or on international obligations, which resulted in the issue of limited territorial validity visas.[87]

Mutual recognition had particularly harsh consequences on individuals since a third country national whose name had been entered in the SIS by a Contracting Party was to be excluded from all the other Contracting Parties irrespective of whether his conduct would have constituted a ground for exclusion there.

A 'pure' mutual recognition approach was however refuted by the national courts of some Contracting Parties.[88] The French Conseil d'Etat ruled that it could review the legality of an entry in the SIS made by the authorities of another Contracting Party by virtue of Article 111 of the Schengen Convention.[89] In *Forabosco*, the Conseil d'Etat

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[85] Emphases added.

[86] For this reason, the Netherlands Parliament required the adoption of protocols to be annexed to the Convention which were to define such terms on the basis of their interpretation under Community law. See Bontempi (1995) p. 45.

[87] See Article 5(2).

[88] See Guild (2001) p. 27.

[89] *Forabosco*, Case 190384, and *Hamassaoui*, Case 198344, 9 June 1999 (www.legifrance.gouv.fr). In both cases the Conseil d'Etat held that the applicants were entitled to sufficient information regarding their entry in the SIS to enable the national judge to review the lawfulness of the entry. The Conseil d'Etat based these decisions on Article 111(1) of the Schengen Convention which provided that 'any person may, in the territory of each Contracting Party, bring before the courts or the authority competent under national law an action to correct, delete or obtain information or to obtain compensation in connection with an alert involving them'. For in-depth analysis see Gortazar (2001) p. 138. A similar approach was applied by the Tribunale amministrativo regionale del Lazio, sentenza n. 13164/2001 *Ghadban* (www.giustizia-amministrativa.it). The Tribunale amministrativo held that the consular authority had a duty to inform the visa applicant of the national or other Member States' dispositions from

ruled that German authorities had made an error by including Forabosco in the SIS on the basis of the sole fact that she was refused asylum in Germany. Such a ground was held not to be among the grounds laid down in Article 96 of the Schengen Convention. In this context, it appeared clear that the exclusion of a central judicial authority entrusted with interpreting the Convention could resulted in lack of uniformity of national entry conditions, which could undermine the application of mutual recognition and thus the functioning of the whole system.[90]

The common conditions and procedures for issuing visas

The Convention also established certain criteria and procedures for issuing uniform visas. It provided that the diplomatic and consular authorities of the Contracting Party of main destination or, where this could not be determined, first entry were to be responsible for issuing the uniform visa.[91]

It also made provision for the affixing of uniform visas on travel documents.[92] According to these, only limited territorial validity visas could be affixed on travel documents valid for only one or more Contracting Parties (with the territorial validity of the visa excluding the Contracting Parties for which the travel document was not valid).[93]

When a travel document was not recognized as valid by one or more of the Contracting States (since it had been issued by an unrecognized State or government) the visa was to be affixed on a separate sheet. The Executive Committee could however agree on affixing visas to travel documents issued by countries or international bodies not recognized by all the Contracting Parties (such as North Korea, the Former Republic of Macedonia, Somalia and Taiwan) provided that the documents guaranteed returnability. In practice, often, the Contracting Party that did not recognize the travel document

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which his assessment as a 'security threat' derived and of the specific list where his name was traced, particularly in view of the consequences faced by an individual in case of erroneous inclusion in the SIS.

[90] See Staples (2003) pp. 246 and 248.

[91] Article 12. The Executive Committee also adopted decisions on the criteria for determining the state of main destination and on the rights and obligations between representing and represented States in the context of visa issue. See Decisions of the Executive Committee of 14 December 1993 extending the uniform visa (SCH/Com-ex(93) 21) and of 27 June 1996 on the principles for issuing Schengen visas in accordance with Article 30(1)(a) of the Schengen Convention (SCH/Com-ex(96)13 rev 1), OJ 2000 L 239/18 and 180.

[92] Articles 13-14.

[93] Travel documents issued under the 1954 UN Convention on the Status of Stateless Persons, for example, are not valid for Austria and Portugal which are not parties to the UN Convention. These countries, nevertheless, consented to the other Schengen States affixing uniform visas to the Convention Travel Document. See Decision of the Executive Committee of 16 December 1998 concerning the compilation of a manual of documents to which a visa may be affixed (SCH/Com-ex (98)56), OJ 2000 L 239/207.

affixed the visa on a separate sheet but consented to the other Contracting Parties affixing uniform visas on the document. This was for example the practice of Portugal with regard to passports issued by Taiwan.[94] The Executive Committee was to agree unanimously the list of passports and travel documents to which a visa could be affixed and the list of countries that were not recognized. Such lists were without prejudice to the Member States' recognition of countries and entities.[95]

The Convention left other criteria and procedures to be determined by the Executive Committee at a later stage. The Executive Committee was to specify cases where the issue of a uniform visa was subject to prior consultation of the central authorities of the issuing Contracting Party or any other Contracting Party. Further rules to be agreed within the Executive Committee included rules on the examination of visa application, on the issue of visas at borders, and on the visa-issuing authorities.[96]

(iii) The Common Consular Instructions and local consular cooperation

The success of the Schengen common visa policy ultimately depended on its uniform implementation by the Contracting Parties' consular authorities. Lack of uniform implementation would have led to visa shopping, thus undermining the very rationale of the common visa policy.

The first instrument to ensure uniformity was the Common Consular Instructions (CCI).[97] The CCI contained the Convention articles and the Executive Committee's decisions on the common conditions and procedures for issuing visas.

Through the CCI, national consular authorities were to implement the principle of mutual recognition of the Contracting Parties' conditions for issuing visas and of their concerns with regard to national security, public order and international relations.

Thus, the CCI naturally contained the 'black' and 'white' lists, the airport transit 'black' list, the list of national documents entitling entry without a visa (such as residence permits and cards issued by foreign ministries to members of international organizations

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[94] See the Manual of documents to which a visa may be affixed, *supra* n. 93.

[95] See Article 17. See also the Manual of documents to which a visa may be affixed, *supra* n. 93, and Annex 11 (criteria for travel documents to which a visa may be affixed) of the CCI, *infra* n. 97.

[96] Article 17.

[97] The CCI, as contained in Decision of the Executive Committee of 28 April 1999 'withdrawal of old versions of the Common Manual and the Common Consular Instructions and Adoption of new versions' (SCH/Com-ex (99) 13), were published in the *Official Journal* after the Schengen *acquis* was incorporated into the European Union legal order in May 1999 by virtue of the Protocol 'integrating the Schengen acquis into the framework of the European Union' attached to the Treaty of Amsterdam, see OJ 2000 L 239/317. For the latest consolidated version of the CCI, see OJ 2002 C 313/1.

and foreign diplomats), and the Manual of documents to which a visa could be affixed.[98]

Further, they laid down an obligation for the consular authorities to consult the SIS before a uniform visa was issued. They also provided a list of nationalities for which the central authorities of one or more Contracting Parties were to be consulted before a uniform visa was issued. This list, contained in Annex 5, was classified as 'confidential' and not published.[99]

The CCI also contained some rules aimed at improving security generally. Thus, they laid down some criteria in relation to the examination of visa applications including a requirement for consular authorities to be particularly vigilant in relation to 'risk' categories (unemployed persons or persons with no regular income) and with regard to verification of documents.[100] They provided that in the case where a visa application was lodged with the consular post in a State which was not the applicant's State of residence and a risk of illegal immigration was observed, the uniform visa could be issued only after consultation with the consular mission in the applicant's State of residence or with the central authorities.[101]

The CCI also laid down requirements with regard to the administrative management and organization of the visa sections in diplomatic or consular posts, particularly security measures on blank visa storage and measures to ensure that the staff responsible for issuing visas was not exposed to local pressure.[102]

The second instrument to ensure uniform implementation of the common visa policy was consular cooperation at local level.[103] Local consular cooperation involved an exchange of information considered important for a uniform interpretation of the CCI, for ensuring that the interests of all the Contracting States were known and taken into account, and for preventing visa shopping in general (in particular through the exchange of information on the use of false documents, illegal immigration routes, clearly ill-

[98] Annexes 1, 3 and 4, and *supra* n. 93.

[99] For example, following events in East Timor, Portugal requested that Indonesian nationals be issued only with limited territorial validity visas (excluding the visa validity for Portugal) or, in the case the applicant for a visa intended to enter or transit Portugal, its central authority were to be consulted before a visa could be issued. See Decision of the Executive Committee of 5 May 1995 on common visa policy (SCH/Com-ex (95)), OJ 2000 L 239.

[100] Parts III and V.

[101] See Part II and Annex 5.

[102] Part VII.

[103] See Part VIII.

founded applications and the good faith of applicants).

The practical measures to prevent visa shopping also included the regular exchange of information on visas issued and refused through which consular authorities were expected to detect trends and shifts in applications from one Contracting Party to another and make the necessary recommendation to their central authorities.[104] Further, they included the practice of stamping the passports of visa applicants when visa applications were lodged in order to prevent multiple or successive applications.[105] Moreover, document advisers were from time to time sent to selected consular posts in order to assist them with the detection of false documents.[106]

Arrangements for monitoring the implementation of the CCI constituted a further and essential instrument to ensure uniformity.[107]

Such monitoring was the responsibility of a Standing Committee. This was composed of one representative for each Contracting Party as well as the necessary seconded experts (the Commission was also included as an observer).

With regard to the implementation of the CCI, the Standing Committee was in particular to evaluate the application of the provisions for prior consultation, consultation of the SIS and storage of visa blank stickers. In relation to applicant countries, it was also to assess whether the conditions governing the issue of visas corresponded to those of the CCI, while, with regard to countries already applying the Convention, it was to make an assessment on the issue of limited territorial validity visas (quantity, target groups, and grounds for issue).

3. The Maastricht Treaty: Article 100c and the Third Pillar

3.1 The negotiations

With the adoption of the Draft External Frontiers Convention blocked over the issue of Gibraltar, by the end of 1990 progress on the adoption of the compensatory measures on

[104] See Decision of the Executive Committee of 21 April 1998 on the exchange of statistics on issued visas (SCH/Com-ex(98) 12), OJ 2000 L 239/173.

[105] See Decision of the Executive Committee of 23 June 1998 on the stamping of passports of visa applicants (SCH/Com-ex(98) 21), OJ 2000 L 239/200.

[106] Decision of the Executive Committee of 16 December 1998 on coordinated deployment of document advisers (SCH/Com-ex(98) 59 rev), OJ 2000 L 239/308.

[107] See Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen (SCH/Com-ex(98) 26 def), OJ 2000 L 239/138. On monitoring implementation see Decision of the Executive Committee of 21 April 1998 on the activities of the Task Force (SCH/Com-ex (98)1 rev 2), OJ 2000 L 239/191.

external border controls appeared meagre. The intergovernmental structure came increasingly under criticism because of its inefficiency.[108] Cooperation on immigration and policing, however, attracted initially little attention at the IGC on Political Union launched at the December 1990 Rome Summit. It was Chancellor Kohl who – already determined solidly to anchor a reunified Germany into a reinforced European Union – pushed the issue high on the IGC's agenda as he saw in European cooperation a solution to an increasingly hot issue in domestic politics.[109] The debate centred on the issue of whether intergovernmental cooperation should be abandoned in favour of Community competence.

Denmark and the United Kingdom were against any transfer of competence to the Community, with the United Kingdom also opposing the elimination of internal border controls. Moreover, the United Kingdom and France were concerned about the effects of Community policies on their bilateral obligations and their ability to act unilaterally. On the other hand, Germany, Italy and the Benelux countries wished to transfer competence to the Community.[110]

The Luxembourg Presidency, which took over responsibility for managing the IGC in January 1991, made four suggestions on the matter: (i) maintaining the existing cooperation arrangements (which suited Denmark), (ii) inserting a new reference in the Treaty to cooperation with details left to the Council (which suited the United Kingdom, Ireland and Greece), (iii) introducing in the Treaty more elaborate provisions for cooperation specifying the decision making procedures for each policy area before final integration of immigration policy into the Community legal order (which suited Germany, France and Portugal), (iv) full communitarization (preferred by the Netherlands, Belgium, Italy and Spain).[111]

In April 1991, Luxembourg presented a 'non-paper' on draft amendments to the Treaty proposing a three-pillar structure according to which the Community (the First Pillar) would be complemented by intergovernmental cooperation on foreign and security policy (the Second Pillar) and justice and home affairs (the Third Pillar). This suited the United Kingdom but was seen as too 'minimalist' by Germany, France, Spain, Belgium, the Netherlands and Italy. Germany, in particular, called at the Luxembourg Summit in June 1991, for the adoption of a common immigration policy at Community level. When the Netherlands assumed the presidency in July 1991 it proposed

[108] See *supra*.
[109] Papademetriou (1996) pp. 51-52; Turnbull and Sandholtz (2001) p. 215.
[110] Papademetriou (1996) pp. 51-52.

communitarization of justice and home affairs. It was however supported only by Belgium and the Commission. The Member States expressed a clear preference for the three-pillar model which became the basis of negotiations at the Maastricht Summit.[112]

The Treaty on European Union agreed at Maastricht in February 1992 confirmed the Luxembourg proposal, and introduced a three-pillar structure for the European Union.[113] While the preference for the intergovernmental method for cooperation on justice and home affairs thus prevailed, as a result of a political compromise between those Member States which wanted to communitarize immigration, asylum and external border controls and those Member States which objected to communitarization, the TEU transferred some aspects of visa policy to Community competence.[114]
Article 100c EC, inserted among the internal market provisions of the EC Treaty, conferred competence on the Community for the establishment of the 'black' list of countries whose nationals were to have visas to cross the external borders of the Member States, and a uniform format for visas. The selection of these aspects for communitarization, and the inclusion of Article 100c among the internal market provisions, emphasized their characterization as the most indispensable compensatory measures. At the same time, the split minimized curtailment of national autonomy for visa policy. The establishment at Community level of only a 'black' list, as opposed to full harmonization of the visa requirements imposed by the Member States, implied less intrusion on the sovereign right to control entry of aliens and on the Member States' ability to use visa requirements as a national foreign policy instrument. The exclusion from Community competence of the 'conditions and procedures' for issuing visas and of 'rules on a uniform visa' (i.e. mutual recognition of national visas issued according to the common conditions) can also be explained by their touching more deeply on the issue of state sovereignty. The conditions and procedures for issuing visas have ramifications into areas which remain within national competence (such as recognition

[111] See Geddes (2000) p. 89.
[112] See Pryce (1994) p. 36; Papademetriou (1996) pp. 52-53; Geddes (2000) pp. 90-91; Denza (2002) pp. 74-75.
[113] The Treaty came into force on 1 November 1993 after ratification by Denmark and France following national referenda and, lastly, by Germany following the judgement of the German Constitutional Court on the compatibility of the TEU with the German Constitution (*Brunner v. European Union Treaty* [1994] 1 CMLR 57). As to the implications of the pillar structure see Chapter 2.
[114] As Anderson, den Boer and Miller explained: 'At the two extremes of this compromise were the UK, whose island-state is not much threatened, and Germany, which is open and exposed at the crossroads of a continent. In the IGC, the UK was in the forefront of wanting to continue with primarily intergovernmental methods. Only visa policy, at the insistence of the Germans, was successfully tacked on to the EC Pillar. Anderson, M., den Boer and Miller (1994) p. 115.

of passports). Mutual recognition of national visas was perhaps the most sensitive issue involving a considerable curtailment of state sovereignty in relation to access into the state territory.

However, the division of competence between the Third Pillar and Article 100c was difficult to defend and became the object of disagreement and disputes between the institutions which greatly impeded progress.

3.2 The Third Pillar on Justice and Home Affairs

The Third Pillar provisions were contained in Title VI TEU, Articles K-K.9.[115]

The objective of cooperation was established in Article K.1. This provided that: 'For the purpose of achieving the objectives of the Union, in particular the free movement of persons...Member States shall regard the following areas as matters of common interest'. These area were: (i) asylum policy, (ii) rules governing the crossing by persons of the external borders of the Member States, (iii) immigration policy, (iv) drug addiction, (v) fraud, (vi) judicial cooperation in civil matters, (vii) judicial cooperation in criminal matters, (viii) custom cooperation, and (ix) police cooperation for the purpose of combating terrorism, drug-trafficking and other serious forms of crime. The objective of cooperation appeared vague as the Member States were required only to treat such areas as 'matters of common interest'.

Cooperation so defined was limited by three principles. Firstly, it was to be 'without prejudice to the powers of the European Community'. Secondly, it was to comply with the ECHR and the 1951 Convention relating to the Status of Refugees. Thirdly, it was 'not to affect the exercise of the responsibilities incumbent upon the Member States with regard to maintenance of law and order and the safeguarding of internal security.[116]

Reflecting Article C EU, prescribing a 'single institutional framework' for the Union, the Council, which had previously been excluded from intergovernmental cooperation, acquired the central role under the Third Pillar. The Council could adopt 'joint positions' and 'joint actions', and could draw up conventions to be recommended to the Member States for adoption in accordance with their constitutional requirements.[117] It was to act by unanimity – except for matters of procedure and for implementing measures if it so decided – on an initiative of a Member State or, with regard to the first

[115] For an in-depth analysis see Hendry (1993).
[116] Article K.1-K.2.

six matters of common interest, the Commission.[118]

The Commission was to 'be fully associated' with the work of the Third Pillar.[119] Moreover, as just mentioned, it shared a right of initiative with the Member States with regard to the first six matters of common interest. In practice, the Commission seldom used its right of initiative, at least until 1997.[120] This mainly reflected the Commission's desire to avoid any counter-productive disagreement among the Member States as to its proper role under the Third Pillar. Moreover, justice and home affairs ministers generally appeared reluctant to allow the Commission to establish a role in their field. The Commission's actual influence depended thus on its tactical ability and the provision of expertise.[121]

As with the Second Pillar, the initiation of policy rested primarily on the Presidency assisted by the Council Secretariat. This meant a lack of continuity, because of the Presidency's half-yearly rotation and the link of initiatives with specific national interests, which was only to a limited extent redressed by multi-annual programmes agreed by the Council.[122]

Article K.6 provided that the European Parliament was to be regularly informed by the Presidency and the Commission on discussions, that it was to be 'consulted' by the Presidency on the principal aspects of activities and its views were to be taken duly into account, and that it could submit questions to the Council and make recommendations to it. This provision, like the provision governing the role of the Commission, was ambiguous and open to different interpretations.[123] In practice, before 1997 few proposals were passed to the European Parliament for consultation.[124]

The jurisdiction of the Court of Justice was almost completely excluded by virtue of Article L EU.[125] Exclusion of the Court aimed at preserving the intergovernmental character of the Pillar. The Member States feared that the Court would introduce legal principles and doctrines developed in the Community context with the ultimate effect of

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[117] Article K.3. The Member States were also required to 'inform and consult one another in the Council with a view to coordinating their action'.

[118] Articles K.4(3) and K.3(2).

[119] Articles K.4(2) and K.3(2).

[120] See Curtin and Dekker (1999) pp. 117-119; Peers (2000) pp. 20-21.

[121] Monar (1997b) p. 329; den Boer and Wallace, W. (2000) p. 509; Peers (2000) pp. 20-21.

[122] See Monar (1997b) p. 330; den Boer and Wallace, W. (2000) p. 504. A Resolution identified the priorities for the 1996-1998 period, OJ 1996 C 319/1.

[123] O'Keeffe (1995) p. 903. The extent and effectiveness of consultation varied depending on the Presidency in office. See evidence to the House of Lords by Amédée Turner MEP (qq. 227-234), House of Lords Select Committee on the European Communities (1993-94).

[124] Peers (2000) p. 21.

[125] On the Court's jurisdiction under Article M see *infra*.

curtailing their autonomy.[126]

Exclusion of the jurisdiction of the Court was regrettable given the substantive scope of the Third Pillar. Although individuals were not in principle to be affected by Third Pillar measures but only by national implementing measures against which national judicial protection was available,[127] exclusion of the jurisdiction of the Court of Justice meant that there was no overriding judicial authority to ensure consistency of interpretation and enforcement, and provide for minimum standards of human rights compliance among all Member States.[128]

Article K.3(2)(c) however established that conventions could attribute jurisdiction to the Court of Justice with regard to their interpretation and application 'in accordance with such arrangements as they may lay down'. The issue of the Court's jurisdiction over individual conventions negotiated under the Third Pillar gave rise to bitter disputes between the Member States and deadlocks.[129]

Article K.4 established a Coordinating Committee of senior officials – the K.4 Committee – which was entrusted with coordinating and preparing the work of the Council, and delivering opinions at the request of the Council or on its own initiative. The K.4 Committee was in fact the old pre-Maastricht Group of Coordinators. The role of Coreper was safeguarded through a reference to Article 151 EC in Article K.4. Again, the relationship between the two bodies was however not fully clarified and friction arose.[130] Generally, the practice became that the K.4 Committee transmitted proposals to the Council through Coreper which normally commented only on proposals with First Pillar implications or raising important political issues.[131]

With regard to Third Pillar instruments, the legal effect of joint positions and joint actions remained unclear. Third Pillar provisions expressly obliged the Member States to defend joint positions in international organizations and at international conferences. But, unlike Second Pillar provisions, they did not expressly require that the Member States' national policies conformed to joint positions, or that joint actions were to

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[126] See O'Keeffe, *infra* n. 187.

[127] Cf. Meyring (1997) p. 241.

[128] Justice (1996a) p. 16; Neuwahl (1995); Rossi (1997) p. 106.

[129] For a full account see Peers (2000) pp. 25-26; Denza (2002) p. 313-316; Rossi (1997) p. 114. The compromise dispute settlement provisions of the European Police Office (Europol), the Customs Information System (CIS) and the Protection of the Communities' Financial Interests Conventions (PIF) Conventions (respectively Articles 40, 27 and 8), all adopted by the Council under the Third Pillar in July 1995, became the model for the Amsterdam Treaty provisions, OJ 1995 C 316/1, 33 and 48.

[130] Monar (1997b) p. 329; den Boer and Wallace, W. (2000) p. 507.

[131] Peers (2000) p. 18; Denza (2002) p. 81.

commit the Member States in their positions. In the light of this difference, many commentators concluded that Third Pillar joint positions and joint actions – which were not free-standing international instruments among States but made by the Council under Treaty powers – were not capable of being legally binding so as to require national law to conform to them.[132] The issue constituted a further example of the ambiguity of the Third Pillar. The Member States developed the practice of relying on clearly non-binding instruments such as resolutions, recommendations, conclusions and decisions. Conventions thus appeared the only clearly legally binding instrument capable of requiring changes to national laws.

The Third Pillar also provided for the possibility of closer co-operation between the Member States, which was taking place under the Schengen Convention.[133]

3.2.1 Relationship between the Third Pillar and the Community

The Third Pillar was connected to the Community in various ways. The Common and Final Provisions of the TEU linked together all three Pillars. Article C EU established a 'single institutional framework' for the Union which was to ensure the consistency of its activities. This had some far-reaching implications. It meant, for example, that certain Community measures governing the institutions were applicable in an across-the-pillars fashion.[134]

Article D EU entrusted the European Council with defining the general political guidelines of the Union. This was clearly reflected in Second Pillar provisions, which prescribed that the Council responded to the political guidelines of the European Council, but it was not expressly reflected in the Third Pillar provisions, although action by the European Council did cover the Third Pillar in accordance with Article D.[135]

Article M EU safeguarded Community competence by providing that nothing in the TEU was to affect the Community Treaty. The same stipulation was provided for in Article K.1 which stated that cooperation under the Third Pillar was to be 'without prejudice to the powers of the European Community'. Since Article L, which excluded

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[132] Müller-Graff (1994) p. 509; Denza (2002) p. 78. For a different opinion see Meyring (1997) pp. 232-233.

[133] Article K.7.

[134] See, for example, Case T-174/95 *Svenka Journalistforbundent v. Council* [1998] ECR 2289, where the Court of First Instance held that Decision 93/731 – the Community instrument governing access to documents – which was adopted under Article 151 EC (now 207) covered Council decisions on access to Third Pillar documents since Article 151 EC expressly applied to the Third pillar by virtue of Article K.8(2) and Decision 93/731 contained no exclusion,.

the Court of Justice's jurisdiction with regard to the TEU provisions, excluded Article M from its scope, the Court had jurisdiction to monitor that Third Pillar activity did not encroach on Community powers.

Such jurisdiction was affirmed by the Court in the *Airport Transit Visas Case,* where the Commission challenged the validity of the Joint Action on Airport Transit Visas adopted by the Council under Article K.3 on the ground that the measure fell within the scope of Article 100c EC.[136] The United Kingdom intervening argued that the Court did not have jurisdiction to review the validity of the Joint Action since Third Pillar measures were outside the scope of Article 173 EC. The Court dismissed the argument holding that Article L and M EU entrusted the Court with ensuring that Third Pillar activity did not encroach on Community powers.

A further bridge between the First and Third Pillars was provided by Article K.9. Article K.9 – the so called *passerelle* provision – provided for the possibility of transferring any of the first six matters of common interest listed in Article K.1 to the European Community (Article 100c). Such transfer – as it constituted in practice an amendment of the Treaties – required unanimity in the Council and ratification by all Member States in accordance with their respective constitutional requirements. It could be proposed either by a Member State or the Commission.

A Declaration on Asylum attached to the Maastricht Treaty provided that the Council was to consider by the end of 1993 whether to apply the *passerelle* provision to asylum policy. In November 1993 the Commission expressed the opinion that further experience with the Third Pillar was desirable before the use of Article K.9, which the Council endorsed.[137] In November 1995 the Commission advocated the transfer to Community competence of all matters dealt with in the Third Pillar with the exception of judicial and police cooperation in criminal matters. However, it declared that the issue was better left to the 1996 IGC, particularly given the cumbersome procedure envisaged by Article K.9.[138] Monar suggested that the Commission might have wanted to avoid polarization of the Member States on the question of communitarization at least before the start of the IGC.[139]

A further connection between the Community and the Third Pillar was provided by

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[135] O'Keeffe (1995) pp. 896-897.
[136] Case C-170/96 *Commission v. Council* [1998] I-2763.
[137] SEC(93) 1687.
[138] COM(95) 566.
[139] Monar (1997b) p. 331.

virtue of the arrangements for financing.[140]

3.2.2 Criticism of the Third Pillar

Soon after its entry into force and already in the context of the TEU's review as provided for in Article N EU,[141] the Third Pillar was strongly criticized on the ground of serious structural deficiencies.[142]

The Third Pillar's greatest defect was that it did not provide for adequate legal instruments.[143] As mentioned earlier, the Member States remained divided on the legal effect of joint positions and joint actions – with no possibility for a clarification from the Court of Justice – and came to rely on clearly non-binding instruments.[144] Reliance on non-binding measures and lack of a mechanism for monitoring implementation meant that Third Pillar measures were often not transposed (or at least not fully and timely) into national policies or national administrative agencies' practices.[145]

Conventions, the only clearly legally binding instrument, generally took a very long time before entering into force as a result of slow and uneven ratification by national parliaments, and no real monitoring of their implementation took place.

A further problem of the Third Pillar was its cumbersome five-layer decision-making structure.[146] Below the Council were Coreper and the K.4 Committee. Three Steering Groups reported to the K.4 Committee on respectively: immigration and asylum; police and custom cooperation; and judicial cooperation.[147] Various working groups reported to each Steering Group. Moreover, other groups existed independently, such as Cirea,

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[140] Article K.8.

[141] In this context, the Council in its Report on the Functioning of the Treaty on European Union (SN 1821/95, 10.03.1995), emphasized that the little time the Third Pillar had been in force for precluded a true assessment of its provisions.

[142] See Commission's Report on the Operation of the Treaty on European Union, SEC(95) final, 10 May 1995, paras. 47-52. See also Hailbronner (2000) p. 49.

[143] O'Keeffe (1995) p. 898. See also Commission Communication on immigration and asylum policies, 23.02.1994, COM(94) 23 final, paras. 15-18; Reflection Group's Report, 5 December 1995, SN 520/95 (Reflex 21), para. 48.

[144] Walker (1998) pp. 235-236.

[145] See the Austrian Strategy Paper on immigration and asylum, Council doc. 9809/98, 29.09.1998. See also Den Boer and Wallace, W. (2000) pp. 511-512. An exception was the Joint Action on an evaluation mechanism, OJ 1997 L 344/7, under which a group of experts would visit the Member States regularly to see whether they had implemented Third Pillar crime and policing measures effectively. Under the Schengen Convention implementation was assured through a system of inspections by multinational teams.

[146] See for example the United Kingdom Government (1996) para. 53.

[147] These replaced the old working groups in pre-Maastricht. They were terminated by the United Kingdom Presidency in early 1998.

Cirefi and Horizontal Group on Data Processing.[148] This heavy structure tended to slow down the decision-making process and increase the workload of coordination.[149]
A further weakness of the Third Pillar was that it overlapped with Community competence with regard to visa policy, drug addiction, international fraud and treatment of migrants.[150] This caused institutional friction and slowed down the decision-making process. The boundary between the Community and Third Pillar competence was firstly questioned in *Portugal v. Council* where Portugal challenged the validity of a Development Cooperation Agreement concluded under the First Pillar on the ground that the Agreement included provisions on fighting drug abuse which should have been based on Article K EU.[151] Later, in the *Airport Transit Visas Case* the Court was again called to delimit the division of competence, this time with regard to visa policy (see *infra*).[152]

Apart from its inefficiency, the Third Pillar was also worrying on the ground of lack of transparency and political accountability.[153] Secrecy surrounded Third Pillar activity, which made it difficult for national parliaments to influence policy.[154]
Some national parliaments developed procedures for scrutiny of Third Pillar activity. The United Kingdom government, for example, following a Report by the House of Lords Select Committee on the European Communities in 1993,[155] undertook to provide Third Pillar documents to Parliament at an appropriate stage of policy development. The government however refused at that time to grant a parliamentary scrutiny reserve under which it would withhold agreement in the Council until Parliament had scrutinized the relevant documents. Stricter procedures were applied by the Parliaments of the Netherlands – which has a monist approach to international law – and Finland.[156]
Access to Third Pillar documents by the public also improved as a result of the Court of First Instance's judgement in *Svenka Journalistforbundet v. Council.*[157]

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[148] See Peers (2000) p. 24.
[149] Monar (1997b) p. 329. 'Horizontal' or 'high level' groups, such as the High Level Group on Asylum and Migration were developed to link together the negotiations within the different working groups and prepared multi-annual programmes. See den Boer and Wallace, W. (2000) p. 506.
[150] This was clearly pointed out by the Commission with regard to visas. See Commission's Report, *supra* n. 142, para. 52.
[151] Case C-268/94 *Portugal v. Council* [1996] ECR I-6177. The Court of Justice, pointing to the general nature of the provisions in questions, found that they fell within the concept of development policy.
[152] *Supra* n. 136.
[153] See Commission's Report, *supra* n. 142, para. 18.
[154] See for example Justice (1996b).
[155] See House of Lords Select Committee on the European Communities (1992-93).
[156] See Curtin and Dekker (1999) pp. 120-121; Denza (2002) pp. 328-329.
[157] *Supra* n. 134.

3.2.3 Results

According to Denza:

> 'It was clear by the end of the process of ratification of the Maastricht Treaty, that the Third Pillar broadly reflected the extent of public and parliamentary readiness at that stage to integrate asylum, immigration, police and judicial cooperation into the EU'.[158]

The field of justice and home affairs was a particularly sensitive one. Cooperation was inextricably linked to the issue of sovereignty, touching on responsibility for maintaining internal security and on the issue of jurisdiction.

As Monar states:

> '...traditionally the enormous concentration of political, administrative and financial powers of the modern state has found one of its main reasons of legitimacy in the guarantee of the internal security of its citizens. As a result justice and home affairs are intimately linked to the traditional concept of national sovereignty: even the slightest renunciation of national control over state instruments in this area seems to question the nation-state in one of its most essential functions'.[159]

Moreover, cooperation was made difficult by the existence of profound differences between the Member States' substantive and procedural laws and law enforcement practices and by their propensity to assume the superiority of their individual national systems, which hindered the application of the principle of mutual recognition.[160]

These factors and attitudes were ultimately at the basis of the Third Pillar's legal and constitutional ambiguities.

What the Third Pillar did at least provide for was a framework for a process of reciprocal learning which was essential to establish the foundations for common policies and to build sufficient mutual trust to support their implementation.[161] Activity under the Third Pillar did result in the transformation of working practices of interior

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[158] Denza (2002) p. 84.

[159] Monar (1997b) p. 326.

[160] Thus, for example application of the Dublin Convention had in some cases been excluded on the ground that the national asylum laws of the Member State responsible for processing the application did not afford the same level of protection as those of the Member State where the applicant was seeking refuge. See *R v. Secretary of State for the Home Department ex parte Adan and Aitsguer* [2000] UKHL 67. See Boccardi (2002) p. 177; Nicol (2004) p. 173.

[161] Den Boer and Wallace, W. (2000) p. 501.

ministries and police forces and the development of extensive networks.[162]

In practice, activity under the Third Pillar also brought about a great deal of policy convergence in the field of asylum and immigration, with national policy makers adopting unilaterally many of the restrictive measures they had been reluctant to adopt collectively.[163]

Moreover, although progress under the Third Pillar appeared generally limited,[164] by the time of the 1996 IGC a network of instruments and institutions was starting to take shape.[165]

3.3 Article 100c EC

As mentioned earlier, as a result of a political compromise between those Member States that wanted to communitarize immigration, asylum and external border controls and those that were against communitarization, the Treaty of Maastricht transferred some aspects of visa policy to Community competence. Article 100c EC provided that 'the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, shall determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States'. Qualified majority voting applied after 1 January 1996.

Further, it provided that the Council, before 1 January 1996, was to adopt, acting by qualified majority voting on a proposal from the Commission and after consulting the European Parliament, measures relating to a uniform format for visas.

Article 100c also made provision for the introduction of visa requirements 'in the event

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[162] See, for example, House of Lords Select Committee of the European Communities (1997-1998a).

[163] See Papademetriou (1996) pp. 106; Rasmussen (1997) p. 159. In this respect see, for example: Resolution of 20 June 1994 adopted by the Council on limitations on admission of third country nationals to the Member States for employment (OJ 1996 C 274/3); Resolution of 30 November 1994 relating to limitations on the admission of third country nationals to the Member States for the purpose of pursuing activities as self-employed (OJ 1996 C 274/7). With regard to asylum, two Resolutions were adopted by the EU immigration ministers in London from 30 November to 1 December 1992. One related to 'manifestly unfounded applications for asylum', the other regarded 'a harmonized approach to questions concerning host third countries', published in Guild and Niessen (1996) pp. 141 and 161 respectively. The Council also adopted measures in an attempt to establish a common approach to the 1951 Convention on Refugees: Resolution of June 1995 on minimum guarantees for asylum procedures, OJ 1996 C 274, and Joint Position of March 1995 on the harmonized application of the definition of the term 'refugee' in Article 1of the 1951 Geneva Convention, OJ 1996 L 63/2.

[164] See for example Monar (1997b) pp. 331-334; Hailbronner (2000) p. 48; Denza (2002) pp. 193-234. For an account on progress toward a EU immigration policy see Peers (1998).

[165] Den Boer and Wallace, W. (2000) p. 512. In particular, Europol, *supra* n. 129, was taking shape (although the Convention had not yet been ratified). The CIS, *supra* n. 129, was being computerized and two other databases for Europol and Eurodac were under development (the formal adoption of the Eurodac Convention establishing a system for the identification of applications for asylum under Article 15 of the Dublin Convention was set aside to take place under the Amsterdam Treaty, Council Document 11118/4/96 p. 10).

of an emergency situation in a third country posing a threat of a sudden inflows of nationals from that country into the Community', thus explicitly confirming the use of visas to block asylum inflows.

Such visa requirements were to be introduced by the Council acting by a qualified majority voting on a recommendation from the Commission for a period not exceeding six months (consultation of the European Parliament was excluded presumably on the ground of a need to act quickly).

The Article, departing from the standard Community legislative procedure, provided that the Commission was to examine any request made by a Member State that it submit a proposal to the Council. It also contained a material exception stating that nothing in it 'could prejudice the exercise of the responsibilities incumbent upon the Member States with regard to the maintenance of law and order and the safeguarding of internal security'.

It clarified its relation with intergovernmental cooperation by stipulating that the provisions of conventions in force between the Member States governing areas covered by the Article were to remain in force until their content was replaced by measures adopted pursuant to the Article.

4. Progress on visa policy under the Maastricht Treaty

4.1 The Visa Regulation and the Draft External Frontiers Convention

4.1.1 The Commission's proposals

Soon after the Maastricht Treaty entered into force, the Commission in a Communication proposed two related measures for adoption by the Council which, together with a regulation on a uniform format for visas to be proposed by the Commission at a later stage, were to provide the rules governing the crossing of the external frontiers of the Member States including a common visa policy.[166]

One proposal, based on Article K.3 EU, was a Council decision to establish a Convention on the crossing of the external frontiers of the Member States.[167] This Draft Convention corresponded in substance to the Draft External Frontiers Convention that

[166] COM(93) 684, 10.12.1993, OJ 1994 C 11. For an in-depth analysis see House of Lords on the European Communities (1993-94).

[167] On the Commission's choice for a Council decision 'establishing' a convention see O'Keeffe (1994) p. 141. The Commission held that under the TEU the Member States could no longer conclude conventions between one another in the areas listed in Article K.1 in the traditional manner prescribed by public international law. O'Keeffe remarked that the very purpose of introducing the Third Pillar was to allow the Member States to act under international law rather than Community law.

had been negotiated by the Member States within the framework of the Ad hoc Group on Immigration but had never been signed because of the dispute between the United Kingdom and Spain over its application to Gibraltar.
The Commission amended the original Draft Convention in response to changes brought about by the TEU, in particular the transfer of competence to the Community for certain aspects of visa policy and the possibility of granting jurisdiction to the Court of Justice over the interpretation and application of Third Pillar conventions.

The provisions of the Draft Convention were largely based on the relevant provisions of the Schengen Convention.[168] Unlike the Schengen Convention, however, the Draft Convention did not provide for the abolition of internal border controls. The Commission, in accordance with its interpretation of Article 7a (previously 8a), maintained that measures on the removal of internal frontier controls were to be adopted under Community law. At a later stage, it did propose such measures under Community powers but the Council did not act on them.[169] The United Kingdom, for its part, never accepted that the underlying objective of the Draft Convention and the Visa Regulation was the removal of internal border controls.[170]

With regard to visa policy, the Draft Convention provided for the progressive harmonization of the Member States visa policies, without prejudice to decisions adopted under Article 100c EC.[171]
It introduced the concept of a uniform visa. This was defined as an 'entry, transit or re-entry visa of the uniform format provided for in Article 100c(3)...issued under the rules

[168] They included provisions on: organization and standards of border controls (Articles 2-6); entry conditions for short stays (Article 7); equivalence between a residence permit and a visa for the purpose of external border crossing (Article 8); a joint list of persons to be refused entry (Articles 10-13); and the introduction of carriers' sanctions and of penalties for unlawful crossing (Articles 14-15). The provisions on the joint list – by virtue of which a Member State could exclude a third country nationals from the territory of the whole Community simply on the basis that there were serious grounds for believing that he was planning to commit a serious crime or that he represented a threat to public policy or national security – were strongly criticized particularly on the ground of lack of adequate remedies for persons wrongly included in the joint list. Also strongly criticized was the obligation to introduce carriers' sanctions on the ground that these had the effect of hindering the ability of asylum-seekers to escape from countries where they feared persecution. See ILPA and Refugee Council, House of Lords Select Committee on the European Communities (1993-94) paras. 29 and 44.
[169] The Commission proposed three directives after the Schengen Convention became operative in March 1995. Two, based on Article 100 EC, provided for respectively the abolition of border controls and free circulation of all third country nationals. The third, based on Articles 49, 54(2) and 63(2) EC, provided for amendments to the EC free movement provisions. COM(95) 347, 348, and 346, OJ 1995 C 289/16, C 306/5 and C 307/18.
[170] See House of Lords Select Committee on the European Communities (1993-94) para. 57.
[171] Article 17.

specified in...this Convention'.[172] These rules established the entry conditions to be satisfied by aliens and the conditions and procedures to be followed by the Member States when issuing visas.[173] The Draft Convention provided that 'a Member State shall not require a visa issued by its own authorities of a person applying to stay for a short time within its territory who holds a uniform visa'.[174]

The second Commission's proposal was a regulation based on Article 100c determining the third countries whose nationals were to be in possession of a visa when crossing the external frontiers of the Member States.

The proposed Draft Regulation contained a list of 126 countries whose nationals had to be in possession of a visa when crossing the external borders (the 'black' list) and an obligation for the Council to include by 30 June 1996 any other third country either on the 'black' list or on a list of countries whose nationals were to be visa exempt (the 'white' list).

The Commission justified the postponement to 30 June 1996 on the grounds of the sensitivity of the matter and of the divergent policies of the Member States. Until 30 June 1996, the Member States were to retain discretion over visa requirements for nationals of countries not included on the 'black' list, on the understanding that divergences between the Member States 'may not give rise to controls contrary to Article 7a'.[175]

The declared 'cornerstone' of the Commission proposed Draft Regulation was the establishment of the principle of mutual recognition of visas for the purpose of external border crossing. According to Article 2 of the Draft Regulation 'a Member State shall not be entitled to require a visa of a person who seeks to cross its external frontiers and who holds a visa issued by another Member State, where that visa is valid throughout the Community'. A visa valid throughout the Community would be the uniform visa granted according to the rules in the Draft Convention.

4.1.2 Disagreement over the division of competence

The Commission's understanding of the division of competence for visa policy between the First and Third Pillars, as illustrated by the Commission's proposals, was ultimately

[172] Article 1(1)(f).
[173] Articles 19-22, 24-25. These provisions were the same as those of the Schengen Convention.
[174] Article 18.
[175] Article 1 and Preamble.

underpinned by the Commission's interpretation of Article 7a.[176]

The Commission interpreted Article 100c as ultimately functional to the removal of internal frontier controls. It thus interpreted the Article as requiring complete harmonization of the Member States' visa requirements, and accordingly it included in the Draft Regulation not only a 'black' list but also an obligation for the Council to include any third country either in the 'black' or in a 'white' list by June 1996.

However, the objective of removing internal frontier controls remained a disputed one, and accordingly some Member States never accepted that the underlying purpose of the Visa Regulation was to serve it.[177]

A further controversial point was the Commission's splitting of the principle of mutual recognition of visas between the Draft Convention and the Draft Regulation. While the Draft Convention laid down the principle for the purpose of free circulation in the Community, the Draft Regulation was to give effect to it specifically where it related to the crossing of the external borders of the Member States.

The Parliament adopted an even wider interpretation of Article 100c than the Commission, holding that the Draft Regulation was also to cover the common conditions and procedures for issuing visas and the principle of equivalence between a residence permit and a visa, which had been included in the Draft Convention.[178]

The Council rejected the interpretations of the Commission and the Parliament. It amended the Commission's Draft Regulation deleting the obligation to completely harmonize the visa requirements of the Member States by June 1996 and the principle of mutual recognition of visas. The Preamble to the Council Regulation stated that 'the Member States will constantly endeavour to harmonize their visa policies with regard to third countries not on the common list',[179] and that the principle of mutual recognition and the conditions and criteria for issuing visas were matters to be determined within the 'appropriate framework', namely the Third Pillar.[180]

4.1.3 The 'black' list

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[176] See Hailbronner (1994) pp. 981-985 and 987; O'Keeffe (1994) pp. 146-147.

[177] See *supra* n. 170.

[178] See Peers (1996) p. 153, who argued that at first sight only the Parliament's and the Council's maximalist interpretations appeared coherent.

[179] 9th Recital Regulation 574/1999, OJ 1999 L 72/2, replacing Regulation 2317/95, OJ 1995 L 234/1. The Council did not expressly reject the view that Article 100c required complete harmonization of the Member States' visa requirements *eventually*. Article 2(4) of the Regulation established a duty for the Member States to notify their position in relation to the countries not on the 'black' list, and Article 3 provided for the Commission to draw up a progress report on harmonization two years after the Regulation's adoption.

A further problem surrounding the adoption of the Commission's proposals was the 'black' list of the Draft Regulation. The Commission proposed a 'black' list which was substantially the same as the Schengen 'black' list without any prior negotiations with those Member States that were not taking part in the Schengen Convention (the United Kingdom, Ireland, and at that stage Denmark).[181] The 'black' list so proposed thus included a number of Commonwealth countries for which it was the United Kingdom's policy to grant visa-free access.

The United Kingdom strongly opposed the adoption of the list claiming that the inclusion of these countries in the 'black' list was not justified either on security or on immigration risk grounds. In particular, it argued that any immigration flow from these countries would be directed primarily to its territory rather than that of the other Member States.[182]

The final list thus excluded twenty-eight countries, almost all Commonwealth countries – though nationals of these countries remained subject to visa requirements within the Schengen framework.[183]

As mentioned earlier in the context of the Schengen Convention, the 'black' list was generally criticized as too restrictive. Such restrictiveness resulted from the fact that the 'black' list amounted (almost) to a cumulation of the Member States' national visa requirements. These varied widely for a number of reasons. Firstly, the Member States used different criteria for deciding whether to impose visa requirements, with certain Member States emphasizing immigration and security risks and others reciprocity and political disapproval. Secondly, even taking the same criteria as a starting point, divergences remained wide. As the Home Office explained, there were genuine differences in the level of immigration and security threat that particular countries presented to different Member States, flowing from historical links or geographical proximity. In this context, it was doubted whether more common reporting under the CFSP arrangements could have been very significant in achieving a shared positions since the existing disparities were not seen as coming primarily from differences in perception of the political situation in third countries.[184] Thirdly, there were no adequate instruments to ensure a uniform evaluation of the criteria or their implementation.

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[180] 2nd and 4th Recitals Regulation 574/1999.

[181] See House of Lords Select Committee on the European Communities (1993-94) para. 70.

[182] See House of Lords Select Committee on the European Communities (1993-94) paras. 70-73 and 106-108.

[183] Article 6 Regulation 574/1999 expressly provided that the Regulation was without prejudice to any further harmonization between individual Member States going beyond the common list.

[184] See *supra* n. 79.

The resulting restrictiveness of the common visa policy meant a disruptive impact on the Member States' bilateral relations. The United Kingdom was the only Member State that was not prepared to withdraw the preferential treatment accorded to its ex-colonies in the form of visa-free access, and such policy currently remains at the basis of the United Kingdom's opt-out from the Community common visa policy.[185]
The final list also included three additional countries – Peru, the Federal Republic of Yugoslavia and the Former Yugoslav Republic of Macedonia – following developments at Schengen level.[186]

4.1.4 Results

The unresolved dispute between the United Kingdom and Spain over the territorial application of the Draft External Frontiers Convention continued to block its signing. The Draft External Frontiers Convention was also unacceptable to the United Kingdom on the ground that it attributed jurisdiction to the Court of Justice, as was permissible under Article K.3(2)(c) EU.[187]

The Visa Regulation adopted by the Council in 1995 departed radically from the Commission's proposal. Apart from introducing the changes in relation to the division of competence between the Third Pillar and Article 100c and in relation to the 'black' list, the Council also limited the scope of the Visa Regulation so that it covered only visas issued for stays of three-months and for transit, thus excluding airport transit visas.[188]
Since the Council failed to reconsult the Parliament despite the major changes introduced into the Commission's proposal, the Parliament brought proceedings against the Council under Article 173 EC (now 230) for failure to reconsult. The Court of Justice annulled the Regulation on this procedural ground while preserving its effects

[185] Interview with United Kingdom diplomat, 30 July 2003.
[186] Peers (1996) p. 152.
[187] See House of Lords Select Committee on the European Communities (1993-94) para. 48. The reasons were explained by O'Keeffe in these terms: 'It is assumed that the Court will bring to the task of interpretation and dispute settlement of conventions concluded under this provision at least some of the feature which have characterized its case law when acting within the context of the Community Treaties. Thus, it may be expected that the Court could emphasize the Rule of Law, the pre-eminence of the general principles of law such as equality and non-discrimination, legal certainty, legitimate expectations, *ne bis in idem*, the right to a fair hearing, proportionality and the respect of the principles contained in human rights instruments to which the Community and/or its Member States are parties, including the European Convention on Human Rights'. O'Keeffe (1994) pp. 144-145.
[188] Moreover, the Visa Regulation (and the Draft Convention) did not preclude the possibility of granting a longer period of stay (national visas). The practice of the United Kingdom, for example, was to grant visas for stays of six months.

until a replacement was adopted.[189] The Council adopted the replacement two years later after duly consulting the Parliament and ignoring its proposed amendments.[190]
Thus, even in the context of Article 100c progress was agonizingly slow.[191] While the Commission presented its proposal in December 1993, the Council adopted the Visa Regulation only in September 1995 after lengthy negotiations over the visa list. After the Parliament's successful challenge in 1997, it took two further years for the Council to adopt the replacing Regulation which contained only two minor amendments to the visa list.

4.2 The Joint Action on Airport Transit Visas

After excluding airport transit visas from the scope of the Visa Regulation, the Council adopted a Joint Action on Airport Transit Visas under Article K.3 EU.[192]
This contained a list of ten countries whose nationals required visas for the purpose of airport transit in all Member States.[193] The objective of harmonization was security and control of illegal immigration.
The Joint Action stipulated that for countries not on the list the Member States retained discretion as to whether or not to require airport transit visas.
It did not provide for the conditions governing issue of airport transit visas but envisaged the possibility of future adoption of criteria by the Council.

4.2.1 Dispute over competence: the Airport Transit Visas Case

The adoption of the Joint Action on Airport Transit Visas was also surrounded by disagreement over the division of competence between the First and Third Pillars.
Soon after the adoption of the Joint Action, the Commission brought an annulment action under Article 173 EC arguing that measures on airport transit visas fell within the scope of Article 100c EC, thus linking harmonization in this field to the establishment of the internal market. The Council maintained that the measure was outside the scope of Article 100c since in the case of airport transit no 'crossing of the external borders' of the Member States was involved (third country nationals would not *legally* enter the territory of the Member States). The Court of Justice, after establishing its jurisdiction

[189] Case C-392/95 *Parliament v. Council* [1997] ECR I-3213.
[190] Regulation 574/1999, *supra* n. 179.
[191] Den Boer and Wallace, W. (2000) p. 509.
[192] Joint Action 96/197 JHA, OJ 1996 L 63/8.
[193] These countries were Afghanistan, Ethiopia, Eritrea, Ghana, Iraq, Iran, Nigeria, Somalia, Sri Lanka and Zaire. At Schengen level, the list further included Pakistan and Bangladesh.

to police the boundary between the Community and the intergovernmental Pillars on the basis of Articles L and M EU, held that Article 100c, in the light of Article 3(d) of the EC Treaty, was concerned with measures on entry and movement of persons in the internal market. Since in the case of airport transit no *legal* crossing of the external border occurred, the measure was outside the scope of Article 100c.[194]
As Peers pointed out the resulting situation was that airport transit visas fell within the scope of Article 100c(3) – since the Regulation on a uniform format for visas explicitly applied to them – but not of Article 100c(1).[195]

4.3 The Regulation on a uniform format for visas
More successful was the adoption of the Regulation laying down a uniform format for visas.[196] A uniform format for visas was indispensable to ensure a high and uniform level of protection for visas against falsification and forgery. The Regulation provided that short-term (three months' validity) and transit visas (including airport transit visas) issued by the Member States were to be produced in the form of a uniform format (provided in the Regulation), and were to comply with a number of specifications (to be adopted by the Commission assisted by a Committee of representatives of the Member States).[197]
The Regulation authorized the Member States to use the uniform format also for visas falling outside its scope (i.e. national visas), provided differences were incorporated in order to distinguish them from those within the scope of the Regulation.[198]

Furthermore, a Draft Joint Action on a uniform format for forms for affixing visas issued to persons holding travel documents not recognized by the Member State issuing the visa was almost agreed in 1998 under the Third Pillar. The European Parliament, expressing its opinion on the proposal in accordance with Third Pillar consultation arrangements, maintained that the measure should have been based on Article 100c(3) rather than Article K.3.[199]

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[194] *Airport Transit Visas Case, supra* n. 136.
[195] Peers (1996) p. 154.
[196] Regulation 1683/95, OJ 1995 L 164/1.
[197] Articles 1 and 5.
[198] Article 7.
[199] OJ 1998 C 379/384. The European Parliament also proposed to amend the measure to include an obligation for the Member States to exchange information on counterfeited or falsified visa formats and a

4.4 Other measures

A Council Recommendation relating to local consular cooperation was adopted under the Third Pillar.[200] The Recommendation, recognizing that the issue of visas, pending the preparation of joint instructions, was governed by national legislation, endorsed the need for each Member State to take account, when issuing its own visas, of the interests of the other Member States with regard to national security, public order and illegal immigration. For this reason, it envisaged the need for the Member States' consular services to maintain local consular cooperation involving the exchange of information on criteria for issuing visas and on national security, public order and illegal immigration risks.

The Recommendation also envisaged the drawing up of joint reports on local visa issue. Further, local consular services were expected to adopt joint measures to detect simultaneous visa applications or any earlier visa refusal by a Member State, and to exchange information for the purpose of determining the good faith and reputation of visa applicants.

The Council further adopted a Recommendation on provisions for the detection of false or falsified documents in the visa departments of representations abroad and in the offices of domestic authorities dealing with the issue or extension of visas.[201] The Recommendation called for uniform levels of expertise and equipment, and, for this purpose, for the Member States to consider whether to make their equipment available when necessary to other Member States or the common use of equipment.

Other measures adopted by the Council included 'Conclusions on the organization and development of the Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration (Cirefi)'.[202]

This was in response to the K.4 Committee recommendation that Cirefi, originally established in 1992 to assist in the implementation of the External Frontiers Convention (which was eventually never signed), should be progressively strengthened to assist the Member States in preventing unauthorized immigration and illegal residence,

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clause stating that 'counterfeiting or falsifying such format shall be punishable according to national laws'.

[200] 4 March 1996, OJ 1996 C 80/1.

[201] 29 April 1999, OJ 1999 C 140/1. See also Joint Action 98/700, adopted under Article K.3, setting up a European Image Archiving System (FADO) for the purpose of exchanging among the Member States by computer means information concerning genuine and false documents, OJ 1998 L 333.

[202] 30 November 1994, OJ 1996 C 274/50.

combating trafficking, detecting forged documents and improving expulsion procedures.

The Council also adopted a Joint Action allowing visa-free travel of third country national school children.[203] The legal basis of this measure was again disputable. Since the measure concerned the abolition of internal border controls, it could have been argued that Article 100 EC constituted the appropriate legal basis. The Commission took umbrage when the Council adopted the Joint Action, but it declined to sue the Council.[204]

5. Conclusion

The sensitive nature of visas meant that initially cooperation on visa policy was strictly maintained within the intergovernmental sphere. The lack of political consensus among the Member States on the abolition of internal frontier controls in the Community resulted in such cooperation taking a dual track (the 'Trevi' Group and the Schengen Convention).

The TEU, in striking a compromise between the Member States which wanted to introduce Community powers for the adoption of the 'compensatory' measures and those which opposed communitarization, introduced significant changes. It introduced a more formal framework for intergovernmental cooperation on justice and home affairs – the Third Pillar – which was connected to the Community through the device of the pillar structure, and Community powers for some aspects of visa policy (the 'black' list and the uniform format for visas). The split of visa policy between the First and Third Pillars made it possible to communitarize the most indispensable compensatory measures for the removal of internal frontier controls. At the same time, it minimized curtailment of national autonomy for visa policy by implying minimum intrusion in the sovereign right to control entry into the State and in the ability of the Member States to use visas as a national foreign policy instrument.

The split, however, turned out to be unworkable. Institutional conflict arose over demarcation of competence, underpinned by disagreement over the interpretation of Article 7a. This greatly impeded progress.

The Third Pillar itself did not deliver the expected results because of its structural

[203] Joint Action 94/795 JHA, OJ 1994 L 327.

deficiencies, particularly the inadequacy of its instruments and the lack of a monitoring mechanism. Some of these structural deficiencies were the result of the Third Pillar's legal and constitutional ambiguity and flexibility, underpinned by caution on the part of the Member States in proceeding with cooperation in the sensitive field of JHA and the lack of political consensus on a number of issues, such as the ultimate objective cooperation was to serve and the role of the Community institutions, particularly the Court of Justice, in the Third Pillar's framework.

With regard to visas and external border controls, the Third Pillar produced no significant results, with the adoption of the Draft External Frontier Convention blocked over the issue of Gibraltar.

While there was agreement among the Member States on the inadequacy and deficiency of the Third Pillar and on the need for reform, there was no consensus as to how to proceed. A majority of the Member States favoured communitarization of visas, asylum and immigration. Others, maintaining that the Third Pillar's deficiency was not directly attributable to its intergovernmental nature, proposed to improve the intergovernmental framework.

[204] See Peers (2000) p. 31.

4 AMSTERDAM AND BEYOND

The first part of this Chapter analyses the changes in the legal framework on visas introduced by the Treaty of Amsterdam, subsequent developments and proposed changes in the Draft Constitutional Treaty. The second part considers progress since Amsterdam on measures for a common visa policy.

1. Title IV EC of the Amsterdam Treaty

1.1 The negotiations

As a commentator explained with regard to the situation ahead of the 1996 IGC:

> 'The British view immediately after the signing of the TEU, with its provisions for a review in 1996, was that they had five years in which to prove to the Germans that real progress could be made in these sectors on an intergovernmental basis. Because of the delay in ratification of the Treaty they only had two.
> Making Maastricht work in these pillars was never going to be easy, and as the 1996 IGC approached it was clear that the Germans were dissatisfied with progress, and would be pressing for the absorption of the intergovernmental pillars into the EC pillar. The British position ahead of 1996 was that the protection of the three-pillar structure remained a fundamental objective, in line with the general British commitment to building a Europe of cooperating nation-states rather than transferring power to a supranational super-state'.[1]

Already in 1994, the German Presidency made clear its wish that Third Pillar issues should be gradually transferred to Community competence. The 'Lamers Report' published by Kohl's Christian Democratic Union in anticipation of the 1996 IGC proposed, as a solution to the ongoing dispute as to the pace and depth of European integration, a two-speed Europe, provoking negative reactions from both the United Kingdom and France.[2]

[1] George (1997) p. 109.
[2] Papademetriou (1996) p. 91.

The reports by the Community institutions on the functioning of the TEU – prepared under the mandate of the Corfu European Council of June 1994 in view of the IGC – converged to a remarkable extent on emphasising Third Pillar deficiencies.[3]

The major shortcomings of the Third Pillar were identified in the inadequacy of its instruments, the absence of any mechanism to monitor implementation, the cumbersome decision-making structure and the overlap with Community competence.[4]

In this light, both the Commission and the European Parliament advocated the transfer of justice and home affairs to the Community Pillar, except with regard to judicial cooperation in criminal matters and police cooperation, and the incorporation of the Schengen system into the European Union legal system.[5]

The Reflection Group, convened by the Spanish Presidency to assist in the preparation of the IGC agenda, was divided on how to achieve greater efficiency in the field of justice and home affairs. The majority of its members favoured communitarization of external border controls, visa, immigration and asylum policies. Other members, on the other hand, expressed their belief that the lack of progress was not necessarily attributable to the intergovernmental nature of cooperation and that structural improvements in this sphere could solve many of the problems.[6]

The IGC reflected the same division. The Netherlands, Belgium, Luxembourg, Germany, France, Italy, Portugal and Austria wanted to communitarize external border controls, visa, asylum and immigration policies, with Germany and Austria also wanting to bring into Community competence matters on crime, terrorism and drug trafficking and France strongly opposing such a move. The United Kingdom, Ireland, Denmark, and initially Sweden, on the other hand, opposed any communitarization, preferring to strengthen the existing intergovernmental structure. Italy, Spain, Austria and the Benelux countries also wanted to integrate the Schengen system into the European Union.[7]

In addition to such fragmentation, as Monar explained:

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[3] Monar (1997b) p. 321.

[4] See, for example, Commission's Report on the Operation of the Treaty on European Union, SEC(95) final, 10 May 1995, paras. 47-52. See also Reflection Group's Report, 5 December 1995, SN 520/95 (Reflex 21), para. 48. Among the other deficiencies identified were the lack of clear objectives and the requirement of unanimity. See also Chapter 3.

[5] See Commission Opinion 'Reinforcing Political Union and Preparing for Enlargement' requested by the Italian Presidency with regard to its proposal to the Council for amendment of the Treaties (Council doc. CONF 3860/1/96, 17 June 1996) identifying asylum and immigration as suitable areas for incorporation into the Community Pillar; Parliament Resolution A4-0102/95 on the functioning of the TEU with a view to the 1996 IGC – Implementation and development of the Union, Bourlanges-Martin Report, para. 4.

[6] Reflection's Group Report, *supra* n. 4, paras. 45-55.

[7] See Monar (1997b) pp. 321-322; den Boer and Wallace (2000) p. 513.

> 'There was a whole range of staunchly defended national positions which needed to be accommodated. Among these were the British and (*volens nolens*) Irish non-participation in the Schengen System, the special position of Denmark as a Schengen member opposing further communitarization, French concerns about jurisdiction of the Court of Justice on national measures relating to internal security, the Dutch interest in limiting applications to the Court in asylum matters, German concerns about the asymmetrical effects of international migratory pressure on Germany and Belgium's reluctance to accept the safe country of origin principle in respect of asylum applications emanating from other European Union countries'.[8]

The Treaty of Amsterdam, agreed in June 1997,[9] accommodated all these different national positions, bringing about fragmentation and increased confusion.[10]

The Treaty gave a new content to Article 14 EC (ex 7a) by providing, in Article 62(2) EC, that Article 14 requires 'the absence of any controls on persons, *be they citizens of the Union or nationals of third countries*, when crossing internal borders'.[11]

It reformulated the allocation of competence by communitarizing visa, asylum and immigration policies, which are now governed by new Title IV EC (Articles 61-69). It also provided for the integration of the Schengen *acquis* into the European Union legal order. The Protocol integrating the Schengen *acquis* into the framework of the European Union provided that the Council was to determine the legal basis for each of the provisions which constituted the Schengen *acquis*. In default of agreement, provisions were to be regarded as acts based on the Third Pillar.[12]

The Treaty also accommodated, through the introduction of 'variable geometry' arrangements, the positions of the United Kingdom, which opposed removal of internal frontier controls, Ireland, which wanted to retain its 'common travel area' with the United Kingdom, and Denmark, which under the 1992 Edinburgh Declaration was precluded from accepting Community competence on visas, asylum and immigration.

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[8] Monar (1997b) p. 322.

[9] The Treaty was signed on 2 October 1997 and entered into force in May 1999.

[10] It was the change of government in the United Kingdom following the May 1997 elections which made possible an agreement based on a series of opt-out clauses. See Nugent (1999) p. 78; Boccardi (2002) p. 131.

[11] Emphasis added.

[12] Article 2 of the Protocol, OJ 1997 C 340/93. When the Treaty of Amsterdam entered into force in May 1999, the Council adopted two decisions whereby it defined the Schengen *acquis* and allocated it to a legal basis under the EC or EU Treaties, see Council Decisions 1999/435/EC and 1999/436/EC of 20 May 1999, OJ 1999 L 176/1 and 17. On incorporation see House of Lords Select Committee on the European Communities (1997-98b); Wagner (1998). On issues related to the communitarization of the Schengen *acquis* such as the determination of the character of the instruments attributed and judicial review of the attribution or of the compatibility of the Schengen *acquis* with the Community Treaty, see Hailbronner (2000) pp. 73-74.

Furthermore, new Title IV EC is characterized by *sui generis* provisions in the Community context. The law-making procedure is complex and departs from the Community standard procedure, the jurisdiction of the Court of Justice is limited, and national autonomy in a number of areas is safeguarded.

The remaining Third Pillar, now covering only police and judicial cooperation in criminal matters – which greatly increased in importance and volume – was itself considerably reformed.[13]

New Title IV EC and the new Third Pillar are linked by the same objective: the establishment of an 'area of freedom, security and justice'. This objective was added to the existing Union objectives in Article 2 EU.

The Treaty of Amsterdam also introduced provisions for 'closer cooperation', permitting Member States wishing to establish closer cooperation between themselves to use the institutions, procedures and mechanisms of the Treaties. Title VII EU lays down the general principles and conditions for closer cooperation, while Article 11 EC and Article 40 EU add specific additional criteria for closer cooperation within the Community's and the Third Pillar's spheres respectively.[14]

1.2 Provisions of Title IV[15]

1.2.1 Opt-outs

A Protocol on Article 14 attached to the Treaty stipulates that the United Kingdom and Ireland can maintain frontier controls on persons seeking access to their territories from other Member States, and that the other Member States are reciprocally entitled, in derogation from Article 14 EC, to exercise controls on persons seeking to enter their territory from the United Kingdom and Ireland.[16]

A separate Protocol on the position of the United Kingdom and Ireland provides that these countries are not automatically bound by Title IV EC.[17] They have however the option of participating in the negotiation and adoption of any measure proposed under the Title within three months from the proposal having been presented to the Council,[18]

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[13] See Chapter 3.
[14] See Gaja (1998).
[15] See Hailbronner (1998); Monar (1998); O'Keeffe (1998).
[16] Protocol on the application of certain aspects of Article 14 of the Treaty establishing the European Community to the United Kingdom and Ireland, OJ 1997 C 340/97.
[17] OJ 1997 C 340/99.
[18] Article 3. This also ensures that the opt-in procedure cannot be used by the United Kingdom and Ireland to block the decision making process by providing that if after a reasonable period of time a measure cannot be adopted with the United Kingdom and Ireland taking part, the Council can adopt it without their participation, in accordance with the normally applicable procedure.

and of opting-in with regard to measures already adopted, subject to a Commission decision in accordance with Article 11(3) EC.[19] Ireland however reserved the possibility of withdrawing from the opt-out Protocol altogether so as to be fully covered by Title IV.[20]

The Protocol integrating the Schengen *acquis* into the framework of the European Union also makes special provision for the United Kingdom and Ireland, which were not parties to the Schengen Convention.[21] The United Kingdom and Ireland are not bound by the Schengen *acquis*, but can at any time request to take part in some or all of its provisions. Adherence is not automatic upon request but is subject to a positive decision of the Council taken by unanimity of the Schengen members.[22] The United Kingdom applied in 1999 to participate in the Schengen provisions on police and judicial cooperation, drugs and the SIS consistently with its policy of supporting cooperation on internal security measures. Ireland has adopted a similar approach.[23] The United Kingdom also participates in practical cooperation on external border controls, which has led to increased criticism, given the rationale behind such cooperation, of the United Kingdom's continuing determination to retain internal frontier controls.[24] However, United Kingdom and Irish participation in security measures contributes towards easing border controls between these two countries and the rest of the Community.

Denmark also obtained through a further Protocol an opt-out from Title IV except with regard to measures 'determining the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States' and measures relating to a uniform format for visas, for both of which Denmark had already accepted Community competence with the introduction of Article 100c EC by the Maastricht Treaty.[25]

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[19] Article 4.
[20] Article 8.
[21] *Supra* n. 12.
[22] Article 4. On the other hand, the opt-in of the United Kingdom and Ireland to measures 'building upon the Schengen acquis' that find their legal basis in Title IV is governed by Articles 3 and 4 of the Protocol on the position of the United Kingdom and Ireland. This is confirmed by the position taken by the Council as regards the United Kingdom's and Ireland's possible opt-in to Regulation 539/2001 on the visa lists, which was considered a measure 'building upon the Schengen *acquis*'.
[23] See respectively Council Decisions of 29 May 2000 and 28 February 2002, OJ L 2000 L 131/43 and OJ L 2002 64/20.
[24] See House of Lords Select Committee of the European Union (2002-03b) para. 50.
[25] Article 4 of the Protocol on the position of Denmark, OJ 1997 C 340/101. Institutional conflict emerged with regard to the application of this exception to the Danish opt-out (see *infra*). No such provision is contained in the Protocol on the position of the United Kingdom and Ireland.

Under the Protocol integrating the Schengen *acquis* into the framework of the European Union, Denmark continues to be bound by the Schengen *acquis* under international law vis-à-vis the Member States which were signatories to the Schengen Convention. Accordingly, those parts of the Schengen *acquis* integrated into Title IV EC are binding on Denmark under international law.[26] As regards Council decisions 'building upon the Schengen *acquis'* that find their legal basis in Title IV EC, Denmark can within six months from their adoption decide whether to be bound by them under international law.[27]

The constitutionality of the arrangements for Denmark has, however, been questioned. As Dekker and Wessel state, 'it is highly questionable whether the Treaties allow for a possibility of Union member states to engage in separate legal relationships on areas covered by the Union and thus to act as regular states, instead of member States'.[28]

Indeed, as a result of incorporating the lack of political consensus on removal of internal frontier controls and on Community competence for the necessary 'compensatory' measures (which previously found expression in the pillar structure and the Schengen Convention) into the Community Pillar, the Amsterdam Treaty has eroded the Community method with regard to the principle that the Member States cannot assume permanent derogations from Community regimes (uniformity of application of the law) and the principle that they cannot resort to international law to govern their relations within areas which fall within Community competence.

Moreover, the 'variable geometry' arrangements result in extreme complexity, not least because it becomes very difficult to map out the applicable law due to the possible existence of different overlapping regimes of a different nature. The situation is rendered worse by the fact that old Third Pillar measures also continue to apply in relation to the Member States which do not participate in Title IV measures replacing them,[29] and that Title IV overlaps with other Community powers on the treatment of third country nationals, for which no derogations are in place.

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[26] Article 3 of the Protocol, *supra* n. 12.

[27] Article 5 of the Protocol on the position of Denmark, *supra* n. 25.

[28] Dekker and Wessel (2001) p. 409. Denmark is at present seeking an international agreement with the Community in order to adhere to the Brussels I Regulation on civil cooperation in its amended form. See Kuijper (2004) p. 621.

[29] According to Hailbronner measures adopted under the old Third Pillar 'remain unchanged in their legal nature and binding force until their content is replaced by the new measures adopted on the basis of the new Title in the EC Treaty'. Moreover, once new measures are adopted, old Third Pillar instruments 'have to remain in force and unchanged in their legal nature in relation to countries that do not participate in the adoption of new instruments'. See Hailbronner (2000) p. 1059.

As to the practical working of the opt-out arrangements, it seems that they are greatly contributing to watering down Commission proposals. As a commentator explained, by extending the offer to opt in as a bargaining chip, the outsider Member States 'obtain certain concessions, resulting in considerable dilution of the original Commission proposals'.[30]

1.2.2 Legislative procedure

With regard to the legislative procedure, Title IV prescribed that for the first five years after the entry into force of the Treaty of Amsterdam (i.e. up to 1 May 2004) the Council was to act by unanimity, the Commission had no monopoly on the right of initiative but shared it with the Member States, and the Parliament was only to be consulted. This 'weak' procedure reflected the wish of the Member States to retain extensive control of the newly communitarized fields.

After the five-year transitional period (i.e. since 1 May 2004), the Commission has the sole right of initiative, but is under a duty to examine any request made by a Member State that it submit a proposal to the Council. The Council is to decide by unanimity whether to apply to all or parts of the areas covered by Title IV the co-decision procedure prescribed in Article 251 EC.[31]

Given that the adoption of most measures under Title IV is subject to a mandatory five-year time limit,[32] most measures should have been adopted under the 'weak' legislative procedure described above.

In derogation from its normal legislative procedure, Title IV provides a less restrictive legislative procedure for the adoption of measures on short-term visas. This reflects the fact that some measures on visas had already been agreed under the First Pillar and to a greater extent under the Schengen Convention. It probably also reflects a desire to facilitate the adoption of the most indispensable compensatory measures for the realization of the free movement of persons.

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[30] Kuijper (2004) p. 621.

[31] Articles 67(1) and (2) EC. Automatic passage to qualified majority voting was blocked by Germany because of the strong opposition of the Lander. See Geddes (2001) p. 117.

[32] The five-year time limit does not apply to the adoption of burden-sharing measures (Article 63(2)(b) EC), conditions of entry and residence and rules on the issue of long-term visas and residence permits (Article 63(3)(a) EC), and measures on the rights and conditions under which third country nationals legally resident in a Member State may reside in another Member State (Article 63(4) EC). The five-year time limit, if not respected, can arguably give rise to actions for failure to act.

With regard to the adoption of the 'white' and 'black' lists and of a uniform format for visas the Council (from the entry into force of the Treaty of Amsterdam) is to act by qualified majority on a proposal from the Commission and after consulting the European Parliament.[33]

This procedure is the same as that applicable under old Article 100c EC after 1 January 1996, with the exception that under Article 100c the Commission had to examine requests by Member States for a proposal to the Council.

Since the adoption of the 'white' and 'black' lists and the uniform format for visas is subject to the mandatory five year time limit, the Council came under an obligation to abolish the 'grey' list by 1 May 2004. The Vienna Action Plan envisaged a further restriction of this time limit.[34] A Regulation was duly adopted by the Council on 15 March 2001.[35] The Regulation eliminated the 'grey' list by including Colombia – the only country on which the Schengen States had not reached agreement by the time the Schengen *acquis* was incorporated into the European Union – on the 'black' list.

In relation to the adoption of measures laying down the 'conditions and procedures' for issuing visas and 'rules on a uniform visa', the normal legislative procedure of Title IV applied for the first five years after the entry into force of the Amsterdam Treaty.[36] After the five-year transitional period, however, in derogation from the normal procedure applicable under Title IV, these areas came to be *automatically* covered by the procedure prescribed in Article 251 EC (i.e. qualified majority voting and co-decision).[37] The Commission has the sole right of initiative, but is under a duty to consider any request by a Member State that it submit a proposal to the Council.

The adoption of measures on mutual recognition of visas for the purpose of free circulation, on the other hand, is to take place indefinitely under the normal legislative procedure of Title IV.[38]

The fact that different law-making procedures are prescribed for different visa measures makes it important to establish a clear distinction between the different legal bases. This can however prove difficult in certain cases. It appears, for example, that the Council

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[33] Article 67(3) EC.
[34] The Action Plan listed the Regulation on the 'black' and 'white' lists among the measures to be taken in two years from the entry into force of the Treaty of Amsterdam, see *infra*.
[35] Regulation 539/2001, OJ 2001 L 81/1.
[36] Article 67(1) EC.
[37] Article 67(4) EC.
[38] Article 62(3) EC.

and the Commission held different opinions as to whether visa exemption for third country nationals in possession of residence permits issued by the Member States was to be based on Article 62(2)(b)(i), governing the adoption of the visa lists, or Article 62(2)(b)(iv), governing the adoption of rules on a uniform visa. Similarly, their opinions diverged as to the borderline between Article 62(2)(b)(iii), on a uniform format for visas, and Article 62(2)(b)(ii), on the procedures and conditions for issuing visas.[39] Some overlap also exists between Title IV EC and other legal bases in the EC Treaty governing access of certain categories of third country nationals in the Member States.[40]

1.2.3 Jurisdiction of the ECJ

The jurisdiction of the Court of Justice with regard to Title IV and measures adopted under it is limited.[41] Only national courts of last resort can request preliminary rulings on the interpretation of Title IV and on the interpretation and validity of measures adopted under it.[42]

Although the attribution of at least some automatic jurisdiction to the Court of Justice with regard to justice and home affairs was a welcomed major reform, the limitation of the preliminary ruling procedure within the framework of the EC Treaty constitutes a further example of erosion of the Community method.

The possible effects of such limitation are a lack of uniformity in the application of the law (given that major questions of interpretation might reach courts of last resort only with considerable delays or not al all), and a less effective protection of individual rights. The restriction of the ability of individuals to question the validity of Community law through the preliminary ruling procedure (in view of the fact that individuals cannot resort to annulment actions under Article 230 EC with regard to Community general legislation) goes against the principle of effective remedies. Moreover, under the Court's jurisprudence, national courts cannot declare Community law invalid,[43] and can set aside national measures implementing Community law on the ground of the Community measure's possible invalidity only after requesting a preliminary ruling.[44]

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[39] See *infra*.

[40] See Commission Staff Working Paper on visa policy consequent upon the Treaty of Amsterdam and the integration of the Schengen *acquis* in the EU, 26 July 1999, SEC(99) 1213.

[41] For an account see Curti Gialdino (1998) pp. 52-60; Arnull (1999) pp.115-117; Eeckhout (2000).

[42] Article 68(1) EC.

[43] Case 314/85 *Foto-Frost* [1987] ECR 4109.

[44] Joined Cases C-143/88 and C-92/89 *Zuckerfabrik* [1991] ECR I-415. For these comments see Eeckhout (2000) p. 157-159. See also Arnull (1999) pp. 116-117.

Article 68(2) EC provides for the exclusion of the Court's jurisdiction with regard to Community measures taken pursuant to Article 62(1) EC (lifting of internal border controls) relating to the 'maintenance of law and order and the safeguarding of internal security'. This provision is echoed by Article 2 of the Protocol integrating the Schengen *acquis* into the framework of the European Union, which states that with regard to the Schengen *acquis* the Court 'shall have no jurisdiction on measures or decisions relating to the maintenance of law and order and the safeguarding of internal security'.[45] It still remains for the Court to define what measures are excluded from its jurisdiction by virtue of Article 68(2) EC (although the Member States can be expected to claim that the Court should not argue with their characterization of a measure).

As a counterweight for the limitation of the preliminary ruling procedure, and with a view to avoiding the protraction of proceedings by preliminary rulings, a new judicial procedure was introduced. Accordingly, the Council, the Commission or a Member State (but not the European Parliament) can request the Court to give a ruling on a question of interpretation of Title IV or acts based on it. However, such rulings are not to apply to judgments of courts or tribunals of the Member States which had become *res judicata*.[46]

1.2.4 Provisions safeguarding national competence

Title IV EC also contains a number of provisions aimed at safeguarding national competence. Article 63 EC provides that measures adopted by the Council pursuant to Article 63(3) and (4) EC[47] 'shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements'. Such provision seeks to limit the application

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[45] Article 68(2) EC. For an interpretation of the scope of this provision see Eeckhout (2000) pp. 163-165.

[46] Article 68(3) EC. Curti Gialdino described this judicial procedure as a mixture of: (i) the Article 300(6) procedure with regard to international agreements, under which only the Council, the Commission and the Member States may request an interpretative ruling, (ii) the 'reference in the interest of the law' procedure used in the 1968 Brussels Convention on jurisdiction and enforcement of judicial decisions in civil and commercial matters, and in the 1980 Rome Convention on the Law Applicable to Contractual Obligations, which prescribes the non applicability of rulings to judgments of national courts or tribunals which have become *res judicata*; and (iii) the preliminary reference procedure laid down in Article 234 EC as far as the effect of the judicial decision is concerned. See Curti Gialdino (1998) pp. 57-58.

[47] Measures on immigration policy within the areas of (i) conditions of entry and residence, and procedures for the issue by Member States of long term visas and residence permits, and (ii) illegal immigration and residence; and (iii) measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States.

of the Community doctrine under which the Community would normally acquire exclusive competence once it adopted rules.[48]

Parallel to this provision, the Member States adopted a Declaration on Article 63(3)(a) EC (ex 73k(3)(a))[49] which stated that Member States could negotiate and conclude agreements with third countries in the areas covered by Article 63(3)(a) EC 'as long as such agreements respect Community law'. The effect of such Declaration was again to preserve the Member States' treaty-making powers irrespective of the adoption of comprehensive Community legislation, thus avoiding the effects of the *AETR* doctrine.

Similar provisions are found in the Protocol on the external relations of the Member States with regard to the crossing of external borders. The Protocol states that Article 62(2)(a) EC 'shall be without prejudice to the competence of Member States to negotiate or conclude agreements with third countries as long as they respect Community law and other relevant international agreements'. The Protocol thus precludes the Community from acquiring exclusive external competence.

Further, a political Declaration on Article 62(2)(b) EC (ex 73j(2)(b)) was introduced. According to this, the Council could take into account the 'foreign policy considerations of the Union and the Member States' when adopting rules on short-term visas. The Declaration thus confirmed that the Member States' foreign policy considerations constitute a legitimate concern in the decision-making process at Community level. It also created a bridge between the Community visa policy and the CFSP, but underlined that the CFSP parallels and does not subsume the foreign policies of the Member States.

Title IV also contains a national public order clause. Article 64(1) EC provides that Title IV 'shall not affect the exercise of the responsibilities incumbent upon the Member States with regard to the maintenance of law and order and the safeguarding of internal security'.[50] It remains for the Court of Justice to interpret Article 64(1) EC.[51]

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[48] See Hailbronner (2000) p. 67; Denza (2002) p. 17.

[49] On the conditions of entry and residence, and procedures for the issue of long-term visas and residence permits.

[50] The same provision was contained in Article 100c(5) EC and Article K.2(2) EU of the Maastricht Treaty, and is now contained in Article 33 EU. For an interpretation of the scope of this provision see Hailbronner (1998) pp.1052-1053. He argues that the provision should be concerned with the exercise of police power. On the other hand, he argues, it may be interpreted as a limit for Community action implying that it is not the task of the Community to issue regulations restricting the exercise of police power relating to the maintenance of law and order.

1.2.5 Emergency situations

Article 64(2) EC provides for emergency situations. In case one or more Member States is confronted with an emergency situation characterized by a sudden inflow of nationals of a third country, the Council can, acting by qualified majority on a proposal from the Commission (and with no consultation of the European Parliament), adopt provisional measures of a duration not exceeding six months for the benefit of the Member State(s) concerned.

This provision resembles old Article 100c(2) EC, but the provisional measures are now not limited to the imposition of visa requirements but apply across the whole area of Title IV. Article 64(2) EC is however more restrictive in its application than old Article 100c(2) EC since under the latter a 'threat' of a sudden inflow was sufficient to justify the adoption of provisional measures. Further, Article 64(2) EC, as opposed to old Article 100c(2) EC, is concerned with emergency situations affecting one or more Member States, as opposed to the Community, and with the adoption of measures for their individual benefit.[52]

2. The Vienna Action Plan and the Tampere European Council

2.1 The Vienna Action Plan

In December 1998 the European Council meeting in Vienna approved the Council and Commission's Action Plan on 'how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice'.[53] The Action Plan laid down the priorities for the establishment of the area of freedom, security and justice.

The Action Plan identified two principles as its starting points. Firstly, the success of the Action Plan depended on 'ensuring that the spirit of inter-institutional co-operation inherent in the Amsterdam Treaty is translated into reality'. Secondly, the concepts of freedom, security and justice were inseparable: 'one cannot be achieved in full without the other two'.[54]

From this premise, the Action Plan defined the aims of the area of freedom, security and justice by considering each of the three concepts in turn. With regard to 'an area of

[51] And thus to establish a limit to the scope of application of infringement actions. See Curti Gialdino (1998) pp. 58-59.

[52] See Peers (2000) p. 80.

[53] Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam establishing an area of freedom, security and justice, 4 December 1998, 13844/98, OJ 1999 C 19/1.

[54] Paras. 4-5.

freedom', the Action Plan provided that 'the Treaty of Amsterdam ...opens the way to giving "freedom" a meaning beyond free movement of people across internal borders'. The concept thus included 'freedom to live in a law-abiding environment in the knowledge that public authorities are using everything in their individual and collective power to combat and contain those who seek to deny or abuse that freedom'. The Action Plan further provided that 'freedom must also be complemented by the full range of fundamental human rights', and identified respect for privacy and the protection of personal data as fundamental freedoms deserving special attention.[55]

Referring in particular to immigration and asylum policies, the Action Plan stated that 'different considerations must apply to immigration policy on the one hand and asylum policy on the other' and that 'particular priority needs to be attached to combating illegal immigration on the one hand, while on the other hand ensuring the integration and rights of those third country nationals legally present in the Union as well as the necessary protection for those in need of it even if they do not meet fully the criteria of the Geneva Convention'.[56]

With regard to 'an area of security', the Action Plan, after clarifying that the new provisions do not 'affect the exercise of the responsibilities incumbent upon the Member States to maintain law and order and safeguard internal security', stated that the Treaty of Amsterdam 'provides an institutional framework to develop common action...not only to offer enhanced security to the citizens but also to defend the Union's interests'.

The objective was 'to prevent and combat crime at the appropriate level, organized or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud'.[57]

With regard to 'an area of justice', the Action Plan, after emphasizing the importance of 'respecting the reality that, for reasons deeply imbedded in history and tradition, the Member States' judicial systems differ substantially', identified a clear need to improve judicial cooperation in criminal matters.[58] This was seen to require some approximation of legislation. The Action Plan emphasized that 'criminal behaviour should be approached in an equally efficient way throughout the Union: terrorism, corruption,

[55] Paras. 6-7.
[56] Para. 8.
[57] Paras. 10-11.

traffic in human beings, organized crime, should be the subject of minimum common rules relating to the constituent elements of criminal acts, and should be pursued with the same vigour wherever they take place'. At the same time, the Action Plan emphasized the necessity that 'procedural rules should respond to broadly the same guarantees' and concluded that in principle this was already achieved through the application of the ECHR.[59] This conclusion has been widely challenged.[60]

After defining the aims of the area of freedom, security and justice, the Action Plan made general considerations and recommendations. It stressed the significance of communitarization of immigration and asylum policies, which made it possible to overcome the deficiencies shown by intergovernmental co-operation such as the non-binding character of the instruments adopted and the absence of adequate monitoring arrangements.[61] In this context, it stressed the need to replace certain 'soft-law' measures of the former Third Pillar with more effective instruments.
The Action Plan also stressed the significance of the enhanced Union's external role resulting from communitarization of visa, asylum and immigration policies and from the new possibility for the Council to conclude international agreements under the Third Pillar. It also emphasized the necessity to co-ordinate the work undertaken under the Community and the Union structures on the establishment of the area of freedom, security and justice, and proposed to reform for this purpose the working structures of the Council. Moreover, it stressed the importance of the Action Plan within the context of the pre-accession strategy since the Action Plan set out for the benefit of the applicant countries a clear and comprehensive statement of the Union's priorities in the area.

In addition, the Action Plan spelt out the principles under which the Council and the Commission determined the priorities for the establishment of the area of freedom, security and justice. These included, apart from the guidance already given by the

[58] Para. 15.
[59] Paras. 18-19.
[60] See for example Guild (2004) particularly pp. 225-226 and 233. The author points out to the partial incorporation of due process rights contained in the ECHR and to the inconsistent ratification by the Member States of Protocol 7. See also Alegre and Leaf (2004) pp. 207-208.
[61] The lack of implementation of non-binding instrument was emphasized by the Austrian Strategy Paper on immigration and asylum, Council doc. 9809/98, 29.09.1998.

Treaty of Amsterdam, subsidiarity, solidarity, operational efficiency and the principle that 'responsibility for safeguarding of internal security rests with Member States'.[62]
Priorities were divided into measures to be taken within two years and measures to be taken within five years.
With regard to visa policy, measures to be taken within two years included the establishment of: (i) procedures and conditions for issuing visas by Member States (resources, guarantees of repatriation and accident or health cover); (ii) a list of countries whose nationals were subject to airport transit visas; (iii) rules on a uniform visa; and (iv) a Regulation establishing the 'white' and 'black' lists.
Measures to be taken within five years included: (i) extension of the Schengen representation mechanisms with regard to visas and initiation of a discussion 'on the possibility of establishing an arrangement between the Member States, which will improve the possibility of preventing visa applicants from abusing the foreign representations of one or more Member States in order to gain access to another Member State, which at the time of application was the actual intended country of destination'[63]; and (ii) attention to new technical developments in order to ensure – as appropriate – an even better security of the uniform format for visas.
Other priority measures identified by the Action Plan which were to complement measures on visas in the fight against illegal immigration included: (i) further harmonization of the Member States' laws on carriers' liability; (ii) a coherent EU policy on readmission and return; (iii) improvement of the possibilities for removal of persons through co-ordinated implementation of re-admission clauses and the development of European Official (Embassy) Reports on the situation in countries of origin; (iv) information campaigns in countries of origin and transit; and (v) assessment of countries of origin in order to formulate a country specific integrated approach.[64] In relation to the implementation of the latter measure, the Vienna European Council approved the creation of the High Level Working Group on Asylum and Immigration (HLWG), which was vested with the task of drawing up action plans for certain countries of origin of asylum seekers and migrants with the aim of addressing, in a comprehensive, integrated cross-pillar approach, the root causes of migration and flight from those countries.[65]

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[62] Para. 24.
[63] Para. 38.
[64] Para. 36.
[65] See Chapter 5.

Further relevant priority measures included: strengthening the fight against illegal immigration networks within the context of Europol co-operation, and establishing minimum rules relating to the constituent elements and to penalties with regard to offences such as trafficking in human beings, sexual exploitation of children, and drug trafficking.

2.2 The Tampere European Council

Apart from approving the Council's and Commission's Action Plan, the Vienna European Council also agreed on the need to call a special meeting of the European Council in October 1999 to continue discussions on the creation of the area of freedom, security and justice.

According to Denza: 'the objective was that following the entry into force of the Treaty of Amsterdam a high profile should be given to this area of increasing importance, that its relevance to the citizens of Europe should be demonstrated, and that strategy in novel areas should be established for some years ahead'.[66] More cynically, a Finnish diplomat described the special European Council as intended 'to make sure that our heads of governments at last understand what they signed up to at Amsterdam'.[67]

The Tampere European Council of October 1999 – the first European Council exclusively devoted to justice and home affairs – established the political guidelines and the concrete objectives for the creation of the area of freedom, security and justice.[68]

The European Council set out the political guidelines for each of the policies required for the creation of the area of freedom, security and justice. With regard to 'a common EU asylum and migration policy', the European Council stated that 'the aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity'.[69]

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[66] Denza (2002) p. 240. See also House of Lords Select Committee on the European Communities (1998-99), pp. 12-16.

[67] Quoted in den Boer and Wallace, W. (2000) p. 517. In this context, the Protocol integrating the Schengen *acquis* into the European Union appeared particularly problematic since at the time of signature the Schengen *acquis* had not been clearly defined. See House of Lords Select Committee on the European Communities (1997-98b).

[68] Presidency Conclusions, Tampere European Council, 15 and 16 October 1999, 200/1/99.

[69] Para. 4.

With regard to 'a genuine European area of justice', the European Council emphasized *inter alia* that better compatibility and more convergence between the legal systems of Member States must be achieved.[70]

With regard to 'a Union-wide fight against crime', the European Council stated that 'a common effort is needed to prevent and fight crime and criminal organizations throughout the Union' in the form of joint mobilization of police and judicial resources.

Finally, with regard to 'stronger external action', the European Council underlined the necessity for the Union to 'develop a capacity to act and be regarded as a significant partner on the international scene'.[71]

Generally, the European Council expressed its determination to maintain the objective of the creation of the area of freedom, security and justice at the top of the political agenda, and to keep in constant review progress made towards implementing the necessary measures and meeting the deadlines of the Treaty of Amsterdam.

After setting out the political guidelines, the European Council formulated concrete objectives for each of the policies required by the creation of the area of freedom, security and justice. These objectives straddled all three Pillars.

With regard to 'a common EU asylum and migration policy', and particularly within the context of 'management of migration flows', the European Council recommended the further development of 'a common active policy on visas and false documents, including closer co-operation between EU consulates in third countries and, where necessary, the establishment of common EU visa issuing offices'.[72]

The Tampere European Council also called for 'the development, in close co-operation with countries of origin and transit, of information campaigns on the actual possibilities for legal immigration'.[73]

It urged the adoption of legislation by the Council foreseeing severe sanctions against trafficking in human beings and economic exploitation of migrants,[74] and invited the Member States, together with Europol, to direct their efforts to detecting and dismantling the criminal networks involved.

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[70] Para. 5.
[71] Para. 8.
[72] Para. 22.
[73] Para. 22.
[74] See Council Framework Decision of 19 July 2002 on combating trafficking in human beings, OJ 2002 L 203/1.

It also called for closer co-operation and mutual technical assistance between the Member States' border control services, and for the rapid inclusion of the applicant States in such co-operation.

Further, the European Council called for 'assistance to countries of origin and transit to be developed in order to promote voluntary return as well as to help the authorities of those countries to strengthen their ability to combat effectively trafficking in human beings and to cope with their readmission obligations towards the Union and the Member States'.

Pointing out that the Amsterdam Treaty conferred powers on the Community in the field of readmission, the European Council further invited the Council to 'conclude readmission agreements or to include standard clauses in other agreements between the European Community and relevant third countries'.[75]

The European Council stressed the need for partnerships with countries of origin and transit aimed at addressing the root causes of migration. For this purpose it invited the Union and the Member States to ensure a greater coherence of the Union's internal and external policies. It also extended the mandate of the HLWG.[76]

In the context of EU 'stronger external action', the European Council underlined that 'all competences and instruments at the disposal of the Union, and in particular, in external relations must be used in an integrated and consistent way to build the area of freedom, security and justice. Justice and Home Affairs concerns must be integrated in the definition and implementation of other Union policies and activities'. The European Council also underlined that 'full use must be made of the new possibilities offered by the Treaty of Amsterdam for external action and in particular of Common Strategies as well as Community agreements and agreements based on Article 38 EU'.[77]

3. The Treaty of Nice

The Treaty of Nice[78] – whose purpose was to introduce certain institutional and procedural reforms in the Treaty of Amsterdam in view of enlargement[79] – did not

[75] Paras. 26-27.
[76] The Tampere European Council approved the HLWG's Action Plans for Afghanistan and the region, Iraq, Morocco, Somalia and Sri Lanka. See Chapter 5.
[77] Paras. 59-60.
[78] OJ 2001 C 80. The Treaty was signed on 26 February 2001 and came into force on 1 February 2003 following Irish ratification.

introduce any significant amendment to Title IV EC. No changes were introduced in relation to the jurisdiction of the Court of Justice. The co-decision procedure was extended only in relation to the adoption of two kinds of measures: measures on judicial co-operation (except for aspects relating to family law), and certain measures on asylum.[80]

As regards other provisions of the Treaties relevant to visas, the Treaty of Nice amended Article 18 EC on Union citizenship.[81] Qualified majority voting was introduced for the adoption by the Council of measures on the right of citizens of the Union to move and reside freely in the Member States. However, the Article was amended to exclude from its scope 'provisions on passports, identity cards, residence permits or any other such document'.

The Treaty of Nice also amended Article 230 EC to the effect that now the Parliament may bring annulment actions on the same terms of the Commission, the Council and the Member States, and not only for the purpose of protecting its prerogatives.

4. Changes under the Constitutional Treaty

The Constitutional Treaty, if ratified, would introduce major changes in the field of justice and home affairs.[82] The Constitutional Treaty introduces into Part III (The Policies and Functioning of the Union), under Title III (Internal Policies and Actions), a new Chapter headed 'Area of Freedom, Security and Justice' bringing together current First and Third Pillars' competences. This Chapter – Chapter IV – contains eight articles of general applications (Articles III-158-165), and then divides its subject matter into four distinct parts: (i) policy on border checks, asylum and immigration; (ii) judicial cooperation in civil matters; (iii) judicial cooperation in criminal matters; and (iv) police cooperation.

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[79] The Treaty of Amsterdam had failed to address the issues of the Commission composition and the voting rules in the Council after enlargement. Consequently, a Protocol 'on the institutions with the prospect of enlargement of the European Union' annexed to the Treaty envisaged a comprehensive review of the provisions on the composition and function of the EU institutions 'at least one year before the membership exceeds twenty'. See Nugent (1999) p. 82.

[80] However the co-decision procedure was to be applicable only after the Council adopted legislation defining the common rules and basic principles governing the issue.

[81] Article 18 EC can arguably cover measures governing the access into the Member States' territories of third country nationals who are family members of EU nationals.

[82] See Chapter IV of Title III of Part III, provisional consolidated version of the draft Treaty establishing a Constitution for Europe, 25 June 2004, CIG 86/04. On the changes see also Chapter 2.

The normal Community decision-making procedure (qualified-majority voting and co-decision) is introduced for most of these areas,[83] and the current limitations as to the jurisdiction of the Court of Justice under the Title IV EC and the Third Pillar are removed. Also, standard Union instruments (laws, framework laws, regulation and decisions) apply to all the areas covered by Chapter IV.

With regard to border checks, asylum and immigration, Chapter IV requires the establishment of 'common policies' and, for this purpose, reformulates some of the current legal bases.

A common policy on visas forms an integral part of the Union policy on border checks. The aim of the latter policy remains unclear. According to Article III-166, the policy should not only ensure the absence of internal frontier controls on persons and common controls at the external borders, but it should also lead to the 'gradual introduction of an integrated management system for external borders'. The Constitutional Treaty is however silent on the form this system should take. It is however apparent that a Union policy on border checks is becoming an objective itself, independent of frontier-free movement, and that more integration is envisaged.

With regard to visa policy, a single legal basis is introduced, thus ending the current splitting of the policy into four specific parts with different procedures.[84]

A further innovation introduced by the Constitutional Treaty with regard to border checks, asylum and immigration policies consists in the introduction of the principle of solidarity and fair sharing of responsibility. In particular, the Constitutional Treaty envisages the introduction in Union acts of measures giving effect to this principle.[85] The introduction of the principle appears particularly appropriate given the inequality in responsibility for policing the Union external borders among the Member States, particularly after enlargement.

Among some of the further innovations introduced (whose application extends over all the areas covered by Chapter IV) is the possibility of introducing a mechanism for the evaluation by the Member States, in collaboration with the Commission, of implementation of Union policies by national authorities.[86] This evaluation mechanism,

[83] For some of the areas currently covered by the Third Pillar unanimity is retained or a special decision-making procedure is applicable. See Chapter 2.
[84] Article III-166(2)(a).
[85] Article III-169.
[86] Article III-161.

which has its roots in Schengen arrangements, is contemplated, at least partially, as a response to concerns over implementation standards of future new Member States.[87]
A further innovation consists in the setting up of a standing committee within the Council entrusted with ensuring that operational cooperation on internal security is promoted and strengthened.[88]

The United Kingdom, Ireland and Denmark have retained their opt-out positions.[89] Denmark, however, can substitute the provisions governing its position with new provisions whereby when it decides to opt-in to measures proposed or adopted under Chapter IV, it will be bound by them under Union law, rather than international law.[90]
It also appears that the Constitutional Treaty continues to safeguard national competence to conclude agreements with third countries on the crossing of the external borders.[91]

5. Measures on visas under the Amsterdam Treaty

5.1 Visa lists

Article 62 EC prescribes the adoption of 'the list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement' (the 'black' and 'white' lists), within five years of the entry into force of the Treaty of Amsterdam.
In the light of the Community objective of internal frontier abolition, which Title IV is meant to serve, such 'black' and 'white' lists are to be exhaustive (i.e. include all third countries); no Member State could be expected to abolish controls at the frontiers with other Member States when such a course of action could cause a security deficit resulting from other Member States applying a more relaxed visa policy.

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[87] See Monar (2003) p. 134. With regard to current Third Pillar areas, the possibility of infringement actions under Articles III-265 and 266 is also introduced.
[88] Article III-162. See Chapter 2.
[89] See Protocol on the Schengen acquis integrated into the framework of the European Union, Protocol on the application of certain aspects of Article III-14 of the Constitution to the United Kingdom and Ireland, and Protocol on the position of the United Kingdom and Ireland on policies in respect of border controls, asylum, immigration, judicial cooperation in civil matters and on police cooperation. See also United Kingdom Government (2003) para. 84. With regard to Denmark, see Protocol on Denmark.
[90] Article 9 Protocol on Denmark.
[91] Protocol on the external relations of the Member States with regard to the crossing of the external borders.

The visas referred to in Article 62 EC are visas 'for intended stays of no more than three months' which related to 'the crossing of the external borders of the Member States'. Article 62 EC, in view of the *Airport Transit Visas Case*,[92] excludes airport transit visas.

5.1.1 Regulation 539/2001 (as amended)[93]

The Council adopted the Regulation 'listing the third countries whose nationals must be in possession of a visa when crossing the external borders and those whose nationals are exempt from that requirement' on 15 March 2001.[94] The Regulation included every non-member country on either the 'black' or the 'white' list. Since its adoption, it has been amended twice.[95]

Harmonization of the visa requirements imposed by the Member States is a remarkable achievement,[96] although the resulting visa regime can be criticized as excessively restrictive. An important consequence of harmonization is that the Community, under the *AETR* doctrine, has acquired exclusive competence to conclude visa exemption agreements with third countries. Apart from constituting an instrument of harmonization, which is a pre-condition for the abolition of internal frontier controls, Community exclusive external competence for visas further strengthens the external identity of the Community.

However the Community visa regime remains fragmented due to the opt-outs of Denmark, the United Kingdom and Ireland.

With regard to Denmark, the Commission in its original proposal maintained that on the basis of the exception to the Danish opt-out from Title IV EC, contained in the Protocol on the position of Denmark, Denmark was to participate in the Regulation.

Such position was based on the Commission's interpretation of old Article 100c EC - whose exact wording constitutes the subject matter of the exception. The Commission argued that old Article 100c in view of Article 7a (now 14) required the adoption of both a 'black' and 'white' list (i.e. total harmonization) and that accordingly Article

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[92] Case C-170/96 *Commission v. Council* [1998] ECR I-2763.

[93] For the consolidated text see CONSLEG, 2001R0539, 1 May 2004.

[94] Regulation 539/2001, *supra* n. 35. For the Commission's amended proposal see COM(2000) 27final, OJ 2000 C 177E/66. For the Commission's original proposal see Document 500PC0027 (europa.eu.int/eur-lex/en/com/dat/2000/en_500PC0027.htm).

[95] Regulation 2414/2001, 7 December 2001, OJ 2001 L 327/1, by which Romania was effectively included in the 'white' list, and Regulation 453/2003, 6 March 2003, OJ 2003 L 69/10, by which Ecuador was moved from the 'white' to the 'black' list.

[96] It took the Council almost eight years to achieve full harmonization under a Community instrument, with the first Commission proposal dating back to December 1993.

62(2)(b) 'makes no innovation over Article 100c but merely confirms and clarifies the objectives to which it gives form'.[97]

The Council, however, treated the Regulation as a measure 'building upon the Schengen *acquis*'.[98] Accordingly, under the Protocol on the position of Denmark, Denmark was not bound by the Regulation under Community law, but could, within six months, decide whether to be bound by it under international law.[99] The direct applicability of the Regulation in Denmark and the possibility of infringement actions before the Court of Justice are thus excluded.

The United Kingdom and Ireland decided not to take part in the Regulation. The main reason for the United Kingdom's non-participation was that adherence to the Regulation would have meant the introduction of visa requirements for nationals of 31 countries (26 of which are Commonwealth countries), as well as the removal of visa requirements for nationals of Bulgaria, Romania, Slovakia, Croatia, Ecuador and Macao. This reason continues to be at the basis of the United Kingdom's non-participation.[100]

A further reason for non-participation appeared to be concerns on the part of the United Kingdom that participation in the arrangement could undermine in the long-term the legal security of its controls at the frontiers with other Member States.[101]

United Kingdom and Irish non-participation in the visa arrangements may hinder free movement between these countries and the rest of the Community. Differences between the visa requirements applied by the United Kingdom and Ireland and those applied by the Member States may result in the strengthening of border controls between the two groups. The aim is to maintain differences to a minimum. Thus, the United Kingdom – which is present at every level of the Council when visa matters are considered – intervened strongly against proposals to amend the Visa Regulation to lift visa requirements for nationals of Bulgaria and Romania, notwithstanding its non-participation in the Community regime.[102] United Kingdom and Irish participation into security measures (such as the SIS, the uniform format for visas and local consular cooperation) may also contribute to ease controls between these two countries and the rest of the Community. As convergence between the policy of the United Kingdom and

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[97] Explanatory Memorandum of the Commission to its first proposal, *supra* n. 94. The Commission's interpretation of Article 100c was not *explicitly* accepted by the Council during Maastricht. See Chapter 3.

[98] 2nd Recital.

[99] See *supra* n. 25.

[100] Interview with United Kingdom diplomat, 30 July 2003.

[101] House of Commons Select Committee on European Scrutiny (2000a).

[102] Interview with Commission official DG JHA/A1, 10 December 2002.

Ireland and that of the Community increases, it becomes increasingly difficult for the United Kingdom to justify its opt-out from frontier-free movement.

Non-participation has also implied that the principle of equivalence between residence permits issued by the Member States and visas (i.e. exemption from visa requirements for holders of residence permits) does not apply between the United Kingdom and Ireland, on the one hand, and the rest of the Member States, on the other. This causes practical problems for third country nationals resident either in the United Kingdom and Ireland or in the rest of the Community who wish to travel to the Community or the United Kingdom and Ireland respectively.

The Regulation sets out in a Recital the criteria on which decisions on whether to include a third country in the 'white' or 'black' lists are based. These are said to relate to 'illegal immigration, public policy and security and to the Union's external relations with third countries, consideration also being given to the implications of regional coherence and reciprocity'.[103]

The Commission in the Explanatory Memorandum to its original proposal considered each of these criteria in turn.[104]

According to the Explanatory Memorandum, the assessment of the risk of illegal immigration includes both an internal and an external assessment. The internal assessment is based on information and statistics on illegal residence (resulting, for example, from apprehensions of illegal immigrants within the national territory, or applications for regularization within the context of national regularization programmes), refusals of admission, expulsions and clandestine immigration and labour networks.

The criteria for collecting and analysing such information, however, continue to vary among the Member States with a European dimension lacking.[105] In this light, a number of proposals have been made to advance the collection, exchange and analysis of information on the basis of common definitions and methods. The Council decided in May 2001 to introduce a public annual report on asylum and migration which includes a

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[103] 5th Recital.

[104] For an in-depth consideration of the criteria see Guild (2001) pp. 33-37. See also Melis (2001) p. 138.

[105] This is clearly stated in: Commission Communication on a common policy on illegal immigration, COM(2001) 672 final, 15.11.2001, para. 4.2.2; Commission Communication on the development of a common policy on illegal immigration, COM(2003)323 final, 3.03.2003, para. 2.5; Comprehensive Plan to combat illegal immigration and trafficking of human beings, Council doc. 6621/1/02 JAI, 28.02.2002, para. 44; Commission Green Paper on a common return policy, COM(2002) 0175/final, para. 3.4.1. See also Guild (2001) p. 35.

section analysing data on illegal immigration.[106] Furthermore, proposals have been made to strengthen the role of Cirefi – whose actual efficiency had come into doubt – particularly with regard to networking among Member States in the field of analysis.[107] A European Migration Observatory is also under development to monitor and carry out comparative analysis of both legal and irregular migratory flows.[108]

The external assessment of the risk of illegal immigration concerns the reliability of travel documents issued by third countries and the existence and impact of readmission agreements.[109]

Following the introduction of Community competence with regard to repatriation of illegal residents,[110] the Community has successfully concluded negotiations on readmission agreements with Sri Lanka, Hong Kong and Macao, while negotiations are in progress with Morocco, Pakistan, Russia and Ukraine, Albania, Algeria, China and Turkey.[111] In return for the conclusion of readmission agreements, Hong Kong and Macao were offered the lifting of visa requirements. However, as the Commission pointed out when discussing Union leverage in persuading third countries to conclude readmission agreements in its Green Paper on a Community Return Policy, offering 'visa facilitation or the lifting of visa requirements can be a realistic option in exceptional cases only (e.g. Hong Kong, Macao); in most cases it is not'.[112] It is clear

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[106] Council doc. 7973/01 ASIM 10. The Commission has presented an Action Plan for the collection and analysis of Community statistics, SEC(2001) 602, 9.04.2001.

[107] Comprehensive Plan to combat illegal immigration, *supra* n. 105, para 45; Commission Communication on the development of a common policy on illegal immigration, *supra* n. 105, para. 2.5. Cirefi collates statistical information on: illegal immigration and unlawful residence, facilitation of illegal immigration, use of false or falsified documents and expulsion matters. Cirefi and Cirea were assessed as inefficient in the Austrian Strategy Paper on migration and asylum policy, *supra* n. 61. In July 2002, the Council abolished Cirea on grounds of inefficiency. It was replaced by Eurasil (European Network for Asylum Practitioner). See Monar (2003) p. 120.

[108] See Comprehensive Plan to combat illegal immigration, *supra* n. 105, para. 46; Commission Green Paper on a common return policy, *supra* n. 105, para. 3.4.1. The establishment of such European Migration Observatory was called for by the Laeken European Council of 14 and 15 December 2001, see Presidency Conclusions, SN 300/1/01 Rev 1, para. 40.

[109] On the issue of readmission agreements as a central element of the EU's strategy to combat illegal immigration see Chapter 5. Conclusion of readmission agreements together with financial assistance to countries of origin and transit and retorsion against countries which are unwilling to cooperate constitute an example of the Union's practice of using its external economic and political leverage to achieve its internal objectives. On this issue generally see Cremona (1998).

[110] See Article 63(3)(b) EC and confirmation by the Tampere European Council, Presidency Conclusions para. 27.

[111] See Commission Communication on the development of a common policy on illegal immigration, *supra* n. 105, para. 3. See also Draft Council Conclusions: Criteria for the identification of third countries with which new re-admission agreements need to be negotiated, Council doc. 7990/02, 15.04.2002, para. 3.

[112] Para. 4.1.1, *supra* n. 105. See also the EU Common Strategy on the Mediterranean Region (OJ 2000 L 183/5) which lists among the proposed EU's 'actions and specific initiatives' that 'the EU will study the simplification and acceleration of visa issue procedure'. See also the ADS (Approved Destination Status)

that the conclusion of readmission agreements is not in itself a sufficient factor to include a third country in the 'white' list. All other criteria outlined in the Regulation must also be taken into account.

In relation to the assessment of 'public policy' and 'domestic security' risks, again, the existence of common definitions and uniform evaluation mechanisms seems a crucial precondition. However, a 'common European approach' in this field seems restricted to the objective of combating criminal networks concerned with the smuggling of migrants and trafficking in human beings, and terrorism. Indeed, the Explanatory Memorandum only referred, in relation to the assessment of the 'public policy' and 'domestic security' criteria, to the importance of conclusions reached in the police cooperation context. Such conclusions, arrived at with the support of Europol, concern mainly the prevention, investigation and analysis of crimes relating to smuggling of migrants and trafficking in human beings, and terrorism.[113]

The criterion of the 'European Union's external relations, consideration also being given to the implications of ... reciprocity' is perhaps the most controversial, being one which greatly contributed to the common visa policy's restrictiveness.[114]
As the Explanatory Memorandum explained, what this criterion actually means is that the common visa regime may well 'reflect the specific position of a Member State in relation to a third country, to which the other Member States adhere in a spirit of solidarity'. This position is in line with the Declaration on Article 62(2)(b) EC (ex 73j(2)(b)) attached to the Treaty of Amsterdam which stated that the Council could take into account the 'foreign policy considerations of the Union *and the Member States*' when adopting rules on short-term visas.[115]
The background to this state of affairs is that the European Union does not have a 'single' foreign policy. In line with the fact that the Member States continue to be sovereign States, the CFSP parallels and does not subsume the foreign policies of the Member States. The limited nature of the CFSP and the fact that, for a number of reasons, the Member States' national foreign policies vary considerably implies only

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Agreement between the Community and China containing provisions on visa facilitation and on readmission. See Kuijper (2004) p. 619.
[113] See Comprehensive Plan to combat illegal immigration, *supra* n. 105, paras. 82-85. On Europol role see also Council Recommendation of 30 November 2000, OJ 2000 C 357/7.
[114] See the United Kingdom's position as to the 'black' list proposed by the Commission under old Article 100c EC, in Chapter 3.
[115] Emphasis added.

relatively limited convergence on foreign policy. The differences in the national visa policies of the Member States prior to harmonization provide an example of such limited convergence.

The controversial point is that, as pointed out by the United Kingdom in relation to the adoption of the 'black' list under old Article 100c, even in relation to divergences stemming purely from different political relations with third countries (rather than from public policy or security concerns) the method employed for harmonization concentrated on giving priority to restrictive positions rather than visa-free treatment. This approach resulted in an extremely restrictive common policy and disadvantaged those Member States with strong external links.

It is possible to explain the priority given to restrictive positions in terms of the retention of sovereign status by the Member States and the consequent application of the principle of reciprocity in their relations with third countries. On the one hand, it is understandable that a Member State may be unwilling to grant visa-free access into its territory to nationals of a third country in the absence of reciprocity. On the other hand, this means that if uniformity is to be achieved among the Member States, all of them would have to impose visa requirements on the nationals of the country in question with implications on their bilateral relations with this country and on the treatment their nationals are going to receive. The only way to avoid an excessively restrictive outcome out of harmonization was to hammer out the variation in reciprocity in the relations between Member States and third countries.

The central role of reciprocity is confirmed by the arrangements introduced by the Regulation to ensure reciprocity between individual Member States and third countries. The mechanism established by the Regulation ensures reciprocity and at the same time uniformity of the visa requirements applied by the Member States and, necessarily, solidarity between them. Thus, under the Regulation, if a country on the 'white' list imposes visa requirements on nationals of a Member State, all Member States must introduce visa requirements for nationals of such third country no later than 30 days after the Member State on whose nationals visa requirements were imposed notifies the Council and the Commission.[116]

[116] Standard bilateral visa exemption agreements generally contain suspension clauses to the effect that either party may temporarily suspend the agreement in whole or in part with an obligation to notify the other party without delay.

The imposition of visa requirements by the Member States is to be treated as a provisional measure. If the third country in question repeals the visa requirements, such provisional measure will cease to operate. If it does not, the Commission is to examine any request by the Council or by a Member State that it submit a proposal to the Council for including the third country concerned on the 'black' list.[117]

This reciprocity mechanism will become superfluous once, as a result of the *AETR* doctrine, Community visa exemption agreements replace the Member States' individual bilateral visa exemption agreements with third countries.[118] What remains to be seen is the extent to which a unified position on the part of the Member States, resulting from Community visa exemption agreements, will strengthen their individual positions *vis-à-vis* third countries.[119]

In the meantime the Commission is to undertake an in-depth review of the meaning and scope of reciprocity in view of the fact that it appears that nationals of certain Member States are subject to visa requirements by certain third countries included in the 'white' list or are exempt for a period shorter than the period for which the Member States exempt nationals of those countries.[120]

The criterion of 'regional coherence' was not articulated in the Explanatory Memorandum. It clearly applied in relation to the Commission's proposal to include Bulgaria and Romania in the 'white' list.

In the context of the Central and Eastern European countries, the application of a 'regional coherence' criterion for the determination of visa requirements softens some of the problems ensuing from 'differentiation' among these countries resulting from the Union's 'membership conditionality' approach.[121] In particular, the application by the new Member States of the Schengen *acquis* on border controls and visas will result in the strengthening of the borders between the new Member States and non-Member

[117] Article 1(4).

[118] The Commission is currently preparing negotiating briefs to conclude agreements between the Community and third countries. See Biannual update of the scoreboard to review progress on the creation of an area of freedom, security and justice in the European Union, 30.11.2000 (COM(2000) 728 final), p. 32. See also Kuijper (2000) p. 365.

[119] Thus, to what extent a third country will be ready to impose visa requirements to nationals of a Member State when such a course of action will result in all Member States imposing visa requirements on its nationals.

[120] Article 2 Regulation 453/2003, *supra* n. 95.

[121] On the issue of differentiation see Smith, K. (2003).

States which could exacerbate existing tensions among them, particularly with regard to the issue of the treatment of ethnic minorities.[122]

In this context, the inclusion of Romania in the 'white' list would have resolved a specific problem faced by Hungary, now a Member State. The imposition by Hungary of visa requirements on Romania would have given rise to difficulties because of the large number of Hungarians living in Romania and possible retorsion on the part of Romania. The imposition of visa requirements in this case was described as a 'politically and socially intractable problem' that might even give rise to destabilization.[123]

In this context, there even appeared to be discrepancy between the various accession requirements (the application of the Schengen *acquis* on border controls and protection of ethnic minority rights) since candidate countries had been encouraged by the Union to conclude agreements among themselves for the protection of ethnic minority rights which inter alia included provisions on the facilitation of cross-border movement.[124]

The 'black' and 'white' lists introduced by the Regulation are the same as those which were agreed at Schengen level with very few changes. Colombia, the only country on which the Schengen States had not reached agreement by the time the Schengen *acquis* was incorporated into the European Union legal order, was included in the 'black' list following pressure from the Benelux countries, France, Portugal and Greece. The 'black' list includes approximately 135 countries.

While the Commission proposed the inclusion of Romania and Bulgaria in the 'white' list – as a result of progress these countries had achieved on border controls, security of travel documents, conclusion of new readmission agreements and review of existing ones and because of the state of relations between these countries and the Union – agreement could not initially be reached in the Council. This was notwithstanding that 'the Kosovo crisis in the first half of 1999 and the ensuing instability throughout the

[122] Smith, K. (2003) p. 124; Phuong (2003) pp. 647-648 and 658-659.

[123] See House of Lords Select Committee on European Union (1999-2000) paras. 44-47. Hungary suggested special visa arrangements for ethnic Hungarians living abroad, but these proposals were later abandoned, see Phuong (2003) p. 647. Various proposals have now been put forward for facilitating movement of persons between the new Member States and their Eastern neighbours. See, for example, Proposal for a Council Regulation on the establishment of a regime of local border traffic at the temporary external borders between Member States, COM(2003)0505 (02).

[124] Hillion (2004) pp. 728-730. See also Borissova (2003) p. 119, who argues that the application of the *acquis* on visas seemed contrary to the concept of *relations de bon voisinage*, a component of the first political Copenhagen criterion. It also appeared inconsistent with plans to establish a free trade area in South Eastern Europe, in the context of the Stability Pact for South Eastern Europe.

Balkans led to a consensus within the EU that Bulgaria and Romania should not be further isolated'.[125]

The resulting compromise was that the Regulation originally included both countries on the 'white' list but in relation to Romanian nationals it provided that visa exemption was to come into force at a later date to be decided by the Council following reports by the Commission setting out undertakings Romania was prepared to give in relation to illegal immigration and residence, including arrangements for repatriation. Thus, nationals of Romania were provisionally to be subject to visa requirements under the Regulation.[126]

The Commission's report on Romania presented in June 2001 stated that 'Romania has made undeniable progress in legislative and organizational matters as regards illegal immigration and repatriation from the Member States of persons illegally resident there who have travelled from Romania, visa policy and border controls'.[127] The Regulation was accordingly amended on 7 December 2001 to effectively include Romania on the 'white' list.[128] However, it appears that some of the undertakings Romania has given in return for visa-free access for its nationals to the Union may put it in breach of international human rights instruments, including the undertaking to punish its own nationals found residing and working illegally in Member States by preventing their future departure from their homeland for a specified length of time (arguably contrary to Article 2 Protocol 4 ECHR on the right to leave one's country).[129]

A further amendment of the lists took place on 6 March 2003, by virtue of Amending Regulation 453/2003.[130] This was in response to calls from the Seville European Council of 21 and 22 June 2002 urging the Council and the Commission, within their respective areas of responsibility, to attach top priority to reviewing the 'black' and 'white' lists by the end of 2002 in the context of the Union's fight against illegal immigration.[131]

By virtue of the amendment, Ecuador was moved from the 'white' to the 'black' list. No amendment to the list had been previously undertaken (except with regard to the position of Romanian nationals). In particular, no amendments followed the terrorist

[125] Smith, K. (2003) p. 128.
[126] Ex Article 8.
[127] COM(2001) 361 final, 29.06.2001. The report also sets out Romania's commitments in these areas.
[128] Regulation 2414/2001, *supra* n. 95.
[129] COM(2001) 61 final, 2.02.2001, Vol. 1, pp. 4 and 7, and Vol. 2, pp.12-13. See also ILPA (2002).
[130] *Supra* n. 95.
[131] Presidency Conclusions, 200/02, para. 30.

attacks of 11 September 2001 – a fact that can be taken to testify to the common visa policy's extreme restrictiveness.

The background to the Commission's proposal for the Amending Regulation illustrates that the common visa policy is still underpinned by national evaluation of the conditions for imposing visa requirements and highlights the inadequacy of the existing instruments aimed at achieving an assessment according to common definitions and methods.[132] Such a state of affairs – which may partly be reconnected to the intergovernmental roots of the common visa policy and partly to the division of competence between the Community and the Member States – has important implications for the role of the Commission and for the content and character of the policy.

The way the Commission proceeded to gather the information necessary for reviewing the visa lists was to send a questionnaire to the Member States (including the United Kingdom and Ireland for information only) asking for a fresh evaluation of third countries in the light of the criteria for the determination of the visa lists. Evaluation of the replies led to the proposal to include Ecuador in the 'black' list. Only four Member States requested such an inclusion on the ground that recent regularization programmes had shown that a large number of Ecuadorian nationals were illegally present on their territories and because of political and public order considerations.[133]

The Commission therefore relied on information directly provided by the Member States. Information collated by bodies such as Cirefi and Europol appeared insufficient since it mainly concerns countries that are already on the 'black' list. Information resulting from local consular cooperation is useful, but collection and presentation of such information depends on the Presidency in office.[134]

The Amending Regulation also introduced a provision establishing a uniform date from which the Member States had to bring the visa requirement for nationals of Ecuador into effect.[135] This appeared necessary in the light of past experience: Spain implemented the visa requirements for nationals of Colombia six months after Regulation 539/2001 had entered into force.[136] In this context, the Commission underlined that a correct and timely implementation of the amendment to the 'black' list

[132] Interview with Commission official DG JHA/A1, 10 December 2002. For the Commission proposal see COM(2002) 679 final.
[133] Some Member States did not reply to the questionnaire or replied after the deadline.
[134] Interview with Commission official, DG JHA/A1, 10 December 2002.
[135] Article 3(2) Regulation 453/2003, *supra* n. 95.
[136] Interview with Commission official, DG JHA/A1, 10 December 2002.

by all Member States was essential for the common visa policy's success as an instrument to combat illegal immigration.[137]

The 'black' list of the Regulation also includes the Palestinian Authority under the category of 'entities and territorial authorities that are not recognized as States by at least one Member State' (together with Taiwan, which was already so listed in old Regulation 574/1999).[138]

Hong Kong and Macao are listed under the same category on the 'white' list, following assessment of the criteria referred to above.

Notwithstanding the specific reference to this particular category, inclusion in the 'black' or 'white' lists under the heading 'States' does not of course imply or preclude recognition by the Member States and the Community since decisions on recognition of States and governments continue to be national decisions, though they are often taken collectively within the CFSP framework.[139] Article 6 of the Regulation clarifies this point by explicitly stating that the Regulation does not affect the competence of the Member States as regards recognition of States and passports, travel or identity documents.

Like the previous Visa Regulation, the Regulation makes also provision for succession of States. Nationals of third countries formerly part of countries on the 'black' or 'white' lists are respectively to be subject to or exempt from visa requirements unless and until the Council decides otherwise.[140]

In contrast with the Commission's original proposal, the Regulation does not provide for the equivalence between residence permits issued by the Member States and visas for the purpose of crossing the external borders. The practical effect of such a provision would be to exempt nationals of countries included on the 'black' list from visa requirements when they possess a residence permit issued by a Member State. Accordingly, the provision also implies *mutual recognition* of residence permits issued by the Member States for the purpose of external border crossing. On this ground, the

[137] Commission Communication on the development of a common policy on illegal immigration, *supra* n. 105, para. 2.1.

[138] East Timor, which acquired full statehood on 20 May 2002, was moved from the section 'territorial entities' to the section 'States' of the 'black' list by Regulation 453/2003, *supra* n. 95.

[139] Warbrick (2003) p. 258.

[140] Article 1(3).

Council believed that the provision fell within the scope of Article 62(2)(b)(iv) on rules on a uniform visa, which prescribes a stricter legislative procedure.[141]

Under the Regulation, the Member States maintain discretion in relation to several categories of persons. According to the Commission, in spite of the objective of attaining a high degree of harmonization in visa matters, it has to be accepted that national considerations specific to a Member State will continue to apply in certain areas. Each Member State should retain a certain margin of flexibility so that it can decide on the visa to apply to third-country nationals in these categories.

As regards stateless persons and recognized refugees,[142] the Commission proposed that visa requirements could be determined according to a residence criterion. Thus, under the Commission's original proposal, stateless persons and recognized refugees were to be subject to or exempt from visa requirements depending on whether the country where they resided and which issued them with travel documents was included on the 'black' or the 'white' list respectively. This was said by the Commission to 'constitute further progress towards harmonization' of the Member States' visa policies.

This residence criterion proposed by the Commission was rejected by the Council. The Member States were concerned on security grounds about exempting from visa requirements refugees resident in countries included on the 'white' list.[143]

Accordingly, under the Regulation recognized refugees and stateless persons are to be subject to visa requirements if the country where they reside and which issued them with travel documents is included on the 'black' list, while the Member States maintain discretion with regard to recognized refugees and stateless persons residing in a country included on the 'white' list. This arrangement is without prejudice to obligations under

[141] The issue constitutes an example of possible legal basis confusion. The provision is currently applied by virtue of communitarized Schengen rules. Annex 4 to the CCI contains the list of documents issued by the Schengen States that entitle the holder to enter without a visa. The equivalence of residence permits and visas for the purpose of external border crossing has made it necessary, in order to avoid the Schengen visa regime being undermined, to introduce anti-counterfeit and anti-forgery residence permits, see Regulation 1030/2002 laying down a uniform format for residence permits for third country nationals, OJ 2002 L 157/1. The Council also adopted a Joint Action under the old Third Pillar on 16 December 1996, OJ 1997 L7/1.

[142] Persons within the meaning of the New York Convention of 28 September 1954 relating to the status of stateless persons (360 UNTS 117) and the Geneva Convention of 28 July 1951 relating to the status of refugees (189 UNTS 137) respectively. Neither Convention lays down any rule specifically on visa requirements. They only provide that: '(1) The Contracting States undertake to issue transit visas to stateless persons who have obtained visas for a territory of final destination. (2) The issue of such visas may be refused on grounds which would justify refusal of a visa to any alien' (para. 9 Schedule). Moreover, they prescribe an obligation to recognize as valid the Conventions' travel documents (para. 7 Schedule).

[143] Interview with Commission official DG JHA/A1, 10 December 2002.

the 1959 European Agreement on the Abolition of Visas for Refugees,[144] which stipulates that refugees resident in the territories of the signatory governments are exempt from visa requirements providing they hold a valid travel document and their visits are of not more than three months duration.[145]

The imposition of visa requirements on certain other categories of persons remains similarly within the discretion of the Member States. Under the Regulation the Member States can provide for exceptions from the visa requirements or exceptions from the exemption from the visa requirements with regard to the following categories: (a) holders of diplomatic passports, official-duty passports and other official passports; (b) civilian air and sea crew; (c) the flight crew and attendants on emergency or rescue flights and other helpers in the event of disaster or accident; (d) the civilian crew of ships navigating in international waters; and (e) holders of *laissez-passer* issued by some intergovernmental international organizations to their officials.[146]

Rules on visa requirements for such special categories are the subject of bilateral agreements, such as diplomatic visa exemption agreements, or are contained in multilateral or bilateral agreements of a wider scope.[147]

However, national policy is not completely unrestricted, but the Member States have entered a number of undertakings in order to ensure security. With regard to visa requirements for holders of diplomatic, official and service passports, for example, provisions included in the CCI stipulate that 'the Schengen States undertake not to conclude at a future date, without prior agreement with the other Member States, agreements in the area of removing visa requirements for holders of diplomatic, official and service passports with States whose nationals are subject to prior consultation for a visa to be issued by another Schengen State'.[148] In this respect the Commission's position is that following the attribution of the CCI to Articles 62 and 63 EC such an undertaking has acquired the force of Community law.[149] The Commission's position has made Italy desist from concluding a visa exemption agreement with Russia.

[144] Article 3. All Member States are parties to the Agreement except for Austria and Greece.
[145] See Article 1 of the Agreement, 376 UNTS 85.
[146] Article 4.
[147] For a detailed account of the international agreements see Chapter 1.
[148] Annex 2, point I.8.2, CCI, OJ 2002 C 313/1.
[149] Interview with Commission official DG JHA/A1, 10 December 2002.

Further, building on the old Third Pillar Joint Action concerning travel facilities for school pupils from third countries resident in the Member States,[150] the Regulation stipulates that the Member States retain discretion to exempt from visa requirements a school pupil national of a country on the 'black' list but residing in a country on the 'white' list travelling in the context of a school excursion. They also retain discretion to impose visa requirements on nationals of countries included on the 'white' list if they carry out a paid activity during their stay.[151]

The Member States are under an obligation to communicate the measures governing visa matters within their discretion to the Commission and the other Member States. Such measures are to be published by the Commission in the *Official Journal*.[152] Unlike the Commission's amended proposal the Regulation does not state that the issue of exceptions from the visa exemption is in due course to be covered by Community visa exemption agreements with third countries.

5.1.2 Airport transit visas

Notwithstanding the fact that the Vienna Action Plan identified 'the drawing up of a list of countries whose nationals are subject to an airport transit visa requirement (abolition of the current grey list)' as a priority measure to be taken within three years from the entry into force of the Treaty of Amsterdam,[153] and that the Commission in its biannual scoreboard envisaged the adoption of a regulation by April 2001, a Community measure establishing the list of countries whose nationals are subject to airport transit visas has not yet been adopted or proposed.

The Member States, including the United Kingdom and Ireland, remain bound by the Joint Action on Airport Transit Visas adopted under the former Third Pillar.[154] The Member States (excluding the United Kingdom and Ireland) are also bound by the airport transit visa 'black' list agreed at Schengen level, which is contained in the CCI.[155] This has not been changed in response to the terrorist attacks of 11 September 2001.

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[150] Joint Action 94/795, 30.11.1994, OJ 1994 L 327.
[151] Article 4.
[152] Article 5.
[153] Para. 36, *supra* n. 53.
[154] *Supra* n. 29. On the Joint Action, see Chpater 3.
[155] The CCI were attributed to Articles 62 and 63 EC, see *supra* n. 12. Regulation 789/2001 'reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications', adopted under Articles 62(2) and (3), lays down the procedure to amend the airport transit visa 'black' list contained in the CCI. This stipulates a shared right of initiative for the Commission and the Member States and unanimity in the Council (no consultation of the Parliament is

Moreover, there is uncertainty as to which Article of Title IV may constitute the appropriate legal basis for measures on airport transit visas. Following the *Airport Transit Visas Case*,[156] Article 62 EC – which envisages the least restrictive law making procedure in the entire Title IV – cannot constitute a legal basis for airport transit visa measures since it concerns measures on the 'crossing of the external borders' and visas for intended 'stays' of no more than three months.

5.2 Conditions and procedures for issuing visas

Article 62(2)(b)(ii) EC prescribes the adoption by the Council, within five years of the entry into force of the Treaty of Amsterdam, of 'the procedures and conditions for issuing visas'.

A Community measure has not yet been adopted, and communitarized Schengen provisions apply. These provisions lay down the common conditions aliens must fulfil to be granted entry in the Schengen territory for stays not exceeding three months,[157] and the rules and procedures to be followed by the Member States when issuing visas.[158] They are implemented through the CCI.[159]

As explained in Chapter 3, the Schengen visa arrangements are characterized by flexibility allowing the Member States ultimately to maintain individual control as to who can obtain a visa to enter their territories. This flexibility is achieved through the principle of mutual recognition of national entry requirements and the possibility of departing from its application. Its justification resides in the nature of visas (an expression of the sovereign right to control entry) and in their ramifications into areas which remain within national competence (such as recognition of States).[160]

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prescribed). The Regulation further states that at the end of the five-year transitional period, the Council may decide to confer implementing powers on the Commission. In light of the practice of the Member States, it seems that they continue to retain competence as to airport transit visa requirements for nationals of countries not included in the common list.

[156] *Supra* n. 92.

[157] Articles 15-16 of the Schengen Convention established the common entry conditions for aliens (see Chapter 3). They were allocated to Article 62(2)(b), but in relation to Article 14 on affixing visas to travel documents it was 'recognized that the current rules on the recognition of travel documents are unaffected'. The Convention Articles on the SIS (see Chapter 3) were allocated by default to the Third Pillar. See *supra* n. 12.

[158] Articles 12-14 of the Convention established these rules and procedures (see Chapter 3). They were allocated to Article 62(2)(b). Moreover, there are a number of decisions of the Executive Committee, adopted under Article 17 of the Convention with a view to implementing the Schengen Convention's provisions on visas, which were allocated to legal bases in Title IV. See *supra* n. 12.

[159] On the CCI, see Chapter 3. They were allocated to Articles 62 and 63 EC. See *supra* n. 12.

[160] See Chapter 5.

This flexible approach also characterizes new Community instruments adopted under Article 62(2)(b) EC.

The Regulation governing the issue of visas to participants to the Olympic and Paralympic Games in Athens in 2004,[161] for example, provides that the Member State responsible for issuing visas to members of the Olympic family (generally Greece under communitarized Schengen rules) can issue limited territorial validity visas when these persons do not meet the conditions governing the issue of uniform visas.[162]

Similarly, the Regulation 'on the issue of visas at the border, including the issue of such visas to seamen in transit'[163] stipulates that seamen who, because of their nationality, fall into the category of aliens who cannot be granted a visa without prior consultation of one or more Member States' central authorities in accordance with Annex 5B of the CCI, can without such consultation taking place, be issued at the border with a limited territorial validity visa.[164]

The independence of the Member States in formulating entry conditions is also acknowledged by Regulation 789/2001 'reserving to the Council the implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications'.[165]

The Regulation provides that the Manual of travel documents to which a visa may be affixed, the Manual concerning the issuance of Schengen visas in third States where all the Schengen States are not represented, and those parts of the CCI which consist of 'lists of factual information which must be provided by each Member State'[166] are to be amended or updated unilaterally by the Member States, rather than by an act of the Council. The Regulation only provides for a procedure whereby the amendments are to be communicated to the other Members of the Council and to the Commission.[167]

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[161] Regulation 1295/2003, OJ 2003 L 183/1.

[162] Rules established by the IOC require the national government of the city hosting the Olympic Games to give an assurance that competitors will not be refused visas. See Chapter 1.

[163] Regulation 415/2002, OJ 2003 L 64/1.

[164] As to international instruments governing the international movement of seamen see Chapter 1.

[165] OJ 2001 L 116/2.

[166] These include the airport transit visa 'grey' list; diplomatic visa exemption for countries not subject to prior consultation and diplomatic visa exception to the visa exemption; the list of visa applications requiring prior consultation; the list of documents entitling entry without a visa; and the amounts required for crossing borders.

[167] Article 2.

Thus, although the Manual of travel documents to which a visa may be affixed was attributed to Article 62(2)(b)(ii) EC,[168] since the Manual collects the Member States' different positions as to recognition of passports and travel documents, each Member State may amend unilaterally the part of the Manual recording its position, with only an obligation to communicate the amendments to the other Member States and the Commission.

This state of affairs illustrates the uncertainty surrounding the significance of attribution of certain Schengen provisions to an EC legal basis. It is unclear why the Manual was attributed to Article 62 in the light of the fact that the Member States retain competence as to recognition of passports, and that, accordingly, they continue to amend it unilaterally.

The Regulation also prescribes that, for the first five years after the entry into force of the Treaty of Amsterdam, certain other parts of the CCI are to be amended by a special procedure (requiring unanimity in the Council and a shared right of initiative between the Commission and the Member States) rather than the procedure prescribed by Title IV.[169] This is justified on the ground that 'the Member States have an enhanced role in respect of the development of visa policy, reflecting the sensitivity of this area, in particular involving political relations with third countries'.[170]

After this transitional period, the Council is to review the conditions under which such implementing powers would be conferred on the Commission.

The Commission has applied pursuant to Article 230 EC for the annulment of the Regulation on the ground that under the Regulation the Council reserved to itself implementing powers improperly and without giving adequate reasons, in breach of Article 202 EC and the Second Comitology Decision.[171]

Tension between the Commission and the Member States also developed over the issue of competence to conclude agreements with third countries on visa facilitation. The attitude of some Member States has been that the flexibility of Schengen rules (i.e. the fact that the Member States retain competence as to who can obtain a visa to enter their

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[168] Decision of the Executive Committee of 16 December 1998 concerning the compilation of a manual of documents to which a visa may be affixed (SCH/Com-ex (98)56).

[169] Article 1. These include the airport transit visa 'black' list; provisions on the diplomatic mission or consular post responsible for issuing visas; provisions on prior consultation; and diplomatic visa exemption for nationals of countries subject to prior consultation.

[170] 8th Recital.

[171] Case C-257/01 *Commission v. Council*, pending.

territories) implies that they also have external competence with regard to the conclusion of agreements on visa facilitation. On this understanding, Germany concluded an ADS (Approved Destination Status) Agreement with China containing provisions on the issue of collective visas to groups of Chinese tourists and a provision on readmission of such persons. The Commission threatened to bring infringement proceedings against Germany on the ground that the agreement infringed Community competence and resulted in discrimination in favour of German travel services operators. The result was that the Community itself finally signed an ADS agreement with China.[172]

5.3 The uniform format for visas

Article 62(2)(b)(iii) EC prescribes the adoption of measures on a uniform format for visas.

The exact scope of Article 62(2)(b)(iii) EC was at least initially uncertainty. The borderline between this Article and Article 62(2)(b)(ii) on conditions and procedures for issuing visas – which prescribes a stricter law-making procedure – seemed not totally clear-cut.[173] Moreover, it was at first uncertain whether Article 62(2)(b)(iii) could cover measures 'on a uniform format for forms for affixing visas issued to persons holding travel documents not recognized by the Member State issuing the visa' since old Article 100c was never used as a legal basis for such measures and a draft joint action on the matter within the framework of the Third Pillar came close to agreement in 1998.[174] The issue was later settled in light of the adoption under Article 62(2)(b)(iii) of a regulation on the matter.[175]

Adopted measures also confirmed that Article 62(2)(b)(iii) covered 'rules and methods for filling in the uniform format', but did not cover 'rules on conditions of storage of blank visas'.[176]

The uniform format for visas – originally adopted under old Article 100c – is an important component of the common visa policy. It introduces a very high level of

[172] See Kuijper (2004) p. 619.
[173] See Commission staff working paper, *supra* n. 40, para. 6.
[174] At that time, the European Parliament expressed its opinion that the measure should have been based on Article 100c(3) EC rather than Article K.3 EU. See Chapter 3.
[175] Regulation 333/2002, OJ 2002 L 53/4.
[176] See Article 2 Regulation 333/2002, *supra* n. 175, and Article 1 Regulation 334/2002 amending Regulation 1638/95 laying down a uniform format for visas, OJ 2002 L 53/7. The Commission proposals,

security for visas against falsification and forgery, thus contributing to ensuring the effectiveness of the common visa policy. In light of the nature of visas, it is also a symbol of political unity – although the common visa policy remains characterized by arrangements which ensure that the Member States can continue to use visas to express their individual positions.[177]

The uniform format for visas has been one of the aspects of the common visa policy whose development has been most influenced by the events of 11 September 2001. Following these events, both the European Council and the Council emphasized the urgency for the European Union to take immediate action, including action to ensure the security of passports and visas, and the fight against false and forged documents.[178] Accordingly, in February 2002 the Council adopted a Regulation amending Regulation 1683/95 on the uniform format for visas and a Regulation laying down a uniform format for forms for affixing visas (in both of which the United Kingdom is participating).[179] Amended Regulation 1683/95 prescribes the future integration of a photograph in the visa sticker (by 2007). It also introduces powers to change the colour of the visa sticker and to lay down technical standards to be used for the filling in of the uniform visa. According to the Commission's Explanatory Memorandum, the possibility of changing the colour of the visa format assists the prevention of forgeries, while the integration of a photograph allows establishment of a more reliable link between the holder and the visa so that the visa can be protected against fraudulent use.[180]

Further proposals were put forward in the Comprehensive Plan to combat illegal immigration and trafficking in human beings.[181] The Plan proposed the inclusion of biometric data in the visa and the establishment of a Visa Identification System.[182] Following the Plan, the Commission proposed further amendments to the Regulation on the uniform format for visas, on which political agreement has now been reached.[183]

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on the other hand, covered also the conditions of storage of blank visas and forms, COM(2001) 157 final, 23.03.2001.

[177] See Chapter 5.

[178] JHA Council, 20 September 2001; European Council, 21 September 2001 and 19 October 2001.

[179] Regulation 334/2002, *supra* n. 176, and Regulation 333/2002, *supra* n. 175.

[180] Commission's Explanatory Memorandum to the amended proposal, document 501PC0577, http://europa.eu.int.

[181] *Supra* n. 105.

[182] See *infra*. The establishment of the Visa Identification System was urged by several European Councils, including the Laeken, Seville and Thessaloniki European Councils.

[183] COM(2003) 558 final, 24.09.2003.

Under these amendments, the visa would also include biometric data (facial image and fingerprints), and the introduction of the photograph would be brought forward to 2005. The proposals have been widely criticized as a step on the road to widespread use of biometric indicators across the EU, and on the basis of concerns over data protection. The Commission itself underlined that the supervisory authorities established by the Member States under Directive 95/46/EC on data protection are under funded and that consideration should be given to the establishment of a supervisory authority at Community level. Questions have also been raised as to the operation of the scheme with regard to photographs of heavily veiled Muslim women.[184]

The changes that have been taking place with regard to the uniform format for visas, following the events of 11 September 2001, are striking. The visa is changing into an identity document and a register of third country nationals who are granted or refused visas (the Visa Identification System) is under construction.[185] This development remains highly controversial from the point of view of data protection.

Parallel to these developments are changes in relation to other identity documents. Uniform formats have been introduced for residence permits,[186] Facilitated Transit Documents (FTD) and Facilitated Rail Transit Documents (FRTD),[187] while in relation to passports of Union citizens measures have been adopted on an intergovernmental basis.[188]

Following the Thessaloniki European Council recommendations to establish a 'coherent approach in the EU on biometric data', the Commission proposed to introduce biometric identifiers also in residence permits.[189]

Moreover, following calls from the European Council of 12 December 2003 urging the Commission 'to submit in due time a proposal for the introduction of biometric identifiers in passports', also in light of recent US legislation requiring biometric identifiers in passports of citizens of countries granted a visa waiver, the Commission

[184] Letter from the Chairman to Caroline Flint MP, House of Lords European Union Committee (2003-04b) pp. 314-315.

[185] On the issues surrounding such developments see Guild (2003) p. 344.

[186] *Supra* n. 141. Communitarized Schengen rules provide for visa-free access to the Schengen States for third country nationals who hold a residence permit issued by a Schengen State.

[187] Regulations 693/2003 and 694/2003, OJ 2003 L 99/8 and 15. These documents are meant specifically to facilitate transit between Kaliningrad and Russia.

[188] See Resolution of the representatives of the government of the Member States meeting within the Council of 8 June 2004 (10038/1/04), supplementing the resolutions of 23 June 1981, 30 June 1982, 14 July 1986, 10 July 1995 and 17 October 2004.

proposed a Regulation on standards for security features and biometrics in EU citizens' passports, which could be followed by proposals on the establishment of a 'EU passport register'.[190] However, it seems that in the light of the multiple functions of passports, the Community powers on external border controls, on which the Commission's proposal is based, are insufficient for adopting the measure.[191] Article 18 EC cannot constitute a legal base either since, following the Treaty of Nice amendments, it excludes 'passports and other identity documents' from its scope.

It is also Union practice to encourage and support other countries in strengthening their efforts to render their travel documents more secure. In particular, abolition by the Community of visa requirements for nationals of third countries is declared conditional *inter alia* on the introduction by the countries in question of measures against passport fraud.[192]

5.4 Rules on a uniform visa

Article 62(2)(b)(iv) EC prescribes the adoption by the Council of 'rules on a uniform visa'.[193] A uniform visa is a visa issued by the Member States according to the common procedures and conditions for issuing visas which is valid for the entire territories of the Member States (it implies mutual recognition of visas issued by the Member States in accordance with the common conditions for the purpose of both external frontier crossing and free circulation in the Community).

Article 62(2)(b)(iv) EC covers only mutual recognition of visas for the purpose of 'the crossing of the external borders of the Member States'. Mutual recognition of visas for the purpose of free circulation is covered by Article 62(3) EC, which envisages a different law-making procedure.[194]

At present, mutual recognition is applied by virtue of communitarized Schengen rules. Article 10 of the Schengen Convention, attributed to Article 62(2)(b), prescribes mutual recognition of visas for the purpose of external border crossing, while Article 19 of the

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[189] *Supra* n. 183.

[190] COM(2004)116 final.

[191] 'EU biometric passport proposal exceeds the EC's powers', www.statewatch.org/news.

[192] See *supra* the criteria for the definition of the 'black' and 'white' lists.

[193] Again, the exact scope of the Article was disputable. Confusion arose for example on whether rules prescribing visa exemption for third country nationals in possession of residence permits issued by the Member States were to be based on Article 62(2)(b)(i) EC on the visa list or Article 62(2)(b)(iv) EC on the uniform visa. See *supra*.

Convention, attributed to Article 62(3) EC, prescribes mutual recognition of visas for the purpose of free circulation.

With regard to free circulation, the Commission proposed a directive 'relating to the conditions in which third-country nationals shall have the freedom to travel in the territory of the Member States for periods not exceeding three months, introducing a specific travel authorization and determining the conditions of entry and movement for periods not exceeding six months'.[195]
The proposed directive covers free circulation for third country nationals who possess short-stay visas, are exempt from visa requirements, or possess a residence permit or a long stay visa.[196] It does not extend to third country nationals who have a right to enter or stay in a Member State under Community law, such as family members of EU nationals and beneficiaries under Community agreements with third countries. It does not substantively harmonize the conditions for free circulation but provides for mutual recognition of national conditions.

An important innovation in the proposal is the introduction of a travel authorization which would allow third country nationals to move freely for six months instead of three (provided they do not spend more than three months in the same Member State).[197] Accordingly, the proposed directive (together with the fact that the Community is to replace the Member States in visa exemption agreements under the *AETR* doctrine) would put an end to the practice under the Schengen Convention which allows the Contracting States to extend the stay of an alien exempted from visa requirements beyond three months on the basis of bilateral visa exemption agreements.[198] Such a practice was described by the Commission as incompatible with

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[194] Article 62(1) EC could have also been identified as a possible legal basis. However, the allocation of Article 19 of the Schengen Convention – establishing the principle of mutual recognition of visas for the purpose of free circulation – to Article 62(3) EC dissipates any doubt.
[195] OJ 2001 C 270E/244.
[196] Accordingly, the proposed directive would repeal Regulation 1091/2001, OJ 2001 L 150/4, which envisages the equivalence between a short-stay and a long-stay visa for the purpose of free circulation.
[197] Since the authorization was to cover stays of six months, Article 62(3) EC could not be used as a legal basis. Article 63(3) EC was used instead.
[198] As the Commission explained, for third country nationals exempt from visa requirements Article 20(2) of the Schengen Convention envisaged each Member State's right to extend beyond three months an alien's stay pursuant to a bilateral agreement. Thus, nationals of third countries could cumulate successive rights of short stay that they enjoyed by virtue of bilateral agreements between their country and the Schengen States.

the spirit of an area without 'frontiers'[199] and with the limit on short stays under the visa exemption scheme set by Article 62(3) EC.

The proposed directive would also have the effect of extending the possibility of moving freely for six months to all third country nationals (whether subject to or exempt from visa requirements).[200]

6. Measures under development

Future developments of the common visa policy are illustrated in the Comprehensive Plan to combat illegal immigration and trafficking of human beings,[201] developed on the basis of the Commission communication on illegal immigration,[202] which was adopted by the Council on 28 February 2002.

The Plan – which post-dated the 11 September 2001 terrorist attack – underlined the significance of visa policy as an instrument to prevent illegal immigration and terrorism, and proposed its development in three ways. Firstly, the Plan proposed the adoption of 'measures aimed at improving the security of the visa and of the residence permit based on new technologies'. Accordingly, it recommended that consideration should be given to including the biometric data of the applicant in visas and, where appropriate, in residence permits. Moreover, it recommended that third countries should be encouraged 'and even supported in strengthening their efforts in order to render their travel documents more secure'.

Secondly, the Plan proposed the development of a Visa Identification System (VIS), called for by the Laeken European Council and the JHA Council of 20 September 2001.[203] The VIS will be a database storing information on visa holders, including their photo and biometric data (which are required for issuing the visa), and the image of their travel documents. It will therefore permit the verification of the identity of travellers on the basis of such stored information. In particular, it will enable the identification of those travellers found without travel documents and will, by virtue of

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[199] Such interpretation of the concept of 'frontiers' highlights the tension between the objective of achieving an area without internal frontiers and the retention of sovereign status by the Member States. Retention of sovereign status implies 'frontiers' since they delimit responsibility for the application of international law.

[200] Contrast with the initiative of the Portuguese Republic 'with a view to adopting the Council Regulation on the period during which third-country nationals exempt from visa requirements are free to travel within the territory of the Member States', OJ 2000 C 164/6.

[201] *Supra* n. 105.

[202] *Supra* n. 105.

[203] See Council Decision of 8 June 2004 establishing the Visa Identification System, OJ 2004 L 213/5.

the stored image of their travel documents, facilitate the issue of new travel documents for the purpose of repatriation. It will also permit the detection of any travel document manipulation. Controversially, the Plan also proposed the inclusion of information on visa requests and refusals in the VIS.[204]

The Plan furthermore underlined the need to assess whether such a system could be integrated in the SIS. If this were the case the information on issued visas could be used also for the purpose of issuing alert tags (for arrest and removal) for persons who did not leave the Union on time.[205]

Thirdly, in line with calls from the Tampere and Laeken European Councils, the Plan recommended the progressive adoption of measures for the establishment of joint visa offices. For this purpose, it proposed the setting up of joint offices or infrastructures in Pristina as a pilot project, and a feasibility study on the legal and technical issues involved. The Plan pointed out that such a system would facilitate 'more uniform application of the common rules' on issuing visas and thus reduce the risk of visa shopping. Furthermore, a burden-sharing approach would reduce the costs of issuing visas and provide the financial means necessary to improve the technical equipment used for the purpose of issuing visas (detection of counterfeit or forged documents, secured storage conditions for blank visas, etc.). Moreover, the sharing of staff would mean the sharing of experience and know-how in the field of risk assessment of illegal immigration or potential overstayers. The pilot project in Pristina was however unsuccessful, and no progress has been made in this field.[206]

The Plan must also be seen in the light of co-operation with the United States following the 11 September 2001 terrorist attacks. Such co-operation might cover: (i) encouraging the introduction by third countries of machine-readable documents, (ii) exploring further use of biometrics, (iii) information exchange on stolen passports/visas or breach of passport/visa security, (vi) co-ordination of false document training, and (v) identification of a list of data to be exchanged between border management services.

7. Conclusion

[204] On this see ILPA (2002). The Plan is silent on the issue raised by previous proposals of including in the database 'certain visa categories to be refused at the request of UN, NATO, WEU, CFSP, etc'. See Statewatch (2002) p. 14.

[205] See Statewatch, *supra* n. 204, p. 14.

[206] Commission Communication on the development of a common policy on illegal immigration, *supra* n. 105, para. 2.1.

The Amsterdam Treaty has introduced major changes: an amendment of Article 14, communitarization of visas, asylum and immigration, and incorporation of the Schengen *acquis* into the Union legal order. These changes have been accompanied by the introduction of 'variable geometry' arrangements to accommodate the position of the Member States which oppose removal of internal frontier controls and communitarization of the 'compensatory' measures. The Amsterdam Treaty has thus accommodated the lack of political consensus on these issues (which previously found expression in the Schengen Convention and in the pillar structure) into the Community Pillar through erosion of the Community method with regard to the principle that the Member States cannot assume permanent derogations from Community regimes, and the principle that they may not resort to international law to regulate their relations within areas falling within Community competence.

The introduction of these 'variable geometry' arrangements has resulted in an extremely complex and fragmented regime.

The accommodation of national interests and concerns is also at the heart of the *sui generis* and complex character of Title IV, and of the fragmentation of the legal base for visas into four distinct parts, which has resulted in institutional tension over the scope of the different legal bases.

Institutional tension over the division of competence for visas between the Community and the Member States also inevitably continues in the light of the nature of visas and their ramifications into areas for which the Member States retain competence (see, for example, tension in relation to Regulation 789/2001, and the allocation of competence for visa facilitation agreements with third countries). In this context, also, the legal implications for national autonomy of the attribution of certain Schengen provisions on visas to a Community legal basis remain uncertain (see, for example, the Manual of documents to which a visa may be affixed).

Considerable progress has been made over the adoption of measures on visas since the Treaty of Amsterdam entered into force. Exhaustive 'black' and 'white' lists have been established, the uniform format for visas has been developed to include biometric identifiers and the Visa Identification System is being constructed. Communitarization has remedied some of the problems of the intergovernmental method, particularly those related to ensuring compliance.

The Union's visa policy continues, however, to be surrounded by controversy, particularly because of its emphasis on restriction. Concerns have also emerged in relation to the use of biometric identifiers, data protection and the adequacy of individual remedies.

Furthermore, the nature of visas continues to dictate flexibility for the common visa policy in the form of an extensive retention of national autonomy as to who can obtain a visa to enter the national territory, which may prevent the common visa policy from achieving all its objectives. Also, the Member States continue to be responsible for the implementation of visa policy at consular level, and the achievement of greater uniformity in this field has been problematic in the light of its constitutional implications.

5 VISA POLICY IN THE THREE-PILLAR STRUCTURE

1. Managing the three pillar structure: the EU as a unity

This study, while focusing on visa policy, has investigated the legal nature of the European Union in an attempt to shed light on the constitutional form European integration is taking and the role of the nation state in such a process.

The European Community has been surrounded by much debate as to its nature. Difficulties in defining the Community derived from its 'combining the hitherto incompatible'. The Community arguably possesses both federal and intergovernmental characteristics, which has made it difficult for both federalist and state-centric theories of integration to render a convincing account of its nature. Such difficulties have in turn led to new descriptions which combine the federalist and the intergovernmentalist approaches. Going even further than that, the Community has been described as 'the first truly post-modern international political form',[1] or 'Europe' has been described as 'overlapping layers of European economic and political "spaces" tied together by the Community's "spider like strategy to organize the architecture of a Greater Europe"'.[2]

It is often argued that the Community (or the 'supranational' character of European integration) was weakened by the creation of the European Union with the Maastricht Treaty.[3] With the creation of the Union, the Community was absorbed into a wider framework of co-operation of an intergovernmental nature. Such a development can be interpreted as a denial of the central position of the Community (or the Community's method) in the process of European integration and as the negation of any movement towards a federal political system which would mean the end of the separate existence of the Member States as sovereign States. Thus, while the TEU advanced the scope of integration by including new areas of policy into the common framework, 'the level of integration was not fundamentally altered to take the system closer to a supranational political community'.[4]

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[1] Ruggie (1993) pp. 140 and 172.

[2] Former Commission President Jacques Delors in 'Inner Space', *The Economist*, 18 May 1991. Quotation from Ruggie (1993), p. 140. See also Harding (2000).

[3] Such development is seen by many authors as the culmination of a continuing process of movement from the Community method to the intergovernmental one. See for example, Ballarino (1997), pp. 45 and 52. According to whom, such a tendency can be seen as triggered by the 'democratic deficit'. See also Weiler's 'exit and voice' approach to the analysis of the relationship between normative and decisional supranationalism. Weiler (1999) p. 36-38.

[4] Chryssochoou (2001) p. 57, who treats such development as a denial of neofunctionalism's assumption that the scope and level of integration are mutual reinforcements.

Equally important is to establish the nature of the relationship between the Union and the Community: are they autonomous from each other or do they form a single legal system? If a 'fusion' between the Community and the Union is accepted what are the consequences for the Community (and the intergovernmental) method? It may be argued that the Community method has been weakened. The role entrusted by the TEU to the European Council, for example, has practical implications for the institutional balance under the Community Treaty.[5] It causes an alteration of the Commission's role as the sole initiator of the legislative process in the Community sphere and it further weakens the role and legitimacy of the European Parliament.[6]

Moreover, what are the consequences of a fusion for the hierarchy of Union norms (or the relationship between the Pillars)? While the primacy of the Community is envisaged by many Articles of the TEU,[7] some authors have doubted whether taking this principle as the basis of the hierarchy of Union norms is consistent with the treatment of the Union as a single legal system.

As Wessel states:

> '...despite the plain language of Article 47 TEU, it cannot be maintained that Community law is not at all affected by CFSP, or – more generally – by Union law apart from the explicit modifications in the three Treaties. *Implied* modifications of Community law do not seem to be subject to Article 47, since this would deprive a number of provisions in the remaining Titles of the TEU...of their effect. The requirement of consistency ... is the best example in this respect. But one could also mention the single institutional framework..., the common objectives..., or the respect for human rights...The preservation of the *acquis communautaire* may be a key principle in the Treaty on European Union, but a functioning of the Community in complete isolation from the other areas of the Union is obviously not intended'.[8]

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[5] Curtin (1993) p.42; De Burca (1999) pp. 66-69. Many authors argue that European Council guidelines are not legally binding on the EC institutions because of Article 47 EU. See for example, Curtin (1993) p. 27; Everling (2002) p. 150. But see also Timmermans (1996) p. 68, who argues that the European Council is 'the only institution which has an overall competence covering all Union activities irrespective of the pillar in which they are situated...But this competence is of a restricted nature. It does not imply a competence to enact legally binding decisions, it remains limited to providing "the Union with the necessary impetus for its development" and defining "the general political guidelines thereof"'.

[6] Draetta (1999), p. 58. It is apparent that the Community method is also being weakened through treaty revision. See for example: declarations and protocols on certain provisions of Title IV EC excluding the application of Community pre-emption doctrines in certain areas; the legislative and judicial provisions of Title IV EC; 'variable geometry' arrangements; the Protocol on the Role of National Parliaments.

[7] Articles 1, 3, 47 TEU.

[8] Wessel (2000a) p. 1148. Trüe points out that: 'The fundamental equal ranking follows from the coherence requirement: the coherence requirement does not require ... a change in the law under one pillar to conform to that of another, but a contemporaneous coordination of the pillars'. Trüe, Verleihung von Rechtspersönlichkeit and die Europäische Union und Verschmelzung zu einer einzigen Organisation – deklaratorisch oder konstitutiv?, Universität des Saarlandes: Vorträge, Reden und Berichte aus dem

On the other hand, a fusion has implications for the intergovernmental method as well.[9] It is possible, for example, for the Court of Justice to declare a legal act adopted under any of the intergovernmental Pillars void under Article 230 EC.[10] Also, certain obligations binding on the institutions are binding in an across-the-pillars fashion.[11] Most importantly, as von Bogdandy states:

> '...as a presumption, the legal principles developed in the context of the EC Treaty can be extended to the EU Treaty as long as they are not expressly excluded. The principle of direct effect, for example, is excluded, but the principle of supremacy of European Law is not'.[12]

Thus, while the extension of the doctrine of 'direct effect' on Third Pillar framework decisions is precluded because of Article 34 EU, the applicability of the doctrine of 'supremacy' is possible when the EU is treated as a unity.[13] The extension of the doctrine of supremacy on Third Pillar framework decisions would result in an erosion of the international law nature of the Third Pillar and an alignment of the Third Pillar method to the Community method.[14] The legal effect of framework decisions remains uncertain due to a lack of jurisprudence by the Court of Justice.[15]

Europa-Institut, No 357 (Saarlandes, 1997), p. 61. Quotation and translation from Wessel (2000a) p. 1131.

[9] It is also through treaty revision that the intergovernmental method is made increasingly 'resemble' the Community method. This results from the strengthening of the position of the EC institutions and from an improvement of the organization of the intergovernmental Pillars. See de Witte (1998) pp. 55-56; de Zwann (1998) p. 188-189.

[10] Case C-170/96 *Commission v. Council (Airport Transit Visas)* [1998] ECR I-2763.

[11] Cases T-174/95 *Svenka Journalistforbundent v. Council* [1998] ECR 2289; T-188/98 *Kuijer v. Council* [2000] ECR II-1959. See also Article 46(d) EU which includes infringement of the fundamental rights mentioned in Article 6(2) EU as a ground on which the Court of Justice may review acts of the institutions irrespective of the Pillar under which such acts are undertaken. However, the Article states that the Court may review such acts only 'insofar as the Court has jurisdiction' under the EC or EU Treaty.

[12] Von Bogdandy (1999) p. 909. See also Everling (2002) p. 157.

[13] Cf. Hailbronner (2000) p. 48. Hailbronner remarks that Third Pillar instruments adopted within the Maastricht framework were sources not of Community but of international law and, accordingly had neither direct effect in the domestic sphere nor took precedence over national law. As to the implications of extending the Court of Justice's jurisdiction over the Third Pillar, see O'Keeffe (1994) pp. 144-145.

[14] The doctrine of supremacy of Community law, as developed by the European Court of Justice in Case 6/64 *Costa v. Enel* [1964] ECR 585, is one of the most important features which distinguish Community law from international law. Although international law regards itself as hierarchically superior to national law and compliance with national law cannot justify a failure to comply with international law, international law remains result orientated. A conflict between obligations emanating from international law and national law does not result in the invalidity of one of the obligations but in responsibility for breach of the relevant obligation. On the other hand, Community law, under the doctrine of supremacy, 'takes precedence over national law' to the effect that national courts should not apply national laws which conflict with Community law, and the national legislator is under a duty not to adopt laws which are inconsistent with Community obligations. See Bethlehem (1998); de Witte (1999). The doctrines of supremacy and direct effect of Community law have been accommodated in national legal systems by

It may therefore be argued that a fusion may accelerate an already existing process of convergence of methods.[16]

The unity of the European Union has long been denied on the basis of its heterogeneity with regard to procedure and effect of legislative acts under the different Pillars.[17] However, an alternative criterion to determine unity could be consistency.[18] In the context of the EU, consistency is ensured in particular by the existence of common objectives and principles and by the 'single institutional framework' – which 'shall ensure the consistency and continuity of the activities carried out in order to attain the objectives' of the Union, with the Council and the Commission specifically invested with a duty to ensure consistency of the EU external activities.[19]

But, does the Union's heterogeneity prevent the proper working of the single institutional framework and the achievement of consistency in practice?

Many authors have remarked that under the Maastricht Treaty the goal of consistency was overall not met.[20]

Schmalz, for example, states that:

> 'The divergent interpretations of the concept of coherence [the communitarian and the intergovernmental interpretations] led the institutional connections between the Union's pillars often being blocked by inter-institutional clashes or being abused as one-way streets for the procedural contamination of one pillar by the other. The effect was fragmentation rather than coherence and fear of contamination rather than interaction between the pillars, causing

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way of national constitutional provisions or acts which provide for the transfer or delegation of sovereignty to the Community. In the United Kingdom the European Communities Act 1972, which serves such purpose, does not apply to the intergovernmental Pillars.

[15] Uncertainty remains also with regard to any possible direct effect of measures implementing framework decisions and 'indirect effect' of framework decisions. See Peers (2000) p. 49; Craig and de Burca (2003) p. 179.

[16] As to convergence of methods see Denza (2002) p. 5-32.

[17] See Koenig and Pechstein (1998). See also Everling (2002) p. 156, who argues that the formal separation of the EC and EU and their different degree of integration and supranationality preclude the existence of a completed legal unity and make possible to talk only of a political unity. This would however not preclude a far-reaching uniform application of the Treaties (such as the extension of the doctrine of supremacy over Third Pillar framework decisions).

[18] The systematic link between norms: the validity and meaning of a norm are determined according to the totality of all norms presumed to belong to the legal system. See von Bogdandy and Nettesheim (1996) p. 281. See also Verhoeven (2002) pp. 124-132. A legal system is thus defined as a set of legal propositions which are consistent with each other. Further characteristics, which are desirable, but not essential, are a reasonable comprehensiveness and the possession of institutions of a judicial, executive and legislative nature. See Hartley (1999) p. 126.

[19] Article 4 EU. For the concepts of consistency and coherence in the EU, see Tietje (1997).

[20] See however the analysis by Cremona (1998).

European foreign policy to be preoccupied with quarrels over procedures rather than producing real substance'.[21]

Indeed, the heterogeneity of the Pillars, the unclear division of competence between them and the lack of clarity as to their relationship (which is ultimately connected to the existence of different visions on the direction European integration should take) have been an obstacle to the proper functioning of the three-pillar structure. The strategy adopted to make the heterogeneous Union function as a single system has been three fold:

(i) the creation of what Schmalz has called 'functional and institutional bridges' (i.e. coherence of procedures and institutional competences under the intergovernmental and Community Pillars).[22] Such an aspect of the strategy may be seen as an attempt to make the intergovernmental and the Community methods converge without merging into one another. It has amounted to an improvement of the organization of the intergovernmental Pillars, which has led many authors to talk, rather misleadingly, of a 'resemblance' of the intergovernmental Pillars to the Community,[23] and to a strengthening of the role of the EC institutions, the Commission in particular, under the intergovernmental Pillars.[24] Inevitably, some 'bridges' have established a hierarchy by strengthening the position of the Council and the European Council.[25]

(ii) A clearer division of competence between the Pillars. While overlaps between the Pillars are to a certain extent inevitable,[26] there are examples of 'managed' overlaps and the institutions have proved ready to review the allocation of legislative powers between the Pillars.[27] It remains important to avoid what can be called 'unreasonable' overlaps or

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[21] Schmalz (1998) p. 427.

[22] Schamlz (1998) pp. 428-439. See also Smith, M. (2001) p. 184-192 for 'informal and formal mechanisms' of institutional reform.

[23] See *supra* n. 9.

[24] This has led many authors to describe the intergovernmental Pillars as not 'purely' intergovernmental but as a 'third way' between intergovernmentalism and communitarization. See, for example, Anderson, den Boer and Miller (1994) p. 116; O'Keeffe (1995) p. 901; Regelsberger and Wessels (1996); Rossi (1997) p. 103.

[25] See for example Articles 13 and 14 EU. Such strengthening is often justified on the ground that it is balanced by the strengthening of the Commission's role under the intergovernmental Pillars.

[26] In this context, see von Bogdandy (2002) p. 236, who describes the European Union as 'a cooperative system of separation of powers' which 'implies that there are narrow limits to disentangling the powers of the various (competence) levels in order to establish clearer lines of responsibilities'.

[27] See for example Article 301 EC on trade sanctions, and the transfer of competence to the Community for dual use goods – a subject previously divided between the EC (implementation) and the CFSP (content). See Koutrakos (2001) pp. 104-106; Denza (2002) pp. 103 and 303-304. For further examples of 'managed' overlaps, see 'model common positions' (Council doc. 5194/95, 6.03.1995) meant to solve the conflict between the Commission and the Council as to the extent CFSP common positions could touch on Community issues. See Timmermans (1996); Rummel and Wiedeman (1998); Smith, M. (2001) p. 185. See also EU 'mixed' agreements with third countries, which because of their wide scope have been

unclear fragmentation of policies between the Pillars, as was the case for visa policy under the Maastricht Treaty.

(iii) Reliance on the guiding and coordinating role of the European Council, which coordinates the different Pillars by identifying the Union's objectives and creates impetus for decision-making.[28]

With regard to the changes introduced by the Treaty of Amsterdam to facilitate the proper functioning of the three-pillar structure and the achievement of consistency, Schmalz argues:

> 'True, the Amsterdam Treaty does not provide for 'golden bridges' to manage the dual structure of European external activities between the individual pillars. However, there are a number of bridges which allow for an adequate dualism management, provided it is the political will of all Member States and institutions involved to use these bridges effectively.... The key to an effective and coherent external policy of the EU is a change in perspective from the restricted focus on the defence of competencies to the perception of contributing to a genuine European external policy'.[29]

As to the actual institutional practice following the Treaty of Amsterdam, Denza concludes:

> 'Examination of recent practice by the institutions, suggests that where the need for cross-pillar action follows from a strategic overview of a subject or a geographical area or from a defensible division of powers set out in the TEU, the institutions are able to adopt consistent and coherent legislative instruments. ...[O]n the evidence of recent instruments, the institutions are becoming familiar with cross-pillar techniques and are now able to use their various powers in a consistent and convincing manner.'[30]

If a (perhaps not completed) legal fusion between the Union and the Community is accepted, what are the consequences for a definition of the Community and the Union?

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described as 'institutionalized frameworks to help achieve coherence among the EU's policies toward important areas of interest'. See Hillion (2000b) pp. 1216-1223; Smith, M. (2001) p. 185.

[28] The European Council, established in 1974, was the first institutional link between the EC and EPC, see Baches Opi and Floyd (2003) p. 303. It remains true that the involvement of the European Council does not rule out the possibility of institutional conflict as to the choice of legal base for implementation of European Council guidelines or common strategies. But it at least establishes the direction policy should take and creates momentum.

[29] Schmalz (1998) p. 439-440.

[30] Denza (2002) p. 308-309. For a similar assessment see von Bogdandy (1999); Curtin and Dekker (1999); Wessel (2000a) particularly p. 1168.

There is a growing consensus that the European Union is more international than statal in nature. The creation of the European Union was seen by many authors as supporting the conclusion that in explaining European integration 'intergovernmentalism – or modified schemes of cooperative interstate behaviour in the form of "confederance", "cooperative confederalism" or "confederal consociation" – has survived the tides of supranationalism and regional centralization'.[31] The continuing existence of a system of States is confirmed, although a less rigid understanding of state sovereignty is put forward (such as 'ultimate responsibility' or 'powers reserved to the State').[32]

Thus, Wallace describes the Union as 'a constitutional system which has some state attributes, but which most – or all – of its constituent governments do not wish to develop into a state, even while expecting it to deliver outcomes which are hard to envisage outside the framework of an entity which we would recognise as a (federal) state'.[33] Such a definition also informs other descriptions of the Union such as 'Staatenverbund',[34] 'federation of nation states',[35] 'constitutional order of States'[36] or 'commonwealth'.[37] The term 'constitutional' is used 'to denote that the European Union seeks to restrain the propensity of nation states to parochialism and self-interest'. The Union cannot 'be viewed as a loose set of treaty arrangements and diplomatic agreements that are the will of the Herren der Verträge'.[38]

Thus, as de Witte argues, 'the view of the EU as a single organization ... requires a rethinking of age-old doctrines about the nature of *European Community law*'. At the same time, one of the fundamental principles of the TEU is the preservation of the *acquis communautaire*. Such requirement has implications for a definition of the Union. Although given its intergovernmental components the 'European Union...is less different from other international organizations than the pre-Maastricht EEC used to

[31] Chryssochoou (2001) p. 26.
[32] Chryssochoou (2001) p. 140.
[33] Wallace, W. (1994) p. 274. See also Hill (1993) p. 315 who describes the EU as suffering from a 'capability-expectations gap'.
[34] The German Constitutional Court in *Brunner v. European Union Treaty* [1994] 1 CMLR 57.
[35] Cohen-Tanugi (1995) p. 174, quoted in de Witte (1998) p. 65.
[36] Dashwood (1998) p. 216.
[37] MacCormick (1997) p. 9. According to MacCormick, the status of each Member State 'towards other states external to the European Community and Union has not changed in the way of any diminution of their independence and "sovereignty" in an external sense. This is a fact which does not conflict with the equal truth that in the internal perspective of the Community and the relations of member states each has ceded fundamental powers pertaining to sovereignty with the effect that none remains in the full classical sense a sovereign state'. MacCormick (1997) p. 8.
[38] Verhoeven (2002) p. 123.

be', it is not 'an ordinary international organization because the *acquis communautaire*...colours the whole organization'.[39]

The changes which the Constitutional Treaty will introduce, if ratified, may challenge this vision. In an attempt to simplify and reorganize the Treaties, the Constitutional Treaty abandons the three-pillar structure in favour of a unitary structure. The Community method is extended to the Third Pillar. The CFSP continues to be governed by its own special provisions with regard to decision-making procedure and institutional competence, but the Constitutional Treaty tends to conceal, if not undermine, the specificity of the CFSP with regard to the legal method employed.[40]
As de Witte anticipated:

> 'The merger [of the Pillars] could then be used as the opportunity for a critical reconsideration of the need to preserve the present legal differences between the pillars... [I]t will have to be seen how much of the distinctiveness of the second and third pillar must be preserved'.[41]

Finally, some theories on European integration have gone beyond the dichotomy intergovernmentalism-supranationalism. Such theories, labelled 'multi-level governance', see integration as a polity-creating process where authority and policy-making are shared across multi-levels of government (national, supranational and subnational) which are interconnected rather than nested.[42] The result is a system of 'overlapping authority and multiple loyalties' often described as 'new medievalism'.[43] Such theories challenge the concept of state sovereignty and claim a discontinuity in the modern system of States.[44]

What is the importance of the EU visa policy in a study of the European Union?
The EU visa policy lends itself to testing the unity of the European Union (i.e. the interaction between the intergovernmental and the Community spheres). Although the Treaty of Amsterdam transferred visa policy as a whole to the First Pillar, ending the

[39] De Witte (1998) p. 65.
[40] See Chapter 2.
[41] De Witte (2002) p. 1267.
[42] Hooghe and Marks (2001).
[43] Bull (2002) p. 245-246. As he explains: 'If modern states were to come to share their authority over their citizens, and their ability to command loyalties, on the one hand with regional and world authorities, and on the other hand with sub-state or sub-national authorities, to such an extent that the concept of sovereignty ceased to be applicable, then a neo-medieval form of universal political order might be said to have emerged'. See also Ruggie (1993) p. 173; Harding (2000) p. 145; Chryssochoou (2001) p. 111.

division of competence between the First and Third Pillars that existed under the Maastricht Treaty, visa policy remains a subject which straddles all the Pillars of the Union. Visas have ramifications into areas for which the Member States remain competent and which are often the object of cooperation under the intergovernmental Pillars. The clearest example is provided by the use of visas in recognition of States and governments.

The roots of visas in state sovereignty result in a specific character for the common visa policy under the First Pillar. The common visa policy is characterized by flexibility which allows acknowledgement of the continuing independence of the Member States for certain aspects of visas.

Furthermore, some essential aspects of visa policy, such as local consular cooperation, continue to be tackled under the Second Pillar.

The issue which arises is to what extent the policy is viable: is it possible effectively to cooperate on visa policy while maintaining the division of competence between the Community and the Member States as enshrined in the pillar structure? Is the common policy capable of achieving its objectives? What are the implications of the Pillars' overlapping for democratic and judicial control of the policy?

The issue of consistency of Union activity also emerges in relation to the project of creating an 'area of freedom, security and justice' of which the common visa policy is a component.

The project requires the coordination of measures falling under the First and Third Pillars, the integration of justice and home affairs concerns into the EU external activity and the coordination of different treaty objectives. Thus, the project forces us to consider whether the Union is acting as a 'unity' (i.e. is capable of using all the different instruments at its disposal to achieve its objectives and maximise its impact), and the legal and institutional implications of consistency in terms of convergence of methods.

2. Consistency of Union activity under the Maastricht Treaty

2.1 Disputes over competence

[44] Ruggie (1993) pp. 143-144.

While there are a number of examples of successful management of overlaps between the Pillars,[45] the division of competence for visa policy between the First and Third Pillars under the Maastricht Treaty proved unsustainable.[46] The split of visa policy was the result of a political compromise, rather than principle, and as such was all the more capable of reflecting the underlying disagreement between the Commission and the Member States as to the interpretation of Article 7a (now 14), and the corresponding scope of Article 100c EC.

According to Denza:

> '...[T]he cross-pillar allocation of competence over visa policy set out in the Maastricht Treaty could only have worked satisfactorily if the line between intergovernmental and Community action had been clearly drawn and logically defensible, and this was not the case. Whereas in the cases of sanctions and control of dual-use goods..., cross-pillar action could be justified by the dichotomy between the foreign policy objectives and the commercial instruments for their implementation, this was not the case with visa policy. Visa policy called for integrated decision-making and legislation, and the artificial division set out in the Maastricht Treaty was not defensible'.[47]

Disagreement between the institutions as to the borderline between the First and Third Pillars arose in relation to four sets of measures: (i) the Draft External Frontiers Convention and the Visa Regulation; (ii) the Airport Transit Visas Joint Action; (iii) the Draft Joint Action on a uniform format for forms for affixing visas issued to persons holding travel documents not recognized; and (iv) the Joint Action allowing visa free travel of third country nationals school children. The choice of the legal basis for the Airport Transit Visa Joint Action, in particular, became the object of a dispute before the Court of Justice.[48]

2.2 Cross-pillar measures

The Maastricht Treaty, however, also offered a few examples of across-the-pillars action by the institutions. The Commission's linked proposals for a Visa Regulation and for the adoption of the Draft External Frontiers Convention constituted such an example. The Commission approached visa policy substantively, integrating the different powers at its disposal. The failure in this case was attributable to the confusing

[45] See *supra* n. 27.
[46] For a full account see Chapter 3.
[47] Denza (2002) p. 305.
[48] *Supra* n. 10.

division of competence, but most of all to the deadlock between the United Kingdom and Spain over Gibraltar. It remains true, however, that such across-the-pillars action by the Commission remained an isolated case since the Commission, in general, refrained from using its right of initiative under the Third Pillar.[49] The Draft External Frontiers Convention represented a 'safe' proposal given that it had already been negotiated by the Member States within the framework of the Ad hoc Group on Immigration, and a measure on which the success of Community action on visas was strictly dependent.

[49] For the reasons, see Chapter 3.

The Council also adopted an across-the-pillars approach where the circumstances so required. In 1996, for example, the European Union adopted a defensive strategy in response to the adoption by the US Congress of the Helms-Burton and D'Amato Acts.[50] Such a strategy involved all the three Pillars of the Union.[51] It included an EC Regulation laying down the various EC countermeasures and a complementary Joint Action based on both Articles J.3 and K.3 EU which provided that the Member States were to take national measures insofar as European interests were not protected under the Regulation.[52] The Joint Action thus formed the basis for national measures introducing visa requirements and providing for visa denial to potential litigants against European interests.[53] The EU defensive strategy is remarkable from the point of view of the unity of the EU not only because it constitutes an example of successful integration of the three Pillars leading to a watertight system for the protection of European interests,[54] but also because the Joint Action constitutes the first example of an EU instrument finding its legal base in both the Second and Third Pillars.[55]

A further example of across-the-pillars activity in the context of visa policy resulted from reliance on local consular cooperation established under the Second Pillar.[56] The Council adopted a Recommendation relating to local consular cooperation regarding visas under Article K.1(3) EU and also a Recommendation, under Article K.1 EU, on the provision for the detection of false or falsified documents in the visa departments of

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[50] Respectively the Cuban Liberty and Democratic Solidarity Act and the Iran-Libyan Sanctions Act. These in an attempt to isolate the countries concerned aimed at penalizing those trading with or investing in such countries. The Helms-Burton Act, for example, provided that Cuban Americans whose business had been taken over during the 1959 revolution could sue foreign companies which bought or leased the assets from the Castro government, and also that the US government could deny visas to any foreigner with a stake in such properties. By their extraterritorial application the Acts violated international law rules on jurisdiction. For in depth analysis see Cremona (1998) pp. 90-94; Roy (2000); Denza (2002) pp. 106-109.

[51] For the background which led to rely on a combination of action under the different Pillars rather than on a Community instrument exclusively, see Cremona (1998) pp. 90-91.

[52] Regulation 2271/96, OJ 1996 L 309/1 and Joint Action 96/668 CFSP, OJ 1996 L 309/7. See also the Common Position on Cuba of 2 December 1996 adopted under Article J.2.

[53] See Roy (2000) p. 138.

[54] See Denza (2002) p. 108, who states that 'the measures gave the EU an extremely powerful negotiating weapon in seeking to persuade the US to abandon its confrontational course of action and to bring its legislation within internationally accepted limits'.

[55] For more recent examples of double legal base measures see Common Positions 2001/930 and 931/CFSP, OJ 2001 L 344/90 and 93. These were adopted on the joint basis of Articles 15 and 34 EU since they addressed both foreign policy and policing and criminal law matters. The first Common Position transposed Security Council Resolution 1373/2001 of 28 September 2001 on the suppression of terrorism. The second Common Position laid down specific measures to combat terrorism. They were part of a pack of measures including also a Community Regulation and a Decision. See Peers (2003) pp. 237-239.

[56] Article J.6 EU (now 20 EU).

representations abroad and in the offices of domestic authorities dealing with the issue or extension of visas.[57]

A further example where cooperation between the Member States' embassies under the Second Pillar was used for Third Pillar purposes is provided by the use of joint reports on third countries prepared by the Member States' embassies by Third Pillar bodies such as Cirefi and the former Cirea.[58] As two commentators pointed out, these bodies 'prepare critical reports on the situation in each country outside the EU based on reports from embassies on the refugee situation. Such reports then form an essential part in the evolution of policies at national and EU level'.[59]

Thus, institutional practice under the Maastricht Treaty already gave expression at least to a limited extent to the unity of the Union. Firstly, it was possible to detect symmetry between the practices of the institutions when they performed EU tasks and when they performed EC tasks and a maximization of their powers under the TEU.[60] This was the case in particular for the Council and for the Court of Justice in the light of the *Airport Transit Visas Case*.[61] The same cannot be said of the Commission, whose reliance on its right of initiative under the Third Pillar to propose the adoption of the Draft External Frontier Convention remained an isolated episode.[62]

Secondly, the institutions tended to approach issues substantively rather than in a pillar-specific fashion. The Commission proposed the Visa Regulation and the Draft External Frontiers Convention jointly, while the Council's defensive strategy in response to the adoption of the Helms-Burton and D'Amato Acts in the US involved the integration of measures from different Pillars, as well as a Joint Action whose legal base lay in both the Second and Third Pillars.

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[57] Recommendations of 4 March 1996 and of 29 April 1999, OJ 1996 C 80/1 and 1999 C 140/1. See Chapter 3. Within the framework of the Schengen Convention, Schengen States used cooperation among their embassies also to address difficulties in obtaining documents by foreign consulates in the Schengen capitals for expulsion of illegal foreign nationals from the Schengen territory. In the case a Schengen State experienced difficulties in obtaining a laissez-passer for repatriation, it could instruct its ambassador in the country concerned to draw up the measures to be taken locally together with Schengen colleagues. Decision of the Executive Committee of 21 April 1998 on the activities of the Task Force (SCH/Com-ex (98) 1 rev 2), OJ 2000 L 239/19.

[58] Under the Maastricht Treaty the Council adopted 'Guidelines on joint reports on third countries' and 'Procedure for drawing up reports in connection with joint assessment of the situation in third countries', 20.06.1994, OJ 1996 C 274/52.

[59] Curtin and Dekker (1999) p. 115.

[60] Curtin and Dekker (1999) p. 104.

[61] *Supra* n. 10.

[62] See Peers (2000) pp. 20-21.

Thirdly, activity under the different Pillars was functionally integrated. Thus, diplomatic cooperation established under the Second Pillar was used for the benefit of Third Pillar activity.

3. Consistency of Union activity under the Amsterdam Treaty

3.1 Nature of the common visa policy: mutual recognition of the conditions of entry and cooperation under the intergovernmental Pillars

While the Treaty of Amsterdam transferred visa policy as a whole to the First Pillar, visa policy, because of its ramifications, continues to be a subject which straddles all the Pillars of the Union. The nature of the common visa policy reflects such a state of affairs.

In accordance with the nature of the EU, the Member States retain competence in a number of fields which are relevant with regard to the conditions aliens must satisfy to enter their territories (or to obtain visas for this purpose). Firstly, the Member States retain competence with regard to the conclusion of international agreements that either as a principal objective or indirectly make provision for access into the state territory of specific categories of persons, including the establishment and validity of special travel documents.[63]

Secondly, as sovereign States the Member States retain ultimate competence with regard to recognition of passports and travel documents (i.e. recognition of States and governments).

Thirdly, the Member States remain responsible with regard to their criminal law systems (including what criminal offences may justify exclusion from the national territory).

Fourthly, the Member States remain responsible with regard to the maintenance of their 'national security' and 'public order', and with regard to the conduct of *their* foreign policies (and thus with regard to exclusion of aliens on such grounds).

This situation is reflected in the common entry conditions for aliens.[64] The method which has been employed for the formulation of common entry conditions is mutual recognition of the Member States' national entry conditions and the possibility of departing from such mutual recognition through the issue of limited territorial validity visas, or, in the case of recognition of passports, through special arrangements for affixing visas. This method permits the acknowledgement of the Member States'

[63] For these instruments see Chapter 1.

retention of competence in the fields upon which entry conditions touch. It also implies that ultimately the Member States retain the sovereign right to control access into their territories.

The Member States' determination to maintain competence in these fields has however not prevented them from cooperating under international law towards substantively harmonizing their positions. Such cooperation has taken place within the intergovernmental Pillars.

3.1.1 Recognition of States and governments

Recognition of States is an aspect of foreign policy on which the Member States now systematically cooperate within the CFSP. Cooperation aims at recognizing States collectively, and a CFSP decision is followed by acts of express or implied recognition by individual Member States.

Within the framework of cooperation, recognition is used by the Member States to further the Union's objectives including the preservation of peace and international security, the development and consolidation of democracy and the rule of law, and respect for human rights and fundamental freedoms.[65] Through an EPC statement, for example, the Member States and the Community implicitly recognized North Korea in 1992, making recognition conditional on the acceptance by North Korea of commitments under the Nuclear Non-Proliferation Treaty.[66]

After the disintegration of the Soviet Union and the Federal Republic of Yugoslavia, the Member States produced in December 1991 the EC Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union.[67] The Guidelines stated that recognition by the Community and the Member States could follow for these States if they were prepared to accept the conditions set out in the Declaration, which included: (i) respect for the UN Charter, the Final Act of Helsinki and the Charter of Paris, especially with regard to the development and consolidation of the rule of law and democracy and respect for human rights, (ii) respect for ethnic minorities, (iii) respect for the inviolability of all frontiers, and (iv) acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation.

The CFSP is sometimes an imperfect framework for cases of recognition. There are still some differences among the Member States as to recognition of States and governments

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[64] See Chapters 3 and 4.
[65] See Frowein (2002) pp. 171-174.
[66] Denza (1994) pp. 579-581.

which are not resolved within the CFSP.[68] Even when cooperating under the CFSP it may be difficult to achieve results in certain cases. Greece, for example, long blocked joint recognition of Macedonia although Macedonia had satisfied the EC Guidelines.[69] The non-adherence to the EC Guidelines in the case of Macedonia showed the limited nature of the CFSP: the EC Guidelines were non-binding and one Member State alone blocked the formation of a common position.
As Nuttall commented:

> 'The deliberations of the Council become those of a diplomatic conference mediating among the domestic interests of the participants, rather than a body working out and implementing a common foreign and security policy reflecting the joint interests of the Community'.[70]

It remains true that non-recognition of Macedonia was a matter of vital national interest to Greece, and that the emergence of issues especially sensitive to one Member State, although possible, has been relatively rare. Greek obstruction of the common position on recognition of Macedonia has however contributed to the move away from insistence on unanimity under the CFSP and the introduction by the Amsterdam Treaty of the possibility of 'constructive abstentions'.[71]

Any divergence in the Member States' recognition decisions will be reflected in the EU visa policy through special arrangements for affixing uniform visas.[72] The Member States' positions vary in relation to, *inter alia*, passports issued by North Korea, the Former Republic of Macedonia and Taiwan. Greece does not recognize passports issued by North Korea and by Macedonia. All Member States, except Portugal, treat ordinary passports issued by Taiwan as documents entitling the holder to cross the external borders and which may be endorsed with a visa. Diplomatic passports issued by Taiwan are recognized only by Austria, Germany and Italy.[73]

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[67] (1991) 62 BYIL 559.
[68] This may be taken as a by-product of the nature of the CFSP.
[69] Germany, on its part, anticipated slightly recognition of Slovenia and Croatia. Under the German declaration, however, recognition was to become effective as from 15 January 1992 – the date agreed by the Member States for joint recognition. Warbrick (1997) pp. 25-32; Smith, M. (1998) p. 71.
[70] Nuttall (1994) p. 25.
[71] Forster and Wallace, W (2000) p. 484.
[72] See Chapter 3.
[73] See the Schengen Manual of documents to which a visa may be affixed (SCH/Com-ex (98)56), originally published in OJ 2000 L 239/207. See Chapter 4.

In the case of recognition of passports, the overlap between the First and Second Pillars with regard to visa policy is clear. The overlap dictates the method of harmonization used at Community level: the EU visa policy does not entail loss of autonomy with regard to recognition of passports, but it is capable of reflecting convergence reached under the CFSP or its absence.

3.1.2 Harmonization of criminal laws under the Third Pillar

As mentioned in Chapter 3, the SIS – the common 'black' list of 'undesirable' persons – relies on cross-recognition of the Member States' laws governing exclusion of aliens from the national territory.

Cross-recognition in this context has been particularly criticized for its harsh consequences on individuals: a person whose name has been inserted in the SIS by a Member State will be excluded from all other Member States irrespective of whether his conduct would have constituted a ground for exclusion there. A notorious illustration of the application of these rules was provided by the case of the Greenpeace activist who was denied entry into the Netherlands following a report in the SIS entered by France despite the fact that the Netherlands would otherwise not have blocked entry in the circumstances.[74]

Cross-recognition is again underpinned by the Member States' autonomy with regard to their laws governing exclusion of aliens from the national territory. It remains to be seen to what extent the Third Pillar will provide for substantive harmonization of the Member States laws in this area.

The Third Pillar, whose objective is to 'provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States',[75] provides for common action on judicial cooperation in criminal matters which includes the progressive adoption of 'measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties'. The scope of harmonization is currently limited to the fields of organized crime, terrorism and illicit drug trafficking.[76]

So far the Member States have approximated their legal provisions with regard to facilitation of unauthorized entry and with regard to trafficking in human beings. As to facilitation of unauthorized entry, the Council, using both the First and Third Pillars,

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[74] Staples (2003) p. 229.
[75] Article 29 EU.
[76] Article 31 EU.

adopted a Community Directive based on Article 63(3)(b) EC defining the infringement in question and, on a French initiative, a Third Pillar Framework Decision providing for minimum rules for penalties.[77]

With regard to trafficking in human beings, the Council, on a Commission proposal, adopted a Third Pillar Framework Decision which defines the punishable acts and establishes minimum rules for penalties.[78]

Furthermore, political agreement has finally been reached on a framework decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of drug trafficking.[79] Agreement on this had proved problematic since the Netherlands refused to accept the principle of prison sentences for the possession of small amounts of soft drugs.[80]

Such EU measures approximating criminal laws have indeed influenced national immigration legislation. Amendments to Italian immigration legislation of 11 July 2002 (*Bossi-Fini*) added as entry requirements for aliens (alongside the already existing requirement that an alien should not constitute a threat to the public order and security of *any* Schengen State) the requirement that an alien must not have been convicted of offences relating to the facilitation of unauthorized entry into Italy or from Italy into other States, or of offences relating to trafficking in persons for the purpose of prostitution or in children for the purpose of illicit activities.[81]

Approximation of substantive criminal law under the Third Pillar remains however limited in scope for the purpose of the functioning of the SIS.

The Constitutional Treaty amplifies the scope of harmonization. It envisages harmonization of criminal offences and sanctions for a number of specific crimes. This list of crimes may be extended by the Council by unanimity to cover other crimes considered to fall in the category of 'particularly serious crime with cross-border dimensions resulting from the nature or impact of such offences or from a special need to combat them on a common basis'. The Constitutional Treaty also contemplates

[77] See respectively Directive 2002/90, OJ 2002 L 328/17, and Framework Decision of 28 November 2002, OJ 2002 L 328/1. The Framework Decision provides that the Member States shall take the measures necessary to ensure that the infringements in question 'are punishable by effective, proportionate and dissuasive criminal penalties, which may entail extradition'. It also provides for circumstances where the Member States shall ensure that the infringements in question 'are punishable by custodial sentences with a maximum sentence of not less than eight years'.

[78] Framework Decision of 19 July 2002, OJ 2002 L 203/1. On this see Obokota (2003).

[79] The Commission proposal dates back to May 2001, COM(2001)259, OJ 2001 C 270E.

[80] See Monar (2003) p. 127.

[81] Legislative Decree 286/1998 as amended.

harmonization 'if the approximation of criminal legislation proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures'.[82]

3.1.3 Harmonization of foreign policy positions and implementation of visa bans

The Member States have been cooperating since EPC collectively to use visa requirements against certain nationalities to indicate political disapproval of their governments' policy, and collectively to use visa bans against specific persons deemed politically responsible for a particular state of affairs.

The examples of collective action are numerous. On 22 April 1980, as a response to the Iranian hostage affair, the Member States agreed within the framework of EPC to reintroduce visa requirements for Iranian nationals.[83] On 14 April 1986 they agreed to introduce restrictions on the issue of visas to Libyans following a collective decision that Libya was responsible for fostering terrorism.[84] In 1996 the adoption in the US of the Helms-Burton and D'Amato Acts prompted agreement among the Member States on measures to introduce visa requirements for US nationals as part of countervailing measures.

Visa bans have also been used in many occasions. In October 1986, for example, the Member States, except Greece, agreed to introduce restrictions on high-level visits by Syrians after the Hindawi bomb plot.[85] In March 1998 the Member States agreed within the CFSP to refuse visas to representatives of the Federal Republic of Yugoslavia responsible for repressive action in Kosovo.[86] They have also agreed visa bans for members of the military regimes in Sierra Leone, Angola, Nigeria, Afghanistan, Myanmar, Liberia, Belarus, Zimbabwe and the Transnistrian region of the Moldovan Republic, and for persons responsible for violent acts in Monstar and Macedonia.[87]

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[82] Article III-172. A special decision-making procedure is applicable whereby one third of the Member States may establish 'enhanced cooperation' in relation to a measure if agreement among all the Member States cannot be reached. See Chapter 2.

[83] See Hill (1988) p. 181.

[84] The restrictions were introduced in relation to the Berlin disco bomb affair. See Hill (1988) p. 176; Nuttall (1992) p. 305.

[85] See Hill (1988) p. 179; Nuttall (1992) p. 307.

[86] Common Position of 19 March 1998, OJ 1998 L 95/1, *et subs.*

[87] Common Position (Sierra Leone) of 29 June 1998, OJ 1998 L 187/1; Common Position (Angola) of 3 July 1998, OJ 1998 L 190/1; Common Positions (Nigeria) of 20 November 1995 and 28 November 1997, OJ 1995 L 298/1 and OJ 1997 L 338/7; Common Position (Afghanistan) of 26 February 2001, OJ 2001 L 57/1; Common Positions (Myanmar) of 28 October 1996 and 6 February 1998, OJ 1996 L 287/1 and OJ 1998 L 32; Common Position (Liberia) of 7 May 2001, OJ 2001 L 126/1; Common Position (Belarus) of 11 July 1998, OJ 1998 L 195; Common Position (Zimbabwe) of 18 February 2002, OJ 2002 L 50/1; Common Position (Transnistrian region of the Moldovan Republic) of 28 February 2003, OJ 2003 L

Many of these visa bans – but not all of them – are based on Security Council Resolutions.[88] Moreover, in CFSP decisions they usually complement sanctions of an economic nature (as was the case with regard to Yugoslavia and Zimbabwe, for example).[89]

Notwithstanding the introduction of Title IV EC, decisions by the Member States on the introduction of visa bans continue to be taken under the CFSP.[90] This state of affairs has been described as offering 'an example of a possible legal basis confusion'.[91] Visa bans indeed offer a further example of possible tension between the Community and the CFSP. While the foreign policy objective of visa bans justifies the adoption of a CFSP instrument, their migration aspect would seem to justify the adoption of a Community instrument based on Title IV.[92]

However, while in relation to economic sanctions the dichotomy 'foreign policy objective–economic nature' is acknowledged by Article 301 EC, which envisages the adoption of a Community instrument implementing a CFSP decision, this is not the case for visa bans, and CFSP decisions imposing visa bans are implemented through national measures.[93]

This state of affairs is ultimately connected to the nature of the Community visa policy regime. The visa policy regime leaves almost intact the Member States' autonomy to grant or deny visas to individuals for their national territories and does not provide for

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53/60; Common Position (Monstar) of 17 March 1997, OJ 1997 L 81/1; Common Position (Macedonia) of 16 July 2001, OJ 2001 L 194/55.

[88] This is the case for the Common Positions on Afghanistan, Angola, Liberia and Sierra Leone, see *supra* n. 87. See also Chapter 1.

[89] The Common Position on Yugoslavia, *supra* n. 86, also confirmed the embargo on arms export and provided for a moratorium on government-financed export credit support for trade and investment. Previous sanctions against Yugoslavia also included the suspension of the Community Cooperation Agreement, quantitative limits on the importation of textile products, suspension of the Generalized System of Preferences, and suspension of the PHARE programme. See Kuijper (1993) p. 414. The Common Position against Zimbabwe, *supra* n. 87, also included an arms embargo and the freezing of funds and financial assets of identified persons. See also Regulation 926/98/EC on reduction of certain economic relations with Yugoslavia (OJ 1998 L 130/1) and Regulation 310/2002 concerning certain restrictive measures in respect of Zimbabwe (OJ 2002 L 50/4).

[90] A CFSP decision introducing visa bans for certain nationals from the former Federal Republic of Yugoslavia was challenged on the ground that it should have been based on Title IV EC instead, but the cases were eventually withdrawn. See Wessel (2000a) p. 1151.

[91] Wessel (2000a) p. 1152.

[92] It appears that Article 62 is not considered appropriate for specific, individual bans, often of a short-term character.

[93] See also Italy's proposal to implement Security Council Resolution 1390/2002 requiring the imposition of entry and transit bans on persons included in the list established by the Sanctions Committee on Afghanistan, through the SIS. Council doc. 7994/03, 31.03.2003.

'positive' rules which may be affected in case of unilateral national action.[94] While recourse to a Community instrument for implementing a visa ban agreed within the CFSP would have its advantages in terms of the uniform implementation of the ban, it would undermine Member States' competence and their sovereign right to control access into their territories.

This situation may be contrasted with that arising in relation to the visa requirements imposed by the Member States on third country nationals in accordance with the Visa Regulation establishing the 'black' and 'white' lists. This aspect of the common visa policy falls into the exclusive competence of the Community and has been totally harmonized following the adoption of exhaustive 'black' and 'white' lists. Any alteration of the rules may thus take place only through a Community instrument. In this context, the issue that emerges regarding the interaction between the Pillars is the recurrent issue of the extent to which CFSP decisions (or even European Council acts) may cover matters relating to visa requirements without infringing Community competence.[95] The recent Union action in relation to Kaliningrad shows that in practice it is becoming increasingly difficult to compartmentalize action by the Union and that there is increasingly fluidity between what can be called the 'political sphere' of the Union and the Community.[96]

With regard to substantive convergence of the Member States' foreign policy positions, notwithstanding some progress under the CFSP, this is inevitably incomplete, and the EU visa policy provides for a number of instruments to accommodate divergence. Under communitarized Schengen arrangements, a Member State may require consultation of its central authorities before uniform visas are issued by any Member State to certain nationalities. Following such consultation, the Member State may oppose the granting of a uniform visa, in which case only a limited territorial validity

[94] In this context, see also Draft Council Conclusions on flexibility in issuing visas to participants in Euro-Med meetings, 13.02.2003, doc. 6254/03. Under the Draft Conclusions, in order to facilitate the issue of visas to participants in the Euro-Med meetings, the Presidency 'should...inform, on the one hand, other Member States of the schedule meetings and, on the other hand, the appropriate local authorities about the way in which the relevant rules should be applied in order to facilitate the process'.

[95] See Timmermans (1996). In this context, see Conclusions of the Seville and Brussels European Councils (respectively, paras. 55 and 17) and the 'Common Line' for Russia adopted by the Council on 13 May 2002.

[96] A deal between the EU and Russia was struck at the EU-Russia Summit in November 2002. This consisted in a system of multiple-entry transit papers for Russian citizens travelling to and from Kaliningrad and a EU-Russia joint anti-terrorist strategy. Following this, the Council adopted Regulation 693/2003 on facilitated transit documents, OJ 2003 L 99/8.

visa can be issued. This procedure was used by Portugal to prevent the issue of uniform visas to Indonesia nationals following events in East Timor.[97]

On the other hand, the positions of the Member States seem to converge remarkably on visa denial to Taiwanese high-ranking officials, as a result of Chinese pressure. It has been submitted that 'the foreign ministries of the EU's Member States have an unofficial and secret agreement of travel restrictions for ROC/Taiwanese Politicians: the five most important political leaders, including the president, vice president, premier, foreign minister, and defence minister, are not to receive a visa even for private reasons'.[98]

An important innovation introduced by the Constitutional Treaty is that the addressees of CFSP decisions on visa bans may now challenge the legality of the decisions before the Court of Justice.[99] This is a modest answer to concerns about the exclusion of individual remedies for CFSP action (resulting from the exclusion of the Court of Justice jurisdiction), particularly in the light of possible Union accession to the ECHR.

3.1.4 The Member States' international obligations to grant access into their territories

While the Member States may depart from mutual recognition of national entry conditions and grant a limited territorial validity visa on grounds of 'national interest', a structural limit to the application of mutual recognition results from the Member States' duty to honour their international obligations governing access into their territories.[100]

The principle that the Member States should honour their pre-existing international obligations is recognized in the EC Treaty itself. Article 307 EC provides that 'the rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty'. Moreover, it is generally not possible for a Member State to justify a breach of its international obligations on the basis of a security risk to (or an internationally wrongful act against) *another* Member State, except in the presence of a United Nation Security Council

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[97] See Decision of the Executive Committee of 5 May 1995 on common visa policy (SCH/Com-ex (95) PV 1 Rev), OJ 2000 L 239/175.

[98] See Lan (2004) pp. 125-126 and 131.

[99] Article III-282.

[100] See for example *The Times*, 'Mugabe's Rome visit beats EU travel ban', 8 June 2002. Italy was bound under UN rules to admit Mr. Mugabe to attend a FAO meeting in Rome as head of a FAO Member State. International obligations (particularly with regards to human rights) also limit mutual recognition of

resolution or where the wrongful act amounts to a violation of an obligation owed *erga omnes*.[101]

Thus, for example, when the Member States, following the Falklands invasion, imposed sanctions on Argentina by means of various EEC regulations (but without Security Council cover), Argentina complained that the Member States were in breach of their GATT obligations and that Article XXI of the GATT – which stipulates that a Party can take 'any action which it considers necessary for the protection of its essential security interests' – could not legitimize their actions since they were not involved in the conflict and their security was not at issue.[102]

Thus, European Union instruments prescribing the imposition of visa bans by the Member States often contain exceptions to their application. The Common Position on Nigeria provided that the Member States could grant exemptions from the visa bans to Nigerian nationals: (i) participating in an international conference on their territory, (ii) pursuant to the provisions of a headquarters agreement, and (iii) in order to follow up undertakings already entered into particularly in respect of sporting events (i.e. the 1998 Football World Cup and the World Basketball Championship).[103]

Similarly, the Common Position concerning restrictive measures against the leadership of the Transnistrian region of the Republic of Moldova provided that the Member States' obligation to impose the travel ban was to be 'without prejudice to cases where a Member State is bound by an obligation of international law, namely: (i) as a host country of an international intergovernmental organization; (ii) as a host country of an international conference convened by, or under the auspices of, the United Nations; or (iii) under a multilateral agreement concerning privileges and immunities'.[104]

The same approach was adopted in the Community Regulation governing the granting of visas to participants in the Athens 2004 Olympic and Paralympic Games, and the Regulation governing the issue of visas at the borders, particularly to seamen in transit. Both Regulations, in light of the IOC rules and international rules governing the

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judicial decisions in criminal matters and have in some occasions limited the application of the Dublin Convention. See Alegre and Leaf (2004); Nicol (2004).

[101] A breach of treaty obligations resulting from the imposition of visa bans decided by the Security Council will not be problematic since Article 103 of the UN Charter provides that where there is a conflict between obligations under the Charter and obligations under any other international agreement, the former prevail.

[102] See Chinkin (1997) pp. 193 and 187-198.

[103] Common Position of 28 November 1997, *supra* n. 87.

[104] Article 1(3) Common Position of 28 February 2003, *supra* n. 87.

movement of seamen, provide for the possibility of granting limited territorial validity visas when the common conditions of entry are not satisfied.[105]

The use of limited territorial validity visas in this context illustrates the tension between the project of creating an area without internal 'frontiers' and the retention of sovereign status by the Member States. As long as the Member States remain individually bound by international obligations concerning entry into their territories, frontiers between them will continue to exist to demarcate the application of international law in a given case. This situation could change only if Community agreements were substituted for the Member States' individual agreements.[106] This of course would imply an enormous transfer of competence to the Community and, given the number and far-reaching scope of these agreements, call into question the separate existence of the Member States.
These factors are also at the basis of the exceptions laid down in the Visa Regulation as to its application. The application of the Visa Regulation is excluded for a number of special categories of persons. Visa requirements for these categories are determined by bilateral agreements (such as diplomatic visa exemption agreements or headquarters agreements between the Member States and international organizations) or by multilateral or bilateral agreements of a wider scope (such as the 1944 Chicago Convention on International Civil Aviation).[107] Apart from the difficulties which it would entail, harmonization at Community level of the visa requirements applied by the Member States with regard to these categories would raise the issue of Community external competence under the *AETR* doctrine. Still, it is difficult to envisage a Community agreement covering one aspect (e.g. diplomatic visa requirements) of a wider issue which by its nature falls squarely into Member States' competence (e.g. diplomatic representation by third countries in the Member States). Moreover, rules on visas are often contained in international agreements of a wider scope which the Community may have no competence to conclude.

3.1.5 The role of the Community institutions

[105] See Chapter 4.
[106] The substitution of the Member States' individual visa exemption agreements with the countries in the 'white' list with Community visa exemption agreements, for example, puts an end to the situation whereby third country nationals could extend their stay within the common area beyond three months by cumulating successive rights of short stay that they enjoyed by virtue of bilateral agreements between their country and the Member States – a practice which was described by the Commission as incompatible with the spirit of an area without internal 'frontiers'. See Chapter 4.
[107] See Chapter 1.

Notwithstanding the introduction of a Community legal basis for the adoption of 'the procedures and conditions for issuing visas', formulation of entry conditions continues to be national. Consistency derives from the Community principle of mutual recognition of nationally determined entry conditions, but States may depart from its application. Even where substantive convergence is achieved among the Member States (for example in relation to recognition of passports or visa bans for individuals), this is not translated into a Community instrument in order not to undermine Member States' competence in these fields and their sovereign right to exclude aliens. Substantive convergence is often recorded in an instrument adopted under the intergovernmental Pillars which for its nature poses no threat to national autonomy.

Although a First Pillar policy, visa policy thus envisages a very limited role for the Community institutions in the formulation of the conditions and procedures for issuing visas.[108] This is further reflected in Regulation 789/2001 'reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications'. This allows the Council to amend certain parts of the CCI unanimously on a proposal from a Member State or the Commission, while those parts of the CCI consisting of 'lists of factual information which must be provided by each Member State' can be amended unilaterally by the Member States.[109]

The flexibility of the common visa policy (i.e. the fact that the Member States retain competence as to who can obtain a visa to enter their territories) has also been used by some Member States as an argument to resist Community competence with regard to agreements with third countries on visa facilitation, which the Commission has attacked.[110]

The extensive retention of national autonomy also implies a limited role for the Commission in monitoring implementation of the policy. It appears that the Member States are bound only by obligations of a procedural nature laid down in some provisions of the Schengen *acquis*, such as obligation to consult or obtain the agreement of the other Member States before undertaking a certain course of action. Following the attribution of these provisions to a Community legal basis, the Commission maintains that such obligations have acquired the force of Community law, and that accordingly the Commission may bring infringement actions against non-compliant Member States.

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[108] See Cholewinski (2003) p. 112.

[109] See Chapter 4. The Commission has now challenged the validity of the Regulation in Case C-257/01 *Commission v. Council*, pending.

[110] See Chapter 4.

The Commission's attitude has made Italy desist from concluding a diplomatic visa exemption agreement with Russia.[111]

The flexibility of the common visa policy is also at the basis of the exclusion of a rights-based approach for the common visa policy, with implications for the Court of Justice's jurisdiction.
As Hailbronner explains:

> 'Taking into account the weak position of third country nationals under the law as it stands [generally no one has an individual right to be issued with a visa] there is no more than a marginal role for the European Court of Justice with respect to visa and entry issues. Taking into account that the Schengen Protocol has established an irrebutable presumption that the Schengen *acquis* attributed by the Council is *in toto* in conformity with primary Community law and that, moreover, the visa-related parts of this *acquis* do not affect Schengen States' competence to refuse issuance of visas in accordance with the relevant national law it is hard to imagine that any questions might arise which require referral for preliminary ruling to the European Court of Justice'.[112]

While the introduction of a rights-based approach would not in principle be inconsistent with retention of national autonomy for the formulation of entry conditions, it would entail some limitations on the Member States' sovereign right to control entry.
In the context of other EC policies, the Court has proved to be a vehicle for the control and harmonization of concepts such as 'national security' and 'public order' on which the Member States rely as justification for derogating from Community regimes.[113] The Court has engaged in assessing the *exercise* of powers retained by the Member States to ensure its compatibility with Community rules.[114] This has included a review of a Member State's practice of recognizing documents issued by an unrecognized State,[115] and a review of a Member State's actions aimed at implementing their international obligations under the UN Charter. [116]

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[111] See Chapter 4.
[112] Hailbronner (2000) p. 158. For a different opinion see Cholewinski (2003) pp. 129-130.
[113] See Staples (2003) pp. 236-244 with regard to the EC free movement of persons regime.
[114] For example, the Court affirmed its jurisdiction to assess whether restrictions on export of dual-use goods were in conformity with Article 30 EC and the Community Common Commercial Policy. See Cases C-367/89 *Aime Richardt* [1991] ECR I-4621; C-70/94 *Werner v. Germany* [1995] ECR I-3189; C-83/94 *Leifer* [1995] ECR I-3231.
[115] The Court assessed whether the United Kingdom's practice of recognizing documents issued by the 'Turkish Republic of Northern Cyprus' for the purpose of the Community Association Agreement with Cyprus was in conformity with that Agreement. See Case C-432/92 *Anastasiou* [1994] ECR I-3087.
[116] The Court considered whether national sanctions based on 'public policy' aimed at strengthening implementation of a UN Security Council resolution were in conformity with the Common Commercial

In the context of the common visa policy, the Court will be largely precluded from controlling the *exercise* of powers retained by the Member States. The possible consequences of this are lack of uniformity of national entry conditions and remedies.[117] This has not only harsh consequences for individuals,[118] but may also undermine the system as a whole since, in a situation where a minimum level of uniformity of entry conditions is not guaranteed, the application of mutual recognition may prove difficult or may even be challenged by national courts.[119]

In such a situation, the smooth functioning of the common visa policy (i.e. the unhindered application of the principle of mutual recognition) relies heavily on convergence achieved within the intergovernmental Pillars on foreign policy issues relevant for entry conditions or on what individual behaviour may constitute a ground for exclusion. Convergence within the Second Pillar will also determine to what extent the common visa policy can be considered a foreign policy instrument of the Union.

In the context of the common visa policy, the role of the Court of Justice seems restricted to cases where Community law grants rights of entry to third country nationals. This is primarily the case for family members of Community nationals, but may also be the case for beneficiaries of Community external agreements[120] and posted workers of Community enterprises.[121]

Policy. See Case C-124/95 *Centro Com* [1997] ECR I-81. For an in-depth analysis of the Court's role see Koutrakos (2001) particularly pp. 113-163.

[117] See Staples (2003).

[118] However, if a rights-based approach is to serve any purpose to a third country national who has been denied a short-term visa, the review system would have to work swiftly.

[119] The case of the Greenpeace activist mentioned earlier offers an example of a case where mutual recognition proved difficult (and embarrassing) for a Member State. For an example of a national court rejecting the application of mutual recognition, see the Conseil d'Etat in *Forabosco*, Case 190384, 9 June 1999, considered in Chapter 3.

[120] Community Association Agreements may grant rights of entry to the nationals of the Contracting Parties for the purpose of establishment or the provision of services. The Association Agreements with Poland, Hungary, Romania, Bulgaria and the Czech and Slovak Republics provide (or provided) only for a right of establishment. They are accordingly irrelevant for short-term visas. Moreover, the Court of Justice held that the right of entry established by such Agreements was not undermined by national systems of prior controls (long-term visa requirements). See Cases C-235/99 *Kondova* [2001] ECR I-6427; C-63/99 *Gloszczuk* [2001] ECR I-6369; C-257/99 *Malik* [2001] ECR I-6567. For an in-depth analysis see Weiss (2001) pp. 255-260. On the other hand, in some Community agreements which envisage the realization between the Parties of the freedom to provide services, it is possible to find a reference to the speedy issue of visas for service providers. This is the case for the EC-Russia Partnership and Cooperation Agreement which provide in Article 37 for the temporary movement of persons for the purpose of negotiating or concluding agreements to sell cross-border services (the relevant national rules on entry and stay are applicable, but it is provided that their application should not nullify or impair benefits accruing to any Party under a specific provision of the Agreement). A Joint Declaration on Article 37 requires the Parties to 'ensure that the issuing of visas and residence permits...are conducted...with a view to facilitating the prompt entry, stay and movement of businessmen in Russia and the Member States'.

[121] The Court held that Articles 49 and 50 EC gave the right to enterprises established in a Member State to provide services in another Member State by way of posting their third country national workers there.

Thus, in *MRAX v. Belgium*,[122] the Court of Justice interpreted Directive 68/360[123] - requiring the Member States to accord to family members of Community workers who are third country nationals 'every facility for obtaining any necessary visas' – to the effect that 'a visa must be issued without delay and, as far as possible, at the place of entry into national territory'.[124] The Court held that under Community legislation 'a Member State may not send back at the border a third country national who is married to a national of a Member State and attempts to enter its territory without being in possession of a valid identity card or passport or, if necessary, a visa, where he is able to prove his identity and conjugal ties and there is no evidence to establish that he represented a risk to the requirements of public policy, or public health'.[125]

The Commission, on its part, considered (and eventually desisted from) bringing a case against Spain arguing that Directive 64/221[126] - imposing a duty on the Member States to inform third country nationals who are family members of Community nationals of the grounds of public policy, public security or public health upon which decisions to exclude them from their national territories are based (unless this is contrary to the interests of the security of the State involved) – created a duty for the Member States when refusing a visa on the ground of a report in the SIS to give information on the grounds on which the report decision was based.[127]

3.2 Local consular cooperation

Local consular cooperation is an aspect of visa policy that falls under the Second Pillar of the Union.

Cooperation between the Member States' consular and diplomatic posts is a long-established practice.[128] Reflecting and building on this, Article 20 EU provides:

The imposition of residence permits by the receiving State would amount to a breach of Articles 49 and 50. See Case C-43/93 *Vander Elst* [1994] ECR I-3803. The Commission in its proposal for a directive on the posting of workers who are third country nationals for the provision of cross-border services, proposed the abolition of visa requirements for such workers, OJ 1999 C 67/12. The amended proposal is at present before the European Parliament.

[122] Case C-459/99, [2002] ECR I-6591.

[123] 'On the abolition of restrictions on movement and residence within the Community for workers of Member States and their families', OJ Sp. Ed. 1968 L 257/13.

[124] Para. 60.

[125] Para. 62.

[126] 'On measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security and public health', OJ Sp. Ed. 1964 850/64.

[127] Interview with Commission official, DG JHA/A1, 10 December 2002.

[128] Macleod, Hendry and Hyett (1996) p. 420. For an account of cooperation within EPC, see Bot (1984); Brinkhorst (1984). For a recent assessment see Anderson, S. (2001).

'The diplomatic and consular missions of the Member States and the Commission Delegations in third countries and international conferences, and their representations to international organizations, shall cooperate in ensuring that the common positions and joint actions adopted by the Council are complied with and implemented.

They shall step up cooperation by exchanging information, carrying out joint assessments and contributing to the implementation of the provisions referred to in Article 20 of the Treaty establishing the European Community'.[129]

It is also established practice for the Member States to share premises and functions of their diplomatic and consular posts in an attempt to save costs and improve the efficiency of representations in third countries. This is the case for the shared United Kingdom/France/Germany embassies in Alma Ata and Minsk and the joint Nordic embassies in Windhoek and Dar-es-Salaam.

Also, the Member States often entrust the protection of their interests in a country where they are not represented to another Member State that has a diplomatic presence there in accordance with Article 46 of the 1961 Vienna Convention on Diplomatic Relations. For example, Belgium (for economic issues) and the Netherlands (for political issues) represent Luxembourg in South Korea. Sharing of resources has also taken place between the Member States' diplomatic missions and the Commission's delegations, as is the case for the 'House of Europe' at Abuja.[130]

In the context of visa policy, cooperation between the Member States' diplomatic and consular posts in third countries is essential for the uniform implementation of the common visa policy, which is a precondition for its success, and for the collection of information indispensable for policy formulation.[131]

Uniform implementation of the EU visa policy by the Member States' consular posts is ensured through the CCI and local consular cooperation.[132]

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[129] Article 20 EC provides that 'every citizens of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State,...'.

[130] See Duke (2002) pp. 856-857; Anderson, S. (2001) p. 468; Denza (1998) pp. 49 and 400-402 who points out that as yet there is no disposition on the part of Member States to accredit a single individual as head of mission in a third country, as it is allowed by Article 6 of the Vienna Convention, since there are still sensitivities about free access to archives and sharing confidential information. There are also national bars to closer integration. France, for example, has a constitutional prohibition on being represented abroad by a non-French national.

[131] Joint reports on third countries prepared by the Member States' embassies form raw material for third country reports and action plans by bodies such as Cirefi, the HLWG and former Cirea. These have an impact on the evolution of both national and EU policies. See Curtin and Dekker (1999) p. 115.

[132] See Chapter 3.

With regard to local consular cooperation, the CCI provide that 'missions...shall organize meetings on a regular basis depending on the circumstances and as often as they deem suitable'. Exchange of information during such meetings aims to ensure a uniform implementation of the EU visa policy (indispensable for avoiding visa shopping and enhancing security) and the identification of local conditions which may require the adoption of further measures at national or EU level.

While the missions and consular posts of the Member States enjoy a certain discretion with regard to the organization of local cooperation meetings – with ultimate responsibility falling on the central authorities of the Member States – and the circle of people participating in such meetings may vary considerably from one place to another, the Council has made some recommendations on the matter.

The Council recommended that all EU and Schengen members and the Commission should be invited to meetings and that attendance by the heads of visa sections or their deputies should be 'imperative and mandatory'. Candidate countries which have started accession negotiations should also be invited on a regular basis by the heads of missions, while representatives of third countries should be invited at intervals on the basis of local practice or where there are special reasons. Third countries such as the US, Canada and Australia, which often have special migration experts, can be invited for the purpose of acquiring information.[133]

Furthermore, the Council, following the events of 11 September 2001, recommended that local consular cooperation should be intensified, since exchange of information is 'an invaluable means of seeking at an early stage to identify persons related to terrorist threats, terrorists and terrorist groups and to fight illegal immigration and trafficking in human beings'. In particular, the Council urged 'the diplomatic missions of the Member States in third countries where networks involved in or associated with terrorism are assumed to exist to exchange information obtained in connection with visa applications regularly and at least once a month'.[134]

But how successful has local consular cooperation been? Does the fact that responsibility for local consular cooperation, in terms of monitoring and collecting information, falls with the Member States have a negative impact on the formulation and implementation of the common visa policy?

[133] Local consular cooperation, doc. 7819/1/01, approved by the Council on 28-29 May 2001.

The extent to which local consular cooperation is successful remains controversial. It seems that the success of local consular cooperation varies according to the places involved. Some concrete results include the fruitful exchange of information on forged documents in Congo, and the joint elaboration of a uniform information leaflet and of a translation of the visa application in Russia, China and Algeria.[135] According to a commentator: 'in the local consular cooperation meetings on visas, the embassies actually do make European Immigration policy...With regard to Schengen although the meetings are informal, they may decide policy by deciding to whom to give visas – or not'.[136]

The Report on local consular cooperation prepared by the French Presidency in December 2000 mentioned among the achievements of local consular cooperation 'the harmonization of lists of justifications and, in general, of conditions for examining applications and the regular exchange of statistics', as well as numerous specific initiatives against documentary fraud.[137]

However, lack of uniformity was also identified, particularly in the form of: (i) no harmonized approach to applications lodged through travel agencies, which in the case of Kiev resulted from different instructions from national central authorities, and (ii) divergences concerning the recognition of travel documents and applications from aliens in transit. Such lack of uniformity caused visa shopping. Other problems revealing malfunctioning included: (i) a misunderstanding of the stamp 'visa application lodged on...at...' (which is affixed on the passports of visa applicants for the purpose of preventing multiple applications), which was wrongly treated by certain posts as indicating the rejection of the visa application; and (ii) the high number of limited territorial validity visas issued.

The French Presidency also expressed its disapproval on practices of establishing a local common roster of persons deemed undesirable (a kind of 'local SIS').[138]

The Council has begun to address these problems.[139] *Inter alia* it adopted a decision on a uniform visa application form and on rules on the processing of visa applications lodged through travel agencies.[140]

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[134] Council Conclusions on intensified consular cooperation, 20.11.2002, Council doc. 14525/02.
[135] Interview with Commission official, DG JHA/A1, 10 December 2002.
[136] Anderson, S. (2001) p. 472.
[137] Council doc. 14496/00.
[138] Such a practice raises the issue of lack of democratic and judicial control of local consular cooperation.
[139] See *supra* nn. 133-134.

The Commission in its Communication on a common policy on illegal immigration commented that:

> 'It does not make any sense to introduce new rules or to harmonize rules at EU level, if present regulations are not enforced with sufficient resources and, most importantly, the necessary will. Common efforts are condemned to fail, if Member States' services and practices do not follow the rules adopted in common i.e. relating to visa issuance and external border controls'.[141]

The Commission suggested that monitoring the enforcement of existing common rules, by, for example, undertaking regular joint screenings of consular posts, should be strengthened.[142]

Some limited progress in this direction has been made. While responsibility for supervising local consular cooperation continues to fall on the Presidency (which under the CFSP has general responsibility to represent the Union), the Greek Presidency in its Report on local consular cooperation recommended a procedure that the Presidency should follow to monitor local consular cooperation and also collect relevant information.[143]

The Presidency, it is suggested, should send a questionnaire to the members of local consular cooperation in regions in which migration flows originate, and compile a report setting out conclusions and tables of statistics on visas granted and applications rejected. Such a report should then be passed to the Working Party on Visas which on its basis would decide on possible additional activities. The Presidency would also be responsible for transmitting to posts involved in local consular cooperation the records of meetings of the Working Party on visas, drawn up by the Council Secretariat, in order to achieve a continuous flow of information to its members regarding the latest initiatives and developments in visas.

The solution now seriously contemplated in order to achieve a uniform implementation of the common visa policy is the establishment of common visa offices. The French

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[140] Council Decision of 25 April 2002 on the amendment of Part III and Annex 16 to the CCI, OJ 2002 L 123/50; Council Decision of 12 July 2002 on the adaptation of Parts III and VIII of the CCI, OJ 2002 L 187/44.

[141] COM(2001) 672 final, 15.11.2001, para. 3.5.

[142] As to the monitoring arrangements under the Schengen Convention, see Chapter 3. See also Article III-161 of the Constitutional Treaty, considered in Chapter 4.

Presidency in its Report saw this as 'the only way of achieving full harmonization of procedures'.

The establishment of common visa offices has been called for by the Tampere and Laeken European Councils.[144]

The Comprehensive Plan to combat illegal immigration, considering the establishment of common visa offices, stated:

> 'One of the expected advantages of joint visa posts would be to reduce the cost of issuing visas. Such a burden-sharing approach could provide the financial means needed by the Member States in order to improve the technical equipment used for the purpose of issuing visas (detection of counterfeit or forged documents, access to online databases of sample travel documents, secured storage conditions for blank visas stickers, etc.). In addition, staff sharing would also mean sharing of experience and know-how in the field of risk assessment of illegal immigration or potential overstayers. In a medium or longer-term perspective, one more substantial positive outcome of joint visa posts would consist of more uniform implementation of the common rules and the reduction of visa shopping'.[145]

What form common visa offices should take (mere sharing of premises, extension of the system of representation or, controversially, issue of visas on behalf of the Community) is still unclear.

Although visa policy falls now within the First Pillar, it is likely that the Member States will resist, on constitutional grounds, the introduction of a Community measure governing the establishment of common visa offices (setting out powers and responsibility of officials and legal remedies).[146] Instead, it is likely that the matter will be tackled intergovernmentally within the Second Pillar. Even within the intergovernmental framework, the issue as to the form of the common visa offices (the creation of a specific body of officials or a looser form of cooperation) will be a delicate one because of its legal and constitutional implications.

In this context, the Constitutional Treaty introduces some relevant changes. The Constitutional Treaty introduces 'Union delegations'.[147] These will represent the Union

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[143] 2.06.2003, doc. 9991/03.

[144] Presidency Conclusions, Tampere European Council, 15 and 16 October 1999, para. 22; Presidency Conclusions, Laeken European Council, 14 and 15 December 2001, para. 42.

[145] 28.02.2002, Council doc. 6621/1/02, para. 32.

[146] See Staples (2003) p. 249.

[147] The name 'Union delegations' was finally favoured to the other controversial proposal to call such delegations 'EU embassies'. See Final Report of Working Group VII on External Action, 16 December 2002, CONV 459/02, part A, para. 7.

in third countries and international organizations and will replace the current Commission's delegations. They are to operate under the authority of the Minister for Foreign Affairs and in close cooperation with the Member States' diplomatic services.[148] The staff of these Union delegations is to be provided from the 'European External Action Service'. This (to be established by a European decision of the Council taken on a proposal from the Minister of Foreign Affairs and after consulting the European Parliament and obtaining the consent of the Commission) will be composed of officials from the relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services, and will assist the Minister for Foreign Affairs.[149]

The creation of Union delegations will probably improve the Commission's access to information and its analysis capacity as a result of secondment of members of national diplomatic services.

It appears that the Union delegations 'will not at first be issuing visas and passports to EU citizens, although some countries want to include such consular services at a later date'.[150]

4. The 'area of freedom, security and justice': consistency and maximization of Union activity

The Union project to establish an 'area of freedom, security and justice' offers a further opportunity to look at the coordination and interaction of the Pillars.

As the Tampere European Council emphasized, the project requires the coordination of measures falling under different Pillars because of their complementarity, the integration of justice and home affairs concerns into the Union external policies in order to maximize Union leverage vis-à-vis third countries, and the coordination of different treaty objectives in the light of their overlap (development policy has, for example, an impact on migration pressure).

This section looks at how Union powers are integrated with regard to the objective of 'combating illegal immigration' specifically. The analysis is restricted for reasons of

[148] Article III-230.

[149] Article III-197. From the Declaration re Article III-197, it appears that preparatory work on the External Action Service is to start from the date of signing of the Constitutional Treaty, rather than after national ratification.

[150] *The Times*, 'EU to set up its own embassies around the world', 12 June 2004.

space and relevance (combating illegal immigration is one of the main objectives of the common visa policy).

4.1 The European Council: formulating Union overall policy

Within the Union, the European Council takes a central political leadership role, guiding the work of the meetings of the Council and the Commission, setting the medium term objectives of the Union and taking the so called 'history-making decisions'.[151]

Article 4 EU provides:

> 'The European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof'.

Reflecting Article 4 EU, Article 13 EU, included in the CFSP provisions, provides:

> '1. The European Council shall define the principles of and general guidelines for the common foreign and security policy...
> 2. The European Council shall decide on common strategies to be implemented by the Union in areas where the Member States have important interests in common....
> 3. The Council shall take the decisions necessary for defining and implementing the common foreign and security policy on the basis of the general guidelines defined by the European Council.
> 4. The Council shall recommend common strategies to the European Council and shall implement
> them, in particular by adopting joint actions and common positions.
> The Council shall ensure the unity, consistency and effectiveness of action by the Union'.

Article 4 EU implies that action by the European Council may touch upon any of the three Pillars, and both European Council conclusions and common strategies in relation to third countries do include issues falling under all three Pillars. It is the broadly political nature of European Council decisions that allows an overarching combination of different Pillars' issues.[152]

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[151] Hix (1999) p. 29; Peterson and Bomberg (1999) p. 28; Wallace, H. (2000) p. 20.
[152] Although decisions by the European Council are capable of imposing obligations on the Member States and the institutions, they are something less than legal instruments in the full sense. See Timmermans (1996) p. 68; Denza (2002) p. 136. See also Article I-20 of the Constitutional Treaty which states that the European Council 'does not exercise legislative functions'.

The European Council thus plays a prominent role in establishing consistency of Union activity.

4.1.1 Conclusions of the European Council

The European Council formulates the overall Union policy in relation to the establishment of the 'area of freedom, security and justice', thus coordinating measures falling under different Pillars.

The central role of the European Council appears evident from the work programme established by the Tampere European Council – the first European Council which dealt exclusively with justice and home affairs issues.[153]

Subsequent European Councils have reviewed progress on implementation of the Tampere Work Programme and have provided further impetus.

The Laeken European Council of December 2001 held that: 'The European Council reaffirms its commitment to the policy guidelines and objectives defined at Tampere and notes that while some progress has been made, there is a need for new impetus and guidelines to make good delays in some areas'.[154]

With regard to 'a true common asylum and immigration policy', the Laeken European Council (after affirming the importance of achieving a balance between protection of refugees, in accordance with the principles of the 1951 Geneva Convention, the legitimate aspiration to a better life and the reception capacities of the Union) called for, *inter alia*: (i) the integration of the policy on migratory flows into the European Union's foreign policy, and in particular the conclusion of re-admission agreements, (ii) an action plan on illegal immigration on the basis of the Commission communication, and (iii) the development of a European system for exchange of information on asylum, migration and countries of origin.[155] The Laeken European Council also called for better management of the Union's external borders, which would help in the fight against terrorism, illegal immigration networks and trafficking in human beings, and for the Commission and the Council to work out the necessary arrangements for cooperation between external border control services and examine the conditions in which a common service could be created.[156] It also asked the Commission and the Council to

[153] Presidency Conclusions, Tampere European Council, 15 and 16 October 1999, 200/1/99. For an analysis, see Chapter 4.
[154] Presidency Conclusions, Laeken European Council, 14 and 15 December 2001, 300/1/01, para. 37.
[155] Para. 40.
[156] A feasibility study on the creation of a European Border Police was undertaken by Italy, see Feasibility study for the setting up of a 'European Border Police', Final Report, May 2002.

take steps to set up the common VIS and to examine the possibility of setting up common consular offices.[157]

The politicization of illegal immigration issues in the French presidential election campaign in April and May 2002 – resulting in the National Front of Jean-Marie Le Pen gaining second place in the first round of elections – contributed to keeping illegal immigration high on the Union's agenda. EU countries saw the production of action at EU level as one way to avoid far-right political groups exploiting illegal immigration issues.[158] Illegal immigration thus became the central issue of the Seville European Council of June 2002.[159]

The Seville European Council expressed its determination 'to speed up the implementation of all aspects of the programme adopted in Tampere for the creation of an area of freedom, security and justice in the European Union', and welcomed the adoption of the Comprehensive Plan to combat illegal immigration and the Plan for the management of external borders.[160] With regard to the Comprehensive Plan on illegal immigration, the Seville European Council called on the Council and the Commission to attach top priority to the following measures contained in the Plan: (i) review of the list of third countries whose nationals required visas (the 'black' list), (ii) introduction as soon as possible of the common VIS, (iii) speeding up the conclusion of readmission agreements, and adoption of a repatriation programme on the basis of the Commission's Green Paper, (iv) formal adoption by the Council of the Framework Decisions on combating trafficking in human beings and on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence and of the Directive defining facilitation of irregular entry, transit and residence.[161]

Within the context of the Plan for the management of the external borders, the Seville European Council urged the introduction of the Common Unit for External Border Practitioners to coordinate the measures contemplated in the plan.[162] It requested the

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[157] Para. 42.

[158] Monar (2003) p. 122.

[159] In this context, see also the letter written by Prime Minister Blair to former Prime Minister Aznar on 16 May 2002 expressing his hope that the Seville European Council would deliver a 'strong push' on the Tampere agenda, particularly with regard to the strengthening of the EU external borders, a tougher approach towards countries of origin on returns and the creation of an equitable asylum system. See Monar (2003) p. 122.

[160] Presidency Conclusions, Seville European Council, 21 and 22 June 2002, 200/02, paras. 26 and 27.

[161] Para. 30.

[162] Such a body was established within the Council in the framework of SCIFA + (Strategic Committee for Immigration, Frontiers and Asylum meeting with the heads of Member States' border guards) by the Danish Presidency. The Commission has now proposed the establishment at Community level of a

Council, the Commission and the Member States to implement a number of measures including the creation of a network of Member States' immigration liaison officers.[163]

The Seville European Council also addressed the issue of integrating immigration policy into the Union's relations with third countries. This issue had been surrounded by disagreement. The United Kingdom and Germany wanted a tough approach involving negative measures and retorsion against non-cooperating countries. France, on the other hand, preferred the 'carrots' approach involving aid to countries willing to cooperate. While the French approach had so far prevailed, the Seville European Council endorsed the use of negative measures under the EC and CFSP.[164]

Thus, apart from urging that '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', the Seville European Council stated that:

> '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'.[165]

The Thessaloniki European Council of June 2003 also laid great emphasis on the integration of migration issues in the Union's relations with third countries.

It underlined 'the importance of developing an evaluation mechanism to monitor relations with third countries which do not cooperate with the EU in combating illegal immigration'. It identified the following criteria for such evaluation: (i) participation in

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European Agency for the management of operational cooperation at the external borders, which should take over the more operational tasks of the Common Unit, see COM(2003)687 final/2. The Seville European Council was silent on the issue of creating a European Border Guard, perhaps reflecting the lack of consensus among the Member States on the need, shape, task and organization of such a body.

[163] Para. 32.

[164] Monar (2003) p. 122.

international human rights instruments (which contributes in defining the third country in question as 'safe' in the context of processing asylum applications in the Union), (ii) cooperation in readmission/return, (iii) efforts in border controls and interception of illegal immigrants, (iv) combating trafficking in human beings, including taking legislative and other measures, (v) cooperation on visa policy and possible adaptation of their visa systems, (vi) creation of asylum systems, and (v) efforts in redocumentation of their nationals. It further stated that the Council should evaluate such factors using information from International Labour Organization networks and through intensified and more efficient consular cooperation between the Member States in third countries, and that the Commission should report annually on the results.[166]

Furthermore, the Thessaloniki European Council welcomed the progress made in entrusting the Common Unit of External Border Practitioners with the operational implementation and coordination of the measures contained in the plan for the management of the external borders.[167] It also called for solving the remaining problems with regard to the establishment of the VIS. In this context, it underlined the need for a coherent approach in the EU on biometric data, which would result in harmonized solutions for documents for third country nationals, EU citizens' passports and information systems, and invited the Commission to prepare the appropriate proposals.[168]

A further example of the European Council political leadership role and its cross-pillar approach is provided by the Extraordinary European Council which met in Brussels in response to the attacks on the United States of 11 September 2001. Apart from expressing the Union's support and calling for a global coalition against terrorism, the European Council set up a plan of action which included immediate action to ensure the security of passports and visas and strengthen the fight against false or forged documents.[169]

4.1.2 Common strategies

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[165] Paras. 35-36.
[166] Presidency Conclusions, Thessaloniki European Council, 19 and 20 June 2003, paras. 19-21.
[167] See *supra* n. 162.
[168] Para. 11.
[169] European Council Conclusions, 21 September and 19 October 2001. As to the European Union responses to terrorism see Peers (2003).

Common strategies with regard to third countries constitute a further example of the European Council's prominent role in establishing consistency. Little use has been made of common strategies so far, allegedly because they may be implemented by instruments adopted under qualified majority voting.[170]

Generally, common strategies set out the Union's strategic goals with regard to its relationship with a third country (such as the establishment or maintenance of peace, stability and security, and the consolidation of democracy, the rule of law and a market economy). Such strategic goals are followed by more precise objectives and by specific initiatives which may touch on issues falling under any of the three Pillars.

The strengthening of cooperation in the fields of justice and home affairs is a recurrent objective of common strategies. With regard to Russia, for example, the EU identified as an 'area of action', the 'fight against organized crime, money laundering and illicit traffic in human beings and drugs'.[171] This fight is to be conducted, *inter alia*: (i) by improving cooperation on readmission, including the conclusion of a readmission agreement; (ii) by intensifying dialogue with Russia on the adjustment of Russia's visa policy to that of the European Union and on the introduction of travel documents which are sufficiently fake-proof; and (iii) by working together with Russia with a view to the introduction of carriers' sanctions by Russia. In this context, a 'specific initiative' was the setting up of a plan focused on common action.[172]

With regard to Ukraine, cooperation on justice and home affairs was also identified as a 'principal objective'.[173] According to the Common Strategy, 'the EU will seek to intensify dialogue with Ukraine on the adjustment of Ukraine's visa policy with that of the EU through the introduction of visa requirements consistent with EC provisions and the introduction of travel documents which are sufficiently non-forgeable'. Among the 'specific initiatives' were: improving cooperation regarding readmission, including the conclusion of a readmission agreement, supporting the full application of the Geneva Convention, and assessing the scale of illegal immigration via Ukraine.

The EU Common Strategy on the Mediterranean of 20 June 2000, which contemplates similar 'specific initiatives' in the field of justice and home affairs,[174] also includes the

[170] See for example Cremona (2004) p. 569.
[171] Common Strategy of the European Union on Russia, 4 June 1999, OJ 1999 L 157/1.
[172] OJ 2000 C 106/5.
[173] Common Strategy of the European Union on Ukraine, 23 December 1999, OJ 1999 L 331.
[174] Such as developing 'effective cooperation mechanisms to fight against illegal immigration, *inter alia* through the establishment of readmission agreements', OJ 2000 L 183/5.

undertaking by the Union that it 'will study the simplification and acceleration of visa issue procedures'.

4.1.3 Implications of the role and approach of the European Council

The active involvement of the European Council is typical of the intergovernmental policy-mode of the EU.[175] It results from the need to provide impetus for a relatively new area of Union activity – the formal approval of the European Council in these areas confirms the highest level of political commitment[176] – and from the sensitivity of the subject-matter, which also dictates its being tackled at the highest political level.

The cross-pillar approach of the European Council has an impact on the Commission's role as sole initiator of legislation under the Community Pillar. The Commission comes under enormous political pressure to execute European Council directions. This is because the European Council is the body where ultimate legitimacy resides, which implies also that common strategies generate expectations on the part of third countries.

The impact of the European Council's role on the Commission is, however, to some extent redressed by the Commission increasingly strong involvement in the intergovernmental Pillars, and by the fact that the Commission also considerably contributes to overall policy formulation (see *infra*).

Tension may arise insofar as the Commission may resist intrusion in certain Community policies. With regard to development policy, for example, the Commission has consistently maintained that developmental considerations only should be at the basis of the Community development policy.[177]

A further issue arising from the European Council's approach relates to the integration of justice and home affairs issues in Community external policies. This is indeed taking place. Clauses on cooperation on justice and home affairs, such as clauses on 'joint management of migration flows and compulsory readmission', are being integrated into Community agreements with third countries.[178] It is still uncertain how these clauses will evolve in terms of their legal effect (whether their breach can constitute a ground for suspension of the agreement), particularly in the light of the new approach

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[175] Wallace, H. (2000) p. 34.
[176] Hix (1999) p. 29.
[177] Nuttall (1992) p. 267.
[178] See, for example, the Association Agreement with Tunisia, OJ 1998 L 97/1 (Article 61 on money laundering; Article 62 on combating drug use and trafficking; Article 69(3)(c) on establishing a dialogue on illegal immigration and the conditions governing the return of individuals) and the Association Agreement with Morocco, OJ 2000 L70/2.

introduced by the Seville European Council envisaging the application of negative measures in the case of lack of cooperation.[179]

Integration has also taken the form of assistance to third countries to help them cope with certain justice and home affairs issues.

Although integration of justice and home affairs issues into Community external policies is taking place, there is also a tendency to tackle certain justice and home affairs issues separately in Third Pillar instruments rather than including them in 'mixed' agreements with third countries. This tendency has been said to have an impact on consistency and the institutional balance.[180] Some justice and home affairs issues, however, may require to be addressed in a separate instrument because of their complexity.

As long as justice and home affairs concerns (competence for which is fragmented between the Community and the Member States) are included into Community external instruments and agreements, institutional conflict may arise, for example, as regards which procedures (those of the First or Second/Third Pillar) should govern their suspension.[181] In this context, the European Council has not excluded resort to a CFSP decision providing for retorsion when a third country is assessed as 'unwilling to cooperate' on combating illegal immigration, 'after full use has been made of existing Community mechanisms without success' and 'while honouring the Union's contractual commitments and not jeopardizing development cooperation objectives'.

A final issue relating to the European Council's role in establishing consistency is that such a role does not rule out the possibility of institutional conflict as to the choice of legal basis for the adoption of the relevant measures.[182] Common strategies, for example, provide that they are to be 'implemented by the EU institutions and bodies each acting within the powers attributed to them by the Treaties, and in accordance with the applicable procedures under those Treaties'.[183] No serious institutional conflict has

[179] In this context see the evolution of human rights clauses in Community agreements. See Kuijper (1993) pp. 420-421; Cremona (1996).

[180] Hillion (2000b) pp. 1228-1235.

[181] The overlap between the CFSP and the Community with regard to human rights concerns, for example, gave rise to the question whether suspension of an agreement due to a violation of human rights should be decided on according to the procedures of the Community or those of the CFSP. Divergent views on such a point blocked for a long time the conclusion of the MEDA programme between the Union and the Mediterranean countries. See Schmalz (1998) p. 428.

[182] See Hillion (2000a) pp. 297 and 300.

[183] Para. 24 Common Strategy on the Mediterranean, *supra*.

arisen so far. Some tension over allocation of competence arose, however, with regard to an agreement with China covering visa facilitation and readmission.[184]

4.2 The Council and the Commission

The Council and the Commission have also tackled issues in an across-the-pillar fashion, following closely the direction and priorities identified by the European Council.

4.2.1 The Vienna Action Plan

Even before the Tampere European Council, the Commission and the Council adopted an integrated approach to the creation of an 'area of freedom, security and justice' in their Action Plan on 'how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and Justice', approved by the Vienna European Council in 1998.[185]

4.2.2 Comprehensive Plan to combat illegal immigration and trafficking in human beings (the Santiago Plan)

In the establishment of a Union policy against illegal immigration, the Presidency, the Council and the Commission have actively followed the directions set by the European Council. The Council has adopted various action plans on the basis of Commission communications (which specific initiatives in the form of legislation, projects, studies, more specific action plans and guidelines have followed) whose implementation has been monitored by the Presidency and the Commission through its Scoreboard.

The Commission produced a Communication on a common policy on illegal immigration in November 2001 which closely followed the objectives established by the Tampere European Council for the 'management of migration flows'.[186] The Laeken European Council of December 2001 called for the development of an action plan on the basis of such Communication. The Spanish Presidency produced the 'Comprehensive Plan to combat illegal immigration and trafficking in human beings in the European Union' (the Santiago Plan) which was adopted by the Council (with no parliamentary scrutiny) on 28 February 2002.[187]

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[184] Kuijper (2004) p. 619.
[185] 4.12.1998, 13844/98, OJ 1999 C 19/1. This is considered in Chapter 4.
[186] *Supra* n. 141.
[187] *Supra* n. 145.

The Santiago Plan includes proposals on: (i) visa policy, (ii) information exchange and analysis on migration flows, (iii) pre-frontier measures such as coordination of the Member States' liaison officers in countries of transit and origin, financial and technical support to third countries to combat illegal immigration, and the introduction of awareness-raising campaigns, (iv) border management, including the development of a coherent strategy to integrate the different functions of border control and a feasibility study on a European Border Guard (v) readmission and return policy, (vi) the role of Europol in the detection and dismantling of criminal networks, (vi) the introduction of penalties, and the swift ratification and coordinated implementation of the UN Convention against Transnational Organized Crime and its two accompanying Protocols on smuggling and trafficking signed in Palermo on 15 December 2000.

With regard to visa policy, the Santiago Plan recommended the annual review of the visa lists, the inclusion of photo and biometric data of visa holders in their visas, the establishment of joint visa offices with a pilot project in Pristina, and the establishment of the VIS. Progress has been achieved on all these aspects of visa policy, except for the establishment of joint visa offices,[188] and on all other policies dealt with in the Plan which complement visa policy.

Disagreement and uncertainty continues however to surround the development of some of the most controversial proposals.[189]

Other developments have given rise to concern with regard to democratic and legal accountability.[190]

4.2.3 Integration of justice and home affairs concerns in the EU external policies

The Tampere and successive European Councils emphasized the importance of integrating justice and home affairs concerns into Union external policies. With regard to the fight against illegal immigration specifically, such integration has taken the form of financial and technical support to countries of origin and transit, the insertion of JHA clauses in Community agreements and the conclusion of Community readmission

[188] See Chapter 4.

[189] The idea of a European Border Police, which was originally supported by some Member States particularly in the aftermath of the terrorist attacks of 11 September 2001 and in the light of fears that the acceding countries were not capable of fulfilling Schengen standards and would be disproportionally burdened, has been abandoned in favour of a later possible decision to establish a European Corps of Border Guards which would complement but not replace national border police forces. See Council Plan on the management of the external borders of the Member States, 14.04.2002, Council doc. 10019/02. See also House of Lords Select Committee on the European Union (2002-03b).

agreements, and assessment of cooperation by third countries in the fight against illegal immigration.

(i) Financial and technical support to countries of origin and transit

The Santiago Plan envisages financial and technical support to countries of origin and transit in particular to help them strengthen their capacity to combat trafficking in human beings and to cope with their readmission obligations. The Plan envisages the financing of projects in the area of: support for asylum seekers infrastructure, establishment of reception centres, awareness-raising campaigns, improvement of documentary security, fight against corruption, deployment of liaison officers, support for returns of irregular immigrants and improvement of border control management and equipment. Community financial assistance instruments such as PHARE, MEDA, CARDS and TACIS were accordingly adapted to include justice and home affairs programmes and the Commission has provided for a new budgetary instrument for cooperation with third countries of origin and transit.[191]

(ii) Readmission agreements and JHA clauses in Community agreements

The Santiago Plan, recognizing the importance of a readmission and return policy in the fight against illegal immigration, required the Commission to present a Green Paper on a Community return policy and analyse the advisability of establishing a financial instrument for implementing it. The Santiago Plan emphasized the role of the proposed VIS in facilitating the identification of illegal residents and the issue of travel documents for return purposes.[192] It urged the identification of the third countries generating illegal immigration with a view to concluding readmission agreements, and the use by the EU of its political weight against third countries which showed reluctance to fulfil their readmission obligations. It also underlined the desirability of agreeing with third countries rules on transit of returnees.

The Commission presented its Green Paper on 10 April 2002.[193] The Commission emphasized the desirability of concluding readmission agreements with countries which are reluctant to readmit returnees and require extensive administrative procedures to

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[190] This is the case for operational cooperation between the Member States' heads of border guards in the Council, see *supra* n. 162. See House of Lords Select Committee on the European Union (2002-03b) para. 58-63.

[191] See Scoreboard (First half of 2003). Country or Regional Strategy papers prepared by the Commission provide a list of financial programmes on a country-by-country basis.

[192] See Chapter 4.

[193] COM(2002) 175 final.

determine nationality and identity. In order to enhance such countries' willingness to cooperate, the Commission underlined that the EU should consider forms of support, which could also ensure that return is sustainable. Moreover, underlining the difficulties in negotiating readmission agreements resulting from the fact that they are for the exclusive benefit of the Community, and the fact that the Commission has very little to offer in exchange for their conclusion in the area of freedom, security and justice (visa facilitation or the lifting of visa requirements being a realistic option in exceptional cases only, such as Hong Kong and Macao), the Commission invited the Council to examine the possibility of developing complementarity between readmission and return policy and other Community policies (trade, technical/financial assistance, development, legal immigration, etc.).

The Council has adopted Conclusions on criteria for identification of third countries with which new readmission agreements need to be negotiated.[194] The criteria were identified as: (i) migration pressure (with data to be submitted by Cirefi) and degree of difficulty in obtaining travel documents for repatriation (with data submitted by the Member States in accordance with the relevant Council Conclusions);[195] (ii) geographical proximity to the EU; and (iii) regional coherence.

The Council authorized the Commission to negotiate Community readmission agreements with Morocco, Sri Lanka, Russia, Pakistan, Hong Kong, Macao, Ukraine, Albania, Algeria, China and Turkey.[196]

The Council has also proposed to ensure that the full migration agenda is taken forward in the dialogue within the context of current and future Association, Cooperation or equivalent agreements including the root causes of migration, the Community legal migration policy, the joint management of migration flows, including visa policy, border control, asylum, readmission and controlling illegal immigration, and the integration of legal migrants living and working in the EU.[197]

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[194] 15.04.2002, Council doc. 7990/02.

[195] Council Conclusions on obtaining travel documents for the repatriation of people who do not fulfil or no longer fulfil entry and residence conditions, 6071/02 REV 1.

[196] Commission Communication on the development of a common policy on illegal immigration COM(2003) 323 final, para. 3.

[197] Commission Communication on the development of a common policy on illegal immigration, *supra* n. 196, para. 3.

(iii) Assessment of cooperation by third countries

The Seville and the Thessaloniki European Councils underlined the importance of assessing cooperation by third countries in the fight against illegal immigration and of applying retorsion against third countries assessed as 'unwilling to cooperate'.

Already before the Seville European Council, the strategy adopted by the Council 'to prevent and combat illegal immigration and trafficking of human beings by sea' provided for a system of retorsion in the case of lack of cooperation by third countries.[198] According to the Council Conclusions, third countries of boarding, departure or transit of vessels should adopt a number of measures to fight illegal immigration including: (i) international instruments such as the UN Conventions against Transnational Organized Crime of December 2000 with its accompanying Protocols, and the 1951 Geneva Convention relating to the Status of Refugees (adherence to which contributes towards defining the third country in question as a 'safe third country' in the context of processing asylum applications in the Union); (ii) criminal penalties for smuggling, trafficking and travel document fraud; (iii) awareness-raising campaigns; (iv) police controls at sea borders and inside the national territory; (v) strengthening of controls at their land borders including the adaptation of their visa systems; (vi) cooperation with the border services of the Member States; (vii) a willingness to accept readmission obligations.

Relations with third countries which did not cooperate were to be systematically assessed on the basis of a report by the HLWG, and such assessment was to be taken into account in relations between the Union and its Member States and the countries concerned in all relevant areas. Moreover, the Union was to apply an 'early political response'. On the other hand, third countries willing to cooperate were to receive support. Furthermore, independently of assistance under Community policy, such countries could require resources and technical support from the Union and the Member States, in their respective fields of competence, for the application of the measures they were required to take.

The form that integration of justice and home affairs concerns in the EU external relations is taking has been strongly criticized.[199] Statements such as 'the EU will use its

[198] Council Conclusions on measures to be applied to prevent and combat illegal immigration and trafficking of human beings by sea, 13.06.2002, 9958/02.

[199] See, for example, Boccardi (2003) p. 206; European Parliament Resolution of 30 March on asylum-seekers and migrants – action plans for countries of origin and transit, OJ 2000 C 378/75.

political weight against third countries which are assessed as reluctant to cooperate' have been described as very heavy-handed and only construable as a threat.[200]

Moreover, third countries are increasingly required to align their external border policies to that of the Union and to introduce a number of measures and legislation to prevent immigrants travelling to the Member States. The strengthening of borders with neighbouring countries may however cause a number of problems and damage political relations. The Union's policy seems in this context to contradict the Union's objective to encourage integration between third countries as a recipe for peace and prosperity. Moreover, the introduction of restrictive measures may even put third countries in breach of international human rights instruments.[201]

4.2.4 Coordination of treaty objectives

The Tampere European Council envisaged a comprehensive approach to migration i.e. an approach that also aimed at addressing the root causes of migration by tackling political, human rights and development issues in third countries of origin.

Notwithstanding such an objective, it has been submitted that the link between the Member States' foreign policies and migration pressure has been largely overlooked.[202]

(i) The High Level Working Group on Migration and Asylum

To help implement such an approach, the Council established the HLWG, whose mandate was continued by the Tampere European Council.[203] The HLWG's action plans for third countries of origin are prepared by one or more Member States acting as coordinators. These action plans not only adopt a cross-pillar approach by proposing measures for cooperation in the four integrated categories of foreign policy, development, economic assistance, and migration and asylum, but also coordinate measures by the Union, the Community, the Member States and international organizations.

The Action Plan for Morocco, for example, proposed, *inter alia*:

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[200] ILPA (2002).

[201] A questionable commitment from the standpoint of human rights is represented by Romania's and Bulgaria's undertaking to punish their own nationals found residing and working illegally in Member States by preventing their future departure from their homelands for a specified length of time (which is contrary to the right to leave one's own country). This undertaking was given in return for visa-free access to the Union for their nationals. See also the implications attached to the adoption of the visa 'black' list by some of the Central and Eastern European Countries. On these issues see Chapter 4.

[202] Boccardi (2003) p. 211.

(i) the establishment of permanent dialogue on migration in the framework of the EU-Morocco Association Agreement;

(ii) strategies to combat illegal trafficking including the early detection of false documents, with seminars on the topic organized by France, Belgium and Spain and financed by Odysseus;[204]

(iii) fight against criminal trafficking networks by enforcing measures to improve police cooperation on the identification and detection of networks, with provision of technical assistance and equipment by the Union;

(iv) conclusion of an EC readmission agreement;

(v) the adoption of visa requirements by Morocco for third country nationals from the West Africa region (including Nigeria, Senegal, Mali and Democratic Republic of Congo) and the training of consular officials from the Maghreb to be organized by the International Organization on Migration and financed by Odysseus;

(vi) a report by Cirea/Cirefi on the numbers, nationalities, destinations and 'modus operandi' of third country nationals transiting through Morocco to Europe and evaluation of measures introduced by Morocco, under the responsibility of the Presidency;

(vii) various initiatives aimed at economic development, training and retraining and promotion of local development to be included by the Commission in its country strategy papers and financed under MEDA.[205]

The Action Plans prepared by the HLWG were severely criticized by the European Parliament in March 2000 for insufficient attention to human rights concerns, undue focus on prevention measures, inadequate consultation with politicians and representatives of the civil society in the 'target' countries, and an inappropriate budgetary allocation.[206]

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[203] The Tampere European Council approved the Action Plans for Afghanistan and the region, Iraq, Morocco, Somalia and Sri Lanka. An Action Plan for Albania and the Region was produced on 20 March 2000.

[204] The Odysseus Programme (of training, exchanges and cooperation in the fields of asylum, immigration and crossing of the external borders) established by Joint Action 98/244/JHA of 19 March 1998 has been substituted by ARGO (action programme for administrative cooperation in the fields of external borders, visas, asylum and immigration) adopted by the Council on a proposal from the Commission by Decision 2002/463/EC, 13.06.2002, OJ 2002 L 161/11.

[205] 'Implementation of the Action Plan for Morocco', 30.05.2002, 8939/00.

[206] See *supra* n. 199. See also ILPA Submissions on the European Commission's Communication on a Common Policy on Illegal Immigration, www.ilpa.org.uk/submissions/Illegalresponse.htm.

(ii) Commission Communication 'integrating migration issues in the European Union's relations with third countries'

The integration of the treaty objectives of creating an 'area of freedom, security and justice' and of pursuing a policy in the field of development cooperation is a sensitive issue which may give rise to institutional tension particularly since the Commission, the executor of the EC development policy, has consistently maintained that development considerations only should be at the basis of the EC development policy.

In its Communication on 'integrating migration issues in the European Union's relations with third countries'[207] the Commission considered the relationship between the Community development policy and migration. The Commission underlined that development policy contributes to the effectiveness of the EU migration policy since it addresses the 'push' factors of migration and tries to prevent and reduced forced migration. On this basis, the Commission held that the current priorities of the EC development policy, which focus on poverty reduction, should be maintained. However, the Commission held that 'to ensure coherence between the Community development and migration policy it is necessary to assess systematically the relationship between migration issues and the priority sectors and cross-cutting concerns – gender, environment and human rights – of the EU development policy, and to identify actions where appropriate'.

The Commission identified four areas that could be considered for further action. The first area is 'trade and development'. The Commission recommended to 'continue to promote the improvement of effective market access' for products coming from developing countries and the integration of developing countries into the world trading system. It also underlined the importance of the Community promoting south-south trade, the promotion of foreign direct investment and of core labour standards. Moreover, the Commission recommended that the Community stimulated international discussions on the free movement of people.

The second area identified is 'conflict prevention, regional integration and cooperation'. According to the Commission regional integration is the best recipe against war and thus represents a structural contribution to avoid refugee-producing conflicts. The Community should support conflict prevention activities such as shared management of natural resources and border region cooperation programmes.

[207] 3.12.2002, COM(2002) 703 final.

The third area for further action is 'institutional capacity building and good governance'. The Commission included among the relevant actions institutional and constitutional reform, reform of the electoral system, measures to strengthen and guarantee human and minority rights, anti-corruption measures and reform of police, judiciary and civil service.

The fourth area is 'food security and sustainable rural development'. The Commission underlined that food security and access to food and drinking water will limit 'survival' migration by poor people. Moreover, sufficient jobs and satisfactory income to rural people will reduce the number of people moving from the rural areas to the cities, which is considered by the Commission as the first step towards international migration.

5. Conclusion

An analysis of the common visa policy shows that the Union is increasingly assuming the nature of a 'cooperative system of separation of powers' which 'implies that there are narrow limits to disentangling the powers of the various (competence) levels'.[208]

The roots of visas in state sovereignty – resulting from the fact that visas are the expression of the sovereign right to control entry and from their ramifications – has implied a *sui generis* character for the common visa policy within the Community context. The common visa policy has not so far involved the loss of ultimate national competence as to who can obtain a visa to enter the national territory.

This flexibility has had consequences for the role of the Community institutions in the formulation, implementation and monitoring of the policy. In particular, it has resulted in the exclusion of a monitoring mechanism at Community level capable of ensuring a minimum level of consistency of the Member States' positions with regard to the granting of individual visas. In the absence of this, the smooth functioning of the policy depends heavily on convergence achieved within the intergovernmental Pillars. This will also determine the extent to which the common visa policy can be considered a foreign policy instrument of the Union as a whole.

The Member States also continue to be responsible for implementation of visa policy at consular level. Local consular cooperation established under the Second Pillar is the instrument through which the Member States seek to achieve a uniform implementation of the policy, through coordination and sharing of resources, expertise and information.

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[208] *Supra* n. 26

There have been demands for greater integration in this field, but so far little progress has been made. The Constitutional Treaty would introduce some important changes in this context.

Visa policy thus continues to depend greatly on activity under the intergovernmental Pillars for its smooth functioning. The intergovernmental Pillars have increasingly been strengthened, but they still leave scope for divergences between the Member States with the ultimate aim of not undermining their sovereign status. The common visa policy thus remains fragmented, and may fail to achieve all its objectives.

With regard to the creation of an 'area of freedom, security and justice', the Union has clearly shown to be capable of acting as a 'unity', and the European Council has had a major role in directing Union action within this field. While the institutions have been acting as interlocking components, development policy appears to be the area where institutional conflict over competence could emerge.

A different issue which arises is the increasingly strong emphasis which JHA concerns are assuming within the Union's external policy, at the expense of other equally important objectives.

Annex

'Black' and 'white' lists annexed to Regulation 539/2001 (as amended)

'Black' list

1. STATES

Afghanistan
Albania
Algeria
Angola
Antigua and Barbuda
Armenia
Azerbaijan
Bahamas
Bahrain
Bangladesh
Barbados
Belarus
Belize
Benin
Bhutan
Bosnia and Herzegovina
Botswana
Burkina Faso
Burma/Myanmar
Burundi
Cambodia
Cameroon
Cape Verde
Central African Republic
Chad
China
Colombia
Congo
Côte d'Ivoire
Cuba
Democratic Republic of the Congo
Djijbouti
Dominica
Dominican Republic
East Timor
Ecuador
Egypt
Equatorial Guinea
Eritrea
Ethiopia
Federal Republic of Yugoslavia (Serbia-Montenegro)
Fiji
Former Yugoslav Republic of Macedonia
Gabon
Gambia
Georgia
Ghana
Grenada
Guinea
Guinea-Bissau
Guyana
Haiti
India
Indonesia
Iran
Iraq

Jamaica
Jordan
Kazakhstan
Kenya
Kiribati
Kuwait
Kyrgyzstan
Laos
Lebanon
Lesotho
Liberia
Libya
Madagascar
Malawi
Maldives
Mali
Marshall Islands
Mauritania
Mauritius
Micronesia
Moldova
Mongolia
Morocco
Mozambique
Namibia
Nauru
Nepal
Niger
Nigeria
North Korea
Northern Marianas
Oman
Pakistan
Palau
Papua New Guinea
Peru
Philippines
Qatar
Russia
Rwanda
Saint Kitts and Nevis
Saint Lucia
Saint Vincent and the Grenadines
São Tomé and Príncipe
Saudi Arabia
Senegal
Seychelles
Sierra Leone
Solomon Islands
Somalia
South Africa
Sri Lanka
Sudan
Surinam
Swaziland
Syria
Tajikistan
Tanzania
Thailand
The Comoros
Togo
Tonga
Trinidad and Tobago
Tunisia
Turkey
Turkmenistan
Tuvalu
Uganda

Ukraine

United Arab Emirates

Uzbekistan

Vanuatu

Vietnam

Western Samoa

Yemen

Zambia

Zimbabwe

2. ENTITIES AND TERRITORIAL AUTHORITIES THAT ARE NOT RECOGNISED AS STATES BY AT LEAST ONE MEMBER STATE

Palestinian Authority

Taiwan

'White' list

1. STATES

Andorra
Argentina
Australia
Bolivia
Brazil
Brunei
Bulgaria
Canada
Chile
Costa Rica
Croatia
Guatemala
Holy See
Honduras
Israel
Japan
Malaysia
Mexico
Monaco
New Zealand
Nicaragua
Panama
Paraguay
Romania
Salvador
San Marino
Singapore
South Korea
United States of America
Uruguay
Venezuela

2. SPECIAL ADMINISTRATIVE REGIONS OF THE PEOPLE'S REPUBLIC OF CHINA

Hong Kong SAR
Macao SAR

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