

Chapter Eight

Immigration and Asylum or Foreign Policy: The EU's Approach to Migrants and Their Countries of Origin

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According to the amendments to the Treaty on European Union brought about by the Amsterdam Treaty, Immigration and Asylum Policies will become fully the business of the European Communities of May 2004.¹ In the jargon, they will then have moved from the third to the first pillar. While changes in the voting system on these subjects are pending, the biggest immediate change has been institutional. On paper this move signaled a strengthening of Justice and Home Affairs – the internal, political aspects of European integration pertaining to areas traditionally seen as the stronghold of the sovereign state. However, the ink was barely dry on the ratifications when a new initiative took off, labeled as ‘cross-pillar’. The High Level Working Group on Asylum and Migration (HLWG) has seemingly moved asylum and immigration, or at least elements of the policies pertaining to those issues, into yet a different institutional framework, but also onto a different policy plain.

In this chapter I will seek to respond to the question of whether a comprehensive approach to asylum and immigration policy is evolving into a transformed foreign policy approach. Underlying this chapter is the premise that in order to be comprehensive, asylum and immigration policy has to be mindful of foreign policy and vice versa. However, I will contend that in the institutional tug of war for this policy area, the very element lost, at least in the short-term, may well be the holistic nature of an approach to asylum and immigration. Specifically, the key linkage between development assistance as part of foreign policies on the one hand, and as a tool in the management of migration flows on

the other, appears not to be progressing as advocates of a comprehensive approach, which the key actors in the HLWG might have anticipated. I will conclude with a suggestion as to how the HLWG could be re-constructed as a useful tool in the process of both EU enlargement and integration on the political level.

Key issues in this chapter from the point of view of this volume as a whole will be the externalities of immigration and asylum policies *within* the European Union with regard to its linkage to other policy areas, and the impact of policy creation in this area on outward looking, foreign and development policies. One area of discussion will be that of whether in the case of the HLWG there is a case of asylum and immigration policies having a broad institutional impact or rather one of a reigning back in of those policies by the inter-governmental sphere. Particular mention will be made of development aid and humanitarian assistance within the context of foreign policies, as well as trade issues. Another area of key concern to the volume is that of the way in which EU immigration and asylum policies ‘externalize’ or are transferred to non-member states. As elsewhere in the volume the candidate or transit states (dependent on one’s point of departure) of eastern and central Europe will be a focus of attention, but other states will also feature, namely the six selected for coverage by the HLWG. The concluding ideas for a re-orientation of the HLWG will precisely look to the institutional role, which it or a like-body, could play in policy development during and as a result of enlargement.

What is a comprehensive approach?

There are many suggestions as to what a comprehensive approach to asylum and immigration issues might look like. It is generally understood by academics, NGOs and International Organizations to be an approach that would integrate policy areas and modes of policy conceptualization. This means that asylum and immigration would not be isolated as a domestic policy issue, but its foreign policy implications and the implications which foreign policy has for it, would also be taken into account. In the process, all forms of migration (legal, illegal, refugee and asylum) would be taken into account, and the full course from motives to move through to ultimate ‘solutions’ (integration, return or for some refugees, resettlement) would be connected.

In practice the concept is perceived as being employed somewhat differently from this theory. At one extreme the practice of the notion might be characterized as meaning that all issues which pertain to asylum and immigration as such would be connected and influenced by policy concerns in those areas. In other words, foreign, security, trade and development policies would all be created with the potential and desirability or otherwise, of asylum seeker and migrant arrivals in mind. So, for example, weapons would not be sold to a dictatorial government because they might be used against citizens forcing them to become asylum seekers in the country that sold the weapons. This would be a state centric view of a comprehensive approach. An alternative,

human rights oriented, view on this example might be that weapons would not be sold to the government in question because they might be used against the citizens, violating their human rights and causing them to flee. In this version, where they would flee to would not be a pertinent issue.

A mediating view might be to suggest that government departments simply follow through on the whole chain of thinking: if weapons are sold and used in the violation of human rights, the selling government has contributed to a situation which in universal moral terms is undesirable. If, furthermore, those persons whose rights have been violated seek protection in the state which (coincidentally or not) sold the weapons which were the tools of their fear and injuries, then that government has caused itself a particular policy headache, especially if the numbers of people seeking protection are substantial. This might be called 'joined up government'.²

Part of the concern in this paper is to discern how a comprehensive approach is being construed at EU level. Is asylum and immigration *becoming* a foreign policy matter? Or is foreign policy *being used* for asylum and immigration policy ends (and particularly to limit asylum seeker and immigrant arrivals)? Or are asylum, immigration and foreign policies becoming one single entity?

Chronology of a 'Comprehensive Approach'

The Introduction to this volume has set out the institutional developments pertaining to asylum and immigration policies, from the Treaty of Rome through to the Treaties of Amsterdam and Nice. For the purposes of this chapter, a reminder as to how the TEU established a new institutional structure is useful. The 'old' issues, everything dealt with by the European Communities prior to 1992 went under the first pillar. In that pillar the Commission had a major role, proposing binding instruments of policy, to be implemented by Member States after passage through the Council of Ministers. The TEU established two further pillars of the EU temple. The second pillar dealt with the embryonic Common Foreign and Security Policy. The Commission's role in that area was minimal, and all decision-making had to be unanimous (in many first pillar issues there was already qualified majority voting). The third pillar of the new structure was that dealing with cooperation in the fields of Justice and Home Affairs, including asylum and immigration. The Commission gained a joint right of initiative, however, in essence, this was a weak pillar as far as Union level integration was concerned. No binding instruments of import were ever likely to emerge. Rather, the Member States were to engage in formal discussions on issues ranging from immigration to terrorism, drug smuggling to fraud. Indeed, the Commission made little or no use of its right of initiative, whereas since the entry into force of the Treaty of Amsterdam, it has been highly productive.

Justice and Home Affairs and Foreign and Security policies were the political issues, which could potentially become the new areas for deepening integration once Economic and Monetary Union was firmly established and a

new area of 'spill over' became likely. Under the Amsterdam Treaty, the area of Justice and Home Affairs was divided, with asylum and immigration matters moving fully to the first pillar five years after ratification. With that move, the Commission gains the capacity to propose directives (binding measures) to the Council, which will have to decide on their acceptability by unanimous vote, unless the Council votes unanimously to shift to Qualified Majority Voting. Foreign and Security Policies remain in the situation created under the Treaty on European Union, although there is increased discussion of an EU defense initiative to complement (or rival?) NATO and the WEU.

Comprehensive and Root Cause Approaches: Taking Asylum and Immigration into the External Policies Area³

During the period of formal inter-governmental cooperation the Commission issued a Communication on Asylum and Immigration Policies. This 1994 Communication is important in the context of this chapter because it saw the first deep discussion of a comprehensive approach toward asylum and immigration policies in the European Union (European Commission 1994). This document states that a holistic approach is needed which would address migration pressures, control or management of immigration, and the integration of legal immigrants. The Communication emphasized the need for the integration of asylum and immigration policies with external policies and a focus on root cause approaches. It supported its assertion of the need for this approach by referring to the 1992 Edinburgh Conclusions. However, it went further than those Conclusions and than the opening of asylum and immigration policies to external policy thinking by looking for early warning. It suggested the establishment of an Immigration Observatory for this purpose. Two studies (a pre-feasibility and a feasibility study) were carried out, but no concrete plan to develop such a body was ever adopted.⁴ In part this was due to the existence of mechanisms for information gathering within the Council (CIREFI and CIREA)⁵ as well as EUROSTAT's existing role as the gatherer of statistics in the European Union. In essence, there was no political will to create a new institution which would have had to engage in diplomatic exchanges and exercises with sending and transit states of asylum seekers, refugees and immigrants generally, as well as have influence on the type of admissions policies which the Member States employed. In 1999 the German Presidency tabled a Draft Resolution for the Creation of an Early Warning System within the framework of CIREFI, and focusing on illegal immigration (Council of the European Union 1999). This Resolution has not been passed.

While there has been no political will to create such a forward looking, information and policy combining institution, the momentum to investigate the causes of migration also diminished. The 1994 Communication raised the issue in the immediate aftermath and midst of the massive forced migrations from the Balkans, and particularly Bosnia, and after Western Europe had experienced the unfulfilled fears of massive movements of people from Eastern Europe, with the

collapse of communism and end of dictatorships that had locked in would-be refugees. The first time concern to address the causes of migration at source emerged again, in a concrete, textual form, within the EU, was in 1998 at the adoption of the paper: *Influx of Migrants from Iraq and the Neighboring Region: EU Action Plan*.⁶ If the total influx from Turkey and Iraq were combined, over the period 1995-1997 they had been the major source of asylum seekers to the EU Member States.⁷

The Action Plan on Iraq, as published, did not include a report on the country or its neighbors. It enumerated a list of actions, which the Justice and Home Affairs (JHA) Council, and the Commission could undertake, particularly in terms of informing one another about their immigration policies and procedures vis-à-vis Iraqi asylum seekers and their assessments of the situation, as well as their contacts with UNHCR. The Action Plan text does not refer to measures undertaken or to be undertaken in any other area of Community or Union activity, except the mention of meeting with the representatives of Central and Eastern Europe and Cyprus, within the Council, as these are countries of transit for those being smuggled from Iraq and Turkey. Even then, the text is not specific about which Council should meet with those representatives. In other words, this Action Plan looks to the future and is concerned very specifically with the asylum and immigration (internal) policies of EU Member States. That is not to say that the policy outlook from the paper was optimistic or advanced. The fact that it was concerned with internal policies of the Union towards immigration and asylum, and tried to plan policy moves, is important when one considers the Action Plans put forward by the HLWG, which clearly deal with on-going Union activities in non-JHA areas, around which a certain rhetoric is emerging, and tries to characterize them as specifically not dealing with asylum policies of the EU Member States.

In the second half of 1998, Austria held the Presidency of the European Union, and used that period to issue what became a notorious 'Strategy Paper' (Austrian Presidency 1998). While much of the paper was dismissed and abandoned, primarily in response to its suggestion of reviewing and abandoning the 1951 Geneva Convention, parts of the paper have clearly influenced the EU work program. This is not surprising, as the Austrian Justice Ministry clearly wrote the paper with full knowledge of the tone and direction of progress in the asylum and immigration area to that point. In the context of the foreign policy aspects of a holistic approach to asylum and immigration it is interesting to note that paragraph 43 states:

The European Union's migration policy, in particular its visa, asylum, immigration, freedom of movement and border-security policies, must obviously cover the following areas, irrespective of specific topical events and short-term developments:

- reduction of migratory pressure in the main countries of origin of immigrants;
- intervention in conflict regions;
- extension of development aid and economic cooperation;

- political cooperation between host States and States of origin;
- raising of human rights standards.

This statement links very strongly to the late 1998 development of the HLWG. Whether or not the idea of the HLWG was inspired by previous suggestions the concrete form the HLWG has taken and its approach are very different from anything previously proposed linking foreign and immigration policies. What is more, it remains a work in progress.

The High Level Working Group on Asylum and Migration⁸

In October 1998, the Dutch government, on the basis of a Foreign Ministry initiative, proposed that a new body, which became the High Level Working Group on Asylum and Migration, be formed.⁹ The Dutch proposal was informally discussed at the informal summit in Portschach on 24-25 October 1998. It was formally presented to the JHA Council of 29-30 October 1998, which took note of the proposal and supported it. The General Affairs Council of 9-10 November 1998 approved the plan. The Note from the Dutch Delegation clearly indicates that the initiative intends to build on the Action Plan on Iraq, and relies for support on the Austrian Strategy Paper.¹⁰

The proposal was for “a common, integrated and cross-pillar (or pillar-bridging)¹¹ approach, targeting the situation in the countries of origin of asylum seekers and migrants.” This suggestion came in the light of the realization that the Member States had a common interest, namely:

Control over the arrival in the EU of persons who wrongly enter asylum procedures and the arrival of illegal migrants. The southern states are confronted by a high influx of illegal migrants. The northern states in contrast are faced by a high influx of asylum seekers, of whom it eventually transpires that a great many do not have a legitimate claim to international protection. The uncontrolled arrival of this type of person presents the Member States increasingly with insurmountable problems, in connection with: reception, administrative processes, the length of judicial procedures, the disappearance of a large group of people into illegality, return to the country of origin. A great many migrants and asylum seekers are, what is more, victims of the practice of human smugglers who abuse the situation of these people.

The danger exists that this situation will undermine the reception and legitimate protection of people who, in accordance with international law, deserve protection.

The model was the Action Plan on Iraq and the desire, in the longer-term was to establish common country reports on the basis of:¹²

- Regular up to date analyses of the human rights situations in the countries of origin, to be created in the CFSP area;
- Regular up to date analyses of the migration and refugee problems to be created in the JHA area;
- Attention to targeted humanitarian assistance for the reception of displaced persons in the region.
- Taking diplomatic and political initiatives to establish dialogue with the countries of origin and/or their neighboring countries;
- Investigation of the possibilities for readmission agreements and return agreements for rejected asylum seekers;
- Regulations on asylum, migration and the combating of cross-border crime along lines to be agreed in the JHA Council;
- Reaching better and more up-to-date information gathering and exchange systems on asylum and migration flows in connection with the JHA Council and the Commission.

In order to prepare for these goals, a horizontal, pillar-bridging task force was proposed, which should draw up a list of priority countries of origin – which could be based on the statistics concerning arrivals in the EU Member States.¹³ It was noted that the countries around the EU's periphery, including the Balkan and Mediterranean countries should not only be seen as potentially being in the target group, but also as partners which should be engaged in the process of controlling and regulating migration, including transit migration, the combating of human smuggling and the regulation of readmission and return agreements.¹⁴

Once adopted, the group was assigned the tasks of drawing up a list of countries and making a survey of existing initiatives and reports on those countries, both at the national, Member State, level (such as country reports from diplomatic posts and ministries) and at EU level (CIREA and CIREFI analyses and statistics) as well as 'third party' reports, such as those from UNHCR and key NGOs. The analysis and resulting action plans should contain a number of elements, according to the terms of reference set out by COREPER. These were:

- a joint analysis of the causes of influx, including the human rights situation in the subject-country (Council of Ministers 1999: Annex 1c (i));
- an assessment of the effectiveness of aid and development strategies in the battle to limit economic migration (Council of Ministers 1999: Annex 1c (ii));
- identification of the needs for humanitarian and rehabilitation assistance, and the ways to assist "reception of displaced persons in the region" (Council of Ministers 1999: Annex 1c (iii)); and "establishing, maintaining and improving reception

and protection in the region” (Council of Ministers 1999: Annex 1c (vii));

- information on re-admission agreements (Council of Ministers 1999: Annex 1c (v));
- information of possibilities for return – both safe (Council of Ministers 1999: Annex 1c (vii)) and voluntary (Council of Ministers 1999: Annex 1c (x));
- areas of and means for cooperation with UNHCR (Council of Ministers 1999: Annex 1d) and NGOs (Council of Ministers 1999: Annex 1e);
- “the preparation of proposals for joint measures in the field of asylum and migration, including information campaigns in the countries of origin and transit, as well as combating cross-border crime, with specific reference to police cooperation for an exchange of information aimed as an effective flight against criminal organizations involved in illegal immigration” (Council of Ministers 1999: Annex 1c (ix)).

The creation of the HLWG, and its operationalization, contain a number of remarkable departures from the history of EC/EU cooperation on asylum and immigration, and from the plans which had at that point been set out and agreed to in the Amsterdam Treaty, even though that Treaty had not yet come into force.

Conceived of while the Union was still operating under the pre-Amsterdam Treaty on European Union, under which asylum and immigration matters were dealt with and coordinated by the K4 committee and not by COREPER (the Committee of Permanent Representatives) it is noteworthy that COREPER was asked by the Council to determine the terms of reference of the new working group. This point is less remarkable when one considers that COREPER will be taking over coordination of the asylum and immigration agenda after the transition period, that it (informally) did play a role during the K4 era, and that the subject matter of the working group is, in essence, relations with other states, even if the title of the group is the HLWG *on asylum and migration*. But given this title, the fact that the creation of the group was supported, and agreed to by the Justice and Home Affairs Council, and the fact that the high level officials attending the group’s meetings are (generally) justice or home office civil servants,¹⁵ the scope for speculation, primarily among asylum focused NGOs, and confusion as to the real motives behind and place of the HLWG is great. The further departures from practice and planning are all linked to this point.

The JHA Council agreed to the HLWG initiative on 7 December 1998, the same day as the Council and Commission issued an *Action plan ... on how best to implement the provisions of the Treaty of Amsterdam establishing an area of freedom, security and justice*. That Action Plan stated (paragraph 36) that “measures in the fields of asylum and immigration [and] ... assessment of countries of origin” be taken in order to formulate an integrated approach that

would be attuned to the idiosyncrasies of the countries of origin (European Union 1998).

Nothing specific in the Treaty requests that such assessments should be made: that they would be part of the wider project on asylum and immigration matters is not surprising in the context of the developments to that date, including the Commission's past statements in its 1994 Communication, for example, and the Action Plan on Iraq, and the Austrian Strategy Paper. However, the implementation of the not specifically Treaty-based measures, in the form of the HLWG agreed to on the same day, took, on the face of it, some of the new Commission powers away from it. A cross pillar body made up of Member State officials, dealing with the foreign policy aspects of asylum and migration would clearly not take on first pillar characteristics.

The Terms of Reference stipulate that the HLWG will undertake tasks in areas of second and third pillar business, although much of the work referred to in the Terms of Reference is scheduled to be transferred to the first pillar in May 2004. Under the terms of the period of transition, we see third pillar people talking about second pillar subjects, with the aim of doing work that is scheduled to fall under the first pillar. No implementation of the Action Plans can take place without money, and the money will have to come from development budgets, ultimately, rather than a JHA budget.

The cross-pillar setting is a new institutional development, and is itself leading to what could be described as a 'turf battle' between those representing asylum and immigration policies (under Commissioner Vittorino) and the new representative for Foreign Policy matters (Javier Solana). How that ownership battle may play out is also influenced by (and influencing) the matter of the real motives for the HLWG itself. As stated above, the title specifically mentions asylum and migration. Yet officials working within the group are increasingly focused on development issues, and the need to incorporate development ministries and Commission representatives in the formulation of reports and creation of action plans. Development ministers and their staff, as well as development officials in the European Commission have put up stiff resistance to working with this group on the basis that development funds, limited as these are, should certainly not be used to prevent people from exercising their human rights, including the right to seek asylum. Yet, if any funding for implementation is to be found, this undoubtedly has to come from development budgets. Under the Swedish presidency (first half of 2001) a commitment has been made to the HLWG to seek the best possible coordination between EU migration and EU development policies (Dutch Foreign Minister 2001).¹⁶ The budgetary authorities of the European Parliament and Council of Ministers have approved a Commission proposal for a 10 million EURO budget for development assistance in the area of asylum and migration (Dutch Foreign Minister 2001). The Netherlands and Sweden have also approved a budget for the implementation of the HLWG Action Plans, conditional on other Member States also providing funding.

The HLWG's first task was to produce the list of countries which it would consider (Council of Ministers 1999). The selection made was for:

Afghanistan/Pakistan; Albania and the neighboring region; Morocco; Somalia and Sri Lanka (Council of Ministers 1999). Moreover, the HLWG wished to proceed with an update on the Action Plan on Iraq (Council of Ministers 1999).

The Terms of Reference do stipulate that the HLWG should make “proposals for deepening political/diplomatic consultations with the country concerned and/or neighboring countries,” but suggestions have been made by officials, mindful of the Dutch initiative, that a primary intention of the group is to engage in dialogue with those countries. In any case, the first reports, submitted, on schedule, to the special summit meeting in Tampere, Finland in October 1999, were drafted without direct dialogue with the six key countries or their neighbors. Once the reports were published (only days before the summit, after lengthy discussions on the subject of transparency), the countries described naturally gained the opportunity to react, and the dialogue could begin.

International Relations and the High Level Working Group

Due to the nature of the work undertaken by the HLWG, the primary advance made in inter-state relations was perhaps that made between the 15 Member States. It is easy to forget that relations between the EU States *are* international relations. For the first time in the field of asylum and migration issues, representatives of those states sat around the meeting table and discussed issues which were not concerned with their own policies as such. In Justice and Home Affairs issues, the need to defend one’s own way of ‘doing things’ such as the reception facilities made available or not for asylum seekers, the process of admissions to procedure etc. has been paramount in the harmonization discussions, and often stood in the way of agreements. By talking about another state, far away, with common concerns (about the arrival of asylum seekers and/or immigrants and the humanitarian situation) the fifteen could set out on an equal footing and without self-preservation as a motivating factor in the selection of standpoints. The fact that JHA officials are sitting round the table might, from this perspective, not be so bad, even if they are discussing foreign and development policy, rather than asylum and immigration issues. At least they are talking and agreeing, which may feed into later possibilities directly within the asylum and immigration policy area.

The first five Action Plans were presented to the Tampere summit meeting in October 1999.¹⁷ The Conclusions of this meeting state that the European Council welcomed these plans in the context of the EU’s need for:

a comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit. This requires combating poverty, improving living conditions and job opportunities, preventing conflicts and consolidating democratic states and ensuring respect for human rights, in particular rights of minorities, women and children. To that end, the Union as well as Member States are invited to contribute, within their respective competence under the Treaties, to a greater coherence of

internal and external policies of the Union. Partnership with third countries concerned will also be a key element for the success of such a policy, with a view to promoting co-development (European Council 1999: para. 11).

Under the Portuguese Presidency an *Introductory Note* was submitted by the Council's General Secretariat to COREPER detailing the projected implementation of the first five Action Plans and submitting for adoption the Action Plan for Albania [Council of the European Union, 2000 #12]. That *Note* makes it clear that the HLWG had not entertained prior discussions with the countries that are subjects of its reports. It specifies how the HLWG has started "exchanging information with the authorities of *certain* third countries" (Council of the European Union 2000: para. 5, emphasis added). A number of the selected countries do not have governments with which the EU Member States or representatives thereof are able or likely to be able to exchange information, due to sanctions and the breaking of diplomatic relations (specifically Afghanistan, Pakistan and Iraq.) This point gives rise to more questions about the appropriateness of the six countries or regions selected from the point of view of successful foreign policy action linked to asylum and migration issues. The *Introductory Note* also indicates the sensitiveness of the relationship with Morocco in the context of implementing the EU's HLWG Action Plan. It had been agreed by the HLWG that "a new mission to Rabat should be undertaken by the Presidency, incoming Presidency, Spain as coordinator of the Action Plan, the Commission and the Council Secretariat, with a view to holding technical discussions to explore with the various authorities involved concrete steps to implement the projects" (Council of the European Union 2000: para. 5). The Moroccans had not appreciated the report and Action Plan approved at Tampere, as will be described below.

In the Conclusions of its Nice meeting (December 2000), the European Council notes progress made "on all aspects of the policy established at Tampere", including "partnerships with countries of origin" (European Council 2000: para. 50). Nice had, like Tampere, been billed as a summit at which the HLWG would be high on the agenda. Indeed, the Tampere Conclusions had requested that the HLWG report on the implementation of its Plans at the Nice meeting. Little had been implemented, either in terms of HLWG contacts with the countries concerned, or in the area of IO and NGO inspired cooperative programs. Indeed, the HLWG was awaiting funding commitments to enable it to achieve the success of implementing its plans.

At the first meeting of the HLWG under the Swedish Presidency, on 15 January 2001, the Swedes emphasized their desire to implement the action plans and to prioritize dialogue with the regions in question. In doing the latter, they stated a desire to make use of existing cooperation mechanisms such as the Stability Pact in the Balkans (for Albania and the region) and the EU-Morocco Association Council for Morocco. As these stated desires indicate, existing mechanisms are the primary tools of implementation for the HLWG, as indeed existing policies are the primary goals of its Action Plans. Once again, questions of 'ownership' over policies arise. Interestingly, the Dutch report on the first

meeting presided over by the Swedish Presidency notes that in connection with the Morocco plan, the monitoring remains in the hands of the HLWG. This, however, is less a comment on the mandate of the HLWG in relation to existing areas of policy creation and implementation within the EU than a comment on Moroccan desires to negotiate the contents of the report and action plan on receipt in late 1999. The Moroccan government felt insulted by the plan and report which describes, for example, how “Moroccan society suffers from lacunae in the social and cultural area especially vis-à-vis the image of Europe which is considered as a haven of prosperity where even the poorest enjoy elementary social rights which are non-existent in third world societies” (High Level Working Group 1999a: para. 30d). It expressed a desire to assist in redrafting the report and action plan: however, these are non-negotiable as far as the EU is concerned – and are the responsibility of the HLWG. In such a situation, the claims to seek ‘dialogue with the states in the region’ clearly become qualified to indicate dialogue on the implementation of the EU’s plans, not on the drafting of those plans.

Sri Lanka, on the other hand, welcomed the report and action plan as an indication of interest in its situation. The Swedish presidency noted that the Sri Lankan government wished to work with the Union on managing the migration flow, and that it hoped to establish a ‘Joint Committee EU-Sri Lanka’ to discuss the action plan at the end of February 2001. Many human rights groups would likely express their reservations at the EU discussing the outward migration of those fleeing government repression and a civil war in which government forces are embroiled with that same government. The HLWG report states that “the human rights situation in Sri Lanka is a cause for concern ... arbitrary arrest, detention and interrogation of Tamils, particularly in Colombo, is a cause for concern” (High Level Working Group 1999b: para. 4). Further, the report states “the emigration of Sri Lankans for non-asylum purposes is low” (High Level Working Group 1999b: para. 8). In spite of this, “recognition rates of those granted full refugee status vary from 1% (Austria) to 51% (France)” (High Level Working Group 1999b: para. 8).

The High Level Working Group is mandated to indicate areas in which cooperation can take place with UNHCR and NGOs, and has sought to involve such organizations in the process of drafting the reports submitted to the Council. Transparency has appeared to improve during the period in which the HLWG has been active (ECRE 1999), from a situation in which NGOs were given just a couple of hours to view drafts of the reports, with no opportunity to make copies or even notes on the documents, to full publication and joint participation in seminars on the subject, and consultation of the NGOs and UN agency by the HLWG officials. On the other hand, Amnesty International has criticized the lack of openness about the information presented in the reports, most specifically the Afghanistan report, as has the Federation of the Afghan Refugee Organizations in Europe (Amnesty International 1999; FAROE undated mimeo). How, for example, these NGOs ask, can the HLWG substantiate and prove suggestions of Afghans spending years in Pakistan prior to a move to

Europe, while the refugees themselves often claim to have spent days there *en route* (FAROE undated mimeo).

Besides listing projects which are already underway in other areas of the EU's work programs, such as education and healthcare projects in Somalia undertaken by Finland and Sweden or ECHO's program in Iraq (Council of the European Union 2000: Table 1) the implementation projections by the HLWG involve the seeking of collaborative projects with IOs and NGOs in the relevant countries. All of the projects proposed to date come from three organizations: IOM (especially information campaigns, training of immigration officials in the subject countries and return programs); UNHCR and the International Committee of the Red Cross (the latter two organizations have projects proposed on humanitarian aspects of reconstruction, assistance and development and human rights primarily) (Council of the European Union 2000: Table 2).

A Comprehensive Future for Asylum, Immigration and Foreign Policy?

Attempts to cooperate with NGOs and UNHCR have faced the HLWG with strong criticism concerning its motives and intentions and the implementation of its action plans. As mentioned above, the title of the HLWG refers specifically to asylum and migration. However, in the face of the criticism that the HLWG's objective is to limit access to protection inside the EU States, officials have sought to de-link it from asylum as such. ECRE, for example, has written that (ECRE 1999: para. 5):

If the European Union is to carry any credibility in promoting human rights in other regions of the world, it must command international respect for its own human rights record. The Member States of the EU must fulfil their obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, under the UN Human Rights Covenants and also under the European Convention on Human Rights. In reality it will not be possible to eliminate all the root causes of refugee flight. So long as the refugee flows persist, one central item on any action plan must be the provision of asylum in Europe for those who seek it.

The HLWG officials have sought to explain it as being an initiative aimed at immigration – a suggestion easily refuted by listing the countries targeted, and referring to COREPER's terms of reference which said that the countries selected should be “the most important countries of origin and transit of *asylum seekers* and migrants” (emphasis added.) An analysis of EU arrival and acceptance rates for asylum-seekers shows that four or five of the countries are places from which people with a genuine protection need flee (Afghanistan, Iraq, Somalia and Sri Lanka, with Albania and the neighboring region producing both people in need of protection and people migrating for economic reasons alone). Officials have also sought to claim that the HLWG is concerned with

development issues and not with asylum or immigration policies. In strict terms they may be right – most of the implementation of the action plans would involve development aid to the countries of origin, not a specific alteration in asylum or immigration policies connected to entry, admission to asylum procedures or outcomes of those procedures. However, the Terms of Reference do refer to readmission agreements, joint measures in the field of asylum and immigration relating to information campaigns, repatriation, and reception in the region all of which clearly impact policies of admission and acceptance of asylum-seekers and refugees. These are specific areas of asylum and immigration policies, rather than the overall policies as mentioned in the Dutch Note (van der Schans and van Buren 1999). However, the HLWG as it exists may be justified in saying it is not an asylum and immigration policy tool as such on the basis of this mandate. As this seems a ‘picky’ way to describe the group, however, given its context, the fact remains that the HLWG is seemingly caught between two groups that are bound to object to its *raison d’être*. Within governmental circles the development ministries are against cooperation in measures which cut their regular development budgets and have the potential to be construed as abuses of human rights of those whose rights have already been violated causing them to desire to seek protection elsewhere. From outside government realms, the HLWG is likewise criticized for limiting access to asylum, and being part of the process of restricting asylum policies generally. UNHCR called on the HLWG, prior to the finalizing of its Action Plans in September 1999 to “maintain a distinct focus on asylum”; to spell out the protection dimension “in sufficient detail”; not to give the impression that strengthening protection capacities elsewhere would or could “absolve the Member States of their responsibility to fulfill their protection obligations” and hoped that the proposed measures would “result in concrete and substantial support for the actions and programs of UNHCR and its partners” (UNHCR 1999).

The HLWG as part of a comprehensive approach is being interpreted as an extreme version of the typology set out in the introduction to this chapter. It seems to the outside world that asylum and immigration policy thinkers are trying to re-think foreign policy, with only the limitation of asylum and immigration a their goal. The theory behind earlier suggestions of an observatory, as well as academic, NGO and UNHCR descriptions of an ‘ideal’ comprehensive approach tend to extend the ‘dream’ of there being an alternative to refugeehood and human rights abuses. The Dutch Note in fact strove for a means to allow access to procedures and protection for those who deserve it, but to cut it off at source for those who did not. However, the HLWG is seen (rightly or wrongly) to be seeking a (some policy makers might say more pragmatic) dream of there being an alternative to refugeehood *here* (in the EU).

This understanding of the HLWG raises another element of intrigue around its title and motives: after all, the HLWG came into being at a moment when migration to the EU States for economic motives became popular with policy makers once more. Such migration can support the growing EU economies, and provide people to both fill the many (skilled and unskilled) jobs on the market

and to pay for pensions and other welfare benefits promised to citizens and long-term residents. While the squeeze from within and beyond governments is on to avoid restrictive foreign policy tool usage to prevent asylum seekers' entry and admission, the squeeze is also on to not limit all non-asylum immigration in the same way as it had been apparent since the 1970s. To that extent the HLWG is a body which is ahead of its times, but also too late. It is ahead in that creating dialogue within and beyond the Union on the causes of migration and forced migration and dealing with those causes in order to avoid human rights abuses is a goal which is not yet achievable but nonetheless desirable. It is behind in that the limitations on migration, which seemed necessary to states in recession, and the perception of refugees as villains may just be passing (the latter in the wake especially of the Kosovo crisis).

Institutionally, one could wonder whether the HLWG is an attempt to keep elements of asylum and immigration policies in the inter-governmental sphere, or an attempt to shift elements of foreign policy into the community sphere. Many commentators have been surprised that no new states were added to the list of subjects either at the Tampere summit in October 1999 or at the Nice summit in December 2000. If one considers the above analysis of the need to avoid countries of origin of genuine asylum seekers in order to satisfy the requirements of the governmental development community and of the increasingly powerful civil society (NGO) lobby, and to avoid antagonizing countries of potentially useful emigration due to current economic needs, the list of countries which could usefully be subject to Action Plans is limited. An alternative may be to employ the HLWG precisely in the way in which the discourse around the group, if not the papers emitted by the Council on the subject, is heading, and to return to an element that the *Dutch Note* suggested, but which was not included in the Terms of Reference.¹⁸ If dialogue with the countries concerned rather than the creation of abstract EU-desire-oriented plans became the core task of the HLWG, then it could be used as a useful information and common asylum policy development forum for the EU to share with countries which are now transit countries, but also candidates for EU membership. Not only could they fulfill some accession requirements of those countries by exchanging policy and practice ideas at an early (pre-membership) stage,¹⁹ they could also fulfill goals suggested by the title of the group, but nowhere developed. It is the HLWG on asylum and migration, not immigration. Citizens of candidate states, once they become EU citizens, will achieve a right to migrate between the 16+ Member States. While the migration of all EU citizens who chose to take up this right should also be a topic of policy consideration, including questions of how these citizens can carry welfare and social benefit rights with them around the Union, this would fall clearly under the first pillar. For a cross-pillar working group, however, dialogue with the candidate countries on the movement of their citizens to the EU prior to their gaining the right to freedom of movement, could be useful. This might also be an appropriate learning stage prior to more complete dialogue with other countries of origin on the subject of migration.

From the point of view of this volume, one can conclude that the HLWG is a forum in which immigration and asylum policy creates external effects by impacting trade, development and foreign policies. Specifically, all of these areas are mentioned in the action plans, chiefly related to existing approaches being undertaken by the various relevant components of the institutional apparatus of the EU. Furthermore, readmission agreements, relating to both nationals and transit migrants are mentioned in the action plans as something for the future. The area of readmission is a sensitive one, and links again to the developing agreements with and encroachment of EU-like policies on the candidate states. The HLWG is also an forum from which EU policies might be 'exported' to non-EU states, perhaps primarily the candidate states, but by no means exclusively.

In the meantime, as a purely asylum and migration oriented foreign policy talking-group, the HLWG is unlikely to have a useful or productive future, particularly if dialogue with countries of origin and transit remains an afterthought to the creation of what could be called 'selfish' EU policies. As a forum in which ideas for making truly joined-up government policies which impact asylum and migration questions at all ends, and for including new Member States and partner organizations in the process of thinking on asylum, migration, foreign and development policies, the HLWG may be a work in progress.

Notes

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1. For a scheme of informal, then formal inter-governmental cooperation, followed by semi-community and (beyond 2004) full community activity, see (van Selm-Thorburn 1998).

2. This term has been coined and used by Prime Minister Tony Blair and the British Labor Party. While one may be cynical of it as a piece of political jargon, it has certain interesting connotations in this context.

3. The 'root causes' debate, kicked off in the United Nations in the 1980s, is described in (Zolberg, et al. 1989: 258). A lengthier description of the European Union debate can be found in (van Selm - Thorburn 1998: 86-103).

4. *Pre-Feasibility Study for a European Migration Observatory* (1994) and *Feasibility Study for a European Migration Observatory: Final Report* (1996).

5. CIREA is the Center for Information, Discussion and Exchange on Asylum, while CIREFI is the Center for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration. Both function as clearing houses for Member States to exchange (sometimes confidential) information.

6. *Influx of Migrants from Iraq and the Neighboring Region: EU Action Plan adopted by the Council on 26 January 1998.*

7. See UNHCR statistical table at <http://www.unhcr.ch/refworld/refbib/refstat/1998/98tab26.htm> (2 Feb. 2001). In fact the Federal Republic of Yugoslavia was the single largest country of origin of asylum seekers in that period. Turkey and Iraq were at two and three respectively.

8. I am grateful to Mr. Peter van Wulften Palthe, Director Movement of Persons, Migration and Consular Affairs, Ministry of Foreign Affairs, The Hague, The Netherlands, who took the time to talk with me on the subject of the creation and development of the HLWG.

9. The initiative has the number 13344/98 JAI 37 AG 15. It was also presented to the Dutch Parliament on 6 November 1998 with the document numbers 19 637 and 21 501-02 as *Nota van de Nederlandse Delegatie: Task Force Asiel en Migratie (Note from the Dutch Delegation: Task Force on Asylum and Migration)*. The letter to the Parliament was from the Secretary of State for Foreign Affairs, with responsibility for EU matter, Mr. Benschop, also in the name of the Secretary of State for Justice with responsibility for asylum and immigration, Mr. Cohen.

10. *Note of the Dutch Delegation: Task Force on Asylum and Migration* paragraphs 1 and 2.

11. The HLWG is usually referred to in English as being 'cross pillar'. In fact the Dutch term (where the initiative came from) 'pijloverstijgend' gives more an impression of the group being a bridge between, or even above, the pillars.

12. *Dutch Note* para 5 – author's translation.

13. *Dutch Note* para 6.

14. *Dutch Note* para 7.

15. All Member States send Justice or Home Office officials to HLWG meetings in Brussels. The Netherlands and Sweden send teams headed by Foreign Ministry officials, while the UK and Spain also send Foreign Ministry staff as part of the team. The other eleven Member States send only Justice and Home Affairs officials.

16. Original in Dutch, translation by the author.

17. The Action Plan on Albania and the neighboring region was delayed due to the Kosovo crisis (a delay which in itself raises questions as to the effectiveness of this policy group in relation to reaction to asylum and migration crises and foreign policy as a comprehensive and strategically applied whole.)

18. *Dutch Note* para 7.

19. See Grabbe in this volume.

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